

No. 22-52

In the Supreme Court of the United States

ARIYAN, INCORPORATED, DOING BUSINESS AS DISCOUNT
CORNER, ET AL.,

Petitioners,

v.

SEWERAGE & WATER BOARD OF NEW ORLEANS, ET AL.,
Respondents.

*On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit*

**BRIEF OF THE CATO INSTITUTE AS *AMICUS
CURIAE* IN SUPPORT OF PETITIONERS**

Clark M. Neily III
Counsel of Record
Trevor Burrus
Nicole Saad Bembridge
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, DC 20001
(202) 842-0200
cneily@cato.org

July 22, 2022

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INTEREST OF AMICUS CURIAE¹

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

Cato is interested in this case because it involves the vitally important issue of protecting property owners from the abuse of governmental authorities who refuse to provide the "just compensation" that the Constitution mandates for compelled takings.

¹ Rule 37 statement: All parties were timely notified and consented to the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than *amicus* funded its preparation or submission.

SUMMARY OF ARGUMENT

“Government is instituted to protect property of every sort” and “that alone is a just government, which impartially secures to every man, whatever is his own.” James Madison, *The Writings*, vol. 6 (1790–1802) 101–02 (1906). Accordingly, the Fifth Amendment commands payment of just compensation when the government seizes private property for public use. U.S. Const. amend. V. Yet the Fifth Circuit interprets this command to only guarantee the right to an unenforceable judgment, payable entirely at the government’s choosing.

Over four years ago, Louisiana courts entered just-compensation judgments for Petitioners, a group of small business owners whose property and livelihoods were seriously damaged by a Sewerage and Water Board of New Orleans’s (“Sewerage Board”) construction project. App.K-5. And yet the Sewerage Board still has not paid Petitioners and shows no intent of paying anytime soon. Pet. Br. at 10. Petitioners sued in federal court, but the Fifth Circuit held that Louisiana state law bars enforcement of takings judgments. *Ariyan, Inc. v. Sewerage & Water Bd. of New Orleans*, 29 F.4th 226, 232 (5th Cir. 2022). According to the Fifth Circuit, the Sewerage Board could unilaterally withhold payment for decades, if it ever pays at all, and federal courts are powerless to do anything about it. *Id.* (noting that the panel “understand[s] the [Petitioners’] frustration” at nonpayment of their just compensation judgments but holding that the Fifth Amendment does not require federal courts to provide relief).

But Petitioners’ property rights cannot be contingent upon the government’s largesse, and the Fifth

Circuit’s judgment conflicts with this Court’s own interpretation of what the Constitution requires.

This Court has held that the Just Compensation Clause is self-executing and that judicial enforcement in case of nonpayment is required. *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2171 (2019) (the clause is self-executing); *Joslin Mfg. Co. v. City of Providence*, 262 U.S. 668, 677 (1923) (adequate provisions for enforcing judgments are required).

Likewise, this Court has held that just compensation requires reasonably timely payment. *Bragg v. Weaver*, 251 U.S. 57, 62 (1919) (the Constitution requires compensation without unreasonable delay). This is critical: without further guidance from this Court regarding temporal limits on when just compensation is due, lower courts will continue to permit indefinite delays. For many elderly property owners, like Petitioners, indefinite delay may be functionally equivalent to denial of just compensation entirely.

Government stonewalling to delay or outright refuse payment is a recurring problem. Several recent cases from within the Fifth Circuit alone illustrate the frequency of the abuse. *Lafaye v. City of New Orleans*, 35 F.4th 940 (5th Cir. 2022); *Violet Dock Port Inc., LLC v. Heaphy*, No. 19-11586, 2019 WL 6307945 (E.D. La. Nov. 23, 2019). Predictably, poor and disadvantaged communities are the ones most likely to have property seized, and now, after the Fifth Circuit’s ruling, they will also be more likely to go uncompensated after the government seizes their property. *See generally*, Steve P. Calandrillo, *Eminent Domain Economics: Should “Just Compensation” Be Abolished, and Would “Takings Insurance” Work Instead?*, 64 Ohio St. L.J. 451

(2003) (explaining that the government is incentivized to take property in poor areas for public use).

It has been nearly four decades since this Court last provided guidance on the Just Compensation Clause. *See United States v. 50 Acres of Land*, 469 U.S. 24 (1984). The decision below makes clear that this lacuna has created confusion about what the clause requires—confusion that is now undermining the core guarantee of just compensation for Louisianans and others. This Court should grant review to clarify that just compensation requires both reasonable promptness and enforceability.

