

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

RICHARD ALLEN DEVILLIER, ET AL.	§	
<i>Plaintiffs</i>	§	
	§	
V.	§	Civil Action No. 3:20-CV-00223
	§	
THE STATE OF TEXAS	§	
<i>Defendant</i>	§	

THE STATE OF TEXAS’S MOTION TO REMAND TO STATE COURT

Defendant, the State of Texas (the State), acting by and through the Texas Department of Transportation (TxDOT), files this Motion to Remand to State Court, as no subject matter jurisdiction exists in this case, and would respectfully show the following:

I. Background

Plaintiffs initially filed four separate class action cases against the State of Texas (the State) in various state courts, which were never certified. *See* Exs. A–D. In each case, Plaintiffs alleged a state law inverse condemnation claim under article I, section 17 of the Texas Constitution. *Id.* However, Plaintiffs also alternatively alleged an additional federal inverse condemnation claim based on the unsupported assertion that the U.S. Constitution itself creates a federal cause of action for takings without requiring a procedural vehicle. *Id.* In two of the four cases, some of the Plaintiffs added procedural and substantive due process claims. *See* Exs. C and D.

It seemed that Plaintiffs were attempting to bring a 42 U.S.C. § 1983 claim against the State, as they invoked no procedural vehicle for their federal takings claim other than an alleged general violation of the Takings Clause of the Fifth Amendment of the U.S.

Constitution, and so the State removed the cases to federal court. *See* Exs. A–D. Supplemental jurisdiction of the state law claim was also requested premised on the initial assumption—which the Supreme Court has now indicated is incorrect¹—that a federal question was proffered that was necessary for the federal courts to answer. *Id.*

After the removal, the State sent a conference letter requesting Plaintiffs amend their complaint because it appeared that Plaintiffs were attempting to bring federal claims that could not be brought directly under the U.S. Constitution, and Plaintiffs had otherwise failed to adequately plead a federal inverse condemnation claim. *See* Ex. E. Plaintiffs indicated that they would not amend their petition, and while they believed the State’s assumption was incorrect, they would not now move for remand because they believed the Fifth Amendment claim to be self-executing, making federal subject matter jurisdiction (and thus removal) proper under 28 U.S.C. § 1331. *See* Ex. F. The State filed a motion to dismiss for failure to state a federal constitutional claim or to bring valid federal and state inverse condemnation claims. The motion was denied.

All four cases were eventually consolidated under this cause, and Plaintiffs next filed an initial and first amended master complaint (encompassing the four consolidated cases), alleging four counts: (1) a state inverse condemnation claim under article I, § 17 of the Texas Constitution, (2) a federal inverse condemnation claim directly under the U.S. Constitution through the Fifth Amendment’s Takings Clause, (3) a procedural due process claim under the Fourteenth Amendment, and (4) a substantive due process claim under the

¹*DeVillier v. Texas*, 601 U.S. 285, 292 (2024) (“But, this case does not require us to resolve that question . . . [o]ur constitutional system assigns to state officers a coordinate responsibility to enforce [the Constitution] according to their regular modes of procedure.”).

Fifth Amendment's Takings Clause (as incorporated through the Fourteenth Amendment). *See* Ex. G. The State renewed its motion to dismiss, which was denied, but this Court noted an immediate appeal might materially advance the ultimate termination of the litigation and allowed for a permissive interlocutory appeal under 28 U.S.C. § 1292(b).

On interlocutory appeal, the Fifth Circuit held “the Fifth Amendment Takings Clause as applied to the states through the Fourteenth Amendment does not provide a right of action for takings claims against a state.” *Devillier v. State*, 53 F.4th 904 (5th Cir. 2023) (per curiam). The Fifth Circuit remanded the case to the district court, noting “nothing in this opinion is intended to displace the Supreme Court of Texas’s role as the sole determinant of Texas state law.” *Devillier*, 53 F.4th at 904.

The Fifth Circuit later denied rehearing en banc. *See Devillier v. Texas*, 63 F.4th 416 (5th Cir. 2023) (per curiam). Concurring, Judge Higginbotham explained that neither the Fifth Amendment’s Takings Clause nor § 1983 provides a federal cause of action for takings claims against States. *Id.* at 417. He further outlined that the Takings Clause does not inherently grant “direct access to federal courts, and for good reason.” *Id.* at 418. He considered it “plain” that “self-executing speaks only to the completeness of the claim itself, the point at which a takings claim is ready for *a* court,” which may be a state court. *Id.* In the absence of a federal cause of action, “[t]he pathway for enforcement in takings by the state is . . . through the state courts to the Supreme Court.” *Id.* at 418–19. Because “[t]he Supreme Court of Texas recognizes takings claims under the federal and state constitutions,” Texas fulfills its “obligations under the Takings Clause for takings by the state.” *Id.* at 417 n.2, 418. Recognizing an implied cause of action “would reflect a distrust

of the state courts” who “take the same oath to faithfully apply the law as do federal judges.” *Id.* at 419. Thus, whether there should be a federal cause of action to enforce the Fifth Amendment’s Takings Clause is a question that the Constitution leaves to “Congress,” which “wrote § 1983” but declined to allow suits against the States. *Id.* at 420.

The Supreme Court ultimately granted certiorari to consider whether the Fifth Amendment’s Takings Clause itself creates a federal cause of action for takings in the event that the legislature has not otherwise affirmatively provided a cause of action. *DeVillier*, 601 U.S. at 290. However, the Supreme Court concluded there was no reason to reach that question in this case because Texas state law provides a vehicle by which property owners may seek just compensation against the State. *DeVillier*, 601 U.S. at 292–93. The Supreme Court concluded that, on remand, Plaintiffs should pursue their claims under the Takings Clause through the cause of action available under Texas law. *Id.* at 293. The only takings action under state law is through article I, § 17 of the Texas Constitution. The Supreme Court never in its opinion or order endorsed the idea that Plaintiffs’ alleged self-executing federal takings claim could also continue, and Judge Higginbotham again concurred in the Fifth Circuit’s order remanding the case back to the district court. *DeVillier v. Texas*, No. 21-40750, 2024 U.S. App. LEXIS 28990, at *1-2 (5th Cir. Nov. 13, 2024). He concluded that remaining in federal court would improperly shadow the High Court and the only correct path is remand of the cases to state court. *Id.* at 1, 5.

Following the Supreme Court opinion, Plaintiffs filed their second amended complaint, which still included all four previous alleged counts, as well as two additional counts. *See* Ex. H. However, the new fifth count was simply a request for declaratory

judgment, and the sixth count alleged an additional state common law cause of action that includes no reference to a procedural vehicle other than a vague reference to this case and, assumedly, the Supreme Court opinion. *Id.*

II. Legal Standard – Federal Question Jurisdiction

A party is entitled to remove a matter if it could have been brought in federal district court originally. 28 U.S.C. § 1441(a). The district courts have original subject matter jurisdiction over all civil actions arising under the Constitution, laws, or treaties of the United States. 28 U.S.C. § 1331. Although the constitutional meaning of “arising under” may extend to cases where a federal question is an ingredient of the action, the U.S. Supreme Court has long construed the statutory grant of federal-question jurisdiction as a limited power. *See Merrell Dow Pharms. Inc. v. Thompson*, 478 U.S. 804, 807 (1986). Another longstanding, if less frequently encountered, variety of federal “arising under” jurisdiction extends to certain cases where federal-question jurisdiction will lie over state law claims that implicate significant federal issues. *See Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg.*, 545 U.S. 308, 312 (2005). However, constitutional concerns do not arise in takings cases—and thus cannot represent a significant federal issue—when property owners have other ways to seek compensation, such as under state law. *See DeVillier*, 601 U.S. at 292.

A federal court must presume that a cause of action lies outside its limited jurisdiction, and the party asserting jurisdiction bears the burden of establishing the contrary. *Energy Mgmt. Servs., LLC v. City of Alexandria*, 739 F.3d 255, 258–59 (5th Cir. 2014). Notably, “the mere presence of a federal issue in a state cause of action does not

automatically confer federal-question jurisdiction.” *Id.* at 813; *see also Caterpillar, Inc. v. Williams*, 482 U.S. 386, 397 n. 11 (1987) (“Although occasionally the removal court will seek to determine whether the real nature of the claim is federal, regardless of plaintiff’s characterization, most courts correctly confine this practice to areas of the law pre-empted by federal substantive law.”). The mere possibility of the existence of a federal question is insufficient to overcome state court jurisdiction where, as here:

The most one can say is that a question of federal law is lurking in the background, just as farther in the background there lurks a question of constitutional law, the question of state power in our federal form of government. A dispute so doubtful and conjectural, too far removed from plain necessity, is unavailing to extinguish the jurisdiction of the states If we follow the ascent far enough, countless claims of right can be discovered to have their source or their operative limits in the provisions of a federal statute or in the Constitution itself with its circumambient restrictions upon legislative power. To set bounds to the pursuit, the courts have formulated the distinction between controversies that are basic and those that are collateral, between disputes that are necessary and those that are merely possible.

Gully v. First Nat’l Bank, 299 U.S. 109, 117–18 (1936).

Article III of the Constitution also limits the jurisdiction of federal courts to live cases and controversies. U.S. Const. art. III, § 2; *see U.S. Parole Comm’n v. Geraghty*, 445 U.S. 388, 395 (1980). Ripeness is an essential prerequisite to subject matter jurisdiction, which means a case must not be speculative or premature. *Shields v. Norton*, 289 F.3d 832, 835 (5th Cir. 2002); *see also Roark & Hardee LP v. City of Austin*, 522 F.3d 533, 544 (5th Cir. 2008) (“The ripeness doctrine is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction.”). Ripeness must be determined by the court, and the court “cannot be bound by the wishes of the parties.”

Id. (citing *Reg'l Rail Reorganization Act Cases*, 419 U.S. 102, 138 (1974)).

