No. 24-

IN THE

Supreme Court of the United States

ALISON COLE-KELLY,

Petitioner,

v.

STATE OF CALIFORNIA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The State of California, pursuant to its unclaimed property laws, regularly seizes possession of owners' unclaimed personal property, holds it in custody and trust for the owners, uses it for the state's purposes to pay its obligations, without paying the owners of that unclaimed property any compensation for its use of the owners' property pursuant to California Code of Civil Procedure §§1540(c) and 1562. That is an unconstitutional taking without just compensation in violation of the Fifth Amendment's Takings Clause made applicable to the states pursuant to the Fourteenth Amendment.

The issues in this case are:

1: May a property owner whose property is taken and used by the state without compensation, sue the state directly for just compensation under the Fifth Amendment's Takings Clause where the state has not affirmatively provided the property owner with a cause of action and in fact, has affirmatively precluded any cause of action to recover compensation for its taking and use of the owner's property?

2: Does Eleventh Amendment sovereign immunity bar a property owner's self-executing Fifth Amendment right to just compensation for the state's taking of his/her property?

LIST OF PARTIES

Petitioner: The petitioner is:

ALISON COLE-KELLY, the Plaintiff in the *Alison Cole-Kelly v State of California, et. al. Northern District of California Case Number 22-cv-02841-HSG and the appellant in the consolidated for decision Ninth Circuit Court of Appeals Case of Alison Cole-Kelly v. The State of California et al. Case Number 23-15413*

Respondents are the STATE OF CALIFORNIA, THE CONTROLLER OF THE STATE OF CALIFORNIA AND BETTY YEE, the former Controller of the State of California, who were the defendants in the *Cole-Kelly v. The State of California et. al.,* Case Number 23-15413

RELATED PRECEEDINGS

Alison Cole-Kelley v. Betty T. Yee, et al. in the United States Court of Appeals for the Ninth Circuit Case Number 23-15413. Judgment entered on March 14, 2024.

Alexander Cote v. Office of the Controller of the State of California, et al. in the United States Court of Appeals for the Ninth Circuit Case Number 23-15375. Judgment entered on March 14, 2024.

Jennifer Sykes v. Office of the Controller of the State of California, et al. in the United States Court of Appeals for the Ninth Circuit Case Number 23-15377. Judgment entered on March 14, 2024.

Alison Cole-Kelley vs. Office of Controller of the State of California, et al. in the United States District Court for the Northern District of California Case Number 4:22-cv- 02841-HSG. Consolidated decision entered on March 13, 2023.

Alexander Cote vs. Office of Controller of the State of California, et al. in the United States District Court for the Northern District of California Case Number 4:22-cv- 04056-HSG. Consolidated decision entered on March 13, 2023.

Jenifer Sykes v. Office of Controller of the State of California, et al. in the United States District Court for the Northern District of California Case Number 4:22-cv- 04133-HSG. Consolidated decision entered on March 13, 2023.

There is a pending Petition for Writ of Certiorari in *Gerlach v. Rokita,* U. S. Supreme Court Case No. 24- 21, which seeks review, and which raises a similar issue to an issue raised here, as to whether the Eleventh Amendment bars a Fifth Amendment just compensation claim.

Alexander Cote and Jennifer Sykes have also filed a petition for writ of certiorari with this Court from the same Ninth Circuit March 14, 2024 consolidated opinion (Appx. A hereto) in Cole-Kelly and Cote and Sykes.

TABLE OF CONTENTS

Table of Contents

TABLE OF APPENDICES

TABLE OF CITED AUTHORITIES

Page

CASES

Page

Page

Page

Page

Page

STATUTES AND OTHER AUTHORITIES

Cited Authorities

Page

CITATIONS TO OFFICIAL AND UNOFFICIAL OPINIONS AND ORDERS IN THIS CASE

Alison Cole-Kelly v. State of California et al., District Court Decision, 2023 WL 24080749 (March 13, 2023)

Alison Cole-Kelly v. State of California et al., Ninth Circuit Decision 2024 WL 1108546 (March 14, 2024)

Alison Cole-Kelly v. State of California et. al, Ninth Circuit, Case No. 23-15413, order denying rehearing and rehearing en banc (April 23, 2024)

Alexander Cote v. State of California et al., District Court Decision, 2023 WL 24080749 (March 13, 2023)

Alexander Cote v. State of California et al., Ninth Circuit Decision 2024 WL 1108546 (March 14, 2024)

Jennifer Sykes v. State of California et al., District Court Decision, 2023 WL 24080749 (March 13, 2023)

Jennifer Sykes v. State of California et al., Ninth Circuit Decision 2024 WL 1108546 (March 14, 2024)

Supreme Court Order granting Jennifer Sykes and Alexander Cote extension of time to August 12, 2024 to file petition for Writ of Certiorari (23 A 1085)

Supreme Court Order granting Alison Cole-Kelley extension of time to August 12, 2024 to file a petition for writ of certiorari (July 23, 2024) (24 A 67)

BASIS FOR THIS COURT'S JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. §1254(1) from the Ninth Circuit's March 14, 2024 Judgment and April 23, 2024 denial of petition for rehearing and rehearing en banc.

Counsel for Cole-Kelly petitioned for and on July 23, 2024, was granted an extension of time to August 12, 2024 to file her petition for writ of certiorari from the consolidated decision of the Ninth Circuit in *Cole-Kelly v. State of California et al.*

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions and statues involved are set out in the appendix.

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Alison Cole-Kelly, hereby petitions for a writ of certiorari to review the Ninth Circuit consolidated decision holding that Cole-Kelly, Sykes, and Cote and California owners of unclaimed property held in custody for them by the State of California) do not have a Fifth Amendment claim for the State's taking of their unclaimed personal property without just compensation, and that any such claims are barred by the Eleventh Amendment.

INTRODUCTION

California holds unclaimed private personal property – typically stocks, bonds, uncashed checks, insurance

benefits, and dormant accounts held by banks and other financial institutions – that it uses for public purposes until the principal is returned to the property owners. When the unclaimed property, or the cash proceeds therefrom, is returned to the owners, California's Unclaimed Property Law ("UPL") prohibits the payment of interest to the owners. (California Code of Civil Procedure ("C.C.P.") §1540(c)) Only the principal itself is returned, and no just compensation is paid to the property owners. Forty-Four other states have a similar unclaimed property law that likewise prohibits (or makes no provision for) the payment of just compensation to the owners of seized, unclaimed property used for public purposes.

In the consolidated decision below, relying on its decisions in *Suever v. Connell,* 579 F.3d 1047 (9th Cir. 2009) and *Turnacliff v. Wesley,* 546 F.3d 1113 (9th Cir. 2008), the Ninth Circuit held that California's public use of unclaimed private property, which it holds in custody and trust for the owners, is not a taking that requires just compensation under the Takings Clause of the Fifth Amendment, and that even if it is a takings claim, it is barred by the state's Eleventh Amendment sovereign immunity.

The Seventh Circuit has reached the opposite conclusion, holding that the Takings Clause requires States to pay just compensation to the owners of unclaimed property for the time their property is in the State's possession and used for public purposes. *See Kolton v. Frerichs*, 869 F.3d 532, 533 (7th Cir. 2017); *Cerajeski v. Zoeller,* 735 F.3d 577, 581-582 (7th Cir. 2013); and *Goldberg v. Frerichs,* 912 F.3d 1009, 1010 (7th Cir. 2019). The result is a growing inter-circuit split that already has produced divergent decisions by district courts in two other circuits as well as conflicting decisions in various State courts.

The constitutional questions presented here are indisputably important. The Takings Clause plays a crucial role in balancing the state's need to use private property for public purposes with the property owner's right to just compensation for the state's taking and use of her property

. It strikes an important balance between the States' power to pursue public works and the constitutional rights of private property owners to just compensation for the state's taking of their property. The Takings Clause prevents the government from abusing its authority by taking property without just compensation. However, there is a tension between the Fifth Amendment self-executing protection of property owners' right to just compensation for the states' taking and use of their property, and the Eleventh Amendment sovereign immunity, which purportedly bars property owners from suing the state to recover the just compensation the Fifth Amendment provides for them.

The Ninth Circuit's decision that the Takings Clause does not require just compensation even though the unclaimed private property is custodied and held in trust by the State for the owners and is admittedly used for public purposes, because the State has sovereign immunity for its taking of the owners' property without compensation, leaves the States uncertain about whether they must pay just compensation to the property owners. The Ninth Circuit's decision risks exempting not just unclaimed property in California, but in nearly every State that has enacted similar unclaimed property statutes. Indeed, the Ninth Circuit case here has most recently been held as authority to deny just compensation under Pennsylvania unclaimed property law. *Dillow v. Garity,* 2024 WL 1975458 at *4

This Court repeatedly has held, most recently in *Cedar Point Nursery*, that "a physical appropriation is a taking whether it is permanent or temporary; the duration of the appropriation bears only on the amount of compensation due." 594 U.S. at 140 (citing *Dow*, 357 U.S. 17, 26 (1958)). *See also Tahoe-Sierra Preservation Council*, 535 U.S. at 322; *Loretto*, 458 U.S. at 436-37. The Ninth Circuit's decision upholding California's UPL is squarely at odds, not only with the Seventh Circuit, but with this Court's prior holdings.

This case is a suitable vehicle for resolving the important issue of whether a property owner has a self-enforcing direct cause of action under the just compensation clause of the Fifth Amendment against the state. That is the issue this Court initially took up in *Devillier v State of Texas,* 601 U.S. 285 (2024) but left unresolved for another case, like this one, where there is no other cause of action to redress the state's failure to pay just compensation for its taking. Unlike *Devillier*, in this case, California and most other states do not provide a cause of action and in fact, specifically preclude such a claim. A direct Fifth Amendment takings claim is the only avenue for redress.

There is no need for the Court to delay review of this case. The petition presents legal questions able to be resolved without awaiting further factual development. Forty-Four states explicitly bar payment of interest or just compensation to the property owners. Whether the Takings Clause requires California and the other States to pay just compensation to the owners of unclaimed property is not dependent on any particular facts and will not vary materially from State to State. Therefore,

this case offers the Court an opportunity to cleanly and definitively resolve the circuit conflict that is of vital importance.

