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P R O C E E D I N G S

(11:10 a.m.)

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

Mr. McNamara.

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

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

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

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

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

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

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

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

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

25 That's true as to statutes, which is

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

5 I welcome the Court's questions.

6 JUSTICE THOMAS: In your reply brief,
7 you say that the 19th century federal courts
8 were faced with a bedrock property right and no
9 way to enforce it directly.

10 Doesn't that seem to be at odds -- the
11 fact that the courts there had to resort to
12 extra-constitutional causes of action, isn't
13 that at odds with your argument now?

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

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

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

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

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

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

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

16 JUSTICE BARRETT: Counsel --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

17 JUSTICE GORSUCH: Some remedy?

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

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

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

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

1 common law, right?

2 MR. McNAMARA: Well, Your Honor, two
3 -- two --

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

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

12 JUSTICE GORSUCH: Fifth. Fair enough.

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

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

18 MR. McNAMARA: Well --

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

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

25 JUSTICE GORSUCH: Ah. Okay. I

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

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

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

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

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

25 MR. McNAMARA: So two responses, Your

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

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

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

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

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

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

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

24 JUSTICE GORSUCH: If -- if it did,
25 I'd -- that one would I -- I'd take seriously,

1 but I didn't see it.

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

8 JUSTICE GORSUCH: No trespass, no
9 conversion?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 court had to pay for that taking.

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

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

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

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

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

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

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

1 brief --

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

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

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

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

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

1 that the --

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

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

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

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

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

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

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

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

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

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

1 taking for purposes of the Texas Constitution.

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

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

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

20 MR. McNAMARA: Yes, Your Honor.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 can return here, in the statement of one of the
2 judges, and ask for that remedy again, which
3 will not probably be refused if --

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

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

11 JUSTICE ALITO: What qualifications do
12 you recognize?

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

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

25 JUSTICE ALITO: Well, does it make

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

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

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

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

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

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

1 principles, it includes the right to receive
2 compensation for the property taken.

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

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

23 But this Court has also squarely held
24 and again repeated in Knick that the Fifth
25 Amendment does furnish a basis on which a court

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

12 It is the defendant's choice to have
13 this federal claim that turns on federal law
14 heard in federal court. That's the choice that
15 Texas made, and that choice can't, on the
16 merits, extinguish our Fifth Amendment remedy.

17 What Texas has effectively
18 accomplished here by making the unusual decision
19 to remove is that it's eliminated the Fifth
20 Amendment question from this case and given
21 itself what it believes -- I'm not conceding
22 that they're right about Texas law -- but what
23 it believes is a more favorable rule of Texas
24 law.

25 But, if First English is right and the

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

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

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

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

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

1 claim in it because --

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

8 MR. McNAMARA: I -- so I -- I think --
9 I -- I see my light is on.

10 CHIEF JUSTICE ROBERTS: No, go ahead.

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

21 Texas courts have said yes, we are
22 entitled to invoke our rights under the Fifth
23 Amendment. But, again, they just cite the Fifth
24 Amendment. They're not invoking some special
25 cause of action that they have created. They,

1 like other courts, look to the Constitution, to
2 this Court's analysis of the Constitution, and
3 say the Constitution provides the entitlement to
4 just compensation, not, as far as I'm aware, an
5 independent common law cause of action.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel.

8 Let's suppose you bring a -- a -- the
9 state takes some action, you claim that is a
10 taking, you bring that claim for just
11 compensation. In the state court, they decide
12 yes, it was a taking, and so the government owes
13 you \$3 million. And the government says: Wow,
14 we didn't think it was worth that much. Here,
15 take it back.

16 And can they do that?

17 MR. McNAMARA: To -- to a point, Your
18 Honor. I think saying here take it back runs
19 afoul of what Justice Brennan identified in his
20 San Diego Gas & Electric dissent that ending the
21 taking just creates an uncompensated temporary
22 taking. And that is why, as this Court noted in
23 Knick, Justice Brennan's dissent became the law
24 in First English, that just stopping the taking
25 creates an uncompensated temporary taking.

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

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

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

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

19 MR. McNAMARA: I -- I think --

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

25 MR. McNAMARA: I -- I think that would

1 be a valid ground for going back to the district
2 court and saying that the facts have changed.

3 The way --

4 CHIEF JUSTICE ROBERTS: Okay. Thank
5 you.

6 MR. McNAMARA: Thank you, Your Honor.

7 CHIEF JUSTICE ROBERTS: Justice
8 Thomas?

9 Justice Alito?

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

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

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

1 going forward, what would the remedy be?

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

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

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

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

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

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

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

1 seller would have sold that kind of easement
2 for, but it's limited to the fair market value.
3 It's limited to what the government took as
4 distinct from what the property owner may have
5 lost.

6 JUSTICE ALITO: Okay. Thank you.

7 CHIEF JUSTICE ROBERTS: Justice
8 Sotomayor?

9 Justice Kagan?

10 Justice Barrett?

11 Justice Jackson?

12 Okay. Thank you, counsel.

13 MR. McNAMARA: Thank you, Your Honor.

14 CHIEF JUSTICE ROBERTS: Mr. Nielson.

15 ORAL ARGUMENT OF AARON L. NIELSON

16 ON BEHALF OF THE RESPONDENT

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

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

1 This appeal thus isn't about
2 substantive rights. All Petitioners had to do
3 was use Texas's cause of action. Instead,
4 Petitioners insist they can bring a cause of
5 action directly under the federal Takings Clause
6 itself. This argument is wrong for many
7 reasons.

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

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

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

1 And as this Court explained in Knick,
2 states didn't start recognizing state causes of
3 action until after the Fourteenth Amendment's
4 ratification.

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

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

14 We welcome the Court's questions.

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

17 MR. NIELSON: So I would point the
18 Court to the Texas Supreme Court's decision in
19 City of Baytown --

20 JUSTICE THOMAS: Yeah.

21 MR. NIELSON: -- and they say, we hear
22 claims under both the Texas Constitution and
23 under the federal Constitution, and then they
24 resolve the claim under Penn Central, which, of
25 course, is a decision of this Court.

1 JUSTICE THOMAS: Let's say we affirm
2 here. Can Petitioners' constitutional right be
3 vindicated now in -- in Texas courts?

