No. 24-1435

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

REPLY BRIEF FOR THE PETITIONER

The William Thaddeus Coleman Jr. Memorial Team

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Oral Argument

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

The Fifth Amendment secures a right to just compensation but supplies no cause of action. Respondent manufactures one by appropriating the money-mandating inquiry from the Court of Federal Claims. He immediately qualifies his "cause of action" by hinging it on a state's alternative remedies, but this is nothing more than an attempt to end-run around *Bivens*.

A. The Takings Clause does not open federal courts to just compensation claims.

Ames agrees that the Takings Clause is money-mandating. Pet.Br.7. But this alone does not permit respondent to "invoke the power of the court." *Davis v. Passman*, 442 U.S. 228, 239 n.18 (1979).

Respondent asserts that "the Founders would have known" that a right and a monetary remedy together constitute a cause of action. Res.Br.6–7. Yet his support consists of cases brought under independent procedural vehicles. *E.g.*, *President & Coll. of Physicians v. Salmon*, 91 Eng. Rep. 1353, 1353 (KB 1701) ("action of debt"); *Johnson v. City of Parkersburg*, 16 W.Va. 402, 403 (1880) ("trespass on the case"). And it would be odd to attribute an understanding to the Framers conflicting with their decision to give Congress the keys to the public fisc. Pet.Br.12. Respondent calls this choice "inapposite" because Ames is a state, Res.Br.9–10, but he sues under a provision incorporated identically

against the states, *see* Res.Br.17. Courts do not presume judicial enforcement of rights given "a textually demonstrable constitutional commitment of an issue to a coordinate political department." *Davis*, 442 U.S. at 242 (citation modified).

Respondent's "money-mandating inquiry" is specific to the Court of Federal Claims. *Contra* Res.Br.6. A money-mandating source of law is "generally both necessary and sufficient to permit a Tucker Act suit." *Me. Cmty. Health Options v. United States*, 590 U.S. 296, 323 (2020). Respondent substitutes "provide a cause of action" for "permit a Tucker Act suit," Res.Br.6, but these words make all the difference. The Court of Claims devised the money-mandating test to reflect "the historical boundaries of [its] competence": exercising Congress's delegated authority to satisfy the nation's debts. *Eastport S.S. Corp. v. United States*, 372 F.2d 1002, 1008 (Ct. Cl. 1967). Extending the test beyond this context ignores the fact that the Framers did not intend for courts to control the public fisc without congressional assent. Pet.Br.16–17.

It is no solution to claim *Alexander v. Sandoval*, 532 U.S. 275 (2001), "prescribes" using the "money-mandating inquiry" to "identify[] causes of action." Res.Br.13. *Sandoval* did no such thing—the words "money," "money-mandating," and "right to receive money" never appear in the case. *See generally* 532 U.S. 275. Nor did *Maine Community* understand *Sandoval*'s rule as interchangeable with the

money-mandating test; it merely observed that the Tucker Act's "money-mandating inquiry" supplies the "framework for determining when Congress has authorized a claim against the Government." 590 U.S. at 323 n.12. *Contra* Res.Br.7–8. This focus on congressional intent explains why the Tucker Act's jurisdictional grant and immunity waiver are required to transform a money-mandating source of law into a cause of action. Pet.Br.19; *Sandoval*, 532 U.S. at 286 ("private rights of action … must be created by Congress"). Respondent conveniently omits the rest of the *Maine Community* footnote, which aligns with this understanding: "[T]here is no express cause of action under the Takings Clause." 590 U.S. at 323 n.12.

Ultimately, respondent hedges, insisting that litigants must at least be able to sue under the Takings Clause when no other legal remedies exist. Res.Br.17. He invokes tort suits against individual defendants. Res.Br.24–26 (citing, *e.g.*, *Baring v. Erdman*, 2 F. Cas. 784, 786 (C.C.E.D.Pa. 1834) (trespass against canal worker); *Thacher v. Dartmouth Bridge Co.*, 35 Mass. 501, 502 (1836) (trespass against bridgebuilders)). But "common-law claims against [] officers for intentional torts" do not yield constitutional causes of action. *Hernández v. Mesa*, 589 U.S. 93, 100–01 (2020); *see* Pet.Br.17–18. And if "the writ of trespass provided a vehicle for vindicating the Takings Clause,"

