No. _____

IN THE

Supreme Court of the United States

PAMELA J. ANTOSH AND
NED E. LASHLEY,

Petitioners,

v.

VILLAGE OF MOUNT PLEASANT,
DAVID DE GROOT, AND
VILLAGE OF MOUNT PLEASANT COMMUNITY
DEVELOPMENT AUTHORITY,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

ERIK S. OLSEN
Counsel of Record
EMINENT DOMAIN SERVICES, LLC
6515 Grand Teton Plaza, Suite 241
Madison, WI 53719
erik@eminentdomainservices.com
608-535-6109
Attorney for Pamela J. Antosh and Ned E. Lashley

QUESTION PRESENTED

Whether the court of appeals erred in affirming the district court, when the Village of Mount Pleasant admitted that it had used eminent domain to take private property for a private purpose (the Foxconn Project), and the district court applied the *Colorado River* doctrine *sua sponte* even though the state proceedings were not parallel because the state proceedings were statutorily barred from addressing the Petitioners' Fifth Amendment public-use claim as well as other constitutional issues.

PARTIES TO THE PROCEEDING

Petitioners in this Court and appellants in the court of appeals are Pamela J. Antosh and Ned E. Lashley. Respondents in this Court and appellees in the court of appeals are Village of Mount Pleasant, David De Groot, and Village of Mount Pleasant Community Development Authority.

DIRECTLY RELATED PROCEEDINGS

United States District Court

Pamela J. Antosh, et al. v. Village of Mount Pleasant, et al., 2023 WL 2465920 (E.D. Wis. Mar. 10, 2023) (Case No. 22-cv-00117-bhl)

United States Court of Appeals

Pamela J. Antosh, et al. v. Village of Mount Pleasant, et al., 99 F.4th 989 (7th Cir. April 25, 2024) (Case No. 23-1678)

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 99 F.4th 989 and reprinted in the Appendix to this Petition at App. 1a-15a. The opinion of the district court is reported at 2023 WL 2465920 and reprinted in the Appendix to this Petition at App. 16a-35a.

JURISDICTION

The court of appeals entered its judgment on April 25, 2024. App. 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

United States Constitution, Fifth Amendment

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

42 U.S.C. § 1983 Civil action for deprivation of rights

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

purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Wis. Stat. § 32.05(5) Court action to contest right of condemnation. If an owner desires to contest the right of the condemnor to condemn the property described in the jurisdictional offer, for any reason other than that the amount of compensation offered is inadequate, the owner may within 40 days from the date of personal service of the jurisdictional offer or within 40 days from the date of postmark of the certified mail letter transmitting such offer, or within 40 days after date of publication of the jurisdictional offer as to persons for whom such publication was necessary and was made, commence an action in the circuit court of the county wherein the property is located, naming the condemnor as defendant. Such action shall be the only manner in which any issue other than the amount of just compensation, or other than proceedings to perfect title under ss. 32.11 and 32.12, may be raised pertaining to the condemnation of the property described in the jurisdictional offer. The trial of the issues raised by the pleadings in such action shall be given precedence over all other actions in said court then not on trial. If the action is not commenced within the time limited the owner or other person having any interest in the property shall be barred from raising any such objection in any other manner. Nothing in this section shall be construed to limit in any respect the right to determine the necessity of taking as conferred by s. 32.07 nor to prevent the condemnor from proceeding with condemnation

during the pendency of the action to contest the right to condemn.

Wis. Stat. § 32.05(11) Waiver of hearing before commission; appeal to circuit court and jury. The owner of any interest in the property condemned named in the basic award may elect to waive the appeal procedure specified in sub. (9) and instead, within 2 years after the date of taking, appeal to the circuit court of the county wherein the property is located. The notice of appeal shall be served as provided in sub. (9) (a). Filing of the notice of appeal shall constitute such waiver. The clerk shall thereupon enter the appeal as an action pending in said court with the condemnee as plaintiff and the condemnor as defendant. It shall proceed as an action in said court subject to all the provisions of law relating to actions originally brought therein and shall have precedence over all other actions not then on trial. The sole issues to be tried shall be questions of title, if any, under ss. 32.11 and 32.12 and the amount of just compensation to be paid by condemnor. It shall be tried by jury unless waived by both plaintiff and defendant. The amount of the jurisdictional offer or basic award shall not be disclosed to the jury during such trial. Where one party in interest has appealed from the award, no other party in interest who has been served with notice of such appeal may take a separate appeal but may join in the appeal by serving notice upon the condemnor and the appellant of that party's election to do so. Such notice shall be given by certified mail or personal service within 10 days after receipt of notice of the appeal and shall be filed with the clerk of court.

Upon failure to give such notice such parties shall be deemed not to have appealed. The appeal shall not affect parties who have not joined in the appeal as herein provided. In cases involving more than one party in interest with a right to appeal, the first of such parties filing an appeal under sub. (9) or under this subsection shall determine whether such appeal shall be under sub. (9) or directly to the circuit court as here provided. No party in interest may file an appeal under this subsection if another party in interest in the same lands has filed a prior appeal complying with the requirements of sub. (9). In cases involving multiple ownership or interests in lands taken the provisions of sub. (9) (a) 1., 2. and 3. shall govern.

INTRODUCTION

The district court declined to exercise jurisdiction over this case under the *Colorado River* doctrine, and the court of appeals agreed. The result of these decisions bars the landowners in this case from litigating the constitutional question of whether their property was impermissibly taken for a private purpose. Contrary to the rulings of the lower courts, this federal action was not parallel to the state proceedings. If this Court does not grant certiorari, the landowners will have been denied a federal forum to vindicate their federal constitutional right that property shall be taken only for a public purpose.

The Seventh Circuit Court of Appeals' particularly broad approach to the *Colorado River* doctrine stands out among the circuits. In the case at hand, the court of appeals expanded the doctrine even further by effectively overruling the requirement of parallel proceedings. It was clear legally that the state and federal proceedings were not parallel, yet the district court still dismissed the case. In reviewing the district court's decision, the Seventh Circuit admitted that the two cases presented different issues and that regardless of how the state case was decided, the public use claim would go unanswered, however, the Seventh Circuit still concluded that the two cases were "parallel."

Granting this petition would clarify the divergent applications of the *Colorado River* doctrine among the circuits, and rein in the overly broad approach applied by the district court and court of appeals in

this case. Although the *Colorado River* doctrine has commendable goals, it cannot act as a complete bar to the courthouse door in light of the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." *Colorado River Cons. Dist. v. United States*, 424 U.S. 800, 817-18 (1976) (citations omitted).

The court of appeals' decision also has the severe consequence of imposing a barrier to plaintiffs with a takings claim, which had been conclusively removed by the recent *Knick* decision. However, the lower courts in this case held that challenging the constitutionality of the taking in a federal forum was not available to the Petitioners due to the fact that they had first filed an appeal of compensation under Wis. Stat. § 32.05(11) in state court. This was in spite of the fact that it is impossible to raise constitutional challenges to a taking in a Wis. Stat. § 32.05(11) action, as in that action, "[t]he sole issues to be tried shall be questions of title, if any, under ss. 32.11 and 32.12 and the amount of just compensation to be paid by condemnor." Wis. Stat. § 32.05(11). Nevertheless, the lower courts held that the state proceeding under Wis. Stat. § 32.05(11) and the federal proceeding bringing constitutional challenges to the taking under 42 U.S.C. § 1983 were parallel, and dismissed the federal case. The lower courts' decisions effectively placed the takings plaintiffs in this case back into a pre-*Knick* landscape, so that once again, "the guarantee of a federal forum rings hollow." *Knick v. Township of Scott,* 588 U.S. 180, 185 (2019).

STATEMENT

A. Legal Background

The *Colorado River* abstention doctrine revolves around the "exceptional-circumstances test" announced by the Supreme Court in *Colorado River Water Cons. Dist. v. United States*, 424 U.S. 800, 817-21 (1976). The *Colorado River* doctrine is only applied if the concurrent state and federal actions are parallel. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 13, 28 (1983). The following discussion of Wisconsin and federal law is necessary in order to answer the question of whether the state and federal proceedings in this matter were actually parallel.

Under Wisconsin's statutory framework, there are two distinct types of eminent domain lawsuits; one type, a "compensation" lawsuit, deals only with the amount of just compensation and issues of title. The other type of lawsuit, a "right-to-take" lawsuit, can address any and all non-compensation issues including constitutional issues. The compensation and right-to-take lawsuits are required to proceed separately and may proceed simultaneously.

There are two procedures under which condemning authorities may exercise eminent domain depending on the purpose for the taking. The procedure set forth in Wis. Stat. § 32.05 is for transportation facilities and sewers, while the procedure set forth in Wis. Stat. § 32.06 is a catch all for all other types of takings. Both the Section 32.05 and the Section 32.06 procedures provide for both

"compensation" lawsuits and "right-to-take" lawsuits.

The two different types of eminent domain lawsuits under Wisconsin state law must proceed in court separately, but may proceed simultaneously. The first type of lawsuit is an action to contest the right of condemnation. Wis. Stat. § 32.05(5), Wis. Stat. § 32.06(5). The statutes explain that this type of action must be filed "[i]f an owner desires to contest the right of the condemnor to condemn the property ... for any reason other than that the amount of compensation offered is inadequate ...." Wis. Stat. § 32.05(5); *see* Wis. Stat. § 32.06(5). The statutes further explain that the aggrieved landowner may "commence an action in the circuit court of the county wherein the property is located" and that "[s]uch action shall be the only manner in which any issue other than the amount of just compensation or ... to perfect title ... may be raised pertaining to the condemnation of the property described in the jurisdictional offer." *Id.* Actions under this statute are colloquially known among eminent domain practitioners as "right-to-take" actions. A plaintiff has 40 days from the service of a jurisdictional offer to commence a right-to-take action under Wis. Stat. §§ 32.05(5) or 32.06(5).

The second type of action that is specified under Wisconsin law in relation to eminent domain takings is what practitioners call a "compensation proceeding" because it is a proceeding to determine the amount of just compensation which must be paid for the taking. Wisconsin law specifies that compensation proceedings involving sewers and

transportation facilities follow a different procedural path from takings for all other purposes.

Under Wisconsin law, takings for sewers and transportation facilities are governed by Wis. Stat. § 32.05 ("Condemnation for sewers and transportation facilities.") Takings for sewers and transportation facilities are allowed to use a "quick take" procedure. *Waller v. American Transmission Co.*, 2013 WI 77, ¶ 57, 350 Wis. 2d 242, 833 N.W.2d 764 ("Condemnors use Wis. Stat. § 32.05, known as the 'quick-take' statute, for condemning property related to sewer and transportation projects.") Takings for purposes other than transportation facilities and sewers proceed under a different section of the Wisconsin Statutes using a "slow-take" procedure. *Waller*, 2013 WI 77, ¶ 57 ("Other condemnors utilize Wis. Stat. § 32.06, the 'slow-take' statute, which is the 'catch-all' for condemnations not covered by § 32.05.") This section of the statutes specifies a procedure where the condemning authority generally must initiate condemnation proceedings prior to taking title. Wis. Stat. § 32.06 ("Condemnation procedure in other than transportation matters"). Condemnation for the entire gamut of public uses including such classic public uses as airports, schools, power lines, pipelines, and parks all must be accomplished under Wis. Stat. § 32.06.

In both compensation proceedings under Section 32.05 and compensation proceedings under Section 32.06, "the sole issues to be tried shall be questions of title, if any ... and the amount of just compensation to be paid by condemnor." Wis. Stat. § 32.05(11); *see* Wis. Stat. § 32.06(10).

In Wisconsin, right-to-take cases and compensation cases proceed separately, and often simultaneously, with separate case numbers and often with different judges. The statutes explicitly state that the compensation proceedings may continue while the right-to-take litigation is pending: "Nothing in this section shall be construed ... to prevent the condemnor from proceeding with condemnation during the pendency of the action to contest the right to condemn." Wis. Stat. § 32.05(5). This view that the statutes envision simultaneously litigated "right-to-take" and "compensation" cases was confirmed by the Wisconsin Supreme Court in the *Waller* case: "It is apparent that the legislature intended to create two independent proceedings relating to ... condemnation, an owner's action in circuit court under sec. 32.06(5), Stats., and the condemnation proceeding before a judge under sec. 32.06(7). From sec. 32.06(5), it is clear that the two proceedings may go on simultaneously." *Waller*, 2013 WI 77, ¶ 58 (citing *Falkner v. N. States Power Co.*, 75 Wis. 2d 116, 120, 248 N.W.2d 885 (1977)).