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

10 There's still live claims here.
11 There's still a claim under the Texas
12 Constitution itself and they have federal due
13 process claims. This is an interlocutory
14 appeal.

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

20 JUSTICE SOTOMAYOR: I'm --

21 CHIEF JUSTICE ROBERTS: Counsel, in --
22 just a couple of quotes from cases. In Cedar
23 Point, we said that the Court in First English
24 "concluded categorically that the government
25 must pay just compensation for physical

1 invasion."

2 In Knick, it said First English
3 rejects "the view that the Constitution does not
4 of its own force furnish a basis for a court to
5 award money damages against the government."

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

8 MR. NIELSON: Correct, Your Honor.

9 CHIEF JUSTICE ROBERTS: -- where I
10 wrote the opinions. So --

11 (Laughter.)

12 MR. NIELSON: Correctly wrote the
13 opinions.

14 CHIEF JUSTICE ROBERTS: -- so do you
15 have any dispute with those -- those holdings?

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

21 CHIEF JUSTICE ROBERTS: The -- the --
22 the -- the -- it -- it's --

23 MR. NIELSON: -- in federal court --
24 yes, Your Honor.

25 CHIEF JUSTICE ROBERTS: -- it's --

1 it's the statement of the -- the right, and
2 that's a federal right, right?

3 MR. NIELSON: Yes, Your Honor.

4 CHIEF JUSTICE ROBERTS: So you can
5 require that a federal assertion of rights like
6 that be brought in state court and not in
7 federal court?

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

14 And that's how it's been -- as this
15 Court explained in Knick, that's how state
16 courts have always done it. Since 1870s, this
17 Court said and onwards --

18 CHIEF JUSTICE ROBERTS: Well, it said
19 -- what we said in --

20 MR. NIELSON: -- that's how we've done
21 it.

22 CHIEF JUSTICE ROBERTS: -- what we
23 said in Knick is that the Constitution of its
24 own force furnishes the basis for a court to
25 award money damages. And you think what we had

1 in mind is a -- a basis to -- to -- in state
2 court but not federal court?

3 MR. NIELSON: When the claim is
4 against a state, in Knick, the Court said 19
5 times by our count 1983. Every time the Court
6 states the holding in Knick, they tie it to
7 Section 1983 because there's a difference
8 between the substantive right and the cause of
9 action.

10 In Knick, the cause of action was
11 Section 1983 because Congress said, if you're
12 going to sue municipalities or cities, there you
13 go, there's the cause of action.

14 CHIEF JUSTICE ROBERTS: Well, you
15 removed to federal court, where you couldn't
16 bring an action under 1983, right?

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

23 Texas -- these are filed in different
24 counties. Texas has no way to put all of them
25 in a single Texas court. So, if the cases were

1 going to be in a single court, it had to be
2 through removal and put them in -- in that
3 court.

4 The second reason for that was Texas
5 courts don't have a lot of experience with
6 implied rights of action, alleged -- implied
7 rights of action under federal law. This is the
8 bread and butter of this Court's -- you guys'
9 Court resolves factual -- those types of issues
10 all of the time. So we thought let's just get
11 it there, we'll get everybody in one case, and
12 we can take out this, you know, putative federal
13 cause of action, which we think is flatly
14 irreconcilable to begin with.

15 CHIEF JUSTICE ROBERTS: So what --
16 under what basis would they proceed against the
17 state under -- under 1983?

18 MR. NIELSON: They -- they couldn't,
19 Your Honor. There is no such claim. Congress
20 has said that you can bring claims against
21 cities and municipalities. You cannot sue the
22 states under Section 1983.

23 They say they can. So, under Bell
24 v. Hood, they've claimed that there is a federal
25 cause of action. When someone asserts that a

1 federal cause of action exists, the federal
2 courts have jurisdiction to decide whether that
3 is true, and then they can decide on the merits
4 whether the cause of action exists.

5 CHIEF JUSTICE ROBERTS: Well, isn't
6 that a -- a Catch-22 or -- I mean, you say you
7 -- they have to proceed in -- in state court.
8 They can't proceed in federal court. And as
9 soon as they do, you remove it to federal court
10 under 1983, where you say they can't proceed?

11 MR. NIELSON: Well, we would make the
12 same argument in state or federal court that
13 there is no federal cause of action directly
14 under the Fifth Amendment. That is not --

15 CHIEF JUSTICE ROBERTS: Well, but
16 that's what was rejected in the -- in the two
17 cases that I read to you, Cedar Point and Knick.

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

1 there is a cause of action.

2 JUSTICE KAGAN: But, General, do you
3 agree with Mr. McNamara that if a state takes a
4 person's property and doesn't give compensation,
5 that state is violating the Constitution every
6 day? It's an ongoing violation. Do you agree
7 with that?

8 MR. NIELSON: That's not how the Court
9 has -- I -- I -- I believe -- I certainly agree
10 that's a violation of the Constitution. I don't
11 think this Court's cases have ever --

12 JUSTICE KAGAN: But that's what I want
13 to know. It's an --

14 MR. NIELSON: Sure.

15 JUSTICE KAGAN: -- ongoing violation
16 of the Constitution, right? I've taken Mr.
17 McNamara's property. I haven't paid him. Every
18 day, I'm violating the Constitution, correct?

19 MR. NIELSON: Yes, Your Honor.

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

22 MR. NIELSON: Yes, Your Honor. And
23 what this Court said in Knick is, when there's
24 not a cause of action, which remember there
25 wasn't a cause of action, there were -- you have

1 -- there's no remedies.

2 JUSTICE KAGAN: Yeah.

3 MR. NIELSON: What -- what is
4 injunctive relief --

5 JUSTICE KAGAN: But this is -- this is
6 very different.

7 MR. NIELSON: Sure.

8 JUSTICE KAGAN: You know, in the usual
9 case, we have a constitutional -- let's take a
10 Fourth Amendment case. You know, it's you've
11 searched somebody's home illegally.

12 MR. NIELSON: Mm-hmm.

13 JUSTICE KAGAN: It's happened, and
14 then it's over, and then the question is what
15 remedy are you going to be giving for that
16 violation.