The Supreme Court has recognized the need for careful judgments about exercising federal judicial power in an area of uncertain jurisdiction. *Thompson*, 478 U.S. at 814. If, at any time before final judgment, it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. 28 U.S.C. § 1447(c); *see also Franchise Tax Bd. of State of Cal. v. Constr. Laborers Vacation Tr. for S. Cal.*, 463 U.S. 1, 8 (1983) (“If it appears before final judgment that a case was not properly removed, because it was not within the original jurisdiction of the United States district courts, the district court must remand it to the state court from which it was removed.”). “No matter the stage of the case, the [court] must be sure [subject matter jurisdiction] exists, even if the parties expect a decision on the merits.” *See Bilello v. Kum & Go, LLC*, 374 F.3d 656, 659 (8th Cir. 2004). All doubts regarding whether removal jurisdiction is proper should be resolved against a finding of federal jurisdiction. *See Acuna v. Brown & Root Inc.*, 200 F.3d 335, 339 (5th Cir. 2000).

“To determine whether jurisdiction is present for removal, we consider the claims in the state court petition as they existed at the time of removal.” *Manguno v. Prudential Prop. & Cas. Ins.*, 276 F.3d 720, 723 (5th Cir. 2002). “It is long settled law that a cause of action arises under federal law only when the plaintiff’s well-pleaded complaint raises issues of federal law.” *City of Chicago v. Int’l Coll. of Surgeons*, 522 U.S. 156, 163 (1997). Any ambiguities are construed against removal because the removal statute should be strictly construed in favor of remand. *See Acuna*, 200 F.3d at 339. Federal jurisdiction cannot be based on an insubstantial federal question. *See Thompson*, 478 U.S. at 817. The

interrelation of federal and state authority and management of the federal judicial system would be ill-served by a rule that made the existence of federal-question jurisdiction depend on the novelty of the federal question asserted. *Id.*

III. Legal Standard – Supplemental Jurisdiction

The doctrine of supplemental jurisdiction—or pendent jurisdiction—permits federal courts to decide certain state law claims involved in cases raising federal questions. *See Ameritox, Ltd. v. Millennium Labs., Inc.*, 803 F.3d 518, 530 (11th Cir. 2015). Now codified at 28 U.S.C. § 1367, the modern doctrine of supplemental jurisdiction derives from *United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966), and *Carnegie–Mellon University v. Cohill*, 484 U.S. 343 (1988). Those cases continue to guide federal courts as they determine whether to retain or relinquish jurisdiction over supplemental state law claims. *See City of Chicago*, 522 U.S. at 172–73. District courts possess the authority to dismiss or remand claims brought under § 1367(a) if a claim meets one of the § 1367(c) factors:

- (1) the claim raises a novel or complex issue of State law,
- (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
- (3) the district court has dismissed all claims over which it has original jurisdiction, or
- (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

See Ameritox, 803 F.3d at 531.

Any one of the § 1367(c) factors is sufficient to give the district court discretion to dismiss a case’s supplemental state law claims. *Id.* “Although the sharp distinction between remands authorized by § 1367(c) and remands authorized by § 1447(c) is often misunderstood, the reason behind their different treatment is clear.” *Hudson United Bank*

v. LiTenda Mortg. Corp., 142 F.3d 151, 157 (3d Cir. 1998). Section 1447(c) remands are warranted only when a federal court has no rightful authority to adjudicate a state case that has been removed from state court. *Id.* “Remands authorized by § 1367(c) may be entered only when federal subject matter jurisdiction has been affirmatively established, via 28 U.S.C. § 1367(a), and are entered independently of whether the case originated in state or federal court.” *Id.* at 157–58 (citing *City of Chicago v. Int’l Coll. of Surgeons*, 522 U.S. 156, 165. “[A] district court’s decision to remand pursuant to § 1367(c) does not imply that the case was improperly filed in federal court. *Hudson*, 142 F.3d at 158. “Rather, it reflects the court’s judgment, reviewable on appeal for abuse of discretion, that at the present stage of litigation it would be best for supplemental jurisdiction to be declined so that state issues may be adjudicated by a state court.” *Id.* (citing *Gibbs*, 383 U.S. at 726–27).

The U.S. Supreme Court in *Gibbs* further warned courts that “[n]eedless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties by procuring for them a surer-footed reading of applicable law.” 383 U.S. at 726. One such needless decision would occur when a court decides issues of state law after the federal claims are dismissed before trial. *Id.* Another occurs where it appears that the “state claim constitutes the real body of a case, to which the federal claim is only an appendage.” *Id.* at 727. Specifically, if it appears that the state issues substantially predominate, whether in terms of proof, of the scope of the issues raised, or of the comprehensiveness of the remedy sought, the state claims should be left to the state for resolution. *Id.* at 726–27. In these situations, the state claims should either be dismissed without prejudice and left to be re-filed in state court or remanded to state court when the

statute of limitations over the plaintiff's state law claims has expired before the federal court has determined that it should relinquish jurisdiction over the case. *Id.*; *see also Cohill*, 484 U.S. at 353.

Pendent jurisdiction is "a doctrine of discretion, not of plaintiff's right." *Cohill*, 484 U.S. at 350. The issue of whether pendent jurisdiction has been properly assumed remains open throughout the entire litigation. *Gibbs*, 383 U.S. at 727. Pretrial procedures or the trial itself may reveal a substantial dominance of state law claims that could not have been anticipated earlier. *Id.* Dismissal or remand may be warranted even in the event of completed litigation. *Id.*

IV. Argument

The State initially sought removal to this Court because, at the time of removal, it seemed that Plaintiffs were attempting to bring a federal claim, even if vaguely plead. That turned out to be correct, as Plaintiffs did not seek remand and quickly asserted upon removal that their references to the Fifth Amendment were, in fact, an alleged self-executing federal claim and question that would make federal subject matter jurisdiction (and thus removal) proper from their perspective under 28 U.S.C. § 1331. While the propriety of Plaintiffs' claims and self-proclaimed procedural vehicle were being considered by the Court, the State took the position that, if federal jurisdiction existed, that this case should be dismissed in its entirety on the merits. However, as is evident by the multitude of recommendations, opinions, concurrences, and dissents that have been filed in the various adjudications in this case, the State acknowledges that this case represents complicated legal and procedural issues, and the Supreme Court and Fifth Circuit have

expressed a clear preference that Plaintiffs should be allowed to continue to litigate their claims in the Texas state courts whose regular practice is to hear such claims. *See DeVillier*, 601 U.S. at 293; *DeVillier*, 2024 U.S. App. LEXIS 28990, at *2 (Higginbotham, J., concurring on remand to district court that the claims should be remanded to state court).

If there was some question as to whether a court should remand or dismiss federal claims, Texas Courts have offered a way forward, particularly if a litigant is being remanded to state court involuntarily, allowing the preservation of their federal claims on remand to state court. *See VRC, L.L.C. v. City of Dall.*, 391 F. Supp. 2d 437, 440 (N.D. Tex. 2005) (remanding state law claim as federal substantive due process claims considered not ripe); *Milliken v. Town of Addison*, No. Civ.A.3:02-CV-1164-D, 2002 WL 31059802, at *4 (N.D. Tex. Sept. 13, 2002) (remanding state claim and unripe federal claim to state court); *Guetersloh v. State*, 930 S.W.2d 284, 289 (Tex. App.—Austin 1996, writ denied) (describing process of reserving federal claims on remand to pursue state court litigation). The Fifth Circuit has approved of such an approach. *See John Corp. v. City of Houston*, 214 F.3d 573, 581 n. 13 (5th Cir. 2000) (“In bringing their claim for compensation to the state court, [litigants] may be able to avail themselves of the steps outlined in *Guetersloh* and reserve their right to have their takings claim litigated in federal court.”).

A. Plaintiffs have failed to establish claims over which this Court could have original federal subject matter jurisdiction.

The Court should remand this case pursuant to 28 U.S.C. § 1447, as only a state cause of action was ever ripe and adequately asserted through a proper procedural vehicle. Plaintiffs’ remaining claims either do not have a proper procedural vehicle or are otherwise

not ripe, and are speculative and premature. While the State acknowledges that it initially pursued removal, given its incorrect assumption that Plaintiffs were making a 42 U.S.C. § 1983 claim and Plaintiffs’ novel assertion of a federal cause of action without a procedural vehicle to support the claim, it is clear that novelty and ambiguity are not enough to create a federal question as would support original subject matter jurisdiction in this Court. *See DeVillier*, 601 U.S. at 292 (2024); *see also Thompson*, 478 U.S. 817. (“The interrelation of federal and state authority and management of the federal judicial system would be ill-served by a rule that made the existence of federal-question jurisdiction depend on the novelty of the federal question asserted.”). Further, even if the parties agreed now that jurisdiction was proper—which they plainly do not—the parties’ concessions at any point in this case do not in and of themselves create jurisdiction. *See Blanchette v. Conn. Gen. Ins. Corps.*, 419 U.S. 102, 138 (1974) (“[W]e cannot rely upon concessions of the parties and must determine whether the issues are ripe for decision . . . to the extent that questions of ripeness involve the exercise of judicial restraint from unnecessary decision of constitutional issues, the Court must determine whether to exercise that restraint and cannot be bound by the wishes of the parties.”).

Similarly, while Plaintiffs have argued that their state law claim implicates significant federal issues, mainly Constitutional issues, the Supreme Court did not reverse the Fifth Circuit judgment that a federal takings claim did not exist but instead vacated and remanded with instructions for Plaintiffs to pursue their state law cause of action. *DeVillier*, 601 U.S. at 293. To stay in federal court, Plaintiffs needed the Supreme Court to affirmatively say that their alleged procedural vehicle existed and that their federal takings

claim could continue, yet the Supreme Court affirmatively held that “constitutional concerns do not arise” where, as here, and the state provides a vehicle via a cause of action for takings claims. *DeVillier*, 601 U.S. at 292.

Notably, the Supreme Court did not agree with any of Plaintiffs’ arguments. It explained that (1) even self-executing constitutional rights like the Takings Clause do not necessarily come with their own federal causes of action; (2) the *First English* case—Plaintiffs’ primary authority—does not hold that the Takings Clause creates a federal cause of action for takings; and, critically, (3) “constitutional concerns do not arise when property owners have other ways to seek just compensation,” including via state causes of action. *Id.* at 291–92. Instead, the Supreme Court embraced classic federalism, confirmed its faith in the state courts, and ordered Plaintiffs “to pursue their claims under the Takings Clause through the cause of action available under Texas Law.” *DeVillier*, 601 U.S. at 292–93. It did not say Plaintiffs were to pursue those claims in addition to their alleged federal takings claim. Thus, any claim of an original or continued substantial federal issue in this case is clearly at odds with the Supreme Court’s opinion.

