SUPREME COURT OF LOUISIANA

No. 2024-C-0055

WATSON MEMORIAL SPIRITUAL TEMPLE OF CHRIST D/B/A/ WATSON MEMORIAL TEACHING MINISTRIES, CHARLOTTE BRANCAFORTE, ELIO BRANCAFORTE, BENITO BRANCAFORTE, JOSEPHINE BROWN, ROBERT PARKE, NANCY ELLIS, MARK HAMRICK, ROBERT LINK, CHARLOTTE LINK, ROSS MCDIARMID, LAUREL MCDIARMID, JERRY OSBORNE, JACK STOLIER AND WILLIAM TAYLOR

Plaintiffs-Respondents

VERSUS

GHASSAN KORBAN, IN HIS CAPACITY AS EXECUTIVE DIRECTOR OF THE SEWERAGE AND WATER BOARD OF NEW ORLEANS

Defendant-Applicant

CIVIL PROCEEDING

On writ of certiorari to the Fourth Circuit Court of Appeal,
Docket No. 2023-CA-0293
The Honorable Daniel L. Dysart, Joy Cossich Lobrano, and
Karen K. Herman, presiding, and

On appeal from the Civil District Court, Orleans Parish, No. 2022-10955,
"F-14," Honorable Jennifer M. Medley, presiding

GHASSAN KORBAN'S BRIEF IN SUPPORT OF APPLICATION FOR REHEARING

Michael E. Botnick (#3284)
Alex B. Rothenberg (#34740)
GORDON, ARATA, MONTGOMERY, BARNETT,
MCCOLLAM, DUPLANTIS & EAGAN, LLC
201 St. Charles Avenue, 40th Floor
New Orleans, LA 70170-4000
Telephone: (504) 582-1111
Facsimile: (504) 582-1121
mbotnick@gamb.com
arothenberg@gamb.com

MITCHELL & ASSOCIATES, APLC

CRAIG B. MITCHELL #24565
CHRISTOPHER D. WILSON #27142
615 Baronne Street, Suite 300
New Orleans, Louisiana 70113
Telephone: (504) 527-6433
Facsimile: (504) 527-6450
Email: cbmitchell@mitchellaplc.com
cdwilson@mitchellaplc.com

And

DARRYL HARRISON #08410
SEWERAGE AND WATER BD
OF NEW ORLEANS
625 St. Joseph Street, Room 201
New Orleans, LA 70165
Telephone: (504) 585-2236
Facsimile: (504) 585-2426
Email: dharrison@swbno.org

Attorneys for Defendant-Applicant
Ghassan Korban

TABLE OF CONTENTS

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

I. FEDERAL *RES JUDICATA* BARS PLAINTIFFS' SUIT 1

A. *Reeder* does not govern exceptions to federal *res judicata* 2

B. There is no express or implied reservation against *res judicata* 3

II. LA. CONST. ART. I, § 4(B)(1) DOES NOT AUTHORIZE MANDAMUS 4

III. THE CONCURRENCES DO NOT PROVIDE ALTERNATIVE RATIONALES TO AFFIRM THE COURT OF APPEAL 6

IV. CONCLUSION 8

TABLE OF AUTHORITIES

Cases

Ariyan, Inc. v. Sewerage & Water Bd. of New Orleans, 29 F.4th 226 (5th Cir. 2022)......................... 3,5,8

Ariyan, Inc. v. Sewerage & Water Bd. of New Orleans, 543 F. Supp. 3d 373 (E.D. La. 2021) 3,4

B&B Hardware, Inc. v. Hargis Indus., 575 U.S. 138 (2015) 4,8

Black v. OPM, 641 F. App'x 1007 (Fed. Cir. 2016)... 4

Chamberlain v. State ex rel. Dep't of Transp., 624 So. 2d 874 (La. 1993) 8

Conwill v. Greenberg Traurig, L.L.P., No. 11-0938, 2012 U.S. Dist. LEXIS 140197 (E.D. La. Sept. 28, 2012) 2