A Wisconsin plaintiff subjected to eminent domain who has a Fifth Amendment takings claim (or other constitutional claims) also has the option of filing a case in federal court under 42 U.S.C. § 1983. This is because "Congress intended § 1983 to be an independent protection for federal rights." *Pulliam v. Allen*, 466 U.S. 522, 541 (1984). *See generally Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 665-89 (1978). The right to proceed directly to federal court with Fifth Amendment and Fourteenth Amendment claims was confirmed in the recent *Knick* case. *Knick v. Township of Scott*, 588 U.S. 180, 191 (2019). While

Section 1983 claims borrow the applicable state statute of limitations, applying the short 40-day time period would be inconsistent with the purpose of section 1983. *See Burnett v. Grattan*, 468 U.S. 42, 48-55 (1984) (six month statute of limitations borrowed from state administrative law was not appropriate for federal civil rights claims).

B. Factual and Procedural Background

In 2017, the Village of Mount Pleasant ("Village") entered into a development agreement to facilitate the development of manufacturing facilities for Foxconn Technology Group. D. Ct. Doc. 23, First Am. Compl. ¶ 2. In 2019, the Village condemned property from the Petitioners for the stated purpose of a highway (Highway KR), using Wis. Stat. § 32.05, the procedure for transportation facilities and sewers. D. Ct. Doc. 23, First Am. Compl. ¶ 8. The Petitioners' property was located in Racine County, within an area that the Village had designated as Area III of the Foxconn Project Area. D. Ct. Doc. 23-1. However, all of the documents that the Village used to accomplish the taking referenced the transportation facility and sewer statute, sec. 32.05. D. Ct. Doc. 23, First Am. Compl. ¶¶ 8-20. The Village sent a Jurisdictional Offer for the property that stated the "Public Purpose for Property" was "[h]ighway or other transportation related purposes." D. Ct. Doc. 23, First Am. Compl. ¶ 11; D. Ct. Doc. 23-2.

Therefore, the Petitioners did not believe that they needed to file a right-to-take challenge under Wis. Stat. § 32.05(5) to challenge the legality of the taking. Under Wisconsin's statutory framework for eminent domain law, the Petitioners could have filed

a right-to-take case in either state or federal court in 2019 if they had known that the taking was really for Foxconn, but they did not do this at that time because the documents from the Village gave no indication that a public purpose issue existed: the taking appeared to be for a highway. D. Ct. Doc. 23, First Am. Compl. ¶¶ 11- 20.

The Petitioners did file a compensation case in state court under Wis. Stat. § 32.05(11) (as *Ned E. Lashley, et al. v. Village of Mount Pleasant*, Racine County Circuit Court Case No. 19-CV-1782) but did not file a right-to-take case challenging the public purpose of the taking at that time. D. Ct. Doc. 23, First Am. Compl. ¶¶ 21-24. Constitutional issues are not allowed to be raised in the state court compensation case. Wis. Stat. § 32.05(11).

The state compensation case proceeded to pre-trial motion practice in late 2021. D. Ct. Doc. 23, First Am. Compl. ¶¶ 26-41. During this pre-trial motion practice, the posture of the case suddenly changed when the Village convinced the Racine County Circuit Court to interpret "the public improvement for which such property is acquired" to include the entire Foxconn Project. D. Ct. Doc. 23, First Am. Compl. ¶ 26. The Village had tactical reasons for taking this position. The Village wanted to exclude evidence of the impact of "the project" on the value of the Petitioners' property. D. Ct. Doc. 23, First Am. Compl. ¶ 31. According to Wisconsin's project influence rule set forth in Wis. Stat. § 32.09(5)(b):

> Any increase or decrease in the fair market value of real property prior to the date of evaluation *caused by the public improvement for which such property is acquired*, or by the likelihood that the property would be acquired for such improvement, other than that due to physical deterioration within the reasonable control of the owner, may not be taken into account in determining the just compensation for the property.

Wis. Stat. § 32.09(5)(b) (emphasis added).

The Village's project influence motion filed in the compensation case began describing the "public improvement" not as a road project, but as *the entire Foxconn Project* including the Tax Incremental District and zoning changes. D. Ct. Doc. 23, First Am. Compl. ¶¶ 27-34. Despite the clear documents initiating the taking that only referenced the Highway KR road project, in its motion in limine before the state circuit court, the Village argued that the taking was for "The Foxconn Project." D. Ct. Doc. 23, First Am. Compl. ¶¶ 27-34. The Village described the entire scope of "The Foxconn Project," including the Agreement between the State and Foxconn, state level legislation, the creation of special Tax Incremental Financing District rules, the rezoning of the entire Project area to Business Park, and the formal Development Agreement between Mount Pleasant and Foxconn. *Id.* The Village argued that the "public improvement" included the entire Tax Incremental Financing District ("TID") Plan, which was created to enable the Foxconn Project. D. Ct. Doc. 23, First Am. Compl. ¶¶ 33-34.

The Village included a summary of the TID Plan that explicitly identified Foxconn as the "Developer" who would construct a facility "expected to result in up to a $10 billion private investment." D. Ct. Doc. 23, First Am. Compl. ¶ 34. The TID Plan summary explains that the acres in the TID area were to be developed by what are obviously private entities: "the Developer" (Foxconn), "supply chain vendors," and "other businesses." *Id.*

On January 5, 2022, the Racine County Circuit Court held a final pretrial in which the court ruled on the Village's motion in limine. D. Ct. Doc. 23, First Am. Compl. ¶ 35. Based on the submitted briefing and the arguments of counsel at the hearing, the court found that, "[t]he public improvement involved in this case is more than improvement of County Highway KR." D. Ct. Doc. 23, First Am. Compl. ¶ 36. The court further explained that, "A more realistic view is that the public improvement quote, 'is all of the public infrastructure, including requiring zoning modifications implemented to better support the development', end quote. This view is bolstered by review of the Tax Increment District No. 5 Plan language." D. Ct. Doc. 23, First Am. Compl. ¶ 37.

Based on the Village's admissions and assertions that the public improvement was the entire multifaceted Foxconn Project, including the TID No. 5 Plan, the rezoning, and the Development Agreement with Foxconn, the circuit court ruled that the public improvement was "the entire scope of the public infrastructure required by the TID plan which included rezoning modifications, including the plaintiff's property in this case, to support the

development." D. Ct. Doc. 23-7, First Am. Compl. Ex. G, Tr. 17:7-11. The "development" supported by the TID Plan was private development by Foxconn and other private businesses. D. Ct. Doc. 23, First Am. Compl. ¶ 34. Because of this ruling, the circuit court held that the rezoning of property in the TID was part of the public improvement, and therefore the Business Park zoning of the Petitioners' property could not be admitted at trial. D. Ct. Doc. 23, First Am. Compl. ¶¶ 40-41.

When the Village succeeded in convincing the state court in the compensation case that the taking was really part of the Foxconn Project, the Petitioners had a public use claim because of the application of judicial estoppel. This occurred on January 5th of 2022 when the state circuit court ruled that the taking was actually for the Foxconn Project. D. Ct. Doc. 23, First Am. Compl. ¶¶ 35-41.

The Village's strategy was this: the Village could not openly take the Petitioners' property for the private purpose of the private Foxconn development project, so the Village styled all the eminent domain documents as being a taking for highway purposes. This allowed the Village to avoid a constitutional right-to-take challenge under Wis. Stat. § 32.05(5) in state court or under 42 U.S.C. § 1983 in federal court. But if the taking was really for a highway, then the Village faced the disadvantage of not being able to exclude evidence of the rezoning for the purposes of determining compensation because the project influence rule would only exclude the impact of the Highway KR improvement project. The project influence rule would not exclude evidence of the other changes related to the entire Foxconn Project

development such as the rezoning. So the Village changed its position and argued to the state court in the compensation case that the public improvement for which the property was taken was not just Highway KR, rather, it was the entire Foxconn Project including the TID and zoning changes. The Village convinced the state court in the compensation case of this position.

Accordingly, on January 28th of 2022, Petitioners filed this federal lawsuit in the Eastern District of Wisconsin under 42 U.S.C. § 1983, as Case No. 22-cv-117, alleging that the Village took the Petitioners' property for the private Foxconn Project under the guise of a highway taking as evidenced by the Village's arguments before the Racine County Circuit Court and ratified by the subsequent decision of the Racine County Circuit Court. D. Ct. Doc. 1, Compl.; D. Ct. Doc. 23, First Am. Compl. ¶ 38. The district court had jurisdiction pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1343(3) in that the controversy arose under the United States Constitution and under 42 U.S.C. § 1983 and 28 U.S.C. § 2201 and 28 U.S.C. § 2202. The case was a 42 U.S.C. § 1983 suit alleging violations of the Petitioners' federal constitutional rights under the United States Constitution, Fifth and Fourteenth Amendments. "Section 1983 claims 'accrue when the plaintiff knows or should know that his or her constitutional rights have been violated.'" *Kelly v. City of Chicago*, 4 F.3d 509, 511 (7th Cir. 1993) (quoting *Wilson v. Geisen*, 956 F.2d 738, 740 (7th Cir. 1992)).

The Petitioners' lawsuit in federal court was analogous to a Wis. Stat. § 32.05(5) right-to-take lawsuit (which had not filed by the Petitioners) because it raised constitutional issues, rather than an appeal of compensation. The complaint alleged a variety of claims, one of which was a public use claim and one of which was an equal protection claim. D. Ct. Doc. 23, First Am. Compl. ¶¶ 24-55. The Petitioners claimed that the Village had used eminent domain to take their property for a private use in violation of the Fifth Amendment's guarantee that private property may only be taken for public uses and had violated the 14th Amendment as well. D. Ct. Doc. 23, First Am. Compl. ¶¶ 1, 37-40.

The Village moved to dismiss the federal complaint. D. Ct. Doc. 8. The Petitioners then amended their complaint. D. Ct. Doc. 23. The Village again moved to dismiss. D. Ct. Doc. 24. The Village's motions did not raise the *Colorado River* doctrine, and the parties did not argue *Colorado River* in the briefs or at oral argument. On March 10th, 2023, the district court granted the Village's Motion to Dismiss on the basis of *Colorado River* abstention. D. Ct. Doc. 42, App. 16a-35a. The district court then entered judgment in favor of the Village and terminated the case. D. Ct. Doc. 43. The Petitioners timely appealed by filing their notice of appeal on April 7, 2023. D. Ct. Doc. 44. The Seventh Circuit affirmed the district court in a decision dated April 25, 2024, again on the basis of *Colorado River* abstention. App. 1a-15a. This Petition ensued.

REASONS FOR GRANTING THE PETITION

A. The Courts of Appeals are Divided in their Application of the *Colorado River* Doctrine, and the Seventh Circuit's Broad Application Stands Apart

This Court has had limited opportunity to develop the *Colorado River* doctrine since its inception in 1976. In the absence of guidance from this Court, the circuits have developed divergent applications of the doctrine. The Seventh Circuit stands apart with a particularly broad approach that denies jurisdiction to a far greater extent than was originally envisioned in this Court's *Colorado River* and *Moses H. Cone Memorial Hospital* cases. This Court is urged to grant this petition for the purpose of clarifying the doctrine and unifying the circuits. The following discussion summarizes the circuits' approaches for the purpose of illustrating the outlier nature of the Seventh Circuit's approach.

I. First Circuit

The First Circuit recognizes a "presumption in favor of assuming jurisdiction…." *Jiménez v. Rodríguez-Pagán*, 597 F.3d 18, 28 (1st Cir. 2010). For *Colorado River* abstention to apply, the movant must demonstrate the "clearest of justifications displayed by exceptional circumstances." *Maldonado-Cabrera v. Anglero-Alfaro*, 26 F.4th 523, 528 (1st Cir. 2022) (quoting *Nazario-Lugo v. Caribevisión Holdings, Inc.*, 670 F.3d 109, 116 (1st Cir. 2012)).

