No. _____

# In the Supreme Court of the United States

GHASSAN KORBAN, in his official capacity as Executive Director of the Sewerage and Water Board of New Orleans,

*Petitioner,*

*v.*

WATSON MEMORIAL SPIRITUAL TEMPLE OF CHRIST, D/B/A WATSON MEMORIAL TEACHING MINISTRIES, CHARLOTTE BRANCAFORTE, ELIO BRANCAFORTE, BENITO BRANCAFORTE, JOSEPHINE BROWN, ROBERT PARKE, NANCY ELLIS, MARK HAMRICK, ROBERT LINK, CHARLOTTE LINK, ROSS MCDIARMID, LAUREL MCDIARMID, JERRY OSBORNE, JACK STOLIER, AND WILLIAM TAYLOR,

*Respondents*.

On Petition for a Writ of Certiorari to the Supreme Court of Louisiana

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTION PRESENTED

"[C]laim preclusion prevents parties from raising issues that could have been raised and decided in a prior action—even if they were not actually litigated." *Lucky Brand Dungarees, Inc.* v. *Marcel Fashions Grp., Inc.*, 590 U.S. 405, 412 (2020). "The preclusive effect of the judgment of a federal court is governed by federal law, regardless of whether that judgment's preclusive effect is later asserted in a state or federal forum." *Herrera* v. *Wyoming*, 587 U.S. 329, 360 n.4 (2019) (Alito, J., dissenting) (citing *Taylor* v. *Sturgell*, 553 U.S. 880, 892 (2008)).

Some state courts, however, such as the Supreme Court of Louisiana, have manufactured an exception to this rule based on their speculation about whether the federal court in the prior action would have declined discretionary jurisdiction over pendent state-law claims had the relevant claims actually been raised. Other courts refuse to engage in such "an exercise of prognosticative futility," and instead require plaintiffs to raise all potential state-law claims in the federal action. *Anderson* v. *Phoenix Inv. Couns. of Bos., Inc.*, 387 Mass. 444, 451, 440 N.E.2d 1164, 1168 (1982).

Given this split, the question presented is:

Is a prior federal judgment *res judicata* as to state-law claims in a subsequent state- or federal-court action that arise from a common core of facts and that could have been, but were not, raised in the prior federal action?

## PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The case caption contains the names of all parties to the proceeding.

Petitioner Ghassan Korban, in his official capacity as Executive Director of the Sewerage and Water Board of New Orleans, was the Applicant-Defendant below.

Respondents were the Respondents-Plaintiffs below. All of the Respondents are individuals, not corporations, except for Respondent Watson Memorial Spiritual Temple of Christ, doing business as Watson Memorial Teaching Ministries. It is a Louisiana corporation with no parent corporations, and no publicly held company owns 10% or more of its stock.

## STATEMENT OF RELATED PROCEEDINGS

This case is directly related to the following proceedings, broken down by procedural posture for ease.

The judgments on review, which held that the federal judgment lacked preclusive effect, are reflected in the following cases:

- *Watson Mem'l Spiritual Temple of Christ* v. *Korban*, No. 2024-C-00055, 387 So.3d 499 (La. June 28, 2024) (opinion affirming and remanding to district court) (App.A, 4a-36a).
- W*atson Mem'l Spiritual Temple of Christ* v. *Korban,* No. 2023-CA-0293, 382 So.3d 1035 (La. App. 4 Cir. Dec. 13, 2023) (opinion reversing and remanding) (App.B, 37a-54a).
- *Watson Mem'l Spiritual Temple of Christ* v. *Korban,* No. 2022-10955 (Civil Dist. Ct., Orleans Par.) (judgment signed Feb. 1, 2023, entered Feb. 6, 2023) (App.C, 55a-57a), together with Jan. 27, 2023 transcript setting forth reasons for judgment (App.D, 58a-68a).
- *Watson Mem'l Spiritual Temple of Christ* v. *Korban*, No. 2024-C-00055, 390 So.3d 277 (La. Aug. 2, 2024) (mem.) (rehearing denied) (App.E, 69a-70a).

The federal cases in which Respondents sought to have their state judgments enforced are:

- *Ariyan, Inc.* v. *Sewerage & Water Bd. of New Orleans*, No. 2:21-cv-00534, 543 F. Supp. 3d

373 (E.D. La. 2021) (judgment entered June 9, 2021).

- *Ariyan, Inc.* v. *Sewerage & Water Bd. of New Orleans*, No. 21-30335, 29 F.4th 226 (5th Cir. 2022) (opinion issued Mar. 21, 2022; reh'g en banc denied Apr. 19, 2022, ECF No. 109).
- *Ariyan Inc.* v. *Sewerage & Water Bd. of New Orleans*, No. 22-52, 143 S. Ct. 353 (2022) (mem.) (cert. denied Oct. 17, 2022).

The state cases whose judgments Respondents sought to have enforced in the federal case are:

- *Ariyan, Inc. d/b/a Discount Corner* v. *Sewerage & Water Bd. of New Orleans*, No. 15-10789 (Civil Dist. Ct., Orleans Par.) (judgment issued Feb. 27, 2018).
- *M. Langenstein & Sons, Inc.* v. *Sewerage & Water Bd. of New Orleans*, No. 15-11971 (Civil Dist. Ct., Orleans Par.), consolidated with *K&B Louisiana Corp. d/b/a Rite Aid Corp.* v. *Sewerage & Water Bd. of New Orleans*, No. 15-11394 (Civil Dist. Ct., Orleans Par.) (judgment issued Jan. 2, 2019).
- *Lowenburg* v. *Sewerage & Water Bd. of New Orleans*, No. 2016-621 (Civil Dist. Ct., Orleans Par.) (judgment issued Mar. 21, 2019; judgment affirmed on appeal July 29, 2020; no writ filed with La. Supreme Ct.).
- *Lowenburg* v. *Sewerage & Water Bd. of New Orleans*, No. 2016-621 (Civil Dist. Ct., Orleans Par.) (judgment issued Nov. 19, 2020).

- *Lowenburg* v. *Sewerage & Water Bd. of New Orleans*, No. 2016-621 (Civil Dist. Ct., Orleans Par.) (judgment issued Nov. 19, 2020).
- *M. Langenstein & Sons, Inc.* v. *Sewerage & Water Bd. of New Orleans*, No. 15-11971 (Civil Dist. Ct., Orleans Par.) (judgment issued Nov. 19, 2020).
- *Sewell* v. *Sewerage & Water Bd. of New Orleans*, No. 15-4501 (Civil Dist. Ct., Orleans Par.) (judgment issued Apr. 25, 2018; judgment reissued Aug. 3, 2020).
- *Sewell* v. *Sewerage & Water Bd. of New Orleans,* No. 15-4501 (Civil Dist. Ct., Orleans Par.) (judgment issued Apr. 25, 2018; no appeal filed).
- *Sewell* v. *Sewerage & Water Bd. of New Orleans*, No. 15-4501 (Civil Dist. Ct., Orleans Par.) (judgment issued Apr. 25, 2018; judgment aff'd on appeal May 29, 2019; writ appl. denied by La. Supreme Ct. on Oct. 16, 2019).

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## PETITION FOR WRIT OF CERTIORARI

Petitioner Ghassan Korban, in his official capacity as Executive Director of the Sewerage and Water Board of New Orleans ("SWB"), respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Louisiana in this case.

## INTRODUCTION

It is a fundamental principle of sound judicial administration and federal law that plaintiffs do not get two bites at the apple by bringing only a portion of their claims in an initial federal action and then reserving other claims for a subsequent action if they fail in their first attempt. Rather, *all* claims arising from a common core of facts that can be brought together must be brought together. Any such claims left out are thereafter barred by *res judicata*.

In this case, plaintiffs below sought to enforce state court judgments in federal court by raising federal claims but intentionally excluding state-law claims and related theories of relief subject to pendent jurisdiction. Having lost that case on the merits, they then brought a subsequent enforcement action in state court raising the state law claims and theories they excluded from the federal action. From the start, Petitioner argued that those state-law claims were barred by federal *res judicata* because the federal district court had jurisdiction to decide those claims together with the federal claims seeking to enforce the same judgments.

But the Louisiana Supreme Court, applying its interpretation of federal law, held that *res judicata* did not bar those previously neglected claims because,

based on its crystal-ball view of the counterfactual past, the federal court *would have* declined to exercise its discretionary pendent jurisdiction if the state-law claims had been properly raised. In so doing, the court endorsed a rule that forgives a plaintiff's failure to raise state-law claims based entirely on what other courts—in rejecting that very rule—have called "an exercise of prognosticative futility." *Anderson* v. *Phoenix Inv. Couns. of Bos., Inc.*, 440 N.E.2d 1164, 1168 (Mass. 1982).

In the process, the Louisiana Supreme Court cemented its position on the wrong side of a split that undermines the principles of federal *res judicata* and calls into question the finality of federal judgments. Such a rule multiplies litigation for both defendants and the federal courts and removes responsibility for litigation choices, such as which claims to pursue or abandon, and which court to choose as the sole forum.

This is not and should not be the law. To the contrary, federal judgments are entitled to full respect by state, as well as federal, courts. If state courts can look past the pleading choices of federal plaintiffs in later cases by allowing them to raise abandoned claims, then *res judicata* and its salutary predicates are substantially undermined. This case presents this Court with a clean vehicle to ensure the finality of federal judgments by holding that "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action" even if it were hypothetically possible that the federal court would have declined to exercise jurisdiction over those claims had they been brought. *Kremer* v. *Chemical Constr.*

*Corp.*, 456 U.S. 461, 466 n.6 (1982) (citing *Allen* v. *McCurry,* 449 U.S. 90, 94 (1980) and *Cromwell* v. *County of Sac,* 94 U.S. 351, 352 (1877)). For these reasons, the petition should be granted.

## OPINIONS BELOW

The opinion of the Louisiana Supreme Court is reported at 387 So.3d 499 (La. 2024). App.A, 4a-36a. The order denying the application for rehearing is reported at 390 So.3d 277 (La. 8/2/24) (mem.). App.E, 69a-70a. The Louisiana Fourth Circuit Court of Appeal's decision is reported at 382 So. 3d 1035 (La. App. 4 Cir. 2023). App.B, 37a-54a. The district court's judgment is unreported. App.C, 55a-57a; App.D, 58a-68a.

## JURISDICTION

The judgment of the Louisiana Supreme Court was entered on June 28, 2024 (App.A, 4a-36a). An application for rehearing was denied on August 2, 2024 (App.E, 69a-70a), and this petition was filed on October 31, 2024—90 days later. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a).

## STATUTORY PROVISIONS INVOLVED

In relevant part, 28 U.S.C. § 1367 provides:

> (a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such

original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if—

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

## STATEMENT OF THE CASE

### A. Legal Background

Claim preclusion, or *res judicata*, applies where: (1) the same parties were involved in prior federal litigation, (2) that prior litigation involved the same claim or cause of action as the later state or federal suit, and (3) the prior litigation was terminated by a final judgment on the merits. *Blonder-Tongue Lab'ys, Inc.* v. *University of Ill. Found.,* 402 U.S. 313, 323-324 (1971) (citing *Bernhard* v. *Bank of Am. Nat'l Tr. & Savings Ass'n,* 122 P.2d 892, 895 (Cal. 1942)). "The dismissal for failure to state a claim * * * is a 'judgment on the merits.'" *Federated Dep't Stores, Inc.* v. *Moitie*, 452 U.S. 394, 399 n.3 (1981), *abrogated on other grounds by Rivet* v. *Regions Bank of La.*, 522 U.S. 470 (1998)).

"The preclusive effect of a federal-court judgment is determined by federal common law." *Taylor* v. *Sturgell*, 553 U.S. 880, 891 (2008). This Court has the "ultimate authority" to declare those rules. *Id.* (citation omitted). Moreover, "whether a Federal judgment has been given due force and effect in the state court *is a Federal question* reviewable by this court, which will determine for itself whether such judgment has been given due weight or otherwise." *Deposit Bank* v. *Frankfort*, 191 U.S. 499, 515 (1903) (emphasis added) (citations omitted).

When the required elements are met, claim preclusion forecloses "litigation of a matter that never

has been litigated, because of a determination that it should have been advanced in an earlier suit" on the same cause of action. *Migra* v. *Warren City Sch. Dist. Bd. of Educ.,* 465 U.S. 75, 77 n.1 (1984). Put differently, "[a] judgment is an absolute bar to a subsequent action on the same claim"—whether it was raised or not. *United States* v. *International Bldg. Co.*, 345 U.S. 502, 504 (1953). "[C]auses of actions are the same"—and therefore subject to *res judicata*—"if they arise from the same 'transaction,'" *Nevada* v. *United States*, 463 U.S. 110, 130 n.12 (1983), "or common nucleus of operative facts as another already tried." *Currier* v. *Virginia*, 585 U.S. 493, 507 (2018) (citation omitted).

The reasons for strict enforcement of *res judicata* are legion. *Res judicata* serves to "ensure[] the finality of decisions," "encourage[] reliance on judicial decisions, bar[] vexatious litigation, and free[] the courts to resolve other disputes." *Brown* v. *Felsen*, 442 U.S. 127, 131 (1979).

Some state courts, however, have created an exception to *res judicata* where a subsequent court may speculate about how the prior federal court would have exercised discretion if an unraised claim had been presented rather than excluded. While far from the universal rule, that often-arising exception is acknowledged in a comment to Restatement (Second) of Judgments § 25, which notes that "[i]f * * * the court in the first action would clearly not have had jurisdiction to entertain the omitted theory or ground (or, having jurisdiction, would clearly have declined to exercise it as a matter of discretion), then a second action in a competent court presenting the omitted

theory or ground should be held not precluded." Restatement (Second) of Judgments § 25, Comment *e* (1982).

The issue raised by the parenthetical scenario from that comment in the Restatement, however, has vexed state courts for more than forty years, and is the subject of an intractable split under which some courts will speculate about what a federal district court in a prior case would have done with unraised state-law claims later raised in state court while others refuse to engage in such guesswork. The speculative side of this split regarding federal *res judicata* is amply presented in this case.

### B. Underlying State Court Proceedings

This petition is the latest chapter in a series of cases dating back to 2013. In that year, the United States Army Corps of Engineers and the Sewerage and Water Board of New Orleans (SWB) began construction on a massive flood control project in New Orleans as part of the Southeast Louisiana Urban Flood Control Program. *Ariyan, Inc.* v. *Sewerage & Water Bd. of New Orleans*, 29 F.4th 226, 228 (5th Cir.) (*Ariyan II*), *cert. denied mem.,* 143 S. Ct. 353 (2022) (*Ariyan III*). Respondents in this case are a subset of seventy property owners who claimed this construction caused them to suffer property damage and economic loss. *Ibid.*

In 2015 and 2016, Respondents filed suit in Louisiana state court and, in 2018 and thereafter, prevailed on state-law takings claims which resulted in final judgments against the SWB "for a combined $10.5 million." *Ibid.* Under Louisiana law, most money

judgments against political subdivisions are not exigible absent express legislative authorization and are typically placed in a queue to wait their turn to be paid pursuant to the required legislative process. See La. Const. art. XII, § 10(C) ("No judgment against the state, a state agency, or a political subdivision shall be exigible, payable, or paid except from funds appropriated therefor by the legislature or by the political subdivision against which the judgment is rendered."). Although dissatisfied with having to wait in line with all other judgment holders, Respondents did not challenge that process or otherwise seek immediate enforcement of their judgments in state court. Rather, they sought to circumvent what they understood (at the time) to be adverse state law and jump the line by running to federal court.

### C. Prior Federal Enforcement Action

In March 2021, Respondents filed a federal action under 42 U.S.C. § 1983 against the SWB and Ghassan Korban, its executive director and the Petitioner here, under the theory that the SWB's alleged delay in paying their judgments was a new *federal* taking distinct from the state law takings claims at issue in their underlying state court judgments. *Ariyan, Inc.* v. *Sewerage & Water Bd. of New Orleans*, 543 F. Supp. 3d 373, 377 (E.D. La. 2021) (*Ariyan I*). They did not raise their potential state-law claims in that action.

The SWB moved to dismiss, arguing that Respondents stated no federal takings claim or cause of action cognizable under § 1983. The district court agreed and dismissed their suit as "legally baseless" because "[c]ourts have consistently observed a

distinction between a state's *taking* of property without just compensation and its temporary *retention* of just compensation that has been fixed and awarded by a state court." *Id.* at 377.

Respondents appealed. In their brief, Respondents admitted that they brought their federal suit to avoid "protracted litigation trying to collect judgments in state court" and to attempt to defeat the Louisiana Constitution's prohibition against seizing public assets to satisfy a money judgment. *See* Appellants' Br. at 17, *Ariyan II*, 29 F.4th 226 (5th Cir. 2022) (No. 21-30335), 2021 WL 3822820, ECF No. 32. The Fifth Circuit affirmed after concluding, like the district court, that under "long-standing precedent," "there is no property right to timely payment on a judgment." *Ariyan II*, 29 F.4th at 228.

Respondents then sought certiorari in this Court. In so doing, Respondents again conceded that they sought to enforce their state court money judgments raising only federal claims in federal court because—in their view—"Louisiana law forecloses any such efforts." Pet. Reply Br. at 3 n.2, *Ariyan III,* 143 S. Ct. 353 (2022) (No. 22-52) (citations omitted); *accord* Pet. for Cert. at 10, *Ariyan III,* 143 S. Ct. 353 (2022) (No. 22-52) ("[S]tate and local governments are not subject to the usual judgment-satisfaction process because Louisiana has not waived sovereign immunity for that purpose."). This Court denied the petition for certiorari. *Ariyan III*, 143 S. Ct. 353 (2022).

### D. Return to State Court

Unhappy with that result, a subset of the plaintiffs in *Ariyan* filed a suit in Louisiana state court

seeking to enforce the very same money judgments, this time raising state-law claims they previously declined to raise in federal court because they thought them meritless.

As relevant to this petition, Petitioner Korban moved to dismiss the case as barred by federal *res judicata*. App. 74a ("The federal *Ariyan* judgments satisfy all four criteria for federal *res judicata*, which bars Plaintiffs from re-litigating those claims in this suit."). Without written or oral reasons, the Louisiana trial court denied Korban's *res judicata* argument, but found merit in his argument under the Louisiana Constitution and entered judgment dismissing the entire case with prejudice. App. 64a (after argument saying, in total, "So on the Exception of Res Judicata, I'm going to deny that. On the Exception of No Cause of Action, I would grant that."); App. 55a-57a (written order to same effect).

Respondent Plaintiffs appealed to the Louisiana intermediate appellate court, and Petitioner here again reiterated the federal *res judicata* defense. App. 94a ("Because this case and the prior federal action involve the same common nucleus of operative facts, Plaintiffs' claims to enforce their judgments are barred, irrespective of what legal theory they assert."). That court reversed the trial court, finding that neither federal *res judicata* nor the Louisiana Constitution barred this action. App. 51a-54a. The court explained that, under the Louisiana Supreme Court's decision in *Reeder* v. *Succession of Palmer*, 623 So.2d 1268, 1272-1273 (La. 1993), federal *res judicata* is no bar to state-law claims brought after a federal judgment on the same issues if the federal district

court "clearly would have declined to exercise" its pendent jurisdiction. App. 53a.

Petitioner sought and obtained review by the Louisiana Supreme Court, yet again raising his federal *res judicata* defense. App. 109a ("The prior federal judgment is entitled to *res judicata* effect."); App. 119a ("The Prior Federal Judgment is Entitled to *Res Judicata* Effect and Bars this Action."). The Louisiana Supreme Court, however, affirmed, relying on its *Reeder* precedent to reject the federal *res judicata* defense. App. 11a (quoting *Reeder*, 623 So.2d at 1272-1273), 15a. And it went further still, placing the burden on Petitioner, not on Respondents, the plaintiffs in the prior action, to "demonstrate that the federal court *would have* exercised jurisdiction" over the state-law claim. App. 15a (emphasis added) (citing *Watson* v. *Memorial Spiritual Temple of Christ*, 382 So.3d 1035, 1045 (La. App. 4 Cir. 2023) (included here as App. 54a)).

Petitioner sought rehearing, raising yet again the federal *res judicata* defense, App. 140a ("Federal *Res Judicata* Bars Plaintiffs' Suit"), but rehearing was denied, App. 69a-70a.

## REASONS FOR GRANTING THE PETITION

The Supreme Court of Louisiana has exacerbated an existing split by expressly holding that federal *res judicata* does not apply because, even though state-law claims had not been raised in the prior federal action, if they *had*, the district court would likely have declined to decide them after rejecting the federal claims. And it placed the burden on *the defendant* to disprove such default speculation, rather than on

plaintiffs to establish such counterfactual grounds for avoiding *res judicata*. That conclusion undermines the finality of federal judgments, negates responsibility for litigation choices, and provides plaintiffs with two bites at the apple, multiplying litigation in the process. The practical effects of the court's speculative inquiry into actions that federal courts might have taken are untenable, incorrect as a matter of law, destructive of sound judicial administration, and squarely presented in this case. The petition for a writ of certiorari should be granted.

## I. State and Federal Courts Are Split on Whether State Law Claims Are *Res Judicata* if Not Brought with Federal Claims In a Prior Federal Court Action.

The question presented is the subject of a widely recognized nationwide split. "One line of cases"—the line that Louisiana follows—holds that where federal question claims are decided on the merits, such as at summary judgment, "it is 'clear'—or at least it should be deemed 'clear'—that the federal court would not have entertained pendent jurisdiction over the state claim." *Gilles* v. *Ware*, 615 A.2d 533, 541 (D.C. 1992) (per curiam).[1] A different line of cases "require[s] a plaintiff to file the state claim in federal court, invoke the court's pendent jurisdiction, and thus build a record reflecting the court's [actual] exercise of

[1] Although this language is found in Associate Judge Ferren's separate opinion, it is found in Part III, which the *per curiam* decision notes is the opinion of the Court: "[t]he judgment of the Superior Court is affirmed based on the analysis in Parts II.–III. of Judge Ferren's opinion, which Judge Wagner joins." *Gilles* v. *Ware*, 615 A.2d 533, 534 (D.C. 1992) (cleaned up).

discretion over pendent jurisdiction." *Ibid.* Both lines of cases purport to be interpreting the statement in Restatement (Second) of Judgments § 25, Comment *e* (1982), that suggests that cases following a federal court judgment and asserting previously unraised state-law claims may be brought in state court if, "having jurisdiction, [the federal court] would clearly have declined to exercise it as a matter of discretion[]."

### A. At least eight States speculate about whether the prior federal court would have exercised its discretion over pendent claims when deciding whether such claims are barred by federal *res judicata*.

States following the first line of cases "interpret the caveat [in the Restatement] to mean that it is 'clear' that a federal court would have declined pendent jurisdiction over a state claim when the federal court decides the federal claim by summary judgment." *Bergeron* v. *Busch*, 579 N.W.2d 124, 131 (Mich. App. 1998) (Hoekstra, J., dissenting) (citations omitted). Those States include Louisiana, Michigan, West Virginia, Oregon, Colorado, Connecticut, Texas, and Wisconsin.

The Supreme Court of Louisiana first joined this side of the split in *Reeder* v. *Succession of Palmer*, 623 So.2d 1268 (La. 1993), and applied that precedent here. In its decision in the current case, the Supreme Court of Louisiana not only guessed at the hypothetical exercise of discretion by a federal court under its counterfactual, it went further and held that Petitioner, the defendant who had won in federal

court, had the burden of demonstrating that the federal court would have exercised jurisdiction over the unraised state-law claims. App. 10a, 15a.

Other courts similarly speculate about how federal courts would exercise their discretion regarding pendent jurisdiction. In Michigan, for example, the Supreme Court—over a dissent—rejected a federal *res judicata* defense and "h[e]ld that, when the federal claims are dismissed before trial, the federal court clearly would have dismissed the state claims if there are no exceptional circumstances that would give the federal courts cause to retain supplemental jurisdiction." *Pierson Sand & Gravel, Inc.* v. *Keeler Brass Co.*, 596 N.W.2d 153, 159 (Mich. 1999).

West Virginia's Supreme Court of Appeals did the same in *Sattler* v. *Bailey,* rejecting a federal *res judicata* defense and holding "that, when the federal claim in a federal action is dismissed by the federal court prior to trial," it is "therefore * * * clear that the federal court would have declined to exercise jurisdiction of a related state claim which could have been raised" such that "a subsequent action in a state court on the state claim which would have been dismissed * * * is not barred by the doctrine of *res judicata.*" 400 S.E.2d 220, 226-227 (W. Va. 1990).[2]

[2] This curiously assumes that the federal court would have accepted jurisdiction initially, then dismissed the pendent claims without prejudice at some later point so long as it was before trial, regardless of the effort and resources previously expended on such state claims.

The Supreme Court of Oregon in *Ram Technical Services, Inc.* v. *Koresko*, likewise rejected a "broad rule" that would require all state-law claims to have been brought in the initial federal action in order to "remove[] any question whether the federal court would have declined to exercise its supplemental jurisdiction." 208 P.3d 950, 957 n.5 (Or. 2009) (en banc). Instead, like West Virginia, it rejected a federal *res judicata* defense by concluding that "the record leaves no doubt" that the federal court in the prior federal action would have declined to exercise continuing pendent jurisdiction over state claims had they been raised because the federal claims were dismissed before trial. *Id.* at 957-958.

Although the specifics of this rule and the degree of speculation allowed play out differently in the various jurisdictions on this side of the split, it is functionally the same in Connecticut, Texas, Wisconsin, and Colorado. Courts in those States engage in various levels of speculation about whether federal judges in prior federal actions would have continued to exercise pendent jurisdiction over state-law claims if such claims had been raised.

The Supreme Court of Connecticut, for its part, has cited the Second Circuit's precedents as "evinc[ing] a strong policy against the exercise of pendent jurisdiction in situations in which the underlying federal claim has been eliminated prior to trial" as a basis for concluding that a federal court would "'*clearly* have declined to exercise'" pendent jurisdiction over state-law claims had they been raised. *Connecticut Nat'l Bank* v. *Rytman*, 694 A.2d

1246, 1259-1260 (Conn. 1997) (quoting Restatement (Second) of Judgments § 25, Comment *e*)).

And a Court of Appeals in Texas, in deciding *Motient Corp.* v. *Dondero*, a state case brought after a federal judgment where state-law claims had not been raised, likewise hypothesized about how the federal court would have acted if given the chance. 269 S.W.3d 78, 88-90 (Tex. App. 2008). And after pondering what the particular judge in the prior case might have done, the Court of Appeals reversed a judgment based on *res judicata*, relying on the Restatement's speculative rule. *Id*. at 90.

For its part, the Wisconsin Court of Appeals found that federal *res judicata* did not bar its consideration of newly raised state claims after a federal court "declined to entertain [different] pendent state claims raised in [the] federal action, dismissing them without prejudice." *Parks* v. *City of Madison,* 492 N.W.2d 365, 369-370 (Wis. Ct. App. 1992). On that basis, it found that "even if [the plaintiff] had joined the precise state-law claims he raises in this action, the district court would not have considered them." *Id.* at 370.

And finally, the Colorado Court of Appeals finds it clear that the federal court would not have exercised jurisdiction if "the federal court claim was dismissed on defendant's motion for summary judgment." *First Interstate Bank of Denver, N.A.* v. *Central Bank & Tr. Co. of Denver*, 937 P.2d 855, 859 (Colo. App. 1996).

At least eight States thus broadly apply the speculative approach reflected in the comment to the Restatement (Second) of Judgments § 25 and reject federal *res judicata* by presuming to don a federal

judge's robes and speculating about what the judge would have done had state-law claims been raised.

### B. At least six States and two Federal Circuits refuse to speculate about whether the prior federal court would have exercised discretionary pendent jurisdiction and bar any state-law claims that could have been, but were not, raised.

A conflicting line of cases "require[s] a plaintiff to file the state claim in federal court, invoke the court's pendent jurisdiction, and thus build a record reflecting the court's [actual] exercise of discretion over pendent jurisdiction." *Gilles*, 615 A.2d at 541. This line of cases recognizes that, because "termination of the foundational federal claim does not divest the district court of power to exercise supplemental jurisdiction, but, rather, sets the stage for an exercise of the court's informed discretion," *Roche* v. *John Hancock Mut. Life Ins. Co.*, 81 F.3d 249, 256-257 (1st Cir. 1996), the mere fact that a federal court has dismissed the asserted federal claims does not make it sufficiently clear that the federal court would, if given the opportunity, have declined jurisdiction over unraised state-law claims.

