

In the Supreme Court of the United States

STATE OF AMES,

Petitioner

v.

DANIEL WELLES,

Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE AMES CIRCUIT

BRIEF FOR THE PETITIONER

The William Thaddeus Coleman Jr. Memorial Team

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NOVEMBER 17, 2025
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Oral Argument

QUESTIONS PRESENTED

- I. Whether this Court should fashion a direct cause of action under the Takings Clause.
- II. Whether there is a Takings Clause exception to state sovereign immunity from private damages suits in federal court.

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OPINIONS BELOW

The unreported opinion of the United States Court of Appeals for the Ames Circuit is reproduced on pages 3–12 of the Joint Appendix (JA). The unreported opinion of the United States District Court for the District of Ames is reproduced at JA-12–13.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on April 27, 2025. JA-3. This Court granted the petition for a writ of certiorari on September 1, 2025. JA-2. It has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS

This case concerns Articles I and III of the United States Constitution; the Fifth, Eleventh, and Fourteenth Amendments; 28 U.S.C. §§ 1346(a), 1491(a), and 2402; and 42 U.S.C. § 1983. The relevant provisions are reproduced in the Appendix.

STATEMENT OF THE CASE

This case arises out of Ames’s response to the COVID-19 pandemic. Following the declaration of a national public health emergency, the governor issued an executive order to address an acute shortage of medical supplies. Pursuant to the order, the state hospital system temporarily operated respondent’s hand sanitizer manufacturing facility and returned it once the emergency ended.

Respondent then sued Ames for compensation directly under the Takings Clause of the Fifth Amendment.

The district court correctly dismissed his claim. But in an avowedly “novel” ruling, the court of appeals reversed. JA-11. Its judgment disregards the Constitution’s careful distribution of government power. Under our tripartite framework, Congress controls the public fisc and determines when federal courts may hear claims for money. And under our system of dual sovereignty, states retain the immunity from private suits that they possessed before entering the union. The court below cast aside both principles in sustaining respondent’s lawsuit. No other circuit has gone this far. Left standing, the Ames Circuit’s decision usurps Congress’s lawmaking power and strikes at the heart of federalism. Nothing in the Constitution demands this result.

Factual History

In 2020, COVID-19 spread through Ames, overwhelming the state’s hospitals. *See* JA-22. Soon, the federal government declared a nationwide public health emergency. *See* JA-18.

Recognizing that Ames’s essential workers could not “adequately supply themselves with the physical materials necessary to combat” the pandemic, Governor Rafael Traficante instructed the Department of Public Health and the state hospital system to acquire vital medical

equipment. JA-22. In June 2020, the state hospital system took possession of respondent's hand sanitizer manufacturing facility "to address a critical state-wide shortage of hand-sanitizer." JA-4. Respondent neither asked for compensation nor sought an injunction. *Id.* Ames returned the facility to respondent as soon as the federal public health emergency subsided. *Id.*

A month later, respondent filed suit in state court, claiming that Ames had violated the Fifth Amendment of the United States Constitution by taking his property without compensation. *Id.* His complaint pled no other cause of action. JA-18–20. Because respondent sued directly under the Fifth Amendment, the State removed to Ames district court for resolution of the federal question. It then moved to dismiss the case. JA-5.

The district court granted the State's motion with prejudice. It noted that respondent sought compensation "directly under the Fifth Amendment," which "does not provide a direct cause of action." JA-12. It also held that "Ames [was] immune from damages claims under the Eleventh Amendment." *Id.*

The Court of Appeals for the Ames Circuit reversed. JA-11. It concluded that, as a matter of "text and [] original meaning," *id.*, the Takings Clause creates a direct cause of action, JA-8, and overrides sovereign immunity, JA-10.

On the Fifth Amendment, the court noted three facts about the Takings Clause: that it (1) promised just compensation (a monetary remedy) for government takings, (2) was “self-executing,” and (3) formed “one of only two constitutional guarantees that provides it [sic] own remedy.” JA-6–7 (quoting *Fulton v. Fulton Cnty. Bd. of Comm’rs*, 148 F.4th 1224, 1238 (11th Cir. 2025)). “A cause of action,” the court concluded, “must follow the clause’s remedy.” JA-7. Inferring a cause of action also comported with “the original understanding of the Constitution.” JA-8. The Ames Circuit “admit[ted] that it [was] strange indeed to find a direct cause of action under the Constitution, which does not ‘typically come with a built-in cause of action to allow for private enforcement in courts.’” *Id.* (quoting *DeVillier v. Texas*, 601 U.S. 285, 291 (2024)). But it ultimately determined that the Takings Clause’s remedial character “implies a cause of action.” *Id.*

On the Eleventh Amendment, the court recognized that “states are generally immune from suits seeking damages” in federal court. *Id.* Nevertheless, it carved out an exception for suits under the Takings Clause. JA-10. The court reasoned that because Ames did not recognize an inverse condemnation action, respondent could only obtain compensation under the federal Constitution. JA-9. For the Constitution as a whole to have meaning, the Eleventh Amendment had to give way to the Fifth. *Id.* Otherwise, states could take property without providing

a state law remedy and assert immunity in federal court—an outcome that “would shock the conscious [sic] in the context of the only other constitutional amendment [sic] to provide an express remedy: habeas corpus.” JA-10. The court of appeals did not mention any of this Court’s foundational state sovereign immunity precedents. JA-8–10. It “acknowledge[d] that the result [it] reach[ed]” was “novel,” and that sister circuits had reached the opposite conclusion, before reversing anyway. JA-10–11.

This Court granted Ames’s petition for certiorari. JA-2.

SUMMARY OF ARGUMENT

The Fifth Amendment prohibits governments from taking private property for public use without just compensation. Yet like all other provisions in the Bill of Rights, the Takings Clause does not itself create a cause of action. Even if it did, state sovereign immunity would bar respondent from enforcing it against Ames.

Text, structure, and history point in the same direction. The Takings Clause specifies a right to just compensation but not the procedural mechanism for seeking judicial relief. The Constitution entrusts Congress, not the judiciary, with overseeing the public fisc and enforcing constitutional obligations against states. And historical practice confirms that the Takings Clause does not contain a cause of action. So the court below “implied” one. JA-8. A single reason not to is

enough to foreclose this path. Here, the separation of powers, federalism, and the availability of alternative remedies each preclude reviving this disfavored judicial activity.

Even assuming the existence of a Fifth Amendment cause of action, state sovereign immunity defeats respondent's claim. There is no Takings Clause carveout to sovereign immunity. Under this Court's precedent, a state may only be haled into court if Congress has abrogated its immunity or the state has waived it. Here, the record discloses no evidence of congressional abrogation. Nor did Ames waive its immunity from takings suits through ratifying the Constitution or by litigating this dispute. The State removed the case to federal court for resolution of the federal question while maintaining the immunity defense it could still have raised in state court.

The court below first inferred a direct cause of action under the Takings Clause, then decided—without mentioning abrogation or waiver—that state sovereign immunity did not block respondent's suit. Both conclusions are without precedent. Either supplies independent grounds to reverse.

ARGUMENT

I. RESPONDENT CANNOT SEEK RELIEF DIRECTLY UNDER THE TAKINGS CLAUSE.

The Takings Clause does not contain a cause of action. *See Me. Cmty. Health Options v. United States*, 590 U.S. 296, 323 n.12 (2020).

The court below “implie[d]” one. JA-8. Its judgment can only stand if the Court revives the “*ancien regime*” of implied causes of action. *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001). Because doing so in this case would arrogate legislative power and upset the balance between the dual sovereigns, this Court should reverse.

A. There is no cause of action in the Takings Clause.

Causes of action determine “who may judicially enforce” rights conferred by law. *Davis v. Passman*, 442 U.S. 228, 239 (1979). This Court has recognized that “[c]onstitutional rights do not typically come with a built-in cause of action to allow for private enforcement in courts.” *DeVillier*, 601 U.S. at 286 (citing *Egbert v. Boule*, 596 U.S. 482, 490–91 (2022)). The Takings Clause is no exception: It promises just compensation but is silent on how to effectuate that guarantee. The Constitution assigns that decision to Congress. Historical practice confirms that court-ordered compensation depends on legislative assent.