ARGUMENT

I. THIS COURT SHOULD GRANT REVIEW TO CLARIFY THAT THE JUST COMPENSATION CLAUSE REQUIRES MORE THAN AN UNENFORCEABLE JUDGMENT

“[A] property owner acquires an irrevocable right to just compensation immediately upon a taking[.]” *Knick* 139 S. Ct. at 2172 (citing *First English Evangelical Lutheran Church of Glendale v. Cnty. of Los Angeles*, 482 U.S. 304 (1987)). Yet the Sewerage Board’s intransigence makes Petitioners’ right to compensation illusory, and the Fifth Circuit says Louisiana law prevents federal courts from doing anything about it. *Ariyan, Inc.*, 29 F.4th at 232 (finding “the core of Plaintiffs’ claims is foreclosed by settled law”). In effect, this makes Petitioners’ property rights contingent on the Sewerage Board’s grace.

After ruling that the Sewerage Board inversely condemned Petitioners’ properties for a flood control project, Louisiana courts entered just compensation judgments. App.K-9. More than four years later, the

Sewerage Board still has not paid Petitioners a cent. Pet.Br. at 10. This is not due to insufficient funds on the part of the Sewerage Board, whose “latest financial statements indicate that it possesses assets exceeding \$3 billion.” App.K-24. Rather, the Boards’ nonpayment of the judgment is discretionary—discretion which, according to the Fifth Circuit, Louisiana is entitled to indefinitely. *Ariyan, Inc.*, 29 F.4th at 232.

Holding that there is no federal remedy to enforce the state court compensation judgments, the Fifth Circuit prevents an entire class of Louisiana landowners who have suffered uncompensated takings from seeking relief in federal court. This ruling will allow local government entities to hide behind state law provisions such as La. Const. art. XII, § 10(C) or La. Rev. Stat. § 13:5109 to deny or defer paying just compensation indefinitely.

The Fifth Circuit’s interpretation of what the Just Compensation Clause requires runs contrary to this Court’s precedents. The Court has emphasized that the clause “may not be evaded or impaired by any form of legislation,” and that a landowner has “an unqualified right to a judgment for the amount of such damages, which can be enforced—that is, collected—by judicial process.” *Baltimore & Ohio R. Co. v. United States*, 298 U.S. 349, 368 (1936); *Sweet v. Rechel*, 159 U.S. 380, 402 (1895). The Court has described the Just Compensation Clause as being a “self-executing,” enforceable right, meaning “it supplies a sufficient rule by means of which the right given may be enjoyed and protected or the duty imposed may be enforced.” *Knick*, 139 S. Ct. at 2171; *Davis v. Burke*, 179 U.S. 399, 403 (1900); see also *First English Evangelical Lutheran Church*, 482 U.S. at 316 n.9 (the

Constitution “of its own force . . . furnish[es] a basis for a court to award money damages against the government”). And, critically, it has held that “the requirement of just compensation is satisfied when . . . there is adequate provision for enforcing the pledge.” *Joslin Mfg. Co.* 262 U.S. at 677.

But far from recognizing a self-executing clause that requires enforcement, the Fifth Circuit allows Fifth Amendment property rights to be trumped by state procedural rules. This means that Louisiana property owners who are due just compensation must “rely exclusively upon the generosity of the judgment debtor.” *Ariyan, Inc.*, 29 F.4th at 230 (quoting *Louisiana ex rel. Folsom v. City of New Orleans*, 109 U.S. 285, 295 (1883) (Harlan, J., dissenting)). But this undermines the fundamental requirement that the “Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. Const. art. VI, §2, cl. 2; Eric Berger, *The Collision of the Takings and State Sovereign Immunity Doctrines*, 63 Wash. & Lee L. Rev. 493, 498 (2006) (arguing that direct constitutional action against the state is practically necessary for the right to just compensation to have any force). Without review from this Court, Louisianans’ Fifth Amendment rights will continue to be contingent on their condemnors’ largesse.

A. Governments May Not Defer Payment of Compensation Indefinitely or for Unreasonable Periods of Time

When government action rises to the level of a taking, it requires compensation without indefinite delay. Accordingly, this Court has recognized as “settled” the

principle that unless “adequate provision is made for the certain payment of the compensation without unreasonable delay,” a taking “contravene[s] due process of law in the sense of the Fourteenth Amendment.” *Bragg*, 251 U.S. at 62. The Constitution requires “reasonably prompt ascertainment and payment” and “adequate provision for enforcing,” with the landowner being “paid—and paid promptly.” *Joslin Mfg. Co.*, 262 U.S. at 677–78.

Finally, this Court recently emphasized that “allowing the government to keep the property pending subsequent compensation to the owner . . . was not what [the Framers] envisioned.” *Knick*, 139 S. Ct. at 2176. Collectively, these cases establish that if the government fails to pay a just compensation judgment within a reasonable time, that failure represents a violation of the Fifth and Fourteenth Amendments.