Res.Br.24, that only confirms the clause did not itself get claimants into court.[1]

Habeas provides a helpful contrast. *Contra* Res.Br.20. The Framers secured a judicial mechanism for challenging detention but not takings. Pet.Br.11. Respondent brushes this distinction aside by claiming that "both just compensation and *habeas* have been provided by Article III and non-Article III tribunals." Res.Br.21. The case he cites authorized *habeas* suits in a judicial forum, not a legislative one. *Swain v. Pressley*, 430 U.S. 372, 380 (1977). *Swain* emphasized that for *habeas*, the buck stops with the judiciary. *Id.* (preserving *habeas* in district court if local court relief proved inadequate). Conversely, district courts resolving takings suits carry out the Court of Federal Claims' "legislative" function. *United States v. Sherwood*, 312 U.S. 584, 587 (1941); *see* Pet.Br.19.

Respondent never contends with the fact that claimants were long left without judicial remedies. Pet.Br.15. His founding-era support comprises James Madison and John Jay's letters suggesting judicial review. Res.Br.23–24. Yet Congress "rejected [Madison's] idea,

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[1] Respondent's other authorities involve disanalogous state constitutional provisions or common law powers unavailable to federal tribunals. Res.Br.26–27 (citing *Blanchard v. City of Kansas*, 16 F. 444, 445–46 (C.C.W.D.Mo. 1883) (interpreting "material changes" liberalizing Missouri's Takings Clause); *City of Elgin v. Eaton*, 83 Ill. 535, 536–37 (1876) (implying cause of action against municipal corporation)); *see* Pet.Br.17 n.1.

preferring to maintain control over claims without judicial interference." Floyd D. Shimomura, *The History of Claims Against the United States*, 45 La. L. Rev. 625, 638 (1985); *accord* Pet.Br.16. Respondent's assertion that courts must hear takings suits, Res.Br.5, overlooks decades of evidence to the contrary, Pet.Br.16.

The Court has rightly refused to encroach upon this legislative prerogative by giving itself power to grant relief. *See* Pet.Br.17; *Langford v. United States*, 101 U.S. 341, 343 (1879). If "money-mandating" has the impact respondent desires, Res.Br.5, what emerges is a cause of action enforceable against every level of government, *see* Pet.Br.19–20, 25–27 (describing consequences). It is cold comfort to say that states may be immune, Res.Br.10, since local governments sit "at the heart of takings" disputes, Nestor M. Davidson & Timothy M. Mulvaney, *Takings Localism*, 121 Colum. L. Rev. 215, 221 (2021).

B. This Court should not imply a cause of action contingent on alternative remedies.

Because "the reference to compensation in the Takings Clause does not create an express constitutional cause of action," it requires a "judicial genesis … to bring the remedy into being." *Devillier v. State*, 63 F.4th 416, 421 n.1 (5th Cir. 2023) (Higginson, J., concurring in denial of rehearing en banc). As respondent rushes to distance himself from implied causes of action, Res.Br.10, he simultaneously asserts that courts must address remedial gaps by "provid[ing] some method of

vindicating" rights, Res.Br.27. The cases he cites show that these statements are incompatible; when courts fill remedial gaps, they imply causes of action. Res.Br.26–27. *Compare Knick v. Twp. of Scott*, 588 U.S. 180, 200 (2019) ("state courts began to recognize implied rights of action for damages under the state equivalents of the Takings Clause"), *with* Res.Br.26 (quoting same but omitting "implied").

Respondent has unsatisfying answers to each factor precluding an implied cause of action. Pet.Br.23–28. For instance, he suggests that the "class of defendants" covered would be "coextensive with § 1983." Res.Br.9. Because states are not liable under that statute, Pet.Br.25, this would doom his claim. Even assuming respondent would prefer his cause of action to cover states, Congress has the exclusive authority to subject states to suit. Pet.Br.29 n.4. Complications like this explain the Court's hesitancy to invent causes of action—"[h]aving sworn off the habit," it should decline respondent's "invitation to have one last drink." *Sandoval*, 532 U.S. at 287.