In the First Circuit, "some duplication alone is not enough to justify a stay of [a] federal action...." *Glassie v. Doucette*, 55 F.4th 58, 64 (1st Cir. 2022) "'[I]t would be a serious abuse of discretion to grant [a] stay or dismissal at all' '[i]f there is any substantial doubt' 'that the parallel state-court litigation will be an adequate vehicle for the complete and prompt resolution of the issues between the parties.'" *Glassie*, 55 F.4th at 64 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 28 (1983)). To be "sufficiently parallel," the state case "must resolve all of the claims in the federal case." *Id.* at 64 (quoting *Villa Marina Yacht Sales, Inc. v. Hatteras Yachts*, 947 F.2d 529, 533 (1st Cir. 1991)).

If cases are found to be parallel, the First Circuit applies a (non-exclusive) eight factor test for exceptional circumstances. *Rio Grande Community Health Ctr., Inc. v. Rullan*, 397 F.3d 56, 71-72 (1st Cir. 2005).

II. Second Circuit

In the Second Circuit, similar to the First Circuit, cases are considered parallel when "the resolution of existing concurrent state-court litigation could result in 'comprehensive disposition of litigation.'" *Woodford v. Cmty. Action Agency of Greene County*, 239 F.3d 517, 522 (2d Cir. 2001) (quoting *Colorado River*, 424 U.S. at 817). There must be both an identity of parties, an identity of issues, and an identity of relief sought. *Nat'l Union Fire Ins. Co. v. Karp*, 108 F.3d 17, 22 (2d Cir. 1997).

For the purpose of determining parallelism, the Second Circuit appears to be the only circuit other than the Seventh Circuit willing to consider how the state court action could be amended as opposed to how it actually was pled. *Telesco v. Telesco Fuel & Masons' Materials, Inc.,* 765 F.2d 356, 359 (2d Cir. 1985).

If suits are found to be parallel, then Second Circuit courts consider six factors, "with the balance heavily weighted in favor of the exercise of jurisdiction...." *Niagara Mohawk Power Corp. v. Hudson River-Black*, 673 F.3d 84, 100 (2d Cir. 2012) (quoting *Moses H. Cone*, 460 U.S. at 16). "[A] carefully considered judgment taking into account both the obligation to exercise jurisdiction and the combination of factors counselling against that exercise is required. Only the clearest of justifications will warrant dismissal." *Id.* at 101 (quoting *Colorado River*, 424 U.S. at 818-19).

III. Third Circuit

The Third Circuit also disfavors *Colorado River* abstention. "The doctrine is to be narrowly applied in light of the general principle that 'federal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress.'" *Nationwide Mut. Fire Ins. Co. v. George V. Hamilton Inc.*, 571 F.3d 299, 307 (3d Cir. 2009) (quoting *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996)).

Parallel cases involve the same parties and "substantially identical claims [and] nearly identical allegations and issues." *Nationwide*, 571 F.3d at 307

(quoting *Yang v. Tsui*, 416 F.3d 199, 204 n.5 (3d Cir. 2005)). If the cases are found to be parallel, then the Third Circuit applies the six factor test. *Nationwide*, 571 F.3d at 308.

IV. Fourth Circuit

The Fourth Circuit recognizes that as a general rule, parties are allowed to pursue parallel actions in state and federal court "until one becomes preclusive of the other." *Chase Brexton Health Services, Inc. v. Maryland*, 411 F.3d 457, 462 (4th Cir. 2005). "'Despite what may appear to result in a duplication of judicial resources, '[t]he rule is well recognized that the pendency of an action in the state [system] is no bar to proceedings concerning the same matter in the Federal court having jurisdiction.'" *Id.* (quoting *McLaughlin v. United Va. Bank*, 955 F.2d 930, 934 (4th Cir. 1992)) (quoting *McClellan v. Carland*, 217 U.S. 268, 282 (1910)).

In order to find that cases are parallel in the Fourth Circuit, the court must determine that "'the parallel state-court litigation will be an adequate vehicle for the complete and prompt resolution of the issues between the parties.'" *Id.* at 464 (citing *Moses H. Cone*, 460 U.S. at 28). If the parties, issues raised, and remedies sought are not the same, the cases are not parallel. *Id.* at 464-65 (citing *New Beckley Mining Corp. v. Int'l Union, UMWA*, 946 F.2d 1072, 1073-74 (4th Cir. 1991)).

If parallelism is found, then a district court must carefully balance the six factors. *Id.* at 463-64 (citing *Moses H. Cone*, 460 U.S. at 16).

V. Fifth Circuit

In the Fifth Circuit, in order to be parallel, the cases must involve the same parties and the same issues. *Exxon Corp. v. St. Paul Fire & Marine Ins. Co.,* 129 F.3d 781, 785 (5th Cir. 1997) (citations omitted). A "mincing insistence on precise identity" of parties and issues is not required, but the same "general subject matter" is not enough. *Republicbank Dallas, N.A. v. McIntosh*, 828 F.2d 1120, 1121 (5th Cir. 1987) (per curiam). Courts are to look "to the named parties and to the substance of the claims asserted in each proceeding." *African Methodist Episcopal Church v. Lucien*, 756 F.3d 788, 797 (5th Cir. 2014).

If cases are found to be parallel, the Fifth Circuit uses the six factor test for exceptional circumstances. *Black Sea Inv., Ltd. v. United Heritage Corp.*, 204 F.3d 647, 650 (5th Cir. 2000).

VI. Sixth Circuit

In the Sixth Circuit, parallel cases must have the same parties and issues, not just the same "basic facts." *Baskin v. Bath Township Bd. of Zoning Appeals*, 15 F.3d 569, 572 (6th Cir. 1994). In performing the parallelism analysis, the court "must compare the issues in the federal action to the issues actually raised in the state court action, not those that might have been raised." *Baskin*, 15 F.3d at 572. Parallelism requires availability of complete relief in the state proceedings. *Heitmanis v. Austin*, 899 F.2d 521, 527 (6th Cir. 1990).

If cases are parallel, Sixth Circuit courts apply an eight factor exceptional circumstances test, adding "the relative progress of the state and federal proceedings" and "the presence or absence of concurrent jurisdiction" to the usual six factors. *Romine v. Compuserve Corporation*, 160 F.3d 337, 341 (6th Cir. 1998).

VII. Seventh Circuit

Prior to the case at bar, the Seventh Circuit's view of parallelism was already by far the most relaxed, and in the case at bar, the Seventh Circuit essentially did away with the parallelism requirement.

To be parallel, the court considers whether "substantially the same parties are contemporaneously litigating substantially the same issues in another forum." *Freed v. JP Morgan Chase Bank, N.A.*, 756 F.3d 1013, 1019 (7th Cir. 2014) (quoting *Interstate Material Corp. v. City of Chicago*, 847 F.2d 1285, 1288 (7th Cir. 1988)) (quoting *Calvert Fire Ins. Co. v. American Mutual Reinsurance Co.*, 600 F.2d 1228, 1229 n. 1 (7th Cir. 1979)). Seventh Circuit courts also "examine whether the cases raise the same legal allegations or arise from the same set of facts." *Id.*, at 1019 (citing *Tyrer v. City of South Beloit*, 456 F.3d 744, 752 (7th Cir. 2006)). "Precisely formal symmetry is unnecessary" to find parallelism. *Adkins v. VIM Recycling, Inc.*, 644 F.3d 483, 499 (7th Cir. 2011).

In the case at bar, the Seventh Circuit still recited the standard that there must be "a substantial likelihood that the state litigation will

dispose of all claims presented in the federal case." App. 7a (quoting *Huon v. Johnson & Bell, Ltd.*, 657 F.3d 641, 646 (7th Cir. 2011)). However, the Seventh Circuit then effectively erased that requirement (along with the same issues requirement) with its decision, which acknowledged that "the federal and state litigation present different issues." App. 8a. The Seventh Circuit admitted that, "regardless of how the dust settles in state court, their public-use takings claim in federal court will go unanswered." App. 8a. The court justified its finding of parallelism by explaining that, although the state and federal proceedings involve different issues, they *could* have involved the same issues if Petitioners had raised their public-use claim years earlier in either state or federal court. App. 8a.

This logic seems to be an outgrowth of the Seventh Circuit's willingness to consider how the state court case *could* have been pled as opposed to how it is *actually* pled, in performing the parallelism analysis. *See Rosser v. Chrysler Corp.*, 864 F.2d 1299, 1308 (7th Cir. 1988). This goes even further than the Second Circuit *Telesco* case, *supra*, in which the state pleadings could be amended to become parallel to the federal case. The Seventh Circuit is willing to find parallelism even when the state pleadings *cannot* be amended to become more similar to the federal action, due the statute of limitations having run (in the *Rosser* case), or due to the Wisconsin statutory bar to bringing constitutional challenge claims in a Wis. Stat. § 32.05(11) case (in the case at bar).

If the proceedings are parallel, the Seventh Circuit is the only circuit to use a ten (non-exclusive) factor test to determine whether abstention is proper. *Adkins*, 644 F.3d at 500-01.

It has been noted that in practice, the Seventh Circuit applies the *Colorado River* doctrine very broadly, which results in "routine denial" of jurisdiction. Note, Owen W. Gallogly, Colorado River *Abstention: A Practical Reassessment*, 106 Va. L. Rev. 199, 224-233 (2020). Suffice to say, "routine denial" is not consistent with a doctrine that this Court originally envisioned would be invoked in "limited" and "exceptional" circumstances. *Colorado River*, 424 U.S. at 818. This Court envisioned that, "[o]nly the clearest of justifications will warrant dismissal." *Id.* at 819.

VIII. Eighth Circuit

The Eighth Circuit has a more precise test for parallelism. *Fru-Con Const. Corp. v. Controlled Air, Inc.*, 574 F.3d 527, 535 (8th Cir. 2009). It is not enough that the cases involve the same parties and are based on the same general facts. *Id.* (citing *Federated Rural Elec. Ins. Corp. v. Ark. Elec. Coop., Inc.*, 48 F.3d 294, 297 (8th Cir. 1995)). The Eighth Circuit requires "a substantial likelihood that the state proceeding will fully dispose of the claims presented in the federal court." *Id.* (citing *TruServ Corp. v. Flegles, Inc.*, 419 F.3d 584, 592 (7th Cir. 2005)). "This analysis focuses on matters as they currently exist, not as they could be modified." *Id.* (citing *Baskin v. Bath Township Bd. of Zoning Appeals*, 15 F.3d 569, 572 (6th Cir. 1994)).

If the cases are found to be parallel, the Eighth Circuit applies the six factor test, noting that it is "non-exhaustive." *Id.* at 534 (quoting *Mountain Pure, LLC v. Turner Holdings, LLC*, 439 F.3d 920, 926 (8th Cir. 2006)).

IX. Ninth Circuit

In the Ninth Circuit, "exact parallelism" is not required, "[i]t is enough if the two proceedings are 'substantially similar.'" *Holder v. Holder*, 305 F.3d 854, 867 (9th Cir. 2002) (quoting *Nakash v. Marciano,* 882 F.2d 1411, 1416 (9th Cir. 1989)). "In this Circuit, the narrow *Colorado River* doctrine requires that the pending state court proceeding resolve all issues in the federal suit." *Holder*, 305 F.3d at 859. A state court proceeding is parallel only if it provides "relief for all of the parties' claims." *Intel Corp. v. Advanced Micro Devices, Inc.*, 12 F.3d 908, 913 n.4 (9th Cir. 1993).

If the cases are found to be parallel, then Ninth Circuit courts apply an eight factor test, which consists of the usual six plus "the desire to avoid forum shopping" and "whether the state court proceedings will resolve all issues before the federal court." *United States v. State Water Resources Control Bd.*, 988 F.3d 1194, 1203 (9th Cir. 2021) (quoting *R.R. St. & Co., Inc. v. Trans. Ins. Co.*, 656 F.3d 966, 978-79 (9th Cir. 2011)). The eighth factor, of course, is also part of the parallelism test.