Given the holding, the only way to read the Supreme Court’s decision is that it is now settled that where a Texas cause of action exists to vindicate federal takings rights, Plaintiffs must use it and cannot attempt to rely alternatively on an implied federal cause of action. *See* Ex. H; *see also DeVillier*, 601 U.S. at 292–93; *cf. Wilson v. Midland County*, 116 F.4th 384 (5th Cir. 2024) (en banc) (faulting § 1983 plaintiff for not pursuing available state remedy). There is no other conceivable reason why the Court would have also taken such care to provide the following indictment of pursuing claims in State court:

Our constitutional system assigns to state officers a coordinate responsibility to enforce the Constitution according to their regular modes of procedure. It therefore looks to the good faith of the States to provide an important assurance that this Constitution, and the Laws of the United States which shall be made in Pursuance thereof shall be the supreme Law of the Land. We should not assume the States will refuse to honor the Constitution, including the Takings Clause, because States and their officers are also bound by obligations imposed by the Constitution.

DeVillier, 601 U.S. at 292–93 (cleaned up, internal citations omitted). The State’s position mirrors the Fifth Circuit’s, which stated in its concurring opinion:

It is now settled that in providing rights of action for takings by the state, Texas is discharging its obligations under the Fifth Amendment and the state removal is now without jurisdictional legs to stand on A unanimous Supreme Court has relied upon the state pathway, enabling it to not to reach the difficult issue of implied federal jurisdiction. As its decision makes plain, this pathway—available to all states—is in classic service to federalism. It would be perverse to not return these cases to the state courts from which they were removed so they may travel on the Supreme Court’s predicate pathway.

Devillier, 2024 U.S. App. LEXIS 28990, at *3-4.

1. Plaintiffs’ takings claims under the Texas Constitution do not support federal original and independent subject matter jurisdiction.

In their Count 1, Plaintiffs allege takings claims under article I, § 17 of the Texas Constitution. *See* Exs. A–D. There should be no dispute in this case that this count is a state law cause of action, and it substantially predominates the issues before the court, in terms of required proof, the scope of the issues raised, and the comprehensiveness of the remedy sought. The Supreme Court stated in no uncertain terms that it trusts the state courts of Texas to honor the Constitution and the “state-law inverse-condemnation cause of action provides a vehicle for takings claims based on both the Texas Constitution and the Takings Clause.” *Id.* at 292–93. Thus, this claim can only be properly adjudicated by the state courts

of Texas. This claim does not provide original subject matter jurisdiction as would support independent jurisdiction to pursue the claim in federal court.

2. Plaintiffs’ takings claims under the Fifth Amendment do not support federal original and independent subject matter jurisdiction.

Plaintiffs’ Count 2 alleges a taking without just compensation under Fifth Amendment of the United States Constitution. *See* Exs. A–D. Plaintiffs cite no basis for this claim and such a claim currently does not exist under the law, and is, therefore, speculative and unconvincingly novel. The Supreme Court chose not to recognize the claim as a legitimate federal question that needed answering or as otherwise raising a federal issue such that state law cannot be separated from federal law. *Id.* at 292–93. The Supreme Court clearly stated it trusts the Texas courts to honor the Constitution, and a “state-law inverse-condemnation cause of action provides a vehicle for takings claims based on both the Texas Constitution and the Takings Clause.” *Id.*

To maintain this action, Plaintiffs needed the Supreme Court to conclude that the Takings Clause came built-in with its own implied cause of action and procedural vehicle authorizing suits for compensation, which the Supreme Court refused to do, noting that “Constitutional rights do not typically come with a built-in cause of action” but instead “are generally invoked defensively” absent “an independent cause of action designed for that purpose” by Congress or by state law. *DeVillier*, 601 U.S. at 291.

As is evident from Plaintiffs’ Second Amended Master Complaint², since the issuance of the Supreme Court opinion, Plaintiffs have maintained that the Supreme Court

² *See* Ex. H.

validated their alleged federal question, yet such language is notably absent from the Court’s opinion and order. At most, the Supreme Court noted that its “precedents do not cleanly answer the question whether a plaintiff has a cause of action arising directly under the Takings Clause.” *Id.* at 292; *see Acuna*, 200 F.3d at 339 (“All doubts regarding whether removal jurisdiction is proper should be resolved against a finding of federal jurisdiction.”). But Plaintiffs willfully ignore that the Supreme Court concluded “this case does not require us to resolve that question,” and that “[o]n remand, DeVillier and the other property owners should be permitted to pursue their claims under the Takings Clause through the cause of action available under Texas law.” *Id.* at 292–93.

This claim does not provide original subject matter jurisdiction as would support independent jurisdiction to pursue the claim in federal court.

3. Plaintiffs’ procedural due process claims under the Fourteenth Amendment are not ripe and do presently support original and independent federal subject matter jurisdiction.

In Count 3, Plaintiffs allege procedural due process claims in violation of the Fourteenth Amendment to the U.S. Constitution. *See* Exs. C and D. These claims are not ripe, as they are both speculative and premature, so they cannot stand as a basis of subject matter jurisdiction. *See Norton*, 289 F.3d at 835. A takings claim must be adjudicated before a claim of procedural deprivation of due process can be made. *See Rosedale Missionary Baptist Church v. New Orleans City*, 641 F.3d 86, 91 (5th Cir. 2011) (“[W]here the injury that resulted from an alleged procedural due process violation is merely a taking without just compensation, we cannot know whether the plaintiff suffered any injury until the takings claim has been adjudicated We must therefore allow state takings

procedures to run their course before we can adjudicate the procedural due process claim.”).

These claims do not provide original subject matter jurisdiction as would support independent jurisdiction to pursue the claims in federal court. Plaintiffs’ claims of procedural due process may be remanded along with the state claims and reserved to the degree that they may become ripe later. *See John Corp.*, 214 F.3d at 581 n. 13 (explaining litigants may avail themselves of the steps outlined in *Guetersloh* and reserve their right to later litigate their federal claims in federal court.)

4. Plaintiffs’ substantive due process claims under the Fourteenth Amendment are not ripe and do presently support original and independent federal subject matter jurisdiction.

Plaintiffs’ Count 4 claims allege substantive due process violative of the Fourteenth Amendment to the U.S. Constitution. *See* Exs. C and D. These claims are also not ripe, as they are both speculative or premature, and so they cannot stand as a basis of subject matter jurisdiction. *See Norton*, 289 F.3d 832, 835 (5th Cir. 2002). A substantive due process claim is only ripe for review if it is sufficiently independent of the takings claim and is not “subsumed” by it, and that is not the case here. *See Steward v. City of New Orleans*, 537 F. App’x 552, 556 (5th Cir. 2013) (citing *John Corp.*, 214 F.3d at 583). Substantive due process claims that rest on the same protections that are afforded by the Takings Clause are subsumed by them. *See John Corp.*, 214 F.3d at 583.

Here, Plaintiffs do not allege any facts or cite to any law or regulation to support that their substantive due process claim is separate from the takings or procedural due process claims. Plaintiffs’ concern is only with their substantive right to just compensation,

which the Supreme Court assured Plaintiffs that they could pursue through a state law inverse-condemnation action. *See DeVillier*, 601 U.S. at 293. Plaintiffs further allege only that they are dissatisfied with the level of protection provided under Texas law regarding takings and inverse condemnation in general as to the intent element. *See* Exs. A and B.

Plaintiffs have yet to litigate their claims under the state law standard, and there is no law to suggest that the inability to meet the current legal standard as set out by the courts creates a ripe due process concern pre-litigation. Further, regarding the “rationally related” standard referenced by the Plaintiffs’ pleadings, rationally related is in reference to a government action, not a complaint about the legal standard set by the courts. *See* Exs. A and B; *see generally Mikeska v. City of Galveston*, 451 F.3d 376, 379 (5th Cir. 2006) (explaining a substantive due process claim has two elements: (1) whether the plaintiff has been deprived of a constitutionally protected right, and (2) whether the governmental action is rationally related to a legitimate governmental interest); *see also Hidden Oaks Ltd. v. City of Austin*, 138 F.3d 1036, 1044 (5th Cir. 1998) (highlighting the limited range of substantive due process analysis). Plaintiffs’ fail to argue that any actions by the State are not rationally related to a legitimate State interest, and in fact, they allege that TxDOT’s actions were taken “to enhance public safety and the capacity of IH-10, and to provide an evacuation route via its eastbound lanes” *See* Exs. A and B.

To the extent Count 4 even alleges a violation of substantive due process, it is simply a takings claim under a substantive due process label and would not represent a claim that could be made independent of the takings claim in this Court at this time. This claim does not provide original subject matter jurisdiction as would support independent

jurisdiction to pursue the claim in federal court. Plaintiffs' claims of denial of substantive due process may be remanded along with the State claims and reserved to the degree that they may become ripe later. *See John Corp.*, 214 F.3d at 581 n. 13.

B. Plaintiffs have failed to establish federal claims as necessary to support the exercise of supplemental jurisdiction, but even if they had, remand to state court under 28 U.S.C. § 1367(c) is appropriate.

If this Court never had subject matter jurisdiction as would independently support removal, it cannot properly exercise supplemental jurisdiction. *See Hudson*, 142 F.3d at 157–58 (3d Cir. 1998) (citing *City of Chicago*, 522 U.S. at 165). However, to the degree the Court concludes it obtained subject matter jurisdiction over an independent federal claim, 28 U.S.C. § 1367(c) supports a remand to state court. At a minimum, two of the four factors listed § 1367(c) clearly apply—and this Court only needs one to justify remand. *See Ameritox*, 803 F.3d at 531.

1. Plaintiffs' state law claims raise a novel or complex issue of state law and should be remanded pursuant to § 1367(c)(1).

Not only are all state inverse condemnation cases under Texas law generally complex, but this is an extraordinary case predicated upon extraordinary legal theories, the resolution of which will have a wide-ranging impact. Plaintiffs comprise at least 72 individuals, one corporation, and four limited liability companies, located across four separate counties, alleging impact and damages to varying degrees, stemming from two historic rainfall events to the extent the State of Texas has rarely seen. Further, at no point in this case have the parties agreed on how the law surrounding intent, a necessary element under an inverse condemnation case in Texas, should apply. *See Harris Cnty. Flood*

Control Dist. v. Kerr, 499 S.W.3d 793, 799 (Tex. 2016) (“Generally, plaintiffs seeking recovery for a taking must prove the government “intentionally took or damaged their property for public use, or was substantially certain that would be the result.”).