B. Without a Temporal Limit on Payment, the Guarantee of Just Compensation Is Hollow

“The Founders recognized that the protection of private property is indispensable to the promotion of individual liberty.” *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2071 (2021). In the words of John Adams, “[p]roperty must be secured, or liberty cannot exist.” *Id.* (quoting *Discourses on Davila*, 6 Works of John Adams 280 (C. Adams ed. 1851)). Accordingly, last term, this Court reaffirmed that “[t]he government must pay for what it takes.” *Id.* Yet because the value of the judgment to Petitioners “depends necessarily upon the remedies given for its enforcement,” the Just Compensation Clause is a guarantee in name only without a court-enforceable due date. *Louisiana ex rel. Folsom v.*

City of New Orleans, 109 U.S. 285, 295 (1883) (Harlan, J., dissenting).

This Court has already developed factors for determining whether government action is “reasonably prompt” in cases where satisfaction of a right depends on timeliness, as it does here. *Joslin Mfg. Co.*, 262 U.S. at 677. In *Barker v. Wingo*, this Court set out four factors for determining when a delay in providing a speedy trial exceeds constitutional bounds: length of delay, the reason for the delay, the assertion of the right, and prejudice to the person asserting a constitutional injury. 407 U.S. 514, 530–32 (1972). Courts should require no less in the context of just compensation. Fifth Amendment property rights would be relegated to a bizarre second-class status—subservient to state procedural rules—if the Fifth Circuit’s ruling is allowed to stand. This Court must clarify that a temporal limit is required if the Just Compensation Clause is to have any force at all.

It is no answer for the Sewerage & Water Board to say that the compensation award is being delayed with interest accruing on that amount. This is the equivalent of saying that injured landowners should be compelled to make an involuntary loan to the government until such time as the government is ready to pay the compensation judgment. That has the effect of placing the burdens of government on the unfortunate few whose land is taken, which runs afoul of the underlying premise of the Just Compensation Clause: to prevent government from disproportionately placing burdens on a select few rather than the public as a whole. See *Monongahela Nav. Co. v. United States*, 148 U.S. 312, 325 (1893) (“[the Takings Clause] prevents the public from loading upon one individual more than his

just share of the burdens of government, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him.”).

When landowners suffer direct or indirect condemnation of their property, as Petitioners did here, they need just compensation promptly so that they can relocate, rebuild, or repair the damage. Pet. Br. at 8. Petitioners’ property damage included damaged foundations, shifting porches, broken floors, cracked interior and exterior walls, broken and shifting fireplaces, leaking roofs, and inoperable and leaky doors and windows. *Id.* An unenforceable state court judgment is no substitute for the timely payment needed to remediate those government-inflicted damages to private property.

II. REVIEW IS NECESSARY TO STOP THE RE-CURRING PROBLEM OF GOVERNMENT ARBITRARILY DELAYING OR DENYING JUST COMPENSATION

The Sewerage Board is far from the first government entity to arbitrarily refuse to pay compensation. *See, e.g., Fla. Dep’t of Agric. & Consumer Servs. v. Dooliver*, 283 So. 3d 953 (Fla. Dist. Ct. App. 2019) (government outright refused to pay compensation and refused to make any request to the legislature to appropriate the funds); *Archbold-Garrett v. City of New Orleans*, 893 F.3d 318, 322 n.1 (5th Cir. 2018) (city allocated funds to pay just compensation only “as they see fit”); *Vogt v. Bd. of Comm’rs*, 2001-0089 (La. App. 4 Cir. 03/27/02), 814 So. 2d 648, 653-55 (judgment creditors of levee district board could not obtain writ of seizure to satisfy just compensation judgment); *Dep’t of*

Transp. & Dev. v. Sugarland Ventures, Inc., 476 So. 2d 970, 976 (La. Ct. App. 1985) (just compensation judgments may only be satisfied by appropriation of funds by state or municipal legislature); *see also Commonwealth v. Lot No. 218-5 R/W*, 9 N. Mar. I. 533 (2016) (government took property, acknowledged its obligation to pay compensation, but didn't pay for more than 20 years).

Other recent Fifth Circuit cases involving the same Louisiana laws the Sewerage Board cites illustrate the frequency of this problem. The Fifth Circuit just denied *en banc* review in *Lafaye v. City of New Orleans*, holding again that the government's failure to honor a judgment—even when that judgment calls for the return of personal property acquired by a government unlawfully—cannot be enforced by federal courts. 35 F.4th at 940. As a result, the *Lafaye* plaintiffs, who are waiting for the city of New Orleans to return traffic fines illegally collected from them over twelve years ago, will, like the Petitioners below, indefinitely be at the government's mercy.