Likewise, this case presents an opportunity to resolve the tension between property owners' Fifth Amendment guaranteed right to just compensation, and the Eleventh Amendment's provision of immunity to the states from paying that just compensation.

STATEMENT

PERTINENT UNDISPUTED FACTS

The State of California has enacted Unclaimed Property Laws (the "UPL") to deal with property non-permanently escheated to the State of California. (C.C.P. §§1300 et seq., C.C.P. §§1400 et seq., C.C.P. §§1500 et seq.)

The State of California has created an "Unclaimed Property Fund" ("UPF") in the State Treasury. All money [except "permanently escheated" money, i.e., money that has not been claimed by the Owner after the statutory period (5 years) is deposited in the UPF.

All interest received, or other income derived from the mandated investment (pursuant to Government Code §13470), in interest bearing government bonds of monies in the UPF, is deposited in the General Fund. (C.C.P. §1318)

While Controller holds the owner's property in custody, pursuant to the UPL, Controller converts the owner's property into cash and uses the property for public purposes, including by investing the property and

earning interest, and otherwise using it to fund the State of California's operations and programs. (COLE-KELLY ER-104 at ¶50)

The care and custody of property delivered to the Treasurer or Controller is assumed by the State for the benefit of those entitled thereto, i.e., the owners. (C.C.P. §1361)

Property received by the State as unclaimed property shall not permanently escheat to the State. It is in the interest of the Legislature of the State of California that property Owners be reunited with their property. (C.C.P. §1501.5(a)–(c))

"Owner" means the person who had legal right to the property before its escheatment. (C.C.P. §1540(d))

Any person who claims to have been the owner of property paid or delivered to the Controller may file a claim to the property, or proceeds from the sale of the property, with the Controller (C.C.P. **§1540(a)), but "interest" shall not be payable on any claim paid to the Owner.** (*C.C.P.* **§1540(c))**

Prior to August 11, 2003, the Controller paid the owner of the non-permanently escheated unclaimed personal property interest on said property when it returned said property to the owner. (C.C.P. ***§1540(c)***)

Section 1540(c) was amended in 2003 to provide that no interest be paid to the owners of unclaimed property. The Controller ceased paying interest on unclaimed property on August 11, 2003 (C.C.P. ***§1540(c))*** in order to make up

some of the State's budget shortfall (California Spending Plan 2003-2004, p. 1) (COLE-KELLY ER-42, COLE-KELLY ER-47 at subparagraph (3), COLE-KELLY ER-49 at "COMMENTS" – 50).

Controller holds Cole-Kelly's property ($4,000) in custody for her. (C. C. P. §1361)

Under C. C. P. §1540(c), the Controller is required not to pay any just compensation to the owners for the State's use of that property.

Accordingly, C.C.P. §§1540(c) and 1562 effectively provide the State of California with an interest-free use of unclaimed private property funds without providing any just compensation to the owners.

The State of California currently holds more than $13 Billion in unclaimed property funds and receives over $200 Million in income annually on said unclaimed property funds and uses that money to fund State of California obligations. The State of California otherwise pays market rates to borrow money.

In this action, Petitioner seeks a declaration that C.C.P. §§1540(c) and 1562 - which provide for the State of California's confiscation of the interest and other earnings on unclaimed property and its beneficial use of the property – are unconstitutional on their face and as applied, and for just compensation as a taking for which she and the Class are entitled under the Fifth and Fourteenth Amendments.

In fact, the entire California UPL is unconstitutional because the State acquires possession of owners' property on the unsupported presumption that the property has been "abandoned" with no proof of the owner's intent to abandon (or even knowledge that it has been abandoned) without a fair, prior opportunity to be heard. *Taylor v. Westly* 402 F.3d 924, 926-928 (9th Cir. 2005); *Cerajeski v. Zoeller* 735 F.3d 577, 580-581 (7th Cir. 2013); *Taylor v. Yee* 136 S. Ct. 929, 930 (2016)

The Takings Clause mandates that "just compensation" must be paid to the owners of private property whenever their property is put to public use. *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2074 (2021); *Murr v. Wisconsin*, 582 U.S. 383, 392 (2017); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980). This requirement applies whether the taking is permanent or only temporary. *See Cedar Point Nursery*, 141 S. Ct. at 2074 (citing *United States v. Dow*, 357 U.S. 17, 26 (1958)); *Tahoe-Sierra*, 535 U.S. at 322; *Webb's Fabulous Pharmacies*, 449 U.S. at 162-65; *United States v. Petty Motor Co.*, 327 U.S. 372, 66 S. Ct. 596, 90 L. Ed. 729 (1946); and *General Motors Corp.*, 323 U.S. 373, 65 S. Ct. 357. The Takings Clause protects the time value of money or property as much as it protects the money or property itself.

The Court has held that "A property owner acquires an *irrevocable* right to just compensation *immediately* upon a taking" "[b]ecause of the self-executing character of the Takings Clause with respect to compensation." (emphasis added) *Devillier v. State of Texas* 601 U.S. 285, 291 (2024) citing *Knick v. Township of Scott* 588 U.S. 180, 192 quoting *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles,* 482 U.S. 304, 315.

In tension with unclaimed property owners' Fifth Amendment right to just compensation for the state's taking of their property is the state's claimed Eleventh Amendment sovereign immunity protection against being sued to pay such just compensation, which California and most other states assert to prevent paying the property owners any compensation for the state's takings.

PROCEDURAL HISTORY

On May 13, 2022, Cole Kelly filed her complaint in this action, on her own behalf and on behalf of a class of California owners of unclaimed personal property who had not received interest or the value of California's use of that unclaimed personal property, seeking compensation for California's taking and use for public purposes of her and the putative class's unclaimed personal property, in violation of the Takings Clause of the Fifth Amendment Cole-Kelly also seeks declaratory and injunctive relief, declaring that California's unclaimed property laws, particularly C. C. P. §§1540(c) and 1562, are unconstitutional. She also seeks an injunction enjoining California and Controller from continuing to take and use unclaimed personal property without compensating the owners for violations of 42 U. S. C. §1983 (COLE-KELLY ER-107 – COLE-KELLY ER-110)

Two other cases (Jennifer Sykes v. Office of the Controller of the State of California and Alexander Cote v. Office of the Controller of the State of California) were subsequently filed by two separate plaintiffs alleging similar claims. Those two cases were ordered related to Cole-Kelly's case on July 25th, 2022.

On July 19, 2022, Cole-Kelly moved for class certification of her claims. On July 28, 2022, the District Court vacated the briefing and hearing schedule on Cole-Kelly's class certification motion, in light of the request to continue the class certification until after Controller's motion to dismiss was decided.

On August 5, 2022, Controller moved, pursuant to F. R. Civ. P. 12(b)(6), to dismiss Cole-Kelley's case and also, to dismiss the related cases.

On March 13, 2023 the District Court granted Controller's motion to dismiss Cole-Kelly's and the related cases on the grounds that the UPL is constitutional (Appx. B, pp. 17a-18a) citing *Suever v. Connell* 579 F. 3d 1047, 1056-1059 (9th Cir. 2009) and *Turnacliff v. Wesley* 546 F. 3d 1113 , 1115 (9th Cir. 2008), and that Controller and California have Eleventh Amendment immunity (Appx. B, pp. 14a-17a) citing *Suever v. Connell* 579 F. 3d at 1059 and *Turnacliff v. Wesley* 546 F. 3d at 1115, and that under the law of the circuit doctrine, Petitioner's claims were barred by the *Suever* and *Turnacliff* cases. (Appx. B, pp. 17a-18a) The district court also denied as moot Cole-Kelly's class certification and summary judgment motions, based on its dismissal Order and Judgment. *Id.*

Cole-Kelly, Sykes, and Cote timely appealed.

On March 14, 2024, the Ninth Circuit panel in this case, in a consolidated decision, affirmed the district court's dismissal of their cases on the grounds that C.C.P. §1540(c) is constitutional and bars her Fifth Amendment takings without just compensation claim, and that any such Fifth Amendment claim is further barred by Eleventh

Amendment sovereign immunity. (Appx. A, pp. 4a-5a) The Court further declined to follow Seventh Circuit precedent from *Cerajeski*, *Knowlton* and *Goldberg*. (Appx. A, p. 5a)

On April 23, 2024 the Ninth Circuit denied Petitioner Cole-Kelly's timely filed petitions for rehearing and rehearing en banc. (Appx. D, p. 25a)

Petitioner Cole-Kelly timely filed her Petition for Writ of Certiorari on July 22, 2024 but withdrew it after this Court, on July 23, 2024, granted her an extension to August 12, 2024 to file a joint petition for writ of certiorari.

REASONS WHY CERTIORARI SHOULD BE GRANTED

1. This Court should grant certiorari to determine the issue on which it granted certiorari but left open in *Devillier v. Texas* 601 U.S. 285, 292 (2024) as to whether an owner of the property taken by the government has a direct Fifth Amendment claim for just compensation where, as here, "a property owner had no cause of action to vindicate [her] rights under the Takings Clause."

In the *Devillier case,* this Court was presented with the issue of whether a person with a Fifth Amendment just compensation claim can assert that claim in federal court directly under the Fifth Amendment when the claim can also be asserted under state law. This Court deferred deciding that issue because *Devillier* had a remedy under Texas state inverse-condemnation law.

This case presents the Court with the perfect basis to now decide the issue of whether an owner with a Fifth

Amendment takings claim for just compensation can sue the state directly under the Fifth Amendment for monetary just compensation where the owner has no other state or federal statutory basis to do so, and where the state's unclaimed property law, C. C. P. §§1540(c) and 1562, specifically and unconstitutionally *prevents* the state from paying the property owner just compensation (interest) for the state's use of her unclaimed property.

2. Cole-Kelly's Petition for Writ of Certiorari should also be granted so the Court can resolve and correct the conflicts between the Ninth Circuit's decisions in this case and in *Suever v. Connell* 579 F. 3d 1047, 1056-57, and 1059 (9th Cir. 2009) and *Turnacliff v. Wesley* 546 F. 3d 1113 , 1119 (9th Cir. 2008) holding that California's unclaimed property law (C.C.P. §§1540(c) and 1562) prohibiting the state from paying just compensation (interest) to the owners of the property it uses, is constitutional, and the Seventh Circuit's decisions in *Cerajeski v. Zoeller* 735 F. 3d 577, 582 (7th Cir. 2013) *and Kolton v. Frerichs* 869 F. 3d 532, 535 (7th Cir. 2019) and *Goldberg v. Frerichs* 912 F. 3d 1009, 1010-1011 (7th Cir. 2019) holding that payment of just compensation (interest) is required for the states' taking use of owners' unclaimed property.