Folsom v. City of New Orleans, 109 U.S. 285 (1883) 3

Hoag v. State, 04-0857 (La. 12/01/04), 889 So. 2d 1019 5

Jacobs v. City of Bunkie, 98-2510 (La. 05/18/99), 737 So. 2d 14 8

Jazz Casino Co., L.L.C. v. Bridges, 2016-1663 (La. 05/03/17), 223 So. 3d 448....................................... 5

King v. Provident Life and Accident Ins. Co., 23 F.3d 926 (5th Cir. 1994) 2

Knick v. Twp. Of Scott, 588 U.S. 180 (2019).. 3

McLane S., Inc. v. Bridges, 11-1141 (La. 01/24/12); 84 So. 3d 479 6

Mellor v. Par. Jefferson, 2022-01713 (La. 09/08/23), 370 So. 3d 388.. 4,6

Newman Marchive P'ship, Inc. v. City of Shreveport, 07-1890 (La. 4/8/08), 979 So. 2d 1262................ 5

Reeder v. Succession of Palmer, 623 So. 1268 (La. 1993)... 1

Reynolds v. Bordelon, 2014-2362 (La. 06/30/15), 172 So. 3d 589... 7

San Remo Hotel, L.P. v. City and County of San Francisco, 545 U.S. 323 (2005).................................... 3

Terrebonne Fuel & Lube, Inc. v. Placid Ref. Co., 95-654 (La. 01/16/96), 666 So. 2d 624 2

Thompson v. Deutsche Bank Nat'l Trust Co., No. 21-11639, 2022 U.S. App. LEXIS 26089 (11th Cir. Sept. 19, 2022)... 4

Vines v. University of Louisiana at Monroe, 398 F.3d 700 (5th Cir. 2005) 2

Watson Memorial Spiritual Temple of Christ v. Korban, 2024-00055 (La. 06/28/24), 2024 La. LEXIS 1113 .... passim

Statutes

La. Civ. Code art. 2315.. 6

La. Code Civ. Proc. art. 931.. 7

La. Rev. Stat. § 13:5109(B) 5

La. Rev. Stat. § 38:390(A) 6

La. Rev. Stat. § 19:10... 6

La. Rev. Stat. § 19:8... 6

La. Rev. Stat. § 47:1494(A) 5

Constitutional Provisions

La. Const. art. I, § 4(B)(1) 6, 7, 9

La. Const. art. XII, § 10(A) 9, 10

La. Const. art. XII, § 10(C) .... passim

Applicant-Defendant Ghassan Korban ("***Korban***") submits this brief in support of his application for rehearing filed with this Court on July 8, 2024.[1] The Court's June 28, 2024 opinion, *Watson Memorial Spiritual Temple of Christ v. Korban*, 2024-00055 (La. 06/28/24), 2024 La. LEXIS 1113, addresses important issues that arise often. The reoccurrence of these issues makes it especially important that the precedent set by this Court is correct, consistent, and easily applied to future cases. With respect, the Court's opinion does not accomplish these goals on both adjudicated issues.

First, in determining that federal *res judicata* does not bar Plaintiffs' suit, the Court disregards on-point federal jurisprudence and instead relies on its 1993 decision in *Reeder v. Succession of Palmer*, 623 So. 1268 (La. 1993). And while the situation here fails to satisfy the narrow exception to federal *res judicata* recognized in *Reeder*,[2] more importantly, subsequent federal jurisprudence has expressly recognized that *Reeder* announced an incorrect view of *res judicata* that was overly permissive. The Court should not compound that mistake here by extending *Reeder* well beyond what federal courts already announced was in error.