17 But this is a different kind of
18 violation. It's not a -- it's not even clear
19 that the word "remedy" is appropriate here.
20 It's a right to compensation. And the state, by
21 taking the land and not compensating, is
22 violating that right every day. It's not that
23 the state --

24 MR. NIELSON: Mm-hmm.

25 JUSTICE KAGAN: -- is failing to

1 provide a remedy. The state is violating the
2 right to be paid.

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

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

9 MR. NIELSON: Sure.

10 JUSTICE KAGAN: -- usual case, suppose
11 that a state violates Mr. McNamara's First
12 Amendment rights.

13 MR. NIELSON: Yep.

14 JUSTICE KAGAN: Could he bring a suit
15 about that?

16 MR. NIELSON: Yes, Your Honor, for
17 injunctive relief.

18 JUSTICE KAGAN: Yes. And what Mr.
19 McNamara, I believe, is saying is that -- that
20 the usual distinction that we draw, you can
21 bring a right for injunctive relief, but you
22 can't -- you can bring a suit for injunctive
23 relief, but you can't bring a suit for damages,
24 that's the usual distinction.

25 But it sort of falls apart in this

1 case because the right is a right to be paid.

2 MR. NIELSON: Yes, Your Honor. And so
3 I -- I -- I come at this from maybe the other
4 direction. Let's imagine that some government
5 said, you know what, we're not going to pay.
6 We're telling everybody now. Now you are on
7 notice we are not paying.

8 Well, then what happens? Before they
9 could do anything, you would rush to court and
10 you would say: Injunction. They can't do it.
11 They've promised they're not going to pay.
12 They're not going to provide that. And the
13 Constitution says, if they don't, they're out of
14 -- they're -- they're violating their rights.
15 That's Eastern Enterprises v. Apfel, where if
16 there's -- clear that there's not going to be a
17 right to judicial -- to payment, there are no --
18 no monies coming, not -- not judicial, but no
19 payments coming, you can get that injunction
20 right away.

21 JUSTICE KAGAN: I mean, General, let
22 me make the point another way.

23 MR. NIELSON: Sure.

24 JUSTICE KAGAN: I mean, it's sort of
25 backwards to say that Mr. McNamara's client can

1 sue for an injunction, meaning like, you know,
2 give me back my property. Actually, the state
3 has a right to take his property or a
4 prerogative to take --

5 MR. NIELSON: Yeah.

6 JUSTICE KAGAN: -- his property. If
7 the state wants to use his property for a
8 railroad, it doesn't really matter that the -- a
9 person doesn't want to sell. The state has the
10 ability to take -- the only thing that the state
11 does not have the prerogative to do and the
12 thing that the landowner has a right to have is
13 payment.

14 MR. NIELSON: Yes, Your Honor.

15 JUSTICE KAGAN: So to say, well, look,
16 you can sue for an injunction but you can't sue
17 for payment just doesn't understand the nature
18 of this right.

19 MR. NIELSON: Well, so our first-line
20 argument is, you know, the way the United States
21 did it for a hundred years is -- is correct.
22 But, if the Court disagrees with that, if the
23 Court says, you know what, actually --

24 JUSTICE KAGAN: So, General, I kind of
25 agree with that. Your best argument is like

1 what happened between the time of the
2 Constitution and, you know, someplace in the
3 late 19th Century.

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

6 (Laughter.)

7 MR. NIELSON: Sure. All right. So
8 the -- that -- that's the answer I'm going to
9 say. So, if we -- if the Court says, we read
10 First English and it requires not just a
11 substantive relief, it requires some sort of
12 judicial proceeding, which we don't think is
13 consistent with the history, but let's assume,
14 Texas does it. Texas provides the cause of
15 action for which they can bring a federal
16 takings claim.

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

20 JUSTICE BARRETT: What if Texas didn't
21 do it, though?

22 MR. NIELSON: So -- so that's where we
23 get interesting.

24 JUSTICE BARRETT: But I'm not -- but
25 -- I -- I -- and I just want to be clear I'm not

1 talking about the hypothetical you gave where
2 Texas announces in advance --

3 MR. NIELSON: Yeah.

4 JUSTICE BARRETT: -- we're going to
5 take and we're not going to pay. Let's say that
6 Texas takes and just this one property owner
7 can't get the money, the -- Texas is being
8 intransigent about it.

9 MR. NIELSON: Mm-hmm.

10 JUSTICE BARRETT: And Texas says:
11 And, by the way, our state cause of action -- we
12 have no state cause of action for you to use in
13 our courts to get the money, no private bills.
14 We don't do that. There's no state --

15 MR. NIELSON: Sure.

16 JUSTICE BARRETT: -- law remedy. What
17 then?

18 MR. NIELSON: All right. So, you
19 know, if a state goes rogue, that's how we're
20 thinking about it, because we know from Knick
21 all the states don't do that, but let's assume
22 some state says, we're just not going to do
23 that. Well, you have injunctive relief. I
24 realize that might not be a perfect relief --

25 JUSTICE BARRETT: Doesn't work in this

1 hypothetical.

2 MR. NIELSON: It doesn't work because
3 of that. Then the answer is exactly what the
4 Constitution says. Congress -- Section 5 of the
5 Fourteenth Amendment says, if a state is
6 violating the Constitution, which would be
7 happening in this scenario, that's precisely
8 what Section 5 is for.

9 Congress has never done that --

10 JUSTICE BARRETT: So they have to wait
11 for Congress to enforce it through legislation?
12 Would there be some sort of due process
13 violation or an argument that the state has to
14 provide some sort of forum?

15 MR. NIELSON: Well, that's what I'm
16 trying to say. If you read First English that
17 way to say that not only is it there's a
18 substantive obligation, but there has to be a --
19 some sort of judicial forum for -- for, you
20 know, vindication of that --

21 JUSTICE BARRETT: I -- not, I mean, a
22 judicial forum. It could be --

23 MR. NIELSON: Sure.

24 JUSTICE BARRETT: -- an administrative
25 forum. I mean, I -- I'm taking --

1 MR. NIELSON: Okay. Sure. Sure.

2 JUSTICE BARRETT: -- your argument
3 about that.

4 MR. NIELSON: Okay.

5 JUSTICE BARRETT: You're -- you're
6 really saying that the state could shut down and
7 give no administrative forum, no legislative
8 forum, no judicial forum, and because the Fifth
9 Amendment doesn't create an implied cause of
10 action, then the property owner would have to
11 say, Congress, can you please use your Section 5
12 power?