1. The District of Columbia, in recognizing the split, found the approach of courts that would allow "subsequent state actions concerning the same cause of action if the federal action is decided on summary judgment, even if a pendent state claim was never filed in the federal complaint" to be an "unworkable" exercise of "pure speculation." *Gilles*, 615 A.2d at 541. It recognized that, even if a federal court would "most

likely" decline to exercise pendent jurisdiction over state claims after dismissing federal claims, it is "not obliged automatically to dismiss." *Id.* at 541-542. For that reason, it found "no basis for a plaintiff or a state court to conclude with any reliable degree of certainty that the federal court 'clearly' would have dismissed." *Id.* at 541. Given these concerns, the Court found "[m]ore persuasive" the "case authority" that "require[s] a plaintiff to file the state claim in federal court, invoke the court's pendent jurisdiction, and thus build a record reflecting the court's exercise of discretion over pendent jurisdiction." *Ibid.* This approach, it reasoned, served to avoid speculation while imposing no more than a "relatively light obligation to plead the state claim." *Ibid.*

The Massachusetts Supreme Judicial Court reached the same conclusion for the same reasons in *Anderson* v. *Phoenix Investment Counsel of Boston, Inc.*, 440 N.E.2d 1164 (Mass. 1982). In deciding whether federal *res judicata* barred state law claims that had not been brought in a prior federal action, the court found that it was not sufficiently clear that the federal district court would have declined to exercise pendent jurisdiction and refused to engage in what it called "an exercise of prognosticative futility" by attempting "to determine whether the Federal court" in a prior federal action "would have heard the [state-law] claim if it had been raised." *Id.* at 1168. Because there was a "substantial possibility" that the federal court would have entertained the state-law claim, the court held that plaintiffs must first "plead [their] State claim[s] in the Federal court and if that court fails to

hear the claim[s] the plaintiff may then ordinarily file suit in a State court." *Id.* at 1168-1169.

The Supreme Court of Montana reached the same conclusion in *Asarco LLC* v. *Atlantic Richfield Co.*, 369 P.3d 1019 (Mont. 2016). There, though recognizing that "claim preclusion would not apply * * * if it could be shown that the federal district court would have clearly declined to maintain jurisdiction over * * * supplemental state-law claims following its dismissal of the" federal claims, the court "decline[d] to speculate" about what the federal court may have done with the state-law claims "had Asarco raised them." *Id.* at 1027.

The Supreme Court of Iowa did the same in *Penn* v. *Iowa State Board of Regents*, 577 N.W.2d 393 (Iowa 1998). There, after a plaintiff's federal claims were dismissed, the Supreme Court of Iowa found that state-law claims not raised in the prior federal action, but "based upon the same facts," were precluded because "it is unknown whether the federal court would have exercised supplemental jurisdiction" and "any doubts * * * should be resolved in favor of joinder." *Id.* at 400-401 (citation and internal alteration omitted from third quotation).

Similarly, in holding that—after a federal judgment dismissing federal claims on the merits—federal *res judicata* precluded state-law claims later raised in state court, the Supreme Court of Illinois explained that it "d[id] not know whether the district court would have refused to exercise supplemental jurisdiction over [the state-law] claims," in part because "federal courts have *chosen* to exercise

supplemental jurisdiction under circumstances similar to those" it faced. *River Park, Inc.* v. *City of Highland Park*, 703 N.E.2d 883, 896 (Ill. 1998) (emphasis added).[3] Thus because the previously unraised state-law claims "'could have been decided' in [the] federal suit[,] * * * "they are barred under the doctrine of *res judicata* by the dismissal of the federal suit." *Ibid.*

Finally, reaching the exact opposite conclusion from the Court of Appeals of Wisconsin on facts comparable to those in *Parks* v. *City of Madison*, discussed above, the Court of Appeals of Nebraska in *Jensen* v. *Champion Window of Omaha, LLC*, rejected the efforts of the plaintiff in a prior federal action, to add "an additional state law claim" in his later-filed

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[3] In the process, the court collected examples of federal courts that exercised pendent jurisdiction over state claims even after resolving all federal claims at summary judgment. See *River Park, Inc.* v. *City of Highland Park*, 703 N.E.2d 883, 896 (Ill. 1998) (citing *Timm* v. *Mead Corp.,* 32 F.3d 273, 274 (7th Cir.1994); then citing *Myers* v. *County of Lake,* 30 F.3d 847 (7th Cir. 1994)). The fact that examples of such federal cases exist negates the claim that a federal court would "clearly" decline to exercise pendent jurisdiction after resolving all federal law claims on the merits before trial. And there are numerous other examples of federal appellate courts finding no abuse of discretion in such circumstances. *E.g.*, *McCarthy* v. *Mayo*, 827 F.2d 1310, 1317 (9th Cir. 1987) ("The issue then is whether the district court properly exercised its discretion in reaching the merits of the state law claims after dispensing with the federal claims on their merits. * * * [T]he district court did not abuse its discretion in dismissing those claims with prejudice."); *Toone* v. *Wells Fargo Bank, N.A.,* 716 F.3d 516, 524 (10th Cir. 2013) ("It was a matter of district-court discretion whether to consider the Toones' state-law claims after dismissing their federal claims. * * * There was no abuse of discretion here.").

state case, notwithstanding that the federal district court "did not retain jurisdiction over [the different] state law claims" that he did raise. 900 N.W.2d 590, 593 (Neb. App. 2017). Weighing in on "a split of authority on the very narrow issue before" it, the Court of Appeals "adopt[ed] the view that where a federal court dismisses the filed federal causes of action with prejudice but reserves and dismisses the state law claims filed contemporaneously, the only claims reserved are those expressly dismissed without prejudice. Any other state law claims arising from the same factual scenario but not brought in the federal lawsuit are precluded." *Id.* at 593-594. And it did so because it refused, like the District of Columbia, Massachusetts, Montana, Iowa, and Illinois, to "divine or speculate what the federal court would have done if it were presented with the state law claim that was added after dismissal of the case." *Id.* at 594.

2. This same issue can also arise in federal court if a subsequent state case has been removed because of diversity or a further federal question. At least two circuits have come out on the no-speculation side of the split.

In *Brown* v. *Federated Department Stores, Inc.*, 653 F.2d 1266, 1266-1267 (9th Cir. 1981), after this Court rejected the Ninth Circuit's efforts to carve a different and unrelated exception into federal *res judicata*, the Ninth Circuit on remand of the still-open issue concerning unraised state-law claims affirmed that *res judicata* barred state-law claims grounded in the same transaction or events as a previously dismissed federal suit.

As is often the case, after losing their case in federal court, the plaintiffs in *Brown* tried again in state court—only to have their state case removed to federal court. *Moitie*, 452 U.S. at 396. Because "[i]t [was] not clear that the district court in [the first federal action] would have refused to exercise jurisdiction over state law claims," the Ninth Circuit, without speculating about what might have been, held that *res judicata* barred those claims. *Brown*, 653 F.2d at 1267.

The Tenth Circuit did the same in *Nwosun* v. *General Mills Restaurants, Inc.*, 124 F.3d 1255, 1258 (10th Cir. 1997), expressly declining to engage in the "pure speculation" necessary to "conclude that the district court would not have exercised its jurisdiction over the state claim had it been brought in the federal action."[4]

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[4] The Seventh Circuit also seems to take this approach, albeit in *dicta*. The court's decision in *Lee* v. *Village of River Forest*, 936 F.2d 976, 980 (7th Cir. 1991), is instructive. There, Robert E. Lee (not that one) brought a federal action whose claims were ultimately dismissed on the merits for failing to state a claim. *Id.* at 977. Lee then turned to state court, raised a few claims that were dismissed or stricken, and then amended his state complaint to raise new federal claims—resulting in the case being removed to federal court and dismissed as *res judicata*. *Id.* at 978. At that point, now years after his first federal action had been dismissed, Lee returned to the first federal district court and sought relief from judgment under Rule 60(b). *Ibid.* As exceptional circumstances for granting the Rule 60(b) motion, Lee claimed that the first judgment dismissing "his federal claims under Rule 12(b)(6) forever bars him from seeking redress in state court because of the doctrine of *res judicata*." *Id.* at 979.

But the Seventh Circuit saw through the ruse, explaining that "[t]he real issue to be considered is not whether the 12(b)(6)

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In sum, while Michigan, West Virginia, Colorado, Connecticut, Texas, Oregon, and Wisconsin would have reached the same conclusion as Louisiana here, this case, on the same facts, would have been decided differently had it been brought in the District of Columbia, Massachusetts, Montana, Iowa, Illinois, or Nebraska—along with, at least, the Ninth and Tenth Circuits. This Court's review is needed to resolve this well-established and broad split.

## II. The Question Presented Is Important and Recurring and Warrants Review in this Case.

The question presented here arises often, has the potential to arise in nearly every case, is incredibly

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ruling unfairly denies Lee his day in court on state law claims, as Lee contends, but whether Lee erred in not raising all possible claims in the original suit brought in federal district court." *Id.* at 980. And it answered that reframed question affirmatively by applying federal *res judicata* without speculating about what the first district court would have done. It recognized that multiple circumstances exist under which "[a] dismissal of the claims for relief under federal law in a complaint to which pendent state claims have been joined does not of itself end the litigation." *Ibid.* (quoting *Harper Plastics, Inc.* v. *Amoco Chems. Corp.,* 657 F.2d 939, 946 (7th Cir.1981)). True, the pendent state claims "may be dismissed" if "state issues predominate" or are considered "insubstantial." *Ibid.* But they also might not have. Thus, again quoting *Harper*, the Seventh Circuit explained that "[t]he uncertainty over whether a trial judge would exercise pendent jurisdiction does not justify permitting the institution of a multiplicity of proceedings which may have the effect of harassing defendants and wasting judicial resources. If appellant entertained any doubts at the pleading stage, they should have been resolved in favor of joinder." *Id.* (quoting *Harper*, 657 F.2d at 946).

important to efficient and consistent judicial administration, and should be decided in this case.

### A. The question presented arises often and has the potential to arise in every federal civil case.

There can be no question that the rule adopted by the States that speculate about how federal courts would exercise their discretionary pendent jurisdiction has the potential to seriously undermine the finality of federal judgments across the country.

In 2023 alone, plaintiffs brought 131,658 cases invoking the federal-question jurisdiction of the federal district courts.[5] The overwhelming majority of these cases are resolved before trial, and hence would trigger the speculative rule that imagines federal courts declining otherwise-available supplemental jurisdiction based on such pre-trial dispositions of federal claims. Indeed, only about "1 percent of all civil cases filed in federal court are resolved by trial."[6] The other 99%, then, are disposed of before trial and hence potential subjects of speculation if follow-on litigation is brought in those States on that side of the split.

The appellate cases addressed above already show that this scenario—plaintiffs' bringing state-law claims in state court after failing to raise them in federal court—comes up sufficiently often. But it has

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[5] U.S. Courts, *Federal Judicial Caseload Statistics 2023*, https://tinyurl.com/49nr73h7 (last visited Oct. 30, 2024).

[6] Jeffrey Q. Smith & Grant R. MacQueen, *Going, Going, But Not Quite Gone: Trials Continue to Decline in Federal and State Courts. Does it Matter?*, 101 Judicature 26, 28 (2017).

the potential to arise following the dismissal of every federal case—after all, many federal constitutional protections have state counterparts that are at least as or even more protective.[7] And given how "tort law is largely a matter of state rather than federal law," it is hard to imagine a federal damages claim that would not have *some* state-tort counterpart based on the same nucleus of operative facts.[8]

Thus, in States that speculate about how federal courts would have exercised pendent jurisdiction had they been given the opportunity, it will not be hard at all for plaintiffs to later conjure up a state-law claim to circumvent their loss in federal court. Indeed, such plaintiffs will be *encouraged* to bring questionable or hail-Mary federal claims in the first instance (as did the Respondent Plaintiffs in this case) without raising their state claims. The high likelihood such weak claims would be dismissed before trial in the federal court gives them an opportunity to try out their weakest claims, perhaps get discovery or other benefits from the federal action, avoid rolling the dice on any state claims, yet still have confidence that unraised state claims could be raised in a subsequent state-court action. That approach encourages fragmented litigation of weak federal claims, burdens

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[7] *E.g.*, State Democracy Rsch. Initiative, U. Wis. Law Sch., *Explore State Constitutions*, 50 Constitutions (collecting the various state constitutions), https://tinyurl.com/58kazbp7 (last visited Oct. 30, 2024).

[8] Andreas Kuersten, Cong. Rsch. Serv., *No. IF11291, Introduction to Tort Law* 1 (updated May 26, 2023), https://tinyurl.com/ykf6avpw.

federal courts with unnecessary or wasteful suits, and undermines the finality of federal judgments.

### B. *Res Judicata* serves vital public interests.

Given the interests that *res judicata* furthers, its proper application is of great importance not only to defendants in federal civil actions, but also to the courts themselves.

"The authority of the *res judicata*, with the limitations under which it is admitted, is derived by us from the Roman law and the Canonists." *Washington, A. & G. Steam Packet Co.* v. *Sickles*, 65 U.S. 333, 341 (1860). The rule—whether stated as an issue of full faith and credit or an issue of federal common law—thus "predates the Republic" and has "'found its way into every system of jurisprudence, not only from its obvious fitness and propriety, but because without it, an end could never be put to litigation.'" *San Remo Hotel, L.P.* v. *City & County of San Francisco*, 545 U.S. 323, 336-337 (2005) (second quote taken from *Hopkins* v. *Lee*, 6 Wheat. 109, 114 (1821)).[9]

This Court has long held that "res judicata serves vital public interests beyond any individual judge's ad hoc determination of the equities in a particular case." *Moitie*, 452 U.S. at 401. One of the key interests it serves is finality. As this Court's cases recognize,

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[9] Although the *San Remo* court was expressly discussing the full faith and credit statute, 28 U.S.C. § 1738, it recognized that the "ancient rule on which it was based" was the rule of *res judicata*. *San Remo Hotel, L.P.* v. *City & County of San Francisco*, 545 U.S. 323, 337 (2005).

"[p]ublic policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest; and that matters once tried shall be considered forever settled as between the parties." *Baldwin* v. *Iowa State Traveling Men's Ass'n*, 283 U.S. 522, 525 (1931). This doctrine is so fundamental that it should "apply in *every* case where one voluntarily appears, presents his case and is fully heard." *Id.* at 525-526 (emphasis added).

The importance of finality thus reflects that *res judicata*, properly applied, is a "rule of fundamental and substantial justice." *Moitie*, 452 U.S. at 401 (quoting *Hart Steel Co.* v. *Railroad Supply Co.*, 244 U.S. 294, 299 (1917)). More recently, the Court reiterated that "what [it] said with respect to this doctrine" as early as 1897 "is still true today":

> it ensures 'the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for, the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if * * * conclusiveness did not attend the judgments of such tribunals.'

*Nevada*, 463 U.S. at 129 (quoting *Southern Pac. R.R.* v. *United States,* 168 U.S. 1, 49 (1897)).

This Court should take the opportunity that this case presents to resolve a split on a question that touches on "the very object for which civil courts have

been established" and that is a fundamental aspect of the judicial power of the United States.

### C. This is an ideal vehicle for resolving this important question.

This case presents an ideal vehicle to resolve the acknowledged conflict regarding the preclusive effect of federal judgments on unraised state-law claims that would have been subject to pendent jurisdiction. The issue was squarely raised below, where Petitioner "argue[d] that the doctrine of res judicata precludes the instant action given the prior federal court litigation," App. 10a, and the Louisiana Supreme Court squarely ruled upon and rejected that federal-law issue. App. 10a-15a.

On the substantive predicates for *res judicata*, there is no plausible dispute that the same core of operative facts forms the basis for both the prior federal action and the state case under review, as both involve Respondents' efforts to enforce the exact same judgment. And pendent jurisdiction over the unraised state claims was available in the prior federal action, which was dismissed on the merits. In other words, but for speculation about what the first court might have done, *res judicata* plainly and dispositively applies.

The only issue left for this Court to resolve is a pure question of law. Resolution of that question in Respondent's favor was outcome-determinative below. And, should this Court agree with the other courts that refuse to speculate about how prior federal courts would have exercised their discretion regarding

unraised state-law claims, it will be outcome determinative in Petitioner's favor here.

In sum, the issue is clearly presented, is outcome determinative, and there are no other issues or vehicle problems that would prevent its resolution by this Court. The issue has had ample time to percolate, the split is well-acknowledged, and the split is not at all likely to resolve itself. The issue and this case are thus well situated for this Court's full consideration.

## III. The Decision Below Is Incorrect.

In addition to the importance of having an authoritative and uniform answer from this Court on the question presented, it is also important to have the correct answer to that question, rather than the erroneous approach adopted in Louisiana and multiple other States. In this case, the Supreme Court of Louisiana doubled down on its instructions to guess about what federal courts would do with their statutory discretion regarding pendent jurisdiction, going so far as to shift the burden of disproving such speculation to the defendant. App. 15a ("[W]e agree with the appellate court that Korban failed to demonstrate that the federal court would have exercised jurisdiction over the state mandamus action. * * * Therefore, we hold that the appellate court did not err in finding that the instant mandamus suit was not barred by res judicata."). That puts Louisiana on the extreme wrong end of a split centered around an ill-conceived and variously interpreted comment in the Restatement (Second) of Judgments.

From the beginning, the "caveat in comment e of the Restatement of Judgments has been persuasively

criticized" by state and federal courts alike. *Pierson*, 596 N.W.2d at 162 (Taylor, J., dissenting). As the Tenth Circuit explained, "participat[ing] in the speculative gymnastics required to determine whether a federal court would or would not have exercised its supplemental jurisdiction over a state claim never brought" does "disservice to the policy considerations res judicata protects." *Nwosun*, 124 F.3d at 1258. For this same reason, Justice Taylor in Michigan called such role playing "inherently impossible." *Pierson*, 596 N.W.2d at 162 (Taylor, J., dissenting). Rightly so.

This "inherently impossible" game that many state courts are playing also misapplies foundational principles of federal *res judicata*. The purpose of *res judicata* is to "ensure[] the finality of decisions," "encourage[] reliance on judicial decisions, bar[] vexatious litigation, and free[] the courts to resolve other disputes." *Brown*, 442 U.S. at 131. None of those interests are served by the decision below and others on its side of the split.

Indeed, in those States that follow Louisiana, there is little functional bar to a litigant taking a second bite at the litigation apple, particularly where the first bite taste-tests dubious federal theories just to see what might stick or to get the benefits of federal discovery before moving on to the main course in another court. After all, in those States, all it takes for a litigant to get a chance to try again in state court is a district court's disposing of the federal claims before trial. Since many state courts will assume, notwithstanding the fact that pendent jurisdiction is discretionary, that every federal district court who has disposed of federal claims would have declined

discretionary supplemental jurisdiction over remaining state claims had they been brought, there is little incentive to raise those state claims at all. If at first a plaintiff doesn't succeed, there's always state court.

Further, in those States on the speculative side of the split that do not *automatically* presume that a federal court would have declined continuing pendent jurisdiction after disposing of federal claims, the courts nonetheless engage in all sorts of gymnastics to reach the conclusion that the Court *would have* declined its jurisdiction. In *Parks*, for example, the Wisconsin court looked to how the federal court had declined to exercise jurisdiction over some state-law claims to conclude that it would have done the same over any others that may have been brought. 492 N.W.2d at 369-370. Though it is certainly *less* speculative for Wisconsin courts to assume that what was good for some state-law claims would be good for all others, it nevertheless remains speculation to make that assumption, and removes accountability for litigation choices even as between state-law claims.[10]

And the Texas court in *Motient Corp.* v. *Dondero*, went on an archeological expedition, reviewing the particular practices of the specific federal district court judge in past cases to decide what he would have done in the case before it. 269 S.W.3d at 88-90. Such granular delving into the quirks and personalities of

[10] And, of course, the Nebraska court in *Jensen* v. *Champion Window of Omaha, LLC,* did exactly the opposite and allowed only those claims that were raised in the prior federal action to proceed in the subsequent state case. 900 N.W.2d 590, 593-594 (Neb. App. 2017).

individual judges, while perhaps more empirical in its guesswork, presumes much about the way in which a federal judge would approach the specific case before it had such judge had the opportunity. Indeed, it seems to elevate an imagined advisory opinion regarding claims not actually raised above the status of an actual judgment. That turns the federal judicial power (as fictionalized by a subsequent court) on its head.

For its part, the Supreme Court of Connecticut simply waives away any concern that its conclusion was speculative. It explained (correctly) "that [it] cannot decide, with absolute certainty, that the District Court would have declined to exercise jurisdiction," but explained that the test it "adopted * * * does not demand a showing of absolute certainty." *Connecticut Nat'l Bank*, 694 A.2d at 1260. This court was, at least, open about what it was doing.

But whether or not other state courts care to admit that they are speculating about how a different court—in a different system—would exercise its discretion, that is what they are doing. And the varying degrees of speculation that these courts allow only highlight the unfortunate fact that, in practice, federal judgments about which speculation is allowed will serve not as a stop to litigation, but instead only as a pause.

Such a rule serves neither the bench nor the defendants who, having successfully defended against federal claims, are hauled right back into state court by the same plaintiffs, on the same issues, arising from the same facts as the federal action. And state courts will then be forced to get up to speed on underlying

issues that a federal court has already devoted at least some time and attention to addressing. While such a result makes sense if the federal court itself had affirmatively declined to exercise continuing supplemental jurisdiction over state-law claims that *were* raised, and judged for itself how best to use its time, it is absurd to apply it to claims that were available to a plaintiff at the start of the federal action but that the plaintiff elected not to raise. That approach is disrespectful of the discretion afforded district court judges to make that decision for themselves, it is disrespectful of the federal judgments that are entered resolving an entire case or controversy as it was presented, and it oddly demeans the role of subsequent judges that are tasked with guessing about what their colleagues on the federal bench would have done. Such a system helps nobody other than plaintiffs' lawyers by giving them multiple paths to litigate what is properly a single set of claims and thus letting them game the system. That approach undermines the key interests served by *res judicata* and should be rejected by this Court on plenary review.

## CONCLUSION

The Louisiana Supreme Court is on the wrong side of a split that goes to the heart of the judicial power of the United States. To ensure the finality of federal judgments—the "very object" of civil courts—the petition for certiorari should be granted.

Respectfully submitted,

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OCTOBER 31, 2024

# APPENDIX

## TABLE OF APPENDICES

*Appendix A*

**SUPREME COURT OF LOUISIANA**

**No. 2024-C-00055**

**WATSON MEMORIAL SPIRITUAL TEMPLE OF CHRIST D/B/A WATSON MEMORIAL TEACHING MINISTRIES, CHARLOTTE BRANCAFORTE, ELIO BRANCAFORTE, BENITO BRANCAFORTE, JOSEPHINE BROWN, ROBERT PARKE, NANCY ELLIS, MARK HAMRICK, ROBERT LINK, CHARLOTTE LINK, ROSS MCDIARMID, LAUREL MCDIARMID, JERRY OSBORNE, JACK STOLIER, AND WILLIAM TAYLOR**

**VS.**

**GHASSAN KORBAN, IN HIS CAPACITY AS EXECUTIVE DIRECTOR OF THE SEWERAGE AND WATER BOARD OF NEW ORLEANS**

**On Writ of Certiorari to the Court of Appeal, Fourth Circuit,**

**Parish of Orleans Civil**

**GENOVESE, J.**

This Court granted a writ of certiorari in this mandamus proceeding, wherein Plaintiffs (collectively, the "Neighbors"),[1] who prevailed in an inverse condemnation action, sought to compel the

[1] The Neighbors include: Watson Memorial Spiritual Temple of Christ d/b/a Watson Memorial Teaching Ministries; Charlotte, Elio, and Benito Brancaforte; Josephine Brown; Robert Parke and Nancy Ellis; Mark Hamrick; Robert and Charlotte Link; Ross and Laurel McDiarmid; Jerry Osborne; Jack Stolier; and, Dr. William Taylor.

payment of damages awarded at trial from Defendant, Ghassan Korban ("Korban"), in his official capacity as the Executive Director of the Sewerage and Water Board of New Orleans (the "SWB"). The issues presented are whether the instant matter is barred by res judicata, and whether a money judgment based on inverse condemnation under the Louisiana Constitution can be enforced via a mandamus action. The appellate court found that res judicata did not apply and held that the payment of a judgment awarding just compensation for inverse condemnation is a ministerial duty; therefore, courts had the authority to issue a writ of mandamus to satisfy the Neighbors' money judgment. For the reasons that follow, we affirm the ruling of the appellate court and remand the matter to the district court for further proceedings.

## FACTS AND PROCEDURAL HISTORY

The Neighbors claimed that the SWB damaged and interfered with their use and enjoyment of their private homes and church during the Southeast Louisiana Urban Drainage Project (the "SELA Project"), which took place between 2013 and 2016. Multiple groups of residents, including the Neighbors, filed lawsuits to recover damages sustained as a result of the SELA Project.[2] Following a trial on the merits, the Neighbors were awarded $998,872.47 in cumulative damages for inverse condemnation, as well as attorneys' fees and costs, totaling $517,231.03. The

[2] The facts of these claims are discussed in detail in *Lowenburg v. Sewerage & Water Board of New Orleans*, 19-524 (La.App. 4 Cir. 7/29/20), — So.3d —, 2020 WL 13992630 ("*Lowenburg*").

district court's finding, that the SWB was liable to the Neighbors for inverse condemnation, was affirmed on appeal. *Id.*

Thereafter, the SWB did not appropriate funds to satisfy the judgment rendered in the *Lowenburg* suit. In response, the Neighbors filed a separate lawsuit in federal district court against the SWB and Korban pursuant to 42 U.S.C. § 1983, alleging, among other things, that the SWB's failure to pay the inverse condemnation judgment to the Neighbors constituted a secondary taking under the Fifth Amendment of the United States Constitution. *Ariyan, Inc. v. Sewerage & Water Bd. of New Orleans*, 543 F.Supp.3d 373 (E.D. La. 2021), *aff'd*, 29 F.4th 226 (5th Cir.), *cert. denied*, — U.S. —, 143 S.Ct. 353 (2022) ("*Ariyan*"). As to the relief sought, the Neighbors requested a writ of execution seizing the SWB's property to satisfy the judgment. Separately, they sought a declaration that the SWB was contractually obligated to seek reimbursement from the United States Army Corps of Engineers for the judgment via a procedure the two entities agreed to.

The SWB and Korban filed a motion to dismiss for failure to state a claim under Fed. R. Civ. Proc. 12(b)(6), which the federal district court granted. The federal district court expressed sympathy with the Neighbors' frustrations, but found the claim "legally baseless[,]" relying on "centuries of precedent establishing that a state's temporary deprivation of damages does not violate any constitutional right." *Ayrian, Inc.*, 543 F.Supp.3d at 377-78. The federal court also noted practical considerations compelling dismissal, stating that "[d]oing so would likely run

afoul of the full faith and credit statute, encourage forum shopping, and erode the comity federal courts are to diligently maintain with state courts, who are certainly capable of enforcing their own judgments." *Id.* at 379. It further opined: "Under no constitutional guise should federal courts 'become embroiled in a party's attempt to enforce state court judgments . . . against states and municipalities.'" *Id.* (citing *Williamson v. Chicago Transit Auth.*, 185 F.3d 792, 795 (7th Cir. 1999)). The court also declined to exercise jurisdiction over the Neighbors' request for declaratory relief, opining:

> Here, there Is little reason to – and perhaps abundant reason *not* to – allow the plaintiffs' largely conclusory declaratory judgment allegations to proceed as standalone claims in federal court. In 2017, then-District Judge Engelhardt remanded a previous iteration of this litigation to state court in light of this Court's "limited jurisdiction and in light of the particularly local nature of this dispute with the Sewerage and Water Board." See Sewell v. Sewerage & Water Bd. of New Orleans, 2017 WL 5649595, at *1 (E.D. La. Jan. 5, 2017), *aff'd,* 697 F. App'x 288 (5th Cir. 2017). The plaintiffs' dispute with the SWB is no less local now, and for the reasons discussed at length with regard to the deficient § 1983 claims at the heart of this case, dismissing this action in favor of further state-court proceedings – with state-court judges, state-court judgments, state-resident plaintiffs, and a state-agency defendant – is the best use of this Court's "unique and substantial

> discretion." Cf. Wilton, 515 U.S. at 286, 115 S.Ct. 2137.

*Id.* at 380-81. The court reasoned that "State courts can enforce their own judgments." *Id.* at 381. Finally, the court denied the Neighbors' request to amend their complaint, finding that any amendment would be "futile." *Id.* at 381, n. 8.