The Ninth Circuit has strong language counseling against declining jurisdiction (which is consistent with the original language of *Colorado River* and *Moses H. Cone*). "[T]he existence of a

substantial doubt as to whether the state proceedings will resolve the federal action precludes the granting of a stay." *Intel Corp.*, 12 F.3d at 913. A doubt as to whether the state suit can resolve all the issues in the federal suit can be "dispositive." *Id.* "[A] district court may enter a *Colorado River* stay order only if it has 'full confidence' that the parallel state proceeding will end the litigation." *Intel Corp.*, 12 F.3d at 913 (quoting *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 277 (1988)).

The Ninth Circuit has noted that, "federal courts are particularly reluctant to relinquish jurisdiction when a case involves federal law issues. As the Supreme Court stated in *Moses H. Cone*, 'the presence of federal law issues must always be a major consideration weighing against surrender.'" *Intel Corp.*, 12 F.3d at 913 n.7 (quoting *Moses H. Cone*, 460 U.S. at 26). The Ninth Circuit also recognizes, in the context of *Younger* abstention, that a federal court's obligation to exercise its jurisdiction is "particularly weighty" in 42 U.S.C. § 1983 cases. *Potrero Hills Landfill, Inc. v. Cty. of Solano*, 657 F.3d 876, 890 (9th Cir. 2011) (quoting *Miofsky v. Superior Ct. of Cal.*, 703 F.2d 332, 338 (9th Cir. 1983)).

X. Tenth Circuit

In the Tenth Circuit, "[s]uits are parallel if substantially the same parties litigate substantially the same issues in different forums" and "exact identity of parties and issues is not required." *Fox v. Maulding*, 16 F.3d 1079, 1081 (10th Cir. 1994) (quoting *New Beckley Mining Corp. v. Int'l Union,*

UMWA, 946 F.2d 1072, 1073 (4th Cir. 1991), *United States v. City of Las Cruces,* 289 F.3d 1170, 1182 (10th Cir. 2002)). Similar to the other circuits, the Tenth Circuit requires that the state court action will be "'an adequate vehicle for the complete and prompt resolution of the issue between the parties.'" *Fox*, 16 F.3d at 1081-82 (quoting *Moses H. Cone*, 460 U.S. at 28).

In applying the Tenth Circuit test, the court examines the state proceedings *as they actually exist* to determine whether they are parallel to the federal proceedings as opposed to examining how they might have been pled, or might be amended. *Fox*, 16 F.3d at 1081 (citing *McLaughlin v. United Va. Bank,* 955 F.2d 930, 935-36 (4th Cir. 1992), *Crawley v. Hamilton County Comm'rs,* 744 F.2d 28, 31 (6th Cir. 1984)).

If the cases are found to be parallel, then the court uses an eight factor test. *Wakaya Perfection, LLC v. Youngevity Int'l, Inc.*, 910 F.3d 1118, 1122 (10th Cir. 2018) (citing *Fox*, 16 F.3d at 1082). Any doubt should be resolved against *Colorado River* abstention and in favor of exercising federal jurisdiction. *Travelers Indem. Co. v. Madonna*, 914 F.2d 1364, 1369 (10th Cir. 1990).

XI. Eleventh Circuit

Referencing the "virtually unflagging obligation of federal courts to exercise the jurisdiction given to them" stated in *Colorado River*, 424 U.S. at 817-18, the Eleventh Circuit notes that, "[a] policy permitting federal courts to yield jurisdiction to

state courts cavalierly would betray this obligation." *Ambrosia Coal & Constr. Co. v. Pagés Morales*, 368 F.3d 1320, 1328 (11th Cir. 2004). The Eleventh Circuit does not require identical parties and issues to find parallelism, "substantially the same parties and substantially the same issues" are sufficient. *Id.*, at 1330.

The Eleventh Circuit uses the six factor test "with a heavy bias favoring the federal courts' obligation to exercise the jurisdiction that Congress has given them." *Jackson-Platts v. Gen. Electric Capital Corp.*, 727 F.3d 1127, 1141 (11th Cir. 2013).

XII. D.C. Circuit

For cases to be deemed parallel in the D.C. Circuit, a recent district court decision analyzed whether the state proceedings must involve the same parties, the same issues, and be "an adequate vehicle for the complete and prompt resolution of the issues between the parties in federal court." *US Dominion, Inc. v. Herring Networks, Inc.*, 639 F. Supp. 3d 143, 155-57 (D.D.C. 2022) (citing *Moses H. Cone,* 460 U.S. at 28). *See Edge Inv., LLC v. District of Columbia*, 927 F.3d 549, 553, 555-56, 559 (D.C. Cir. 2019) (requirement that state and federal cases be parallel).

The D.C. Circuit uses the six factor test, "heavily weighted in favor of the exercise of jurisdiction." *Edge Inv.*, 927 F.3d at 553-54 (quoting *Moses H. Cone*, 460 U.S. at 16). Apparently sensing an unwanted flood of *Colorado River* abstentions, the D.C. Circuit recently provided a thorough review of the exceptional circumstances analysis in order to

"ensure that *Colorado River* is confined to its banks." *Edge Inv.*, 927 F.3d at 550.

The D.C. Circuit also recognizes that *Colorado River* does not eschew piecemeal litigation as a matter of course, but only "'piecemeal litigation that is abnormally excessive or deleterious.'" *Edge Inv.*, 927 F.3d at 556 (quoting *Ambrosia Coal & Constr. Co. v. Pagés Morales*, 368 F.3d 1320, 1333 (11th Cir. 2004) (emphasis added)). The D.C. Circuit explicitly states that *Colorado River* is not meant to block "a garden-variety example of two lawsuits proceeding concurrently in two courts." *Id.* at 556.

B. This Case Presents an Important Fifth Amendment Issue

Although Wisconsin law allows for an action to be filed under state law to challenge a taking (within 40 days of service of the jurisdictional offer), Wisconsin's eminent domain statutory procedure cannot act to limit or foreclose federal causes of action under 42 U.S.C. § 1983. *Knick v. Township of Scott*, 588 U.S. 180, 191-94 (2019). In the post-*Knick* environment, public use challenges may be brought directly in federal court. The D.C. Circuit recently held that, "[p]rompt access to federal court review of the lawfulness of the taking, including the public use determination, is part of the protection the Fifth Amendment affords." *Allegheny Defense Project v. Fed. Energy Reg. Comm'n*, 932 F.3d 940, 955 (D.C. Cir. 2019).

This case involves the well-known private Foxconn development. Takings projects must be evaluated for whether they are unconstitutional "in light of the entire plan" and not on a piecemeal basis. *Kelo v. City of New London*, 545 U.S. 469, 484 (2005). *Kelo* makes it clear that takings for economic development schemes may, in some cases, be unconstitutional private takings. *Kelo*, 545 U.S. at 487. In *Kelo*, the four justice lead opinion reasoned that, in that case, the City had invoked a state statute that specifically authorized the use of eminent domain to promote economic development, the City's plan was "comprehensive" in character, thorough deliberation had preceded the City's adoption of the plan, and (in their view at that time) the plan unquestionably served a public purpose. *Id.* at 484. In his concurrence, Justice Kennedy made a clear command to courts considering economic development takings: "A court confronted with a plausible accusation of impermissible favoritism to private parties should treat the objection as a serious one and review the record to see if it has merit, though with the presumption that the government's actions were reasonable and intended to serve a public purpose." *Kelo*, 545 U.S. at 491. This case would give this Court an opportunity to address the constitutionality of a taking where, unlike the "comprehensive" development plan in *Kelo*, there was a plausible accusation of impermissible favoritism to a private party, Foxconn.

C. The Decision of the Court of Appeals is Incorrect

I. The Court of Appeals Erred in Concluding that the State and Federal Proceedings were Parallel

The Seventh Circuit's decision in this case does away with the requirement that the issues in the state and federal proceedings be substantially the same, as the court acknowledged that "the federal and state litigation present different issues." App. 8a. This was because the state case was solely a contest of "the amount of compensation owed for the taking." App. 8a. The federal case, on the other hand, was a public-use claim that "the taking has been illegitimate all along, because the Village seized their property for a private use under the guise of a public one." App. 8a. The court even referred to the difference between the two suits as "lopsidedness" and "a mismatch between the federal and state actions." App. 8a, 11a. The court erred when it fell back on its understanding that "the two suits involve the same operative facts," App. 7a, because the question is whether the issues are the same, and whether the state action will be able to resolve the issues raised in the federal action.

The court seemed to agree that it was impossible to bring a constitutional challenge under the existing Wis. Stat. § 32.05(11) compensation appeal, due to the statutory bar on any claims in that action other than "questions of title, if any ... and the amount of just compensation to be paid by condemnor." Wis. Stat. § 32.05(11). The court acknowledged that, "regardless of how the dust

settles in state court, their public-use takings claim in federal court will go unanswered." App. 8a. Therefore, despite reciting the standard that there must be "a substantial likelihood that the state litigation will dispose of all claims presented in the federal case," App. 7a (quoting *Huon v. Johnson & Bell, Ltd.*, 657 F.3d 641, 646 (7th Cir. 2011)), the Seventh Circuit has effectively overruled that requirement. This is because the court was fully aware that the state litigation *could not* dispose of the federal claims, but the court found the actions "parallel" anyway.

The court essentially created a new requirement that it was too late for Petitioners to bring their public use claim. This was not because the statute of limitations had run (it hadn't), but because "[t]hey could have raised a public-use claim years ago." App. 8a. The court justified its finding of parallelism by explaining that, although the state and federal proceedings involve different issues, they *could* have involved the same issues if Petitioners had raised their public-use claim years earlier in either state or federal court. App. 8a. The court essentially found that the federal case was parallel to a *hypothetical* state case that the Petitioners had never filed but hypothetically *could* have filed.

Performing the parallelism analysis, not with the cases that were actually filed, but with a hypothetical case that was never filed, stretches the *Colorado River* doctrine beyond the breaking point. The Seventh Circuit's logic seems to be an outgrowth of its willingness to consider how a state court case *could* have been pled as opposed to how it is *actually* pled, in performing the parallelism analysis. *See*

Rosser v. Chrysler Corp., 864 F.2d 1299, 1308 (7th Cir. 1988). However, this case goes even further than *Rosser*. The Seventh Circuit's method of finding parallelism by comparing the federal case to a hypothetical state case that was never brought, based on the court's opinion that it *could* have been brought, does not give effect to the original motivations of *Colorado River*. In the absence of actual parallel proceedings, an inquiry into whether Petitioners could or should have brought another case at a different time simply does not implicate the *Colorado River* doctrine. Furthermore, a case that is brought within the statute of limitations is not barred simply because it could have been brought years earlier, and in this case, the Petitioners alleged that they could not have brought the case earlier. D. Ct. Doc. 23, First. Am. Compl. ¶¶ 21, 26-41.

The context here for the proper *Colorado River* analysis is that, in Wisconsin, a claim for compensation and a claim challenging the taking are never brought together, in fact this is forbidden by state statute and the claims are required to be brought in separate cases that may proceed simultaneously. Wis. Stat. § 32.05(5); Wis. Stat. § 32.05(11). Furthermore, the court's opinion that a public-use claim could have been brought earlier was contradicted by the allegation in Petitioners' First Amended Complaint that the jurisdictional offer in this case clearly stated that the Village was acquiring the property under Wis. Stat. § 32.05 for "Highway or other transportation related purposes." D. Ct. Doc. 23, First. Am. Compl. ¶ 11. The implication of limiting the taking to being a "road project" as opposed to "the Foxconn Project" in the

takings documents was that it insulated the Village from a legal challenge on the grounds that the taking was a violation of the public purpose clause of the Fifth Amendment to the United States Constitution. D. Ct. Doc. 23, First. Am. Compl. ¶ 22.