13 MR. NIELSON: The answer would be
14 first try to get an injunction. That doesn't
15 always work for the reasons that you say. In
16 that scenario, yeah, that's what the
17 Constitution says.

18 CHIEF JUSTICE ROBERTS: Well, but
19 we're talk --

20 JUSTICE GORSUCH: Why -- why -- why --
21 I'm -- I'm sorry, Chief.

22 CHIEF JUSTICE ROBERTS: I'm sorry.
23 We're talk -- those are two governments. I
24 mean, we're talking about the ability of the
25 government to take property without paying for

1 it. The -- the states and Congress may have
2 common cause on that. And the idea that, well,
3 you look to a different government --

4 MR. NIELSON: Mm-hmm.

5 CHIEF JUSTICE ROBERTS: -- to tell
6 this government that that's not something
7 governments can do, that's not much of a remedy.

8 MR. NIELSON: Well, this Court has
9 cases that says we trust that Congress takes
10 itself seriously. We trust that the states take
11 their oath seriously. That's one of the
12 premises of Alden v. Maine, that they're going
13 to do that. But --

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

16 MR. NIELSON: Sure.

17 JUSTICE GORSUCH: And the -- our whole
18 system of separated powers is premised on that
19 idea. And self-interest here that would be
20 created isn't a rogue state but an incentive for
21 governments not -- not -- to -- to withdraw
22 their -- their existing causes of action. I
23 think that's the thrust --

24 MR. NIELSON: Yeah.

25 JUSTICE GORSUCH: -- of Justice

1 Barrett and the Chief's questions.

2 MR. NIELSON: What we --

3 JUSTICE GORSUCH: And I guess I'm
4 wondering --

5 MR. NIELSON: Sorry.

6 JUSTICE GORSUCH: -- why wouldn't the
7 injunction order the state to pay?

8 MR. NIELSON: So that's a question
9 that has not been litigated, whether you could
10 have injunctive relief to pay.

11 JUSTICE GORSUCH: Say you have to
12 provide --

13 MR. NIELSON: Correct.

14 JUSTICE GORSUCH: -- just
15 compensation. We're not telling you how.

16 MR. NIELSON: Yep.

17 JUSTICE GORSUCH: We're not telling
18 you in what forum.

19 MR. NIELSON: And -- and -- and --

20 JUSTICE GORSUCH: But -- but the
21 Constitution commands it.

22 MR. NIELSON: Sure. As I said, that's
23 -- if you want to read First English that way,
24 Texas has no quarrel with that because we
25 provide it. And we don't just provide through a

1 commission, though I think we have the
2 constitutional right to do so. We do it in
3 court. We --

4 JUSTICE BARRETT: But you have to
5 answer -- I'm sorry. You have to answer the
6 hypothetical.

7 MR. NIELSON: Yeah.

8 JUSTICE BARRETT: I think Justice
9 Gorsuch's premise is that Texas isn't doing
10 this.

11 MR. NIELSON: Okay. So, if we say
12 that a Texas doesn't or -- or some state doesn't
13 have a -- a court proceeding and you don't have
14 any sort -- other sort of commission, you still
15 can get an injunction, and if you know the state
16 doesn't have any of those things, you can get
17 that injunction very, very, very early.

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

20 MR. NIELSON: Mm-hmm.

21 JUSTICE GORSUCH: -- to pay?

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

24 JUSTICE GORSUCH: Okay.

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

1 JUSTICE KAVANAUGH: You don't want to
2 concede that?

3 MR. NIELSON: -- first principles --
4 as a matter of first principles, I don't know
5 how you get there. But I'm saying that Texas
6 has no quarrel with it --

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

8 MR. NIELSON: -- because Texas does --
9 what you're saying --

10 JUSTICE KAVANAUGH: What do you mean
11 --

12 JUSTICE GORSUCH: I've got -- I --
13 I've got it. I've got it. I just want to -- I
14 just want to clear -- clear up two other things.

15 MR. NIELSON: Sure.

16 JUSTICE GORSUCH: What is the common
17 law cause of action and what is the state
18 constitutional cause of action that does exist
19 that you say could have but wasn't brought?

20 MR. NIELSON: That's right. So the --
21 the easiest place to see it because it's the
22 most recent and I think the most clear is the
23 Texas Supreme Court's City of Baytown --

24 JUSTICE GORSUCH: Right. That just
25 says, though, as I understand it from your

1 colleague --

2 MR. NIELSON: Yeah.

3 JUSTICE GORSUCH: -- go look at the
4 federal Constitution. So how does that help
5 you?

6 MR. NIELSON: Well, they look at both.
7 They say, we resolve takings claims under our
8 constitutions, plural, and then they cite both.
9 And then they --

10 JUSTICE GORSUCH: So Texas has
11 represented to this Court that there is a state
12 constitutional cause of action?

13 MR. NIELSON: Yes, Your Honor.

14 JUSTICE GORSUCH: Okay. And is there
15 a common law cause of action --

16 MR. NIELSON: Well, that --

17 JUSTICE GORSUCH: -- that would
18 achieve the same thing?

19 MR. NIELSON: -- that's what I'm --
20 that's what I'm -- I must have -- I must have
21 misunderstood --

22 JUSTICE GORSUCH: Beyond --

23 MR. NIELSON: -- what you were saying.
24 That is the -- the cause of action.

25 JUSTICE GORSUCH: That is the cause of

1 action?

2 MR. NIELSON: Yeah.

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

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

6 JUSTICE GORSUCH: What does --

7 MR. NIELSON: -- vigorously resisted
8 --

9 JUSTICE GORSUCH: Fine. Fine.

10 MR. NIELSON: -- the idea that they
11 have to --

12 JUSTICE GORSUCH: Oh, okay. I got it.
13 And what -- what cause of action remains pendent
14 as you understand it?

15 MR. NIELSON: So they still have
16 claims for federal due process, and they still
17 have claims for the Texas Constitution.