Second, this Court's resolution of the merits leaves its La. Const. art. XII, § 10(C) jurisprudence in a confusing and sometimes self-contradicting state. The Court relies on cases where there were express statutory or constitutional mandates to appropriate funds, which does not exist for Plaintiffs' judgments. Further, central to this Court's reasoning in this case was that the self-executing nature of the constitutional mandate to pay just compensation renders payment of Plaintiffs' money judgments for inverse condemnation non-discretionary and, therefore, subject to mandamus. However, creation of a cause of action against a political subdivision is separate from a legislative allocation of *when* payment must be made. Under this Court's reasoning, all tort and contract judgments would also be subject to mandamus. This would all but eviscerate La. Const. art. XII, § 10(C).

For these reasons and as more fully set forth below, Korban respectfully requests that the Court grant his application for rehearing, reverse the court of appeal, and order dismissal of this suit.

I. FEDERAL *RES JUDICATA* BARS PLAINTIFFS' SUIT

The underlying procedural facts of this case are undisputed and were recognized by this Court. After Plaintiffs obtained their State court money judgment against the Sewerage and Water Board of New

---

[1] On July 10, 2024, this Court granted Korban an extension until July 19, 2024 to file his brief in support of the application for rehearing.

[2] *See* Brief of Korban at 9-12, filed on April 8, 2024.

Orleans ("***SWB***"), they sued the SWB and Korban in federal court seeking execution of their judgments. The federal district court dismissed Plaintiffs' suit for failure to state a claim, the United States Fifth Circuit affirmed, and the United States Supreme Court denied certiorari. Plaintiffs then subsequently filed suit in State court seeking to compel payment of their judgments via a writ of fieri facias and/or mandamus. *See Watson Mem'l*, 2024 La. LEXIS 113, at *2-*4.

A. *Reeder* does not govern exceptions to <u>federal</u> *res judicata*

This Court properly recognized that the preclusive effect of the previous federal judgment is governed by federal law. *Id.* at *7 (citing *Terrebonne Fuel & Lube, Inc. v. Placid Ref. Co.*, 95-654 (La. 01/16/96), 666 So. 2d 624, 633). In determining that federal *res judicata* did not apply to bar this case, the Court found that all the general criteria were satisfied but relied on an exception to the doctrine it recognized in *Reeder*. Specifically, this Court determined that *Reeder* foreclosed application of federal *res judicata* because "language of the federal courts in the instant matter makes it clear that it would have declined to exercise its jurisdiction." *Id.* at *11.

Respectfully, this approach errs in several ways. Primarily, federal courts have recognized that *Reeder* misapplies federal jurisprudence on *res judicata* predating *Reeder* and subsequent to it. *See Conwill v. Greenberg Traurig, L.L.P.*, No. 11-0938, 2012 U.S. Dist. LEXIS 140197, at *15 (E.D. La. Sept. 28, 2012) (discussing *Reeder* and comparing it to U.S. Fifth Circuit precedent). Federal jurisprudence provides that only when "***a judgment*** 'expressly leaves open the opportunity to bring a second action on *specified* parts of the claim or cause of action *that was advanced in the first action*' [should] preclusion [] be forestalled." *Id.* at *16 (quoting *King v. Provident Life and Accident Ins. Co.*, 23 F.3d 926 (5th Cir. 1994)) (bolded emphasis added; non-bolded emphasis added by *Conwill* court). This requirement was reiterated in *Vines v. University of Louisiana at Monroe*, 398 F.3d 700 (5th Cir. 2005), which held that "absent an *express* reservation, res judicata applies to bar a second suit." *Id.* at 712 (emphasis in original). Federal *res judicata* cannot be ignored based on a guess of what the second court believes the first court would have or should have done. This would render federal *res judicata* a wholly subjective and discretionary inquiry by the second court. Instead, there must be an ***express*** reservation ***<u>in the judgment</u>*** by the first court exempting certain claims from *res judicata*. The federal district court's judgment in the prior enforcement action contains no express or implied reservation nor any language that could be construed as such.