1. The text does not confer a cause of action.

The Takings Clause prohibits the government from taking private property for public use without providing “just compensation.” U.S. Const. amend. V; *Chicago B. & Q.R. Co. v. City of Chicago*, 166 U.S. 226, 235–42 (1897) (incorporating the Fifth Amendment against the states). While the clause specifies a “substantive right,” it says nothing about “the procedural vehicle by which a property owner may seek to vindicate that right” in court. *DeVillier*, 601 U.S. at 286; *see also Baker*

v. McCollan, 443 U.S. 137, 145 n.3 (1979) (distinguishing between “substantive rights” and “a method for vindicating federal rights elsewhere conferred”). Nine Justices recently affirmed that “the Constitution did not expressly create a right of action . . . when it mandated just compensation.” *Me. Cmty. Health Options*, 590 U.S. at 323 n.12 (citation modified); *id.* at 334 n.3 (Alito, J., dissenting); *see also Hooe v. United States*, 218 U.S. 322, 335 (1910) (rejecting the “unsound” argument that a takings claim could rest “exclusively on the Constitution”). It is up to Congress to provide relief. *See United States v. Bormes*, 568 U.S. 6, 12 (2012) (Congress had to “suppl[y] the missing ingredient” for monetary claims to be “judicially enforceable” against the United States).

In recognizing a direct cause of action, the court of appeals offered three justifications based on “text.” JA-6–8. Each is unpersuasive.

First, the Takings Clause’s “self-executing” nature does not bear on a litigant’s ability to enforce the right in court. *Contra* JA-7–8. This Court has described the first eight amendments as “self-executing” without identifying causes of action in their text. *City of Boerne v. Flores*, 521 U.S. 507, 524 (1997); *cf. Medellín v. Texas*, 552 U.S. 491, 606 n.3 (2008) (noting that “even when treaties are self-executing,” they “do not . . . provide for a private cause of action” (citation modified)). When *Knick v. Township of Scott* called the Takings Clause “self-executing,”

the Court could not have meant that it supplied its own cause of action—there, the claim was brought “under 42 U.S.C. § 1983.” 588 U.S. 180, 187 (2019); *see also First Eng. Evangelical Lutheran Church of Glendale v. Los Angeles Cnty.*, 482 U.S. 304, 316 (1987) (“self-executing” right to compensation effectuated through inverse condemnation claim).

To the contrary, *Knick* recognized that property owners historically *lacked* a cause of action to sue in court. *See* 588 U.S. at 199–201; *see also TrinCo Inv. Co. v. United States*, 140 Fed. Cl. 530, 534 (2018) (rejecting argument that “the designation of the takings clause as ‘self-executing’ means that the Constitution gives citizens the right to sue”). All “self-executing” means is that “a property owner has a Fifth Amendment entitlement to compensation as soon as the government takes his property without paying for it.” *Knick*, 588 U.S. at 187.

Second, the provision’s remedial character does not create a cause of action. *Contra* JA-7. “[T]he question whether a litigant has a ‘cause of action’ is analytically distinct [from] the question of what relief, if any, a litigant may be entitled to receive.” *Davis*, 442 U.S. at 239; *see also Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 69 (1992) (differentiating between “a cause of action and the relief afforded under it”). Early state court decisions underscore this distinction. *Cf. District of Columbia v. Heller*, 554 U.S. 570, 600–01 (2008) (looking to “analogous arms-bearing rights in state constitutions” in interpreting

the Second Amendment). Like the Takings Clause, New York’s Constitution “provided that private property should not be taken for public uses without just compensation[] and *without prescribing any mode* in which the amount of compensation should be ascertained.” *Beekman v. Saratoga & Schenectady R.R. Co.*, 3 Paige Ch. 45, 75 (N.Y. Ch. 1831) (emphasis added). The natural inference was that “the framers . . . intended” for takings claims to be resolved however “the legislature, in their discretion, might deem best.” *Id.* That logic applies here: A cause of action does not necessarily follow a remedy. Consistent with that understanding, this Court has recognized that there is “no constitutional right to a *judicial* remedy” for takings. *Williams v. United States*, 289 U.S. 553, 580–81 (1933) (emphasis added).

Last, the court below analogized to the Suspension Clause to argue that since both provisions guarantee a remedy, they must each include a cause of action. *See* JA-10 (describing the writ of *habeas corpus* as the “only other constitutional amendment [sic] to provide an express remedy”). But unlike just compensation, “the Great Writ’s central feature is judicial power.” Lee Kovarsky, *A Constitutional History of Habeas Power*, 99 Va. L. Rev. 753, 754 (2013). At common law, courts used their *habeas* authority to “adjudicate the lawfulness of custody, and to fashion appropriate relief.” *Id.* at 759 (discussing how the *habeas* power “subdivides into at least four different types of judicial

authority”). The Constitution thus “secures the preexisting writ of *habeas corpus*”—an inherently judicial instrument. *Fulton*, 148 F.4th at 1271 (Pryor, C.J., dissenting).

Moreover, the Founders placed special weight on the writ of *habeas corpus*. See 3 William Blackstone, Commentaries 129 (describing it as “the most celebrated writ in the English law”). During the ratification debates, some commentators, including Madison and Jefferson, believed it was so essential to securing political liberties that they offered alternative language “protecting the writ of habeas corpus as inviolate.” Amanda L. Tyler, *Is Suspension a Political Question?*, 59 Stan. L. Rev. 333, 352–53 (2006). The Suspension Clause was remarkable not because it maintained the possibility of judicial enforcement but because it allowed Congress to suspend the writ at all. See *id.* Unlike with *habeas corpus*, the Constitution does not enshrine a writ to secure just compensation.

Since the text of the Takings Clause does not confer a private cause of action, this Court need not “search for its meaning beyond the instrument.” *Lake Cnty. v. Rollins*, 130 U.S. 662, 670 (1889). If any doubt remains, however, the Constitution’s design and longstanding practice affirm that litigants cannot bring just compensation suits directly under the Takings Clause.

2. The Constitution assigns Congress the power to decide just compensation claims.

Read as a whole, the Constitution entrusts Congress, not the courts, with resolving takings claims. Just compensation requires payment from the public fisc, and at the founding “[i]t was uncontroversial that the powers to raise and disburse public money would reside in the Legislative Branch.” *Consumer Fin. Prot. Bureau v. Cmty. Fin. Servs. Ass’n of Am., Ltd.*, 601 U.S. 416, 431 (2024); *see also* Nicholas Quinn Rosenkranz, *The Objects of the Constitution*, 63 Stan. L. Rev. 1005, 1046 (2011) (“[T]he Takings Clause . . . is essentially a separation of powers provision.”). This constitutional design forecloses a standalone cause of action for takings.

Of Congress’s rights and duties, “there is perhaps none so important as the control which it constitutionally possesses over the public purse.” 19 Annals of Cong. 1330 (1809) (remarks of Rep. J. Randolph). The Appropriations Clause prohibits money from being “drawn from the Treasury, but in Consequence of Appropriations made by Law.” U.S. Const. art. I, § 9, cl. 7. It supplies “an explicit rule of decision” requiring that “any claim for money from the Federal Treasury” be “authorized by a statute.” *OPM v. Richmond*, 496 U.S. 414, 424–25 (1990). The Taxing and Spending Clause reinforces Congress’s control over the treasury by making it responsible for satisfying the nation’s debts. *See* U.S. Const. art. I, § 8, cl. 1. Because a just

compensation suit against the federal government is a money claim against the United States, the task of resolving it “belongs primarily to Congress as an incident of its power to pay the [nation’s] debts.” *Ex parte Bakelite Corp.*, 279 U.S. 438, 452 (1929).

Article III augments Congress’s control by granting it the exclusive authority to create and define the purview of the lower federal courts. *See* U.S. Const. art. III, § 1; *Kline v. Burke Constr. Co.*, 260 U.S. 226, 234 (1922) (the lower federal courts “derive[] [their] jurisdiction wholly from the authority of Congress”). For instance, when federal courts heard takings-related claims based on state common law torts, their ability to do so depended on congressional authorization. “Congress did not leave federal courts free to discern the existence of causes of action,” but rather enacted legislation directing them to apply state forms of action. Anthony J. Bellia Jr. & Bradford R. Clark, *The Original Source of the Cause of Action in Federal Courts: The Example of the Alien Tort Statute*, 101 U. Va. L. Rev. 609, 628 (2015).

The Framers thus designed a constitutional scheme in which Congress decided claims for payment and delineated the issues cognizable in federal court. This choice was particularly significant because in 1789, the fledgling republic was deeply in debt. *See* John Ferling, *A Leap in the Dark: The Struggle to Create the American Republic* 315 (2003). Against this backdrop, “[i]t would be odd indeed,”

JA-7, for the Framers to have set up a judicial mechanism for extracting money from the new nation that bypassed Congress entirely. *Cf. United States v. Idaho*, 508 U.S. 1, 8–9 (1993) (requiring clear evidence of intent to allow “monetary exactions from the United States”).