These cases present an important issue regarding the meaning and application of the Takings Clause of the Fifth Amendment of the United States Constitution. This Court has held that a property owner acquires an "irrevocable" right to just compensation "immediately" upon a taking because of the self-executing character of the Takings Clause with respect to compensation. *Devillier v. State of Texas* supra, 601 U.S. 285, 291; *Knicks* supra, 588 U.S. at 192; *First English* supra, 472 U.S. at 315.

The Takings Clause mandates that "just compensation" be paid to the owners of private property whenever their property is put to public use. *Cedar Point Nursery v. Hassid* 141 S. Ct. 2063, 2074 (2021); *Murr v. Wisconsin* 582 U.S. 383, 392 (2017); *Webb's Fabulous Pharmacies, Inc. v. Beckwith* 449 U.S. 164 (1980). Just compensation is required whether the public use of private property is permanent or merely temporary. A taking occurs as soon as the property is used by the State for public purposes without paying for it. *Knick v. Township of Scott, Pennsylvania* 139 S. Ct. 2162, 2170 (2019).

The Ninth Circuit's decision also conflicts with the *Cedar Point Nursery v. Hassid* 141 S. Ct. 2063, 2074 (2021) holding that a property owner who establishes that he/she has had his/her property taken by the state without just (any) compensation has a *per se* Fifth Amendment claim against the state for money, including retrospective harm for the period the state deprived the owner of possession/use of his/her property.

In reaching its decisions, the Seventh Circuit relied upon this Court's precedent that "the Takings Clause protects the time value of money just as much as it does money itself". Id (citing *Brown v. Legal Foundation of Washington* 538 U.S. 216, 235 (2003); *Phillips v. Washington Legal Foundation* 524 U.S. 156, 165-72 (1998); and *Webb's Fabulous Pharmacies, Inc.* 449 U.S. at 162-65).

Both the Seventh and Ninth Circuits have considered whether a state's public use of unclaimed private property is a taking that requires just compensation under the Takings Clause of the Fifth Amendment. Although the

unclaimed property laws before the courts were virtually identical, they reached different conclusions. The Seventh Circuit held that the Takings Clause requires a state to pay just compensation to the owners when it uses unclaimed private property for public purposes while in its possession. The Ninth Circuit held that California's virtually identical law, which prohibits the payment of interest and does not provide for the payment of just compensation on unclaimed property it uses for public purposes, does not violate the Takings Clause. The result is a clear and irreconcilable circuit split that only this Court can resolve.

Absent this Court's intervention, this circuit split on whether the Fifth Amendment Takings Clause applies to unclaimed personal property will only deepen. For example, the District of Delaware recently sided with the Ninth Circuit in upholding Delaware's unclaimed property law against an identical Fifth Amendment challenge. *See Light v. Davis, et al.*, No. No. 22-cv-611-CJB, 2023 WL 6295387 (D. Del. Sept. 27, 2023) . Delaware's law, like the California UPL and the former unconstitutional laws in Indiana and Illinois, requires unclaimed property to be used for public purposes while in the State's possession, but prohibits the Delaware State Escheator from paying interest or any other compensation when the unclaimed property is returned to its owners. *Light* is currently on appeal in the Third Circuit. *Light v. Davis, et al.*, *appeal docketed*, No. 23-2785 (3d Cir. Sept. 28, 2023) . That appeal may not succeed because the Third Circuit previously held in *Simon v. Weissmann*, 301 F. Appx. 107, 112 (3d Cir. 2008), that a state does not "take" the interest earned on unclaimed property while in its possession within the meaning of the Takings Clause. In any event,

the Third Circuit can only take sides in the split; it cannot resolve it.

A second appeal also is pending in the Third Circuit. *Dillow v. Treasurer of the Commonwealth of Pennsylvania*, *appeal docketed*, No. 24-2004 (3d Cir. June 4, 2024). Citing *Simon*, the district court dismissed the plaintiff's claim that Pennsylvania's Disposition of Abandoned and Unclaimed Property Act, which does not permit interest or just compensation to be paid to the owners of unclaimed property, violates the Takings Clause.

In *Albert v. Franchot*, No. 1-22-CV-01558-JRR, 2023 WL 4058986 (D. Md. June 16, 2023), *on reconsideration in part*, No. 1:22-CV-01558-JRR, 2024 WL 308937 (D. Md. Jan. 26, 2024), the District of Maryland recently reached the same conclusion as the Seventh Circuit but differed from the Ninth Circuit's holding in this case and the District of Delaware's holding in *Light*. *Albert* upheld an unclaimed property owner's claim that he is owed just compensation for Maryland's public use of his private property. Prior to 2004, Maryland had an unclaimed property statute that provided payment to the owner of interest for the state's use of unclaimed property. Maryland amended its unclaimed property statute in 2004, to delete the provision for payment of interest. The district court's decision in *Albert*, which conflicts with the Ninth Circuit's decision here, is currently on appeal in the Fourth Circuit. *Albert v. Lierman*, *appeal docketed*, No. 24-1170 (4th Cir. Feb. 23, 2024).

In *Maron, et al. v. Patronis*, No. 4:22CV255-RH-MAF, 2023 WL 11891258, *4 (N.D. Fla. Sept. 5, 2023),

the district court upheld the constitutionality of Florida's Disposition of Unclaimed Property Act. The Florida statute permits owners of unclaimed property to recover only the principal; it does not allow interest or just compensation to be paid "for the State's retention or use of the property prior to its return." *Id.* at *1. Citing this Court's decision in *Texaco, Inc. v. Short*, 454 U.S. 516 (1982), *Simon*, and *Turnacliff*, as well as state court decisions in *Dani v. Miller*, 374 P.3d 779, 793-94 (Okla. 2016), *Hooks v. Kennedy*, 961 So. 2d 425, 432 (La. Ct. App. 2007), *Clark v. Strayhorn*, 184 S.W.3d 906, 911-15 (Tex. App. Ct. 2006), and *McKenzie v. Fla. Dept. of Fin. Servs.*, No. 04 CA 755 (Fla. Cir. Ct. Apr. 27, 2005), the district court held that "the constitutional issue is controlled by who technically holds title, rather than by substantive considerations." *Id.*

The district court's decision in *Maron* is currently on appeal in the Eleventh Circuit. *Maron v. Patronis*, *appeal docketed*, No. 23-13178 (11th Cir. Sept. 28, 2023).

The appeals in *Light*, *Dillow*, *Albert*, and *Maron*, however, cannot resolve the circuit split. They can only add to it. The lower court decisions have not varied based upon any factual differences or any minor differences in the statutes. The lower courts have reached different results based on different understandings of whether the Takings Clause protects unclaimed property and applies to temporary takings.

Two circuits, the Seventh and Ninth Circuits, each have reached opposite conclusions on two occasions. The district courts are following their respective circuits. The pending appeals in the Third and Fourth Circuits may add

weight to one side of the circuit split or the other, but they will not resolve the split. There is no reason for this Court to await development in the lower courts before resolving this already entrenched split over these fundamental constitutional questions.

State courts decisions add to the conflict. For example, in *Sogg v. Zurz*, 121 Ohio St. 3d 449, 452-53 (Ohio 2009), the Ohio Supreme Court upheld a claim that Ohio's unclaimed property law violated the analogue to the Fifth Amendment's Takings Clause in the Ohio Constitution. Like the California UPL, the Ohio statute provides that title remains with the property owner "in perpetuity" and it requires Ohio to make public use of the unclaimed property while in state custody. *Id.* at 451. The Ohio Supreme Court held that the state could not control and use earnings on the unclaimed property without compensating the property owner. *Id.* at 452-53.

The state court decisions in *Dani*, 374 P.3d at 793-94, *Hooks*, 961 So. 2d at 432, and *Clark*, 184 S.W.3d at 911-15, and the unreported state court decision *McKenzie*, all of which upheld the constitutionality of their respective state unclaimed property laws, do not help clarify the important question presented in this case.

3. Cole-Kelly's petition for writ of certiorari should also be granted (along with a grant of the pending petition in *Gerlach v. Rokita*) (24-21) to resolve the tension between property owners' Fifth Amendment right, which provides property owners just compensation for the state's taking of their property, and the Eleventh Amendment, which provides states with sovereign immunity against property owners' suits to recover that just compensation.

States are generally immune from suit under the Eleventh Amendment because of their sovereign status. *Edelman v. Jordan*, 415 U.S. 651, 663 (1974). However, this Court has held that, under the Just Compensation Clause, the government has a duty to pay just compensation when it takes property (*Knick v. Township of Scott*, 588 U.S. 180, 191–94 (2019)) and did not hold that such compensation claim is barred by Eleventh Amendment immunity.

The Ninth Circuit decisions in this case (Appx. A, p. 5a) and in *Suever* supra 579 F.3d. at 1059 and the Seventh Circuit's decision in *Gerlach v. Rokita* 95 F.3d. 493, 499 (7th Cir.2024) ["But even if the {Supreme Court} does find {in the *Devillier* case} a direct cause of action {under the Fifth Amendment just compensation clause}, the second obstacle - Eleventh Amendment sovereign immunity - disposes of Gerlach's claim."] have held that even if owners of unclaimed property have a Fifth Amendment takings claim for just compensation for the state's use of their unclaimed property, any such claim against the state or its officers is barred by Eleventh Amendment sovereign immunity.

In contrast, the states' immunity from suits for "damages" accordingly conflicts with their obligation to compensate owners when states take property without providing contemporaneous compensation. *Community Housing Improvement Program v. City of New York*, 492 F. Supp. 3d 33, 40 (E.D.N.Y. 2020).

The Seventh Circuit in Cerajeski, Kolton and Goldberg have held that owners of unclaimed property do have a right to just compensation for the state's taking and use of their unclaimed property and that the Eleventh Amendment does not bar their Fifth Amendment claims.