Binding precedent from the United States Supreme Court also makes clear that the second court's subjective belief about what the first court would have done is not enough to bypass federal *res judicata*. In *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005), the Supreme Court held that "a state court's resolution of a claim for just compensation under state law generally has preclusive effect in any subsequent federal suit," even though the plaintiffs never had an opportunity to bring their federal takings claims before. *Knick v. Twp. Of Scott*, 588 U.S. 180, 184-85 (2019) (discussing *San Remo*).[3] This was called the "*San Remo* preclusion trap." *Id.*

But under *San Remo*, a prior adjudication concerning the same transaction or occurrence or common nucleus of operative facts extinguishes any claims that arise from that same fact pattern. This is true even when, like in *San Remo*, the plaintiffs were ***unable*** to bring those claims in the first action. In dismissing Plaintiffs' prior federal action, Judge Feldman even recognized the applicability of *San Remo* in the wake of *Knick*. *See Ariyan*, 543 F. Supp. 3d at 379. If Supreme Court precedent applies *res judicata* when the prior court would have been unable to adjudicate those claims earlier, it would be incoherent to hold *res judicata* inapplicable based on mere speculation that the first court would have declined to exercise discretion to hear those claims in an earlier suit.

Moreover, the federal courts undoubtedly did address the central issue in this appeal: the enforceability of Plaintiffs' money judgments. And with sympathy for Plaintiffs, the federal courts nevertheless ruled against them and recognized that Plaintiffs "have succeeded in winning a money judgment [but] [w]ithout any judicial means to recover, they are compelled 'to rely exclusively upon the generosity of the judgment debtor.'" *Ariyan, Inc. v. Sewerage & Water Bd. of New Orleans*, 29 F.4th 226, 232 (5th Cir. 2022) (quoting *Folsom v. City of New Orleans*, 109 U.S. 285, 295 (1883)). Plaintiffs' case here undeniably seeks to relitigate that holding and enforce their judgments. Relitigation of adverse rulings is the very behavior federal *res judicata* prevents.

B. There is no express or implied reservation against *res judicata*

While there is no express or implied reservation in the judgment, this Court instead relied on language from the district court's order and reasons regarding its decision to decline to hear Plaintiffs' federal declaratory judgment claim, a claim not at issue in this litigation. *See Watson Mem'l*, 2024 La. LEXIS 1113, at *4. The federal district court undoubtedly discusses "dismissing this action in favor of

[3] In *Knick* the Supreme Court overruled *Williamson County*'s "state-litigation requirement." 588 U.S. at 184. However, *San Remo* was not affected and "*San Remo* is still good law." *Tejas Motel, L.L.C. v. City of Mesquite*, 63 F.4th 323, 334 (5th Cir. 2023).

further state-court proceedings - with state-court judges, state-court judgments, state-resident plaintiffs, and a state-agency defendant." *Ariyan, Inc. v. Sewerage & Water Bd. of New Orleans*, 543 F. Supp. 3d 373, 381 (E.D. La. 2021) (Feldman, J.). But this language is (1) not contained in the judgment; and (2) does not contain an express reservation of any claim from *res judicata*.

To the extent this Court disagrees that any reservation language must be in the actual judgment, it cannot take the quoted language in isolation while ignoring any language that clearly indicates that the court would not have reserved anything from *res judicata*. In dismissing Plaintiffs' claims, Judge Feldman reasoned that "a plaintiff who chooses to bring suit in state court cannot later come to federal court to relitigate issues the state court already decided. ***That is precisely what the plaintiffs wish to do here.***" *Id.* at 379 (emphasis added). If Judge Feldman viewed Plaintiffs' initial attempt to enforce their judgments as an impermissible attempt to relitigate issues already decided, then he certainly would view relitigation of the very suit before him in State court as even more egregious. It is simply not plausible to believe that Judge Feldman intended his decision to be without any effect or consequence for Plaintiffs when he dismissed their claims "WITH PREJUDICE."