The Fourteenth Amendment fortified this allocation of powers. Section Five authorized Congress “to enforce” Section One’s guarantees by “appropriate legislation” against the states. U.S. Const. amend. XIV, § 5. This meant the Fourteenth Amendment required “legislation . . . to make [it] fully effective.” *Ex parte Virginia*, 100 U.S. 339, 345 (1879). It did not extend “the *judicial power*” of the federal government to enforce the prohibitions contained in Section One. *Id.* If “just after the Fourteenth Amendment was ratified” a state had enacted a law proscribed by Section One, a citizen “would have had no means of asserting his constitutional right to be free of it.” *Tennessee v. Lane*, 541 U.S. 509, 559 (2004) (Scalia, J., dissenting). Congress soon exercised its Section Five powers by enacting Section 1983, which created “a federal forum to remedy deprivations” of constitutional rights. *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 66 (1989); *see* 42 U.S.C. § 1983. It chose to cover municipalities but exempt states. *Will*, 491 U.S. at 62, 70; *see also* Cong. Globe 42d Cong., 1st Sess. App. 85 (1871) (Representative Bingham explaining that Section 1983 would address *cities* taking private property for public use without just compensation). This Court

should not undermine the “design of the Fourteenth Amendment”—so central to “maintaining the traditional separation of powers between Congress and the Judiciary”—by fashioning a cause of action against the states. *City of Boerne*, 521 U.S. at 523–24.

3. History reaffirms that there is no constitutional right to judicial enforcement of takings suits.

At the founding and for nearly a century thereafter, “[t]here were no general causes of action through which plaintiffs could obtain compensation for property taken.” *Knick*, 588 U.S. at 199. Instead, Congress exclusively addressed takings claims against the United States. When it eventually delegated its authority to review takings claims, Congress still did not countenance a standalone cause of action in the Fifth Amendment. The “contemporaneous and subsequent practical construction” of the Takings Clause demonstrates that enforcement of the just compensation right relies on legislative authorization. *McPherson v. Blacker*, 146 U.S. 1, 27 (1892).

- a. The early rule was that Congress resolved just compensation claims.*

Before the passage of the Tucker Act in 1887, “Congress retained sole responsibility for paying takings claims against the federal government.” William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Colum. L. Rev. 782, 887 (1995). Aggrieved property owners could only obtain relief by petitioning Congress for compensation through private bills. *Richmond*, 496 U.S. at

430–31. These bills occupied a central place in the work of early Congresses: By 1832, Fridays and Saturdays were fully devoted to “the consideration of private business.” 8 *Memoirs of John Quincy Adams* 479 (Charles Francis Adams ed., 1876). If there were “any uncertainty about” whether the Takings Clause created a judicial remedy, “early practice liquidated it.” *Haaland v. Brackeen*, 599 U.S. 255, 324 (2023) (Gorsuch, J., concurring).

The First Congress “was not willing to accept a system for the independent judicial determination of claims” because it understood Article I as a “directive to retain control over public expenditures.” 2 Wilson Cowen et al., *The United States Court of Claims: A History* 5 (1978); *e.g.*, 1 *Annals of Cong.* 635–36 (1789). For decades, proposals that attempted to loosen congressional control over appropriations “were invariably lost or ignored.” William M. Wiecek, *The Origin of the United States Court of Claims*, 20 *Admin. L. Rev.* 387, 393–94 (1968). In 1848, the legislature again refused to delegate the task to the judiciary because claims against the federal government had to be “addressed to the *discretion* of Congress.” H.R. Rep. No. 498, 30th Cong., 1st Sess. 7 (1848). As “courts [were] closed against enforcing the payment of claims due from the United States,” Congress had to establish “other suitable tribunals” to accommodate the heavy burden of private bills. H.R. Rep. No. 441, 29th Cong., 1st Sess. 8 (1846).

In 1855, it landed on the Court of Claims. At first, the court functioned as “merely an auditing board” without power to issue final judgments. *Langford v. United States*, 101 U.S. 341, 344 (1879). Even after Congress passed a statute giving the Court of Claims final judgment authority, *see* Act of March 3, 1863, ch. 92, § 5, 12 Stat. 766, takings claims lay outside its jurisdiction because “Congress ha[d] made no provision by any general law for ascertaining and paying [] just compensation,” *Langford*, 101 U.S. at 343. As a result, “[m]ost property owners” seeking just compensation were still “left to petition Congress for private relief.” *Cowen et al.*, *supra*, at 45. Since “Congress was neither compelled to act, nor to act favorably,” plaintiffs faced “the misfortune of holding a legal right for which there was no enforceable legal remedy.” *Id.*

To the extent federal courts heard takings-related cases during this period, they were common law suits against individual officers.¹ *See Knick*, 588 U.S. at 199 (describing the practice of “bring[ing] a common law trespass action against the responsible corporation or government official”); *see also, e.g., Mitchell v. Harmony*, 54 U.S. (13 How.) 115, 128,

¹ Some state courts recognized a cause of action under state Takings Clause analogues. *See Knick*, 588 U.S. at 200. But a state court’s ability to imply a cause of action does not bear on a federal court’s authority to do so. Common law courts might be at liberty to create causes of action. Federal tribunals are not. *See Sandoval*, 532 U.S. at 287; *see also infra* Section I.B.1.

137 (1852) (trespass). Here, too, judicial enforcement depended on legislative authorization. Through the Process Acts of 1789 and 1792, Congress “instructed inferior federal courts adjudicating common law suits to borrow the forms and modes of proceeding then in use by the states in which they sat.” Bellia & Clark, *supra*, at 613.

The constitutionality of a government taking arose only indirectly in assessing if the officer had been permitted to act. *See Knick*, 588 U.S. at 199 (whether a statute provided for just compensation determined officer’s affirmative defense). Far from revealing a direct cause of action under the Fifth Amendment, these officer suits reflected the Framers’ belief that individual abuses of power would be protected against by “old common-law actions.” *Buchanan v. Barr*, 71 F.4th 1003, 1014 (D.C. Cir. 2023) (Walker, J., concurring).

b. The Tucker Act regime maintains congressional primacy over takings claims.

It was not until Congress passed the Tucker Act in 1887 that the Court of Claims could hear takings suits against the United States. *See* 28 U.S.C. § 1491(a)(1) (expanding court’s jurisdiction to actions “founded [] upon the Constitution”). The Tucker Act provided the “jurisdictional grant” and “immunity waiver” necessary for the Fifth Amendment’s just compensation mandate to be cognizable in the Court of Claims. *Bormes*, 568 U.S. at 12.

Neither the Takings Clause nor the Tucker Act independently supplies a cause of action for just compensation. Tucker Act suits must be based on a substantive source of law that “imposes an obligation but *does not provide the elements of a cause of action.*” *Id.* at 16 (emphasis added). It was the combination of the Takings Clause’s substantive right and the Tucker Act’s procedural vehicle that enabled takings lawsuits in the Court of Claims. That remains true for the court’s successor, the Court of Federal Claims.

The tribunal Congress established to hear suits for compensation exercises “no part of the judicial power vested in the constitutional courts by the third article.” *Williams*, 289 U.S. at 580–81. It provides for no jury, *see* 28 U.S.C. § 2402, and limited equitable relief, *see Bobula v. U.S. Dep’t of Just.*, 970 F.2d 854, 859 (Fed. Cir. 1992). When district courts hear takings suits under the “Little Tucker Act,” they share these features. *See* 28 U.S.C. § 1346(a)(2) (concurrent district court jurisdiction over monetary claims against the United States “not exceeding \$10,000”); *United States v. Sherwood*, 312 U.S. 584, 591 (1941) (Little Tucker Act “did no more than authorize the District Court to sit as a court of claims”).

Congress thus designed a system lacking many of the hallmarks of judicial power. The Court has upheld it as the exclusive regime for claims against the United States—except when Congress itself has

displaced it. *See E. Enters. V. Apfel*, 524 U.S. 498, 520 (1998) (“a claim for just compensation under the Takings Clause must be brought to the Court of Federal Claims in the first instance, unless Congress has withdrawn the Tucker Act grant of jurisdiction”). This Court has little reason to wade into the thicket of questions raised by allowing litigants to sidestep the Tucker Act and go straight to federal court under a constitutional cause of action. *See* 28 U.S.C. § 1331 (giving district courts “original jurisdiction of all civil actions arising under the Constitution”). History confirms what the Constitution’s text and structure make clear: There is no standalone cause of action for just compensation.