II. The Court of Appeals also Erred in its Application of the Exceptional Circumstances Factors

The main factor in the court of appeals' analysis was the timing of the federal filing in relation to the state proceeding, which the court also found to be "vexatious and contrived." App. 9a, 12a. Indeed, another way of viewing the court's opinion is that the court essentially skipped the parallelism step and focused entirely on the fact that the federal case was filed right before the scheduled trial in the state case. The court thought that the federal case sought "to circumvent the Wisconsin appellate court" and believed that the Petitioners had employed "litigation tactics" that signaled "'a lack of respect for the state's ability to resolve [the issues] properly before its courts.'" App. 9a (quoting *SKS & Associates v. Dart*, 619 F.3d 674, 679 (7th Cir. 2010)). Respect for the state court system is an ideal well-worth protecting. Here, however, the Petitioners were not seeking to overrule the Racine County Circuit Court in federal court. Rather, the position that the Village took to convince the state court of the nature of the project opened the Village up to the federal claim that the Village illegally took property for a private purpose. When this happened, the Petitioners filed their case in federal court, alleging that the Village had violated their constitutional

rights under the Fifth and Fourteenth Amendments.

The timing of this lawsuit, on the eve of the state court trial, was brought on by the Village's initial styling of the takings documents as being for a road project, and its sudden new position to convince the state circuit court late in the case that the taking was for the purpose of the Foxconn Project. The Seventh Circuit found it "uncredible" that the Petitioners did not know until that point that "the road improvements made on their property were associated with the Foxconn development." App. 12a. With respect, the road's "association" with the Foxconn development is not precise language and is not the legal test. The question is whether the Village took the Petitioners' property for a public purpose (the improvement of Highway KR) or whether the Village took the Petitioners' property for an illegal private purpose (the Foxconn Project). Originally, the Village styled all the takings documents to refer to the purpose for the taking as Highway KR. Then, late in the case, the Village claimed, for strategic reasons, that the taking was for the Foxconn Project, which was a private purpose.

The federal case was a direct consequence of the Village taking the position that the taking was not for a public road project, but rather was for the private purpose of the Foxconn Project. The Village took this position in order to obtain a favorable ruling based on the project influence rule, but the natural consequence of the Village's admission was that it opened the Village up to the claim that it took property for an impermissible private purpose.

The court of appeals only did a brief review of the other factors. Although these cases involve property, neither case is "in rem." *See Ambrosia Coal & Constr. Co. v. Pagés Morales*, 368 F.3d 1320, 1332 (11th Cir. 2004). The court of appeals invoked "the desirability of avoiding piecemeal litigation," App. 11a, but this cannot be used to deny a federal forum for the Petitioners' federal constitutional rights, especially in light of the fact that Wisconsin law requires a right-to-take case and a compensation appeal to be brought separately, therefore, "piecemeal" litigation was chosen by the Wisconsin legislature by design. The court invoked judicial economy, but used the same argument regarding timing, that it was too late to file a constitutional challenge in light of the fact that the compensation appeal had been pending for two years. App. 11a. This opinion did not acknowledge the reality that, under Wisconsin law, a compensation appeal under Wis. Stat. § 32.05(11) and a challenge under Wis. Stat. § 32.05(5) would proceed independently of each other, on separate tracks. This means that a plaintiff always has the right to bring both types of cases. And the *Knick*, *Allegheny Defense Project*, and *Burnett* cases support the Petitioners' position that a takings plaintiff can bring a public-use claim directly in federal court, without being limited by a short statute of limitations imposed by state law. *Knick v. Township of Scott,* 588 U.S. 180, 185 (2019); *Allegheny Defense Project v. Fed. Energy Reg. Comm'n*, 932 F.3d 940, 955 (D.C. Cir. 2019); *Burnett v. Grattan*, 468 U.S. 42, 48-55 (1984).

Finally, the court declined to analyze the factor of "the adequacy of the state-court action to protect the federal rights of the plaintiffs," because this and the other remaining factors "do not decisively support anyone." App. 12a. By failing to find that this factor necessitated that the federal court assume jurisdiction, the court of appeals abdicated its responsibility to ensure that plaintiffs with federal constitutional rights claims get their day in court. The court was aware that the state court compensation action was fully inadequate to protect the federal rights of the Petitioners. *See* App. 8a. Rather than holding that this required the district court to assume jurisdiction over the case, however, the court decided that a hypothetical case under Wis. Stat. § 32.05(5), which the Petitioners had never filed, *would* have been adequate to protect these rights. In support of this assertion, the court of appeals cited two cases that were very different from the case at hand. App. 13a. In *Depuy Synthes Sales, Inc. v. OrthoLA, Inc.*, 953 F.3d 469, 479 (7th Cir. 2020), a parallel case was pending in state court with the same issues, in which the plaintiff's claims could be heard. And in *DeVillier v. Texas*, 601 U.S. 285, 287, 293 (2024), the Court assumed that the plaintiff's state-law cause of action would proceed, as the state agreed not to oppose amending the complaint to include this claim (*DeVillier* was not a *Colorado River* case).

The Seventh Circuit has departed from established jurisprudence by substituting the *Colorado River* factor of "the adequacy of the state-court action to protect the federal rights of the plaintiffs," with a modified factor to the effect of "whether there was a state procedure in place that

could have protected the plaintiffs' federal rights." This modification violates the holding in *Knick*: "The 'general rule' is that plaintiffs may bring constitutional claims under § 1983 'without first bringing any sort of state lawsuit, even when state court actions addressing the underlying behavior are available.' … This is as true for takings claims as for any other claim grounded in the Bill of Rights." *Knick v. Township of Scott*, 588 U.S. 180, 194 (2019) (quoting D. Dana & T. Merrill, Property: Takings 262 (2002)). The Seventh Circuit effectively reimposes the *Williamson County* state litigation requirement, which was overruled in *Knick*, on the takings plaintiffs in this case. *Knick*, 588 U.S. at 206 (overruling *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985)). An overruled state litigation requirement cannot be a valid *Colorado River* factor barring the Petitioners' federal case.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ERIK S. OLSEN
Counsel of Record
EMINENT DOMAIN SERVICES, LLC
6515 Grand Teton Plaza, Suite 241
Madison, WI 53719
erik@eminentdomainservices.com
608-535-6109
Attorney for Pamela J. Antosh and Ned E. Lashley

July 23, 2024

APPENDIX

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APPENDIX A
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

NO. 23-1678

PAMELA J. ANTOSH AND
NED E. LASHLEY,

Plaintiffs-Appellants,

v.

VILLAGE OF MOUNT PLEASANT, *et al.,*

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Wisconsin.

*No. 2:22-cv-00117-BHL — **Brett H. Ludwig**, Judge.*

ARGUED JANUARY 8, 2024
DECIDED APRIL 25, 2024

Before WOOD, SCUDDER, and ST. EVE, *Circuit Judges*.

WOOD, *Circuit Judge*. Before us is another chapter in Pamela Antosh and Ned Lashley's litigation challenging the Village of Mount

Pleasant's use of its eminent-domain power to acquire their property. They first filed suit in state court in 2019, soon after the Village condemned their property for road improvements associated with the private Foxconn development. In state court, Antosh and Lashley opted to contest only the amount of compensation they were owed, not the propriety of the taking. But when the state court ruled against them on an evidentiary issue two years into litigation, they decided to try their luck in federal court. In their federal complaint, they alleged for the first time that the taking was improper because it served a private purpose, not a public one.

The district court saw this federal suit as a strategic effort to circumvent an unfavorable state-court ruling without taking the necessary steps to appeal. Accordingly, it dismissed the action without prejudice, citing *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976). Antosh and Lashley now appeal that judgment. We conclude that the district court was right to refrain from exercising jurisdiction over their federal claims, and so we affirm.

I

The Village of Mount Pleasant gained national notoriety as an economic hub in late 2017, when Taiwanese electronics company Foxconn announced a plan to open its first major American factory there. The Village lured the manufacturing giant to the area in part by promising to acquire more than 2,800

acres of privately owned land for the new development. In September 2017, the state of Wisconsin helped the Village live up to its word: the legislature authorized the creation of Tax Incremental Financing District Number 5 ("TIF No. 5"), allowing the Village to finance expenses associated with the Foxconn development. Consistent with TIF requirements under state law, the Village rezoned properties within TIF No. 5 from "agricultural" to "business park." See Wis. Stat. § 66.1105.

The Village also needed to make substantial improvements to the transportation infrastructure in the area to facilitate public access to the Foxconn development. One of these efforts included expanding and improving both County Highway KR and 90th Street. To do that, the Village determined that it was necessary to re-route 90th Street through part of a three-acre parcel owned by Antosh and Lashley. The parcel was located within TIF No. 5 on the corner of the two roads.

In 2019, the Village followed the steps required under state law to condemn a large portion of Antosh and Lashley's property. See Wis. Stat. § 32.05. On June 3, 2019, the Village sent Antosh and Lashley an appraisal letter explaining that the "proposed municipal improvement project" would involve the improvement of various roadways "to allow for the construction of an industrial development that is commonly known as the Foxconn development." The Village later filed a relocation order stating that the condemnation of the property was necessary for the

highway improvement project. On September 19, 2019, the Village issued a jurisdictional offer to purchase their property. That document identifies "[h]ighway or other transportation related purposes" as the "public purpose" of the taking. And finally, on November 20, 2019, the Village recorded an award of damages, thereby transferring the property interests to the Village. See Wis. Stat. § 32.05(7).

Under Wisconsin law, Antosh and Lashley had two options for challenging the taking: a "compensation" action and a "right-to-take" action. An owner who wishes to contest "the amount of just compensation to be paid" by the condemnor must file a compensation action within two years from the date of the taking. Wis. Stat. § 32.05(11). On the other hand, an owner who wishes to contest a taking "for any reason other than that the amount of compensation offered is inadequate" must file a right-to-take action within 40 days of receiving the jurisdictional offer. See Wis. Stat. § 32.05(5) (stating that an owner who fails to meet that deadline "shall be barred from raising any such objection in any other manner").

Antosh and Lashley did not file a right-to-take action. (They received the Village's jurisdictional offer on September 19, 2019, and so their 40-day window lapsed on October 29, 2019.) They did, however, file a compensation action in Racine County Circuit Court on December 4, 2019, seeking greater compensation for the taking. They contended that the Village had paid other property owners in the Foxconn area five to eight times more

than it had offered them. After two years of state-court proceedings, the case was set to proceed to trial on February 1, 2022.

That schedule was interrupted when a key evidentiary dispute emerged in advance of trial. Antosh and Lashley hired an expert appraiser who produced two valuations of their property. One valued the land as "agricultural" property; the other, higher appraisal, valued the land as "business park" property (reflecting the 2017 zoning changes). In response, the Village filed a motion *in limine*, seeking to exclude any evidence relating to the "business park" valuation. The Village urged that this evidence was barred by Wisconsin's Project Influence Rule, which provides that changes in property value "caused by the public improvement for which such property is acquired" may not be considered in determining just compensation. Wis. Stat. § 32.09(5)(b). The Village argued that the "public improvement" for which the property was taken included the Foxconn development (not just the highway improvements), and so the property had to be assessed as "agricultural."

At a final pre-trial conference on January 5, 2022, the state court granted the Village's motion *in limine*. For purposes of the Project Influence Rule, the court concluded, the "public improvement" involved "all of the public infrastructure, including requiring zoning modifications implemented to better support the [Foxconn] development."

On January 28, 2022, four days before trial was to start, Antosh and Lashley filed this suit in the Eastern District of Wisconsin against the Village under 42 U.S.C. § 1983. For the first time, they alleged that the Village condemned their land for a private purpose in violation of the Fifth Amendment. They also alleged equal protection and substantive due process violations under the Fourteenth Amendment.

The state court held a hearing three days later to discuss the impact of the federal suit on the state case. Antosh and Lashley asked the state court to adjourn the proceedings. That court expressed serious concerns about their litigation tactics. It saw the federal suit as an attempt to have a federal court "take a look at" its ruling on the Village's motion *in limine*, "essentially circumventing" appellate review by the state courts. At the same time, the court recognized that a favorable ruling in federal court would render the state case "a nullity." Although it was "not happy" that the federal complaint "looks like an end run of [its] decision," the state court agreed to stay the trial pending resolution of the federal suit.

The Village later filed a motion to dismiss the federal complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). It asked the district court to abstain from exercising its jurisdiction over the proceeding, and in the alternative, to dismiss the case on the merits. Characterizing the federal suit as "utter gamesmanship" showing "tremendous disrespect for the state court system," the district

court elected to dismiss the federal claims, though it did so without prejudice to their renewal. Antosh and Lashley now appeal that judgment, arguing that the district court's decision to abstain was an abuse of discretion.