18 JUSTICE GORSUCH: Would you oppose
19 leave to amend to add a Texas constitutional
20 claim on -- on an email?

21 MR. NIELSON: On behalf of the State
22 of Texas, we would not oppose that in the
23 district court.

24 JUSTICE GORSUCH: Okay. Thank you.

25 JUSTICE KAVANAUGH: Justice Gorsuch --

1 JUSTICE SOTOMAYOR: Sorry. But I -- I
2 -- I -- I'm sorry.

3 JUSTICE KAVANAUGH: Go ahead.

4 JUSTICE SOTOMAYOR: Point of
5 clarification.

6 MR. NIELSON: Sure.

7 JUSTICE SOTOMAYOR: Tell me how they
8 plead this. Let's assume we affirm the court
9 below. There's no freestanding right to come
10 into federal court and sue Texas under the Fifth
11 Amendment.

12 How would they go to the Texas court
13 and make their Fifth Amendment claim?

14 MR. NIELSON: So --

15 JUSTICE SOTOMAYOR: What would they
16 say in the Texas court?

17 MR. NIELSON: So -- yes. So what they
18 would say here, and, candidly, the pleadings
19 have never been as pellucid as I think anyone
20 would have liked, but what I think that they --
21 they would say is, we are bringing our claim
22 under state law, see City -- see, e.g., City of
23 Baytown. I think that would be sufficient to
24 get us there.

25 JUSTICE SOTOMAYOR: That -- that's --

1 my gosh. I've never heard of pleadings in any
2 state where you had to mention the law at issue.

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

4 JUSTICE SOTOMAYOR: Usually you
5 mention the facts --

6 MR. NIELSON: Well --

7 JUSTICE SOTOMAYOR: -- or you state
8 the facts and then you --

9 MR. NIELSON: Well --

10 JUSTICE SOTOMAYOR: But putting that
11 aside, here, they say violation of Article I,
12 Section 17 of the Texas Constitution for the
13 taking, damaging, or the destruction of their
14 property. That's Count 1.

15 MR. NIELSON: Yes, Your Honor.

16 JUSTICE SOTOMAYOR: And Count 2 says
17 violation of the Fifth Amendment of the U.S.
18 Constitution.

19 MR. NIELSON: Yes, Your Honor.

20 JUSTICE SOTOMAYOR: Summarizing
21 basically. I don't know what else they would
22 have had to do in Texas court if I cite that
23 case.

24 MR. NIELSON: It --

25 JUSTICE SOTOMAYOR: They said, I'm

1 suing you in Texas court. You're the one who
2 removed to federal court.

3 MR. NIELSON: Yes, Your Honor.

4 JUSTICE SOTOMAYOR: This seems to me
5 like a totally made-up case because they did
6 exactly what they had to do under Texas law.
7 It's you who are telling me -- it's almost a
8 bait and switch -- that you wanted to get to
9 federal court to basically have a class action
10 and you couldn't do it in state court, so -- but
11 you had to fight something, which -- I don't
12 know what you're fighting because you're telling
13 me that Texas lets them have a cause of action
14 under the Fifth Amendment.

15 MR. NIELSON: Yes, Your Honor.

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

18 JUSTICE SOTOMAYOR: Well, you're the
19 one who removed.

20 MR. NIELSON: We removed, and they
21 didn't come back and say, oh, no, you
22 misunderstand what we're saying. Instead, every
23 step along the way, they have doubled down all
24 the way going to cert, you know, seek certiorari
25 review from this Court.

1 So, if we misunderstood what they were
2 saying --

3 JUSTICE SOTOMAYOR: So, if -- if they
4 go back down and say to the district court, this
5 has been remanded to the district court, all we
6 want is just compensation under the Texas
7 Constitution and the Fifth Amendment under that
8 case that you're mentioning, that's okay and
9 you're not going to resist that?

10 MR. NIELSON: We -- we -- we would not
11 resist that, Your Honor.

12 JUSTICE SOTOMAYOR: Okay.

13 JUSTICE KAVANAUGH: On Justice
14 Gorsuch's injunction-to-pay hypothetical, I just
15 want to make sure I'm clear on that.

16 MR. NIELSON: Yeah.

17 JUSTICE KAVANAUGH: I thought you were
18 saying we don't need to answer that question in
19 this case because Texas provides forums for
20 compensation.

21 MR. NIELSON: Yes, Your Honor.
22 Conceptually, I don't know how you get an
23 injunction to pay money.

24 JUSTICE KAVANAUGH: But -- but --

25 MR. NIELSON: I'm not familiar with

1 that, but that's blowing apart --

2 JUSTICE KAVANAUGH: I -- I understand
3 that, but even in the --

4 MR. NIELSON: Yeah.

5 JUSTICE KAVANAUGH: -- the theoretical
6 possibility of it is just not present here,
7 right?

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

12 JUSTICE KAVANAUGH: Yeah.

13 MR. NIELSON: If I may --

14 JUSTICE JACKSON: What about a
15 declaration? What about a declaration? Is that
16 something different?

17 MR. NIELSON: A declaration? I --

18 JUSTICE JACKSON: Could you sue for --
19 for --

20 MR. NIELSON: Sure.

21 JUSTICE JACKSON: -- declaratory
22 judgment that Texas or whatever state is not
23 paying you?

24 MR. NIELSON: So my understanding of a
25 declaratory judgment action is it sounds in

1 equity, not in damages. So I think it would
2 fall within the -- the universe of Ex parte
3 Young type remedies. So we wouldn't have any
4 objection to that either, though, again, I -- I
5 -- I'm a little bit shooting from the hip, so I
6 apologize it wasn't briefed on that one, so I'm
7 -- I'm a bit nervous on that.

8 JUSTICE JACKSON: Yes.

9 MR. NIELSON: Though, I mean, I -- if
10 I -- if I may, I would like just to make a
11 couple of affirmative points.

12 CHIEF JUSTICE ROBERTS: Well, no, you
13 can do that later.

14 MR. NIELSON: Oh, I apologize, Your
15 Honor.

16 CHIEF JUSTICE ROBERTS: Yeah.

17 Justice Thomas?

18 Justice Alito?

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

21 (Laughter.)

22 MR. NIELSON: Well, I would just like
23 to say that as far as I am aware, Texas is the
24 only party here that has offered evidence on the
25 original public meaning of the actual language

1 of the text, not the ideas, the actual language
2 of the Constitution. And when courts looked at
3 that language, they read it precisely the same
4 way that Texas does now.