Respondent attempts to soften the blow by drawing inspiration from *Bivens*'s consideration of alternative remedies. Res.Br.17. He learns the wrong lesson. This Court's refusal to issue judge-made relief when other remedies exist does not mean respondent can gerrymander a cause of action enforceable only against governments lacking them. To the contrary, respondent's "simple if-then proposition," Res.Br.46—if no

alternative remedies, then cause of action—is at odds with the Court's recognition that a dearth of alternative remedies does not dictate implying a cause of action, Pet.Br.28.[2] And while conditioning the cause of action on a state's remedies does not solve respondent's *Bivens* problems, it produces another by reviving the exhaustion requirement struck down in *Knick*. 588 U.S. at 205 (claimants cannot be forced to "pursue relief under state law" first).

If this Court creates a cause of action conditioned on alternative remedies, it should still reverse. Respondent never explains why he did not pursue a common law trespass claim. *Compare* Res.Br.19 (merely denying "certainty" that he could have prevailed), *with* Pet.Br.27; *see Poindexter v. Greenhow*, 114 U.S. 270, 303 (1885) (mandating trespass's availability). He neglects a mechanism that forces compensation in jurisdictions without inverse condemnation. Pet.Br.42 (mandamus). While he speculates that qualified immunity would have precluded Section 1983 relief, Res.Br.19, remedial adequacy is beside the point, Pet.Br.28. And *Knick* only forecloses injunctive relief where there are no "adequate provision[s] for obtaining just compensation," so if respondent is right on the facts, he has a sufficient alternative remedy. 588 U.S. at

[2] A legislature would need to abolish common law causes of action to "eliminate all access to just compensation." Res.Br.26 n.2. Courts could of course deem this legislative action unconstitutional. Judicial review of legislation is a court's bread-and-butter; creating causes of action is not.

201; *e.g.*, *Pharm. Rsch. & Mfrs. of Am. v. Williams*, 64 F.4th 932, 946 (8th Cir. 2023) (permitting "injunctive relief … to redress violations of the Takings Clause"); Pet.Br.28 (injunction sufficient). Even the test respondent designed for Ames does not cover it.

II. STATE SOVEREIGN IMMUNITY BARS RESPONDENT'S SUIT.

Sovereign immunity shields states from suit subject to well-settled limitations. Recognizing that none can rescue his claim, respondent retrofits the litigation conduct exception and invents several others. All the while, he elides history and precedent and silently abandons the Ames Circuit's reasoning.

A. The Takings Clause does not override immunity.

Respondent contends that "implied" state sovereign immunity must yield to the "express" Takings Clause. Res.Br.47. Either this is wrong or an assortment of this Court's precedent is. *See, e.g.*, *Seminole Tribe v. Florida*, 517 U.S. 44, 47 (1996) (immunity precludes legislation under Indian Commerce Clause's express terms). By respondent's logic, the federal government would be even less immune. *See Keifer & Keifer v. Reconstruction Fin. Corp.*, 306 U.S. 381, 388 (1939) (Ames's immunity is "written into the Eleventh Amendment"; the United States's "is derived by implication"). But saying so would contradict "hornbook law that the Tucker Act" was needed to waive immunity. Res.Br.12. Indeed, respondent's argument was rejected by the author of the book that composes its primary support. *Compare* Res.Br.47, *with Webster v. Doe*,

486 U.S. 592, 613 (1988) (Scalia, J., dissenting) ("No one would suggest that, if Congress had not passed the Tucker Act, the courts would be able to order disbursements from the Treasury to pay ... just compensation.").

Respondent's subsequent treatment of history is selective at best. He fails to engage with the founding-era evidence that has long animated this Court's decisions. *Compare* Res.Br.iv-x, *with* Pet.Br.31, 34 (highlighting *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), and Hamilton, Madison, and Marshall's statements). Given this history, it is unsurprising that, as respondent concedes, Res.Br.48, decades of state court cases upheld immunity against takings claims. While he shrugs them off by noting they predated incorporation, Res.Br.48, many involved state constitutional provisions directly analogous to their federal counterpart, *e.g.*, *Callender v. Marsh*, 1 Pick. 418, 437–38 (Mass. 1823).