The United States Fifth Circuit affirmed the lower court's grant of the motion to dismiss, agreeing that there is long-standing precedent that there is no property right to timely payment on a judgment. *Ariyan, Inc.*, 29 F.4th at 228. With regard to the Neighbors' separate claim for declaratory relief, the United States Fifth Circuit noted that "[t]he Declaratory Judgment Act 'does not of itself confer federal jurisdiction on the federal courts.'" *Id.* at 232 (quoting *Jolly v. United States*, 488 F.2d. 35, 36 (5th Cir. 1974)). Thus, once the Neighbors' 42 U.S.C. § 1983 claims were dismissed, "[w]ithout an underlying federal claim, or any other basis for jurisdiction asserted by the Plaintiffs, the district court properly declined to hear Plaintiffs' standalone claim to declaratory relief." *Id.* The U.S. Fifth Circuit also affirmed the district court's denial of the Neighbors' request for leave to amend their complaint, finding that "amendment would be futile." *Id.*

The Neighbors then instituted the current action in state district court by filing a Petition for Writ of Mandamus and Writ of Fieri Facias. The Neighbors asserted that the damages awarded at trial for inverse condemnation were a just compensation award pursuant to the Louisiana Constitution and the Fifth Amendment of the United States Constitution, but

that the SWB had failed to appropriate funds to satisfy the underlying judgment. According to the Neighbors, the constitutional duty to pay just compensation for the taking or damaging of property is a ministerial duty required by law, and the district court had the power and authority to issue a writ of mandamus directing the immediate payment of the just compensation award.

Korban responded by filing an exception of res judicata on the ground that the federal court litigation sought identical relief arising from the same dispute: payment of the money judgment. Korban also filed an exception of no cause of action, arguing that the Louisiana Constitution prohibits seizure of state assets to satisfy money judgments and that such judgments may only be paid from funds appropriated by the legislature or the political subdivision against which the judgment was rendered. La.R.S. 13:5109. Therefore, Korban asserted that courts may not order appropriation of funds through mandamus, as that power is reserved to the legislature.

Following a hearing, the district court rendered judgment denying Korban's exception of res judicata, granting Korban's exception of no cause of action, and dismissing the Neighbors' claims with prejudice. The Neighbors appealed.

The appellate court reversed and remanded, finding that res judicata did not apply and holding that the payment of a judgment awarding just compensation for inverse condemnation is a ministerial duty; therefore, courts had the authority to issue a writ of mandamus to satisfy the Neighbors' money judgment. *Watson Memorial Spiritual Temple*

*of Christ v. Korban*, 23-293 (La.App. 4 Cir. 12/13/23), 382 So.3d 1035. Thereafter, this Court granted Korban's writ of certiorari. *Watson Memorial Spiritual Temple of Christ v. Korban*, 24-55 (La. 3/12/24), 380 So.3d 567.

**Exception of res judicata**

Korban argues that the doctrine of res judicata precludes the instant action given the prior federal court litigation. We find no merit to this contention.

"[W]hen a state court is called upon to decide the preclusive effect of a judgment rendered by a federal court exercising federal question jurisdiction, it is the federal law of res judicata that must be applied." *Terrebonne Fuel & Lube, Inc. v. Placid Ref. Co.*, 95-654, 95-671, p. 14 (La. 1/16/96), 666 So.2d 624, 633 (citing *Reeder v. Succession of Palmer*, 623 So.2d 1268, 1271 (La.1993)). Federal appellate courts reviewing the res judicata effect of a Prior judgment apply the *de novo* standard of review. *Test Masters Educ. Servs. Inc.*, v. *Singh*, 428 F.3d 559, 571 (5th Cir. 2005), *cert. denied*, 547 U.S. 1055, 126 S.Ct. 1662 (2006) (citing *Procter & Gamble Co. v. Amway Corp.,* 242 F.3d 539, 546 (5th Cir.), *cert. denied*, 534 U.S. 945, 122 S.Ct. 329 (2001)).

Under the federal res judicata law, a judgment bars a subsequent suit if: (1) both cases involve the same parties; (2) the prior judgment was rendered by a court of competent jurisdiction; (3) the prior decision was a final judgment on the merits; and, (4) the same cause of action is at issue in both cases. *Terrebonne Fuel & Lube, Inc.*, 666 So.2d at 633. Notably, where the four elements of the res judicata test are met, courts must also determine whether "'the previously unlitigated

claim could or should have been brought in the earlier litigation.'" *In re Paige*, 610 F.3d 865, 870 (5th Cir. 2010) (quoting *D-1 Enters., Inc. v. Commercial State Bank*, 864 F.2d 36, 38 (5th Cir. 1989); *see also In re Howe*, 913 F.2d 1138, 1145 (5th Cir. 1990); *In re Intelogic Trace, Inc.*, 200 F.3d 382, 388 (5th Cir. 2000)).

This Court also recognized an exception to the application of the doctrine of res judicata in *Reeder*, 623 So.2d 1268, which was relied upon by the appellate court in this case. Korban argues that in declining to apply the preclusive effect of res judicata, the appellate court misapplied *Reeder*, in holding that "Korban has failed to demonstrate that the federal court could have exercised jurisdiction over the state mandamus claim[.]" *Watson Memorial Spiritual Temple of Christ*, 382 So.3d at 1045. We find this argument to be without merit.

In *Reeder*, 623 So.3d at 1272-73 (emphasis added), we opined:

> Succinctly stated, if a set of facts gives rise to a claim based on both state and federal law, and the plaintiff brings the action in a federal court which had "pendent" jurisdiction to hear the state cause of action, but the plaintiff fails or refuses to assert his state law claim, res judicata prevents him from subsequently asserting the state claim in a state court action, **unless the federal court clearly would not have had jurisdiction to entertain the omitted state claim, or, having jurisdiction, clearly would have declined to exercise it as a matter of discretion.** Restatement (Second) of Judgments §§ 24, 25

and 25, Comment e. E.g., *Woods Exploration & Producing Co. v. Aluminum Co. of America,* 438 F.2d 1286, 1315 (5th Cir.1971); *Anderson v. Phoenix Inv. Counsel of Boston,* 387 Mass. 444, 440 N.E.2d 1164, 1168 (1982).

The *Reeder* Court explained:

> Pendent jurisdiction is a doctrine of discretion which allows the trial court a wide latitude of choice in deciding whether to exercise that judicial power. See *United Mine Workers v. Gibbs,* 383 U.S. 715, 725, 86 S.Ct. 1130, 1138, 16 L.Ed.2d 218 (1966). A federal court must consider and weigh in each case, and at every stage of the litigation, the values of judicial economy, convenience, fairness, and comity in order to decide whether to exercise jurisdiction over a case brought in that court involving pendent state law claims. When the balance of these factors indicates that a case properly belongs in state court, the federal court should decline the exercise of jurisdiction by dismissing the case without prejudice. The doctrine of pendent jurisdiction thus is a doctrine of flexibility, designed to allow courts to deal with cases involving pendent claims in the manner that most sensibly accommodates a range of concerns and values. *Carnegie-Mellon Univ. v. Cohill,* 484 U.S. 343, 108 S.Ct. 614, 98 L.Ed.2d 720 (1988); *Rosado v. Wyman,* 397 U.S. 397, 90 S.Ct. 1207, 25 L.Ed.2d 442 (1970); *United Mine Workers v. Gibbs*, *supra.*
>
> . . . .

The principles and standards of pendent jurisdiction support and mesh with the principles of res judicata. The plaintiff is required to bring forward his state theories in the federal action in order to make it possible to resolve the entire controversy in a single lawsuit. Restatement (Second) of Judgments § 25, Reporter's Note at 228 (1982); *Woods Exploration & Producing Co. v. Aluminum Co. of America,* 438 F.2d at 1315. The federal district court, exercising its discretion, may decline jurisdiction of some or all of the plaintiff's state law claims if the court finds that the objectives of judicial economy, convenience and fairness to litigants, as well as other factors, will be served better thereby. *United Mine Workers v. Gibbs,* 383 U.S. at 726, 86 S.Ct. at 1139. To insure that this decision will be made fairly and impartially by the court, rather than by a party seeking the tactical advantage of splitting claims, however, the claim preclusion rules further provide that, unless it is clear that the federal court would have declined as a matter of discretion to exercise its pendent jurisdiction over state law claims omitted by a party, a subsequent state action on those claims is barred. Restatement (Second) of Judgments § 25, Comment e; *Woods Exploration and Producing Co. v. Aluminum Co. of America, supra; Anderson v. Phoenix Inv. Counsel of Boston*, 440 N.E. 2d at 1169.

In view of the breadth of the federal trial courts' discretion and the necessary indeterminacy of

> the discretionary standards, in order for a subsequent court to say that a federal district court clearly would have declined its jurisdiction of a claim not filed, the subsequent court must find that the previous case was an exceptional one which clearly and unmistakably required declination. The rules do not countenance a plaintiff's action in failing to plead a theory in a federal court with the hope of later litigating the theory in a state court as a second string to his bow. Therefore, the action on such omitted claims is barred if it is merely possible or probable that the federal court would have declined to exercise its pendent jurisdiction. Restatement (Second) of Judgments § 25, Comment e. See also *Anderson v. Phoenix Inv. Counsel of Boston,* 387 Mass. 444, 440 N.E.2d 1164, 1169 (1982).

*Id.* at 1273-74.

The above quoted language of the federal courts in the instant matter makes it clear that it would have declined to exercise its jurisdiction. The federal district court and the appellate court were both decisive in ruling that this matter belonged in state court.

Additionally, the discretionary nature of federal supplemental jurisdiction is addressed under 28 U.S.C. § 1367(c), which provides four grounds for declining to entertain supplemental jurisdiction over a state law claim:

> (1) the claim raises a novel or complex issue of State law,

> (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
>
> (3) the district court has dismissed all claims over which it has original jurisdiction, or
>
> (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

*See also Mendoza v. Murphy*, 532 F.3d 342, 346 (5th Cir. 2008) (citing 28 U.S.C. § 1367(c)). Relevant to the matter before us, this case presents a *res novo* issue of state law, and the federal court dismissed the claim over which it had original jurisdiction. Moreover, this matter involving a state court judgment, Louisiana constitutional provisions, a state inverse condemnation judgment against a state political subdivision, and the issue of whether mandamus may lie to enforce that state judgment presents such "exceptional circumstances."

For these reasons, we agree with the appellate court that Korban failed to demonstrate that the federal court would have exercised jurisdiction over the state mandamus action. *Watson Memorial Spiritual Temple of Christ*, 382 So.3d at 1045. Therefore, we hold that the appellate court did not err in finding that the instant mandamus suit was not barred by res judicata. Having so concluded, we next address whether the Neighbors' have stated a cause of action.

**Exception of no cause of action**

Because it presents a question of law, the sustaining of an exception of no cause of action is

subject to *de novo* review. *Wederstrandt v. Kol*, 22-1570, p. 4 (La. 6/27/23), 366 So.3d 47, 51 (quoting *Ramey v. DeCaire*, 03-1299, p. 7 (La. 3/19/04), 869 So.2d 114, 119). "A cause of action, when examined in the context of a peremptory exception, is defined as the operative facts that give rise to the plaintiff's right to judicially assert the action against the defendant." *Law Indus., LLC v. Dep't of Educ.*, 23-794, p. 4 (La. 1/26/24), 378 So.3d 3, 7 (citing *Ramey*, 869 So.2d at 118; *Everything on Wheels Subaru, Inc. v. Subaru South, Inc.*, 616 So.2d 1234, 1238 (La. 1993)). "The function of the peremptory exception of no cause of action is to test the legal sufficiency of the petition, which is done by determining whether the law affords a remedy on the facts alleged in the pleading." *Id.* (citing *Ramey*, 869 So.2d at 118; *Everything on Wheels Subaru, Inc.*, 616 So.2d at 1235). The court reviews the petition and accepts well-pleaded allegations of fact as true. *Id.* (citing *Ramey*, 869 So.2d at 118; *Jackson v. State ex rel. Dep't of Corrections*, 00-2882, p. 3 (La. 5/15/01), 785 So.2d 803, 806; *Everything on Wheels Subaru, Inc.*, 616 So.2d at 1235). The issue at the trial of the exception is whether, on the face of the petition, the plaintiff is legally entitled to the relief sought. *Id.* (citing *Ramey*, 869 So.2d at 118; *Montalvo v. Sondes*, 93-2813 (La. 5/23/94), 637 So.2d 127, 131).

In this case, the relief sought by the Neighbors' petition is a writ of mandamus.

This Court has stated:

> A writ of mandamus is an extraordinary remedy that is directed at a public officer to compel the performance of a ministerial duty required by law. *Jazz Casino Company, L.L.C.*

> *v. Bridges,* 16-1663 (La. 5/3/17), 223 So.3d 488, 492 (citing La. C.C.P. arts. 3861 and 3863). "A 'ministerial duty' is one 'in which no element of discretion is left to the public officer,' in other words, 'a simple, definite duty, arising under conditions admitted or proved to exist, and imposed by law.'" *Id.* (quoting *Hoag* [*v. State*, 04-0857, p. 7 (La. 12/1/04), 889 So.2d 1019, 1024)]. "If a public officer is vested with any element of discretion, mandamus will not lie." *Id.*

*Crooks v. State Through Dep't of Nat. Res.*, 22-625, p. 3 (La. 1/1/23), 359 So.3d 448, 450.

Resolution of the issue of whether mandamus may lie to compel satisfaction of the Neighbors' judgment for inverse condemnation against Korban necessarily requires the interpretation of constitutional articles, which, as with the exception of no cause of action, is subject to a *de novo* standard of review. *Id.* (citing *Newman v. Marchive P'hip, Inc. v. City of Shreveport*, 07-1890, p. 3 (La. 4/8/08), 979 So.2d 1262, 1265). The two constitutional provisions implicated in this case are La. Const. art. XII, § 10, and La. Const. art. I, § 4(B)(1).

This Court has addressed these constitutional provisions in earlier decisions and has recognized that La. Const. art. XII, § 10 creates a "'frustrating dichotomy for the state's judgment creditors.'" *Crooks*, 359 So.3d at 451 (quoting *Newman*, 979 So.2d at 1266; *see also* Lee Hargrave, *"Statutory" and "Hortatory" Provisions of the Louisiana Constitution of 1974*, 43 La. L. Rev. 647, 653 (1983) ("the apparent liberality of abolishing most immunity from suit was offset by the

continuation of a severe limitation on a private citizen's ability to enforce a judgment against the state, a state agency, or a local governmental entity")). *Crooks*, 359 So.3d at 450, also recognized that the doctrine of separation of powers is implicated.

> The Louisiana Constitution divides governmental power among separate legislative, executive, and judicial branches and provides that no one branch shall exercise powers belonging to the others. *Hoag v. State,* 04-0857, p. 4 (La. 12/1/04), 889 So.2d 1019, 1022 (citing La. Const. art. II, §§ 1 and 2). The judicial branch is prohibited from infringing upon the inherent powers of the legislative and executive branches. *Id.* When litigants seek to invoke the power of the judiciary to compel another branch of government to perform or act, we must closely and carefully examine whether the action is within the confines of our constitutional authority. *Id.*

However, as recognized by the appellate court, the question of whether a money judgment against a political subdivision based on inverse condemnation can, under the Louisiana Constitution, be enforced via a mandamus action is a *res nova* issue of Louisiana constitutional law. *Watson Memorial Spiritual Temple of Christ*, 382 So.3d at 1041. Therefore, to resolve the issue, we begin our analysis with the applicable law and settled jurisprudence.

First and foremost, we consider the language of the relevant constitutional provisions. Louisiana Constitution Article XII, § 10(C) provides:

> **Limitations; Procedure; Judgments.** Notwithstanding Paragraph (A) or (B) or any other provision of this constitution, the legislature by law may limit or provide for the extent of liability of the state, a state agency, or a political subdivision in all cases, including the circumstances giving rise to liability and the kinds and amounts of recoverable damages. It shall provide a procedure for suits against the state, a state agency, or a political subdivision and provide for the effect of a judgment, but no public property or public funds shall be subject to seizure. The legislature may provide that such limitations, procedures, and effects of judgments shall be applicable to existing as well as future claims. No judgment against the state, a state agency, or a political subdivision shall be exigible, payable, or paid except from funds appropriated therefor by the legislature or by the political subdivision against which the judgment is rendered.

Louisiana Constitution Article I, § 4(B)(1) provides, in part: "Property shall not be taken or damaged by the state or its political subdivisions except for public purposes and with just compensation paid to the owner or into court for his benefit." Notably, La. Const. art. XII, § 10(C) includes the word "shall," and La. Const. art. I, § 4(B)(1) includes the phrase "shall not." "The word 'shall' is mandatory and the word 'may' is permissive." La.R.S. 1:3.

> Under well-established rules of interpretation, the word "shall" excludes the possibility of being "optional" or even subject to "discretion,"

> but instead "shall" means "imperative, of similar effect and import with the word 'must.'" *Sensebe v. Canal Indem. Co.,* 10-0703, p. 9 (La.1/28/11), 58 So.3d 441, 447, *citing Borel v. Young,* 07-0419 (La.11/27/07), 989 So.2d 42, *Pittman Construction Co. v. Housing Authority of Opelousas,* 167 F.Supp. 517, 523 n.38 (W.D.La.1958), *aff'd,* 264 F.2d 695 (5th Cir.1959), and BLACK'S LAW DICTIONARY 1375 (6th ed. 1990).

*Louisiana Fed'n of Teachers v. State*, 13-120, p. 26 (La. 5/7/13), 118 So.3d 1033, 1051. Undisputedly, by virtue of La. Const. art. I, § 4(B)(1), the Neighbors are entitled to the payment of just compensation by Korban; however, the narrow issue before the Court is whether said payment may be judicially compelled by mandamus.

Louisiana Revised Statutes 13:5109(B)(2)[3] provides that a judgment against the state or its political subdivision is only payable by funds appropriated for the purpose of satisfying that judgment. Generally, "[t]he very act of appropriating funds is, by its nature, discretionary and specifically

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[3] Louisiana Revised Statutes 13:5109(B)(2) provides:

> Any judgment rendered in any suit filed against the state, a state agency, or a political subdivision, or any compromise reached in favor of the plaintiff or plaintiffs in any such suit shall be exigible, payable, and paid only out of funds appropriated for that purpose by the legislature, if the suit was filed against the state or a state agency, or out of funds appropriated for that purpose by the named political subdivision, if the suit was filed against a political subdivision.

granted to the legislature by the constitution." *Hoag*, 889 So.2d at 1024. However, in *Lowther v. Town of Bastrop*, 20-1231, p. 5 (La. 5/13/21), 320 So.3d 369, 372, this Court opined that "[m]andamus may lie against a political subdivision when the duty to be compelled is ministerial and not discretionary." "[T]he relevant consideration is 'whether the act of appropriating funds to pay the judgment . . . is a purely ministerial duty for which mandamus would be appropriate.'" *Id.* (quoting *Hoag*, 889 So.2d at 1023). The critical element necessary for the issuance of a writ of mandamus is that a public officer is not vested with any element of discretion. If discretion exists, mandamus will not lie. *Id.* at 371 (quoting *Hoag*, 889 So.2d at 1024).

In *Lowther*, 320 So.3d 369, this Court considered whether plaintiffs had a cause of action for a writ of mandamus compelling a municipality to satisfy a judgment for back wages owed to its firefighter employees. Therein, former and current firefighters ("the Firefighters") filed a petition for a writ of mandamus seeking enforcement of a judgment they had already procured against their employer, the City of Bastrop ("the City"). *Id.* at 370. The City filed an exception of no cause of action, arguing that the Firefighters were statutorily and constitutionally prohibited from using a writ of mandamus as an alternative means to execute a judgment against a political subdivision. *Id.* In an amending petition, the Firefighters averred the City had a ministerial duty to pay them the amount owed in satisfaction of the judgment and/or appropriate the funds necessary to pay as mandated by applicable law. *Id.* The district

court sustained the City's exception of no cause of action and dismissed the Firefighters' petition for a writ of mandamus. *Id*. The appellate court, citing La. Const. art. XII, § 10(C) and La.R.S. 13:5109(B)(2), concluded that the "[p]ayment of a judgment is not a ministerial act." *Lowther v. Town of Bastrop*, 53,586, p. 6 (La.App. 2 Cir. 9/23/20), 303 So.3d 681, 687. Thus, it held that the Firefighters had no cause of action to enforce the judgment by a writ of mandamus. *Id*. The Firefighters sought review by this Court.

Before this Court, the Firefighters argued that La. Const. art. VI, § 14(A)(2)(e), in conjunction with La.R.S. 33:1992(A), La.R.S. 33:1992(B), and La.R.S. 33:1969, provided them a statutorily mandated and constitutionally protected right to payment of the back wages quantified in the judgment. Therefore, the combination of these laws served as either a *de facto* appropriation or made the appropriation for payment of the back wages a ministerial function. *Lowther*, 320 So.3d at 372. Countering, the City acknowledged its duty to pay the Firefighters; however, it argued that the firefighters were subject to the dictates of La. Const. Art. XII, § 10(C) and La.R.S. 13:5109(B). *Id.* We concluded that because the duty to pay the Firefighters was statutorily and constitutionally mandated, it was ministerial in nature, opining that "[t]he clear language of La. Const. art. VI, § 14(A)(2)(e) and the Title 33 provisions reflect a mandate from the legislature that imposes a ministerial duty on the City to appropriate funds to pay the Firefighters back wages irrespective of La. Const. art. XII, § 10(C) and

La. R.S. 13:5109(B)."[4] *Id.* at 372-73. Therein, we stated:

> The ministerial nature of the duty of the City to pay the Firefighters does not change to a discretionary one simply because the Firefighters obtained a monetary judgment confirming and quantifying the City's payment obligation. Adopting such a distinction would allow the City to disregard its mandatory obligations pursuant to La. Const. art. VI, § 14(A)(2)(e), La. R.S. 33:1992(A), La. R.S. 33:1992(B), and La. R.S. 33:1969 under the guise that a court-issued mandamus compelling performance of these ministerial duties violates the separation of powers doctrine. *See Jazz*

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[4] In reaching our conclusion, we found the City's reliance on *Newman*, 979 So.2d 1262, and *Hoag*, 889 So.2d 1019, for the proposition that the Firefighters were indistinguishable from any other judgment creditor to be inapposite, noting the following:

> In *Jazz Casino*, we distinguished the mandatory nature of paying judgments for tax overpayment refunds and expropriation compensation from the discretionary nature of paying judgments arising from matters of contract or tort. 16-1663, pp. 10-11, 223 So.3d at 495-96. Thus, *Newman* is distinguishable because the judgment therein adjudicated a breach of contract claim. 07-1890, pp. 1-2, 979 So.2d at 1264. *Hoag* is distinguishable because plaintiffs therein sought payment from the legislature itself in contravention of La. Const. art. III, § 16. 04-0857, pp.7-8, 889 So.2d 1019, 1024; *New Orleans Fire Fighters Pension & Relief Fund v. City of New Orleans*, 13-0873, p. 15 (La.App. 4 Cir. 12/18/13), 131 So.3d 412, 421-22.

This Court concluded that, in contrast, the matter before us presented no such conflict. *Id.*

> *Casino*, 16-1663, p. 13, 223 So.3d at 497; *New Orleans Fire Fighters*, 13-0873, p. 20, 131 So.3d at 424. This result would defeat the very purpose of the express constitutional protections to which the Firefighters are entitled.

*Id.* at 373-74. For these reasons, the *Lowther* Court concluded that the action requested by the Firefighters for a writ of mandamus was the City's ministerial duty to appropriate funds necessary to satisfy the judgment as required by La. Const. art. VI, § 14(A)(2)(e), La.R.S. 33:1992(A), La.R.S. 33:1992(B), and La.R.S. 33:1969. *Id.* at 374. Accordingly, we reversed the court of appeal and held that the Firefighters did state a valid cause of action. *Id.*

In *Crooks*, 359 So.3d 448, we considered whether mandamus could lie to compel the state to pay a judgment rendered against it for mineral royalty payments. The district court had recognized plaintiffs as owners of certain riverbanks and ordered the Louisiana Department of Natural Resources ("LDNR") to pay damages for expropriation and mineral royalties received from the riverbank leases. *Id.* at 450. This Court affirmed the award for mineral royalties, but vacated the expropriation award after finding the claim for inverse condemnation had prescribed. *Crooks v. Dep't of Nat. Res.,* 19-160, p. 20 (La. 1/29/20), 340 So.3d 574, 587. When LDNR failed to satisfy the judgment, plaintiffs sought a mandamus to enforce their payment, arguing that depositing funds into the registry of the court to comply with a final judgment is a ministerial act. *Crooks*, 359 So.3d at 450. In opposition, LDNR argued that mandamus

violated La. Const. art. XII, § 10(C) and La.R.S. 13:5109(B)(2), and that the funds sought were unavailable. *Id.* The district court denied the writ of mandamus. *Id.* The court of appeal reversed, finding that mandamus was an appropriate remedy as the funds sought were not public funds, and the judgment could not be enforced by ordinary means. *Crooks v. State Through Dep't of Nat. Res.*, 21-633 (La.App. 3 Cir. 3/16/22), 350 So.3d 901, 909-10.

In this Court, the plaintiffs in *Crooks* argued that mandamus was proper, relying on *Jazz Casino*, 223 So.3d 488, and *Lowther*, 320 So.3d 369. *Crooks*, 359 So.3d at 451. LDNR countered, arguing that satisfaction of the judgment was a power that lies only with the legislature because the initial claim arose in tort. *Id. See* La. Const. art. XII, § 10(C); La.R.S. 13:5109(B)(2). *Crooks* held that in the absence of constitutional and statutory provisions similar in effect to those in *Jazz Casino* and *Lowther*, the judgment was payable only when funds were appropriated by the legislature. *Id.* at 452. Therefore, we concluded that the payment of the judgment for the return of mineral royalties received by the state required legislative appropriation, an act that was discretionary in nature. *Id.* at 449. Thus, we held that the appellate court erred in issuing the writ of mandamus. *Id.* at 452.

In reaching our conclusion in *Crooks*, 359 So.3d 448, that mandamus was improper, this Court acknowledged there are "specific limited exceptions wherein the duty to pay a judgment is constitutionally and statutorily mandated and therefore ministerial in nature." *Id.* at 451. Therein, we explained:

> These constitutional and statutory provisions operate as *de facto* appropriations by the legislature irrespective of the general limitations set forth in La. Const. art. XII, § 10(C) and La. R.S. 13:5109(B)(2). *See Lowther*, 20-1231, p. 6, 320 So.3d at 372-73 (citing *Perschall v. State*, 96-0322, p. 22 (La. 7/1/97), 697 So.2d 240, 255). Where such provisions exist, courts are merely enforcing the positive law and not encroaching on functions constitutionally dedicated to the legislative branch. *Lowther*, 20-1231, p. 5, 320 So.3d at 372; *Hoag*, 04-0857, p. 4, 889 So.2d at 1022.

*Id.*

Subsequent thereto, this Court decided *Mellor v. Parish of Jefferson*, 22-1713 (La. 9/1/23), 370 So.3d 388, wherein defendants, the Jefferson Parish School Board and Jefferson Parish Sheriff, challenged the constitutionality of a district court judgment ordering them to remit funds into the district court's registry. The disputed funds had been collected through the enforcement of a Jefferson Parish ordinance. *Id.* at 389. After this Court affirmed the district court's initial decision finding the ordinance unconstitutional as violative of La. Const. art. VI, § 5(G) and La. Const. art. VII, § 10(A),[5] plaintiffs filed a motion for summary judgment seeking "the immediate return of their property in the possession of these two government entities. . . ." *Mellor*, 370 So.3d at 389. The district court granted summary judgment and ordered the

[5] *Mellor v. Par. of Jefferson*, 21-858 (La. 3/25/22), 338 So.3d 1138.

defendants to remit the funds into the registry of the court. *Id.*

Before this Court, defendants relied on *Crooks*, 359 So.3d 448, and argued that the district court order violated La. Const. art. XII, § 10 and La.R.S. 13:5109(B)(2) because the funds were "public funds," not subject to seizure. *Mellor*, 370 So.3d at 394. Plaintiffs countered that the district court's order complied with La. Const. art. I, § 4(B)(1). *Id.* at 395. They argued that they were owed just compensation because defendants took their property, and that payment should be made to them directly or paid into the court's registry for their benefit. *Id.* Thus, plaintiffs argued that *Crooks*, 359 So.3d 448, was inapplicable. *Id.*

As in *Crooks*, 359 So.3d 448, the *Mellor* Court found that the funds in question were "public funds" and not subject to seizure. *Mellor*, 370 So.3d at 396. We opined that even if petitioners were entitled to a judgment in their favor, the district court "overstepped its authority in ordering defendants to remit funds into the court's registry, as this unconstitutionally intrude[d] upon their delegated responsibility to appropriate funds, pursuant to Article XII, Section 10 of the Louisiana Constitution and Louisiana Revised Statute 13:5109 B (2)." *Id.* at 391 (footnote omitted). *Mellor* held, as did *Crooks*, 359 So.3d 448, that such orders "are a constitutional overreach." *Id.*

Notably, however, the *Mellor* Court reiterated the reasoning in *Crooks* that "a specific constitutional or statutorily provided exception will overcome the mandates of La. Const. art. XII, § 10(C) and La. R.S. 13:5109 B (2)." *Id.* at 396 (citing *Crooks*, 359 So.3d at

452). Therefore, while both *Mellor*, 370 So.3d 388, and *Crooks*, 359 So.3d 448, were found to be instances of constitutional overreach, neither decision precluded mandamus in all instances. Both *Mellor* and *Crooks* noted one decision where this Court did find such authority to be appropriate was in *Jazz Casino*, 223 So.3d 488, which we find to be pertinent and akin to the case presently before us.