Cole-Kelly's petition for writ of certiorari should be granted because the Ninth Circuit's March 14, 2024 decision in this case - holding that Eleventh Amendment sovereign immunity bars their Fifth Amendment taking without just compensation claims - conflicts with the decisions of this Court in *First English Evangelical Lutheran Church of Glendale v. Los Angeles County, CA* 482 U.S. 304, 316, n. 9 (1987) holding that Eleventh Amendment sovereign immunity does not bar a Fifth Amendment takings claim for monetary compensation.

In the *Gerlach v Rokita* 95 F.4th 493 (7th Cir. 2024) decision (pending writ petition here, No. 24-21), the Seventh Circuit resolved in favor of sovereign immunity, holding that the Eleventh Amendment barred Gerlach's claim against the state (through its officers) for just compensation. Eleventh Amendment sovereign immunity is inconsistent with this Court's jurisprudence. *See Chicago, B. & Q.R. Co.*, 166 U.S. at 236 (states are subject to the Just Compensation Clause); *United States v. Great Falls Mfg. Co.*, 112 U.S. 645, 656 (1884) ("The law will imply a promise to make the required compensation, where property . . . is taken[.]"); *Devillier v. State of Texas* 601 U.S. 285, 291 (2024) quoting from *Knick* 588 U.S. at 192 ["a property owner acquires an *irrevocable* right to just compensation *immediately* upon a taking"]. The act of taking property itself waives any asserted immunity from a property owner's claim for compensation. *PennEast Pipeline Co. v. New Jersey*, 594 U.S. 482, 500 (2021); *Gunter*, 200 U.S. at 284

The Ninth Circuit erred in ruling that the Eleventh Amendment bars Cole-Kelly's claims. That ruling conflicts with this Court's precedent - that interest on property

belongs to the property owner. The State of California and its Controller are also not immune because Cole-Kelly's claims are not for "damages" but rather, are equitable claims for disgorgement or a restitution return of their own property. The interest on and time value of, the unclaimed personal property is the property of the owners. *Brown v. Legal Foundation of Washington* 538 U. S. 216, 235 (2003); *Phillips v. Washington Legal Foundation* 524 U. S. 156, 172 (1998) The Eleventh Amendment does not bar claims for the return of one's own property, as the Ninth Circuit held here and in *Suever v. Connell* 579 F.3d 1047, 1058-1059 (9th Cir. 2009) and in *Gerlach* supra 95 F. 4th at 496 and 499.

Cole-Kelly asserts that her and the putative class's claims are not claims for damages but rather, for equitable disgorgement or restitution of their own property *Id.*, i.e., the interest the State of California received on the unclaimed property and/or the benefit the State of California received from its use (without compensation) of Cole-Kelly's and the class's unclaimed personal property, belongs to her and the class. The Controller's refusal to return it or pay it to them under C. C. P. §§1540(c) and 1562, is an unconstitutional taking in violation of the Fifth and Fourteenth Amendments. *Brown v. Legal Foundation of Washington* 538 U.S. 216 supra; *Cerajeski v. Zoeller* 735 F.3d 577, 582 (7th Cir. 2013); *Kolton v. Frerichs* 869 F.3d 532, 533 (7th Cir. 2017); *Goldberg v. Frerichs* 912 F.3d 1009, 1010 (7th Cir. 2019); *Sogg v. Zurz* 121 Ohio St. 3d 449, 453 (2009) The Eleventh Amendment does not provide sovereign immunity for the return of owners' own property.

It is undisputed that the State of California and the Controller obtained and had and have possession and use of billions of dollars of property owners' unclaimed, non-escheated personal property but have not returned and are prohibited by C. C. P. §1540(c) and C.C. P. §1562 from returning to them their interest (or the time value) for its possession and use of the owners' unclaimed personal property.

States have no Eleventh Amendment immunity because the Fifth Amendment trumps the Eleventh Amendment in that it specifically allows for compensation for a taking without just compensation against a state government for its use of private property.

This Court has emphasized that the states' power to take property is conditional upon payment of just compensation. *Great Falls Mfg. Co.*, 112 U.S. at 656; *United States v. Klamath & Moadoc Tribes*, 304 U.S. 119, 123 (1938) ("the taking of property by the United States in the exertion of its power of eminent domain implies a promise to pay just compensation"). The Fifth Amendment thus imposes a duty on the government to pay compensation as the price of exercising the power to take property. *First English Evangelical Lutheran Church of Glendale v. Los Angeles County* 482 U.S. 304, 314. These principles—that states owe compensation when taking property, yet also enjoy sovereign immunity from suits for damages—exist in uneasy tension. Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 Yale L. J. 1, 116 (1988) (The "clarity of this textual provision for a monetary remedy is inconsistent with a premise of sovereign immunity as a constitutional doctrine[.]"); *Chicago Burlington & Quincy*

RR. Co. v. City of Chicago 106 U.S. 226, 233-234, 239-241 (1897); Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 306 n.1 (2002).

However, here and in other takings cases, when property owners attempt to assert that a state owes them compensation, the Ninth Circuit and now, the Seventh Circuit in *Gerlach* supra 95 F.4th at 499, and other courts hold that sovereign immunity absolves them of that obligation. See *Suever v. Connell* 579 F.3d 1047, 1059 (9th Cir. 2009); *EEE Minerals, LLC v. North Dakota*, 81 F.4th 809, 816 (8th Cir. 2023) (sovereign immunity barred a claim after the state legislatively redefined private mineral interests as public property); *Zito v. N.C. Coastal Res. Comm'n*, 8 F.4th 281, 290 (4th Cir. 2021) (sovereign immunity barred a claim that a state's refusal to allow construction of one home caused a taking); *Ladd v. Marchbanks*, 971 F.3d 574, 576 (6th Cir. 2020) (sovereign immunity barred a takings claim); *Citadel Corp. v. Puerto Rico Highway Auth.*, 695 F.2d 31, 33 n.4 (1st Cir. 1982) (sovereign immunity barred a takings claim).

ARGUMENT

I. CALIFORNIA CODE OF CIVIL PROCEDURE §§1540(c) AND 1562 ARE UNCONSTITUTIONAL ON THEIR FACE AND AS ADMITTEDLY APPLIED

It is not disputed by Controller and the State of California that they take "unclaimed" personal property, by non-permanent escheat, and hold it in trust for the owners until the owners claim it (C.C.P. §1313; *Taylor* supra 402 F. 3d at 933-934). It is also undisputed that

Controller deposits that unclaimed, *presumed* abandoned non-permanently escheated personal property in interest bearing accounts, or interest bearing bonds, and then uses the interest and principal of said personal property to pay off government obligations and to pay for State operations. (C. C. P. §1564)

It is also not disputed that over $13 Billion in non-permanently escheated funds are held by California in trust, which non- permanently escheated funds generate over $200 Million per year in interest (www.sco.ca.gov, Home – CA.gov, Unclaimed Property, Download Unclaimed Property Records, All Properties), but none of that interest or the value of California's use of that property is paid to the owners of the personal property that generates that $200 Million per year in interest. (C.C.P. §§1540(c) and 1562)

Controller claims that, even though they are admittedly merely custodians for the owners and hold their property in trust for the owners of that non- permanently escheated personal property, they can keep the revenue (interest) and time value realized from their use of owners' personal property, because C.C.P. §§1540(c) and 1562 *ipse dixit* say they can. But C.C.P. §§1540(c) and 1562 are invalid and unconstitutional because they purport to authorize the State of California to take (seize) the "presumed abandoned" property of another for government use (to pay the State's bills) without compensating the owners for its use. That is a theft or conversion of the owners' property, in violation of their Eleventh, Fourth, Fifth and Fourteenth Amendment rights. *Wall v. City of Whittier* 2019 WL 8810391 at *5-6 (C. D. Cal. 2019)

Indeed, the entirety of the escheat unclaimed property statutes (C.C.P. §§1300 et. seq., 1400 et. seq. and 1500 et. seq.) are unconstitutional because they *presume* and treat owners as having abandoned their personal property without notice, hearing or procedural or substantive due process. *Taylor v. Westly* 402 F.3d 924 (9th Cir. 2005); *Taylor v. Yee* 136 S. Ct. 929, 929-930 (2016)

Controller apparently contend that the interest on or the time value of the owners' presumed abandoned non- permanently escheated property is not the property of the owners (supposedly, only the underlying personal property, held in custody by Controller, is the property of the owners), so the State does not have to return the interest/time value of the owners' personal property. The State is wrong.

As this Court has held, interest on personal property ***is*** property and it belongs to the owner of the personal property. *Brown v. Legal Foundation of Washington* 538 U.S. 216, 235, 242 (2003) ["as we made clear in *Phillips*, the interest earned in the IOLTA account is the 'private property' of the owner of the principal."]; *Phillips v. Washington Legal Foundation* 524 U.S. 156, 172 (1998) [" . . . we hold that the interest income generated by funds held in IOLTA accounts is 'private property' of the owner of the principal."]; *Webb's Fabulous Pharmacies, Inc. v. Beckwith* 449 U.S. 155, 162-163 (1980) ["The usual and general rule is that any interest on an interpleaded and deposited fund follows the principal and is to be allocated to those who are ultimately to be the owners of that principal."]

Indeed, recently, this Court, in *Moore v. Harper* 600 *U.S. 1, 34-35 (2023),* reiterated, albeit in a different context, the continuing vitality of *Phillips v. Washington Legal Foundation* supra, and *Webb's Fabulous Pharmacies, Inc. v. Beckwith* 449 U.S. 155 supra, citing them for its holding that while state law is one important source of defining property rights, "the Federal Constitution provides that 'private property' shall not be taken for public use, without just compensation." (Fifth Amendment) As a result, States "may not sidestep the Takings Clause by disavowing traditional property interests." States may not, "by *ipse dixit* . . . transform private property into public property without compensation." *Moore* supra at 35

In *Taylor v. Yee 136 S. Ct. 929 (2016)* two justices of this Court seriously questioned the validity of forfeiture, in the guise of escheat, on short notice as being a means to seize property without just compensation and a violation of due process. In *Taylor v. Yee* 136 S. Ct. 929 at 929-930 (2016), Justice Alito stated that "[t]he Due Process Clause requires states to give adequate notice before seizing private property . . . Because the seizure of private property is no small thing, notification procedures may not be empty rituals . . . This trend – combining shortened escheat periods with minimal notification procedures – raised important due process concerns. The constitutionality of current state escheat laws is a question that may merit review in a future case."