Federal *res judicata* bars relitiation of cases, even if the second court disagrees with how the first court adjudicated the issue. *See B&B Hardware, Inc. v. Hargis Indus.*, 575 U.S. 138, 157 (2015) ("[I]ssue preclusion prevents relitigation of wrong decisions just as much as right ones.") (cleaned up); *see also Thompson v. Deutsche Bank Nat'l Trust Co.*, No. 21-11639, 2022 U.S. App. LEXIS 26089, at *7 (11th Cir. Sept. 19, 2022) ("*res judicata* prevents relitigation of wrongly decided issues"); *Black v. OPM*, 641 F. App'x 1007, 1009 (Fed. Cir. 2016) ("Both res judicata and collateral estoppel apply even if new evidence exists or the aggrieved party believes the earlier case was wrongly denied."). Undersigned counsel understands the difficulty of this case and the emotional appeal to afford relief. Still, our system of law and order does not relax the preclusive effect of federal judgments to reach that result.

II. LA. CONST. ART. I, § 4(B)(1) DOES NOT AUTHORIZE MANDAMUS

On the merits, the Court's holding that Plaintiffs' can enforce their judgments against the SWB via mandamus is a significant departure from its prior jurisprudence. This Court's precedent has made clear that it has very "rarely found such exceptions to exist" to the restrictions on enforcing money judgments against the State imposed pursuant to La. Const. art. XII, § 10(C). *Mellor v. Par. Jefferson*, 2022-01713 (La. 09/08/23), 370 So. 3d 388, 396. Simply having a cause of action against a political subdivision does not take one's judgment outside the ambit of Article XII, § 10(C); otherwise, all

judgments would be enforceable. Instead, this Court has repeatedly held that there must be a statute or constitutional provision mandating ***when*** payment must be made or funds allocated. Such a statute or provision does not exist for Plaintiffs' inverse condemnation judgments. The Court's opinion overlooks this nuance and risks creating significant uncertainty for the State and the lower courts.

The Court invoked La. Const. art. I, § 4(B)(1)'s mandate to pay just compensation. The obligation to pay undoubtedly exists but does not resolve the issue here of ***when*** the SWB must pay. All judgments impose an obligation to pay, but as the U.S. Fifth Circuit told these very Plaintiffs, the "notion of a judgment as an 'existing liability,' conceptually distinct from its recovery, has only been reinforced in the intervening years." *Ariyan,* 29 F.4th at 230 (citing *Folsom*).

This Court primarily relied on its decision in *Jazz Casino Co., L.L.C. v. Bridges*, 2016-1663 (La. 05/03/17), 223 So. 3d 448, in determining that Plaintiffs' judgments were subject to mandamus. *See Watson Mem'l*, 2024 La. LEXIS 1113, at *25-*28. But this comparison fails and would contravene the precedent of this Court. This Court has been abundantly clear that "La. R.S. 13:5109(B) is a clear expression of legislative intent; judgments rendered against the state are payable only by <u>specific</u> appropriation by the legislature.'" *See Newman Marchive P'ship, Inc. v. City of Shreveport*, 07-1890 (La. 4/8/08), 979 So. 2d 1262, 1268 (quoting *Hoag v. State*, 04-0857 (La. 12/01/04), 889 So. 2d 1019, 1023) (emphasis added by *Newman Marchive* court).

Clear legislative intent is exactly what was present in *Jazz Casino*. The statutes that governed the tax overpayment judgments "***expressly*** require[] an appropriation of funds by the legislature." *Jazz Casino*, 223 So. 3d at 493. For instance, La. Rev. Stat. § 47:1494(A) provides that "[a]t each regular session of the legislature, an amount ***shall be appropriated*** … for the purpose of paying any and all claims." (emphasis added). So, beyond these statutes merely creating a cause of action upon which a political subdivision can be sued (as they can for contract and tort claims), these statutes expressly provide how and ***when*** funds must be appropriated to pay these claims. *That* is what renders payment of those judgments ministerial. ***The legislature*** has exercised its power pursuant to La. Const. art. XII, § 10(C).