The second founding is of no solace to respondent. The Fourteenth Amendment's drafters addressed uncompensated takings by granting "*Congress* ... power to hold [states] to answer." Cong. Globe, 39th Cong., 1st Sess. 1089–90 (1866) (emphasis added) (Representative Bingham). *Contra* Res.Br.49. They would hardly be "shocked" to find takings claims barred by immunity, Res.Br.49, since the Tucker Act did not waive federal immunity until 1887, Pet.Br.18.

This Court has struck a careful balance between immunity and private relief; respondent ignores it. He revives the contention, once a staple of dissents, *e.g.*, *Seminole Tribe*, 517 U.S. at 84–85 (Stevens, J., dissenting), that state sovereign immunity should be discounted due to its "common law" origins, Res.Br.47. But while immunity "derives at least in part from the common-law tradition, the structure and history of the Constitution make clear that [it] exists today by constitutional design." *Alden v. Maine*, 527 U.S. 706, 733 (1999). Respondent also eschews the established exceptions that might have brought him relief. *E.g.*, *Ex parte Young*, 209 U.S. 123, 159–60 (1908); Pet.Br.36 (officer suits for damages). These exceptions have helped vindicate takings claims since the founding and cover many of the cases respondent insists support overcoming immunity. *E.g.*, *United States v. Lee*, 106 U.S. 196, 197 (1882) (officer suit where "United States was not a party"); *Hopkins v. Clemson Agr. Coll.*, 221 U.S. 636, 646 (1911) (discussing liability for college).

Respondent falls back on a cryptic footnote, layering dictum on dictum. Res.Br.50. Of the cases *First English Evangelical Lutheran Church of Glendale v. Los Angeles County* relied on, 482 U.S. 304, 316 n.9 (1987), none concerned sovereign immunity, *e.g.*, *Jacobs v. United States*, 290 U.S. 13, 15 (1933) (Tucker Act). Respondent doubles down by citing two cases that did not implicate immunity either, Res.Br.50—

one of which made clear that *First English* settled nothing, *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 714 (1999).

B. Ames did not waive its immunity.

The parties agree that courts "indulge every reasonable presumption against waiver of state sovereign immunity." Res.Br.35. Nevertheless, respondent argues for a sweeping removal-as-waiver rule adopted by no circuit, including Ames. Res.Br.30; *see* JA-8–10 (waiver never contemplated). Far from "plainly control[ling] this case," Res.Br.29, *Lapides v. Board of Regents* expressly avoided resolving it, 535 U.S. 613, 618 (2002); Pet.Br.48. And as circuit courts have concluded, *Lapides*'s reasoning suggests immunity from damages is waived only when removal creates an unfair advantage. Pet.Br.48–50; *see* Res.Br.34 (agreeing that *Lapides* turns on fairness).[3]

Stripping Ames's immunity would be unfair solely to the state, which has maintained a consistent position from start to finish. Pet.Br.48–49. The case respondent cites, *Ku v. Tennessee*, 322 F.3d 431 (6th Cir. 2003), is a useful comparator. Tennessee asserted immunity only after it "engaged in extensive discovery and then invited the district court to enter judgment on the merits." *Id.* at 435. By contrast, Ames

[3] Respondent maintains precedent "lend[s] no support to" the conclusion that sovereign immunity encompasses "immunity from liability." Res.Br.38. But precedent demands this conclusion. *Sossamon v. Texas*, 563 U.S. 277, 285 (2011) ("a waiver of sovereign immunity to other types of relief does not waive immunity to damages").

raised its immunity defense before any merits determination. JA-12. And even if Ames *had* litigated the merits while keeping state sovereign immunity "as a backstop," respondent never indicates it could not have done so in state court, Res.Br.35, meaning waiver through removal would still be unfair.

This Court's older "voluntary invocation" precedents confirm that electing to join a case is meaningfully distinct from removing one to federal court. *Contra* Res.Br.32. Each turned on the fact that, as respondent concedes, the state entered as a plaintiff or intervenor. Res.Br.30; *see Clark v. Barnard*, 108 U.S. 436, 448 (1883) (state "prosecuted a claim ... thereby ma[king] itself a party to the litigation"); *Gunter v. Atl. Coast Line R.R. Co.*, 200 U.S. 273, 284 (1906) (immunity waived where state "voluntarily become[s] a party"); *Gardner v. New Jersey*, 329 U.S. 565, 574 (1947) ("when the State becomes the actor and files a claim ... it waives any immunity").