The Seventh Circuit in *Cerajeski v. Zoeller* (J. Posner) 735 F.3d 577, 582 (7th Cir. 2013) held that ["Interest on interest bearing unclaimed property is unclaimed property too, and so the property owner can claim it upon proving title . . ."]; *Kolton v. Frerichs* (J. Easterbrook) 869

F.3d 532, 533 (7th Cir. 2017) [". . . a state may not take custody of property and retain income that the property earns."]

Frerichs 912 F.3d 1009, 1010 (7th Cir. 2019), the state circuit court held that the owner of unclaimed property could not receive the time value of unclaimed property in the State of Illinois' possession if it had not been earning interest prior to Illinois obtaining possession of it. The Seventh Circuit (J. Easterbrook) disagreed and held "The Supreme Court has held that the Takings Clause protects the time value of money just as much as it does money itself (citations omitted) . . . The property's owner is entitled to "income that the property earns" .

Some state courts agree. In *Sogg v. Zurz* 121 Ohio St. 3d 449, 453 (2009), the Ohio Supreme Court held unconstitutional the section of the state's unclaimed property law which, like California's, specifically provided that no interest would be paid to the property owner for Ohio's use of his/her unclaimed property. [. . . the state may not appropriate for its own use, against the owner of the underlying property, interest earned on that property."]

Thus, the actual interest received by the State of California or the time value of the State's possession of non-permanently escheated personal property is the property of the owners and must be returned or paid to Petitioner and the class. California cannot side-step the Takings Clause by enacting statutes like C. C. P. §1540(c) and 1562 that purport to allow it to take owners' personal property (interest on owners' unclaimed personal property and use of owners' unclaimed personal property) without justly compensating the owners for such taking and use,

simply by *ipse dixit* transforming private property into public property.

In this case, based on *Suever* supra, the Ninth Circuit decided that California did not have to pay unclaimed property owners interest. That decision was based on the notion that a payment of interest on unclaimed property taken by the state would be a form of "damages" against the State, rather than an equitable return of the owner's property or a disgorgement of the state's gains from its taking of the owner's property and that therefore, the State had Eleventh Amendment immunity. *Suever v. Connell* supra 579 F.3d at 1054 and 1059. However, the intervening *United States Supreme Court case, Liu v. Securities and Exchange Commission* 140 S. Ct. 1936, 1946, 1949 (2020), has seriously undercut the purported *Turnacliff* and *Seuver* decisions rationale. In *Liu*, this Court held that disgorgement of the wrongdoer's gains is an equitable return to the wronged party of the wrongdoer's wrongful gains, not "damages". *Liu* clarified that gain (profits and interest) received by a "wrongdoer" belong to the victims (owners) and should, in equity, be disgorged and returned to the victims – not as damages (measured by the victim's loss) but rather, as disgorgement of the wrongdoer's (California) gain, which gain really belongs to the victims, so that disgorgement of that gain is a return to the owner of her own property. *Id.* at 1946, 1949.

Here, California is the "wrongdoer" by unconstitutionally taking the owners' property and must return the interest or benefit (time value) derived from that property, which itself is also the owners' property, to the owners as a return of their property and not as

damages, which the State claims is barred by Eleventh Amendment sovereign immunity against damage claims.

This case presents issues of exceptional importance to the States' unclaimed property system.

1. As discussed above, the issues in this case are of exceptional importance to the nation's unclaimed property system. Whether states must pay just compensation on unclaimed property they hold and use for public purposes affects most States. Only six States (Indiana, Illinois, New Jersey, Ohio, Maryland, and Wisconsin) now provide for or permit any compensation to be paid to the owners of unclaimed property when it is returned to them.

Given the ubiquity of unclaimed property, the circuit split's current, ongoing impact is huge. According to the National Association of Unclaimed Property Administrators, approximately 33 million people collectively have more than $70 billion worth of unclaimed property held by state treasurers across the country. *See* https://unclaimed.org/who-we-are/. State treasurers return more than $5 billion of unclaimed property to millions of people annually. *See* https://unclaimed.org/who-we-are/ In nearly every State, when the unclaimed property is returned, no just compensation is paid to the owners, which amounts to billions of dollars of cost-free financing for those States and concomitant billions of dollars of unpaid just compensation to the property owners.

The split is particularly intolerable because it creates disparate treatment for private property owners in different States. Currently, the owners of unclaimed

property in Illinois, Indiana, New Jersey, Ohio, Maryland, and Wisconsin enjoy the protection of the Takings Clause, but unclaimed property owners in California and Delaware do not. The Takings Clause has long been held to apply to the States through the Due Process Clause of the Fourteenth Amendment. *See Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 239 (1897); *Barron v. Baltimore*, 32 U.S. 243, 250-51 (1833)). A private property owner's right to just compensation when his/her unclaimed property is taken for public use should not depend upon where he/she lives or where his/her property is located.

This case and the cases that have upheld the constitutionality of the taking of unclaimed private property for public use without paying just compensation, based on *Texaco, Inc. v. Short* 454 U.S. 516,526 (1982), have misapplied the Court's decision in *Texaco*. *Texaco* was not a Taking case. Property was transferred from one private party to another private party. *Texaco*, 454 U.S. at 518 (unused lease to mineral rights reverted to current surface owner of the property). The mineral rights in question never passed into the State's custody, and they were never used for any public purpose. The question presented here, whether a State must pay just compensation for making public use of private property, even if the property came into the State's custody because of the owner's neglect, was not presented in *Texaco*.

Now that a clear split exists over this constitutional question, there is no reason for the Court to stay its hand.

2. Even setting aside the need for certainty, the question presented has enormous stakes for State

treasurers across the country. More than $70 billion worth of unclaimed property is held by State treasurers across the country. See https://unclaimed.org/who-we-are/. It is used for public purposes in nearly every State. More importantly, billions of dollars in interest (just compensation) for use of the unclaimed property is owed to millions of property owners but is withheld from them annually. *See https://unclaimed.org/who-we-are/.* It is important for State treasurers across the country to have uniformity in the application of their laws. Until this Court decides whether the Takings Clause applies to the public use of unclaimed property, there will be no uniformity in whether the States must pay for the public use of that private property.

This case is a suitable vehicle.

This case gives the Court an opportunity to cleanly and definitively resolve an irreconcilable circuit split on an important issue of State power. The decision below, like all the decisions in the circuit courts, the district courts, and the State courts, addresses whether the States' use of unclaimed private property is a "taking." The outcome of these decisions is not dependent on differences in the facts or material differences in the law. The arguments for and against applying the Takings Clause to unclaimed property will be thoroughly set forth by the parties to this case in the arguments they make on their respective sides of the issue.

The Ninth Circuit's decision contradicts this Court's Precedent and lacks any constraining principle.

The Ninth Circuit's decision also squarely conflicts with a plethora of prior decisions of this Court in *Devillier*,

First English, *Cedar Point Nursery*, *Tahoe-Sierra*, *Webb's Fabulous Pharmacies*, and *Loretto*. For that reason, it is clearly erroneous, and this Court should grant a writ of certiorari overruling it and the *Suever* and *Turnacliff* decisions upon which it is based.

Here, and in *Suever* and *Turnacliff*, the Ninth Circuit held that the interest or time value of the state's use of the owners' unclaimed property belongs to the state, even though the state holds custody of the unclaimed property in trust for the owners. The Ninth Circuit, here and in *Suever* and *Turnacliff*, misapplied this Court's decision in *Texaco*. There, the Court held that States could enact laws providing for the transfer of abandoned property from one private owner to another. 454 U.S. at 526. The Indiana Mineral Lapse Act at issue in *Texaco* provided that "a severed mineral interest that is not used for a period of 20 years . . . reverts to the current surface owner of the property." *Texaco*, 454 U.S. at 518. The case involved the transfer of property rights between private citizens, not rights transferred to the State.

The Ninth Circuit's decision conflicts with this Court's decisions in other, more relevant Takings cases which hold that even a temporary physical taking, as occurs with unclaimed property used for public purposes, requires just compensation. For example, in *Cedar Point Nursery*, 141 S. Ct. at 2074, the Court held that a "physical taking" occurs when the government obtains "possession of property without acquiring title to it." Here, the UPL provides that California does not acquire title to the unclaimed property; it merely takes temporary custody of the property in trust for the owner. Cal. Civ. Code § 1501.5(a) ("property received by the state under this chapter shall not permanently escheat to the state").

Once a taking of private property has occurred, the duty to pay just compensation arises if the property is put to public use. The State's duty to pay just compensation under the Takings Clause "arises at the time of the taking, regardless of post-taking remedies that may be available to the property owner." *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2170 (2019) (citing *Jacobs v. United States*, 290 U.S. 13 (1933)). In *Jacobs*, the Court held that "the compensation must generally consist of the total value of the property when taken, plus interest from that time." 290 U.S. at 17 (quoting *Seaboard Air Line R. Co. v. United States*, 261 U.S. 299, 306 (1923)).

As the Court just held, "'a property owner acquires an irrevocable right to just compensation immediately upon a taking' '[b]ecause of "the self-executing character" of the Takings Clause "with respect to compensation."' *De Villier v Texas*, 601 U.S. 285 (2024) (quoting *Knick v. Township of Scott, Pa.*, 588 U.S.180, 192 (2019) (quoting *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U. S. 304, 315 (1987)).

3. In addition, this Court should grant certiorari to answer the important question left undecided in *Devillier* - whether a property owner has a direct takings claim for just compensation under the Fifth Amendment's Takings Clause when, as here, there is no other basis available to compensate the owner and in fact, the state's law specifically prohibits the state from compensating the owner for its use of her property. Almost every state has enacted unclaimed property laws that specifically bar states from justly compensating, or compensating at all, owners for the state's use of their property, in direct violation of the Fifth Amendment. The Court should grant certiorari to resolve that issue.