B. This Court should not imply a cause of action under the Takings Clause.

Because the Takings Clause does not confer an express cause of action, respondent’s claim can only survive if a court implies one. But this Court is “long past the heady days in which [it] assumed common-law powers to create causes of action.” *Egbert*, 596 U.S. at 491 (citation modified). It has all but foreclosed a return to that bygone era. *See, e.g., Jesner v. Arab Bank, PLC*, 584 U.S. 241, 283 (2018) (Gorsuch, J., concurring) (a constitutional provision that “creates no new causes of action ... creates no new causes of action”). Yet the court below implied a cause of action anyway, JA-8, at the risk of “plac[ing] great stress on the separation of powers,” *Nestlé USA, Inc. v. Doe*, 593 U.S. 628, 636 (2021).

1. The Court has effectively shut the door on implying constitutional causes of action.

Only three times has this Court implied a cause of action under the Constitution. *See Ziglar v. Abbasi*, 582 U.S. 120, 131 (2017) (describing the doctrine of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971)). It has refused the last twelve requests to extend *Bivens*. *See Egbert*, 596 U.S. at 486 (collecting cases); *Goldey v. Fields*, 606 U.S. 942, 942 (2025) (per curiam) (latest refusal). Reflecting on its half-century old precedents, the Court has “indicated that if [it] were called to decide *Bivens* today, [it] would decline to discover any implied causes of action in the Constitution.” *Egbert*, 596 U.S. at 502.

Bivens’s logic rested on an anachronistic understanding of the power of federal courts. There, the Court assumed that it “may use any available remedy to make good the wrong done.” *Bivens*, 403 U.S. at 396 (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946)). But it has since forbidden equating Article III tribunals with “common-law court[s]” that maintain a “degree of lawmaking authority.” *Hernández v. Mesa*, 589 U.S. 93, 100 (2020). While federal judges once had this option, those days are long since over. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (“There is no federal general common law.”).

Because “lawmaking involves balancing interests and often demands compromise,” implying a cause of action does not effectuate the

goals of Congress—it “arrogat[es] legislative power.” *Hernández*, 589 U.S. at 100. A federal court’s judgment that implying a cause of action would “further” the purpose of a law or constitutional provision neglects the fact that “no law pursues its purposes at all costs.” *Id.* (citation modified). The Court has therefore abandoned this “*ancien regime*” in the statutory field. *Sandoval*, 532 U.S. at 287. Implied constitutional causes of action are likelier still to run afoul of the separation of powers in that they are “congressionally unalterable.” *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 325 (2015).

The modern regime “appreciate[s] more fully the tension between judicially created causes of action and the Constitution’s separation of legislative and judicial power.” *Egbert*, 596 U.S. at 491 (citation modified). Because “[a]t bottom, creating a cause of action is a legislative endeavor,” *id.*, respect for the separation of powers requires courts not to imply causes of action “whenever there is even a single sound reason to defer to Congress,” *Nestlé*, 593 U.S. at 635. The Court has yet to “create an exhaustive list of factors that may provide a reason not to” imply a cause of action. *Hernández*, 589 U.S. at 102 (citation modified). But it has identified a host of them. *See, e.g., id.* (“risk of interfering with the authority of the other branches”); *Egbert*, 596 U.S. at 493 (potential for systemic impact); *Ziglar*, 582 U.S. at 142 (risk “official[s] [would] second-guess difficult but necessary decisions”); *Minnecci v. Pollard*, 565

U.S. 118, 125 (2012) (alternative remedies). This case raises many such “warning flags.” *Hernández*, 589 U.S. at 103.

2. The separation of powers forecloses implying a cause of action.

Since implying causes of action comes dangerously close to violating the separation of powers, “*any* rational reason (even one)” to prefer Congress’s expertise precludes doing so. *Egbert*, 596 U.S. at 496. Here, reading in a cause of action would contravene the Constitution’s allocation of the power to resolve takings claims to Congress, *see supra* Section I.A.2, and usurp its task of delimiting causes of action. The Takings Clause specifies a remedy—just compensation—but provides no answers to the litany of downstream questions better suited for legislative resolution. It is unclear, for example, whether Section 1983’s municipal liability rule would apply to a Takings Clause cause of action. *Compare Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 712 (1978) (Powell, J., concurring) (counseling against implying a cause of action that “would not be subject to the limitations contained in § 1983” (citation modified)), *with Fulton*, 148 F.4th at 1256 (majority opinion) (permitting plaintiffs who “can’t establish . . . an official policy or custom” under Section 1983 to proceed under a constitutional cause of action for takings).

Nor is it evident what a Takings Clause statute of limitations would be. Courts could default to the most analogous state statute of

limitations, as this Court instructs for Section 1983 and circuit courts have assumed for *Bivens*.² See *Owens v. Okure*, 488 U.S. 235, 236 (1989) (Section 1983); *Sanchez v. United States*, 49 F.3d 1329, 1330 (8th Cir. 1995) (listing *Bivens* cases). This would embrace a state-level patchwork at the expense of predictability and fairness. See *Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 380 (2004) (recounting how “uncertainty” arising from 42 U.S. § 1981’s analogous state statute rule impelled Congress to pass a “uniform federal statute of limitations”). Because the most analogous state statute of limitations is not always obvious, this Court has had to repeatedly clarify its own guidance. See, e.g., *Owens*, 488 U.S. at 249–50 (debating two different state personal injury statutes of limitations for Section 1983).

An even wider range of statutes of limitations could apply to takings claims. See, e.g., *DW Aina Le’a Dev., LLC v. State Land Use Comm’n*, 477 P.3d 836, 845 (Haw. 2020) (considering personal injury, adverse possession, and catchall statutes). Sometimes, courts “assume that Congress intends by its silence that we borrow state law.” *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 147 (1987).

² Or the Court could create a uniform statute of limitations, at the cost of state-level experimentation and the separation of powers. See, e.g., *Bd. of Regents of Univ. of State of N.Y. v. Tomanio*, 446 U.S. 478, 491–92 (1980) (refusing to apply “ad hoc federal” statute of limitations rule); *Wilson v. Garcia*, 471 U.S. 261, 284 (1985) (O’Connor, J., dissenting) (statutes of limitations reflect legislative “evaluation”).

But here, a limitations-borrowing model could not be justified as a best guess of congressional intent, since “Congress did not create the right of action in the first place.” *Short v. Belleville Shoe Mfg. Co.*, 908 F.2d 1385, 1387 (7th Cir. 1990) (Easterbrook, J.).

The Court would also have to determine the class of defendants covered by the cause of action. The Ames Circuit assumed the cause of action would reach states. *See* JA-6. Yet Congress intentionally exempted states from Section 1983, then amended the statute twice without extending it to include them. *See* Pub. L. No. 96-170, 93 Stat. 1284 (1979); Pub. L. No. 104-317, § 309, 110 Stat. 3847, 3853 (1996). The most recent amendment came after the *Will* Court confirmed that Section 1983 “does not provide a federal forum for litigants who seek a remedy against a State.” 491 U.S. at 66. Any “indications that congressional inaction has not been inadvertent” compel “judicial deference.” *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988) (declining to imply a cause of action on this basis).

3. Respect for federalism reinforces this conclusion.

“Federalism was our Nation’s own discovery.” *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring). While all implied causes of action threaten the separation of powers between Congress and the Judiciary, this case goes further. Unlike *Bivens*, which crafted a cause of action to be used against federal officers, a cause of action for takings could run against the states. *See* JA-10.

A constitutional cause of action would open federal courthouse doors nationwide to a deluge of takings claims, threatening the diverse systems states have developed for resolving claims for just compensation. *See, e.g.*, New York Court of Claims Act, art. 2, § 9(2) (granting court of claims jurisdiction over takings suits). In response to any purported taking, litigants could bypass state tribunals and go right to Article III courts. But “[f]ederal courts are not boards of zoning appeals.” *River Park, Inc. v. City of Highland Park*, 23 F.3d 164, 164 (7th Cir. 1994) (Easterbrook, J.) (stressing that state tribunals are better positioned to adjudicate these disputes). Any cause of action under the Takings Clause would sweep in regulatory takings too. To make matters worse, this system would deny states—and states alone—the sovereign’s prerogative to resolve monetary claims in their own courts. *See* 28 U.S.C. § 171(b)–172(a) (Court of Federal Claims hears claims against the United States); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65 (1978) (tribal courts hear claims involving the tribe).

Finally, an implied cause of action would cut into the states’ traditional police powers. The regulation of land use is an area of “quintessential state and local” control. *Rapanos v. United States*, 547 U.S. 715, 738 (2006) (plurality opinion). And states need “great leeway” to “adopt[] summary procedures to protect public health and safety,” *Mackey v. Montrym*, 443 U.S. 1, 17 (1979), especially during

emergencies, *see* JA-22.³ Requiring “cause-of-action conformity may discourage state development of different responses to government-inflicted harms.” Ann Woolhandler & Michael G. Collins, *State Jurisdictional Independence and Federal Supremacy*, 72 Fla. L. Rev. 73, 120 (2020); *accord New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory.”).