But Louisiana's general takings clause, La. Const. art. I, § 4(B)(1), contains no mention of appropriation nor does it specify how the judgments must be paid. The fact that this constitutional provision contains the mandatory phrase "shall" does not resolve this issue. Once again, that only creates the political subdivision's "'existing liability,' [which is] conceptually distinct from its recovery." *Ariyan*, 29 F.4th at 230. This Court correctly noted that breach of contract and tort claims are not enforceable via

mandamus. *See Watson Mem'l*, 2024 La. LEXIS 1113, at *27-*28. But tort claims arise from a legislative act that "obliges" any man who causes damage "to repair it." La. Civ. Code art. 2315. By this Court's reasoning in this case, tort judgments against political subdivisions would be equally enforceable via mandamus, but this Court has repeatedly rejected that position.

Lastly, this Court supports its holding by comparing expropriation and inverse condemnation judgments, and observes that "a finding that mandamus may lie for a taking via expropriation, but not for a taking by means of inverse condemnation, seems to run afoul of that [constitutional] mandate." *Watson Mem'l*, 2024 La. LEXIS 1113, at *28. But this reasoning suffers from a significant flaw: **Expropriation judgments are not enforceable purely as a function of La. Const. art. I, § 4(B)(1), but rather because the legislature has enacted statutes that specifically and expressly require allocation of funds for payment.** For instance, pursuant to La. Rev. Stat. § 19:8:

> The expropriating authority shall not be entitled to possession or ownership of the property until a final judgment has been rendered ***and payment has been made to the owner or paid into the registry of the court***, except as may otherwise be stipulated by the parties.

(emphasis added).

And a further statute expressly requires that the expropriating entity actually deposit the funds into the registry of the court for the benefit of the property owner. *See* La. Rev. Stat. § 19:10. Yet another statute provides that final expropriation judgments against levee or drainage districts "***shall*** be paid within sixty days after becoming final," or else be compelled via "a writ of mandamus to enforce payment." La. Rev. Stat. § 38:390(A) (emphasis added). These statutes would be superfluous if Article I, § 4(B)(1) already compelled the payment of all expropriation judgments. *But see McLane S., Inc. v. Bridges*, 11-1141 (La. 01/24/12); 84 So. 3d 479, 484 ("cardinal rule of statutory interpretation that it will not be presumed that the Legislature inserted idle, meaningless or superfluous language in the statute or that it intended for any part or provision of the statute to be meaningless, redundant, or useless") (cleaned up). These statutes also demonstrate that the legislature knows how to exercise its authority under Article XII, § 10(C) and does so in specific contexts. The legislature has not authorized allocation of funds to pay inverse condemnation judgments, and it would be "constitutional overreach" for the courts to insert themselves in that decision here. *See Mellor*, 370 So. 3d at 391

III. THE CONCURRENCES DO NOT PROVIDE ALTERNATIVE RATIONALES TO AFFIRM THE COURT OF APPEAL

Chief Justice Weimer and Justice Griffin wrote separate concurrences to the majority opinion. With respect, neither concurrence provides an alternative ground that would support the Court's holding.

Chief Justice Weimer states that mandamus is appropriate because "the plaintiffs were able to convincingly demonstrate a conscious indifference." *Watson Mem'l*, 2024 La. LEXIS 1113, at *30 (Weimer, C.J., concurring). He further explains that "[t]he use of the extraordinary remedy of mandamus should be coupled ***with proof*** of conscious indifference to pay the judgment," and that "[t]his ***proof*** should include an evaluation of the time since rendition of the judgment and the efforts made to satisfy the judgment." *Id.* at *30-*31 (emphasis added). But this matter arrives to the Court upon the grant of an exception of no cause of action. There has been no evidentiary hearing, no findings of fact, and actually could not have been at this stage. "No evidence may be introduced to support or controvert the exception of no cause of action." *Reynolds v. Bordelon*, 2014-2362 (La. 06/30/15), 172 So. 3d 589, 594 (citing La. Code Civ. Proc. art. 931). The issue presented before the district court and this Court was merely whether Plaintiffs had stated a cause of action that ***could*** support mandamus, when accepting all of their well-pleaded facts as true. Plaintiffs did not prove "conscious indifference" simply by filing their Petition, and that should still be an issue for the trial court to determine after a full evidentiary hearing, if the Court does not reconsider its holding that mandamus may be available for Plaintiffs' inverse condemnation judgments. If "conscious indifference" is something Plaintiffs must prove to obtain mandamus, they still maintain the burden to prove that to the finder of fact. In truth, Korban and the SWB have been chronologically paying judgments, consistent with the SWB's policy. Some of Plaintiffs were **<u>next</u>** in line to be addressed pursuant to the SWB's policy and an offer of settlement would have been made promptly even in the absence of this litigation.