II

Although abstention "is the exception, not the rule," *Colorado River*, 424 U.S. at 813, under established abstention doctrines, "a federal court may, and often must, decline to exercise its jurisdiction where doing so would intrude upon the independence of the state courts and their ability to resolve the cases before them." *SKS & Associates, Inc. v. Dart*, 619 F.3d 674, 677 (7th Cir. 2010). These doctrines "are not rigid," however. *Driftless Area Land Conservancy v. Valcq*, 16 F.4th 508, 525 (7th Cir. 2021). The unifying feature of the Supreme Court's abstention cases is that "they all implicate (in one way or another and to different degrees) underlying principles of equity, comity, and federalism foundational to our federal constitutional structure." *J.B. v. Woodard*, 997 F.3d 714, 722 (7th Cir. 2021).

Under the doctrine recognized in *Colorado River*, a federal court may defer to a concurrent state court case in exceptional circumstances where abstention would promote "wise judicial administration." 424 U.S. at 818. Several prudential principles animate this doctrine, including "the interest in conserving judicial resources, the desirability of avoiding duplicative litigation and the risk of conflicting rulings, and the benefits of promoting a

comprehensive disposition of the parties' dispute in a single judicial forum." *Driftless*, 16 F.4th at 526. We use a two-step inquiry to assess whether *Colorado River* abstention is appropriate. First, we ask "whether the federal and state actions are ... parallel." *DePuy Synthes Sales, Inc. v. OrthoLA, Inc.*, 953 F.3d 469, 477 (7th Cir. 2020). If so, we ask "whether the necessary exceptional circumstances exist to support a stay or dismissal." *Id.*

We review a district court's determination that state and federal proceedings are parallel *de novo*, but we review its overall decision to abstain for abuse of discretion. *Loughran v. Wells Fargo Bank*, 2 F.4th 640, 647 (7th Cir. 2021).

A

Two suits need not be mirror images to be considered parallel. Rather, concurrent actions are parallel "when substantially the same parties are contemporaneously litigating substantially the same issues in another forum." *DePuy*, 953 F.3d at 477 (quoting *Clark v. Lacy*, 376 F.3d 682, 686 (7th Cir. 2004)). The "critical question" is whether there is a "substantial likelihood that the state litigation will dispose of all claims presented in the federal case." *Huon v. Johnson & Bell, Ltd.*, 657 F.3d 641, 646 (7th Cir. 2011).

Antosh and Lashley's state and federal actions bear obvious similarities. For one, the two suits involve the same operative facts. Both arise from the Village's exercise of its eminent-domain power to

condemn their property. And, although in the federal suit Antosh and Lashley named two additional defendants (the Village's development authority and the Village's president), the parties are otherwise identical. The relevant inquiry is "whether the addition of new parties with different interests alters the central issues in the concurrent case." *Loughran*, 2 F.4th at 648. Here, the incentives and goals of the new defendants in the federal action align with those of the Village, and that suffices to make the parties in the two suits "functionally the same." *Id.*

That said, the federal and state litigation present different issues. In state court, Antosh and Lashley spent two years contesting the amount of compensation owed for the taking. In federal court, they urge that the taking has been illegitimate all along, because the Village seized their property for a private use under the guise of a public one. So the two suits are not perfectly symmetrical: regardless of how the dust settles in state court, their public-use takings claim in federal court will go unanswered.

This lopsidedness, however, is not fatal to a finding that the actions are parallel. The fact that the federal and state suits involve different issues is entirely a product of Antosh and Lashley's own litigation choices. They could have raised a public-use claim years ago—either in state court, by filing a right-to-take action, see Wis. Stat. § 32.05(5), or in federal court, see *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019) (holding that plaintiffs need not

exhaust state court remedies before challenging a taking in federal court). Antosh and Lashley chose neither of these paths. Instead, they spent two years in state court seeking only to recover more money for their property. That they now, with the benefit of hindsight, regret their earlier litigation decisions is not a valid basis for granting them a chance to start over on their takings claim in federal court.

Moreover, we have never demanded an exact fit between the federal and state cases, no matter the theory of abstention. See, *e.g.*, *Courthouse News Service v. Brown*, 908 F.3d 1063, 1071 (7th Cir. 2018) (basing its decision to abstain "on the more general principles of federalism" even though the case was "not a perfect fit" with any of the abstention doctrines), *cert. denied*, *Courthouse News Service v. Brown*, 140 S. Ct. 384 (2019) (mem.); see also *J.B.*, 997 F.3d at 723 (same). "Instead, the abstention inquiry is flexible and requires a practical judgment informed by principles of comity, federalism, and sound judicial administration." *Driftless*, 16 F.4th at 527.

Federalism concerns loom large here. The timing of the federal suit is telling. For two years, as state court proceedings moved along, Antosh and Lashley were satisfied to contest only the amount of compensation owed. They were ready to proceed to trial on that issue. Only after the state court issued a ruling that limited the compensation they could recover did they decide to file their federal complaint. As the state court observed, what Antosh and Lashley "obviously" want is for a federal court

to "take a look at" its ruling. At bottom, they seek to circumvent the Wisconsin appellate court—the proper tribunal in which they may challenge the state court's ruling. Their litigation tactics signal "a lack of respect for the state's ability to resolve [the issues] properly before its courts." *SKS & Associates*, 619 F.3d at 679. We would be endorsing those tactics were we to allow this federal suit to proceed.

Although Antosh and Lashley insist that they are not forum shopping, the record belies this assertion. They contend that for two years the Village concealed the fact that the road improvements that necessitated the taking were intended to facilitate the private Foxconn development, and so they discovered that they had an actionable public-use takings claim only when the Village filed its motion *in limine* in 2021. As the saying goes, that dog won't hunt. Given the extensive local and national media coverage that the 2,800-acre Foxconn development received, it is hard to believe that Antosh and Lashley failed to connect the dots between the road improvements and Foxconn. And not surprisingly, the record confirms this common-sense insight. Back in June 2019, the Village sent Antosh and Lashley an appraisal letter notifying them that the "roadways are being improved to allow for the construction of *an industrial development* that is *commonly known as the Foxconn development*" (emphasis added). And, as the district court noted, Antosh and Lashley "spent two years arguing in state court that they should be entitled to greater compensation similar to other property owners

whose land was condemned *for the purpose of the Foxconn development*" (emphasis in original).

Antosh and Lashley also point out that they have pleaded due process and equal protection claims in federal court, but for similar reasons, this does not help them. Their substantive due process claim alleges that the taking was an arbitrary abuse of power. This theory relies on a premise that, as we have just explained, the record contradicts—that the Village blindsided them about the relation between the road improvements and Foxconn. Meanwhile, their equal protection theory is that the Village paid their "similarly situated neighbors" five to eight times more than it offered them. Yet recall that Antosh and Lashley advanced this exact argument in the state-court compensation action. We repeatedly have held that the parallel nature of the concurrent cases cannot be "dispelled by repacking the same issue under different causes of action." See, *e.g.*, *Clark*, 376 F.3d at 687.

Taken together, it is evident that this case is just a strategic attempt to bypass an unfavorable state-court ruling two years into that litigation. That Antosh and Lashley's own litigation decisions have created a mismatch between the federal and state actions is not enough to destroy the parallel nature of the actions here, where exercising federal jurisdiction would offend fundamental principles of federalism. We thus agree with the district court that the two actions are parallel for the purposes of *Colorado River* abstention.

B

Keeping in mind the federalism concerns we outlined earlier, we next consider the district court's determination that exceptional circumstances justify its decision to dismiss without prejudice. A variety of factors can inform this inquiry. They are spelled out in *Loughran*, 2 F.4th at 647. This list, we have stressed, is "designed to be helpful, not a straitjacket. Different considerations may be more pertinent to some cases, and one or more of these factors will be irrelevant in other cases." *Id.* We address only the more useful points here.

Several factors counsel in favor of abstention. Both the federal and state suits are about rights in the same real property, over which the Village assumed jurisdiction more than four years ago. Indeed, the Village already has built a road across it. The desirability of avoiding piecemeal litigation over the Village's use of its eminent domain power to acquire the property also supports abstention. "Multi-jurisdictional legal challenges involving the same subject matter are costly, disruptive, and run the risk of conflicting rulings." *Driftless*, 16 F.4th at 527. Judicial economy concerns run deep also: the state court has devoted two years of judicial time and resources to resolving Antosh and Lashley's compensation action. The timing of the two actions favors deferring to the state courts. Antosh and Lashley filed the state suit in December 2019 and were just four days away from the start of trial when they filed the federal suit in January 2021. They have provided no good reason for us to interfere with

the state court's extensive handling of the first-filed, pending case.

Finally, the vexatious or contrived nature of the federal claims strongly favors abstention. We already have explained why that is so, but we repeat: only after Antosh and Lashley lost an evidentiary ruling in state court did they file their federal complaint. Further evincing the contrived nature of the federal action is their uncredible assertion that they did not know until 2021 that the road improvements made on their property were associated with the Foxconn development. The district court was entitled to infer from Antosh and Lashley's litigation strategy that this federal suit is "utter gamesmanship"—"little more than a tardy, tactical effort to get a 'do-over' on their takings challenge to avoid a ruling they do not like without taking the necessary steps to appeal."

We see no need for an exhaustive survey of the remaining factors. Even if we were to assume that they do not support abstention, there is more than enough here to demonstrate that the district court did not abuse its discretion. And the remaining factors (inconvenience of the federal forum, source of governing law, concurrent jurisdiction, possibility of removal, and the adequacy of the state-court action to protect the federal rights of the plaintiffs) do not decisively support anyone. We understand that, pursuant to Wisconsin law, it is probably too late for Antosh and Lashley to bring a public-use takings

claim in state court. See Wis. Stat. § 32.05(5). But they have only themselves to blame for that. Since "state courts are co-equal partners when it comes to protecting federal rights[,]" it is enough to know that Antosh and Lashley could have sought to vindicate their federal rights in Wisconsin courts. *DePuy*, 953 F.3d at 479; see also *DeVillier v. Texas*, No. 22-913, 2024 WL 1624576 (U.S. Apr. 16, 2024) (availability of an action under state law provides adequate vehicle for claims under the Takings Clause).

What matters most in the end is that the district court acted well within its discretion when it concluded that allowing this federal suit to proceed would run contrary to fundamental principles of equity, comity, and federalism. The need to safeguard these principles readily supports deference to the state courts in this case.

The judgment of the district court is AFFIRMED.

APPENDIX B
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF WISCONSIN

No. 22-cv-0117-bhl

PAMELA J ANTOSH, NED E LASHLEY,

Plaintiffs,

v.

VILLAGE OF MOUNT PLEASANT, *et al.,*

Defendants.

Filed: March 10, 2023

ORDER GRANTING MOTION TO DISMISS

This is the second lawsuit Plaintiffs Pamela J. Antosh and Ned E. Lashley have filed challenging the Village of Mount Pleasant's use of its eminent domain power to acquire a parcel of their real property. They first filed suit in state court in December 2019, shortly after the Village took steps to condemn their property for highway changes associated with the much-publicized Foxconn development. In state court, Antosh and Lashley elected not to challenge the propriety of the taking itself but instead focused on the amount of compensation they were to receive. Two years into that litigation, however, they changed their minds.

With their case on the brink of trial, the state court undercut their damages theory in a motion in limine ruling. Rather than addressing the correctness of that ruling in the state courts, Antosh and Lashley filed this action, now alleging for the first time that the taking was for an improper *private* purpose. The Village has moved to dismiss, arguing that this Court should either reject these latest claims on their merits or abstain from exercising jurisdiction to allow the long-pending state court action to run its course. (ECF Nos. 24 & 25.) For the reasons given below, the Court concludes that abstention is appropriate and will grant the Village's motion to dismiss.

BACKGROUND[1]

In July 2017, Taiwan-based electronics company Foxconn announced a plan to build its first American factory in Wisconsin. Three months later, the Village of Mount Pleasant emerged as the winner of the bid process for the factory site. Local and national news extensively covered the development and its progress.[2]

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[1] This Background is derived from the allegations in Antosh's amended complaint. (ECF No. 23.) Those allegations are presumed true for purposes of the motion to dismiss. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554–56 (2007).