5 CHIEF JUSTICE ROBERTS: Anything
6 further?

7 JUSTICE ALITO: Thank you.

8 CHIEF JUSTICE ROBERTS: Justice
9 Sotomayor?

10 Justice Gorsuch?

11 Justice Jackson?

12 Thank you, counsel.

13 MR. NIELSON: Thank you, Your Honor.

14 CHIEF JUSTICE ROBERTS: Mr. Kneedler.

15 ORAL ARGUMENT OF EDWIN S. KNEEDLER
16 FOR THE UNITED STATES, AS AMICUS CURIAE,
17 SUPPORTING THE RESPONDENT

18 MR. KNEEDLER: Mr. Chief Justice, and
19 may it please the Court:

20 The Fifth Amendment to the United
21 States Constitution does not of its own force
22 create a cause of action against the government
23 under the Fifth Amendment against the United
24 States Government for damages.

25 Numerous provisions of the

1 Constitution make that clear, including the text
2 of the just compensation clause itself. It says
3 property shall not be taken, no person --
4 property shall not be taken for public use
5 without just compensation.

6 The right is not to have the property
7 taken without compensation. It's not a right to
8 compensation. And this -- it's prohibitory. It
9 has a condition for the -- governmental action
10 to be lawful. That condition is the payment of
11 compensation. If there's not compensation, then
12 the action is unlawful, and what lies is an
13 injunction to cease the taking of the property.

14 This Court in -- in a number of
15 recent -- relatively recent cases has made that
16 point. In *Ruckelshaus versus Monsanto*, in *Dames*
17 *& Moore*, in the railroad reorganization cases,
18 the question really was, should there be an
19 injunction preventing this statute from going
20 into effect, or is there compensation available
21 under the Tucker Act such that an injunction
22 would not be appropriate?

23 In all of those cases, that's what the
24 Court held, that there was compensation
25 available. But that -- the the very question

1 presupposed that there might be situations in
2 which compensation was not available. That's
3 the violation.

4 And the -- the same thing, if you look
5 at the overall context of the Fifth Amendment,
6 that is also true. It -- the preceding clause,
7 as Justice Alito pointed out, says that no
8 person shall be deprived of property without due
9 process. The prohibition is the -- deprivation,
10 the condition -- without -- without the
11 condition of due process.

12 If a court finds a violation, it
13 doesn't order due process. It orders -- it
14 enjoins the conduct that was undertaken without
15 due process. The government can always go back
16 and do it over again with due process.

17 And -- and, finally, there's another
18 clause in the Fifth Amendment that is written in
19 exactly the same way, the indictment clause. It
20 says a person shall not be held for a capital or
21 otherwise infamous crime unless on a presentment
22 of an indictment. An indictment is the
23 condition precedent to having a lawful holding
24 of somebody for a crime, and one --

25 CHIEF JUSTICE ROBERTS: Mr. Kneedler,

1 in the --

2 MR. KNEEDLER: Yeah.

3 CHIEF JUSTICE ROBERTS: -- brief that
4 you -- you filed in First English 38 years ago,
5 you argued that the Constitution does not of its
6 own force furnish a basis for a court to award
7 money damages against the government.

8 Now, in the decision in First English,
9 Justice Rehnquist rejected the idea that "the
10 Constitution does not, of its own force, furnish
11 a basis for the court to award money damages
12 against the government."

13 Now it seems to me that the question
14 is -- turns on basis. And what you seem to be
15 saying is it created a general theory of what
16 the government had to do. But that doesn't mean
17 that anybody could take that and recover
18 compensation. They have to go get an injunction
19 or they -- they can't proceed at all because
20 there's no cause of action?

21 MR. KNEEDLER: Yes, Your --

22 CHIEF JUSTICE ROBERTS: I mean, are
23 you just rearguing the point that the Court
24 rejected?

25 MR. KNEEDLER: Not at all. Not at

1 all. But our point -- our point, that portion
2 of our brief was really going to the cause of
3 action question and -- and for the reasons that
4 we said in that brief and this brief, and -- and
5 I don't think the Court rejected this.

6 For all the reasons we said, not just
7 the text of the clause, but -- but the
8 Appropriations Clause, the Fifth Amendment only
9 applied to the United States, the Appropriations
10 Clause would have prohibited any court from
11 awarding a money judgment or an injunction to
12 pay money because only Congress can authorize
13 the payment of money from the Treasury.

14 CHIEF JUSTICE ROBERTS: Well, but it's
15 --

16 MR. KNEEDLER: OPM versus Richmond
17 makes that clear.

18 CHIEF JUSTICE ROBERTS: Well, the
19 Constitution can do it too, which is what the
20 rest of that footnote rejecting the arguments
21 that the government made in First English said.
22 It says that the "cases made clear that it is
23 the Constitution that dictates the remedy for
24 interference with property rights amounting to a
25 taking."

1 So I -- I'm not sure how you get
2 around the fact that the Constitution speaks in
3 terms of just compensation and not an
4 injunction.

5 MR. KNEEDLER: Well, as I said, it
6 speaks in terms of compensation in terms of
7 defining the right, which is not to have
8 property taken without just -- just
9 compensation. But that footnote, I think it's
10 important to understand the context of that
11 footnote.

12 In fact, all of First English was
13 about the Agins rule in the -- in the -- in
14 California, which said there was not even a
15 taking. Sometimes they said you -- no
16 compensation, but there was no taking until a
17 court first determined that there was a taking.

18 And that was the rule, that was the
19 controversy at the time, the so-called temporary
20 taking. Does -- does the taking arise in a
21 regulatory context at the time the regulation is
22 effective or later? That was the issue that the
23 Court rejected, and in that respect, it said no,
24 compensation is owed from the moment of -- of
25 the Constitution. And what --

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel.

3 JUSTICE ALITO: Mr. Kneedler, I have a
4 little trouble understanding your argument about
5 the Tucker Act. In your view, neither the
6 Tucker Act nor the Takings Clause provides a
7 cause of action, but then you say the
8 combination of the two somehow provides a cause
9 of action.