4. Alternative remedies exist.

While respondent chose to file directly under the Fifth Amendment, he had several paths to court. This is “reason enough” to refuse to imply a cause of action. *Egbert*, 596 U.S. at 493. Respondent could have brought a Section 1983 suit against an individual state officer. *See, e.g., Asociación De Suscripción Conjunta Del Seguro De Responsabilidad Obligatorio v. Flores Galarza*, 484 F.3d 1, 26 (1st Cir. 2007) (permitting takings claim against state treasurer under Section 1983). He could have filed a trespass or conversion claim, *see, e.g., Ossman v. Mountain States Tel. & Tel. Co.*, 520 P.2d 738, 740 (Colo.

³ This Court has recognized a necessity exception to the Takings Clause. *See United States v. Caltex*, 344 U.S. 149, 154 (1952). Some courts have applied this exception to alleged takings during COVID-19. *See, e.g., Friends of Danny DeVito v. Wolf*, 227 A.3d 872, 895–96 (Pa. 2020). Requiring a federal court to adjudicate whether the necessity doctrine applies mid-emergency could cause states to “second-guess difficult but necessary conditions” and chill emergency response. *Ziglar*, 582 U.S. at 142.

1974), or lobbied Ames for administrative or legislative relief, *see Cherokee Nation Bus., LLC v. Arkansas*, 2025 WL 2490061, at *9 (E.D. Ark. Aug. 28, 2025) (requiring plaintiffs “to make their case to the General Assembly” because state claims adjudicators could not approve payments above a certain threshold). If no legal remedies existed, respondent could have sought an injunction to block the director of the Ames State Hospital System from taking his facility. *See Ex parte Young*, 209 U.S. 123, 159–60 (1908); *Ziglar*, 582 U.S. at 148 (including injunctions as example of sufficient alternative remedy).

Existing remedies need not “provide complete relief” to preclude implying a cause of action. *Bush v. Lucas*, 462 U.S. 367, 388 (1983). After all, “the question whether a given remedy is adequate is a legislative determination,” and courts should not be in the business of “second-guess[ing]” Congress’s careful “calibration by superimposing” an implied constitutional cause of action. *Egbert*, 596 U.S. at 498. Even the complete absence of alternative remedies would not warrant judge-made relief. *See Schweiker*, 487 U.S. at 421–22. This is because the legislature’s “decision not to provide a judicial remedy does not compel [the Court] to step into its shoes.” *Hernández*, 589 U.S. at 113; *see also United States v. Stanley*, 483 U.S. 669, 683 (1987).⁴

⁴ Any cause of action must additionally be incorporated to affirm the judgment below. But “[t]he scope of an incorporated right and whether a right is incorporated at all are two different questions.” *Ramos v.*

The lower court’s decision is atextual, unmoored from history, and at odds with the Constitution’s design. For respondent’s suit to proceed, the Court would have to turn back forty-five years of precedent and imply a cause of action over the great weight of evidence that this job belongs to Congress. “No one disputes” that the government has an obligation to pay just compensation. *Trump v. CASA, Inc.*, 606 U.S. 831, 858 (2025). “But the Judiciary does not have unbridled authority to enforce this obligation—in fact, sometimes the law prohibits the Judiciary from doing so.” *Id.* (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)).

II. STATE SOVEREIGN IMMUNITY BARS RESPONDENT’S SUIT.

Even if the Takings Clause provides respondent with a cause of action, the Eleventh Amendment forecloses his claim. *See Larson v. Domestic & Foreign Com. Corp.*, 337 U.S. 682, 692–93 (1949) (cautioning against mistaking “the doctrine of sovereign immunity” for “the requirement that a plaintiff state a cause of action”).

Louisiana, 590 U.S. 83, 107 n.63 (2020). The cause of action need not travel with the right. *See Devillier v. State*, 63 F.4th 416, 421–22 (5th Cir. 2023) (Higginson, J., concurring from the denial of rehearing en banc) (arguing as much). As the Fourteenth Amendment expressly gave Congress “the power to ‘enforce . . . the provisions’ of the Amendment by creating private remedies against the States,” it would be anomalous for Section One’s Due Process Clause to itself incorporate a private cause of action. *United States v. Georgia*, 546 U.S. 151, 158 (2006) (alteration in original).

Sovereign immunity precludes private suits against a state. It was fundamental to the Framers' conception of dual sovereignty. It protects the states' dignity interests and treasuries. And it comes with an established constitutional exception, one that balances the protection of individual rights, federalism, and the separation of powers: Congress may abrogate a state's sovereign immunity by legislating under Section Five of the Fourteenth Amendment. No party claims that it has done so here, and Ames did not consent to respondent's suit. That should have ended the inquiry. Instead, the court below created a new, ad hoc exception to state sovereign immunity. *See* JA-9. The Constitution, our nation's history, and Supreme Court precedent demand reversal.

A. There is no Takings Clause exception to state sovereign immunity.

State sovereign immunity "exists whatever the character of the proceeding or the source of the right sought to be enforced" and "applies alike" to constitutional rights. *Lynch v. United States*, 292 U.S. 571, 582 (1934). It "bars a damages action against a State in federal court." *Kentucky v. Graham*, 473 U.S. 159, 169 (1985); *see also DeVillier*, 601 U.S. at 292 ("just compensation" requires a "damages . . . remedy"). History and precedent confirm that short of congressional abrogation, Ames may not be sued for just compensation in federal court without its consent. Circuit courts have lined up behind this conclusion. The court below stands alone in holding otherwise.

1. The essence of sovereignty is immunity from private damages suits.

States “entered the Union ‘with their sovereignty intact.’” *Fed. Mar. Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743, 751 (2002) (*FMC*) (quoting *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991)). “Integral” to that sovereignty was “immunity from private suits.” *Id.* at 751–52; see *The Federalist* No. 81, at 486 (C. Rossiter ed., 1961) (A. Hamilton) (“It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*.”). The understanding that a nonconsenting sovereign could not be sued was “universal in the States” when the Constitution was drafted and a *sine qua non* of ratification. *Alden v. Maine*, 527 U.S. 706, 715–16, 727 (1999).

When this Court subjected a state to a private party suit in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), it “precipitated an immediate furor and uproar.” *Franchise Tax Bd. of Cal. v. Hyatt*, 587 U.S. 230, 242–43 (2019) (citation modified). Congress swiftly responded by enacting the Eleventh Amendment. See *Alden*, 527 U.S. at 721. The Amendment proclaims that “[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” U.S. Const. amend. XI. Its enactment repudiated *Chisholm*’s ahistorical conclusion

and reaffirmed that the Constitution “preserve[d] the States’ traditional immunity from private suits.” *Alden*, 527 U.S. at 724.

The Court accordingly “underst[ands] the Eleventh Amendment to stand not so much for what it says, but for the presupposition of our constitutional structure which it confirms.” *Blatchford*, 501 U.S. at 779; *cf.* JA-10 (“it is a *Constitution* we are expounding” (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819))). It preserved state sovereign immunity from federal question suits in *Hans v. Louisiana*, 134 U.S. 1 (1890), and has since maintained the states’ immunity from all manner of private party suits. *See, e.g., Seminole Tribe v. Florida*, 517 U.S. 44, 54 n.7 (1996) (collecting cases).

State sovereign immunity serves two primary purposes. First, it “accord[s] States the dignity that is consistent with their status as sovereign entities.” *FMC*, 535 U.S. at 744. Private suits jeopardize that dignity no matter the basis of federal court jurisdiction. *See Idaho v. Coeur d’Alene Tribe*, 521 U.S. 261, 268 (1997). Second, it safeguards “the primeval sovereign right [of] immunity from levies against the government fisc.” *Alabama v. North Carolina*, 560 U.S. 330, 341 (2010). State governments must have the “ability to make [their] own decisions about the allocation of scarce resources.” *Lewis v. Clarke*, 581 U.S. 155, 167 (2017) (citation modified). Even “legitimate claim[s] for compensation” depend on “deliberation by the political process,

established by the citizens of the State, not by judicial decree mandated by the Federal Government and invoked by the private citizen.” *Alden*, 527 U.S. at 751. This is particularly true during a global pandemic. *See* JA-22; *cf.* Ernest A. Young, *Its Hour Come Round at Last? State Sovereign Immunity and the Great State Debt Crisis of the Early Twenty-First Century*, 35 Harv. J.L. & Pub. Pol’y 593, 594 (2012) (noting that both the Eleventh Amendment and *Hans* were products of state crises).