In *Jazz Casino*, 223 So.3d at 495, we held that the appropriation of funds to pay a refund judgment for overpaid taxes was a ministerial duty as mandated by La. Const. art. VII, § 3(A) and La.R.S. 47:1621. Therefore, a court could order a government agency to pay a taxpayer's refund judgment because a specific statutory provision mandated the payment of the judgment. *Jazz Casino*, 223 So.3d at 496. The Court in *Jazz Casino* distinguished the mandatory nature of the overpayment refund and expropriation compensation from the discretionary nature of paying judgments arising from matters of contract or tort. *Id.* We determined, based upon the ministerial nature of the constitutional and statutory duties owed by the tax collector in connection with the taxpayer's refund judgment, that mandamus was appropriate.[6] *Id.* at

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[6] Much like the argument advanced by the Neighbors in the case at bar, *Jass Casino*, 223 So.3d at 497, reasoned:

> To hold otherwise would allow the Secretary to disregard mandatory obligations under La. Const. art. VII, § 3(A) and La. R.S. 47:1621, under the guise that a court-issued mandamus ordering such refund violates the separation of powers doctrine. Such a result would render meaningless the constitutional guarantee under La. Const. art. VII, § 3(A) of "a complete and adequate remedy for the prompt recover[y] of an illegal tax paid by

496-97.

In the case *sub judice*, there exists an express constitutional provision that provides, in part: "Property shall not be taken or damaged by the state or its political subdivisions except for public purposes and with just compensation paid to the owner or into court for his benefit." La. Const. art. 1, §4(B)(1). This constitutional provision provides the authority, as was encompassed in our reasoning in *Mellor*, 370 So.3d 388, and *Crooks*, 359 So.3d 448, for a mandamus action against a political subdivision based on a judgment for inverse condemnation. For these reasons, we find the holdings of *Lowther*, 320 So.3d 369, and *Jazz Casino*, 223 So.3d 488, applicable to the case at bar; we further find that *Mellor*, 370 So.3d 388, and *Crooks*, 359 So.3d 448, although decided correctly under the facts and law, to be distinguishable from the case herein. A judgment for inverse condemnation, left unsatisfied, does not constitute the payment of just compensation. Therefore, we conclude, based on the mandates of La. Const. art. 1, §4(B)(1), that the payment of just compensation for a judgment arising from inverse condemnation is a ministerial, non-discretionary duty; therefore, mandamus may issue to enforce a final judgment for just compensation. Accordingly, via a mandamus action, the Neighbors may seek a court to compel the SWB's compliance with this constitutional mandate.

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a taxpayer," as well as the statutory scheme authorizing the recovery of overpaid taxes rightfully belonging to the taxpayer and the legislatively mandated mechanism for enforcing a final judgment that authoriz[es] the refund of overpaid taxes.

The conclusion we reach herein is further supported by our prior recognition of the similarity between inverse condemnation actions and cases involving expropriation.[7] Both actions arise from a "taking" implicating constitutional concerns of deprivation of property, and both are afforded the protections provided under La. Const. art. 1, §4(B)(1). Additionally, in *State through Department of Transportation & Development v. Chambers Investment Company, Inc.*, 595 So.2d 598, 602 (La.1992) (citing *Reymond v. State, Through the Dep't of Highways,* 231 So.2d 375, 383 (1970)),[8] we opined that "the action for inverse condemnation arises out of the self-executing nature of the constitutional

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[7] See, for example, *Bayou Bridge Pipeline, LLC v. 38.00 Acres, More or Less, Located in St. Martin Parish*, 20-1017, pp. 6-7 (La. 5/13/21), 320 So.3d 1054, 1059, wherein we opined:

> [R]egardless of the specific procedural posture of the case, i.e., whether the proceeding is an expropriation matter (where the damage to property is anticipated) or an inverse taking (where the damage to the property occurred before suit was filed), "one thing that both actions [ ] have in common . . . is our state constitution. *Larkin Dev. N., L.L.C. v. City of Shreveport*, 53,374, p. 13 (La. App. 2 Cir. 3/4/20), 297 So.3d 980, 990, *reh'g denied* 7/16/20, *writ denied*, 20-01026 (La. 12/22/20), 307 So.3d 1039. Moreover, "we note that the courts of this state have held that both expropriation and inverse condemnation actions arise from the same constitutional mandate of just compensation." *Id.* p. 16, 297 So.3d at 991.

[8] See also *Crooks*, 340 So.3d at 581; *Faulk v. Union Pacific Railroad Co.*, 14-1598, p.10 (La. 6/30/15), 172 So.3d 1034, 1044; *Avenal v. State*, 03-3521, p. 26 (La. 10/19/04), 886 So.2d 1085, 1104; *Constance v. State Through Dep't of Transp. & Dev. Office of Highways,* 626 So.2d 1151, 1156 (La.1993).

command to pay just compensation." Indeed, given this common constitutional mandate, a finding that mandamus may lie for a taking via expropriation, but not for a taking by means of inverse condemnation, seems to run afoul of that mandate. We again reiterate that the presence of a constitutional mandate relative to takings is wholly distinguishable from cases where the judgment sought to be enforced through mandamus arises from tort or contract. Although not determinative of the result we reach in this case, the foregoing similarities align with our determination herein.[9]

## CONCLUSION

For the foregoing reasons, we hold that the

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[9] We note that both parties in this case discuss *Parish of St. Charles v. R.H. Creager, Inc.*, 10-180, p. 13 (La.App. 5 Cir. 12/14/10), 55 So.3d 884, 892, *writ denied*, 11-118 (La. 4/1/11), 60 So.3d 1250, which held that "the judiciary has the constitutional authority to issue a mandamus in [an expropriation] matter [to compel payment of a final judgment] if warranted." Although we denied writs in *Creager*, it was cited by the Court in *Lowther*, 320 So.3d at 372. It was also cited, but found to be distinguishable, in M*ellor*, 370 So.3d at 396-97, which noted that *Creager* so held despite its finding that the expropriation statutes were not directly applicable. In the instant case, the appellate court, found "it instructive that in *Creager*, the Takings Clause of the Louisiana Constitution governed and mandamus was proper, even though the expropriation statute was not directly applicable." *Watson Memorial Spiritual Temple of Christ*, 382 So.3d at 1043. The appellate further opined "that no reason exists to treat expropriation and inverse condemnation differently, as the same constitutional protections arise in both." *Id.* (citing *Avenal v. State*, 99-127 (La.App. 4 Cir. 3/3/99), 757 So.2d 1, 12, *writ denied*, 00-1077 (La. 6/23/00), 767 So.2d 41, *cert. denied sub nom. Louisiana Dep't of Nat. Res. v. Avenal*, 531 U.S. 1012, 121 S.Ct. 568 (2000)). Similar reasoning is employed herein.

appellate court did not err in finding that the instant mandamus suit was not barred by res judicata. We further hold that payment of a money judgment based on inverse condemnation under the Louisiana Constitution is a ministerial duty; thus, it may be enforced via mandamus. Accordingly, the appellate court did not err in reversing the district court's ruling sustaining Korban's exception of no cause of action.

Our decision herein, that mandamus may lie to compel the payment of the judgment resulting from the SWB's inverse condemnation of the Neighbors' property, however, does not fully resolve the matter. Because the district court ruled that the Neighbors' failed to state a cause of action, it did not address, nor did the appellate court, the appropriate time and manner for said judgment to be satisfied. While La. Const. art. 1, § 4(B) mandates the payment of just compensation, it does not delineate the time or manner therefor. Mindful of the reality of the public policy implications on the public fisc, and in honoring any statutory limitations applicable to the SWB, we remand this matter to the district court to tailor a plan for a remedy that ensures satisfaction of the judgment at issue within a reasonable period of time.

**DECREE**

The judgment of the appellate court is affirmed, and the matter is remanded to the district court for further proceedings consistent with this opinion.

**AFFIRMED AND REMANDED TO THE DISTRICT COURT.**

**SUPREME COURT OF LOUISIANA**

**No. 2024-C-00055**

**WATSON MEMORIAL SPIRITUAL TEMPLE OF CHRIST D/B/A WATSON MEMORIAL TEACHING MINISTRIES, CHARLOTTE BRANCAFORTE, ELIO BRANCAFORTE, BENITO BRANCAFORTE, JOSEPHINE BROWN, ROBERT PARKE, NANCY ELLIS, MARK HAMRICK, ROBERT LINK, CHARLOTTE LINK, ROSS MCDIARMID, LAUREL MCDIARMID, JERRY OSBORNE, JACK STOLIER, AND WILLIAM TAYLOR**

**VERSUS**

**GHASSAN KORBAN, IN HIS CAPACITY AS EXECUTIVE DIRECTOR OF THE SEWERAGE AND WATER BOARD OF NEW ORLEANS**

*On Writ of Certiorari to the Court of Appeal, Fourth Circuit,*

*Parish of Orleans Civil*

**WEIMER, C.J.**, additionally concurring.

I concur in the opinion. Unquestionably, both the United States Constitution and the Louisiana Constitution allow the taking of private property for a public purpose, but that right is tempered with the obligation to pay compensation. The Louisiana Constitution mandates compensation for the taking and for damages to someone's property. La. Const. art. I, § 4(B)(1) ("Property shall not be taken or damaged by the state or its political subdivisions except for public purposes and with just compensation paid to the owner or into court for his benefit."). The

challenging issue in this matter is the use of mandamus pursuant to La. C.C.P. arts. 3861-3863, often referred to as an "extraordinary remedy." See, e.g., **Crooks v. State Through Dep't of Nat. Res.**, 22-625, p. 3 (La. 1/27/23), 359 So.3d 448, 450. Noteworthy, the plaintiffs did not turn to the use of this extraordinary remedy immediately upon final judgment, as documented in the majority opinion.

In this matter, the plaintiffs were able to convincingly demonstrate a conscious indifference[1] to payment by those cast in judgment. The use of the extraordinary remedy of mandamus should be coupled with proof of conscious indifference to pay the judgment. This proof should include an evaluation of the time since rendition of the judgment and the efforts made to satisfy the judgment. The opinion properly recognizes the practicalities that must be balanced in ensuring payment, even when mandamus is appropriate.

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[1] "Conscious indifference" means an awareness of and disregard for the harm that one's actions could do to the interests or rights of another. *Indifference*, BLACK'S LAW DICTIONARY (11th ed. 2019). A review of Louisiana jurisprudence suggests that the term has not been used in the context of a constitutional violation but has been adopted in the analysis of tortious conduct. See, e.g., **Lester v. BREC Foundation, et al.**, 22-0514, pp. 15-16 (La.App. 1 Cir. 11/4/22), 356 So.3d 18, 30 ("In the context of a tort, 'indifference' (including 'conscious indifference') means conscious disregard of the harm that one's action could do to the interests or rights of another.")

**SUPREME COURT OF LOUISIANA**

**No. 2024-C-00055**

**WATSON MEMORIAL SPIRITUAL TEMPLE OF CHRIST D/B/A WATSON MEMORIAL TEACHING MINISTRIES, CHARLOTTE BRANCAFORTE, ELIO BRANCAFORTE, BENITO BRANCAFORTE, JOSEPHINE BROWN, ROBERT PARKE, NANCY ELLIS, MARK HAMRICK, ROBERT LINK, CHARLOTTE LINK, ROSS MCDIARMID, LAUREL MCDIARMID, JERRY OSBORNE, JACK STOLIER, AND WILLIAM TAYLOR**

**VS.**

**GHASSAN KORBAN, IN HIS CAPACITY AS EXECUTIVE DIRECTOR OF THE SEWERAGE AND WATER BOARD OF NEW ORLEANS**

*On Writ of Certiorari to the Court of Appeal, Fourth Circuit, Parish of Orleans Civil*

**GRIFFIN, J., additionally concurs and assigns reasons.**

Because most provisions of the Declaration of Rights are self-executing,[1] and use mandatory language (e.g., "shall" and "shall not"), their enforcement is distinguishable from contract and tort. *See Gauthreaux v. City of Gretna*, 23-0606 (La. 6/21/23), 363 So. 3d 254, 255 (Griffin, J. concurring in the denial of the writ); John Devlin, *Louisiana*

[1] This is also supported by the implications of La. Const. art. I, § 22. A non-self-executing provision does not use mandatory language or, instead, specifically exempts itself. *See* La. Const. art. I, § 25.

*Constitutional Law*, 54 LA. L. REV. 683, 730-31 (1994).

Thus, prohibitions found in La. Const. art. XII, §10 and La. R.S. 13:5109(B)(2) do not apply to most of the Declaration of Rights per design of the framers. *See* Lee Hargrave, "*Statutory" and "Hortatory" Provisions of the Louisiana Constitution of 1974*, 43 LA. L. REV. 647, 656-57 (1983). The Louisiana Constitution protects against inverse condemnation by stating that "property *shall not be taken or damaged*…" La. Const. art. I, § V (B)(1) (emphasis added). Plaintiffs herein seek mandamus of a self-executing, mandatory provision of the Declaration of Rights.

*Appendix B*

**COURT OF APPEAL, FOURTH CIRCUIT**
**STATE OF LOUISIANA**

**NO. 2023-CA-0293**

**WATSON MEMORIAL SPIRITUAL TEMPLE OF CHRIST D/B/A WATSON MEMORIAL TEACHING MINISTRIES, CHARLOTTE BRANCAFORTE, ELIO BRANCAFORTE, BENITO BRANCAFORTE, JOSEPHINE BROWN, ROBERT PARKE, NANCY ELLIS, MARK HAMRICK, ROBERT LINK, CHARLOTTE LINK, ROSS MCDIARMID, LAUREL MCDIARMID, JERRY OSBORNE, JACK STOLIER, AND WILLIAM TAYLOR**

**VERSUS**

**GHASSAN KORBAN, IN HIS CAPACITY AS EXECUTIVE DIRECTOR OF THE SEWERAGE AND WATER BOARD OF NEW ORLEANS**

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2022-10955, DIVISION "F-14"
Honorable Jennifer M. Medley

* * * * * *

**Judge Joy Cossich Lobrano**

* * * * * *

(Court composed of Judge Daniel L. Dysart, Judge Joy Cossich Lobrano, Judge Karen K. Herman)

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**REVERSED AND REMANDED**

**DECEMBER 13, 2023**

This is a mandamus proceeding, wherein the prevailing parties in an inverse condemnation claim seek to compel payment of damages awarded at trial. Plaintiffs/appellants (collectively, the "Neighbors")[1] appeal the February 8, 2023 judgment of the district court, which granted the exception of no cause of action filed by defendant/appellee, Ghassan Korban ("Korban"), in his official capacity as Executive Director of the Sewerage and Water Board of New Orleans ("SWB"). For the reasons that follow, we reverse and remand for further proceedings.

## FACTS AND PROCEDURAL HISTORY

The Neighbors claim that SWB damaged and interfered with the Neighbors' use and enjoyment of their private homes and church during the Southeast Louisiana Urban Drainage Project (the "SELA Project"), which took place between 2013 and 2016. Multiple groups of residents, including the Neighbors, filed lawsuits to recover damages sustained in connection with the SELA Project. The facts of these claims are discussed in detail in this Court's opinion in *Lowenburg v. Sewerage & Water Bd. of New Orleans*, 19-0524 (La. App. 4 Cir. 7/29/20), -- So.3d --, 2020 WL 4364345 ("*Lowenburg*"). Following a trial on the merits, the Neighbors were awarded $998,872.47 in cumulative damages for inverse condemnation, as well as attorneys' fees and costs, which ultimately

[1] The Neighbors are listed as Watson Memorial Spiritual Temple of Christ d/b/a Watson Memorial Teaching Ministries; Charlotte, Elio, and Benito Brancaforte; Josephine Brown; Robert Parke and Nancy Ellis; Mark Hamrick; Robert and Charlotte Link; Ross and Laurel McDiarmid; Jerry Osborne; Jack Stolier; and Dr. William Taylor.

totaled $517,231.03. The district court's finding, that SWB was liable to the Neighbors for inverse condemnation, was upheld by this Court on appeal. *See Lowenburg*, 19-0524, p. 14, --- So.3d at ---, 2020 WL 4364345 at *7.

Thereafter, SWB did not appropriate funds to satisfy the judgment rendered in the *Lowenburg* suit. In response, the Neighbors filed a separate lawsuit in federal district court, pursuant to 42 U.S.C. § 1983, alleging, among other things, that SWB's failure to pay the inverse condemnation judgment to the Neighbors constitutes a secondary taking under the Fifth Amendment of the United States Constitution. *See Ariyan, Inc. v. Sewerage & Water Bd. of New Orleans*, 543 F.Supp.3d 373, 375 (E.D. La. 2021), *aff'd*, 29 F.4th 226 (5th Cir. 2022), *cert. denied*, --- U.S. ---, 143 S.Ct. 353, 214 L.Ed.2d 170 (2022) ("*Ariyan*"). SWB and Korban filed a motion to dismiss for failure to state a claim, which the district court granted, and the U.S. Fifth Circuit affirmed on appeal, "applying longstanding precedent that there is no [federal constitutional] property right to timely payment on a judgment." *Ariyan*, 29 F.4th at 228.

On December 1, 2022, the Neighbors filed the current action in the district court by filing a "Petition for Writ of Mandamus and Writ of *Fieri Facias*." The Neighbors argued that the damages awarded at trial for inverse condemnation were a just compensation award, pursuant to the Louisiana Constitution and the Fifth Amendment of the U.S. Constitution, but the SWB had failed to appropriate funds to satisfy the underlying judgments. According to the Neighbors, the constitutional duty to pay just compensation for

the taking or damaging of property is a ministerial duty required by law, and the district court has the power and authority to issue a writ of mandamus directing the immediate payment of the just compensation award.

On December 27, 2022, Korban filed exceptions of *res judicata* and no cause of action. In the exception of no cause of action, Korban argued that the Louisiana Constitution prohibits seizure of State assets to satisfy money judgments, and such judgments may only be paid from funds appropriated by the legislature or the political subdivision against which the judgment was rendered. Under Korban's argument, courts may not order appropriation of funds through mandamus, as that power is reserved to the legislature.

A hearing on the exceptions went forward on January 27, 2023. The district court subsequently rendered judgment on February 8, 2023, which denied the exception of *res judicata*, granted the exception of no cause of action, and dismissed the Neighbors' claims against Korban with prejudice. This appeal follows.

## ASSIGNMENTS OF ERROR

On appeal, the Neighbors set forth the following assignments of error:

I. The District Court erred by granting Appellees' peremptory exception of no cause of action and dismissing Appellants' *Petition for Writ of Mandamus and Writ of Fieri Facias*.

II. The District Court erred in granting Appellees' exception of no cause of action on Appellants' petition for writ of mandamus,

because just compensation is constitutionally required under both the state and federal constitutions; therefore, the duty to pay a just compensation award is a mandatory duty that is not subject to discretion, and thus properly subject to mandamus.

III. The District Court erred in granting Appellees' exception of no cause of action on Appellants' petition for writ of *fieri facias*, because the constitutional requirement that just compensation be paid in LA. CONST., art. I, § 4(B) is more specific than, and therefore supersedes, the requirement that judgments only be paid from voluntary appropriations under LA. CONST. art. XII, § 10(C).

## LAW AND ANALYSIS

### Exception of No Cause of Action

The exception of no cause of action raises a question of law, and appellate courts review a district court's ruling on an exception of no cause of action *de novo*. *Herman v. Tracage Dev., L.L.C.*, 16-0082, 16-0083, p. 4 (La. App. 4 Cir. 9/21/16), 201 So.3d 935, 939. "The function of the peremptory exception of no cause of action is to test the legal sufficiency of the petition, which is done by determining whether the law affords a remedy on the facts alleged in the pleading." *State, Div. of Admin., Off. of Facility Plan. & Control v. Infinity Sur. Agency, L.L.C.*, 10-2264, p. 8 (La. 5/10/11), 63 So.3d 940, 945-46 (citing *Ramey v. DeCaire*, 03-1299, p. 7 (La. 3/19/04), 869 So.2d 114, 118). The mover bears the burden of showing that the petition states no cause of action. *Id.*, 10-2264, p. 9, 63 So.3d at 946. Under La. C.C.P. art. 931, no evidence

may be introduced to support or controvert the exception of no cause of action; thus, the trial court reviews the petition and accepts as true all well-pleaded allegations of fact. *Id.*, 10-2264, pp. 8-9, 63 So.3d at 946 (citing *Ramey*, 03-1299, p. 7, 869 So.2d at 118) (other citations omitted).

**Inverse Condemnation**

Pursuant to Article I, Section 4(B) of the Louisiana Constitution, "[p]roperty shall not be taken or damaged by the state or its political subdivisions except for public purposes and with just compensation paid to the owner or into court for his benefit." An inverse condemnation action provides a procedural remedy to a property owner seeking compensation for land already taken or damaged, against a governmental or private entity having powers of eminent domain, where no expropriation proceedings have commenced. *Faulk v. Union Pac. R.R. Co.*, 14-1598, p. 9 (La. 6/30/15), 172 So.3d 1034, 1043-44 (citing *Avenal v. State,* 03-3521, p. 26 (La. 10/19/04), 886 So.2d 1085, 1103-04)(other citations omitted). "Inverse condemnation claims derive from the Taking Clauses contained in both the Fifth Amendment of the U.S. Constitution and Article I, Section 4 of the Louisiana Constitution." *Id.*, 14-1598, p. 9, 172 So.3d at 1044. "Under the Louisiana Constitution, the action for inverse condemnation is available in all cases where there has been a taking *or damaging* of property when just compensation has not been paid, without regard to whether the property is corporeal or incorporeal." *Id.*, 14-1598, pp. 9-10, 172 So.3d at 1044 (footnote omitted)(emphasis in original).

The Louisiana Supreme Court pronounced a three-factor analysis to determine whether a property owner is entitled to "eminent domain compensation," wherein the court must:

> (1) determine if a recognized species of property right has been affected;
>
> (2) if it is determined that property is involved, decide whether the property has been taken or damaged in a constitutional sense; and
>
> (3) determine whether the taking or damaging is for a public purpose under Article I, Section 4.

*Id.*, 14-1598, p. 10, 172 So.3d at 1044 (citing *State, Dep't of Transp. & Dev. V. Chambers Inv. Co.*, 595 So.2d 598, 603 (La. 1992); *Avenal*, 03-3521, pp. 26-27, 886 So.2d at 1104).

In *Lowenburg*, *supra*, this Court examined these factors and upheld the district court's finding that the Neighbors were entitled to damages pursuant to inverse condemnation.

**Mandamus**

"Mandamus is a writ directing a public officer … to perform" "a ministerial duty required by law." La. C.C.P. arts. 3861 and 3863. "A ministerial duty is one in which no element of discretion is left to the public officer, in other words, a simple definite duty, arising under conditions admitted or proved to exist, and imposed by law." *Lowther v. Town of Bastrop*, 20-01231, p. 3 (La. 5/13/21), 320 So.3d 369, 371 (internal quotations omitted). "If a public officer is vested with any element of discretion, mandamus will not lie." *Id.*

Importantly, the Louisiana Constitution enables the legislature to "limit or provide for the extent of liability of the state, a state agency, or a political subdivision." *Id.* (quoting La. Const. art. XII, § 10(C)). Specifically, under Article XII, Section 10(C), "[n]o judgment against the state, a state agency, or a political subdivision shall be exigible, payable, or paid except from funds appropriated therefor by the legislature or by the political subdivision against which the judgment is rendered." *Id.* Moreover, under La. R.S. 13:5109(B)(2),[2] a judgment against the state or its political subdivision is only payable by funds appropriated for the purpose of satisfying that judgment. As a general matter, "[t]he very act of appropriating funds is, by its nature, discretionary and specifically granted to the legislature by the constitution." *Hoag v. State*, 04-0857, p. 7 (La. 12/1/04), 889 So.2d 1019, 1024.

Nevertheless, the Supreme Court has recognized that "[m]andamus may lie against a political subdivision when the duty to be compelled is ministerial and not discretionary." *Lowther*, 20-01231, p. 5, 320 So.3d at 372. "[T]he relevant consideration is 'whether the act of appropriating funds to pay the judgment … is a purely ministerial duty for which mandamus would be appropriate.'" *Id.* (quoting *Hoag*,

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[2] "Any judgment rendered in any suit filed against the state, a state agency, or a political subdivision, or any compromise reached in favor of the plaintiff or plaintiffs in any such suit shall be exigible, payable, and paid only out of funds appropriated for that purpose by the legislature, if the suit was filed against the state or a state agency, or out of funds appropriated for that purpose by the named political subdivision, if the suit was filed against a political subdivision." La. R.S. 13:5109(B)(2).

04-0857, p. 6, 889 So.2d at 1023). The Supreme Court acknowledged there are "specific limited exceptions wherein the duty to pay a judgment is constitutionally and statutorily mandated and therefore ministerial in nature." *Crooks v. State Through Dep't of Nat. Res.*, 22-00625, p. 4 (La. 1/1/23), 359 So.3d 448, 451, *reh'g denied*, 22-00625 (La. 3/16/23), 362 So.3d 424. As the Court explained:

> These constitutional and statutory provisions operate as *de facto* appropriations by the legislature irrespective of the general limitations set forth in La. Const. art. XII, § 10(C) and La. R.S. 13:5109(B)(2). *See Lowther*, 20-1231, p. 6, 320 So.3d at 372-73 (citing *Perschall v. State*, 96-0322, p. 22 (La. 7/1/97), 697 So.2d 240, 255). Where such provisions exist, courts are merely enforcing the positive law and not encroaching on functions constitutionally dedicated to the legislative branch. *Lowther*, 20-1231, p. 5, 320 So.3d at 372; *Hoag*, 04-0857, p. 4, 889 So.2d at 1022.

*Id.*

This case presents a *res nova* issue of law: whether payment of an inverse condemnation judgment against a political subdivision is a ministerial duty. We find that it is.

The Neighbors rely on *Parish of St. Charles v. R.H. Creager, Inc.*, 10-180, p. 13 (La. App. 5 Cir. 12/14/10), 55 So.3d 884, 893, *writ denied*, 11-0118 (La. 4/1/11), 60 So.3d 1250 ("*Creager*"), which held that "payment of final judgments of damages in expropriation cases is a ministerial duty and not a discretionary one" such that "a mandamus may be properly issued for payment of

the judgment in this case." The *Creager* court recognized that the specific levee district statute, La. R.S. 38:513(B), and the mandamus power consistent with that law, were not directly applicable where the parish was not a levee district. *Creager*, 10-180, p. 8, 55 So.3d at 889. Even so, the court found "the legislative intent of those statutes can be instructive." *Id.* When a levee district expropriates land, La. R.S. 38:390(A) requires:

> If the amount finally awarded exceeds the amount so deposited, the court shall enter judgment against the levee district or levee and drainage district and in favor of the persons entitled thereto for the amount of the deficiency. The final judgment together with legal interest thereon shall be paid within sixty days after becoming final. Thereafter upon application by the owner or owners, the trial court shall issue a writ of mandamus to enforce payment.

Looking to this authority, the court further reasoned:

> By incorporating the mandamus power to compel payment of fair and just compensation into the proceedings for expropriation of land by levee boards, we believe the legislature intended that this be an exception to the general mandamus law. Furthermore, we note that the issuance of a mandamus by the trial court in that case is actually mandated by the legislature.

*Creager*, 10-180, p. 8, 55 So.3d at 890. The court was also persuaded that the judgment against the parish

was not obtained in a contract or tort action; "the fact that this matter results from an action taken pursuant to the Parish's power of eminent domain requires a different analysis and outcome." *Id.*, 10-180, pp. 8-9, 55 So.3d at 890. Moreover, under the Takings Clause of the Louisiana Constitution, "the same law that affords the right of the Parish to exercise its police power compels the Parish to pay just and fair compensation, and to afford constitutional due process rights to citizens affected." *Id.*, 10-180, p. 10, 55 So.3d at 891.