Respondent retreats to policy, proclaiming that anything less than a removal-as-waiver rule would not be administrable. Res.Br.33. It is the "definition of chutzpah," Res.Br.31, to do so while supplying no evidence that the twelve circuits applying other tests have struggled to administer them. Respondent's assertion that these tests always demand "*Erie* guesses" is manifestly false. Res.Br.33. "*Erie* guesses" are required only when state high courts are silent. *E.g.*, *Kelly v. Nichamoff*,

868 F.3d 371, 374 (5th Cir. 2017). Even then, they need not be difficult; respondent's example resolved the question in one short paragraph. *Omosegbon v. Wells*, 335 F.3d 668, 673 (7th Cir. 2003). Regardless, comparative expertise "concerns are antiquated and overly formalistic—there's no reason to think federal judges decide state law issues in an unfair way." Diego A. Zambrano, *Federal Expansion and the Decay of State Courts*, 86 U. Chi. L. Rev. 2101, 2179–80 (2019). Nor would *Erie* mean much if it condoned applying federal law whenever doing so were easier.

C. Section One of the Fourteenth Amendment does not abrogate immunity.

While respondent argues that *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), indicates no legislation is needed to abrogate immunity, Res.Br.40–41, it proves the opposite. After referencing Section One's "substantive provisions," Res.Br.40, *Fitzpatrick* continued: "Standing behind the imperatives is Congress' power to 'enforce' them 'by appropriate legislation,'" 427 U.S. at 453 (quoting U.S. Const. amend. XIV, § 5); *see* Pet.Br.46–47. And *City of Boerne v. Flores*'s description of constitutional amendments as "self-executing" means the Court can interpret Section One without implementing legislation, not that it can puncture sovereign immunity in lieu of congressional abrogation. 521 U.S. 507, 524 (1997).

Next, respondent turns to the plan of the Convention. Res.Br.42. Because this doctrine does not concern abrogation, *PennEast Pipeline Co., LLC v. New Jersey*, 594 U.S. 482, 507–08 (2021), respondent cannot call it by its name. Instead, he uses two such cases to argue that constitutional provisions abrogating immunity are commonplace. Res.Br.42 (discussing bankruptcy and Article III). Yet these carveouts tasked Congress with authorizing suits under an exclusively federal grant of power. Pet.Br.46. Respondent nowhere identifies a federal power "complete in itself," so even if legislation were not required, states could not have "implicitly agreed" to private takings suits by ratifying Section One. *Torres v. Tex. Dep't of Pub. Safety*, 597 U.S. 580, 589 (2022).

Finally, respondent relies on the rarely-cited *Reich v. Collins*, which did not touch immunity in federal court. 513 U.S. 106, 110 (1994); Res.Br.43–46. His reaction to *Office of United States Trustee v. John Q. Hammons Fall 2006, LLC*, 602 U.S. 487 (2024), is to limit the decision to its facts while ignoring its reasoning, Res.Br.45. *Contra* Res.Br.30 ("the result *and the reasoning* each independently have precedential force"). And while respondent lauds state court expertise, Res.Br.36, after asking for *Reich*'s rule, he discards its remedy—state court remand. *Compare* Res.Br.45–46, *with Reich*, 513 U.S. at 114.

Respondent's rule lacks any limiting principle; on his logic, every cause of action invoking an incorporated right would pierce immunity.

See City of Boerne, 521 U.S. at 524 (calling first eight amendments "self-executing"). But then Section Five legislation would never be needed, "congruent and proportional" or otherwise. *Tennessee v. Lane*, 541 U.S. 509, 531 (2004). As the coup de grace, respondent claims it would be bizarre for Congress but not the Constitution to be able to trump state sovereign immunity. Res.Br.41. Yet Congress can only abrogate because the Constitution says so; respondent really asks the *Court* to abrogate Ames's immunity, and that is not allowed. Pet.Br.44–45.

CONCLUSION

This Court should reverse the Ames Circuit's judgment.

November 4, 2025

Respectfully submitted,

The William Thaddeus Coleman Jr. Memorial Team

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