As a result, the Court has consistently refused to sanction awards that would come from state treasuries, including in cases that do not otherwise implicate sovereign immunity. *See, e.g., Edelman v. Jordan*, 415 U.S. 651, 666 (1974) (rejecting a claim for injunctive monetary relief in a suit against an officer for that reason). Actions for damages strike at the heart of a state’s sovereign prerogative to be free from suit. *See Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 620 (2002). Takings claims are no different.

2. Historical practice confirms that states retain immunity from takings claims in federal court.

This Court applies a presumption that the Constitution did not sanction proceedings against states that would have been “anomalous” to the Framers. *Hans*, 134 U.S. at 18. The presumption is especially strong for private damages suits—precisely “the type of proceedings from which the Framers would have thought the States possessed immunity.” *FMC*, 535 U.S. at 756; *see also id.* at 760. The Court should

“attribute great significance to the fact that States were not subject to private suits” for alleged takings “at the time of the founding or for many years thereafter.” *Id.* at 744.

Federalists and Antifederalists agreed that states were not compelled “to answer in a court of law, to the suit of an individual” under the Articles of Confederation. Brutus XIII, N.Y.J., Feb. 21, 1788, *reprinted in* 16 The Documentary History of the Ratification of the Constitution 172, 172 (John P. Kaminski & Gaspare J. Saladino eds., 1986). In some corners, ratification cast doubt on the states’ sovereign immunity. *See Chisholm*, 2 U.S. at 479. Many of *Chisholm*’s defenders maintained that the federal government was immune from suit while states had sacrificed their immunity in Philadelphia. *See, e.g., id.* at 425 (argument of Edmund Randolph, representing Chisholm). This profoundly misunderstood the Framers’ conception of dual sovereignty. *See* The Federalist No. 81, at 487 (A. Hamilton) (immunity “will remain with the States”); 3 Debates on the Federal Constitution 533 (2d ed. 1863) (“[i]t is not in the power of individuals to call any state into court” (quoting James Madison)); *id.* at 555 (“I hope no gentleman will think that a state will be called at the bar of the federal court” (quoting John Marshall)). And the Framers’ conception won out. *See* U.S. Const. amend. XI; *accord, e.g., Alden*, 527 U.S. 706.

The bar on private suits equally covered takings claims. In *Coolbaugh v. Commonwealth*, the Pennsylvania Supreme Court rejected a claim for compensation because “it was a settled principle, that no sovereign power was amenable to answer suits either in its own courts, or those of a foreign country, unless by its own consent.” 4 Yeates 493, 494 (Pa. 1808); *see also Black v. Rempublicam*, 1 Yeates 139, 142 (Pa. 1808) (court powerless to grant relief because the “remedy of the plaintiffs . . . is by application to the legislature”). Other state supreme courts agreed. Massachusetts’s high court explained that because “no action can be maintained against the public for damages,” an aggrieved property owner could only “maintain his action for possession, or [] trespass, against” government agents “who were instrumental in the act.” *Callender v. Marsh*, 1 Pick. 418, 437 (Mass. 1823); *see also President, etc. of Mich. State Bank v. Hastings*, 1 Doug. 225, 236 (Mich. 1844) (“while a state may sue, it cannot be sued in its own courts, unless, indeed, it consents”). The bottom line was that unless the state had instituted a statutory framework for payment, “the only mechanism for securing compensation from the government was through a private bill.” Thomas W. Merrill, *Anticipatory Remedies for Takings*, 128 Harv. L. Rev. 1630, 1645–46 (2015).

The states’ immunity from private suit endured. In the 1850s, it remained “an established principle of jurisprudence in all civilized

nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission.” *Beers v. State*, 61 U.S. 527, 529 (1857). It was therefore entirely natural that Illinois’s 1870 constitution contained both a just compensation clause supplying a private damages action and a provision absolutely immunizing the state from suit. See Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52 Vand. L. Rev. 57, 136–37 (1999) (“[t]he question of compensation . . . should be left to the Legislature, instead of twelve men,” based on the “principle . . . that the State should never be sued” (quoting 2 Debates and Proceedings of the Constitutional Convention of the State of Illinois 1580 (1870))).

Litigants only prevailed when courts held state agents *personally* liable for wrongful conduct at common law. See Joseph Story, Commentaries on Agency § 320 (5th ed. 1857); accord *Knick*, 588 U.S. at 199. Individual officers had to pay damages, but “the government itself [was] not responsible for the[ir] misfeasances, or wrongs.” Story, *supra*, at § 319; see also David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. Colo. L. Rev. 1, 17 (1972). The distinction between the state and its officers lives on through *Ex parte Young*, where the Court protects federal rights by allowing federal court officer suits so long as they “reflect the real interests of States” as

sovereigns. *Coeur d’Alene*, 521 U.S. at 280. Compare *Va. Off. for Prot. & Advoc. v. Stewart*, 563 U.S. 247, 255–56 (2011) (applying *Ex parte Young* when it would not “offend the distinctive interests protected by sovereign immunity”), with *Edelman*, 415 U.S. at 666 (rejecting injunction demanding monetary relief because it too closely “resemble[d] a money judgment payable out of the state treasury”). The Ames Circuit’s “novel” decision unsettles this balance. JA-11.

3. Supreme Court precedent shows that the Fifth Amendment does not displace the Eleventh.

This Court has guarded state sovereign immunity against private damages suits, no matter their constitutional foundation. *Hans* held as much with respect to the Contracts Clause. 134 U.S. at 3, 15. The same year, the Court rebuffed a claim against a state founded on the Fourteenth Amendment. *North Carolina v. Temple*, 134 U.S. 22, 26 (1890). And in *Hopkins v. Clemson Agricultural College*, it confirmed that a nonconsenting state could not be haled into federal court for a takings claim. 221 U.S. 636, 641 (1911). The lower courts had dismissed the action against a South Carolina state college because the state, “a necessary party,” had not consented to be sued. *Id.* The Supreme Court affirmed that while the college might be liable for actions furthering its private purposes, “the state, as a sovereign, is not subject to suit.” *Id.* at 644, 647.

None of the Court’s modern takings cases alter this conclusion. *Knick* involved a municipal defendant with no claim to sovereign immunity. See 588 U.S. at 185 (township); *Jinks v. Richland Cnty.*, 538 U.S. 456, 466 (2003) (municipalities not immune). And while the Court in *First English* rejected an argument from the United States (as *amicus*) referencing “principles of sovereign immunity,” 482 U.S. at 316 n.9, that footnote can’t bear much weight. *First English* began as a lawsuit filed against a county, making the Court’s allusion to immunity dicta at most. See *id.* at 307; accord, e.g., *Seven Up Pete Venture v. Schweitzer*, 523 F.3d 948, 954 n.6 (9th Cir. 2008) (dismissing *First English*’s mention of sovereign immunity as irrelevant).

“The rule that the United States may not be sued without its consent is all-embracing,” including for Fifth Amendment claims. *Lynch*, 292 U.S. at 579–81. Congress’s choice to waive the federal government’s immunity for takings claims in the Tucker Act was just that—a choice, not a constitutional mandate. It “retained power to withdraw the consent at any time.” *Id.* at 581. As with the United States, so too with the several states. “Dual sovereignty is a defining feature of our Nation’s constitutional blueprint,” *FMC*, 535 U.S. at 751, and this Court has long maintained that federal and state immunity questions “must depend upon the same principles,” *Fla. Dep’t of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 686 n.21 (1982) (quoting *Tindal v. Wesley*, 167 U.S. 204,

213 (1897)).⁵ Said another way, it is “impossible to find in the scheme of the Constitution a necessity that private remedies [against the states] be expanded . . . to include a remedy not available, for a similar infraction, against the United States.” *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 34 (1989) (Scalia, J., dissenting), *overruled by Seminole Tribe*, 517 U.S. 44 (1996). Our federalist system entitles states to at least the same measure of sovereign immunity as the federal government.

The Ames Circuit held that the Takings Clause had to trump state sovereign immunity for the Constitution, read as a whole, to have “meaning.” JA-9–10. But had the Eleventh Amendment provided that “nothing therein contained should prevent a state from being sued by its own citizens in cases arising under the constitution,” states would not have ratified it; supposing otherwise “is almost an absurdity on its face.” *Hans*, 134 U.S. at 15. Moreover, “[e]minent domain proceedings supply by far the largest number” of Takings Clause lawsuits, and they do not implicate state sovereign immunity. Merrill, *supra*, at 1637.

The court of appeals further reasoned that because preserving sovereign immunity against *habeas corpus* actions would be “absurd,” the same must be true for takings suits. JA-10. Yet *habeas* proceedings do not lie against the sovereign. *See Ex parte Young*, 209 U.S. at 168

⁵ The “plan of the Convention” cases are the sole exception and are not implicated here. *See infra* Section II.B.2.a.