Justice Griffin relies on the self-executing nature of Article I, § 4(B)(1) to support the Court's holding and to distinguish it from contract or tort judgments. *See Watson Mem'l*, 2024 La. LEXIS 1113, at *31-*32 (Griffin, J., concurring). But this misconstrues what "self-executing" means in this context, is inconsistent with this Court's prior jurisprudence, and expressly contradicts what the U.S. Fifth Circuit held against these Plaintiffs when they sought to enforce these same judgments in federal court.

"Self-execution" refers to the existence of a cause of action without further legislative enactment, it does not speak to the enforcement mechanisms available for those judgments. The Court and all parties agree that contract and tort judgments against political subdivisions would not be enforceable via mandamus. And this is supported by this Court's prior jurisprudence in *Newman Marchive*. Tort and contract claims against political subdivisions are authorized pursuant to La. Const. art. XII, § 10(A) ("Neither the state, a state agency, nor a political subdivision shall be immune from suit ***and liability*** in

contract or for injury to person or property.") (emphasis added). But this Court has repeatedly recognized that § 10(A) is itself "a self-executing constitutional provision." *Chamberlain v. State ex rel. Dep't of Transp.*, 624 So. 2d 874, 881-82 (La. 1993); *see also Jacobs v. City of Bunkie*, 98-2510 (La. 05/18/99), 737 So. 2d 14, 18 ("[W]e determined that Section 10(A) was self-executing as it was a mandatory prohibition against sovereign immunity in contract and tort, establishing a rule effective without an act of the legislature."). So if having a cause of action created by a self-executing constitutional provision subjects those judgments to enforcement via mandamus, then contract and tort claims are enforceable in this manner as well. But that is clearly not the rule and would effectively eviscerate Article XII, § 10(C).

Being unable to collect on a money judgment vindicating a constitutional right does not in and of itself violate a constitutional right. The U.S. Fifth Circuit confronted this very argument from Plaintiffs and rejected it. Plaintiffs tried to distinguish cases on the basis that "those cases sounded in state tort and contract law, while the Plaintiffs' judgments are based on violations of a federal constitutional right." *Ariyan*, 29 F.4th at 230. And while that was factually incorrect, *see id.* at 230-31, the U.S. Fifth Circuit held that "even if the underlying judgments were based on violations of federal rights, we are not sure why that distinction would make a difference." *Id.* at 231. The court further explained:

> [Because] there is ***no property right to timely payment on a judgment***, there must be something special about a judgment based on federal constitutional rights that confers this additional property interest for the Plaintiffs' argument to succeed. Plaintiffs do not explain why the legal right underlying a judgment would create this additional property right for some judgments and not others, and it remains unclear to us. It seems that a judgment compensating someone for a breach of contract should confer no less a property interest than a judgment compensating someone for the police's excessive force.

Id. at 231 (emphasis added).

This implicates the merits analysis but also the *res judicata* issue. Having a cause of action arising from a constitutional provision does not alone trump Article XII, § 10(C). But even if this Court were to disagree on that point, this is undoubtedly an issue the U.S. Fifth Circuit already resolved against these Plaintiffs. They should not be able to relitigate that issue, even if this Court thinks the U.S. Fifth Circuit was wrong. *See B&B Hardware*, 575 U.S. at 157.