According to the Neighbors, inverse condemnation – like expropriation – is a taking or damaging of a private property because of a public purpose as provided in Article I, Section 4 of the Louisiana Constitution, and the aggrieved property owners must be subject to the same constitutional protections and benefit from the same ability to collect a judgment for a taking or damaging. This Court determined that "in cases where inverse condemnation rather than formal expropriation of property has taken place[,] … [t]here is no basis in Louisiana law for the different treatment of property owners in these two situations." *Avenal v. State*, 99-0127 (La. App. 4 Cir. 3/3/99), 757 So.2d 1, 12, *on reh'g* (3/15/00), *writ denied*, 00-1077 (La. 6/23/00), 767 So.2d 41. "The same substantive constitutional right (the right, secured by Art. I, § 4 of the 1974 Louisiana Constitution, to receive full compensation for the governmental taking of private property) is triggered by both." *Id.*

The Louisiana Supreme Court compared the "mandatory nature" of a hotel tax overpayment refund, pursuant to statutory and constitutional

authority,[3] to the "compensation that is required in expropriation cases" finding mandamus the appropriate remedy to compel these ministerial duties. *Jazz Casino Co., L.L.C. v. Bridges*, 16-1663, pp. 10-11 (La. 5/3/17), 223 So.3d 488, 496 ("*Jazz*")(citing *Creager*, 10-180, p. 11, 55 So.3d at 891)(footnotes omitted). In doing so, the Court distinguished the overpayment refund proceeding "from cases requiring a legislative appropriation for payment of a judgment, *i.e.*, matters arising out of contract or tort." *Id.*, 16-1663, p. 11, 223 So.3d at 496 (footnote omitted). The Court further reasoned that a refund proceeding, "like an expropriation proceeding, implicates constitutional concerns involving the deprivation of property" and that "the issuance of a writ of mandamus ordering the Secretary [of the Department of Revenue] to use those funds does not violate the constitutional prohibition of seizing public funds." *Id.*, 16-1663, p. 12, 223 So.3d at 497.

Similarly, the Supreme Court compared the mandatory, ministerial duty to pay firefighters back wages[4] to the "appropriation of funds to pay judgment of damages in expropriation case … because the expropriation statutes and La. Const. art. I, § 4(B) make payment of fair and just compensation mandatory and not discretionary." *Lowther*, 20-01231, p. 5, 320 So.3d at 372 (citing *Creager*, 10-180, p. 13, 55

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[3] *See generally* La. Const. art. VII, § 3(A) and La. R.S. 47:1621 *et seq*. (setting out the circumstances and procedure providing refund to the taxpayer for the overpayment of taxes).

[4] *See* La. Const. art. VI, § 14(A)(2)(e); La. R.S. 33:1992(A); La. R.S. 33:1992(B); and La. R.S. 33:1969 (governing firefighter compensation).

So.3d at 892-93). The Court again "distinguished the mandatory nature of paying judgments for tax overpayment refunds and expropriation compensation from the discretionary nature of paying judgments arising from matters of contract or tort." *Id.* (citing *Jazz*, 16-1663, pp. 10-11, 223 So.3d at 495-96).

SWB relies on *Newman Marchive Partnership v. City of Shreveport*, 07-1890 (La. 4/08/08), 979 So.2d 1262, for the general premise that the separation of powers doctrine prohibits issuing mandamus ordering seizure of public assets in satisfaction of money judgments. Nevertheless, *Newman Machive Partnership* was a breach of contract claim, which the Supreme Court acknowledged as distinct from a constitutional takings claim involving the mandatory duty to pay just compensation for deprivation of property rights. *See Lowther*, 20-01231, p. 5, 320 So.3d at 372; *Jazz*, 16-1663, pp. 10-11, 223 So.3d at 495-96.

SWB further cites the recent Supreme Court case of *Mellor v. Parish of Jefferson*, 22-01713 (La. 9/1/23), 370 So.3d 388, rejecting a claim seeking mandamus for return of funds collected through the enforcement of an ordinance later found unconstitutional. *Mellor* declined to follow *Creager*, finding "no specific constitutional or statutory provision permits the trial court to order the defendants to remit [the disputed sum] into its registry[.]" *Id.*, 22-01713, p. 14, 370 So.3d at 397. Instead, the Court adhered to the general pronouncements of La. Const. art. XII, § 10 and La. R.S. 13:5109(B)(2) in determining that the Court lacked specific authority to issue mandamus ordering seizure of public funds to satisfy payment of a money judgment. *Id.*

We find *Mellor* dissimilar from the appeal before us, because, in *Mellor*, there was no holding that the funds collected under the ordinance resulted in a taking under La. Const. art. I, § 4, and neither the constitution nor statute permitted mandamus. Instead, we find this matter analogous to the expropriation issues resolved in *Creager* and followed in *Jazz*. We find it instructive that in *Creager*, the Takings Clause of the Louisiana Constitution governed and mandamus was proper, even though the expropriation statute was not directly applicable. Moreover, we are bound by this Court's pronouncement in *Avenal*, 99-0127, 757 So.2d at 12, that no reason exists to treat expropriation and inverse condemnation differently, as the same constitutional protections arise in both.

Under this reasoning, we find that payment of a judgment awarding just compensation for inverse condemnation, like a judgment awarding just compensation for expropriation, is a ministerial duty, and we find that the Neighbors have stated a cause of action. We, therefore, reverse the judgment of the district court.

***Res Judicata***

Lastly, we find no merit in Korban's argument that the district court's judgment should be upheld on the basis of *res judicata*.[5] Korban has failed to

[5] Korban did not file an answer to the appeal, but seeks affirmation of the district court's judgment of dismissal on alternative grounds: *res judicata*. In the judgment currently before us on appeal, the district court granted Korban's exception of no cause of action, but it denied the exception of *res judicata*. Korban contends that, even if this Court were to reverse its ruling

demonstrate with law or record evidence that the federal court judgment in *Ariyan* bars the instant state law claim for mandamus.

When filing suit in federal court, the Neighbors "invoked federal question jurisdiction, relying on their Fifth Amendment claim." *Ariyan*, 29 F.4th at 232. A state court must apply the federal law of *res judicata* when determining "the preclusive effects of a judgment rendered by a federal court exercising federal question jurisdiction." *St. Charles Surgical Hosp., LLC v. Louisiana Health Serv. & Indem. Co.*, 18-0052, p. 3 (La. App. 4 Cir. 3/21/18), 317 So.3d 854, 856 (quoting *Reeder v. Succession of Palmer*, 623 So.2d 1268, 1271 (La. 1993)). The *res judicata* effect of a prior judgment is a question of law, which is reviewed *de novo*. *Id.*, 18-0052, p. 3, 317 So.3d at 856-57 (quoting *Test Masters Educ. Servs., Inc. v. Singh*, 428 F.3d 559, 571 (5th Cir. 2005)).

*Res judicata* encompasses the doctrine of "claim preclusion," which "bars the litigation of claims that either have been litigated or should have been raised in an earlier suit." *Test Masters Educ. Servs., Inc.*, 428 F.3d at 571. The test for *res judicata* has four requirements:

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on the exception of no cause of action, this litigation should still be dismissed as barred by *res judicata*. "A party who does not seek modification, revision, or reversal of a judgment in an appellate court, including the supreme court, may assert, in support of the judgment, any argument supported by the record, although he has not appealed, answered the appeal, or applied for supervisory writs." La. C.C.P. art. 2133(B). *See also Slaughter v. Louisiana State Employees' Ret. Sys.*, 15-0324, pp. 3-4 (La. 10/14/15), 180 So.3d 279, 281-82.

> (1) the parties are identical or in privity; (2) the judgment in the prior action was rendered by a court of competent jurisdiction; (3) the prior action was concluded by a final judgment on the merits; and (4) the same claim or cause of action was involved in both actions.

*Id.*

Korban argues the general premise that the Neighbors' state law claim seeking mandamus arises from the same underlying facts as the federal suit: that the Neighbors seek to compel payment of the unpaid judgment against SWB. While this may be true, we cannot find it sufficient, without more, under the jurisprudence. As the Supreme Court explained in *Reeder*, 623 So.2d at 1272-73:

> if a set of facts gives rise to a claim based on both state and federal law, and the plaintiff brings the action in a federal court which had "pendent" jurisdiction to hear the state cause of action, but the plaintiff fails or refuses to assert his state law claim, *res judicata* prevents him from subsequently asserting the state claim in a state court action, unless the federal court clearly would not have had jurisdiction to entertain the omitted state claim, or, having jurisdiction, clearly would have declined to exercise it as a matter of discretion.

*Ariyan* dismissed the federal Fifth Amendment takings claim, wherein the Neighbors asserted that nonpayment of the underlying judgment was a "second taking." *Ariyan*, 29 F.4th at 229. The federal district court and Fifth Circuit concluded under a line of

federal jurisprudence[6] that a government's failure to timely pay a judgment did not constitute a violation of a federal constitutional right. *Id.* at 230-32. "Without an underlying federal claim, or any other basis for jurisdiction asserted by the Plaintiffs, the district court properly declined to hear Plaintiffs' standalone claim to declaratory relief." *Id.* at 232.

Other Louisiana courts, following *Reeder*, have recognized that state law claims in a state action are not precluded by *res judicata*, where "although plaintiffs did not assert all of their state law claims in the federal proceeding, the federal court clearly would have declined to exercise its pendent jurisdiction over the omitted state law claims." *Morales v. Parish of Jefferson*, 10-273, pp. 7-8 (La. App. 5 Cir. 11/9/10), 54 So.3d 669, 673. Korban has failed to demonstrate that the federal court could have exercised jurisdiction over the state law mandamus claim, and we find no error in the district court's denial of his exception of *res judicata*.

**CONCLUSION**

Accordingly, for the reasons set forth in this opinion, the judgment of the district court, which granted the exception of no cause of action and dismissed the Neighbors' Petition for Writ of Mandamus and Writ of *Fieri Facias*, is reversed, and this matter is remanded to the district court for further proceedings.

**REVERSED AND REMANDED**

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[6] *See Folsom v. City of New Orleans*, 109 U.S. 285, 3 S.Ct. 211, 27 L.Ed. 936 (1883); *Minton v. St. Bernard Par. Sch. Bd.*, 803 F.2d 129 (5th Cir. 1986); *Freeman Decorating Co. v. Encuentro Las Americas Trade Corp.*, 352 F. App'x 921 (5th Cir. 2009).

*Appendix C*

**CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS**

**STATE OF LOUISIANA**

**DOCKET NO. 2022-10955**
**DIVISION "F" SECTION 14**

**WATSON MEMORIAL SPIRITUAL TEMPLE OF CHRIST d/b/a WATSON MEMORIAL TEACHING MINISTRIES, CHARLOTTE BRACAFORTE, ELIO BRANCAFORE, BENITO BRANCAFORTE, JOSEPHINE BROWN, ROBERT PARKE, NANCY ELLIS, MARK HAMRICK, ROBERT LINK, CHARLOTTE LINK, ROSS MCDIARMID, LAUREL MCDIAMRID, JERRY OSBORNE, JACK STOLIER, and WILLIAM TAYLOR**

**VERSUS**

**GHASSAN KORBAN, IN HIS CAPACITY AS EXECUTIVE DIRECTOR OF THE SEWERAGE AND WATER BOARD OF NEW ORLEANS**

**FILED: _____** **_____**
**DEPUTY CLERK**

**JUDGMENT**

On January 27, 2023, the following matters came before the Court for hearing via Zoom: (l) Plaintiffs' Petition for Writ of Mandamus and Writ of *Fieri*

*Facias*; and (2) Defendant Ghassan Korban's ("***Korban***") Dilatory Exception of Insufficiency of Service of Process and Peremptory Exceptions of *Res Judicata* and No Cause of Action. Appearing for the parties were:

1. Randall Smith, on behalf of Plaintiffs.

2. Craig Mitchell, on behalf of Defendant Korban.

After considering the parties' briefs, the pleadings, the law, and the arguments made before the Court, and for the reasons stated orally on the record at the hearing,

**IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that Korban's Dilatory Exception of Insufficiency of Service of Process is **DENIED AS MOOT**;

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that Korban's Peremptory Exception of *Res Judicata* is **DENIED**;

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED**, that Korban's Peremptory Exception of No Cause of Action is **GRANTED** and that Plaintiffs' Petition for Writ of Mandamus and Writ of *Fieri Facias* is therefore **DISMISSED WITH PREJUDICE**;

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that there be final judgment in favor of Defendant Ghassan Koran, in his capacity as Executive Director of the Sewerage and Water Board, and against Plaintiffs Watson Memorial Spiritual Temple of Christ d/b/a Watson Memorial Teaching Ministries; Charlotte, Elio, and Benito Brancaforte; Dr. Josephine Brown; Robert Parke and Nancy Ellis;

Mark Hamrick; Robert and Charlotte Link; Ross and Laurel McDiarmid; Jerry Osborne; Jack Stolier; and William Taylor, dismissing all claims against Korban **WITH PREJUDICE**.

**NEW ORLEANS, LOUISIANA,** this 1st day of February, 2023

[JENNIFER M. MEDLEY]

JUDGE JENNIFER M. MEDLEY

A TRUE COPY
[Herkida T. Butler]
Deputy Clerk-Minute Clerk
Clerk of Civil Distric Court
Parish of Orleans, State of LA

ENTERED RULE DOCKET/COMPUTER [initialed]
SERVICE COPIES TO SHERIFF [stricken]
CARD WITH RULE DATE MAILED [stricken]
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RULE DATE RECEIVED [stricken]

*Appendix D*

CIVIL DISTRICT COURT
PARISH OF ORLEANS
STATE OF LOUISIANA

NO. 2022-10955 DIVISION "F-14"

WATSON MEMORIAL SPIRITUAL TEMPLE OF CHRIST D/B/A WATSON MEMORIAL TEACHING MINISTRIES, ET AL

VERSUS

GHASSAN KORBAN, IN HIS CAPACITY AS EXECUTIVE DIRECTOR OF THE SEWERAGE AND WATER BOARD OF NEW ORLEANS

PROCEEDINGS held in the above-captioned matter before the HONORABLE JENNIFER M. MEDLEY, JUDGE presiding on Friday, January 27, 2023.

REPORTED BY:
SAMANTHA A. HUTCHISON, BA-CCR
DIVISION "F," CIVIL DISTRICT COURT
ORLEANS PARISH, LOUISIANA.

APPEARANCES:
RANDALL A. SMITH, ESQ.
Attorney for Plaintiff
CRAIG B. MITCHELL, ESQ.
Attorney for Defendant

PROCEEDINGS
(Friday, January 27, 2023)

LAW CLERK:

Docket Position 29, Page 7 of docket, Case No. 2022-10955, Watson Memorial Spiritual Temple of Christ D/B/A Watson Memorial Teaching Ministries, et al v. Korban, Ghassan, in his capacity as Executive Director of the Sewerage and Water Board of New Orleans.

The Court will first take up Ghassan Korban's Declinatory Exception of Insufficiency of Service of Process and Peremptory Exception of Res Judicata and No Cause of Action.

THE COURT:

All right. Can the parties make their appearances for the record?

MR. MITCHELL:

Good morning, Your Honor. Craig Mitchell on behalf of Ghassan Korban.

MR. SMITH:

Good morning – good afternoon, actually, Your Honor. It might be morning where Craig is, I don't know. Randy Smith here, Your Honor, for Watson Memorial Spiritual Temple of Christ, Charlotte Brancafore, Elio Brancafore, Benito Brancafore, Josephine Brown, Robert Parke, Nancy Ellis, Mark Hamrick, Robert Link, Charlotte Link, Ross McDiarmid, Laurel McDiarmid, Jerry Osborne, Jack Stolier, and William Taylor.

THE COURT:

All right. On the Insufficiency of Service of Process, we have a return of 12/28/22.

MR. MITCHELL:

Yes, Your Honor. That is now moot.

THE COURT:

Okay.

MR. MITCHELL:

That's been cured.

THE COURT:

All right. On res judicata, this –

MR. MITCHELL:

Yes, Your Honor – I'm sorry.

THE COURT:

This is a federal court and state court issue.

MR. MITCHELL:

Yes, Your Honor. So this matter has been in litigation for some time. There was a state court judgment that was rendered and then as you know from the record, the plaintiffs went over to the Eastern District asserting an improper taking in order to enforce the money judgment. We went all the way to the United States Supreme Court. It was clear as indicated in our brief that the Louisiana State Constitution prohibits the seizure of public assets for the fillment of any of these judgments. Unfortunately, that's just how the law is.

So the Exception of Res Judicata is based upon

the fact that the parties were identical in federal court. The federal court had competent jurisdiction. We have a final judgment and the claims are the same regardless of how the plaintiffs try to spend it. At the end of the day, they are attempting to enforce this judgment before Your Honor just like they did before the Eastern District, the U.S. Fifth Circuit, and the United States Supreme Court.

MR. SMITH:

Do you want me to respond now, Your Honor, or are you going to go – you're going exception by exception I take it?

THE COURT:

I'm waiting to hear your response.

MR. SMITH:

Oh, great. Okay.

As you know, Your Honor, my clients went to trial on their takings claims for the damages caused by the Sewerage and Water Board. They got a judgment by Judge Nakeshia Knott, and then had to go to the Fourth Circuit and the Fourth Circuit affirmed the award and found that it was a taking. Then despite multiple demands, they – Sewerage and Water Board never paid any of these judgments. So my clients, the church and the individuals, have not received a dime while they continue to pay their Sewerage and Water Board bills on their judgments against the Sewerage and Water Board that are over three years old.

We went into federal court along with other plaintiffs solely under the U.S. Fifth Amendment

and that case was brought solely with an argument that based on a new case in the U.S. Supreme Court called *Knick* that plaintiffs could go directly to federal court. And we asserted there that the failure to pay was itself a Fifth Amendment violation, Fifth Amendment to the United States Constitution. Nothing in that federal lawsuit that we filed mentioned mandamus, the Louisiana Constitution, any of the issues that are before you here. It was a straight shot that the Fifth Amendment required payment – the Fifth Amendment.

Now, that case went – was dismissed by the late Judge Feldman, and he ultimately said that the whole action should be dismissed in favor of further state court proceedings with state court judges, state court judgments, I'm quoting, state resident plaintiffs, and a state agency defendant is the best use of this Court's unique and substantial discretion. State courts can enforce their judgment. So he dismissed it. The Fifth Circuit affirmed. The U.S. Supreme Court refused to hear the case. That's a totally different case. We could not have brought this mandamus claim in that case. We didn't bring it, and we couldn't have bring it. Because there is no federal mandamus power against state court officers, political subdivisions, state employees, and we've cited cases including US Fifth circuit, *Noble v. Cane* as well as others.

And the defendant essentially admits this basically saying in their reply memo at Page 3, plaintiffs dilemma is that no court can grant the relief they seek. So we're happy to address the real

issue here which is there exception of no cause of action as to whether the Louisiana Constitution allows for a mandamus in this case. But to try to say we can't even get to Your Honor on that issue because we filed a completely different case in federal court just on the Fifth Amendment and it was dismissed by Judge Feldman because he said we belong in state court, that's – with all due respect, that's just not fair. We went – we go into all the rules about res judicata and how it doesn't apply here. Not only must you be able to have advanced those cases, we didn't advance those cases, we couldn't advance those cases, and the judgment is both exceptional in reserving the right of the plaintiffs to bring another action is what I just quoted. And we cited numerous cases that res judicata has to be strictly applied, and here that would be just a total miscarriage of justice to say that something we never brought, it couldn't have been brought when our whole federal case was dismissed to tell us to come right here back to CDC to bring this up to you. That's just unconscionable.

MR. MITCHELL:

So if I could respond to that. Judge Feldman did not remand this case to Civil District Court. Judge Feldman and the Fifth Circuit and the U.S. Supreme Court saw exactly what was going on. The plaintiffs were trying to do an in around to the strict prohibition of enforcing these judgments against a public entity. That's exactly what happened.

And with respect to what was actually adjudicated, what issues were up, Your Honor, you

can see on Page 7 of our reply to the plaintiffs opposition to our exception, we quote the United States Fifth Circuit began it's opinion rejecting plaintiff's claims and recognizing the reality of Louisiana's anti-seizures law. Right there from the Fifth Circuit opinion. The Louisiana Constitution bars the seizure of public funds or property to satisfy a judgment against a state or it's political subdivisions. Since Louisiana courts lack the power to force another branch of government to make an appropriation, the prevailing party has no judicial mechanism to compel the defendant to pay.

So we can't sit here and honestly believe that the payment of this judgment was not at issue. Regardless of the legal theory, everyone knows what was going on. It was whether or not they can get this judgment enforced. That was litigated. We spent plenty of time on it. There were amicus briefs filed with the U.S. Supreme Court and I believe the Fifth Circuit. There is nothing exceptional about the outcome. They just don't like it.

Unfortunately, individuals who have judgments against the school board, against the City of New Orleans, against the Sewerage and Water Board, and other public entities throughout the state have this same issue. And this is an issue for the legislature to address, not this Court that's been adjudicated.

THE COURT:

So on the Exception of Res Judicata, I'm going to deny that. On the Exception of No Cause of Action, I would grant that. I mean, it's simply, this Court does not have the power to – we can't make

the Sewerage and Water Board pay outside of whatever order payment people are placed in.

MR. SMITH:

Can I briefly address that, Judge, or is that a final ruling?

THE COURT:

It's a final ruling. You can address it. I've never taken those cases for that reason, but you can address it.

MR. SMITH:

Well – and I appreciate your ruling on the res judicata. As to the Exception of No Cause of Action, the Supreme Court of this state in both the *Lowther* case and the *Jazz Casino* case that we cite, both cite with approval the *Creager* case from the Fifth Circuit for which writ was denied. It specifically says a taking is different from another type of judgment. A judgment based on a taking is different and it goes into reasons and those other cases from the Supreme Court also point that out. And it is distinct from judgments against the City of New Orleans and it's distinct from breach of contracts towards this is a taking which implicates the Louisiana State Constitution.

Unfortunately there's two parts of the Louisiana State Constitution. One says you can't seize assets or compel. The other says, and I quote, properties shall not be taken or damaged by the state except for public purposes and with just compensation paid to the owner. And I'm not going to belabor it if you're ruling is final because we argue that, but we think this is a different species

of judgment. It does make it amenable to a mandamus.

MR. MITCHELL:

Your Honor, thank you. At this point, I understand that the Judge is granting the Exception of No Cause of Action. I just – out of an abundance of caution, I want to make sure that I offer, file, and introduce the various exhibits to my exception as well as the opposition. I previously submitted those through your law clerk, and they were also attached to everything. Hose would be Exhibit A, which is a complaint filed by *Ariyan* in the Eastern District, Exhibit B, the final judgment from June 9, 2021 from the Eastern District, Exhibit C, the motion and order to examine the judgment debtor in the *Ariyan* matter pending in Civil District Court. And then Exhibit A to the Opposition of Petition of Writ of Mandamus, its petition reply brief to the United States Supreme Court in the *Ariyan v. Sewerage and Water Board Enforcement Action*.

MR. SMITH:

And, Your Honor, for us it's just Exhibit B from our opposition to the exception, which are the order and reasons from the *Ariyan* District Court – Federal District Court case. Just as Craig did, we emailed your clerk earlier with that earlier.

THE COURT:

Okay. They're admitted.

MR. MITCHELL:

Thank you, Your Honor. We will prepare the

judgment.

THE COURT:

Thank you so much.

(PROCEEDINGS CONCLUDED.)

REPORTER'S PAGE

I, Samantha A. Hutchison, a Certified Court Reporter, in and for the State of Louisiana, the officer, as defined in Rule 28 of the Federal Rules of Civil Procedure and/or Article 1434(b) of the Louisiana Code of Civil Procedure, before whom this sworn testimony was taken, do hereby state on the record: That due to the interaction in the spontaneous discourse of this proceeding, dashes (--) have been used to indicate pauses, changes in thought, and/or talk overs, that same is the proper method for a Court Reporter's transcription of proceeding, and that the dashes (--) do not indicate that words or phrases have been left out of this transcript.

Also, any words and/or names which could not be verified through reference material have been denoted with the phrase "(sp)."

This certificate is valid only for a transcript accompanied by my original signature and original required seal on this page.

I, Samantha A. Hutchison, Official Court Reporter in and for the State of Louisiana, employed as an official or deputy official court reporter by the Orleans Parish Civil District Court for the State Of Louisiana, as the officer before whom this testimony was taken, do hereby certify that this testimony was reported by

me in the stenomask reporting method, was prepared and transcribed by me or under my direction and supervision, and is a true and correct transcript to the best of my ability and understanding, that the transcript has been prepared in compliance with transcript format guidelines required by statute or by rules of the board or by the Supreme Court of Louisiana, and that I am not related to counsel or to the parties herein nor am I otherwise interested in the outcome of this matter.

_____

SAMANTHA A. HUTCHISON, BA-CCR
CERTIFIED COURT REPORTER, 2017011

*Appendix E*

**THE SUPREME COURT OF**
**THE STATE OF LOUISIANA**

**WATSON MEMORIAL SPIRITUAL TEMPLE OF CHRIST D/B/A WATSON MEMORIAL TEACHING MINISTRIES, CHARLOTTE BRANCAFORTE, ELIO BRANCAFORTE, BENITO BRANCAFORTE, JOSEPHINE BROWN, ROBERT PARKE, NANCY ELLIS, MARK HAMRICK, ROBERT LINK, CHARLOTTE LINK, ROSS MCDIARMID, LAUREL MCDIARMID, JERRY OSBORNE, JACK STOLIER, AND WILLIAM TAYLOR**

**VS.**

**GHASSAN KORBAN, IN HIS CAPACITY AS EXECUTIVE DIRECTOR OF THE SEWERAGE AND WATER BOARD OF NEW ORLEANS**

No. 2024-C-00055

– – – – – –

IN RE: Ghassan Korban, in His Capacity as Executive Director of the Sewerage and Water Board of New Orleans-Applicant Defendant; Applying for Rehearing, Parish of Orleans Civil, Orleans Civil District Court Number(s) 2022-10955, Court of Appeal, Fourth Circuit, Number(s) 2023-CA-0293;

– – – – – –

**August 02, 2024**
Application for rehearing denied.

JBM
JLW
JDH
SJC
JTG
WJC
PDG

Supreme Court of Louisiana
August 02, 2024
*Katie Marjanovic*
Chief Deputy Clerk of Court
For the Court

*Appendix F*

FILED
2022 DEC 27 A 09:04
CIVIL
DISTRICT COURT

**CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS STATE OF LOUISIANA**

**DOCKET NO. 2022-10955**
**DIVISION "F" SECTION 14**

**WATSON MEMORIAL SPIRITUAL TEMPLE OF CHRIST d/b/a WATSON MEMORIAL TEACHING MINISTRIES, CHARLOTTE BRACAFORTE, ELIO BRANCAFORE, BENITO BRANCAFORTE, JOSEPHINE BROWN, ROBERT PARKE, NANCY ELLIS, MARK HAMRICK, ROBERT LINK, CHARLOTTE LINK, ROSS MCDIARMID, LAUREL MCDIAMRID, JERRY OSBORNE, JACK STOLIER, and WLLIAM TAYLOR**

**VERSUS**

**GHASSAN KORBAN, IN HIS CAPACITY AS EXECUTIVE DIRECTOR OF THE SEWERAGE AND WATER BOARD OF NEW ORLEANS**

**FILED: _____** _____
**DEPUTY CLERK**

E-Filed

**MEMORANDUM IN SUPPORT OF GHASSAN KORBAN'S DECLINATORY EXCEPTION OF INSUFFICIENCY OF SERVICE OF PROCESS AND PEREMPTORY EXCEPTIONS OF *RES JUDICATA* AND NO CAUSE OF ACTION**

**NOW INTO COURT**, through undersigned counsel, comes Defendant Ghassan Korban ("***Korban***"), in his capacity as Executive Director of the Sewerage and Water Board of New Orleans (the "***SWB***"), who excepts to Plaintiffs' "Petition for Writ of Mandamus and Writ of *Fieri Facias*" pursuant to Articles 925(A)(2), 927(A)(3), and 927(A)(5) of the Louisiana Code of Civil Procedure.

* * *

[excerpted]

* * *

**B. Peremptory Exception of *Res Judicata*- La. Code Civ. Proc. Art. 927(A)(3)**

Should Korban be properly served, Plaintiffs' claims suffer from other legal impediments. Before the Court need concern itself with the potential merit (or lack thereof) of Plaintiffs' claims, it should dismiss this case pursuant to the peremptory exception of *res judicata*. Because this suit arises from the same common nucleus of operative facts ***and*** seeks the same exact relief sought in the federal suit, Plaintiffs are barred from pursuing this second bite at the apple.

**1. Legal Standard**

The peremptory exception of *res judicata* is the procedural vehicle that bars "claims that were or could have been litigated in a prior lawsuit." *Bd. of Supervisors of La. State Univ. Agric & Merch. College*

*v. Dixie Brewing Co.*, 2014-0641 (La. App. 4 Cir. 11/19/14); 154 So. 3d 683, 689. "The purpose of both federal and state law on res judicata is essentially the same; to promote judicial efficiency and final resolution of disputes by preventing needless relitigation." *Tewebonne Fuel & Lube, Inc. v. Placid Ref. Co.*, 95-0654, 95-0671 (La. 1/16/96); 666 So.2d 624, 631.