10 And the Petitioner says that what
11 you're saying is that nothing plus nothing
12 equals something. So this -- you must be
13 relying on some kind of higher math that I can't
14 understand. Where -- what is the cause of
15 action --

16 MR. KNEEDLER: No, I -- I --

17 JUSTICE ALITO: -- in a Tucker Act
18 suit?

19 MR. KNEEDLER: I -- as I said, I think
20 it's the combination of the two. It's not zero
21 plus zero; it's one-half plus one-half. The --
22 the -- as we say, the -- the -- the
23 Constitution, the Fifth Amendment itself, does
24 not create a -- a -- a cause of action. It
25 would have -- would -- would have been

1 extraordinary. We went for 200 years, as
2 pointed out, with that not being the case.

3 But what the Tucker Act does is, as
4 the Court said two terms ago, three terms ago, I
5 guess, it provides the framework under which
6 it's -- it can be determined whether Congress
7 has provided the ability to -- to sue under the
8 Tucker Act.

9 The Tucker Act standard is whether the
10 particular substantive provision that is being
11 relied upon creates a -- can reasonably be read
12 to mandate compensation if there is a violation.
13 By definition -- and the Court made this point
14 in Bormes -- the Tucker Act is there for
15 something where there is an obligation but no
16 elements of a cause of action. So the -- the --
17 for example, the Fifth Amendment or the statute
18 that may be involved, particular statute that
19 may be involved, by definition does not create a
20 cause of action.

21 Congress provided in the Tucker Act
22 that you can recover compensation if -- if the
23 other provision of law can reasonably be
24 construed. That's a -- that's a Tucker Act
25 standard for when --

1 JUSTICE ALITO: All right. Suppose
2 there -- suppose that the Takings Clause was not
3 in the Constitution, but Congress enacted a
4 statute that said the federal government shall
5 not take private property for public use without
6 just compensation.

7 Would that be a money-mandating
8 statute that creates a cause of action?

9 MR. KNEEDLER: I don't think so. I --
10 because it's a -- it's a -- it's a prohibition,
11 I think it's the same -- the same as the Fifth
12 Amendment itself. It -- it is a directive to
13 Congress not to -- or executive not to take
14 property without affording compensation.

15 Now it may be that the particular
16 statute would be understood or could be
17 interpreted that way, but, here, we're talking
18 about the Constitution, and no other provision
19 of the Constitution provides of its own force a
20 remedy, particularly a remedy for damages.

21 And that would have been extraordinary
22 at the time the Constitution was adopted because
23 of the Appropriations Clause, sovereign
24 immunity, and the Debt Clause. If -- if
25 compensation is not paid, that is a debt of the

1 United States, and it's clear --

2 JUSTICE ALITO: I -- I find it hard to
3 understand how that would not be a statute that
4 mandates the payment of money. It says you --
5 you can't take property for a public use without
6 just compensation. It's talking about paying
7 money. If that's not a money-mandating
8 provision, then --

9 MR. KNEEDLER: It might -- it might be
10 -- it might be money -- money-mandating under
11 the Tucker Act. I -- I think I understood you
12 to say it -- this wasn't the Tucker Act.

13 JUSTICE ALITO: No.

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

16 JUSTICE ALITO: It's another -- it's
17 another statute, and we would interpret it like
18 we interpreted the statute in Maine Community
19 Health. Does it -- does it mandate the payment
20 of money? I would think the answer to that
21 would be yes. And if that's the case with the
22 statute, why isn't it the same with the --

23 MR. KNEEDLER: Because the --

24 JUSTICE ALITO: -- with the Fifth
25 Amendment?

1 MR. KNEEDLER: -- the money mandating
2 is not -- is not something under the Tucker Act.
3 It is -- it is a provision in the Tucker Act
4 that --

5 JUSTICE ALITO: All right.

6 MR. KNEEDLER: It -- it's not -- it's
7 not the other statute. It's a provision in the
8 Tucker Act. And that is a Tucker Act-specific
9 standard for when Congress --

10 JUSTICE ALITO: Thank -- thank --
11 thank you.

12 JUSTICE JACKSON: Mr. --

13 JUSTICE ALITO: Thank you, Mr.
14 Kneedler.

15 JUSTICE JACKSON: -- Mr. Kneedler, I
16 thought your answer to Justice Alito was going
17 to be going back to what you said at the
18 beginning, which is the compensation is
19 conditional in the same way as the Due Process
20 Clause is conditional.

21 I thought that was very interesting,
22 and maybe you want to repeat it.

23 MR. KNEEDLER: Yeah. No, no, that is
24 -- that -- I -- I think that's a fundamental
25 point about the text, not -- of the just

1 compensation clause itself, but the entire Fifth
2 Amendment is pro -- is prohibitory. I mentioned
3 the indictment clause, but the
4 self-incrimination clause is the same way. The
5 Double Jeopardy Clause is -- is the same.

6 JUSTICE JACKSON: And so, to the
7 extent that we see a condition there, it -- you
8 -- you're not interpreting that as mandating
9 that condition necessarily. It's about the
10 prohibition?

11 MR. KNEEDLER: Right. Exactly. If I
12 could -- I'm -- I'm sorry.

13 CHIEF JUSTICE ROBERTS: No.

14 MR. KNEEDLER: If I could go back to
15 the Chief Justice's question about First
16 English, the language in that footnote is
17 directed to, it says -- remedial. But what it
18 is referring to is the -- computation of just
19 compensation as a remedial matter.

20 If you have a cause of action, how do
21 you calculate the remedy? All of the cases, it
22 says, as the cases in the text make clear, it --
23 it -- it -- it's a remedy, and it does provide a
24 basis for compensation, but in a cause of action
25 where there already is one.

1 CHIEF JUSTICE ROBERTS: Thank you.

2 MR. KNEEDLER: Every one of the cases
3 the Court cited --

4 CHIEF JUSTICE ROBERTS: Thank -- thank
5 you, counsel.

6 MR. KNEEDLER: I'm sorry.

7 CHIEF JUSTICE ROBERTS: Justice
8 Thomas?

9 JUSTICE THOMAS: No.

10 CHIEF JUSTICE ROBERTS: Anything
11 further?

12 JUSTICE SOTOMAYOR: Is your position
13 -- is there any daylight between Texas's
14 position and the government's position here?