IV. CONCLUSION

This Court is no stranger to the "frustrating dichotomy" created by La. Const. art. XII, § 10(C) that often produces a result that gives many discomfort. Korban recognizes that to be true here. But that reality does not alter the standard by which Plaintiffs' claims should be assessed. Procedural and substantive bars support the dismissal of this suit, and failure to do so here creates a significant inconsistency in this Court's

jurisprudence that will leave lower courts confounded in the future. For these reasons, Korban respectfully requests that the Court grant his application for rehearing, reverse the court of appeal, and order dismissal of this case.

Respectfully submitted,

Michael E. Botnick (#3284)
Alex B. Rothenberg (#34740)
GORDON, ARATA, MONTGOMERY, BARNETT, MCCOLLAM, DUPLANTIS & EAGAN, LLC
201 St. Charles Avenue, 40th Floor
New Orleans, LA 70170-4000
Telephone: (504) 582-1111
Facsimile: (504) 582-1121
mbotnick@gamb.com
arothenberg@gamb.com

MITCHELL & ASSOCIATES, APLC
CRAIG B. MITCHELL #24565
CHRISTOPHER D. WILSON #27142
615 Baronne Street, Suite 300
New Orleans, Louisiana 70113
Telephone: (504) 527-6433
Facsimile: (504) 527-6450
Email: cbmitchell@mitchellaplc.com
cdwilson@mitchellaplc.com

DARRYL HARRISON #08410
SEWERAGE AND WATER BD OF NEW ORLEANS
625 St. Joseph Street, Room 201
New Orleans, LA 70165
Telephone: (504) 585-2236
Facsimile: (504) 585-2426
Email: dharrison@swbno.org

Attorneys for Defendant-Applicant Ghassan Korban

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief in Support of Application for Rehearing has been served upon all counsel of record and others as listed below, this July 19, 2024, via email and/or U.S. Mail

Alex B. Rothenberg
Counsel for Applicant-Defendant

Honorable Jennifer M. Medley
Judge, Div. F, Section 14, Civil District Court
Parish of Orleans
421 Loyola Avenue, #402
New Orleans, LA 70112
Phone: (504) 497-0250
Docket No.: 2022-10955

Justin Woods
Clerk of Court
La. Fourth Circuit Court of Appeal
410 Royal Street
New Orleans, LA 70130
Phone: (504) 412-6001
Docket No.: 2023-CA-0293

Randall A. Smith (#2117)
Stepehen M. Gele (#22385)
Sarah A. Lowman (#18311)
L. Tiffany Hawkins (#20855)
Andre M. Stolier (#40063)
Smith & Fawer, LLC
201 St. Charles Ave., Suite 3702
New Orleans, Louisiana 70170
rasmith@smithfawer.com
sgele@smithfawer.com
ltiffanyhawkins@smithfawer.com
astolier@smithfawer.com

Counsel for Watson Memorial Spiritual Temple of Christ d/b/a Watson Memorial Teaching Ministries, Charlotte Brancaforte, Elio Brancaforte, Benito Brancaforte, Josephine Brown, Robert Parke, Nancy Ellis, Mark Hamrick, Robert Link, Charlotte Link, Ross McDiarmid, Laurel McDiarmid, Jerry Osborne, Jack Stolier, and William Taylor.

And

LIZ MURRILL
ATTORNEY GENERAL
Machelle R.L. Hall (No. 31498)
HallM@ag.louisiana.gov
Ryan M. Seidemann, Ph.D. (No. 28991)
SeidemannR@ag.louisiana.gov
Morgan D. Rogers (No. 38883)
RogersM@ag.louisiana.gov
Assistant Attorneys General
Louisiana Department of Justice
Civil Division
P.O. Box 94005
Baton Rouge, LA 70802
Telephone: (225) 326-6000
Facsimile: (225) 326-6099

Counsel for Amicus Curiae, the State of Louisiana