A prior federal judgment involving the same facts can support an exception of *res judicata* in Louisiana state court. *Armbruster v. Anderson*, 2018-0055 (La. App. 4 Cir. 06/27/18); 250 So. 3d 310, 317. "Louisiana courts have repeatedly confirmed that federal law is applicable to consideration of whether a federal court judgment has res judicata effect." *Id.* (internal quotation marks omitted).

"Under [federal] res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Allen v. McCurry*, 449 U.S. 90, 94 (1980). The doctrine applies if four elements are met:

> 1) the parties to both actions are identical (or at least in privity); 2) the judgment in the first action is rendered by a court of competent jurisdiction; 3) the first action concluded with a final judgment on the merits; and 4) the same claim or cause of action is involved in both suits.

*Ellis v. Amex Life Ins. Co.,* 211 F.3d 935, 937 (5th Cir. 2000).

When these elements are satisfied, the doctrine

applies "whether or not the judgment was right." *Iselin v. Meng*, 307 F.2d 455, 547 (5th Cir. 1962); *see also Federated Dep't Stores, Inc. v. Molite*, 452 U.S. 394, 398 (1981) ("[Tlhe res judicata consequences of a final, unappealed judgment on the merits [are not] altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case.").

**2. Argument**

The federal *Ariyan* judgments satisfy all four criteria for federal *res judicata*, which bars Plaintiffs from re-litigating those claims in this suit. Plaintiffs acknowledge in their Petition that they were parties to the federal litigation, as was Korban.[6] Plaintiffs also recognize that the federal district court that rendered the judgment had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343, as well as 42 U.S.C. § 1983, and 28 U.S.C. § 2201 and 2202.[7] The federal district court granted the SWB and Korban's Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim and entered judgment "with prejudice."[8] A dismissal with prejudice is an adjudication on the merits. *See Williams v. Dallas Cnty. Comm'rs*, 689 F.2d 1212, 1215 (5th Cir. 1982) ("As a general proposition, dismissal of a complaint for failure to state a claim operates as an adjudication on the merits absent the court's specification to the contrary, and is therefore with prejudice."); *see also*

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[6] *See* Petition at ¶¶14-16.

[7] Ex. A at ¶4.

[8] Ex. B.

*Guajardo v. JP Morgan Chase Bank, N.A.*, 605 F. App'x 240, 244 (5th Cir. 2015).

Lastly, the claims involved in this action are the same that were adjudicated in the federal action. To determine if the fourth criterion for federal *res judicata* is met, courts have adopted a "transactional test." "Under this approach, the critical issue is not the relief requested or the theory asserted but whether the plaintiff bases the two actions on the same nucleus of operative facts." *Matter of Howe*, 913 F.2d 1138, 144 (5th Cir. 1990). "If the factual scenario of the two actions parallel, the same cause of action is involved in both. The substantive theories advanced, forms of relief requested, types of rights asserted, and variations in evidence needed do not inform this inquiry." *Agrilectric Power Partners v. Gen. Elec. Co.*, 20 F.3d 663, 665 (5th Cir. 1994).

Plaintiffs' Petition concedes that this suit seeks to enforce the same State court money judgments that they sought to enforce in the federal litigation.[9] Both suits have sought issuance of a writ to seize the SWB's property to satisfy Plaintiffs' money judgment.[10] The Fact that Plaintiffs may now rely on new theories of relief or couch their claims on different sources of law is of no moment. For instance, Plaintiffs now argue that Article I, § 4(B)(1) of the Louisiana Constitution

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[9] *See* Petition at ¶¶14-16.

[10] *Compare* Ex. A at p. 27 (seeking "issuance of a writ of execution … authorizing seizure by appropriate authorities of the SWBNO's property, wherever located, in amounts sufficient to satisfy the underlying judgments"), *with* Petition at p. 8 (seeking "issue of a writ of *fieri facias*, commanding the Sheriff of this Parish to seize and sell the property of the Sewerage and Water Board of New Orleans sufficient to satisfy the writ").

entitles them to seize the SWB's property in satisfaction of their judgments.[11] While this argument is without merit,[12] it is undoubtedly barred by the doctrine of *res judicata*. Because this case and the prior federal action involve the same common nucleus of operative facts, Plaintiffs' claims to enforce their judgments are barred, irrespective of what legal theory they assert. *See Agrilectric,* 20 F.3d at 665.[13]

For these reasons, Korban respectfully requests that the Court dismiss Plaintiffs' duplicative suit pursuant to the peremptory exception of *res judicata*.

* * *

[excerpted]

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[11] Petition at ¶20.

[12] *See infra* Part II.C.2.a

[13] Any argument that Plaintiffs could not have asserted this argument in the prior federal litigation is patently false. Not only did Plaintiffs seek a writ of execution in the federal litigation (*see* Petition at p. 8), but Federal Rule of Civil Procedure 69(a)(1) expressly provides that execution of a money judgment must accord with state procedure, unless a federal statute governs.

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* * *

[excerpted]

*Appendix G*

FILED
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CLERKS OFFICE
CIVIL DISTRICT COURT

**CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS STATE OF LOUISIANA**

**DOCKET NO. 2022-10955**
**DIVISION "F" SECTION 14**

**WATSON MEMORIAL SPIRITUAL TEMPLE OF CHRIST d/b/a WATSON MEMORIAL TEACHING MINISTRIES, CHARLOTTE BRACAFORTE, ELIO BRANCAFORE, BENITO BRANCAFORTE, JOSEPHINE BROWN, ROBERT PARKE, NANCY ELLIS, MARK HAMRICK, ROBERT LINK, CHARLOTTE LINK, ROSS MCDIARMID, LAUREL MCDIAMRID, JERRY OSBORNE, JACK STOLIER, and WLLIAM TAYLOR**

**VERSUS**

**GHASSAN KORBAN, IN HIS CAPACITY AS EXECUTIVE DIRECTOR OF THE SEWERAGE AND WATER BOARD OF NEW ORLEANS**

**FILED: _____** _____
**DEPUTY CLERK**

**GHASSAN KORBAN'S REPLY IN SUPPORT OF DECLINATORY EXCEPTION OF INSUFFICIENCY OF SERVICE OF PROCESS AND PEREMPTORY EXCEPTIONS OF *RES JUDICATA* AND NO CAUSE OF ACTION**

**NOW INTO COURT**, through undersigned counsel, comes Defendant Ghassan Korban ("***Korban***"), in his capacity as Executive Director of the Sewerage and Water Board of New Orleans (the "***SWB***"), who submits this Reply in support of his Exceptions. The opposition filed by Plaintiffs strains to ignore the preclusive effect of *res judicata*, the Louisiana Constitution, and the numerous courts that have rejected the very arguments and nature of relief Plaintiffs seek here. As a matter of law, Plaintiffs simply cannot re-litigate these issues or obtain via court order seizure of the SWB's property or mandamus requiring Korban to allocate funds to pay their money judgments. For these reasons, Korban respectfully requests that the Court grant his Exceptions and dismiss this action with prejudice.

## I. PEREMPTORY EXCEPTION OF RES JUDICATA

Plaintiffs do not refute that they brought, and lost, a prior suit in federal court seeking the same relief they seek here: satisfaction of their State court money judgments. The arguments they raise to avoid the preclusive effect of the prior federal judgment all fail as a matter of law.

### A. The federal district court did not except any claims from *res judicata*.

Without citation to any authority, Plaintiffs argue that this Court should find an implied reservation of their claims from some language in the federal district court's Order and Reasons.[1] But only a "'***judgment that expressly*** leaves open the opportunity to bring a second action on specified parts of the claim or cause of action that was advanced in the first action should be effective to forestall preclusion.'" *King v. Provident Life & Accident Ins. Co.*, 23 F.3d 926, 928 (5th Cir. 1994) (emphasis added) (quoting 18 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURES § 4413 (1981)).[2] The court in the first action must "expressly reserve[] the plaintiff's right to maintain the second action.'" *Id.* at 929 (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 26 (1982)).

The actual judgment (which is the relevant document) contains no reservation at all, either implied or explicit. It merely states that there be judgment in favor of the SWB and Korban, and against Plaintiffs, and dismisses Plaintiffs' claims "WITH PREJUDICE."[3] The federal district court's Order and Reasons similarly contains no ***express*** reservation of any claims for any subsequent suit. *See Ariyan, Inc. v.*

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[1] *See* Opp. at 2.

[2] As explained in Korban's Memorandum in Support, because the prior judgment was rendered by a federal court, this Court must apply federal *res judicata* law to determine its preclusive effect. *See* Korban's MIS at 4 (citing *Armbruster v. Anderson*, 2018-0055 (La. App. 4 Cir. 06/27/18); 250 So. 3d 310, 317).

[3] *See* Ex. C to Korban's MIS (federal district court judgment).

*Sewerage & Water Bd. of New Orleans*, 543 F. Supp. 3d 373 (E.D. La. 2021), *aff'd*, 29 F.4th 226 (5th Cir.), *cert. denied*, 143 S. Ct. 453 (2022). In fact, the court makes no statement whatsoever regarding *res judicata* or an intention to in any way limit the preclusive effect of its judgment.

The language Plaintiffs seize upon from the federal district court's Order and Reasons does not reserve any claims. This is made clear by the context of that case and the claims Plaintiffs asserted therein. Plaintiffs brought two claims. First, they asserted a claim pursuant to 42 U.S.C. § 1983, claiming that the SWB and Korban's failure to satisfy their State court money judgments violated their federal rights under the Takings Clause. *See Ariyan*, 543 F. Supp. 3d at 377. Their second claim sought a declaratory judgment establishing the parties' alleged rights and duties under the "Damages SOP." *Id.* at 380. The federal district court dismissed Plaintiffs' § 1983 claim because of "centuries of precedent establishing that a state's temporary deprivation of damages does not violate any constitutional right." *Id.* at 378.

The language Plaintiffs claim amounts to an implied reservation of claims comes from the federal district court's discussion of their Declaratory Judgment Act claims, not Plaintiffs' claims to enforce their judgments. *See id.* at 380-81. In declining to address this claim, the court recognized jurisprudence holding that federal courts have discretion in whether to adjudicate such claims. *Id.* at 380. At no time does the court reserve any claims for further adjudication expressly or implicitly. To the extent any reservation could be interpreted from these general statements, it

would only apply to the Declaratory Judgment Act claim regarding the parties' rights under the Damages SOP. There is no plausible argument that these statements apply to the dismissal of their § 1983 claim, which sought to enforce their money judgments. Accordingly, this action, which seeks enforcement of those same judgments, is barred by the prior federal adjudication.

**B. Plaintiffs fail to state a claim in federal or State court.**

To avoid *res judicata*, Plaintiffs also assert that the prior federal action does not bar this suit because federal courts lacked the ability to grant them the relief they now seek, whereas this Court does. This is incorrect legally and stands in stark contradiction to what Plaintiffs have previously averred in other courts, including this one. *See infra* Part II.A (outlining Plaintiffs' admissions that State courts lack the ability under Louisiana law to grant them the relief they now seek and claiming only federal courts could). Plaintiffs' dilemma is that no court (State or federal) can grant them the relief they seek. As outlined below, and described in Korban's original Memorandum in Support, Louisiana's constitution and laws prohibit courts from ordering the seizure of State assets to satisfy judgments or issuing mandamus to compel a public official to allocate funds to pay money judgments. *See infra* Part II.

Plaintiffs note that federal courts lack the ability to compel State actors to take actions via mandamus.[4] But Louisiana law also prohibits State courts from

[4] Opp. at 3.

issuing mandamus compelling public officials to pay their judgments as well. *See Newman Marchive Partnership v. City of Shreveport*, 07-1890 (La.04/08/08); 979 So. 2d 1262; *see also* Korban's MIS at 8-11. To the extent Plaintiffs now believe that State courts afford them remedies not available in federal courts, they should have first brought this action here. The fact that Plaintiffs' claims failed in federal court does not give them a second chance in State court when their claims fail here as well.

Plaintiffs' argument also neglects that this action, like the prior federal action, seeks a writ to seize the SWB's assets to pay their judgments. In this regard, federal courts are no more restricted than State courts. In fact, the opposite is true. Under the Federal Rules of Civil Procedure, "[t]he procedure on execution [of a money judgment] … must accord with the procedure of the state where the court is located, but a federal statute governs to the extent it applies." Fed. R. Civ. P. 69(a)(1). To this end, even a federal judgment rendered pursuant to diversity jurisdiction is restrained by the prohibition against seizure of State assets found in the Louisiana Constitution. *See Freeman Decorating Co. v. Encuentro Las Ams. Trade Corp.,* 352 F. App'x 921, 923 (5th Cir. 2009). But a federal court can "trump" a State's anti-seizure provision and enforce a money judgment against a public entity when there is "a federal interest in the remedy." *Id.* (citing *Specialty Healthcare Mgmt., Inc. v. St. Mary Par. Hosp.*, 220 F.3d 650, 653 (5th Cir. 2000)).[5] State courts are strictly bound by the

[5] Plaintiffs tried to argue the existence of a federal interest in the federal collection action but failed. The United States Fifth

Louisiana Constitution, and no similar exception exists. Thus, Plaintiffs request for a writ of execution did not fail in federal court because the federal court lacked an enforcement mechanism that State courts possess. No court could grant Plaintiffs the relief they seek under any theory they assert, and thus no exception to *res judicata* applies.

Once again, it is of no moment that Plaintiffs asserted a different theory of relief in the federal collection action (a Takings Claim) than they do here. "Res judicata or claim preclusion bar all claims that were or could have been advanced in support of the cause of action adjudicated in [in the earlier case], not merely those that were actually adjudicated." *Langston v. Ins. Co. of N. Am.*, 827 F.2d 1044, 1047 (5th Cir. 1987) (per curiam). This is also true under Louisiana *res judicata*:

> Thus, res judicata used in the broad sense has two different aspects: 1) foreclosure of relitigating matters that have never been litigated but should have been advanced in the earlier suit; and 2) foreclosure of relitigating matters that have been previously litigated and decided.

*Maschek v. Cartemps USA*, 2004-1031 (La. App. 4 Cir. 02/16/05); 896 So. 2d 1189, 1193 (quoting *Stroscher v.*

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Circuit expressly held that "Plaintiffs' underlying state court cases were *not* based on any asserted federal right." *Ariyan*, 29 F.4th at 230 (emphasis in original); *see also id.* at 232 ("Without an underlying federal claim, or any other basis for jurisdiction asserted by the Plaintiffs, the district court properly declined to hear Plaintiffs' standalone claim to declaratory relief."). Plaintiffs are bound by that finding and cannot seek to upset it in any way.

*Stroscher*, 2001-2769 (La. App. 1 Cir. 02/14/03); 845 So. 2d 518, 524).[6] When Plaintiffs sought a writ of execution from the federal court- an action it was generally able to take (i.e. federal courts can issue writs of execution under appropriate circumstances)- and lost, they extinguished their ability to pursue the same relief in a subsequent action, regardless of the theory asserted or forum.

### C. Plaintiffs have not suffered a "subsequent wrong" giving rise to a new action.

Plaintiffs also argue that the SWB's continued delay in payment after they lost the federal suit is a "subsequent wrong" that gives rise to a new action not precluded by *res judicata*.[7] This argument ignores the import of the federal action and would lead to absurd results. Plaintiffs' federal action failed because "failure to appropriate funds to pay [a judgment] … does not constitute a taking." *Ariyan*, 29 F.4th at 230 (internal quotation marks omitted). If the SWB's actions did not give rise to a cognizable claim then, they are not magically cognizable now, both as a matter of law and *res judicata*. What Plaintiffs propose would result in this dispute continuing *ad infinitum*. Plaintiffs advocate for a system where they can simply ignore adverse rulings and bring the same exact

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[6] *See also Mitchell v. Bertolla,* 340 Sp. 2d 287, 291-92 (La. 1976) ("a single cause of action may be based upon several grounds, in which event, whether actually litigated or not, they are all merged in the judgment which bars a new action on the same cause of action on a different ground") (quoting Freeman, Law of Judgments, § 681, 1437-38).

[7] *See* Opp. at 4.

claims time and again. Plaintiffs had their day in court, they lost, and are now bound by that ruling.

**D. No other exceptional circumstances preclude *res judicata*.**

In their last argument regarding *res judicata*, Plaintiffs cite several statutory exceptions to *res judicata* under ***Louisiana*** law.[8] But once again, it is ***federal*** law that applies to determine the *res judicata* effect of this prior federal judgment. *Armbruster*, 250 So. 3d at 317. In any event, none of the exceptions would apply here.

Plaintiffs claim that "exceptional circumstances" should preclude the application of *res judicata*. However, the only alleged "exceptional circumstance" they aver is that they don't like the outcome: "Plaintiffs herein and countless others [] are arbitrarily deprived of vindication for wrongs by the state or its political subdivisions."[9] But this is a result of the Louisiana Constitution and the laws of this State, not some impropriety or injustice in how the federal judgment was rendered. State and federal courts have recognized the "frustrating dichotomy" for the State's judgment creditors whereby citizens face a "severe limitation" on their ability to enforce a judgment against the state, a state agency, or a local governmental entity. *Newman Marchive*, 979 So. 2d at 1266 (citing Lee Hargrave, *"Statutory" and "Hortatory" Provisions of the Louisiana Constitution of 1974*, 43 La. L. Rev. 647, 653 (1983)); *see also Ariyan*, 29 F.4th at 232 (understanding "Plaintiffs'

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[8] *See* Opp. at 4-5.

[9] Opp. at 5.

frustration" but recognizing that they are "[w]ithout any judicial means to recover"). That is the law. This case does not concern "convoluted factual or legal scenarios." Plaintiffs obtained money judgments against a political subdivision of the State; State law does not allow them to seize public property or compel a State actor to satisfy their judgments, so they lost their federal suit seeking enforcement of those judgments.

Dissatisfaction with an outcome in a prior proceeding or disagreement with the law does not give rise to an "exceptional circumstance" sufficient to ignore *res judicata*. Moreover, even if this Court were to ignore the prior suit, it would still be bound by the same laws and restrictions that preclude Plaintiffs from the relief they seek.

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[excerpted]

Respectfully submitted,

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***Attorneys for Ghassan Korban***

* * *

[excerpted]

*Appendix H*

FOURTH CIRCUIT COURT OF APPEAL

STATE OF LOUISIANA

No. 2023-CA-0293

WATSON MEMORIAL SPIRITUAL TEMPLE OF CHRIST D/B/A/ WATSON MEMORIAL TEACHING MINISTRIES, CHARLOTTE BRANCAFORTE, ELIO BRANCAFORTE, BENITO BRANCAFORTE, JOSEPHINE BROWN, ROBERT PARKE, NANCY ELLIS, MARK HAMRICK, ROBERT LINK, CHARLOTTE LINK, ROSS MCDIARMID, LAUREL MCDIARMID, JERRY OSBORNE, JACK STOLIER AND WILLIAM TAYLOR

*Plaintiff-Appellees*

VERSUS

GHASSAN KORBAN, IN HIS CAPACITY AS EXECUTIVE DIRECTOR OF THE SEWERAGE AND WATER BOARD OF NEW ORLEANS

*Defendant-Appellant*

On appeal from the Civil District Court,
Orleans Parish, No. 2022-10955, "F-14,"
Honorable Jennifer M. Medley, presiding

**CIVIL PROCEEDING**

**Brief of Appellee Ghassan Korban, in his official capacity as Executive Director of the Sewerage and Water Board of New Orleans**

* * *

[excerpted]

**B. Plaintiffs' Claims are Also Barred by *Res Judicata***

The peremptory exception of *res judicata* is the procedural vehicle that bars "claims that were or could have been litigated in a prior lawsuit." *Bd. of Supervisors of La. State Univ. & Agric & Merch. College v. Dixie Brewing Co.*, 2014-0641 (La. App. 4 Cir. 11/19/14); 154 So. 3d 683, 689. "The purpose of both federal and state law on res judicata is essentially the same; to promote judicial efficiency and final resolution of disputes by preventing needless relitigation." *Terrebonne Fuel & Lube, Inc. v. Placid Ref. Co.*, 95-0654, 95-0671 (La. 1/16/96); 666 So.2d 624, 631.

A prior federal judgment involving the same facts can support an exception of *res judicata* in Louisiana state court. *Armbruster v. Anderson*, 2018-0055 (La. App. 4 Cir. 06/27/18); 250 So. 3d 310, 317. "Louisiana courts have repeatedly confirmed that federal law is applicable to consideration of whether a federal court judgment has res judicata effect." *Id.* (internal quotation marks omitted).

"Under [federal] res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Allen v.*

*McCurry*, 449 U.S. 90, 94 (1980).[30] The doctrine applies if four elements are met:

> 1) the parties to both actions are identical (or at least in privity); 2) the judgment in the first action is rendered by a court of competent jurisdiction; 3) the first action concluded with a final judgment on the merits; and 4) the same claim or cause of action is involved in both suits.

*Ellis v. Amex Life Ins. Co.*, 211 F.3d 935, 937 (5th Cir. 2000).

When these elements are satisfied, the doctrine applies "whether or not the judgment was right." *Iselin v. Meng*, 307 F.2d 455, 547 (5th Cir. 1962); *see also Federated Dep't Stores, Inc. v. Molite*, 452 U.S. 394, 398 (1981) ("[T]he res judicata consequences of a final, unappealed judgment on the merits [are not] altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case.").

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[30] *See also Langston v. Ins. Co. of N. Am.*, 827 F.2d 1044, 1047 (5th Cir. 1987) (per curiam) (""Res judicata or claim preclusion bar all claims that were or could have been advanced in support of the cause of action adjudicated in [in the earlier case], not merely those that were actually adjudicated."); *Mitchell v. Bertolla*, 340 So. 2d 287, 291-92 (La. 1976) ("a single cause of action may be based upon several grounds, in which event, whether actually litigated or not, they are all merged in the judgment which bars a new action on the same cause of action on a different ground") (quoting Freeman, Law of Judgments, § 681, 1437-38).

**1. Application: the *Ariyan* judgments bar Plaintiffs' current action**

The federal *Ariyan* judgments satisfy all four criteria for federal *res judicata*, which bars Plaintiffs from re-litigating those claims in this suit. Plaintiffs acknowledge in their Petition that they were parties to the federal litigation, as was Korban.[31] Plaintiffs also recognize that the federal district court that rendered the judgment had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343, as well as 42 U.S.C. § 1983, and 28 U.S.C. § 2201 and 2202.[32] The federal district court granted the SWB and Korban's Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim and entered judgment "with prejudice."[33] A dismissal with prejudice is an adjudication on the merits. *See Williams v. Dallas Cnty. Comm'rs*, 689 F.2d 1212, 1215 (5th Cir. 1982) ("As a general proposition, dismissal of a complaint for failure to state a claim operates as an adjudication on the merits absent the court's specification to the contrary, and is therefore with prejudice."); *see also Guajardo v. JP Morgan Chase Bank, N.A.*, 605 F. App'x 240, 244 (5th Cir. 2015).

Lastly, the claims involved in this action are the same that were adjudicated in the federal action. To determine if the fourth criterion for federal *res judicata* is met, courts have adopted a "transactional

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[31] *See R.5-6,* ¶¶ 14-16.

[32] *R.43,* ¶4.

[33] *R.73.*

test." "Under this approach, the critical issue is not the relief requested or the theory asserted but whether the plaintiff bases the two actions on the same nucleus of operative facts." *Matter of Howe*, 913 F.2d 1138, 144 (5th Cir. 1990). "If the factual scenario of the two actions parallel, the same cause of action is involved in both. The substantive theories advanced, forms of relief requested, types of rights asserted, and variations in evidence needed do not inform this inquiry." *Agrilectric Power Partners v. Gen. Elec. Co.*, 20 F.3d 663, 665 (5th Cir. 1994).

Plaintiffs' Petition concedes that this suit seeks to enforce the same State court money judgments that they sought to enforce in the federal litigation.[34] Both suits have sought issuance of a writ to seize the SWB's property to satisfy Plaintiffs' money judgment.[35] The fact that Plaintiffs may now rely on new theories of relief or couch their claims on different sources of law is of no moment. For instance, Plaintiffs now argue that Article I, § 4(B)(1) of the Louisiana Constitution entitles them to seize the SWB's property in satisfaction of their

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[34] *See R.5-6*, ¶¶ 14-16.

[35] *Compare R.66* (seeking "issuance of a writ of execution … authorizing seizure by appropriate authorities of the SWBNO's property, wherever located, in amounts sufficient to satisfy the underlying judgments") (the federal suit), *with R.8* (seeking "issue of a writ of *fieri facias*, commanding the Sheriff of this Parish to seize and sell the property of the Sewerage and Water Board of New Orleans sufficient to satisfy the writ") (Plaintiffs' Petition in this suit).

judgments.[36] While this argument is without merit,[37] it is undoubtedly barred by the doctrine of *res judicata*. Because this case and the prior federal action involve the same common nucleus of operative facts, Plaintiffs' claims to enforce their judgments are barred, irrespective of what legal theory they assert. *See Agrilectric*, 20 F.3d at 665.[38]

**2. The federal district court did not except any claims from *res judicata***

In the District Court, Plaintiffs argued that the court should find an implied reservation of their claims from some language in the federal district court's Order and Reasons. But only a "'***judgment that expressly*** leaves open the opportunity to bring a second action on specified parts of the claim or cause of action that was advanced in the first action should be effective to forestall preclusion.'" *King v. Provident Life & Accident Ins. Co.*, 23 F.3d 926, 928 (5th Cir. 1994) (emphasis added) (quoting 18 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURES § 4413 (1981)). The court in the first action must "expressly reserve[] the plaintiff's right to maintain the second action.'" *Id.* at 929 (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 26 (1982)).

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[36] *R.6-7*, ¶ 20.

[37] *See supra* Part VI.A.1.a.ii.

[38] Any argument that Plaintiffs could not have asserted this argument in the prior federal litigation is patently false. Not only did Plaintiffs seek a writ of execution in the federal litigation (*see R.8*), but Federal Rule of Civil Procedure 69(a)(1) expressly provides that execution of a money judgment must accord with state procedure, unless a federal statute governs.

The actual judgment (which is the relevant document, as opposed to the Order and Reasons) contains no reservation at all, either implied or explicit. It merely states that there be judgment in favor of the SWB and Korban, and against Plaintiffs, and dismisses Plaintiffs' claims "WITH PREJUDICE."[39] The federal district court's Order and Reasons similarly contains no ***express*** reservation of any claims for any subsequent suit. *See Ariyan, Inc. v. Sewerage & Water Bd. of New Orleans*, 543 F. Supp. 3d 373 (E.D. La. 2021), *aff'd*, 29 F.4th 226 (5th Cir.), *cert. denied*, 143 S. Ct. 453 (2022). In fact, the court makes no statement whatsoever regarding *res judicata* or an intention to in any way limit the preclusive effect of its judgment.

Respectfully submitted,

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* * *

[excerpted]

*Appendix I*

FOURTH CIRCUIT COURT OF APPEAL

STATE OF LOUISIANA

No. 2023-CA-0293

WATSON MEMORIAL SPIRITUAL TEMPLE OF CHRIST D/B/A/ WATSON MEMORIAL TEACHING MINISTRIES, CHARLOTTE BRANCAFORTE, ELIO BRANCAFORTE, BENITO BRANCAFORTE, JOSEPHINE BROWN, ROBERT PARKE, NANCY ELLIS, MARK HAMRICK, ROBERT LINK, CHARLOTTE LINK, ROSS MCDIARMID, LAUREL MCDIARMID, JERRY OSBORNE, JACK STOLIER AND WILLIAM TAYLOR

*Plaintiff-Appellees*

VERSUS

GHASSAN KORBAN, IN HIS CAPACITY AS EXECUTIVE DIRECTOR OF THE SEWERAGE AND WATER BOARD OF NEW ORLEANS

*Defendant-Appellant*

On appeal from the Civil District Court,
Orleans Parish, No. 2022-10955, "F-14,"
Honorable Jennifer M. Medley, presiding

**CIVIL PROCEEDING**

**Appellee Ghassan Korban's Surreply**

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[excerpted]

The claims brought by Plaintiffs against Appellee

Ghassan Korban ("***Korban***") fail both procedurally and on the merits. The District Court agreed on the latter, but the doctrine of *res judicata* also bars these claims because they have previously been adjudicated in federal court. Plaintiffs' arguments to the contrary are factually wrong, legally wrong, and/or raise irrelevant and immaterial red-herrings. This brief surreply seeks to correct and clarify these issues with regard to *res judicata*, which provides an independently sufficient ground to affirm the District Court's judgment of dismissal.