Violet Dock Port Inc., LLC v. Heaphy concerned another arbitrary refusal of Louisiana state government to pay just compensation after a property seizure. 2019 WL 6307945 at *1. The government condemnor in that case, St. Bernard Port Harbor & Terminal District (“St. Bernard”), cited the same Louisiana state protections the Sewerage Board relies on here to argue it could not be compelled to pay the judgment due to Violet Dock. *Id.*; La. Const. art. XII, § 10(c); La. Rev. Stat. § 13:5109. Denied relief in state court, Violet Dock filed a Section 1983 action in federal district court, which was dismissed for failure to state a claim. *Violet Dock*, 2019 WL 6307945 at *1.

A Fifth Circuit panel heard Violet Dock’s appeal, and, during oral argument, the judges expressed dismay at St. Bernard’s refusal to pay the judgment. *Violet Dock Port, Inc., L.L.C. v. Heaphy*, No. 19-30992, 2020 U.S. App. LEXIS 42414 (5th Cir. Dec. 29, 2020).. Judge Barksdale told St. Bernard, “you’ve got the money. Pay up. This is really ludicrous.” Oral Argument at 23:54, *Violet Dock Port, Inc., L.L.C. v. Heaphy*, No. 19-30992, 2020 U.S. App. LEXIS 42414 (5th Cir. Dec. 29, 2020).² Judge Elrod expressed similar consternation when pressing St. Bernard for its legal position on why it had not paid the compensation judgment awarded to Violet Dock. Likewise, Judge Ho asked St. Bernard’s counsel, “When is your client going to pay?” *Id.* at 19:50. Ultimately, the panel referred the appeal to mediation, which resulted in payment of the long-overdue compensation. *See* Anthony McAuley, *Port Nola Board Approves Land Purchase for \$1.5B St. Bernard Container Ship Terminal*, Nola.com (Dec. 17, 2020) (explaining that St. Bernard sold Violet Dock’s property to Port NOLA for \$18 million to satisfy the settlement agreement).³

The Fifth Amendment’s safeguards are intended to protect property “owners who, for whatever reasons, may be unable to protect themselves in the political process against the majority’s will.” *Kelo v. City of New London*, 545 U.S. 449, 505 (2005) (O’Connor, J., dissenting). Predictably, government stonewalling disproportionately affects the poor. *Id.* at 521–22 (Thomas, J., dissenting) (recognizing that the victims of government takings are often the poor or disadvantaged). This is because wealthy communities and

² Available at <https://bit.ly/3PIFkA8>.

³ Available at <https://bit.ly/3zcsJcG>.

special interest groups are usually the ones with the resources necessary to scream “not in my backyard” the loudest, and because the government’s direct financial incentives are to procure the lowest value property possible, which is more than likely to be in poor communities. Aaron N. Gruen, *Takings, Just Compensation and Efficient Use of Land, Urban and Environmental Resources*, 33 Urb. Law. 517, 543 (2001) (supporting “public choice theory” findings that the wealthy and special interest groups exercise disproportionate influence in eminent domain decisions, distorting society’s cost-benefit analysis); Calandrillo, *supra* at 518. In the Fifth Circuit, disadvantaged Louisianans are now also more likely to be left without redress when the government unilaterally decides it will not pay.

Other state constitutions and courts recognize that an enforceable temporal limit is necessary to prevent recurring nonpayment of just compensation. *See, e.g.*, Cal. Const. art. I, § 19 (“Private property may be taken or damaged for a public use and only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner.”); Ga. Const. art. I, § 3, (“private property shall not be taken or damaged for public purposes without just and adequate compensation being first paid”); *Dep’t of Trans. v. Mixon*, 864 S.E.2d 67 (Ga. 2021) (courts may enjoin road project if government has not paid compensation); *Bromfield v. Treasurer & Receiver General*, 459 N.E.2d 445, 448 (Mass. 1983) (property owners cannot be “relegated to standing idly by,” with compensation being “the vague hope that on some unascertainable future date their judgment will be satisfied”). Lacking recognition of such a requirement, this will continually be the case in the Fifth Circuit.

The Just Compensation Clause is not an empty guarantee, and the Fifth Circuit's erroneous holding conflicts with this Court's own interpretation of what the clause requires. To restore force to the Just Compensation Clause and ensure redress is available for property owners arbitrarily denied the payment they are due, this Court must clarify that just compensation requires more than an unenforceable judgment.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

Clark M. Neily III
Counsel of Record
Trevor Burrus
Nicole Saad Bembridge
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, DC 20001
(202) 842-0200
cneily@cato.org

July 22, 2022