[2] *See, e.g.*, Nelson D. Schwartz & Vindu Goel, *Foxconn Says It Plans to Build Factory in Wisconsin, Adding 3,000 Jobs*, N.Y. TIMES (July 26, 2017), https://www.nytimes.com/2017/07/26/business/foxconn-factory-wisconsin- jobs html; Chris Isidore & Julia Horowitz, *Foxconn Got a Really Good Deal from Wisconsin. And It's*

In securing the bid, the Village agreed to acquire more than 2,800 acres of privately owned land for the new facility. (ECF No. 23 ¶2.) To accomplish this, the Village used a financing mechanism called a Tax Incremental Financing District (TID). (ECF No. 23-5 at 3.) Wisconsin law provides for the creation of TIDs through a state-legislature managed process that allows municipalities to finance expenses associated with private, tax-producing development. (*See id.*); Wis. Stat. § 66.1105 (2019–20). The legislation creating the TID must identify a specific purpose, and, if the TID is industrial, all the lands within the TID must be zoned as industrial. *See* Wis. Stat. § 66.1105(4)(gm)(4)(a). The Wisconsin legislature authorized the creation of the Foxconn TID in September 2017. (*See* ECF No. 23-5 at 2.) After this authorization, the Village rezoned properties around the site as "business park" properties. (*See id.*)

Getting Better, CNN BUS., (Dec. 28, 2017) https://money.cnn.com/2017/12/28/news/companies/foxconn-wisconsin-incentive- package/index html; Danielle Paquette, Todd C. Frankel & Hamza Shaban, *Foxconn Announces New Factory in Wisconsin in Much-Needed Win for Trump and Scott Walker*, THE WASHINGTON POST, (July 26, 2017) https://www.washingtonpost.com/news/wonk/wp/2017/07/26/foxconn-to-announce-new-factory-in-wisconsin-in- much-needed-win-for-trump-and-scott-walker/; Patrick Marley & Jason Stein, *Foxconn Announces $10 Billion Investment in Wisconsin and up to 13,000 Jobs*, MILWAUKEE J. SENTINEL, (July 26, 2017) https://www.jsonline.com/story/news/2017/07/26/scott-walker-heads-d-c-trump-prepares-wisconsin-foxconn-announcement/512077001/.

The size of the Foxconn development necessitated substantial improvements to the transportation and utility infrastructure in the project area. (*See id.* at 3.) Among other infrastructure efforts, the Village, Racine County, and the State of Wisconsin Department of Transportation agreed to expand and improve County Road KR and 90th Street. (*Id.* at 3–5.) The need for the expansion and re-routing of 90th Street impacted Antosh and Lashley, who owned a three-acre parcel at the corner of County Highway KR and 90th Street. (ECF No. 23 ¶¶3, 5.) As part of the re-routing, the Village utilized its direct condemnation powers under Wis. Stat. § 32.05. (*Id.* ¶14.) Consistent with Wisconsin law, on September 19, 2019, the Village provided Antosh and Lashley with a "jurisdictional offer," which explained that the Village "in good faith intends to use the above-described property for [a] public purpose." (*Id.* ¶12.) Two months later, on November 20, 2019, the Village awarded the Plaintiffs "damages" for the taking of their property, stating that the compensation was for "road purposes" described as the "improvement of CTH KR in Racine County." (*Id.* ¶¶17–19; ECF No. 23-5 at 1.) Under Wisconsin law, the recording of this award served to transfer interest in Plaintiffs' property to the Village. (*See* ECF No. 23 ¶¶17–19.)

On December 4, 2019, Antosh and Lashley filed suit in Racine County Circuit Court. Invoking Wis. Stat. § 32.11, they sought greater compensation for the taking. (*Id.* ¶25; ECF No. 25 at 6.) They complained that while the Village had paid five to

eight times the value of most properties it acquired for the Foxconn project, it had never offered Antosh and Lashley such multipliers for their land. (ECF No. 23 ¶6.) Antosh and Lashley did *not* contend that their property had improperly been taken for a private (as opposed to a public) use. Under Wisconsin law, they would have had to file such a "right to take" challenge within 40 days of their receipt of the jurisdictional offer, or no later than October 29, 2019. *See* Wis. Stat. § 32.05(5). Antosh and Lashley did not pursue such a challenge.

After two years of discovery and other proceedings, the case was finally ready for a February 1, 2022 trial date. (ECF No. 25 at 6.) In advance of trial, the Village filed motions in limine, asking for the exclusion of expert evidence or argument that the Antosh property would have a higher valuation if considered "business park" rather than "agricultural" property. (ECF Nos. 23-5 & 23-6 at 6.) The Court granted the Village's motion at a January 5, 2022 final pretrial conference, citing Wisconsin's Project Influence Rule, codified at Wis. Stat. § 32.09(5)(b). (*See* ECF No. 23-7 at 18.)

In response, on January 28, 2022, just four days before trial was to start, Antosh and Lashley filed this federal court suit. (ECF No. 1.) In federal court, they complained, for the first time, that the Village's taking of their property was an improper acquisition of private land for private use in violation of the Fifth Amendment. (ECF No. 23 ¶52.) Their complaint also alleges equal protection and

substantive due process challenges under the Fourteenth Amendment. (*Id.*¶¶54–55.)

The state court held a hearing on January 31, 2022 to discuss the impact of the federal filing on the state court case. (*See* ECF No. 26-2 at 3.) Plaintiffs' counsel argued that the court should adjourn the February 1 trial unless the Village agreed to waive all issue or claim preclusion arguments. (*Id.* at 4.) The state court ultimately agreed to stay the case, but only after expressing serious concern and frustration over Plaintiffs' litigation tactics. It characterized the federal court lawsuit as an effort to have the federal court "take a look at" the state court's motion in limine rulings, "essentially circumventing" the state court of appeals. (*Id.* at 5–6.) The court observed that Plaintiffs' forum shopping threatened to render the state trial a "nullity" in disregard for the "efficient use of the judicial system [and] the judicial process here in Wisconsin." (*Id.* at 6.) Noting it was "not happy" that Plaintiffs were attempting what "looked like an end run of [its] decision," the court nevertheless agreed to stay the state court trial pending resolution of the federal lawsuit to avoid "a waste of [its] judicial time." (*Id.* at 11.)

LEGAL STANDARD

When deciding a Rule 12(b)(6) motion to dismiss, the Court must "accept all well-pleaded facts as true and draw reasonable inferences in the plaintiffs' favor." *Roberts v. City of Chicago*, 817 F.3d 561, 564 (7th Cir. 2016) (citing *Lavalais v. Vill. of Melrose*

Park, 734 F.3d 629, 632 (7th Cir. 2013)). "To survive a motion to dismiss, the complaint must 'state a claim to relief that is plausible on its face.'" *Roberts*, 817 F.3d at 564 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Roberts*, 817 F.3d at 564-65 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). "The complaint must do more than recite the elements of a cause of action in a conclusory fashion." *Roberts*, 817 F.3d at 565 (citing *Iqbal*, 556 U.S. at 678).

ANALYSIS

The Village seeks dismissal of the Amended Complaint on the merits. It insists Plaintiffs' Fifth Amendment claim fails because Antosh and Lashley have waived any "private" purpose challenge by failing to raise the issue timely under state law and, waiver aside, the Antosh Property was taken for a highway improvement, a quintessential "public" purpose. (*See* ECF No. 25 at 13– 14.) The Village further contends that the Fourteenth Amendment substantive due process and equal protection claims fail because there is nothing "conscience shocking" about taking a property for a road improvement, and neither Antosh nor Lashley is a member of any protected class. (*Id.* at 18–20.) While these arguments are compelling, the Court will not reach them; doing so would improperly intrude on the state court's handling of the takings arguments that

have long been pending in that forum. Plaintiffs' attempt to initiate this federal court challenge to the Village's actions, with a new legal theory apparently waived in state court, only after losing an evidentiary ruling in the state forum, offends fundamental principles of equity, comity, and federalism that underly our parallel judicial systems. Accordingly, rather than enabling gamesmanship, the Court will accept the Village's alternate argument for dismissal and abstain from proceeding with the case.

I. The Village Bears a Heavy Burden in Seeking Abstention.

The decision to abstain should not be taken lightly. As the Supreme Court has emphasized, abstention "is the exception, not the rule." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976). Federal courts have a "virtually unflagging obligation...to exercise the jurisdiction given them" that rests on "the undisputed constitutional principle that Congress, and not the Judiciary, defines the scope of the federal jurisdiction within the constitutionally permissible bounds." *Adkins v. VIM Recycling, Inc.*, 644 F.3d 483, 496 (7th Cir. 2011) (quoting *Colorado River*, 424 U.S. at 817; *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, (*NOPSI*), 491 U.S. 350, 359 (1989)).

But "a federal court may, and often must, decline to exercise its jurisdiction where doing so would intrude upon the independence of the state courts

and their ability to resolve the cases before them." *SKS & Assocs., Inc. v. Dart*, 619 F.3d 674, 677 (7th Cir. 2010). Abstention is required in a variety of situations where federal jurisdiction would improperly interfere with state court litigation. Where "denying a federal forum would clearly serve an important countervailing interest" like "considerations of proper constitutional adjudication," "regard for federal-state relations," or "wise judicial administration," abstention is justified. *Adkins*, 644 F.3d at 496-97 (quoting *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996)).

The situations in which abstention is appropriate fall into four general categories named for the Supreme Court cases in which they originated: *Pullman*, *Burford*, *Younger*, and *Colorado River*.[3] *Pullman* abstention is typically applied in cases with unsettled questions of state law that could render deciding a federal constitutional question unnecessary. *Burford* abstention is invoked to avoid federal involvement when a federal court is asked to review a complicated issue of state law and federal involvement threatens to confuse rather than clarify state law. *Younger* abstention generally applies where there are ongoing state criminal proceedings and a federal lawsuit would interfere with those proceedings. Finally, *Colorado River* is cited where there are parallel state and federal lawsuits and

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[3] *R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496 (1941); *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943); *Younger v. Harris*, 401 U.S. 37 (1971); *Colorado River*, 424 U.S.

exceptional circumstances warrant avoiding proceeding with cases in federal court. *See* 17A Charles Alan Wright & Arthur R. Miller, Fed. Prac. & Proc. § 4241 (3d. ed. 2022).

The Seventh Circuit has cautioned against mindless application of these labels, directing courts to look instead to the underlying "animating force" supporting all of them. *Driftless Area Land Conservancy v. Valcq*, 16 F.4th 508, 525–26 (7th Cir. 2021). All four categories "implicate (in one way or another and to different degrees) underlying principles of equity, comity, and federalism foundational to our federal constitutional structure." *Id.* (quoting *J.B. v. Woodard,* 997 F.3d 714, 722 (7th Cir. 2021)). Accordingly, a court should focus on these fundamental principles in deciding whether the rare situation exists in which abstention is necessary.

II. The Village's Invocation of *Younger* Abstention under *Ahrensfeld* is Problematic.

The Village primarily invokes *Younger* abstention based on a nearly fifty-year-old Seventh Circuit precedent: *Ahrensfeld v. Stephens*, 528 F.2d 193 (7th Cir. 1975). At first blush, this seems like an easy call. *Ahrensfeld* applied *Younger* to affirm a district court's decision to abstain in a substantially similar case, involving parallel state and federal court challenges to a municipality's exercise of its eminent domain power. But the legal landscape concerning both abstention and takings law has

changed dramatically over the last half-century, bringing into question whether a straightforward application of *Ahrensfeld* remains appropriate.