(observing that “it has never been supposed there was any suit against the state by reason of serving the writ upon one of the officers of the state”); *United States ex rel. Elliot v. Hendricks*, 213 F.2d 922, 926 (3d Cir. 1954) (en banc) (“The discussion of *habeas corpus* in Blackstone shows clearly that author’s conception of the writ is not a suit against the crown.”). Nor do *habeas* actions risk a money damage judgment running against a state. *See Preiser v. Rodriguez*, 411 U.S. 475, 494 (1973). As with the existence of a direct cause of action, *see supra* Section I.A.1, the Constitution’s special protection for the Great Writ says nothing about whether the Takings Clause can override the Eleventh Amendment.

4. The Ames Circuit alone allows takings claims to override sovereign immunity.

Applying this Court’s precedent, every circuit besides Ames to consider the issue has held that the Eleventh Amendment bars takings suits against states in federal court. *See, e.g., Frein v. Pa. State Police*, 47 F.4th 247, 257 (3d Cir. 2022) (collecting cases). Some circuits have conjectured that under *Reich v. Collins*, 513 U.S. 106 (1994), states are immune in federal court so long as state courts remain open. In *Reich*, the Court indicated that state courts may be compelled to refund unconstitutional state taxes “notwithstanding” sovereign immunity, but that “the sovereign immunity States enjoy in federal court” remained in force. *Id.* at 110. Several circuits have analogized to *Reich*’s tax-specific

holding to conclude that the Eleventh Amendment bars takings claims against states in federal court only when state courts may hear such claims. *E.g.*, *Hutto v. S.C. Ret. Sys.*, 773 F.3d 536, 552 (4th Cir. 2014). But not a single one has applied *Reich* to displace state sovereign immunity from money damages in federal court, and some doubt that they ever could. *See, e.g.*, *Gerlach v. Rokita*, 95 F.4th 493, 499 n.3 (7th Cir. 2024), *cert. denied*, 145 S. Ct. 1044 (2025) (questioning whether “the unavailability of a state court remedy opens the doors of the federal courthouse to . . . payment of money compensation”).

And for good reason. Conditioning federal sovereign immunity on state court remedies would effectively require state courts “to assume jurisdiction that could not be vested in the federal courts”—exactly what *Alden* forbids. 527 U.S. at 753 (concluding that the Constitution equally safeguards states’ sovereign privilege to assert immunity in state and federal courts). Last Term, this Court cast further doubt on *Reich*’s scope by cabining it to “tax-specific jurisprudence and . . . the unique interests the taxation context involves.” *Off. of United States Tr. v. John Q. Hammons Fall 2006, LLC*, 602 U.S. 487, 503 (2024). The *John Q. Hammons* Court implored litigants not to “assert that the constitutional holding of the tax cases applies to any case involving monetary injury.” *Id.* (citation modified). In short, a rule linking state court capacity and federal court immunity should not travel beyond the tax context—

particularly when the Constitution does not compel a *judicial* compensation framework at all.⁶

Even if *Reich* sweeps beyond taxation, the record does not establish that Ames state courts are closed to just compensation suits. *See Gerlach*, 95 F.4th at 499 (test for openness is “whether state law recognizes a cause of action for a takings claim”). This Court has always respected “the right and duty of the States, within their own judiciaries, to interpret and to follow the Constitution.” *Coeur d’Alene*, 521 U.S. at 275. The court below summarily concluded that because inverse condemnation was not available, it had the authority to command relief. JA-9. But property owners may still avail themselves of common law tort actions that run against officers, including trespass and conversion. *See supra* Section I.B.4. Mandamus forces compensation in jurisdictions without an inverse condemnation cause of action. *See State ex rel. Shemo v. Mayfield Hts.*, 765 N.E.2d 345, 350 (Ohio 2002). State equal protection clauses can be construed to guarantee just compensation. *See Town of Apex v. Rubin*, 919 S.E.2d 111, 114 (N.C. 2025) (interpreting N.C. Const. art. I, § 19 to “only allow[] the taking of private property by eminent

⁶ In any event, the tax refund cases would dictate reversing and remanding to state court to craft appropriate relief. *See McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco, Dep’t of Bus. Regul. of Fla.*, 496 U.S. 18, 50–51 (1990) (leaving it “to the state court on remand” to ensure fulfillment of the state’s remedial “obligation through any form of relief”). Any constitutional defects in the state court’s rulings may be corrected by this Court on review. *See id.* at 29.

domain if . . . the landowner receives just compensation”). And should this Court resolve the first question presented by implying a constitutional cause of action for the first time in forty-five years, Ames’s courts will necessarily be open. Then nothing would preclude claimants from filing in state court—demanding dismissal of respondent’s lawsuit.⁷

B. Because Congress did not abrogate and Ames did not waive sovereign immunity, this suit cannot remain in federal court.

There are “only two circumstances in which an individual may sue a State.” *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 670 (1999). First, Congress may exercise its power under Section Five of the Fourteenth Amendment to permit private lawsuits. *See Fitzpatrick v. Bitzer*, 427 U.S. 445, 455–56 (1976). Second, a State may waive its sovereign immunity. *See Torres v. Tex. Dep’t of Pub. Safety*, 597 U.S. 580, 587 (2022) (“plan of the Convention” waiver); *Lapides*, 535 U.S. at 617–18 (state law and litigation conduct waiver). Neither Congress nor Ames allowed respondent’s action.

⁷ The Court could also reverse and remand with instructions to certify the question of state law remedies to the Ames Supreme Court. *See McKesson v. Doe*, 592 U.S. 1, 4 (2020) (per curiam) (vacating judgment below and remanding for certification of state law question because lower court’s “interpretation of state law [was] too uncertain a premise on which to address the question presented”); *see also* JA-9 (only discussing inverse condemnation). Certification avoids illusory constitutional conflicts and “helps build a cooperative judicial federalism.” *Expressions Hair Design v. Schneiderman*, 581 U.S. 37, 59 (2017) (Sotomayor, J., concurring in the judgment).

1. Congress did not abrogate state sovereign immunity from claims under the Takings Clause.

Before an individual may sue a nonconsenting state, Congress must enact “unequivocal statutory language abrogating the States’ immunity from the suit.” *Allen v. Cooper*, 589 U.S. 248, 255 (2020) (citation modified). It must do so under Section Five of the Fourteenth Amendment, which authorized abrogation by “alter[ing] the pre-existing balance between state and federal power achieved by Article III and the Eleventh Amendment.” *Seminole Tribe*, 517 U.S. at 65–66. The Amendment’s drafters understood that *Congress* would “correct unjust legislation of the States” through Section Five. Cong. Globe, 39th Cong., 1st Sess. 2459 (1866) (Congressman Stevens introducing Amendment in the House). Because Section Five “imposes upon Congress this power and duty,” it is “indispensable.” Cong. Globe, 39th Cong., 1st Sess. 2768 (1866) (Senator Howard introducing Amendment in the Senate).

No statute purports to erase Ames’s immunity from takings suits. Section 1983 intentionally declines to do so. *See Quern v. Jordan*, 440 U.S. 332, 342–43 (1979). Out of respect for “the Eleventh Amendment’s role as an essential component of our constitutional structure,” this Court has required nothing less than “unmistakably clear” abrogations of state sovereign immunity by Congress. *Dellmuth v. Muth*, 491 U.S. 223, 228 (1989) (citation modified). A clear congressional abrogation requirement recognizes that “[o]nly in Congress are the states

represented in a way that reasonably assures consideration of their institutional interests.” Laurence H. Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism*, 89 Harv. L. Rev. 682, 713 (1976); see also *Seminole Tribe*, 517 U.S. at 160 (Souter, J., dissenting) (“The imperative of legislative control grew directly out of the Framers’ revolutionary idea of popular sovereignty.”). Congress has chosen not to permit respondent’s suit in federal court.

2. Ames did not consent to suit.

Ames did not waive its sovereign immunity by ratifying the Constitution or litigating this dispute. There is no evidence of a “structural waiver . . . ‘in the plan of the Convention.’” *Torres*, 597 U.S. at 589 (quoting *PennEast Pipeline Co., LLC v. New Jersey*, 594 U.S. 482, 508 (2021)). And Ames did not waive its sovereign immunity in state court only to gain an unfair litigation advantage through removal. See *Lapides*, 535 U.S. at 617–18.

a. States did not consent to takings claims in the plan of the Convention.