4. Finally, and quite importantly, the Court should grant certiorari in Cole-Kelly's case and in the pending petition for writ of certiorari in the *Gerlach v. Rokita* case (Supreme Court Docket Number 24-21) which also seeks resolution of the ongoing tension between the Fifth Amendment's self-execution grant of the right to just compensation for the state's taking of owner's property, and the Eleventh Amendment's grant of sovereign immunity, which the states almost uniformly and successfully assert in order to block their Fifth Amendment obligations to justly compensate those owners for the state's taking of their property. While this Court appears to have tacitly acknowledged (without explicitly so holding) in

First English supra, *Knick* supra, *Cedar Point* supra, and *Brown* supra, that the Fifth Amendment's Taking Clause's just compensation obligation cannot be barred by a state's claim of Eleventh Amendment sovereign immunity, this case presents the opportunity to clarify the conflict between these two important constitutional grants, at least in the area of states' takings of unclaimed personal property, i.e., to clarify that states' possession and use of the interest/time value of unclaimed personal property without compensation to the owners, is a violation of the Fifth Amendment, for which violation the states do not have sovereign immunity.

CONCLUSION

This Court should grant Cole-Kelly's petition for writ of certiorari in order to resolve the conflict between the Ninth Circuit and the Seventh Circuit and the patchwork of various district courts' and state courts' decisions as to whether owners of unclaimed property have a direct Fifth Amendment claim for just compensation for the state's taking of their property.

This petition should further be granted to resolve the issue that was not decided by this Court in the *Devillier case 601 U.S. 285 (2024)* of whether a person whose property has been taken and used by the state without compensation can sue the state directly under the Fifth Amendment where there is no other law providing for compensatory relief and, in fact, where the state's law specifically precludes compensatory relief to owners of unclaimed property, in violation of the Fifth Amendment.

Also, certiorari should be granted to resolve the constitutional conflict between property owners' "irrevocable" Fifth Amendment right to just compensation for the state's taking of their property and the state's claimed Eleventh Amendment sovereign immunity from justly compensating those property owners for the taking of their property.

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DATED: August 12, 2024

APPENDIX

TABLE OF APPENDICES

APPENDIX A — MEMORANDUM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED MARCH 14, 2024

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 23-15375
D.C. No. 4:22-cv-04056-HSG

ALEXANDER COTE, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Plaintiff-Appellant,

v.

OFFICE OF THE CALIFORNIA STATE CONTROLLER; BETTY T. YEE, IN HER OFFICIAL CAPACITY AS CALIFORNIA STATE CONTROLLER,

Defendants-Appellees.

No. 23-15377
D.C. No. 4:22-cv-04133-HSG

JENNIFER I. SYKES, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Plaintiff-Appellant,

v.

OFFICE OF THE CALIFORNIA STATE CONTROLLER; BETTY T. YEE, IN HER OFFICIAL CAPACITY AS CALIFORNIA STATE CONTROLLER,

Defendants-Appellees.

Appendix A

No. 23-15413
D.C. No. 4:22-cv-02841-HSG

ALISON COLE-KELLY, INDIVIDUALLY AND ON BEHALF OF ALL THOSE SIMILARLY SITUATED,

Plaintiff-Appellant,

v.

BETTY T. YEE, IN HER OFFICIAL CAPACITY AS CALIFORNIA STATE CONTROLLER; STATE OF CALIFORNIA,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of California
Haywood S. Gilliam, Jr., District Judge, Presiding.

Submitted March 12, 2024[*]
San Francisco, California;

Before: S.R. THOMAS, McKEOWN, and CHRISTEN, Circuit Judges.

MEMORANDUM[**]

Plaintiffs-Appellants Alexander Coté, Jennifer Sykes, and Alison Cole-Kelly appeal a district court's dismissal without leave to amend of their putative class action against

[*] The panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

[**] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Defendent-Appellee the California State Controller. We have jurisdiction over this appeal of the district court's dismissal under 28 U.S.C. § 1291. We affirm the judgment of the district court. Because the parties are familiar with the factual and procedural history of the case, we need not recount it here.

"Dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6) is reviewed de novo." *Dougherty v. City of Covina*, 654 F.3d 892, 897 (9th Cir. 2011) (emphasis omitted). "We review for abuse of discretion a district court's dismissal . . . without leave to amend." *Benavidez v. County of San Diego*, 993 F.3d 1134, 1141-42 (9th Cir. 2021). "A district court acts within its discretion to deny leave to amend when amendment would be futile . . . ." *V.V.V. & Sons Edible Oils Ltd. v. Meenakshi Overseas, LLC*, 946 F.3d 542, 547 (9th Cir. 2019) (ellipsis in original) (quoting *Chappel v. Lab. Corp. of Am.*, 232 F.3d 719, 725-26 (9th Cir. 2000)). We review "the question of futility of amendment de novo." *United States v. United Healthcare Ins. Co.*, 848 F.3d 1161, 1172 (9th Cir. 2016).

Plaintiffs claim that California's Unclaimed Property Law (UPL) violates the Fifth and Fourteenth Amendments of the United States Constitution and Article 1, Section 19 of the California Constitution. *San Remo Hotel L.P. v. City And County of San Francisco*, 27 Cal. 4th 643, 664, 117 Cal. Rptr. 2d 269, 41 P.3d 87 (2002) (construing the California Constitution's takings clause "congruently" to the United States Constitution's Takings Clause). They argue that California's Unclaimed Property Law is unconstitutional because it does not require interest to be

paid on escheated property while held by the state nor once reclaimed. Cal. Civ. Proc. Code § 1540(c). Plaintiffs seek declaratory and injunctive relief to remedy this injury.

However, we have already decided this question in two cases: *Turnacliff v. Westly*, 546 F.3d 1113 (9th Cir. 2008), and *Suever v. Connell*, 579 F.3d 1047 (9th Cir. 2009). These cases bind us, and preclude relief. In addressing an estate administrator's challenge to the 2002 version of California's Unclaimed Property Law that guaranteed some interest, we held that "when the Estate abandoned its property, it forfeited any right to interest earned by that property." *Turnacliff*, 546 F.3d at 1119; *Texaco, Inc. v. Short*, 454 U.S. 516, 102 S. Ct. 781, 70 L. Ed. 2d 738 (1982). We confirmed that holding in *Suever*, where we rejected claims for retroactive interest under the same 2002 statute because "state sovereign immunity clearly precludes Plaintiffs from successfully obtaining *more* than [their escheated principal and sales proceeds therefrom] in the form of interest." 579 F.3d at 1059. We also rejected claims for an injunction that required the "payment of interest on any claims for unclaimed property that escheated under" the 2003 California Unclaimed Property Law that paid no interest. *Id.* at 1057. And we rejected claims for equitable relief that were "indistinguishable in effect from claims for money damages against the State and, as such, . . . barred by the Eleventh Amendment." *Id.* at 1059-60.

There is no principled difference to be drawn between the statutes those decisions considered and the one before us today. Plaintiffs' property has validly escheated to the state. The current statute does not guarantee interest,

Cal Civ. Proc. Code § 1540(c) (2021) ("Interest shall not be payable on any claim paid under this chapter."), and we addressed a nearly identical statute that did not guarantee interest in *Suever*. 579 F.3d at 1057; *see* Cal Civ. Proc. Code § 1540(c) (2003) ("No interest shall be payable on any claim paid under this chapter."). As we held in *Suever*: "[T]he State is not constitutionally required to pay *any* interest under the UPL . . . ." 579 F.3d at 1056. The district court applied our precedents correctly. To the extent the plaintiffs' claims are for money damages against the state, they are barred by the Eleventh Amendment. *Id.* at 1059. To the extent any claims escape the Eleventh Amendment, plaintiffs cannot establish an entitlement to the interest they seek. *Turnacliff*, 546 F.3d at 1119.

To overcome the weight of our precedent, plaintiffs cite to several out-of-circuit cases, which do not bind this court, and several Supreme Court decisions. A three-judge panel may overrule circuit precedent only where an "intervening higher authority" is "clearly irreconcilable" with the reasoning of that decision. *CoreCivic, Inc. v. Candide Grp., LLC*, 46 F.4th 1136, 1141 (9th Cir. 2022) (quoting *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc)). *Turnacliff* and *Suever* were decided after the cited Supreme Court cases, and therefore the cited cases cannot constitute "intervening higher authority." *Miller*, 335 F.3d at 900.[1]

1. Plaintiffs also suggest the panel call for en banc review or certify their questions to the Supreme Court. En banc review is not warranted because we are not faced with "contradictory precedents" nor an "irreconcilable conflict" in our case law. *Atonio v. Wards Cove Packing Co., Inc.*, 810 F.2d 1477, 1478-79 (9th Cir. 1987). As to whether

The district court properly applied *Turnacliff* and *Suever* in dismissing the plaintiffs' claims as precluded by Ninth Circuit precedent.

AFFIRMED.

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this panel should certify plaintiffs' questions to the Supreme Court, mere "doubts" about a Court of Appeals' prior panel decisions are insufficient to invoke "so exceptional a jurisdiction" as the Supreme Court's on certification. *Wisniewski v. United States*, 353 U.S. 901, 902, 77 S. Ct. 633, 1 L. Ed. 2d 658 (1957).

APPENDIX B — ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, FILED MARCH 13, 2023

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Case No. 22-cv-02841-HSG
Re: Dkt. Nos. 16, 24, 23, 35

ALISON COLE-KELLY,

Plaintiff,

v.

BETTY T. YEE, *et al.*,

Defendants.

Case No. 22-cv-04056-HSG
Re: Dkt. No. 32

ALEXANDER COTE,

Plaintiff,

v.

OFFICE OF THE CALIFORNIA STATE CONTROLLER, *et al.*,

Defendants.

Appendix B

Case No. 22-cv-04133-HSG
Re: Dkt. No. 23

JENNIFER I. SYKES,

Plaintiff,

v.

OFFICE OF THE CALIFORNIA STATE CONTROLLER, *et al.*,

Defendants.

ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS

Pending before the Court are Defendants' motion to dismiss (Dkt. No. 23) in *Cole-Kelly v. Yee*, 22-cv-02841-HSG ("*Cole-Kelly*"); Defendants' motion to dismiss (Dkt. No. 32) in *Coté v. Office of the California State Controller*, 22-cv-04056-HSG ("*Coté*"); and Defendants' motion to dismiss (Dkt. No. 23) in *Sykes v. Office of the California State Controller*, 22-cv-04133-HSG. Also pending before the Court are the *Cole-Kelly* Plaintiffs' motion for partial summary judgment (Dkt. No. 35), Plaintiffs' motion to certify class (Dkt. No. 16), and Plaintiffs' motion to consolidate related cases and appoint class counsel (Dkt. No. 24). The Court finds this matter appropriate for disposition without oral argument and the matter is deemed submitted. *See* Civil L.R. 7-1(b). The Court **GRANTS** Defendants' motions to dismiss

and **TERMINATES AS MOOT** the *Cole-Kelly* Plaintiffs' motion for partial summary judgment, motion to certify class, and motion to consolidate related cases and appoint class counsel.

I. FACTUAL BACKGROUND

Cole-Kelly, Coté, and *Sykes* are three related putative class actions that challenge the constitutionality of California's Unclaimed Property Law ("UPL"), C.C.P. § 1500 *et seq.*, under the United States Constitution and the California Constitution.[1] As alleged in the *Coté* complaint, "[t]he UPL applies to unclaimed property that is held by a third party, for example, a bank, insurance company, corporation, or public utility. Unclaimed property is generally defined as any financial asset left inactive by its owner for a period of time, typically three (3) years. Under the UPL . . . such property is temporarily transferred to the custody of the State." *Coté* Dkt. No. 1 at ¶ 17. Plaintiffs

1. The *Cole-Kelly* complaint brings three claims: 1) claim for declaratory and prospective injunctive relief on behalf of plaintiff and the class: unconstitutionality under 5th Amendment, 2) claim for declaratory and prospective injunctive relief on behalf of plaintiff and the class: unconstitutionality under Article I, Section 19, and 3) violation of equal protection and due process (42 U.S.C. § 1983). *See generally Cole-Kelly* Dkt. No. 1. The *Coté* and *Sykes* complaints bring the same two claims: 1) claim for declaratory and prospective injunctive relief on behalf of plaintiff and the class for violation of the Fifth and Fourteenth Amendments of the U.S. Constitution, 2) claim for declaratory and injunctive relief on behalf of plaintiff and the class for violation of Article I, Section 19 of the California Constitution. *See generally Coté* Dkt. No. 1; *Sykes* Dkt. No. 1.

further allege that the UPL "is not a true escheat statute; it gives the State custody, not ownership, of unclaimed property." *Id.* Third parties are required to self-report any unclaimed property and "transfer property to the State once the property meets the UPL's definition of unclaimed property and pay the State interest at the rate of twelve percent (12%) per annum for property not timely reported or delivered." *Id.* ¶ 19. According to the *Coté* plaintiffs, "[t]he State collects hundreds of millions of dollars in unclaimed or abandoned property annually but returns just a fraction of that amount to the property owners. The State retains and uses the interest, dividends, accruals, earnings, investment returns, and other benefits earned on and from unclaimed property for public purposes." *Id.* ¶ 20. The *Coté* complaint alleges that "the Controller does not pay interest, dividends, accruals, earnings, investment returns, or other benefits above the original amount of the unclaimed property to the owner or person entitled to recover the unclaimed property and is prohibited by statute from doing so." *Id.* ¶ 21. For this reason, the *Coté* complaint alleges that "[t] he State deprives Plaintiff and all other Class members of just compensation on unclaimed or abandoned property it uses for public purposes." *Id.* ¶ 22. The *Cole-Kelly* and *Sykes* complaints make similar allegations. *See Cole-Kelly* Dkt. No. 1 ¶¶ 10-38; *Sykes* Dkt. No. 1 ¶¶ 17-22.

The central allegation in all three cases is that the UPL is unconstitutional under both the United States Constitution and the California Constitution because it unconstitutionally deprives property owners of any "time

value"[2] accrued by their property during the time it is controlled by the State. Accordingly, the constitutionality of the UPL is a dispositive issue in all three cases.

II. LEGAL STANDARD

Federal Rule of Civil Procedure 8(a) requires that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). A defendant may move to dismiss a complaint for failing to state a claim upon which relief can be granted under Rule 12(b)(6). "Dismissal under Rule 12(b)(6) is appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory." *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008). To survive a Rule 12(b)(6) motion, a plaintiff need only plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). A claim is facially plausible when a plaintiff pleads "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009).

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2. Plaintiffs in all three cases refer to the concept of "time value." *See e.g.*, *Cole-Kelly* Dkt. No. 40 ("Opp.") at 1; *Sykes* Dkt. No. 38 ("Opp.") at 13; *Coté* Dkt. No. 49 ("Opp.") at 13. For clarity, the Court will refer to "interest" throughout this order. Although the Court understands that "time value" may include other forms of appreciation—such as dividends, accruals, or other earnings—it finds that this does not change the analysis or outcome.

In reviewing the plausibility of a complaint, courts "accept factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party." *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). Nevertheless, courts do not "accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Hartman v. Gilead Scis., Inc. (In re Gilead Scis. Sec. Litig.)*, 536 F.3d 1049, 1055 (9th Cir. 2008) (quoting *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001)).

Even if the court concludes that a 12(b)(6) motion should be granted, the "court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts." *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc) (quotation omitted).

III. DISCUSSION

A. Three-Judge Panel

As a preliminary matter, the *Cole-Kelly* Plaintiffs argue that Defendants' motion to dismiss and Plaintiffs' motion for partial summary judgment in *Cole-Kelly* should be decided by a three-judge panel under 28 U.S.C. § 2284. *Cole-Kelly* Opp. at 20-21. Section 2284 provides that three-judge panel "shall be convened when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any

statewide legislative body." 28 U.S.C. § 2284. This case does not involve the apportionment of congressional districts or a statewide legislative body so, under § 2284, Plaintiffs must identify an applicable "Act of Congress" that requires a three-judge panel. In support of their request, Plaintiffs argue that "[w]here, as here, an action seeks to establish the unconstitutionality of a state statute and to enjoin the state and its officers from enforcing that allegedly unconstitutional statute, a party can move, pursuant to 28 U.S.C. § 2284, to have a three-judge district court panel decide the issues." *Cole-Kelly* Opp. at 20-21. The two cases Plaintiffs cite in support both concern 28 U.S.C. § 2281, which stated:

> An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

Hicks v. Miranda, 422 U.S. 332, 342 n.12, 95 S. Ct. 2281, 45 L. Ed. 2d 223 (1975) (quoting 28 U.S.C. § 2281 (repealed 1976)); *see also Fla. Lime & Avocado Growers, Inc. v. Jacobsen*, 362 U.S. 73, 79-80, 80 S. Ct. 568, 4 L. Ed. 2d 568 (1960).

Section 2281, however, was repealed in 1976. *See* 28 U.S.C. § 2281 (repealed 1976); *see also Tedards v. Ducey*, 951 F.3d 1041, 1060 n.37 (9th Cir. 2020) (stating that "[In 1968], Congress required that any case seeking an injunction against a state officer to prevent enforcement of an allegedly unconstitutional state statute be heard by a special three-judge district court," but noting in the citation to the statute that it was "repealed 1976"); *Larry P. By Lucille P. v. Riles*, 793 F.2d 969, 978 n.4 (9th Cir. 1984) (explaining that § 2281 "was repealed in 1976").

The Court knows of no current authority or other basis on which it could grant Plaintiffs' request, and Plaintiffs point to none. Accordingly, Plaintiffs' request for a three-judge panel is **DENIED**.

B. Sovereign Immunity

Defendants argue in the *Cole-Kelly* motion to dismiss that "any claims against the State of California and its agencies are barred by the Eleventh Amendment." *Cole-Kelly* Mot. at 8. Defendants further argue that because "officials sued in their official capacities are not persons within the meaning of § 1983 . . . a plaintiff is barred from suing defendants in their official capacities for money damages, absent congressional abrogation or waiver of sovereign immunity." *Id.* at 8-9 (quotations omitted). The Defendants make similar arguments in the *Coté* and *Sykes* motions to dismiss. *See Coté* Mot. at 9-10; *Sykes* Mot. 9-10. The *Sykes* and *Coté* Plaintiffs argue that "the Eleventh Amendment does not bar claims for prospective injunctive relief to remedy a state's ongoing violations of federal

law." *Coté* Opp. at 16; *Sykes* Opp. at 16. The *Cole-Kelly* Plaintiffs also argue that "the interest (or time value) on the unclaimed property is the property of the owners, not the State" so "Plaintiffs' claim for a return of their interest is a claim for a return of their property, and not a claim for damages against the state." *Cole-Kelly* Opp. at 20 (footnotes and citations omitted); *see also Coté* Opp. at 17 (making similar arguments); *Sykes* Opp. at 17 (same). The *Coté* and *Sykes* Plaintiffs further argue that "even if retrospective relief would be sought, the self-executing aspect of the Fifth Amendment provides relief." *Coté* Opp. at 16; *Sykes* Opp. at 16.

The Ninth Circuit addressed sovereign immunity in the context of claims for interest in *Suever II*: "while the Eleventh Amendment is no bar to Plaintiffs' claims for return of their escheated principal and the sales proceeds therefrom, state sovereign immunity clearly precludes Plaintiffs from successfully obtaining *more* than that amount in the form of interest. . . ." *Suever v. Connell (Suever II)*, 579 F.3d 1047, 1059 (9th Cir. 2009) (emphasis in original).