If the Court were to retain this case, it would, at minimum, be tasked with weighing multiple Texas Supreme Court opinions on intent—which the parties have both briefed on multiple occasions and put forward drastically conflicting interpretations—and likely need to provide its own wholly separate interpretation of Texas law. *See e.g., Tex. Dep’t of Transp. v. Self*, 690 S.W.3d 12 (Tex. 2024); *Kerr*, 499 S.W.3d at 799; *Tarrant Reg’l Water Dist. v. Gragg*, 151 S.W.3d 546, 554 (Tex. 2004); *City of Dall. v. Jennings*, 142 S.W.3d 310, 313 n.2 (Tex. 2004). While the State appreciates the effort this Court has put forth in navigating this complex case, ultimately, “[s]tate courts, not federal courts, should be the final arbiters of state law.” *See Baggett v. First Nat’l Bank of Gainesville*, 117 F.3d 1342, 1353 (11th Cir. 1997); *see also Hardy v. Birmingham Bd. of Educ.*, 954 F.2d 1546, 1553 (11th Cir. 1992) (noting that “[s]tate courts, not federal courts, are the final expositors of state law” in its decision not to exercise pendent jurisdiction); *Ameritox*, 803 F.3d at 540 (“Federal courts are (and should be) loath to wade into uncharted waters of state law”). And as noted by Judge Higginbotham, “[t]he issues of Texas law remain both controlling and complex, and its law of inverse condemnation here is uncertain in its application, and retaining the cases places the district court in the position of making an *Erie* guess or certifying questions of law to the state court.” *Devillier*, No. 21-40750, 2024 U.S. App. LEXIS 28990, at *4.

The Court should remand Plaintiffs’ state law claims to state court. To the degree

necessary, Plaintiffs’ federal claims, whether ripe or not, may be remanded along with the State claims and reserved. *See John Corp.*, 214 F.3d at 581 n. 13.

2. Plaintiffs’ state law claims substantially predominate over any other claim over which the federal district court might have original jurisdiction and should be remanded pursuant to § 1367(c)(2).

Clearly Plaintiffs’ Count 1 in each underlying case is a state law cause of action that substantially predominates the issues before the court, in terms of required proof, scope of the issues raised, and comprehensiveness of the remedy sought. The Supreme Court announced it trusts the state courts of Texas to honor the Constitution, and that a “state-law inverse-condemnation cause of action provides a vehicle for takings claims based on both the Texas Constitution and the Takings Clause,” which is the core of each of the four consolidated cases. *Id.* at 292–93. The proper procedure for each case is for Plaintiffs’ inverse condemnation claims against the State of Texas to be heard by the state courts of Texas.

To the degree necessary, Plaintiffs’ federal claims, whether ripe or not, may be remanded along with the State claims and reserved. *See John Corp.*, 214 F.3d at 581 n. 13.

V. PRAYER

This Court does not have subject matter jurisdiction, thus this case must be remanded pursuant to 28 U.S.C. § 1447(c). The State respectfully requests that the Court grant its Motion to Remand to State Court and for all other relief to which it might show itself entitled.

Respectfully Submitted,

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BRENT WEBSTER
First Assistant Attorney General

RALPH MOLINA
Deputy First Assistant Attorney General

JAMES LLOYD
Deputy Attorney General for Civil Litigation

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COUNSEL FOR DEFENDANT
THE STATE OF TEXAS

CERTIFICATE OF SERVICE

I certify that on December 13, 2024, this document was filed electronically via the Court's CM/ECF system, causing electronic service upon all counsel of record.

/s/ John Zuercher
JOHN ZUERCHER

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

RICHARD ALLEN DEVILLIER, ET AL.	§	
<i>Plaintiffs</i>	§	
	§	
V.	§	Civil Action No. _____
	§	
THE STATE OF TEXAS	§	
<i>Defendant</i>	§	

DEFENDANT’S NOTICE OF REMOVAL TO FEDERAL COURT

NOW COMES Defendant the State of Texas (hereinafter “Defendant”) and hereby files this notice of removal under 28 U.S.C. § 1446(a). As support, Defendant respectfully shows this Court the following:

1. Plaintiffs are Richard and Wendy Devillier; Steven and Rhonda Devillier; Barbara Devillier; David and Angela McBride; Bert Hargraves; Barney and Crystal Threadgill; David Ray; Gary Herman; Rhonda Glanzer; Chris and Darla Barrow; Dennis Dugat; Laurence Barron; Deanette Lemon; Jill White; Beverly Kiker; Yale Devillier, individually and as Personal Representative of the Estate of Kyle H. Devillier; Charles Monroe; Jacob and Angela Fregia; Jerry and Mary Devillier; Zalphia Hankamer; Larry Bollich; Susan Bollich; Shelia Marino; William Meissner; Taylor McBride; Brian and Kathleen Abshier; Jina Daigle; Coulon Devillier; Hailey Ray Sr., Hailey Ray Jr. and Shelia Moor; John Rhame; Alex and Tammy Hargraves; William Devillier; Kyle and Allison Wagstaff; and Gulf Coast Investments, L.L.C. (collectively “Plaintiffs”).

2. **Removal Provision:** This removal is pursuant to 28 U.S.C. § 1441(a) and 28 U.S.C. § 1367(a). Plaintiffs assert a federal inverse condemnation claim under the Takings

clause of the Fifth Amendment to the U.S. Constitution, which invokes this Court's federal-question jurisdiction. *See* Plaintiffs' Original Petition at ¶¶54–70; *see also* 28 U.S.C. § 1441(a); 42 U.S.C. § 1983.1 Plaintiffs also allege an inverse condemnation claim under art. I, sec. 17 of the Texas Constitution against Defendant, which invokes this Court's supplemental jurisdiction. *See* Plaintiffs' Original Petition at ¶¶35–53; *see also* 28 U.S.C. § 1367(a).

3. **State Action:** On May 26, 2020, Plaintiffs filed an original petition against Defendant in the 253rd Judicial District of Chambers County, Texas, in Cause No. 20-DCV-0300. *See Exhibit 1.* Defendant was served with notice of Plaintiffs' Original Petition on or about May 29, 2020. Defendant filed its Original Answer and Affirmative Defenses on June 22, 2020. Venue is proper in this district under 28 U.S.C. § 1441(a) because the state court where the action has been pending is located in this district and this division.

4. **Nature of the Lawsuit:** Plaintiffs allege that TXDOT's design, construction, maintenance and operation of IH-10 between Texas State Highway 61 to the west and Chambers County to the east and north to include a concrete median barrier created a dam effect that caused flooding and damages to Plaintiffs' real property north of IH-10 after Tropical Storms Harvey (in 2017) and Imelda (in 2019) in violation of both the U.S. and Texas' Constitutions. *See* Plaintiffs' Original Petition at ¶¶12, 15–32.

1 Plaintiffs do not couch their federal inverse condemnation claim as a § 1983 claim. However, § 1983 is the only vehicle by which a constitutional violation, such as an inverse condemnation claim under the Takings Clause of the Fifth Amendment, can be brought against a State or state agency. *See, e.g., Knick v. Township of Scott, Penn.*, 139 S.Ct. 2162, 2170 (U.S., 2019).

5. **Jury Demand:** Defendant requested a trial by jury in its Original Answer and Affirmative Defenses.

6. **Removal Requirements of 28 U.S.C. § 1441:** This action is a civil action raising a federal question of which this Court has original jurisdiction under 28 U.S.C. § 1331 and is one which may be removed to this Court by Defendant, pursuant to the provisions of 28 U.S.C. § 1441(a). This action also raises a state-law claim which this Court has supplemental jurisdiction under 28 U.S.C. § 1367(a).

7. **Compliance with Deadline:** Defendant was served with notice of Plaintiffs' Original Petition on or about May 29, 2020. Defendant has thirty (30) days in which to remove. 28 U.S.C. § 1446(b)(3). Therefore, this removal is timely.

8. **State Court Pleadings:** Defendant is filing concurrently with this notice, as required by Local Rules and 28 U.S.C. § 1446(a), a true and correct copy of all pleadings obtained by DSHS in the state court action.

ACCORDINGLY, Defendant prays that this cause be removed to the United States District Court for the Southern District of Texas, Galveston Division, pursuant to Sections 1441 and 1446(a) of Title 28 of the United States Code.

Respectfully submitted,

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Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

RYAN L. BANGERT
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DARREN L. MCCARTY
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COUNSEL FOR DEFENDANT

CERTIFICATE OF SERVICE

This is to certify that on June 29, 2020, a true and correct copy of the foregoing document and all attachments referred to in the notice, have been sent to the following:

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GLORIENI M. AZEREDO
Assistant Attorney General

EXHIBIT 1

20DCV0300

Cause No. _____

Hannah Barefield

Richard & Wendy Devillier; Steven & Rhonda
 Devillier; Barbara Devillier; David & Angela McBride;
 Bert Hargraves; Barney & Crystal Threadgill; David
 Ray; Gary Herman; Rhonda Glanzer; Chris & Darla
 Barrow; Dennis Dugat; Laurence Barron; Deanette
 Lemon; Jill White; Beverly Kiker; Yale Devillier,
 Individually and as Personal Representative of the
 Estate of Kyle H. Devillier; Charles Monroe; Jacob &
 Angela Fregia; Jerry & Mary Devillier; Zalphia
 Hankamer; Larry Bollich; Susan Bollich; Sheila
 Marino; William Meissner; Taylor McBride; Brian &
 Kathleen Abshier; Jina Daigle; Coulon Devillier;
 Halley Ray Sr., Halley Ray Jr. & Sheila Moor; John
 Rhame; Alex & Tammy Hargraves; William Devillier;
 Kyle & Allison Wagstaff; and Gulf Coast Olive
 Investments, L.L.C.

Plaintiffs,

v.

THE STATE OF TEXAS,

Defendant.