15 MR. KNEEDLER: Well, some --

16 JUSTICE SOTOMAYOR: Your -- you
17 representing the government?

18 MR. KNEEDLER: Yeah. To the extent
19 there was a suggestion that there could be an
20 injunction to pay money, we would disagree with
21 that because of the Appropriations Clause, I
22 think. The Fifth Amendment cannot be read --

23 JUSTICE SOTOMAYOR: So would it be --

24 MR. KNEEDLER: -- to allow that.

25 JUSTICE SOTOMAYOR: -- a matter of

1 semantics, you can't take this property? You
2 have to stop flooding it? You have to do --

3 MR. KNEEDLER: You have to -- you have
4 to stop whatever it is that would constitute a
5 taking. And -- and -- and --

6 JUSTICE SOTOMAYOR: All right. And
7 just to clarify your answer to Justice Alito in
8 my head, you're saying it's the Tucker Act plus
9 the statute --

10 MR. KNEEDLER: Yes.

11 JUSTICE SOTOMAYOR: -- mandating
12 payment that gets you into court?

13 MR. KNEEDLER: That is -- that's --
14 that's correct, and it's certainly not the --
15 it's certainly not the other provision itself,
16 the just -- the just compensation clause or the
17 other statute, which by definition --

18 JUSTICE SOTOMAYOR: So that's your
19 half-point/half-point --

20 MR. KNEEDLER: Yes.

21 JUSTICE SOTOMAYOR: -- equals one?

22 MR. KNEEDLER: Yes.

23 JUSTICE SOTOMAYOR: Okay.

24 MR. KNEEDLER: Sorry.

25 CHIEF JUSTICE ROBERTS: Justice Kagan?

1 Justice Gorsuch?

2 JUSTICE GORSUCH: Two questions.

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

9 MR. KNEEDLER: With respect, it's not
10 a loophole. It's a -- it's a fundamental aspect
11 of the Constitution that the Constitution does
12 not -- does not require this.

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

19 JUSTICE GORSUCH: Okay.

20 MR. KNEEDLER: -- that just
21 compensation issues were raised before.

22 JUSTICE GORSUCH: Okay. And then,
23 second, this may be a question better directed
24 to Mr. McNamara when he speaks on rebuttal, but
25 Justice Sotomayor pointed out an interesting

1 feature of the procedural history of this case.
2 The complaint has two counts about takings. One
3 is under the state constitution, and the other
4 is under the federal Constitution.

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

12 MR. KNEEDLER: There's a footnote in
13 the court of appeals' opinion that says that the
14 Texas Constitution or Texas provides a cause of
15 action. And that is not further elaborated
16 upon, but it -- it's --

17 JUSTICE GORSUCH: No. Exactly.

18 MR. KNEEDLER: -- it's remanded for
19 further proceedings, so --

20 JUSTICE GORSUCH: So do you take it
21 that that first count under the state
22 constitution is still alive and available to the
23 plaintiffs?

24 MR. KNEEDLER: I -- it is still alive
25 and available. If it required an amendment to

1 the complaint, I -- I took --

2 JUSTICE GORSUCH: Do you think it
3 requires amendment --

4 MR. KNEEDLER: I --

5 JUSTICE GORSUCH: -- to the complaint,
6 or because it was remanded for further
7 proceedings and the court only expressly
8 addressed the federal Constitution, that that
9 first count is still alive?

10 MR. KNEEDLER: I think it would depend
11 on whether that first count, in -- in relying on
12 the state constitution, was just relying on a
13 state substantive right to compensation or
14 whether it was also relying --

15 JUSTICE GORSUCH: Well, Texas --

16 MR. KNEEDLER: -- on a cause of
17 action.

18 JUSTICE GORSUCH: -- has represented
19 to us that it provides a cause of action --

20 MR. KNEEDLER: Right. And -- and --

21 JUSTICE GORSUCH: -- right? So --

22 MR. KNEEDLER: -- so -- so, if -- if
23 the -- if the complaint is read to be invoking
24 the state cause of action for the federal
25 taking, then, yes, I think that would be open on

1 remand.

2 JUSTICE GORSUCH: Thank you.

3 CHIEF JUSTICE ROBERTS: Justice
4 Kavanaugh?

5 Justice Barrett?

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

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

21 MR. KNEEDLER: That -- that is -- that
22 is correct. And it -- the same thing would be
23 true, you -- there could be a temporary
24 deprivation of due process, and if you get an
25 injunction preventing the government from doing

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

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

14 CHIEF JUSTICE ROBERTS: Justice
15 Jackson?

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

23 MR. KNEEDLER: Right. It -- that --
24 that would depend on -- on state law and the
25 availability of a state cause of action on that.

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

7 But the interim period is endemic
8 to -- to litigation, due process violation being
9 held on -- on an indictment, but that is the
10 proper remedy and that's the -- the remedy that
11 existed until the Tucker Act was passed. It was
12 the remedy that this Court said in Knick was the
13 way to vindicate Fifth Amendment rights -- until
14 the Tucker Act or state constitutions came along
15 and provided a monetary remedy.

16 JUSTICE JACKSON: Thank you.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel.

19 Rebuttal, Mr. McNamara.

20 REBUTTAL ARGUMENT OF ROBERT J. McNAMARA

21 ON BEHALF OF THE PETITIONERS

22 MR. McNAMARA: Thank you, Your Honor.

23 To begin with Justice Gorsuch's
24 question, I think it's important to remember the
25 procedural posture here. I understood my friend

1 from Texas to say that the City of Baytown
2 decision means that Texas courts hear claims
3 "under the federal Constitution."

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

12 To the extent that claim exists, that
13 claim has been extinguished and that warrants
14 reversal.

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

21 That's true in Oregon, as I mentioned,
22 but also New Mexico, South Carolina, Nebraska,
23 the list goes on of states that provide
24 compensation under the Fifth Amendment because
25 they understand the Fifth Amendment to require

1 compensation.

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

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

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

23 But, more broadly, Your Honor, I -- I
24 think Texas's understanding of the Fifth
25 Amendment would relegate property rights to the

1 status of the poor relation of the Bill of
2 Rights.

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

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

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel.

16 The case is submitted.

17 (Whereupon, at 12:23 p.m., the case
18 was submitted.)

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The Contractor hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of Richard Devillier v. Texas, Docket No. 22-913, and that these pages constitute the original transcript of the proceedings for the records of the Court.

BY 
Karen Brynteseon, Court Reporter