Plaintiffs' argument that their claim for a return of the interest is a claim for the return of *their* property (and therefore not barred by the Eleventh Amendment) is foreclosed by the reasoning in *Turnacliff* regarding the interest earned by unclaimed or abandoned property. In *Turnacliff*, Plaintiffs argued, in part, that "the Controller's action ran afoul of the Takings Clause of the Fifth Amendment, because he did not pay to the Estate the actual interest that the unclaimed property earned

while California held it." *Turnacliff v. Westly*, 546 F.3d 1113, 1115 (9th Cir. 2008). The court acknowledged that in a previous case it had held that "prisoners possess a constitutionally cognizable property right in the interest earned on the principal held in Inmate Trust Accounts." *Id.* at 1119 n.3 (citing *Schneider v. Cal. Dep't of Corr.*, 151 F.3d 1194, 1201 (9th Cir. 1998)). The court discussed *Schneider's* holding that "'[t]he "interest follows principal" rule's common law pedigree, and near-universal endorsement by American courts—including California's' left us with 'little doubt that interest income of the sort at issue' [there] was 'sufficiently fundamental that States may not appropriate it without implicating the Takings Clause.'" *Id.* (quoting *Schneider*, 151 F.3d at 1201). The *Turnacliff* court, however, also stated that "[b]y contrast, we are unaware of . . . any authority for the proposition that interest earned by unclaimed or abandoned property belongs to the property owner." *Id.*

Given the Ninth Circuit's statement in *Turnacliff*, this Court declines to find that the interest earned by unclaimed or abandoned property belongs to the property owner. Consequently, Plaintiffs' claims for the payment of any interest accrued by their property while the property was in State custody are barred by the Eleventh Amendment. *Suever II*, 579 F.3d at 1059 (explaining that "Plaintiffs are not entitled to *more* than the actual property that the State took into its possession or the proceeds of that property. . . . Rather, such claims for additional compensation, whether described as 'restitution' or otherwise, are indistinguishable in effect from claims for money damages against the State and, as

such, are barred by the Eleventh Amendment" (emphasis in original) (quotations omitted)).[3]

C. Constitutionality of UPL

To the extent that any of Plaintiffs' claims are not barred by the Eleventh Amendment, these claims fail to state a claim upon which relief can be granted because the claims are not tenable under current Ninth Circuit law.

The Ninth Circuit has "squarely rejected the proposition that property owners have a compensable Fifth Amendment right to interest earned on unclaimed property that escheats to the State of California." *Suever II*, 579 F.3d at 1056.[4] It has stated that "insofar as [a district

3. The *Cole-Kelly* Plaintiffs argue that "*Suever* and *Turnacliff* are not the law of the circuit" based on the Supreme Court's decision in *Liu v. Securities and Exchange Commission*, 140 S. Ct. 1936, 1946, 207 L. Ed. 2d 401 (2020). *See Cole-Kelly* Opp. at 19-20. *Liu* involved a civil enforcement action brought by the SEC. The Court held "that a disgorgement award that does not exceed a wrongdoer's net profits and is awarded for victims is equitable relief permissible under" a statute "that historically exclude[d] punitive sanctions." *Liu*, 140 S. Ct. at 1940. Given the different context of the *Liu* case and its holding, Plaintiffs have not met the high standard of "clear irreconcilability" required before district courts can "consider themselves bound by the intervening higher authority and reject the prior opinion of [the Ninth Circuit] as having been effectively overruled." *Miller v. Gammie*, 335 F.3d 889, 899-900 (9th Cir. 2003) (en banc).

4. The *Coté* and *Sykes* Plaintiffs argue that "[t]he law has developed since the Ninth Circuit Court of Appeals determined that owners of unclaimed property have no Fifth Amendment

court's] order requires prospective payment of interest, or payment of interest on any claims for unclaimed property that escheated under the *current* version of the UPL . . . *Turnacliff* requires reversal." *Id.* 1057 (emphasis added).[5] The Court has also explicitly stated that "[a]s previously noted, we have declared that the current version of the UPL is facially constitutional." *Id.*

The Ninth Circuit could not be more clear: Plaintiffs' claims are not legally viable. If Plaintiffs want to change Ninth Circuit law, they will have to persuade an en banc panel of that court to do so.[6]

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right to interest itself actually earned on their property while held by the State . . . " *Coté* Opp. at 2; *Sykes* Opp. at 2. However, the cases cited by Plaintiffs are out-of-circuit cases that have no precedential value within the Ninth Circuit, and cannot override this circuit's decisions on the question.

5. *Suever II* was decided in 2009, well after the law's 2003 amendment. *See Cole-Kelly* Opp. (explaining that the current version of § 1540(c) was enacted in 2003).

6. The Court finds that Plaintiffs' claims that the alleged taking also violated the due process and equal protection provisions of the Constitution are derivative and fail for the same reason. *See Cole-Kelly* Dkt. No. 1 ¶ 73 ("The California Controller and Treasurer violated Plaintiff's and the Classes' due process and equal protection rights, by taking Plaintiff's and the Class's property without just compensation, thereby causing harm to Plaintiff and the Class."); *Coté* Dkt. No. 1 ¶ 52 ("The UPL violates the Fifth and Fourteenth Amendments of the United States Constitution in that it directs that unclaimed property transferred to the custody of the Controller must be paid to the State's General Fund and used by the State for public purposes without the payment of just compensation to property owners, upon claiming

IV. CONCLUSION

Because the "pleading[s] could not possibly be cured by the allegation of other facts," *Lopez*, 203 F.3d at 1127 (quotation omitted), the Court **GRANTS WITHOUT LEAVE TO AMEND** Defendants' motions to dismiss: Dkt. No. 23) in *Cole-Kelly*, Dkt. No. 32 in *Coté*, and Dkt. No. 23 in *Sykes*.

This order also **TERMINATES AS MOOT** Plaintiffs' motion for partial summary judgment (Dkt. No. 35), Plaintiffs' motion to certify class (Dkt. No. 16), and Plaintiffs' motion to consolidate related cases and appoint class counsel (Dkt. No. 24) in *Cole-Kelly*.

The Clerk is directed to enter judgment in favor of Defendants and to close the three cases.

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the property, for the State's use of that property while in its custody for public purposes."); *Sykes* Compl. ¶ 52 (same).

Defendants point out that "[a]side from a provision in California's Constitution proscribing 'damage' to property without compensation, the Takings Clauses in the United States and California Constitutions have been construed 'congruently.'" *Coté* Mot. at 3 n.1 (quoting *San Remo Hotel L.P. v. City and County of San Francisco*, 27 Cal. 4th 643, 664, 117 Cal. Rptr. 2d 269, 41 P.3d 87 (2002)); *Sykes* Mot. at 3 (same); *Cole-Kelly* Mot. at 3 n.2 (same). The *Coté* and *Sykes* Plaintiffs agree, and the *Cole-Kelly* Plaintiffs do not argue otherwise. *See Coté* Opp. at 1 n.2; *Sykes* Opp. at 1 n.2; *see generally Cole-Kelly* Opp. The Court therefore finds that Plaintiffs' claims under Article I, Section 19 of the California Constitution also fail for the same reason.

Appendix B

IT IS SO ORDERED.

Dated: 3/13/2023

/s/ Haywood S. Gilliam, Jr.
HAYWOOD S. GILLIAM, JR.
United States District Judge

APPENDIX C — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, FILED MARCH 13, 2023

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA,

Case No. 22-cv-02841-HSG

ALISON COLE-KELLY,

Plaintiff,

v.

BETTY T. YEE, *et al.*,

Defendants.

Case No. 22-cv-04056-HSG

ALEXANDER COTE,

Plaintiff,

v.

OFFICE OF THE CALIFORNIA STATE CONTROLLER, *et al.*,

Defendants.

Case No. 22-cv-4133-HSG

JENNIFER I. SYKES,

Plaintiff,

v.

OFFICE OF THE CALIFORNIA STATE CONTROLLER, *et al.*,

Defendants.

Appendix C

Judgment is hereby entered consistent with the Court's Orer Granting Defendants' Motions to Dismiss,

This document constitutes a judgment and a separate document for purposes of Federal Rule of Civil Procedure 58(a).

Dated at Oakland, California, this 13th day of March, 2023.

Mark B. Busby
Clerk of Court

By: Nikki D. Riley
Nikki D. Riley
Deputy Clerk to the Honorable
HAYWOOD S. GILLIAM, JR.

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED APRIL 23, 2024

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 23-15375

D.C. No. 4:22-cv-04056-HSG
Northern District of California, Oakland

ALEXANDER COTE, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Plaintiff-Appellant,

v.

OFFICE OF THE CALIFORNIA STATE CONTROLLER; BETTY T. YEE, IN HER OFFICIAL CAPACITY AS CALIFORNIA STATE CONTROLLER,

Defendants-Appellees.

No. 23-15377

D.C. No. 4:22-cv-04133-HSG
Northern District of California, Oakland

Appendix D

JENNIFER I. SYKES, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Plaintiff-Appellant,

v.

OFFICE OF THE CALIFORNIA STATE CONTROLLER; BETTY T. YEE, IN HER OFFICIAL CAPACITY AS CALIFORNIA STATE CONTROLLER,

Defendants-Appellees.

No. 23-15413

D.C. No. 4:22-cv-02841-HSG
Northern District of California, Oakland

ALISON COLE-KELLY, INDIVIDUALLY AND ON BEHALF OF ALL THOSE SIMILARLY SITUATED,

Plaintiff-Appellant,

v.

BETTY T. YEE, IN HER OFFICIAL CAPACITY AS CALIFORNIA STATE CONTROLLER; STATE OF CALIFORNIA,

Defendants-Appellees.

Appendix D

ORDER

Before: S.R. THOMAS, McKEOWN, and CHRISTEN, Circuit Judges.

The panel has unanimously voted to deny the petition for panel rehearing. The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing and the petition for rehearing en banc is **DENIED.**

APPENDIX E — RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Fifth Amendment of the United States Constitution

. . . nor be deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation.

Appendix E

Suits Against States

Eleventh Amendment of the United States Constitution

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

Appendix E

Fourteenth Amendment

Section 1

. . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Appendix E

California Constitution

Article I - Declaration of Rights

Section 19

(a) Private property may be taken or damaged for a public use and only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner.

Appendix E

California Code of Civil Procedure § 1540(c)

. . .

(c) Interest shall not be payable on any claim paid under this chapter.

Appendix E

California Code of Civil Procedure § 1562

When property other than money is delivered to the State Controller under this chapter, any dividends, interest, or other increments realized or accruing on such property at or prior to liquidation or conversion thereof into money, shall upon receipt be credited to the owner's account by the State Controller. Except for amounts so credited the owner is not entitled to receive income or other increments on money or other property paid or delivered to the State Controller under this chapter. All interest received and other income derived from the investment of moneys deposited in the Unclaimed Property Fund under the provisions of this chapter shall, on order of the State Controller, be transferred to the General Fund.