IN THE DISTRICT COURT OF

CHAMBERS COUNTY, TEXAS

253rd JUDICIAL DISTRICT**PLAINTIFFS' ORIGINAL PETITION AND REQUEST FOR DISCLOSURES**

Plaintiffs Richard & Wendy Devillier; Steven & Rhonda Devillier; David & Angela McBride;
 Bert Hargraves; Barney & Crystal Threadgill; Barbara Devillier; David Ray; Gary Herman; Rhonda
 Glanzer; Chris & Darla Barrow; Dennis Dugat; Laurence Barron; Deanette Lemon; Jill White; Beverly
 Kiker; Yale Devillier, Individually and as Personal Representative of the Estate of Kyle H. Devillier;
 Charles Monroe; Jacob & Angela Fregia; Jerry & Mary Devillier; Zalphia Hankamer; Larry Bollich;
 Susan Bollich; Sheila Marino; William Meissner; Taylor McBride; Brian & Kathleen Abshier; Jina
 Daigle; Coulon Devillier; Halley Ray Sr., Halley Ray Jr. & Sheila Moor; John Rhame; Alex & Tammy
 Hargraves; William Devillier; Kyle & Allison Wagstaff; and Gulf Coast Olive Investments, L.L.C.
 ("Plaintiffs") file this Original Petition seeking just compensation under both the Texas and United

States Constitutions for the taking, damaging, and destruction of Plaintiffs' private property in Chambers County, Texas caused by the design, construction, operation, and maintenance of Interstate Highway 10 by Defendant, the State of Texas during and after Tropical Storms Harvey (2017) and Imelda (2019).

NEED FOR THIS ACTION

1. The State of Texas (the "State"), acting through the Texas Department of Transportation ("TxDOT"), designed, constructed, operates, and maintains Interstate Highway 10 ("IH-10"), a major east-west transportation corridor running through the Houston area and the rest of the southern portion of the country. Two of the State's projects in Chambers County that were recently constructed were designed to raise the elevation of IH-10, to widen IH-10 from four to six lanes, and to install a solid concrete traffic median barrier on its centerline to enhance public safety and to facilitate use of its eastbound (southside) lanes as an evacuation route during periods of flooding by confining the overtopping of water to the westbound lanes (northside). The State's installation of an impenetrable bulwark down the center of the elevated IH-10 effectively created a dam, obstructing the natural north/south rainfall runoff flow that would otherwise overtop the roadway and continue to flow downstream, thus creating backwater flooding onto Plaintiffs' properties, which lie north of IH-10 at elevations below the top of this newly constructed dam.

2. Article I, Section 17 of the Texas Constitution guarantees that "[n]o person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made" Likewise, the Fifth Amendment to the U.S. Constitution provides "nor shall private property be taken for public use, without just compensation." The virtually unconstrained power of the government to take a citizen's private property without their consent is balanced only by the constitutional guarantee that the government must compensate the owner for taking their property.

6. The State of Texas had the power to perform its work on IH-10. And that work was for a public purpose, providing transportation for its citizens and those throughout this country. Neither of those propositions can be honestly denied. Through the recent IH-10 projects, however, TxDOT knowingly caused flooding on Plaintiffs' property in exchange for enhancing public safety and providing an evacuation route during periods of flooding that would otherwise cause overtopping of the roadway. But the constitutional protections, both at the state and federal level, mandate that Plaintiffs are not forced to bear public burdens which, in all fairness and justice, should be borne by the public as a whole. Plaintiffs are entitled to just compensation for this taking and, accordingly, seek the Court's protection to enforce their constitutional rights.

JURISDICTION AND VENUE

7. This Court has jurisdiction over Plaintiffs' claims under Tex. Prop. Code § 21.001. Plaintiffs' claims are each within the jurisdictional limit of this Court. Venue is proper in this Court pursuant to Tex. Civ. Prac. & Rem. Code § 15.011.

DISCOVERY LEVEL

8. Plaintiffs request this cause be governed by Texas Rule of Civil Procedure 190.4 and will seek entry of a Level 3 scheduling order for the action.

REQUEST FOR DISCLOSURES

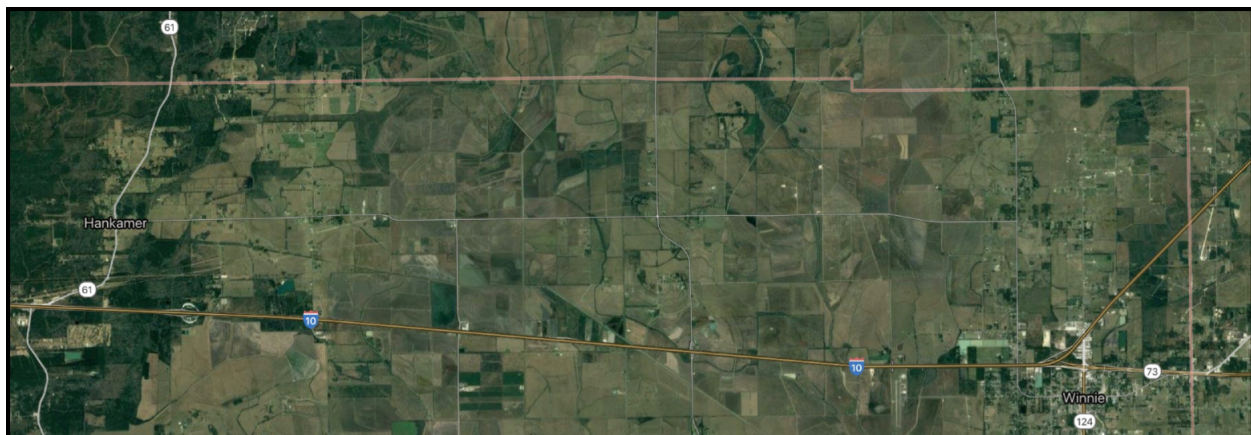
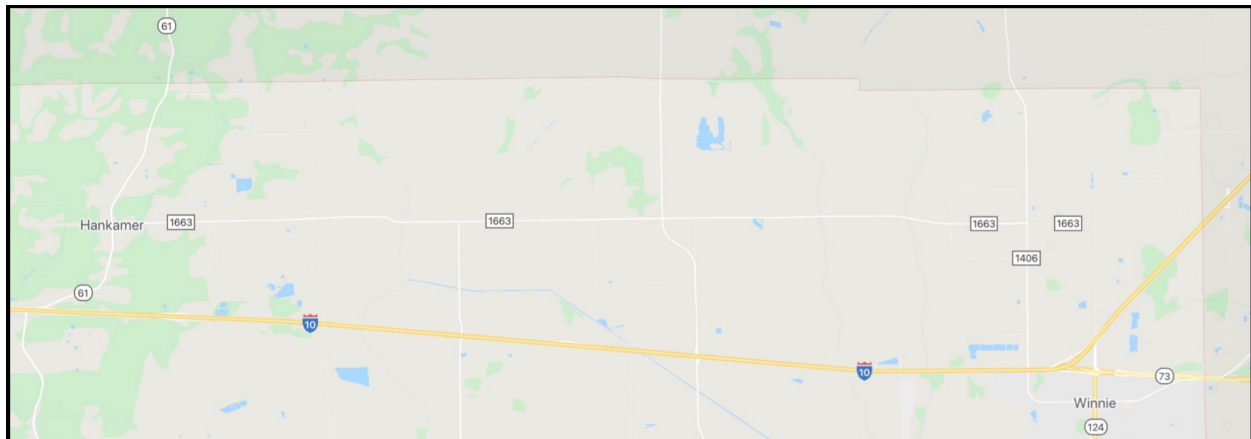
9. Plaintiffs request Defendant, the State of Texas, disclose the information as substantively and procedurally required by Tex. R. Civ. P. 194.

PARTIES

10. The following individuals and entities are **Plaintiffs** in this action: Richard & Wendy Devillier; Steven & Rhonda Devillier; David & Angela McBride; Bert Hargraves; Barney & Crystal Threadgill; Barbara Devillier; David Ray; Gary Herman; Rhonda Glanzer; Chris & Darla Barrow; Dennis Dugat; Laurence Barron; Deanette Lemon; Jill White; Beverly Kiker; Yale Devillier,

Individually and as Personal Representative of the Estate of Kyle H. Devillier; Charles Monroe; Jacob & Angela Fregia; Jerry & Mary Devillier; Zalphia Hankamer; Larry Bollich; Susan Bollich; Sheila Marino; William Meissner; Taylor McBride; Brian & Kathleen Abshier; Jina Daigle; Coulon Devillier; Halley Ray Sr., Halley Ray Jr. & Sheila Moor; John Rhame; Alex & Tammy Hargraves; William Devillier; Kyle & Allison Wagstaff; and Gulf Coast Olive Investments, L.L.C.

11. Each Plaintiff owns and/or leases real and personal property located in a roughly rectangular area of Chambers County, Texas delineated on the west by Texas State Highway 61, on the north and east by the Chambers County line, and on the east and south by IH-10 (hereafter the “Operative Geographic Area”), which is depicted below.



12. Each Plaintiffs’ property lies below the lowest point of elevation reached by the top of the traffic median barriers installed by the State of Texas on the center line of IH-10, dividing the

east-west lanes of traffic in the vicinity of the Plaintiffs' properties where overtopping of this barrier would first occur. Plaintiffs owned or leased their property at the time they suffered devastating flooding during the last two Tropical Storms - Harvey (August 2017) and Imelda (September 2019). As a result, Plaintiffs' properties were inundated, taken, destroyed, and/or damaged by the State of Texas by its design, construction, operation, and/or maintenance of IH-10.

13. And the State (a) knew that its actions would cause or were causing damage to Plaintiffs' properties; (b) knew that the damage to Plaintiffs' properties was substantially certain to result from its actions; and/or (c) knew or should have known that the inundation of Plaintiffs' properties was the natural, probable, and foreseeable consequence of its acts. The constitutional protections against governmental takings entitle Plaintiffs to compensation for the inundation, taking, damaging, and/or destruction of their property.

Defendant

14. Defendant, the State of Texas, is a sovereign entity and body politic with the power of eminent domain and constitutional liability for the taking, damaging, and/or destruction of private property without payment of just or adequate compensation. Defendant answers for its agencies, including but not limited to the Texas Department of Transportation, and may be served by service on Ruth Hughs, the Texas Secretary of State, at 1100 Congress Avenue, Capitol Building Room 1E.8, Austin, Texas 78701.