## I. Korban Has Preserved His *Res Judicata* Argument.

As a threshold issue, Plaintiffs begin their attack on the application of *res judicata* by stating that Korban "declined to appeal that ruling [on *res judicata*] or answer the instant appeal." Plaintiffs' Reply at 8. While Plaintiffs say no more on this issue, their clear implication is that Korban has somehow waived any argument of *res judicata* by failing to cross appeal or answer. Plaintiffs' assertions are patently incorrect and were addressed in Korban's original brief. *See* Korban Br. at 4-5. "A party who ***does not seek*** modification, revision, or reversal of a judgment in an appellate court, including the supreme court, may assert, in support of the judgment, any argument supported by the record, ***although he has not appealed, answered the appeal, or applied for supervisory writs***." La. Code Civ. Proc. art. 2133(B) (emphasis added). As such, a "prevailing party in the trial court [] is not limited to the reasons given by the trial judge in support of its position but may rely on any argument supported by the record." *Johno v. Doe*,

2015-0737 (La. App. 4 Cir. 03/09/16); 187 So. 3d 581, 584 (citing La. Code Civ. Proc. art. 2133(B)). Thus, a prevailing defendant, like Korban, may assert arguments on appeal contained in overruled exceptions, without the need for him to cross-appeal or answer the "loser's appeal." *Bond v. Com. Union Assurance Co.*, 407 So. 2d 401, 405 (La. 1981); *see also Olympia Min., LLC v. HS Res., Inc.*, 13-110 (La. App. 3 Cir. 04/01/15); 162 So. 3d 674, 680. Korban asserted the peremptory exception of *res judicata* in the District Court and thus preserved that issue for appeal. Korban was not required to cross- appeal or answer, and properly asserted *res judicata* in his original brief before this Court. Accordingly, this issue has been preserved on appeal.

## II. The Prior Federal Action Was Not Dismissed for Lack of Subject Matter Jurisdiction.

Korban has previously outlined the criteria for federal *res judicata* and will not reiterate those same points here. However, Plaintiffs focus on one criterion in an effort to defeat *res judicata*: subject matter jurisdiction. Plaintiffs do not appear to contest that all other criteria for *res judicata* are satisfied. Misleadingly, Plaintiffs claim that *res judicata* does not bar these claims because the prior federal action was "dismissed for want of subject matter jurisdiction." Plaintiffs' Reply at 9. This is demonstrably and unquestionably false.

Korban and the SWB moved for dismissal in the federal district court pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim, not under Rule 12(b)(1) for lack of subject matter

jurisdiction. *Ariyan, Inc. v. Sewerage & Water Bd. of New Orleans*, 29 F.4th 226, 229 (5th Cir. 2022) ("The SWB [and Korban] filed a motion to dismiss under Rule 12(b)(6) and the district court granted it."). As previously explained, "dismissal of a complaint for failure to state a claim operates as an adjudication on the merits absent the court's specification to the contrary, and is therefore with prejudice." *Williams v. Dallas Cnty. Comm'rs*, 689 F.2d 1212, 1215 (5th Cir. 1982); *see also Guajardo v. JP Morgan Chase Bank, N.A.*, 605 F. App'x 240, 244 (5th Cir. 2015). Consistent with that precedent, the federal district court's judgment expressly dismissed the claims "with prejudice."[1] In contrast, when a federal court dismisses a case for lack of subject matter jurisdiction, the dismissal is "without prejudice." *Ruiz v. Brennan*, 851 F.3d 464, 472-73 (5th Cir. 2017); *see also Davis v. United States*, 961 F.2d 53, 57 (5th Cir. 1991) (holding that dismissal without prejudice is proper when the district court dismissed for lack of subject matter jurisdiction). Had the federal court dismissed Plaintiffs' claims for lack of subject matter jurisdiction it (1) would have said so; and (2) would have dismissed the claims "without prejudice."

At no time did the federal district court or U.S. Fifth Circuit state or imply that Plaintiffs' claims were dismissed for lack of subject matter jurisdiction. Plaintiffs conflate failing to state a claim with lack of subject matter jurisdiction. Those are two distinct concepts. The fact that Plaintiffs were unable to articulate a cognizable 28 U.S.C. § 1983 claim in

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1 *R.73* (federal district court judgment).

federal court does not mean that the federal district court lacked subject matter jurisdiction to adjudicate their claims. The federal district court had jurisdiction and dismissed Plaintiffs' claims with prejudice. To hold that *res judicata* does not attach in such circumstances would completely subvert the entire purpose of the doctrine and would give rise to endless re-litigation.

### III. The Prior Federal Action Precludes All Claims Regardless of Theory Asserted.

When determining if *res judicata* applies, "[i]f the factual scenario of the two actions parallel, the same cause of action is involved in both. The substantive theories advanced, forms of relief requested, types of rights asserted, and variations in evidence needed do not inform this inquiry." *Agrilectric Power Partners v. Gen. Elec. Co.*, 20 F.3d 663, 665 (5th Cir. 1994). Put another way, "[a] legal theory or claim is part of the same cause of action as a prior claim if it arises from the same operative nucleus of fact," and will be barred from re-litigation pursuant to *res judicata*. *In re Air Crash at Dallas/Ft. Worth Airport*, 861 F.2d 814, 816 (5th Cir. 1988) (internal quotation marks omitted). Plaintiffs concede that "the same nucleus of facts may have been present in *Ariyan*." Plaintiffs' Reply at 10.

However, Plaintiffs seemingly argue that the federal district court would not have had jurisdiction to hear their State law claims seeking enforcement of their judgments. This argument is meritless and easily dismissed. Plaintiffs entered federal court asserting a claim pursuant to 28 U.S.C. § 1983, a federal law, and thus invoked federal question

jurisdiction under 28 U.S.C. § 1331. Once there is any basis for federal jurisdiction, federal courts have supplemental jurisdiction over any related causes of action, like State law claims, that it would normally not have jurisdiction overly independently. 28 U.S.C. § 1367(a). In fact, federal district courts may even retain supplemental jurisdiction over State law claims when all federal claims have been dismissed. *See Mendoza v. Murphy*, 532 F.3d 342, 346-47 (5th Cir. 2008); *see also Smith v. Amedisys Inc.*, 298 F.3d 434, 447 (5th Cir. 2002) (affirming the decision to retain supplemental jurisdiction, despite the dismissal of all federal claims). Thus, the federal district court would have had subject matter jurisdiction to adjudicate Plaintiffs' theories arising under State law. Their failure to assert them does not relieve them from the preclusive effect of *res judicata.*

Misleadingly, Plaintiffs cite authority stating that "'dismissal of a § 1983 complaint under Fed.R.Civ.P. 12(b)(6) may have the effect of depriving federal courts of jurisdiction under 28 U.S.C. § 1343(3) and thus should not be deemed automatically a dismissal on the merits.'" Plaintiffs' Reply at 10 (quoting *Williams*, 689 F.2d at 1215). But that is only the case when the underlying action was dismissed for "lack of a justiciable case or controversy." *Williams*, 689 F.2d at 1215. As explained by the United States Supreme Court:

> A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. The controversy must be definite and concrete,

> touching the legal relations of parties having adverse legal interests. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. Where there is such a concrete case admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged, the judicial function may be appropriately exercised although the adjudication of the rights of the litigants may not require the award of process or the payment of damages.

*Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 241 (1937) (internal citations omitted). The federal court did not dismiss Plaintiffs' claims because they were "hypothetical or abstract" or lacked a real and substantial controversy. The federal court dismissed Plaintiffs' claims because they were not entitled to relief they sought under § 1983. This does not entitle Plaintiffs to a do-over.

### IV. Any "Restrictions" on Federal Courts Do Not Defeat *Res Judicata* Here.

Plaintiffs contend that the prior federal judgment does not preclude this action because they seek "a writ of mandamus … of a *state* official, to appropriate funds to satisfy their" judgments, Plaintiffs' Reply at 11 (emphasis in original), and federal courts lack the ability to order such. Korban addressed this argument in his original brief. *See* Korban Br. at 24

(Part VI.B.3). Plaintiffs' argument neglects the fact that State courts lack that ability as well. While the judicial branch is empowered to render judgments against the state, "the constitution does not provide the judiciary with the ability to execute those judgments. The constitution reserves that power to the legislature." *Newman Marchive P'Ship v. City of Shreveport*, 07-1890 (La. 04/08/08); 979 So. 2d 1262, 1265. "And since Louisiana courts lack the power to force another branch of government ***to make an appropriation***, the prevailing plaintiff has ***no judicial mechanism to compel the defendant to pay***." *Ariyan*, 29 F.4th at 228 (emphasis added). Thus, Plaintiffs' claims would fail in federal or state court, and federal courts' limitation on ordering mandamus on State officials is immaterial.

Plaintiffs' argument is even more frivolous when considering their alternative request for relief: a writ of to seize the SWB's property. The Louisiana Constitution explicitly states that the legislature "shall provide a procedure for suits against the state, a state agency, or a political subdivision and provide for the effect of a judgment, ***but no public property or public funds shall be subject to seizure***." La. Const. Art. XII, § 10(C) (emphasis added). And Plaintiffs cite no case where any State court has ordered seizure of public funds under ***any circumstance***. In fact, Louisiana courts have recognized that "***under no circumstance*** shall 'public property or public funds … be subject to seizure.'" *Holly & Smith Architects, Inc. v. St. Helena Congregate Facility*, 2008-2451, at p. 4 (La. App. 1 Cir. 06/19/09); 11 So. 3d 1246 (emphasis added) (quoting

*Newman Marchive*, 979 So. 2d at 1266). In contrast, federal courts are actually less restricted and under certain circumstances can "trump" Article XII, § 10(C) of the Louisiana Constitution and order seizure of public assets. *See* Korban Br. at 25-26 (citing cases). Plaintiffs had a fair opportunity to raise all of their theories/claims in the federal action. Their failure to raise a particular theory/claim in federal court or their inability to state a cognizable claim does not permit them to perpetually re-litigate.

## V. No Exception Bars Application of *Res Judicata*.

In their final argument, Plaintiffs desperately plead that even if all criteria for *res judicata* are satisfied, that this Court hold that *res judicata* should not be enforced due to the "complex procedural situation[.]" Plaintiffs' Reply at 13.[2] There is nothing complex about the application of *res judicata* here. Plaintiffs brought an action seeking to enforce their money judgments in federal court. They lost on the merits. They filed this suit seeking enforcement of the same exact judgments and seek nearly identical relief. This is the paradigmatic example of when *res judicata* applies to bar subsequent litigation. Losing parties cannot re-file lawsuits in different courts

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[2] Plaintiffs also gesture towards exceptions to *res judicata* recognized by Louisiana law. *See* Plaintiffs' Reply at 12. However, only federal law is relevant to the *res judicata* effect of the prior federal judgment. *Armbruster v. Anderson*, 2018-0055 (La. App. 4 Cir. 06/27/18); 250 So. 3d 310, 317 ("Louisiana courts have repeatedly confirmed that ***federal law*** is applicable to consideration of whether a federal court judgment has res judicata effect." (emphasis added) (internal quotation marks omitted).

arising from the same common nucleus of operative facts after they have lost the first action.

## VI. Conclusion

As outlined in Korban's original brief, Plaintiffs' claims were properly dismissed upon the Exception of No Cause of Action. But they are also procedurally barred under the doctrine of *res judicata*. Plaintiffs' arguments to the contrary fail at every step. Korban respectfully requests that this Court AFFIRM the District Court's judgment of dismissal.

Respectfully submitted,

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* * *

[excerpted]

*Appendix J*

SUPREME COURT OF LOUISIANA

No.

WATSON MEMORIAL SPIRITUAL TEMPLE OF CHRIST D/B/A/ WATSON MEMORIAL TEACHING MINISTRIES, CHARLOTTE BRANCAFORTE, ELIO BRANCAFORTE, BENITO BRANCAFORTE, JOSEPHINE BROWN, ROBERT PARKE, NANCY ELLIS, MARK HAMRICK, ROBERT LINK, CHARLOTTE LINK, ROSS MCDIARMID, LAUREL MCDIARMID, JERRY OSBORNE, JACK STOLIER AND WILLIAM TAYLOR

*Plaintiff-Respondents*

VERSUS

GHASSAN KORBAN, IN HIS CAPACITY AS EXECUTIVE DIRECTOR OF THE SEWERAGE AND WATER BOARD OF NEW ORLEANS

*Defendant-Applicant*

CIVIL PROCEEDING

On application for a writ of certiorari to the Fourth Circuit Court of Appeal, Docket No. 2023-CA-0293 The Honorable Daniel L. Dysart, Joy Cossich Lobrano, and Karen K. Herman, presiding, and

On appeal from the Civil District Court, Orleans Parish, No. 2022-10955, "F-14," Honorable Jennifer M. Medley, presiding

**APPLICATION FOR WRIT OF CERTIORARI BY DEFENDANT-APPLICANT GHASSAN KORBAN, IN HIS CAPACITY AS EXECUTIVE DIRECTOR OF THE SEWERAGE AND WATER BOARD OF NEW ORLEANS**

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* * *

[excerpted]

## IV. STATEMENT OF RULE X, §(1)(A)

## CONSIDERATIONS FOR A WRIT OF CERTIORARI

This case presents at least three of the five criteria recognized by this Court's Rule X, § 1(a) that militate in favor of granting this application.

* * *

[excerpted]

### 1. The prior federal judgment is entitled to *res judicata* effect.

This case could have and should have been dismissed on procedural grounds before addressing the merits, which require an interpretation of the Louisiana Constitution and a determination of whether Plaintiffs' requested relief comports with Article XII, § 10(C). However, that issue should be pretermitted for now because a prior federal judgment precluded Plaintiffs' suit here. *See Calcasieu Par. Sch. Bd. Sales v. Nelson Indus. Steam Co.*, 2021-00552 (La. 10/10/21); 332 So. 3d 606, 616 n. 12 ("constitutional avoidance requires addressing non- constitutional challenges first").

"Perhaps because it is so evident that state courts must, as a matter of federal law, give full faith and credit to the proceedings of federal courts, the unbroken line of cases reaching this conclusion offers little clear judicial thought or explanation." *Pilie' & Pilie' v. Metz*, 547 So. 2d 1305, 1308 (La. 1987) (citing cases). As this Court has explained:

> A party faced with relitigation of a federal judgment in a state court proceeding may plead the federal judgment as res judicata. If the state court refuses to recognize the proper scope of the federal judgment, the party may appeal through the state courts and ultimately seek review in the United States Supreme Court.

*Id.* (internal citations omitted).

"[W]hen a state court is called upon to decide the preclusive effect of a judgment rendered by a federal court exercising federal question jurisdiction, it is the federal law of res judicata that must be applied." *Terrebonne Fuel & Lube v. Placid Ref. Co.*, 95-0654 (La. 01/16/96); 666 So. 2d 624, 633; *see also Taylor v. Sturgell*, 553 U.S. 880, 891 (2008) ("The preclusive effect of a federal-court judgment is determined by federal common law."). "[Federal] [r]es judicata prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, ***regardless of whether they were asserted or determined in the prior proceeding***." *Brown v. Felsen*, 442 U.S. 127, 131 (1979) (emphasis added). Federal *res judicata* requires four elements:

> (1) the parties are identical or in privity; (2) the judgment in the prior action was rendered by a court of competent jurisdiction; (3) the

> prior action was concluded by a final judgment on the merits; and (4) the same claim or cause of action was involved in both actions.

*Test Masters Educ. Servs. v. Singh*, 428 F.3d 559, 571 (5th Cir. 2005).

There is no dispute that Plaintiffs sought to enforce the same State court money judgments in the prior federal action. In fact, the court of appeal's decision did not claim that any of the other necessary elements of *res judicata* were absent. In affirming the federal district court's dismissal of Plaintiffs' claims, the U.S. Fifth Circuit understood and confronted the difficult position they were in:

> Like the district court, we understand the Plaintiffs' frustration. They have succeeded in winning a money judgment. Without any judicial means to recover, they are compelled to rely exclusively upon the generosity of the judgment debtor.

*Ariyan, Inc. v. Sewerage & Water Bd. of New Orleans*, 29 F.4th 226, 232 (5th Cir. 2022) (internal quotation marks omitted).

Unsatisfied with that answer, Plaintiffs did exactly what *res judicata* precludes: they tried to re-litigate their claims. Plaintiffs filed a nearly identical suit in State court seeking enforcement of their State court money judgments. Even the court of appeal recognized that this suit "arises from the same underlying facts as the federal suit: that the [Plaintiffs] seek to compel payment of the unpaid

judgment against SWB."[6]

Compounding the brazenness of Plaintiffs' actions, they even conceded that the entire reason they filed in federal court in the first place was because Louisiana law would not allow them to enforce their money judgments. In seeking review from the United States Supreme Court, Plaintiffs candidly admitted what Korban has argued the entire time:

> The Sewerage [and Water] Board criticizes Petitioners for not trying to execute the judgments in state court … ***but Louisiana law forecloses any such efforts***."

Petitioners' Reply Br. at *4 n. 2, No. 22-52, *Ariyan, Inc. v. Sewerage & Water Bd. of New Orleans*, 2022 U.S. S. CT. BRIEFS LEXIS 3114 (U.S. Sept. 22, 2022 (emphasis added) (citing La. Const. art. XII, § 10(C); *Dep't of Transp. & Dev. v. Sugarland Ventures, Inc.*, 476 So. 2d 970, 975-76 (La. App. 1 Cir. 1985); *State ex rel. Dep't of Highways v. Ponder*, 342 So. 2d 1190, 1191 (La. App. 1 Cir. 1977)). After they lost in federal court they reversed course 180 degrees and sought to relitigate their claims.

However, with limited analysis, the court of appeal declined to apply *res judicata* based upon this Court's precedent in *Reeder v. Succession of Palmer*, 623 So. 2d 1268 (La. 1993). But in doing so the court of appeal misreads and misapplies *Reeder*, which itself held that a prior federal judgment *did*

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[6] App'x at 19.

foreclosure redundant state court proceedings. Under *Reeder*:

> if a set of facts gives rise to a claim based on both state and federal law, and the plaintiff brings the action in a federal court which had "pendent" jurisdiction to hear the state cause of action, but the plaintiff fails or refuses to assert his state law claim, res judicata prevents him from subsequently asserting the state claim in a state court action, unless the federal court **clearly** would not have had jurisdiction to entertain the omitted state claim, or, having jurisdiction, **clearly** would have declined to exercise it as a matter of discretion.

623 So. 2d at 1272-73 (emphasis in original).

Like Plaintiffs here, "the federal district court had pendent jurisdiction to hear the state law claims which Reeder chose not to assert in that forum." *Id.* at 1273.

Yet the court of appeal merely held that "Korban has failed to demonstrate that the federal court could have exercised jurisdiction over the state law mandamus claim[.]"[7] This reverses the burden and directly contravenes *Reeder*. It is Plaintiffs' burden to demonstrate that the federal court "clearly" would not have entertained jurisdiction over state law claims. It is not Korban's burden to prove a negative.

Plaintiffs' assertion that State courts possess enforcement mechanisms not available to federal

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[7] App'x at 20.

courts is incorrect and irrelevant. The procedure for federal courts to enforce money judgments "must accord with the procedure of the state where the court is located[.]" Fed. R. Civ. P. 69(a)(1). And in fact, federal courts sometimes have mechanisms to enforce money judgments unavailable to State courts. For instance, a federal court can "trump" a State's anti-seizure provision (such as Article XII, § 10(C)) and enforce a money judgment against a public entity when there is "a federal interest in the remedy." *Freeman Decorating Co. v. Encuentro Las Ams. Trade Corp.*, 352 F. App'x 921, 923 (5th Cir. 2009) (citing *Specialty Healthcare Mgmt., Inc. v. St. Mary Par. Hosp.*, 220 F.3d 650, 653 (5th Cir. 2000)).

To the extent Plaintiffs have recast their claims to enforce their money judgments under new theories in this action, this does not save them from *res judicata*. For starters, federal *res judicata* "foreclose[es] successive litigation of the very same claim, ***whether or not relitigation of the claim raises the same issues as the earlier suit***." *New Hampshire v. Maine*, 534 U.S. 742, 748 (2001) (emphasis added). Moreover, "[t]he plaintiff is required to bring forward his state theories in the federal action in order to make it possible to resolve the entire controversy in a single lawsuit." *Reeder*, 623 So. 2d at 1274. Plaintiffs are not allowed to seek "tactical advantage[s]" by "splitting claims." *Id.* And "unless it is clear that the federal court would have declined as a matter of discretion to exercise its pendent jurisdiction over state law claims omitted by a party, a subsequent state action on those claims is barred." *Id.*

This Court has emphatically rejected what Plaintiffs seek to do here:

> The rules do not countenance a plaintiff's action in ***failing to plead a theory in a federal court with the hope of later litigating the theory in a state court as a second string to his bow***. Therefore, the action on such omitted claims is barred if it is ***merely possible or probable that the federal court would have declined to exercise its pendent jurisdiction***.

*Id.* (emphasis added).

But that is exactly what Plaintiffs did here, and the court of appeal points to nothing in the record that would support a "clear" indication that the federal district court would have declined to hear any pendant state law claims. And in fact, reading an implied reservation of these claims from *res judicata* would violate federal jurisprudence. Only a "'***judgment that expressly*** leaves open the opportunity to bring a second action on specified parts of the claim or cause of action that was advanced in the first action should be effective to forestall preclusion.'" *King v. Provident Life & Accident Ins. Co.*, 23 F.3d 926, 928 (5th Cir. 1994) (emphasis added) (quoting 18 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURES § 4413 (1981)). No such reservation exists in the judgment or the order and reasons entered by the federal district court.

While not focused on by the court of appeal, Plaintiffs have incorrectly argued that the federal district court's denial to consider its declaratory judgment claim evidences an intention to not consider

any State law claims. This misses the mark for several reasons. The declaratory judgment act claim was not a state law claim, but brought pursuant to the ***federal*** Declaratory Judgment Act (28 U.S.C. § 2201.) *Ariyan, Inc. v. Sewerage & Water Bd. of New Orleans*, 543 F. Supp. 3d 373, 380 (E.D. La. 2021). And the federal district court dismissed the claim because there is no per se rule requiring a district court to hear a standalone declaratory judgment action; it was not dismissed because of an issue regarding pendant jurisdiction over State law claims. *Id.* Thus, there is no evidence- clear or otherwise- that the federal district would have declined to hear claims that Plaintiffs never asserted in federal court.

State courts must give effect to federal judgments, and this Court has long recognized that litigants cannot run to State court when they do not agree with how federal courts adjudicated their claims. If Plaintiffs believed (rightly or wrongly) that their enforcement action had a better chance in State court, they should have filed there first. They are not entitled to "free roll" in federal court and then refile in State court when they lose. The court of appeal's judgment creates a new loophole that has never been recognized before.

Under the court of appeal's reasoning, every plaintiff with a judgment against the State is allowed to have two enforcement actions: one federal and one State. If it fails in its federal action, it can pretend that never happened and pursue a State enforcement action with a request for mandamus. This flies in the face of *res judicata*'s purpose to eliminate redundant and successive litigation, and

renders federal judgments meaningless in a large swath of cases in this State. The potential (and unlikely) availability of mandamus in State court cannot sanction a complete suspension of *res judicata* for federal judgments. Such an approach would multiply the number of duplicative suits in the State and federal courts.

The Court should take this opportunity to reaffirm the respect our courts must afford federal judgments by granting certiorari and ordering dismissal based on *res judicata*.

* * *

[excerpted]

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* * *

[excerpted]

*Appendix K*

SUPREME COURT OF LOUISIANA

No. 2024-C-0055

WATSON MEMORIAL SPIRITUAL TEMPLE OF CHRIST D/B/A/ WATSON MEMORIAL TEACHING MINISTRIES, CHARLOTTE BRANCAFORTE, ELIO BRANCAFORTE, BENITO BRANCAFORTE, JOSEPHINE BROWN, ROBERT PARKE, NANCY ELLIS, MARK HAMRICK, ROBERT LINK, CHARLOTTE LINK, ROSS MCDIARMID, LAUREL MCDIARMID, JERRY OSBORNE, JACK STOLIER AND WILLIAM TAYLOR

*Plaintiffs-Respondents*

VERSUS

GHASSAN KORBAN, IN HIS CAPACITY AS EXECUTIVE DIRECTOR OF THE SEWERAGE AND WATER BOARD OF NEW ORLEANS

*Defendant-Applicant*

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CIVIL PROCEEDING

On writ of certiorari to the Fourth Circuit Court of Appeal, Docket No. 2023-CA-0293
The Honorable Daniel L. Dysart, Joy Cossich Lobrano, and Karen K. Herman, presiding, and

On appeal from the Civil District Court, Orleans Parish, No. 2022-10955, "F-14,"
Honorable Jennifer M. Medley, presiding

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**BRIEF OF DEFENDANT-APPLICANT GHASSAN KORBAN, IN HIS CAPACITY AS EXECUTIVE DIRECTOR OF THE SEWERAGE AND WATER BOARD OF NEW ORLEANS**

* * *

[excerpted]

## ARGUMENT

### I. The Prior Federal Judgment is Entitled to *Res Judicata* Effect and Bars this Action

This case could have and should have been dismissed on procedural grounds before addressing the merits, which require an interpretation of the Louisiana Constitution and a determination of whether Plaintiffs' requested relief comports with Article XII, § 10(C). However, that issue can be pretermitted for now because a prior federal judgment precludes Plaintiffs' suit here. *See Calcasieu Par. Sch. Bd. Sales v. Nelson Indus. Steam Co.*, 2021-00552 (La. 10/10/21); 332 So. 3d 606, 616 n. 12 ("constitutional avoidance requires addressing non-constitutional challenges first").

"Perhaps because it is so evident that state courts must, as a matter of federal law, give full faith and credit to the proceedings of federal courts, the unbroken line of cases reaching this conclusion offers little clear judicial thought or explanation." *Pilie' & Pilie' v. Metz*, 547 So. 2d 1305, 1308 (La. 1987) (citing cases). As this Court has explained:

> A party faced with relitigation of a federal judgment in a state court proceeding may plead

> the federal judgment as res judicata. If the state court refuses to recognize the proper scope of the federal judgment, the party may appeal through the state courts and ultimately seek review in the United States Supreme Court.

*Id.* (internal citations omitted).

"[W]hen a state court is called upon to decide the preclusive effect of a judgment rendered by a federal court exercising federal question jurisdiction, it is the federal law of res judicata that must be applied." *Terrebonne Fuel & Lube v. Placid Ref. Co.*, 95-0654 (La. 01/16/96); 666 So. 2d 624, 633; *see also Taylor v. Sturgell*, 553 U.S. 880, 891 (2008) ("The preclusive effect of a federal-court judgment is determined by federal common law."). "[Federal] [r]es judicata prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, ***regardless of whether they were asserted or determined in the prior proceeding***." *Brown v. Felsen*, 442 U.S. 127, 131 (1979) (emphasis added). Federal *res judicata* requires four elements:

> (1) the parties are identical or in privity; (2) the judgment in the prior action was rendered by a court of competent jurisdiction; (3) the prior action was concluded by a final judgment on the merits; and (4) the same claim or cause of action was involved in both actions.

*Test Masters Educ. Servs. V. Singh*, 428 F.3d 559, 571 (5th Cir. 2005).

### A. All criteria for federal *res judicata* are satisfied.

There is no plausible dispute that all four criteria are met here. Each plaintiff here took part in the prior federal action (*Ariyan*) and Korban was a named defendant as well. The federal district court also undoubtedly had subject matter jurisdiction and decided Plaintiffs' claims on the merits.[3] Plaintiffs' arguments to the contrary are flatly wrong as demonstrated by the record.

Korban and the SWB moved for dismissal in the federal district court pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim, not under Rule 12(b)(1) for lack of subject matter jurisdiction.[4] *Ariyan*, 29 F.4th at 229 ("The SWB [and

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[3] In their Complaint filed in federal district court, Plaintiffs asserted that the court had subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343 and 42 U.S.C. § 1983. *See R.43* (¶ 4).