Under limited circumstances, states are deemed to have waived their sovereign immunity when waiver was “inherent in the constitutional plan.” *Principality of Monaco v. Mississippi*, 292 U.S. 313, 329 (1934). The Constitution’s “formation of a more perfect Union” allows states to be sued by the federal government and sister states. *Id.*

at 328–29. And “where the Constitution in express terms granted an exclusive authority to the Union” and Congress then authorizes private suits pursuant to that power, states have yielded their immunity in favor of a uniform policy in the area of federal concern. *Torres*, 597 U.S. at 587 (citation modified); *see id.* at 588–90 (discussing Bankruptcy Clause, federal eminent domain power, and Congress’s power to raise armies).

There is no such argument for takings claims. States could hardly have waived their immunity from such suits by ratifying the Constitution when the Takings Clause was not incorporated until 1897. Compare *City of Chicago*, 166 U.S. at 241, with *Barron v. City of Baltimore*, 32 U.S. 243, 247–48 (1833). The Takings Clause does not confer an affirmative grant of federal power either—it was “intended solely as a limitation on the exercise of power by the government of the United States.” *Barron*, 32 U.S. at 250–51. And the Fourteenth Amendment does not constitute a structural waiver of its own accord. *See Ex parte Virginia*, 100 U.S. at 344 (“It is not said the *judicial* power of the general government shall extend . . . to declare void any action of a State in violation of the [Fourteenth Amendment’s] prohibitions.”). It would have been illogical for states to waive their immunity in ratifying the Fourteenth Amendment even as compensation from the federal government continued to require private Acts of Congress. *See supra*

Section I.A.3. Ames retains its heartland immunity from private suits under the constitutional plan.

b. Ames has not waived its immunity through litigating this case.

Ames did not waive its sovereign immunity by removing this case to federal court. Sovereign immunity is “a personal privilege which [a state] may waive at pleasure.” *Clark v. Barnard*, 108 U.S. 436, 447 (1883). It encompasses the distinct rights to choose *whether* and *where* to be sued. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99 & n.9 (1984) (explaining that these questions often have different answers). Courts “indulge every reasonable presumption against waiver of fundamental constitutional rights,” including state sovereign immunity. *Coll. Sav. Bank*, 527 U.S. at 682 (citation modified) (repudiating the “constructive waiver” doctrine).

This Court has long held that a state waives immunity when it voluntarily enters a suit in federal court. *See, e.g., Clark*, 108 U.S. at 447–48. It confronted a different scenario in *Lapides*. There, Georgia was *involuntarily* subjected to a suit in state court alleging a federal claim from which it was immune and three state law claims. *Lapides*, 535 U.S. at 617. The legislature had waived state court sovereign immunity for the state law claims. *See* Ga. Code Ann. § 50-21-23. Georgia removed the case to federal court, then asserted sovereign immunity. *Lapides*, 535 U.S. at 616. The Court held that Georgia’s

removal of “state-law claims, in respect to which the State has explicitly waived immunity from state-court proceedings,” waived sovereign immunity in federal court. *Id.* at 617. Allowing Georgia to assert an immunity defense it had given up in state court would promote the “selective use of ‘immunity’ to achieve litigation advantages” and produce “inconsistency, anomaly, and unfairness.” *Id.* at 620. The Court stressed that *Lapides*’s holding was “limited” to its circumstances. *Id.* at 618 (“Nor need we address the scope of waiver by removal in a situation where the State’s underlying sovereign immunity from suit has not been waived or abrogated in state court.”).

There are artificial similarities. Like Georgia, Ames removed to federal court, JA-4, and asserted sovereign immunity, JA-12. But unlike Georgia, Ames never waived its immunity in state court. It made the choice between federal and state court familiar to any party litigating a federal issue, but has not yet been granted the sovereign’s prerogative to assert the privilege not to be sued at all. Because Ames “has maintained a consistent, across-the-board position regarding its immunity,” the State has not waived it in federal court. *Bergemann v. R.I. Dep’t of Env’t Mgmt.*, 665 F.3d 336, 343 (1st Cir. 2011).

Extending *Lapides* to this scenario would contort its reasoning. Any defendant who removes takes the position of the plaintiff on the issue of forum selection but otherwise remains an involuntary

defendant. That's why "[a] party who removes an action from a state to a federal court does not thereby waive any of his or her Federal Rule 12(b) defenses or objections." 5C Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1395 (3d ed. 2019); *see also Blatchford*, 501 U.S. at 786 n.4 ("The fact that Congress grants *jurisdiction* to hear a claim does not suffice to show Congress has abrogated all *defenses* to that claim."). Whether immunity operates like personal jurisdiction, *see Wis. Dep't of Corrs. v. Schacht*, 524 U.S. 381, 394–95 (1998) (Kennedy, J., concurring), or as a substantive defense, *see id.* at 389 (majority opinion), it should not be waived by removal, *see Fed. R. Civ. P.* 12(b)(2) (personal jurisdiction), (6) (failure to state a claim). A sovereign shorn of immunity would be relegated to second-class status.

Equating removal with waiver forces a state defending federal claims in state court to relinquish its right to assert immunity simply to access a federal forum. But the right of removal is substantial given "the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues." *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312 (2005). Private parties would be empowered to force states into a choice between this right and their constitutional right to immunity, all in the supposed interest of fairness. *See Lapides*, 535 U.S. at 620.

Circuit courts have rightly followed the Court’s edict to read *Lapides* narrowly. Four circuits, adopting *Lapides*’s reasoning, apply an unfair advantage rule that bars states from removing and then asserting a sovereign immunity defense previously unavailable in state court. *See, e.g., Bergemann*, 665 F.3d at 341–42. Five others distinguish between immunity from suit in a federal forum, which is relinquished when the state removes, and immunity from liability, which is not. *See, e.g., Beaulieu v. Vermont*, 807 F.3d 478, 486 (2d Cir. 2015). Three circuits initially appeared to embrace capacious readings of *Lapides* treating all removals as waiver. *See Bd. of Regents of Univ. of Wis. Sys. v. Phoenix Int’l Software, Inc.*, 653 F.3d 448, 463–64 (7th Cir. 2011); *Embury v. King*, 361 F.3d 562, 565–66 (9th Cir. 2004); *Estes v. Wyo. Dep’t of Transp.*, 302 F.3d 1200, 1204 (10th Cir. 2002). But they have since clarified their positions. *See Hester v. Ind. State Dep’t of Health*, 726 F.3d 942, 950–51 (7th Cir. 2013) (narrowing prior precedent and leaving question open); *Redgrave v. Ducey*, 953 F.3d 1123, 1125 (9th Cir. 2020) (leaving question open); *Trant v. Oklahoma*, 754 F.3d 1158, 1172–73 (10th Cir. 2014) (noting that “a state may waive its immunity from suit in a federal forum while retaining its immunity from liability”). Every circuit to decide the issue agrees that a removal as per se waiver rule—the only one broad enough to encompass *Ames* here—would be inconsistent, anomalous, and unfair.

The decision below threatens to unsettle generations of precedent. The Ames Circuit must have understood this, for it did not cite any of this Court’s principal sovereign immunity cases, let alone engage with the interests that bar money suits against states. *See* JA-8–10. Respondent’s suit cannot proceed in federal court.

CONCLUSION

This Court should reverse the judgment of the court of appeals and remand with instructions to dismiss.

October 14, 2025

Respectfully submitted,

The William Thaddeus Coleman Jr. Memorial Team

/s/ Lev Cohen

/s/ Justin Curl

/s/ Sophie Li

/s/ Sophia Loughlin

/s/ G. Terrell Seabrooks

/s/ Sadie Statman

APPENDIX

U.S. Const. art. I, § 8, cl. 1

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.

U.S. Const. art. I, § 9, cl. 7

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

U.S. Const. art. III, § 1

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

U.S. Const. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. XI

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life,

liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 5

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

28 U.S.C. § 1346

(a) The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

(2) Any other civil action or claim against the United States, not exceeding \$10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United

States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 7104(b)(1) and 7107(a)(1) of title 41. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

28 U.S.C. § 1491(a)

(1) The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration

shall be considered an express or implied contract with the United States.

(2) To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just. The Court of Federal Claims shall have jurisdiction to render judgment upon any claim by or against, or dispute with, a contractor arising under section 7104(b)(1) of title 41, including a dispute concerning termination of a contract, rights in tangible or intangible property, compliance with cost accounting standards, and other nonmonetary disputes on which a decision of the contracting officer has been issued under section 6 [1] of that Act.

28 U.S. Code § 2402

Subject to chapter 179 of this title, any action against the United States under section 1346 shall be tried by the court without a jury, except that any action against the United States under

section 1346(a)(1) shall, at the request of either party to such action, be tried by the court with a jury.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.