FACTS COMMON TO ALL CLAIMS

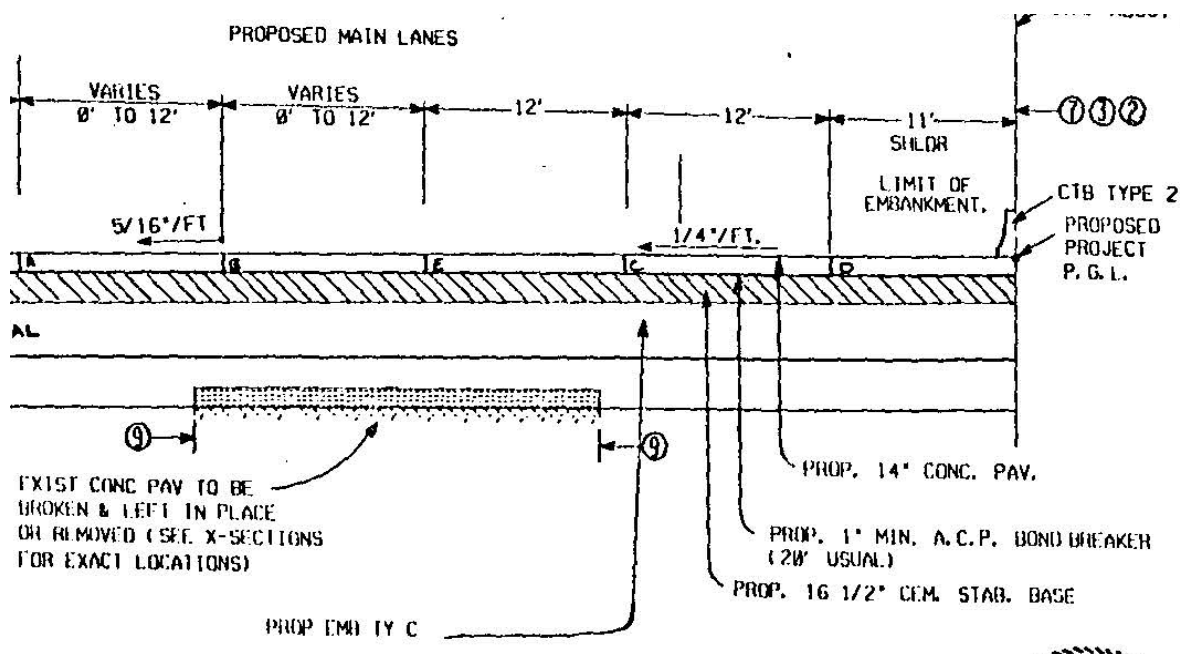
15. For years, the TxDOT has known that the solid concrete traffic median barrier/dam it erected down the middle of IH-10 would block the overtopping of excess rainfall runoff trying to cross over the roadway and cause the flooding of and significant damage to Plaintiffs' real and personal property. And even so, TxDOT continues raising the impermeable traffic barrier/dam,

extending it further east down the center of the highway despite knowing of the damage caused to Plaintiffs' properties by the rainfall runoff it blocks.

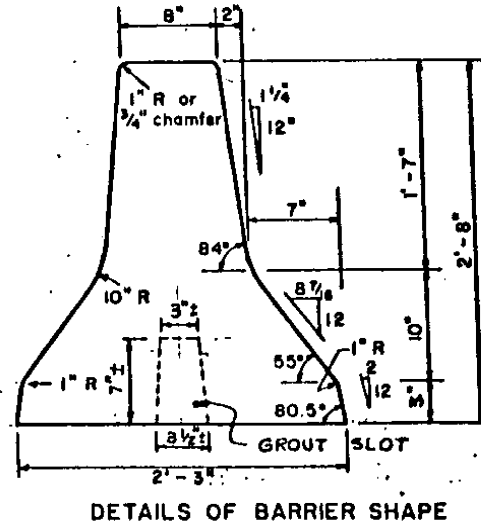
I. The State of Texas has Installed an Impenetrable Solid Concrete Traffic Barrier on the Centerline of Interstate Highway 10 that Operates as a Dam, Blocking Rainfall Runoff Coming from the North that wants to Overtop the Highway Centerline, Backing up Water to the North, and Flooding Plaintiffs' Properties.

16. In 1956, President Dwight D. Eisenhower signed the Federal-Aid Highway Act into law, allocating billions of dollars for the construction of the Interstate Highway System (the "System"), which, in present day, includes IH-10. The Federal Highway Administration dispenses funds to state governments, which in turn build and maintain the System within their respective boundaries. In turn, the states must follow federal regulations that govern the building and maintenance of the System—including any impact of a particular project's design and operation on the hydrology (rainfall runoff characteristics) of the surrounding property.

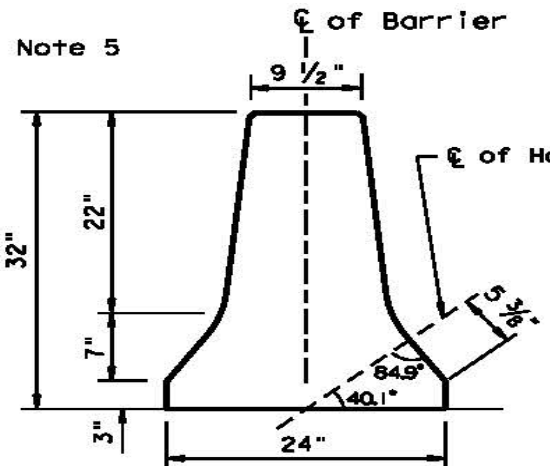
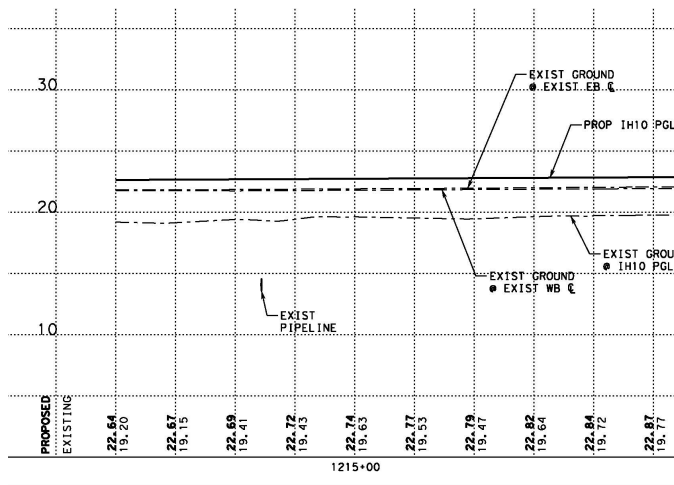
17. As part of Federal Aid Project IR 10-8(134)824, TxDOT significantly raised the elevation of IH-10 from the height of its "Existing Concrete Pavement" to a new "PROPOSED PROJECT P.G.L."



18. In addition, TxDOT erected a precast concrete barrier (“CTB TYPE 2”) in the median between the east/west lanes of IH-10. The barrier was installed in sections thirty feet (30’) long, each weighing approximately seven (7) tons and rising thirty-two inches (32”) above the now-elevated grade level of the traffic lanes. And, importantly, the 30-foot sections are grouted together so as to form a complete seal.



19. Later, pursuant to Federal Aid Project NH 1602(470), TxDOT designed and is constructing another set of improvements to IH-10. These plans include the erection of a thirty-two-inch (32”) permanent concrete traffic barrier down the centerline of a now-elevated highway.



Construction of Project NH 1602(470), including erection of the 32-inch high, solid median barrier down the centerline of IH-10, continues to this day as the work proceeds easterly.

20. Unlike other segments of IH-10, the miles of median barrier in the Operative Geographic Area does not have slots at the base that would otherwise allow water to pass between the north and south sides. instead, the median barrier is completely solid.



21. The functional effect of installing such solid median barriers on elevated highways is to create a dam that blocks stormwater runoff on the north side of the centerline of IH-10, east of State Highway 61 in Chambers County, which backs up and stores water at or below the elevation of the top of the barrier/dam on private property within the Operative Geographic Area.

22. TxDOT's design, construction, and maintenance of these barriers/dams was no mistake. Rather, the barriers/dams—in addition to maintaining traffic safety—keep the southern portion (eastbound lanes) of IH-10 open during severe rainfall events that would otherwise overtop

the roadway and prevent all traffic from using this major traffic corridor. And, while the public generally benefits from the access to transportation along at least a portion of this roadway during such rainfall events, the burden of that benefit falls exclusively on Plaintiffs within the Operative Geographic Area who are forced to store such waters on their property without their permission.

23. For example, in August 2017, Tropical Storm Harvey brought its rainfall to much of southeast Texas, including Chambers County. During and after Harvey, the IH-10 median barrier functioned as a leak-proof dam, blocking rainfall runoff from overtopping the entire roadway and backing water up on the north side.

24. While performing its public functions of providing a safety barrier separating the traffic flow and keeping the eastbound traffic lanes open, the IH-10 median barrier backed up and detained storm water runoff on private property within the Operative Geographic Area and caused extreme damage to Plaintiffs' properties.



25. Likewise, in September 2019, TxDOT's median barrier/dam along IH-10 blocked rainfall runoff from overtopping the roadway during and after Tropical Storm Imelda. Again, eastbound traffic lanes remained open and conferred a benefit to the public at large. And, again, the blocked storm runoff water backed up and flooded and severely damaged Plaintiffs' property.



26. The damage and destruction of Plaintiffs' real and personal property was the intended, direct, natural, and/or foreseeable result of State-authorized affirmative action done for a public purpose—namely, the design, construction, operation, and maintenance of IH-10.

27. Nor were Harvey or Imelda “rare” or “unprecedented” rain events for this region of southeast Texas. The history of hurricanes, tropical storms, and large frontal storms that have released significant amounts of rainfall in the area is well documented. The permanent placement of an impenetrable traffic median barrier/dam down the center of IH-10 guarantees that the flooding of Plaintiffs' properties will inevitably reoccur, like when Imelda followed Harvey only two years later.