In *Ahrensfeld*, the Village of Rosemont, Illinois (Rosemont) acquired property pursuant to its eminent domain power to construct an athletic and convocation center. *Id.* at 195. To do this, Rosemont instituted condemnation proceedings in state court against several property owners. *Id.* While those actions were pending, the property owners brought a Section 1983 lawsuit in federal court to stop Rosemont from proceeding, insisting it was violating their Fifth and Fourteenth Amendment rights. *Id.* The district court dismissed the case on grounds that Rosemont was a municipality and thus not a "person" for Section 1983 purposes.[4] *Id.* at 196. It also grounded its dismissal on "reasons of comity." *Id.* The Seventh Circuit affirmed on appeal, citing *Younger* and invoking the "principles of equity, comity, and federalism [that] lie at the heart of the judge-made doctrine of abstention." *Id.* The Court of Appeals highlighted the need to respect the ability of state courts to dispose of litigation in an orderly and comprehensive fashion, particularly in relation to state law eminent domain procedures. *Id*. at 198. Accordingly, even though the plaintiffs asserted federal constitutional claims in the federal lawsuit, abstention remained appropriate given the

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[4] This analysis preceded by four years the Supreme Court's ruling in *Monell v. Department of Social Services*, 436 U.S. 658 (1978) that municipalities were indeed "persons" for purposes of Section 1983.

"sensitive nature" of the state's eminent domain scheme and the need for federal courts to presume that their state court brethren could consider and resolve any federal constitutional claims properly raised in the state court. *Id.* at 198–99.

The *Ahrensfeld* analysis was bolstered ten years later by the Supreme Court's holding in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194 (1985). Relying on many of the same cases cited in *Ahrensfeld*, the Supreme Court in *Williamson* held that federal courts were precluded from adjudicating Fifth Amendment takings cases until after a property owner had availed himself of state court systems to try to obtain just compensation. *Id*. If the law surrounding *Younger* abstention and takings claims under *Williamson* had held fast over the last thirty-five years, this Court's task would be easy. Abstention would clearly be required. But the legal foundations in both areas have shifted, bringing into question the Village's reliance on *Ahrensfeld.*

As an initial matter, the scope of *Younger* abstention has narrowed significantly since *Ahrensfeld*, and particularly so in the last decade. *See Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 73 (2013) ("Circumstances fitting within the *Younger* doctrine, we have stressed, are 'exceptional.'") (citing *NOPSI*, 491 U.S. at 367–68). Courts now emphasize that *Younger* abstention is only warranted in three types of cases: "where federal jurisdiction would intrude into ongoing state criminal proceedings, or into certain civil enforcement proceedings (judicial

or administrative) akin to criminal prosecutions, or into civil proceedings 'that implicate a State's interest in enforcing the orders and judgments of its courts.'" *Mulholland v. Marion Cnty. Election Bd.*, 746 F.3d 811, 815 (7th Cir. 2014) (quoting *Sprint*, 571 U.S. at 72–73). Outside of these specific situations, federal courts are not to abstain under *Younger* even if there is a risk of duplicitous, parallel litigation in state and federal proceedings. *Id.* at 816. While the Seventh Circuit has cautioned against wooden application of the various categories of abstention, it has also clearly identified the limited situations in which *Younger* abstention is allowed, and none are present here.

Second, and perhaps more significantly, in *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019), the Supreme Court dramatically revised takings law and the division between federal and state courts in deciding takings challenges. *Knick* expressly overruled *Williamson* and makes clear that property owners experiencing a taking need not wait and avail themselves of state court compensation remedies before filing suit in federal court. *Id.* at 2167. The Supreme Court explained that requiring a federal takings plaintiff to pursue state law compensation remedies put the property owner in an improper Catch-22 given the potential for issue and claim preclusion. By precluding federal adjudication until the property owner went first to state court, the property owner risked having his claim barred simply as a result of losing in state court. *Id.* (citing *San Remo Hotel, L.P. v. City & Cnty. of San Francisco*, 545 U.S. 323 (2005)). The Court rejected

this "preclusion trap" as relegating the Fifth Amendment to a separate, lesser realm than other constitutional rights vindicated through Section 1983. *See id.* Accordingly, the Court held that a property owner has an actionable Fifth Amendment claim immediately upon a taking regardless of whether the owner has pursued his claims in state court first. *Id.* at 2168.

Given the substantial narrowing of *Younger* abstention and the Supreme Court's confirmation in *Knick* that federal takings proceedings can proceed even with state remedies available and not yet completed, the Court is reluctant to accept the Village's invitation to abstain based on *Younger* and *Ahrensfeld*. But the extraordinary circumstances of this case nevertheless cry out for abstention. Accordingly, mindful of the Seventh Circuit's caution against pedantic application of the various abstention doctrines and, given the remarkable circumstances in which Plaintiffs chose to undercut the state court's resolution of their own previously filed state court lawsuit, the Court will abstain based on the rationale of *Colorado River*.

III. The Long-Pending State Court Lawsuit and the Exceptional Circumstances Leading to Plaintiff's Federal Court Claims Require Abstention Under *Colorado River*.

Abstention under *Colorado River* is appropriate where there are parallel state and federal proceedings and "exceptional circumstances" require

the federal court to abstain to promote "wise judicial administration." 424 U.S. at 818. In such a situation, abstention conserves judicial resources, avoids duplicative litigation and the risk of conflicting rulings, and "promote[s] a comprehensive disposition of the parties' dispute in a single judicial forum." *Valcq*, 16 F.4th at 526 (citing *Colorado River*, 424 U.S. at 818). In the Seventh Circuit, application of *Colorado River* is a two-step inquiry. First, the Court must ask "whether the concurrent state and federal actions are actually parallel." *Id.* (quoting *DePuy Synthes Sales, Inc. v. OrthoLA, Inc.*, 952 F.3d 469, 477 (7th Cir. 2020)). But this alone is not enough. The Court must also determine "'whether the necessary exceptional circumstances exist to support' abstention." *Id.* (quoting *DePuy*, 952 F.3d at 477). Because both requirements are met and, more fundamentally, because doing so will vindicate the interests of equity, comity, and federalism, all of which have been undermined by Plaintiffs' litigation tactics, the Court will abstain.

The record confirms that the Plaintiffs have brought parallel state and federal lawsuits over the same issues. Suits are considered parallel "when substantially the same parties are contemporaneously litigating substantially the same issues in another forum." *DePuy*, 953 F.3d at 477–78 (quoting *Clark v. Lacy*, 376 F.3d 682, 686 (7th Cir. 2004)). Perfect symmetry between cases is unnecessary. Rather, where both cases will be resolved using the same evidence and the same legal standard, it becomes "nearly certain" that state litigation will dispose of the federal case, suggesting

abstention is appropriate. *See Valcq*, 16 F.4th at 526 (citing *Huon v. Johnson & Bell, Ltd.*, 657 F.3d 641, 647 (7th Cir. 2011)); *DePuy*, 953 F.3d at 478 ("The two lawsuits in our case are parallel, by...any...definition we can imagine. They involve the same parties, the same facts, and the same issues.").

Here, the cases are parallel. Plaintiffs' federal suit contains exactly the same parties as their state suit, with the addition of two new defendants, the Village's development authority and Village president, David De Groot, the inclusion of whom matters little if any to the issues in dispute. (*Compare* ECF No. 23 *with* ECF No. 23-6.) The basic facts and issues are also the same. Both cases concern the process by which the Village used its eminent domain power to take the Antosh property for road improvements related to the Foxconn development. Plaintiffs seek different remedies in this Court, but that is solely the result of their litigation choices. Plaintiffs elected to forgo a challenge to the legitimacy of the taking in state court, focusing instead on the compensation due, only to change course when an evidentiary ruling went against them. In federal court, Plaintiffs seek a ruling that the taking violated both the Fifth and Fourteenth Amendments, as well as damages. Defendants claim Plaintiffs have long ago waived such challenges in state court, but that conclusion depends on an interpretation of state law, specifically Wis. Stat. Section 32.05(5). Neither party has given the state court the chance to address that issue, and this Court is reluctant to interfere in

a state law matter. In sum, the state and federal suits are symmetrical in "all the ways that matter under *Colorado River*."[5] *Valcq*, 16 F.4th at 526.

The remarkable events leading to Plaintiffs' last-minute resort to federal court also satisfy the second "exceptional circumstances" requirement in the *Colorado River* framework. For more than two years, Antosh and Lashley were content to litigate their takings challenge in state court utilizing state procedures without complaint. They elected to forgo and may have forfeited their right to challenge the public purpose of the taking in state court, focusing instead on monetary compensation. Then, after two years of proceedings, Plaintiffs lost an evidentiary ruling and, only then, decided to pursue a new federal court challenge. This lawsuit is thus little more than a tardy, tactical effort to get a "do-over" over on their takings challenge to avoid a ruling they do not like without taking the steps necessary to appeal. This is utter gamesmanship. As the state court observed in staying its case, Plaintiffs' litigation tactics show tremendous disrespect for the state court system. Allowing this gambit to proceed would fly in the face of the interests of equity, comity

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[5] The different remedies sought raise another complication. Plaintiffs have not explained how this Court could grant them a remedy for their "private purpose" claim, the exclusive remedy for which is the return of their property. *See Kelo v. City of New London*, 545 U.S. 469, 477 (2005). Plaintiffs' delay in raising their private purpose argument has made this impossible as the expanded roadway has already been built on Plaintiffs' land.

and federalism at the heart of the abstention doctrines.

The Seventh Circuit has identified ten non-exhaustive and unweighted factors for use in determining whether exceptional circumstances exist. *See Valcq*, 16 F.4th at 526 (citing *DePuy*, 953 F.3d at 477). These factors are intended to be merely illustrative. They are "helpful, not a straightjacket." *Id.* at 526–27 (quoting *Loughran v. Wells Fargo Bank, N.A.*, 2 F.4th 640, 647 (7th Cir. 2021) ("This list...is primarily helpful as a heuristic aid....Different considerations may be more pertinent to some cases, and one or more of these factors will be irrelevant in other cases.")). A district court may thus consider other special characteristics of the case before it too. *Id.* at 527 (quoting *DePuy*, 953 F.3d at 477). This case hits a number of them.

Both cases are about property rights, pure and simple. At Plaintiffs' own request, the state court has been exercising jurisdiction over issues relating to those rights for a full two years and was ready to proceed to trial when Plaintiffs decided to try a new approach in a new forum to avoid a ruling they did not like. (Factors 1, 4 & 7.) Requiring Plaintiffs to continue on the state-court path they initially chose will avoid piecemeal litigation, while affording them adequate protection for their federal rights. (Factors 3 & 6.) And it will not countenance Plaintiffs' gamesmanship, an effort that disrespected the state trial court, its extensive handling of the first-filed case, and the Wisconsin appellate courts, which

should be deciding the correctness of the trial court's rulings.

Nor is this Court persuaded by Plaintiffs' counsel's *remarkable* claim that this federal lawsuit arises not from any dissatisfaction with the state court's motion in limine ruling, but rather because Plaintiffs only just learned that they might have an actionable "private purpose" takings claim. (ECF No. 27 at 2–3.) This assertion is patently absurd. The Foxconn development in the Village of Mt. Pleasant was widely publicized, receiving extensive coverage in the local, state, and national media. (*See supra* note 2.) Counsel's suggestion at oral argument that he was "shocked" to discover that the taking of this property related to Foxconn when motions in limine were filed is impossible to accept at face value. It was never a secret that the road improvement that led to the taking of the Antosh property was intended to facilitate public access to the private Foxconn development. Indeed, counsel simultaneously admitted at argument that he considered, but decided against, joining Antosh and Lashley to another, prior, federal suit challenging the Foxconn development on private purpose grounds. *See Jensen v. Vill. of Mount Pleasant*, No. 18-C-0046, 2018 WL 2063181 (E.D. Wis. May 2, 2018). And the record confirms that Plaintiffs have spent two years arguing in state court that they should be entitled to greater compensation similar to other property owners whose land was condemned *for purpose of the Foxconn development*. (*See* ECF No. 23 ¶6.) These facts lay bare that this suit is a

thinly veiled attempt to change horses midstream following an unfavorable motion in limine ruling.

The extraordinary circumstances surrounding this case and fundamental principles of federalism necessitate abstention in this case pursuant to *Colorado River*. As such, the Court will abstain and dismiss the case without prejudice.

CONCLUSION

For the reasons given above,

IT IS HEREBY ORDERED that the Village's motion to dismiss, ECF No. 24, is **GRANTED without prejudice**. The Clerk of Court is directed to enter judgment accordingly.

Dated at Milwaukee, Wisconsin on March 10, 2023.

s/ *Brett H. Ludwig*

BRETT H. LUDWIG
United States District Judge