[4] While the federal district court and U.S. Fifth Circuit did not expressly address subject matter jurisdiction, they implicitly found it to exist by exercising authority over the case. *Green Valley Special Util. Dist. v. City of Schertz*, 969 F.3d 460, 468 (5th Cir. 2020) (en banc) ("This court has a continuing obligation to assure itself of its own jurisdiction, sua sponte if necessary."). To the extent Plaintiffs now try to collaterally attack the federal courts' subject matter jurisdiction to decide their case (which ***they*** brought in federal court), they cannot. State courts cannot collaterally attack federal judgments on jurisdictional or any other grounds. *Swope v. St. Mary Sch. Bd.*, 251 So. 2d 238, 246 & n. 6 (La. 1970); *see also Allstate Ins. Co. v. Daniel*, 15-304 (La. App. 5 Cir. 10/28/15); 178 So. 3d 610, 613-14 ("The federal judgment of March 6, 2013 was rendered by a court of competent

Korban] filed a motion to dismiss under Rule 12(b)(6) and the district court granted it."). "[D]ismissal of a complaint for failure to state a claim operates as an adjudication on the merits absent the court's specification to the contrary, and is therefore with prejudice." *Williams v. Dallas Cnty. Comm'rs*, 689 F.2d 1212, 1215 (5th Cir. 1982); *see also Guajardo v. JP Morgan Chase Bank, N.A.*, 605 F. App'x 240, 244 (5th Cir. 2015). Consistent with that precedent, the federal district court's judgment expressly dismissed the claims "WITH PREJUDICE" and provides no indication whatsoever to support an argument that it was not an adjudication on the merits. *R.73.* In contrast, when a federal court dismisses a case for lack of subject matter jurisdiction, the dismissal is "without prejudice." *Ruiz v. Brennan*, 851 F.3d 464, 472-73 (5th Cir. 2017); *see also Davis v. United States*, 961 F.2d 53, 57 (5th Cir. 1991) (holding that dismissal without prejudice is proper when the district court dismissed for lack of subject matter jurisdiction). Had the federal court dismissed Plaintiffs' claims for lack of subject matter jurisdiction it (1) would have said so; and (2) would have dismissed the claims "without prejudice."

At no time did the federal district court or U.S. Fifth Circuit state or imply that Plaintiffs' claims were dismissed for lack of subject matter jurisdiction. Plaintiffs conflate failing to state a claim with lack of

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jurisdiction and, thus, imparts absolute verity and has the force of the thing adjudged. Mr. Daniel cannot collaterally attack it through these proceedings involving a permanent injunction.").

subject matter jurisdiction. Those are two distinct concepts. The fact that Plaintiffs were unable to articulate a cognizable 28 U.S.C. § 1983 claim in federal court does not mean that the federal district court lacked subject matter jurisdiction to adjudicate their claims. The federal district court had jurisdiction and dismissed Plaintiffs' claims with prejudice. To hold that *res judicata* does not attach in such circumstances would completely upend the entire purpose of the doctrine and would give rise to endless re-litigation.

Turning to the fourth criterion, the prior federal judgment undoubtedly arose from the same common nucleus of operative facts as the one at issue in this suit: enforcement of Plaintiffs' money judgments. Even the court of appeal recognized that it "may be true" that this suit "arises from the same underlying facts as the federal suit: that the [Plaintiffs] seek to compel payment of the unpaid judgment against SWB." *Watson Mem'l*, 2023 La. App. LEXIS 2138, at *15. Plaintiffs also concede that "the same nucleus of facts may have been present in *Ariyan*." Pltfs.' Fourth Circuit Reply Br. at 10. As all criteria are satisfied, federal *res judicata* applies to bar Plaintiffs' suit.

### B. A subsequent request for mandamus does not nullify federal *res judicata*

One of Plaintiffs' other arguments is that the unavailability of mandamus in federal court precludes the application of *res judicata* to this action. This argument neglects the effect and purpose of federal *res judicata*, and the fact that mandamus is not available to enforce Plaintiffs' money judgments in State court

either.[5] While failing to identify any criterion for *res judicata* that was not satisfied, and with limited analysis, the court of appeal seized upon Plaintiffs' argument and declined to apply *res judicata* based upon this Court's precedent in *Reeder v. Succession of Palmer*, 623 So. 2d 1268 (La. 1993). But in doing so the court of appeal misread and misapplied *Reeder*, which itself held that a prior federal judgment *did* foreclosure redundant state court proceedings.

### *1.* Reeder *supports the application of federal* res judicata *here.*

*Reeder* presents a nearly identical procedural posture to this case. In *Reeder*, after the plaintiffs' claims were dismissed in federal court, they filed an identical suit in State court. The question before this Court was "whether this state court action is barred by res judicata because of a prior federal court judgment in the defendants' favor in a suit based on the same factual transaction or [occurrence] as the instant case. *Id.* at 1269-70. This Court held that the prior federal action did in fact bar the subsequent State court action under federal *res judicata*. This Court explained that "***Reeder was obligated to file in his first suit all the legal theories he wished to assert***. The res judicata effect of the federal court judgment precludes the omitted state law claims because it is not **clear** that the federal district court

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[5] *See infra* Part II of "ARGUMENT" Section.

would have declined to exercise pendent jurisdiction over them." *Id.* at 1270 (first emphasis added; second emphasis in original). This is exactly what Plaintiffs wish to do here.

In analyzing federal *res judicata*, this Court further explained that:

> "When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar [] the claim extinguished includes ***all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction***, or series of connected transactions, out of which the action arose."

*Id.* at 1272 (emphasis added) (quoting Restatement (Second) of Judgments, § 24 (1982)).

This Court continued to explain that:

> if a set of facts gives rise to a claim based on both state and federal law, and the plaintiff brings the action in a federal court which had "pendent" jurisdiction to hear the state cause of action, but the plaintiff fails or refuses to assert his state law claim, res judicata prevents him from subsequently asserting the state claim in a state court action, unless the federal court **clearly** would not have had jurisdiction to entertain the omitted state claim, or, having jurisdiction, **clearly** would have declined to exercise it as a matter of discretion.

*Id.* at 1272-73 (emphasis in original).

*Reeder* facially rejects Plaintiffs' position here and makes clear the heavy burden a State court plaintiff

faces when seeking to relitigate a case he already brought in federal court. Plaintiffs come nowhere close to the required showing.

(a) Plaintiffs fail to demonstrate the federal court clearly would have lacked jurisdiction or declined to hear any State law cause of action.

Like Plaintiffs here, "the federal district court had pendent jurisdiction to hear the state law claims which Reeder chose not to assert in that forum." *Id.* at 1273. Yet the court of appeal reasoned that "***Korban*** has failed to demonstrate that the federal court could have exercised jurisdiction over the state law mandamus claim[.]" *Watson Mem'l*, 2023 La. App. LEXIS 2138, at *17 (emphasis added). This reverses the burden established in *Reeder* and misstates the nature of Plaintiffs' request for mandamus. First, it is Plaintiffs' burden to demonstrate that the federal court "clearly" would not have entertained jurisdiction over State law claims. It is not Korban's burden to prove it clearly would have. Plaintiffs make no showing that the federal courts would not have had jurisdiction or would have declined jurisdiction over any State law claims.

Plaintiffs have incorrectly argued that the federal district court's denial to consider their declaratory judgment claim evidences an intention to not consider any State law claims. This misses the mark for several reasons. The declaratory judgment act claim was not a State law claim, but rather brought pursuant to the ***federal*** Declaratory Judgment Act (28 U.S.C. § 2201). *Ariyan*, 543 F. Supp. 3d at 380. And the federal district court dismissed the claim because there is no per se

rule requiring a district court to hear a standalone declaratory judgment action; it was not dismissed because of an issue regarding pendant jurisdiction over State law claims. *Id.* Thus, there is no evidence–clear or otherwise–that the federal district would have declined to hear claims that Plaintiffs never asserted in federal court.[6]

Plaintiffs' vague invocation of various abstention doctrines is speculative at best and also falls far short of making the "clear" showing required by *Reeder* to avoid federal *res judicata*. *See* Pltfs.' Opp. to Writ. App. at 19-20.[7] To begin, Plaintiffs were the ones who brought their initial enforcement action in federal court, not Korban or the SWB. Now they seek to avoid *res judicata* by pretending to know how a federal court would have considered State law claims or requests for relief that were never brought, with regard to abstention doctrines that were never raised. This would fly in the face of how federal *res judicata* operates and would be nothing less than a *de facto* collateral attack on the prior federal judgment-something which is strictly prohibited. "No principle of

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[6] Plaintiffs' federal complaint also asserted a separate due process claim, but the U.S. Fifth Circuit held that it was abandoned because Plaintiffs failed to argue this claim in their briefs in the district court or on appeal. *Ariyan*, 29 F.4th at 229 n. 1.

[7] For instance, Plaintiffs assert that the federal court would not have been able to decide the enforceability of their money judgments under *Pullman* abstention because it involves an important issue of state law. But the execution of all money judgments issued by federal courts "must accord with the procedure of the state where the court is located." Fed. R. Civ. P. 69(a)(1). By Plaintiffs' logic, federal courts could never enforce their own money judgments. Such a position is patently absurd.

law has received greater and more frequent sanction, or is more deeply imbedded in our jurisprudence, than that which forbids a collateral attack on a judgment or order of a competent tribunal, not void on its face ab initio." *Allen v. Commercial Nat'l Bank*, 147 So. 2d 865, 868 (La. 1962); *see also Allstate Ins. Co. v. Daniel*, 15-90 (La. App. 5 Cir. 10/28/15); 177 So. 3d 169, 173, *writ denied*, 2015-2357 (La. 01/21/16); 184 So. 3d 1284.[8]

(b) Mandamus is a remedy, not a cause of action.

Yet perhaps more to the point, a request for mandamus is not a cause of action or claim, but rather a type of remedy or relief available on some claims. *Hoag v. State*, 04-0857 (La. 12/01/04); 889 So. 2d 1019, 1023 ("Mandamus … is an extraordinary ***remedy***.") (emphasis added). The underlying claim is Plaintiffs' alleged right to enforce their money judgments. Plaintiffs identify no ***claim*** or ***cause of action*** the federal court would have lacked jurisdiction over, and under federal *res judicata* the prior federal suit extinguished all "remedies" they may have been Entitled to against Korban. *See Reeder*, 623 So. 2d at 1272. Because the federal district court had federal question jurisdiction pursuant to 28 U.S.C. § 1331 over Plaintiffs' § 1983 claim, the court would have had

[8] "The federal judgment of March 6, 2013 was rendered by a court of competent jurisdiction and, thus, imparts absolute verity and has the force of the thing adjudged. Mr. Daniel cannot collaterally attack it through his reconventional demand." *Allstate*, 177 So. 3d at 173.

pendant or supplemental jurisdiction pursuant to 28 U.S.C. § 1367 over any and all related State law claims. And "[i]n cases of doubt, therefore, it is appropriate for the rules of res judicata to compel the plaintiff to bring forward his state theories in the federal action, in order to make it possible to resolve the entire controversy in a single lawsuit." *Reeder*, 623 So. 2d at 1273. Plaintiffs failed to do this. Plaintiffs were required to plead all claims and theories they wished to pursue in the prior federal action, which would have allowed the federal court to adjudicate the claims or make a record that it expressly exempted certain claims from *res judicata*. Plaintiffs cannot now simply speculate that this is what would have happened and escape federal *res judicata*.

Under *Reeder*, Plaintiffs are not allowed to seek a "tactical advantage" by "splitting claims." *Id.* at 1274. This Court has emphatically rejected what Plaintiffs seek to do here:

> The rules do not countenance a plaintiff's action in ***failing to plead a theory in a federal court with the hope of later litigating the theory in a state court as a second string to his bow***. Therefore, the action on such omitted claims is barred if it is ***merely possible or probable that the federal court would have declined to exercise its pendent jurisdiction***.

*Id.* (emphasis added).

But that is exactly what Plaintiffs now attempt, and the court of appeal points to nothing in the record that would support a "clear" indication that the federal district court would have declined to hear any pendant

(and unpled) state law claims or remedies.

### *2. Federal jurisprudence does not bar* res judicata *even when a certain cause of action or remedy was previously unavailable.*

In addition to the above, the unavailability of a certain remedy (like mandamus)— or even a cause of action— in federal court does not affect the *res judicata* analysis under federal law. Until recently, Supreme Court precedent held that "a property owner whose property has been taken by a local government has not suffered a violation of his Fifth Amendment rights—and thus cannot bring a federal takings claim in federal court—until a state court has denied his claim for just compensation under state law." *Knick v. Twp. Of Scott*, 139 S. Ct. 2162, 2167 (2019) (citing *Williamson Cnty. Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985)). Despite this, in *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005), the Supreme Court held that "a state court's resolution of a claim for just compensation under state law generally has preclusive effect in any subsequent federal suit," even though they never had an opportunity to bring their federal takings claims before. *Knick*, 139 S. Ct. at 2167 (discussing *San Remo*).[9] This was called the "*San Remo* preclusion trap." *Id.*

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[9] In *Knick* the Supreme Court overruled *Williamson County*'s "state-litigation requirement." 139 S. Ct. at 2167. However, *San Remo* was not affected and "*San Remo* is still good law." *Tejas Motel, L.L.C. v. City of Mesquite*, 63 F.4th 323, 334 (5th Cir. 2023).

Under *San Remo*, a prior adjudication concerning the same transaction or occurrence or common nucleus of operative facts extinguishes any claims that arise from that same fact pattern. This is true even when, like in *San Remo*, the plaintiffs were ***unable*** to bring those claims in the first action. In dismissing Plaintiffs' prior federal action, Judge Feldman even recognized the applicability of *San Remo* in the wake of *Knick*: "Knick makes where to file a constitutional takings suit [] an either/or proposition; ***a plaintiff who chooses to bring suit in state court cannot later come to federal court to relitigate issues the state court already decided***." *Ariyan*, 543 F. Supp. 3d at 379 (emphasis added) (internal quotation marks omitted). The inverse is obviously true as well: a plaintiff who chooses to bring a suit in federal court cannot later come to State court and relitigate issues the federal court already decided.

So even if mandamus was not available in federal court, the final judgment rendered therein precludes subsequent litigation, and Plaintiffs are not entitled to re-litigate the same suit in a different forum simply because they now want to seek mandamus. Plaintiffs ***made a choice*** to seek enforcement of their money Judgments in federal court first. That decision has consequences, and they cannot relitigate in State court simply because they do not like the outcome.[10] In fact,

[10] Moreover, Plaintiffs' assertion that State courts possess enforcement mechanisms not available to federal courts is incorrect and irrelevant. The procedure for federal courts to enforce money judgments "must accord with the procedure of the state where the court is located[.]" Fed. R. Civ. P. 69(a)(1). And in fact, federal courts sometimes have mechanisms to enforce money

in *San Remo* the plaintiff did not have a choice to bring federal claims first and the Supreme Court *still* held that those claims were precluded. The fourth circuit's decision denies any and all preclusive effect to a federal action to enforce a money judgment; the decision below operates no differently than if the prior federal action never occurred at all. This is a truly bizarre result.

Under the court of appeal's reasoning, every plaintiff with a judgment against the State is allowed to have two enforcement actions: one federal and one State. If he fails in his federal action, he can pretend that never happened and pursue a State enforcement action with a request for mandamus. This flies in the face of *res judicata*'s purpose to eliminate redundant and successive litigation, and renders federal judgments meaningless in a large swath of cases in This State. The potential (and unlikely) availability of mandamus in State court cannot sanction a complete suspension of *res judicata* for federal judgments.

**C. No other exceptions to *res judicata* apply.**

The court of appeal identified no exception to *res judicata* that would apply, and Plaintiffs' attempts to invoke any are legally erroneous. To the extent Plaintiffs have recast their claims to enforce their money judgments under new theories in this action,

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judgments unavailable to State courts. For instance, a federal court can "trump" a State's anti- seizure provision (such as Article XII, § 10(C)) and enforce a money judgment against a public entity when there is "a federal interest in the remedy." *Freeman Decorating Co. v. Encuentro Las Ams. Trade Corp.*, 352 F. App'x 921, 923 (5th Cir. 2009) (citing *Specialty Healthcare Mgmt., Inc. v. St. Mary Par. Hosp.*, 220 F.3d 650, 653 (5th Cir. 2000)).

this does not save them from *res judicata*. For starters, federal *res judicata* "foreclose[es] successive litigation of the very same claim, ***whether or not relitigation of the claim raises the same issues as the earlier suit***." *New Hampshire v. Maine*, 534 U.S. 742, 748 (2001) (emphasis added); *see also Langston v. Ins. Co. of N. Am.*, 827 F.2d 1044, 1047 (5th Cir. 1987) (per curiam) ("Res judicata or claim preclusion bars all claims that were or could have been advanced in support of the cause of action adjudicated in [in the earlier case], ***not merely those that were actually adjudicated***.") (emphasis added).[11] Likewise, litigants do not avoid *res judicata* merely by requesting a different remedy for the same claims. *See Brown*, 442 U.S. at 131 (noting that federal *res judicata* "prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding."). "A party cannot escape the requirements of full faith and credit and res judicata by asserting its own failure to raise matters clearly within the scope of a prior proceeding." *Underwriters Nat'l Assurance Co. v. N.C. Life & Accident & Health Ins. Guar. Ass'n*, 455 U.S. 691, 710

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[11] *See also Agrilectric Power Partners v. Gen. Elec. Co.*, 20 F.3d 663, 665 (5th Cir. 1994) ("If the factual scenario of the two actions parallel, the same cause of action is involved in both. The substantive theories advanced, forms of relief requested, types of rights asserted, and variations in evidence needed do not inform this inquiry."). *In re Air Crash at Dallas/Ft. Worth Airport*, 861 F.2d 814, 816 (5th Cir. 1988) ("A legal theory or claim is part of the same cause of action as a prior claim if it arises from the same operative nucleus of fact," and will be barred from re-litigation pursuant to *res judicata*.") (internal quotation marks omitted).

(1982). If Plaintiffs had other grounds of theories of relief regarding enforcement of their judgments, they had a duty to raise them all in the prior federal action.

Plaintiffs' attempt to read an implied reservation of these claims from *res judicata* also fails to comport with federal jurisprudence. Only a "'***judgment that expressly*** leaves open the opportunity to bring a second action on specified parts of the claim or cause of action that was advanced in the first action should be effective to forestall preclusion.'" *King v. Provident Life & Accident Ins. Co.*, 23 F.3d 926, 928 (5th Cir. 1994) (emphasis added) (quoting 18 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURES § 4413 (1981)). No such reservation exists in the judgment entered by the federal district court. *See R.73.* Plaintiffs' reliance on language in the federal district court's Order and Reasons is inapposite. It is the ***judgment*** that must be considered. *Id.* But even the Order and Reasons does not ***expressly*** state that the court's judgment will be exempt from *res judicata*. *See Ariyan*, 543 F. Supp. 3d 373. Plaintiffs' argument for a perceived exemption is debatable, but regardless legally insufficient. Moreover, in affirming the federal district court's dismissal of Plaintiffs' claims, the U.S. Fifth Circuit noted:

> Like the district court, we understand the Plaintiffs' frustration. They have succeeded in winning a money judgment. Without any judicial means to recover, they are compelled to rely exclusively upon the generosity of the judgment debtor.

*Ariyan,* 29 F.4th at 232 (internal quotation marks omitted).

This language leaves no plausible doubt that these same claims were already adjudicated and the U.S. Fifth Circuit understood exactly what that meant: Plaintiffs had no further recourse to compel enforcement of their money judgments. No claims were reserved to be tried in a subsequent suit and therefore *res judicata* bars this suit.

* * *

[excerpted]

Respectfully submitted,

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*Appendix L*

SUPREME COURT OF LOUISIANA

No. 2024-C-0055

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*Plaintiffs-Respondents*

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On writ of certiorari to the Fourth Circuit Court of Appeal, Docket No. 2023-CA-0293
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Honorable Jennifer M. Medley, presiding

**GHASSAN KORBAN'S BRIEF IN SUPPORT OF APPLICATION FOR REHEARING**

* * *

[excerpted]

Applicant-Defendant Ghassan Korban ("***Korban***") submits this brief in support of his application for rehearing filed with this Court on July 8, 2024.[1] The Court's June 28, 2024 opinion, *Watson Memorial Spiritual Temple of Christ v. Korban*, 2024-00055 (La. 06/28/24), 2024 La. LEXIS 1113, addresses important issues that arise often. The reoccurrence of these issues makes it especially important that the precedent set by this Court is correct, consistent, and easily applied to future cases. With respect, the Court's opinion does not accomplish these goals on both adjudicated issues.

*First*, in determining that federal *res judicata* does not bar Plaintiffs' suit, the Court disregards onpoint federal jurisprudence and instead relies on its 1993 decision in *Reeder v. Succession of Palmer*, 623 So. 1268 (La. 1993). And while the situation here fails to satisfy the narrow exception to federal res judicata recognized in *Reeder*,[2] more importantly, subsequent federal jurisprudence has expressly recognized that *Reeder* announced an incorrect view of *res judicata* that was overly permissive. The Court should not compound that mistake here by extending *Reeder* well beyond what federal courts already announced was in error.

*Second*, this Court's resolution of the merits leaves

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[1] On July 10, 2024, this Court granted Korban an extension until July 19, 2024 to file his brief in support of the application for rehearing.

[2] *See* Brief of Korban at 9-12, filed on April 8, 2024.

its La. Const. art. XII, § 10(C) jurisprudence in a confusing and sometimes self-contradicting state. The Court relies on cases where there were express statutory or constitutional mandates to appropriate funds, which does not exist for Plaintiffs' judgments. Further, central to this Court's reasoning in this case was that the self-executing nature of the constitutional mandate to pay just compensation renders payment of Plaintiffs' money judgments for inverse condemnation non-discretionary and, therefore, subject to mandamus. However, creation of a cause of action against a political subdivision is separate from a legislative allocation of *when* payment must be made. Under this Court's reasoning, all tort and contract judgments would also be subject to mandamus. This would all but eviscerate La. Const. art. XII, § 10(C).

For these reasons and as more fully set forth below, Korban respectfully requests that the Court

## I. FEDERAL *RES JUDICATA* BARS PLAINTIFFS' SUIT

The underlying procedural facts of this case are undisputed and were recognized by this Court. After Plaintiffs obtained their State court money judgment against the Sewerage and Water Board of New Orleans ("***SWB***"), they sued the SWB and Korban in federal court seeking execution of their judgments. The federal district court dismissed Plaintiffs' suit for failure to state a claim, the United States Fifth Circuit affirmed, and the United States Supreme Court denied certiorari. Plaintiffs then subsequently filed suit in State court seeking to compel payment of their

judgments via a writ of fieri facias and/or mandamus. *See Watson Mem'l*, 2024 La. LEXIS 113, at *2-*4.

### A. *Reeder* does not govern exceptions to federal *res judicata*

This Court properly recognized that the preclusive effect of the previous federal judgment is governed by federal law. *Id.* at *7 (citing *Terrebonne Fuel & Lube, Inc. v. Placid Ref. Co.*, 95-654 (La. 01/16/96), 666 So. 2d 624, 633). In determining that federal *res judicata* did not apply to bar this case, the Court found that all the general criteria were satisfied but relied on an exception to the doctrine it recognized in *Reeder*. Specifically, this Court determined that *Reeder* foreclosed application of federal *res judicata* because "language of the federal courts in the instant matter makes it clear that it would have declined to exercise its jurisdiction." *Id.* at *11.

Respectfully, this approach errs in several ways. Primarily, federal courts have recognized that *Reeder* misapplies federal jurisprudence on *res judicata* predating Reeder and subsequent to it. *See Conwill v. Greenberg Traurig, L.L.P.*, No. 11-0938, 2012 U.S. Dist. LEXIS 140197, at *15 (E.D. La. Sept. 28, 2012) (discussing *Reeder* and comparing it to U.S. Fifth Circuit precedent). Federal jurisprudence provides that only when "***a judgment*** 'expressly leaves open the opportunity to bring a second action on *specified* parts of the claim or cause of action *that was advanced in the first action*' [should] preclusion [] be forestalled." *Id.* at *16 (quoting *King v. Provident Life and Accident Ins. Co.*, 23 F.3d 926 (5th Cir. 1994)) (bolded emphasis added; non-bolded emphasis added by *Conwill* court). This requirement was reiterated in *Vines v. University*

*of Louisiana at Monroe*, 398 F.3d 700 (5th Cir. 2005), which held that "absent an *express* reservation, res judicata applies to bar a second suit." *Id.* at 712 (emphasis in original). Federal *res judicata* cannot be ignored based on a guess of what the second court believes the first court would have or should have done. This would render federal *res judicata* a wholly subjective and discretionary inquiry by the second court. Instead, there must be an ***express*** reservation ***in the judgment*** by the first court exempting certain claims from *res judicata*. The federal district court's judgment in the prior enforcement action contains no express or implied reservation nor any language that could be construed as such.

Binding precedent from the United States Supreme Court also makes clear that the second court's subjective belief about what the first court would have done is not enough to bypass federal *res judicata*. In *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005), the Supreme Court held that "a state court's resolution of a claim for just compensation under state law generally has preclusive effect in any subsequent federal suit," even though the plaintiffs never had an opportunity to bring their federal takings claims before. *Knick v. Twp. Of Scott*, 588 U.S. 180, 184-85 (2019) (discussing *San Remo*).[3] This was called the "*San Remo* preclusion trap." *Id.*

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[3] In *Knick* the Supreme Court overruled *Williamson County*'s "state-litigation requirement." 588 U.S. at 184. However, *San Remo* was not affected and "*San Remo* is still good law." *Tejas Motel, L.L.C. v. City of Mesquite*, 63 F.4th 323, 334 (5th Cir. 2023).

But under *San Remo*, a prior adjudication concerning the same transaction or occurrence or common nucleus of operative facts extinguishes any claims that arise from that same fact pattern. This is true even when, like in *San Remo*, the plaintiffs were ***unable*** to bring those claims in the first action. In dismissing Plaintiffs' prior federal action, Judge Feldman even recognized the applicability of *San Remo* in the wake of *Knick*. *See Ariyan*, 543 F. Supp. 3d at 379. If Supreme Court precedent applies *res judicata* when the prior court would have been unable to adjudicate those claims earlier, it would be incoherent to hold *res judicata* inapplicable based on mere speculation that the first court would have declined to exercise discretion to hear those claims in an earlier suit.

Moreover, the federal courts undoubtedly did address the central issue in this appeal: the enforceability of Plaintiffs' money judgments. And with sympathy for Plaintiffs, the federal courts nevertheless ruled against them and recognized that Plaintiffs "have succeeded in winning a money judgment [but] [w]ithout any judicial means to recover, they are compelled 'to rely exclusively upon the generosity of the judgment debtor.'" *Ariyan, Inc. v. Sewerage & Water Bd. of New Orleans*, 29 F.4th 226, 232 (5th Cir. 2022) (quoting *Folsom v. City of New Orleans*, 109 U.S. 285, 295 (1883)). Plaintiffs' case here undeniably seeks to relitigate that holding and enforce their judgments. Relitigation of adverse rulings is the very behavior federal *res judicata* prevents.

### B. There is no express or implied reservation against res judicata

While there is no express or implied reservation in the judgment, this Court instead relied on language from the district court's order and reasons regarding its decision to decline to hear Plaintiffs' federal declaratory judgment claim, a claim not at issue in this litigation. *See Watson Mem'l*, 2024 La. LEXIS 1113, at *4. The federal district court undoubtedly discusses "dismissing this action in favor of further state-court proceedings - with state-court judges, state-court judgments, state-resident plaintiffs, and a state-agency defendant." *Ariyan, Inc. v. Sewerage & Water Bd. of New Orleans*, 543 F. Supp. 3d 373, 381 (E.D. La. 2021) (Feldman, J.). But this language is (1) not contained in the judgment; and (2) does not contain an express reservation of any claim from *res judicata*.

To the extent this Court disagrees that any reservation language must be in the actual judgment, it cannot take the quoted language in isolation while ignoring any language that clearly indicates that the court would not have reserved anything from *res judicata*. In dismissing Plaintiffs' claims, Judge Feldman reasoned that "a plaintiff who chooses to bring suit in state court cannot later come to federal court to relitigate issues the state court already decided. ***That is precisely what the plaintiffs wish to do here.***" *Id.* at 379 (emphasis added). If Judge Feldman viewed Plaintiffs' initial attempt to enforce their judgments as an impermissible attempt to relitigate issues already decided, then he certainly would view relitigation of the very suit before him in

State court as even more egregious. It is simply not plausible to believe that Judge Feldman intended his decision to be without any effect or consequence for Plaintiffs when he dismissed their claims "WITH PREJUDICE."

Federal *res judicata* bars relitiation of cases, even if the second court disagrees with how the first court adjudicated the issue. *See B&B Hardware, Inc. v. Hargis Indus.*, 575 U.S. 138, 157 (2015) ("[I]ssue preclusion prevents relitigation of wrong decisions just as much as right ones.") (cleaned up); *see also Thompson v. Deutsche Bank Nat'l Trust Co.*, No. 21-11639, 2022 U.S. App. LEXIS 26089, at *7 (11th Cir. Sept. 19, 2022) ("*res judicata* prevents relitigation of wrongly decided issues"); *Black v. OPM*, 641 F. App'x 1007, 1009 (Fed. Cir. 2016) ("Both res judicata and collateral estoppel apply even if new evidence exists or the aggrieved party believes the earlier case was wrongly denied."). Undersigned counsel understands the difficulty of this case and the emotional appeal to afford relief. Still, our system of law and order does not relax the preclusive effect of federal judgments to reach that result.

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Respectfully submitted,

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