28. Each Plaintiff owned homes, fixtures, businesses, and personal property protected from the taking, damaging, or destruction by the State without compensation. The flooding suffered by each Plaintiff interfered with the ability to use their land and personal property for their intended purposes. Plaintiffs had reasonable expectations that they would be able to occupy and use their homes, businesses, and personal property for the purposes and in the manner for which they were purchased or leased. But the backwater stored onto each Plaintiff's property severely interfered with their reasonable investment-backed expectations regarding the occupancy and use of their property. Many Plaintiffs were displaced from their homes and had to stay in hotels or alternative accommodations following Harvey and Imelda due to this government-induced flooding.

29. Portions of Plaintiffs' homes and other improvements have been damaged and/or destroyed, necessitating the tearing out of soiled walls, removing mold-prone insulation, replacing ruined floors, replacing garage doors and other exterior features, and requiring the repair of a vast array of structural components. Moreover, many Plaintiffs' properties suffered significant erosion and loss of crops, grasses, and groundcover essential to the use to which Plaintiffs had put the properties. And those Plaintiffs using their property for commercial purposes were deprived of the use of, and temporarily any access to, their property, losing the benefits and profits attendant to the continued operation of their commercial ventures.

30. In addition to the damage and loss of access to their real property, Plaintiffs suffered the permanent damage and destruction of personal property including appliances, furniture, tools, machinery, livestock, crops, vehicles, and the tragic loss of personal effects and mementoes which can never be replaced. For many Plaintiffs, the loss amounted to most of their possessions.

31. The impoundment of rainwater runoff on Plaintiffs' property for days on end, destroying Plaintiffs' real and personal property and denying them access to that property, is not something Plaintiffs expected or reasonably could have expected when purchasing and developing

their property. Many of these tracts have been owned by Plaintiffs' forebearers and family members for decades without having been subject to flooding of the nature, character, extent, and duration as they experienced after TxDOT built the barriers/dams along the elevated IH-10.

32. The following summarizes the foundation of the claims presented:

- a. each Plaintiff owned and/or leased real and personal property located north of IH-10 in Chambers County, Texas that lies below the lowest point of elevation reached by the top of the traffic median barriers/dams installed by TxDOT through the middle of IH-10;
- b. each Plaintiffs owned and/or leased the above-referenced property at the time the property suffered devastating flooding during Tropical Storms Harvey (August 2017) and Imelda (September 2019);
- c. each Plaintiffs' real and personal property was inundated, destroyed, and/or damaged as a result of the affirmative actions of the State in designing, constructing, operating, and/or maintaining the configuration of IH-10; and
- d. each Plaintiffs' property was damaged by State actions which either (a) the State knew would result from its actions, (b) the State knew were substantially certain to result from its actions, and/or (c) were the natural, probable, and/or foreseeable consequence of the State's affirmative acts; and
- e. each Plaintiff, as a consequence of the foregoing, is entitled to recovery of just compensation for the losses suffered by the taking, damaging, and/or destruction of their real and personal property.

33. Per Tex. R. Civ. P. 47, each Plaintiff seeks recovery of compensation in an amount greater than \$1 million.

CAUSES OF ACTION

34. While the standards (and controlling authority) governing Plaintiffs' inverse condemnation claims under the Texas and U.S. Constitutions differ, the facts in this case mandate that the State compensate Plaintiffs under both constitutional provisions.

COUNT 1: Violation of Article I, Section 17 of the Texas Constitution for the Taking, Damaging, or Destruction of their Property.

35. Plaintiffs re-allege and incorporate the preceding paragraphs of this Original Petition.

36. To establish a claim under Article I, Section 17, a property owner must show that there has been: (1) an intentional government act by a government entity; (2) that resulted in the taking, damaging, or destroying of a property owner's property; and (3) for public use. Plaintiffs' claims fulfill each of these requirements.

A. The Design, Construction, Operation, and/or Maintenance of IH-10 Constitutes a Public Use.

37. The design, construction, operation, and/or maintenance by the State of Texas of Interstate Highway 10 constitutes a "public use" for purposes of Plaintiffs' inverse condemnation claims.

38. The State of Texas has recognized that public highway projects to facilitate interstate travel fall within the meaning of "public use." Therefore, Plaintiffs, who are owners of property protected by the Texas Constitution, may bring a claim for just or adequate compensation for their property which has been taken, damaged, and/or destroyed by the design, construction, operation, and/or maintenance of IH-10.

B. The Design, Construction, Operation, and/or Maintenance of IH-10 Caused the Flooding of Plaintiffs' Properties.

39. The Texas Supreme Court has recognized that compensation for the taking, damaging or destruction of private property is in order if an injury results from either the construction of public works or their subsequent maintenance and operation. The erection of IH-10, and its subsequent operation and maintenance, by the State that caused the flooding of Plaintiffs' property is an invasion for which compensation is required.

C. The State Intentionally Caused Damage to Plaintiffs' Properties.

40. Finally as to Plaintiff's claim under Article I, Section 17 of the Texas Constitution, the element of intent is shown where the governmental entity that physically damages private property to confer a public benefit (1) knows that a specific act is causing identifiable harm; or (2) knows that the

specific property damage is substantially certain to result from an authorized government action—that is, that the damage is necessarily an incident to, or necessarily a consequential result of, the government’s action. Both of those standards are met here.

1. The State had actual knowledge that its actions caused damage to Plaintiffs’ properties, and that the maintenance and operation of its public improvements would do so again.

37. The State was aware at the time it designed, constructed, operated, and/or maintained the IH-10 projects that its actions would cause physical damage to Plaintiffs’ private property. As the Texas Supreme Court has noted, “There may well be times when a government entity is aware that its action will necessarily cause physical damage to certain private property, and yet determines that the benefit outweighs the harm caused to that property. In such a situation, the property may be damaged for public use.”

38. That is precisely what occurred during both Tropical Storms Harvey and Imelda. Plaintiffs’ properties experienced greater flooding, and for a greater period of time, than ever before because of the backwater effect from the IH-10 projects—as the State knew would happen.

39. Prior to August 2017, Plaintiffs’ properties suffered short-lived, intermittent flooding from heavy rainfall events, but the storm’s runoff was able to (and did) naturally flow south over IH-10 and ultimately down to the Gulf of Mexico. During Tropical Storm Harvey, however, Plaintiffs experienced significantly greater flooding of (and damage to) their properties, and the inundation lasted for a greater period of time—well after Harvey had moved on—than ever before because the rainfall runoff was retained behind the elevated and improved IH-10.

40. Recognizing the impact of the *de facto* dam formed by the elevated highway with its impermeable traffic median barrier, some Plaintiffs contacted State officials (including officials at TxDOT) and told them of the damage caused to their properties by the State’s actions. But the State did nothing to alleviate the problem. Indeed, the State has continued its ongoing modifications to IH-

10, extending even further the impenetrable barrier down the center of the highway despite having been alerted to the damage caused by the inundation of properties by the rainfall runoff it retained. It was only a matter of time before the State's action submerged Plaintiffs' properties again.

41. And that time soon came. In September 2019, Tropical Storm Imelda deluged Chambers County, and again the State's traffic barrier arrested the rainfall runoff. Even though the State had been previously told of the damage caused during Harvey by the weir it had erected in the middle of IH-10, the State had continued its operation and maintenance of the highway and persisted with the erection of the impermeable barrier as well.

42. As Imelda approached, one Plaintiff – Steven Devillier – sought to prevent a repeat of the devastation wreaked by Harvey. Devillier asked government officials for permission to remove some of the barrier, but when his request was relayed to TxDOT, it was denied. As the Beaumont Enterprise related the story:

“[Steven] Devillier lives near Winnie in Chambers County, on the north side of Interstate 10. When Hurricane Harvey struck the region in 2017, a solid concrete barrier that divides the freeway's eastbound and westbound lanes had acted like a dam, holding back water headed toward the Gulf of Mexico.

...

Since Harvey, Devillier says, he had been trying to get something done about the freeway partition. Could the divider be redesigned to allow water to flow through? Could drainage underneath be improved?

The barrier seemed to hold back water to the north, swamping the freeway lanes headed toward Houston. The build-up, he believes, caused his and other homes to be inundated, family members included. The freeway was closed for three days.

Devillier says he and his cousin petitioned authorities for change that didn't come fast enough.

As Imelda bore down, Devillier begged the Chambers County judge for permission to demolish the barrier with a trackhoe, he said. The county engineer said officials passed the request to the Texas Department of Transportation, believing it was not the county's decision to make.

TxDOT, according to a spokesperson, had been working with University of Texas researchers to study how the barrier affected flood-prone areas. The agency wasn't ready to see the barricade immediately taken down.

The barrier kept the eastbound lanes of the freeway open, spokesperson Sarah Dupre wrote in an email, allowing authorities to reach an otherwise sealed-off Winnie.

Devallier's property, along with thousands of additional acres north of the IH-10 barrier, was thereafter flooded by rainfall runoff from Imelda retained by its Projects.

43. Because of the benefits to the general public, including the enhanced safety and the creation of an evacuation route via the eastbound lanes of the freeway, the State has chosen to construct and maintain the operation of IH-10 *with* the barrier. That intentional choice by the State has forced Plaintiffs to bear the burden of providing those public benefits, and they are entitled to compensation for their losses.

2. The State possessed knowledge that damage to Plaintiffs' properties was substantially certain to result from its actions.

44. Because the State actions that form the basis of Plaintiffs' claims were public works performed pursuant to Federal Aid Projects IR 10-8(134)824 and NH 1602(470), compliance with the federal and state rules and regulations applicable to that work was mandatory. The analyses, studies, and documentation required by those rules and regulations provide objective evidence that the State knew harm to Plaintiffs' properties was substantially certain to result from its actions.

45. Because the TxDOT projects cross land that the Federal Emergency Management Agency ("FEMA") has designated as a Special Flood Hazard Area ("SFHA"), i.e. being in the 100-year floodplain, the National Flood Insurance Act required the following actions which would generate objective evidence that damage to Plaintiffs' properties was substantially certain to occur:

- a. A full hydrologic and hydraulic analysis and coordination with the Floodplain Administrator for Chambers County;
- b. A comparison of the flood footprint of the project's design hydraulic analysis with the FEMA Flood Insurance Rate Map Zone footprint, and any serious discrepancies explored; and
- c. If any rise in the base flood elevation results which extends beyond the project right of way, a discussion with the Chambers County Floodplain Administrator

is required to make sure the rise is acceptable—and any rise that could cause damage to properties cannot be acceptable.

46. Similarly Presidential Executive Order 11988 requires each actor, in carrying out federal programs, (1) to reduce the risk of flood loss, to minimize the impact of floods on human safety, health and welfare, and to restore and preserve the natural and beneficial values served by floodplains; and (2) to evaluate the potential effects of any actions in a floodplain to ensure its planning programs reflect consideration of flood hazards and floodplain management and to consider alternatives that will not impact a floodplain. Additional federal regulations required the State to implement Federal Aid Projects IR 10-8(134)824 and NH 1602(470) in a manner (a) to prevent uneconomic, hazardous, or incompatible use and development of floodplains; (b) to avoid, where practicable, encroachments by its actions; (c) to minimize the adverse impacts its actions may have on base floodplains, including direct or indirect support for development; and (d) to preserve the natural and beneficial floodplain values that are adversely affected by such actions.

47. And Title 23, Subpart A of the U.S. Code of Federal Regulations (“Subpart A”), which sets forth Federal Highway Administration (“FHWA”) policies and procedures for the hydraulic design of encroachments on floodplains for highway projects, applies to the Federal Aid projects and thus required TxDOT to prepare location hydraulic studies for each Project that would include a discussion of (a) the hydraulic risks associated with implementation of the action, (b) the impacts from the action on natural and beneficial floodplain values, (c) the support of probable incompatible floodplain development, (d) the measures to minimize floodplain impacts associated with the action, and (e) the measures to restore and preserve the natural and beneficial floodplain values impacted by the action, along with an evaluation and discussion of the practicability of alternatives to any longitudinal encroachments. Again, TxDOT’s understanding of and need for compliance with these regulations created objective evidence of the State’s knowledge of the damage to Plaintiffs’ properties that would occur from its actions regarding IH-10.

48. Finally, several Texas state statutes and regulations, including TxDOT's own rules and policies, require an investigation, analysis, and documentation that provide objective evidence of the State's knowledge of the expected flooding of Plaintiffs' properties created by the State's actions.

3. Subjective knowledge by the State that its action will cause specific harm to a specific piece of property should not be required to recover on a Takings claim under the Texas Constitution.

49. As shown below in Count 2, the intent or knowledge requirement to demonstrate a taking under the Texas Constitution differs from the showing a party needs to make to recover under the Fifth Amendment to the U.S. Constitution. Given the recent change in Takings jurisprudence by the U.S. Supreme Court, any difference should be eliminated.

50. The rights and protection accorded Texas property owners under the State constitution's takings provision should not provide less security against having their property taken without just compensation than its federal counterpart.

51. The ability of a property owner to litigate both a Fifth Amendment Takings claim and a claim under Article I, Section 17 of the Texas Constitution in the same suit should bring the intent standard applicable to each in harmony so that an unnecessary and perfidious dichotomy between the state and federal claims is eliminated.

52. Therefore, if it is discovered the State did not comply with the mandates of federal and state law, regulations, and policy, the State's reckless disregard of facts which it had a duty to investigate should support a finding of the requisite intent for a Takings claim involving the flooding of private property. Government actors should be treated the same as other litigants vis-à-vis how the element of "intent" is applied under Texas law when that element is adjudicated in an action to which they only are subject—a Takings claim. Therefore, Plaintiffs bring their nonfrivolous argument for the extension, modification, or reversal of existing Texas law.

53. Therefore, Plaintiffs seek recovery of just and adequate compensation pursuant to Article I, Section 17 of the Texas Constitution for the permanent and/or temporary taking, damaging, and/or destruction of their real and personal property.

COUNT 2: The Taking of Property Without Just Compensation in Violation of the Fifth Amendment to the United States Constitution.

54. Plaintiffs re-allege and incorporate the preceding paragraphs of this Original Petition.

55. In addition to, and in the alternative to, their claim under the Texas Constitution, Plaintiffs seek recovery for the State's permanent and/or temporary taking of their real and personal property without paying just compensation in violation of the Takings Clause of the Fifth Amendment of the U.S. Constitution.

56. Federal law directs that whether government-induced increased water runoff onto private property constitutes a taking by inverse condemnation under the Fifth Amendment is determined by a two-question test: (1) did the Plaintiff possess a protectable property interest in what they allege the government has taken, and (2) were the effects the Plaintiff experienced the predictable result of governmental action which was sufficiently substantial to justify a takings remedy. Here the answer to both those questions is yes.

57. Each Plaintiff suffered flooding of their property greater than ever before after TxDOT built the barriers/dams along the elevated IH-10.

58. The State should not force Plaintiffs alone to bear the burdens of providing increased highway safety and an emergency evacuation route which, in all fairness and justice, should be borne by the public as a whole.

A. Each Plaintiff Possesses a Property Interest Protected Under the Fifth Amendment Against Being Taken by the State Without Just Compensation.

59. The existence of a protectable property interest under the Fifth Amendment is determined by reference to state law. Texas law recognizes that the term property, as it applies to

takings law, means not only the thing owned, but also every right which accompanies ownership. Each Plaintiff has protected property rights which have been taken by the State's actions.

B. The Effects Each Plaintiff Experienced were the Predictable Result of the State's Action and were Sufficiently Substantial to Justify a Takings Remedy.

60. An analysis of the six factors examined when determining the second part of a federal Takings claim shows that not only was the flooding Plaintiffs experienced the predictable result of the State's action, but also the effects suffered were sufficiently substantial to constitute a taking.

1. The time and duration of the invasion.

61. Because Plaintiffs' properties were physically invaded by the flooding from the Projects (whether temporarily or permanently), the temporal element of the federal analysis is used only to determine the measure of just compensation under the Fifth Amendment, not whether a claim arose at all. This element is not relevant to the takings analysis.

2. The severity of the interference.

62. Plaintiffs meet the severity burden since their real and personal property interests have been subjected to an invasion that destroyed and/or completely precluded each Plaintiffs' access to, right to use, and enjoyment of their property. This element supports the finding of a taking.

3. Plaintiffs' properties were flooded by the State's actions.

63. The question presented by the third factor is whether the invasion of Plaintiffs' properties was caused by the State's action; in essence, a comparison of the results from government-authorized actions for a public purpose with what the result would have been without or "but for" those government-authorized actions. Plaintiffs' properties are located behind a permanent structure that blocks and backs up rainfall runoff at a level that floods those properties. The inundation of Plaintiffs' properties was the direct, natural, and foreseeable result of authorized activities by the State in furtherance of a public purpose: the design, construction, operation, and maintenance of IH-10.

“But for” the State-authorized action, Plaintiffs’ properties would not have been flooded in the manner and to the extent they were flooded, so this factor supports finding a taking.

4. The degree to which the invasion was intended.

64. The intent to find a taking under the Fifth Amendment is shown by evidence that the plaintiffs’ injuries were the direct, natural, or probable result of the authorized government action. It is not necessary to show that the State subjectively intended to take any Plaintiff’s property, only that the flooding of Plaintiffs’ land was the natural and probable consequence of the State’s acts. Here the FEMA floodplain maps clearly showed that rainfall runoff from large storm events overtop this roadway in the vicinity of the Plaintiffs’ properties, such that elevating and constructing a solid barrier/dam across the median of the roadway would obviously block and back up the water attempting to overtop and flow across the road surface. Because an analysis by the State of the hydrological impact that would be caused by the placement of such a dam in the center of IH-10 in northeast Chambers County would have only confirmed this blocking and the flooding that invaded and appropriated Plaintiffs’ property, this factor supports finding a taking.

5. The character of the land at issue.

65. Plaintiffs’ properties are homes, farms, ranches, and businesses whose use is grossly inconsistent with—and exceptionally vulnerable to—significant damage from flooding of the kind and severity experienced because of the TxDOT IH-10 Projects. The character of the land, as reflected in its use by Plaintiffs, supports finding a taking.

6. Plaintiffs’ reasonable investment-backed expectations.

66. Finally, the State’s actions ran counter to, and severely interfered with, Plaintiffs’ reasonable investment-backed expectations in the safety and security of the residential and commercial properties that they rented or owned, as well as the use and enjoyment of their personal property destroyed by the subject flooding. This factor supports finding a taking.

67. When Plaintiffs acquired their property interests, they did not expect that a new hydrologic landscape would be created by the State implementing a *de facto* flood control effort that did not exist, or was not evident, when they purchased or leased their real properties. Most of the Plaintiffs have invested their life savings into their properties without any expectation of the flood certainty that the State has created. And the State-created flooding has severely impacted the economically viable and productive use of the land, further decimating Plaintiffs' reasonable investment-backed expectations. This factor too supports finding a taking.

C. The State's Physical Invasion of Each Plaintiffs' Property, Depriving them of the Use, Enjoyment, Exclusive Possession and Right to Alienate their Property, Independently Constitutes a Taking Under the Fifth Amendment.

68. Federal case law also directs that the analytical test used to determine whether there has been a taking can be assessed through the conceptual framework applicable to the claim.

69. Generally, the government can take property by two means: physically or by regulation. Both types of takings can be further divided into two categories: categorical and non-categorical. Categorical takings deprive the owners of all economically viable use of their property. Non-categorical takings, on the other hand, deprive the owner of some amount of the economic use of the property (either through physical invasion or onerous regulation). Furthermore, a taking can be either permanent or temporary in duration.

70. Here, Plaintiffs' properties were physically invaded by rainfall runoff the state stored on their land, in their homes, and/or in their businesses. The inundation itself lasted for a several days, and that was followed by a long period of cleanup, replacement, and repair after both Harvey and Imelda. Indeed, some properties were not completely repaired after Harvey when Imelda struck, and some remain unfinished to this day. The flooding effected (1) a temporary categorical physical taking of their real property; (2) a permanent non-categorical physical taking of a flowage easement

over their real property, and (3) a permanent categorical physical taking of their personal property. Each Plaintiff seeks just compensation for the taking of their property without just compensation.

PRAYER

Plaintiffs pray that the Court enter judgment in Plaintiffs' favor finding that Plaintiffs are entitled to recovery based on the allegations above in an amount to be determined by the trier of fact, and award Plaintiffs all other relief this Court is empowered to provide and to which Plaintiffs show themselves entitled.

Dated: May 26, 2020.

Respectfully submitted,



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