No. 24-186

In the Supreme Court of the United States

PAMELA ANTOSH, Et Al.,

Petitioners,

v.

VILLAGE OF MOUNT PLEASANT, WISCONSIN, Et Al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

Christopher E. Avallone
Counsel of Record
Alan H. Marcuvitz
Andrea H. Roschke
von Briesen & Roper, s.c.
411 East Wisconsin Ave, Suite 1000
Milwaukee, WI 53202
(414) 276-1122
christopher.avallone@vonbriesen.com

November 4, 2024 *Counsel for Respondents*

SUPREME COURT PRESS ♦ (888) 958-5705 ♦ Boston, Massachusetts

QUESTION PRESENTED

As part of the widely-publicized Foxconn development in Wisconsin, Respondents acquired part of Petitioners' land in 2019 through state law eminent domain procedures for transportation purposes (relocating a public highway). Petitioners immediately filed an action in Wisconsin state court seeking additional compensation. In the state court case, the court issued an evidentiary ruling which effectively limited Petitioners' potential recovery. Instead of appealing the state court order, the Petitioners filed a federal action four days before the state court trial was to begin. In their federal case, Petitioners argued, for the first time, the taking was for a private use.

Both the district court and the court of appeals concluded that it was appropriate to dismiss the case under *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976). Petitioners' state and federal actions were parallel because both cases involved the same parties, the same piece of land, and the same governmental action. And in state court, Petitioners could have, but chose not to, lodge a contemporaneous challenge to the taking. Ultimately, the lower courts concluded that exceptional circumstances were present that justified abstention, including Petitioner's "utter gamesmanship" and "tremendous disrespect for the state court system." App.32a.

The Counterstatement of the Question Presented is:

Did the lower courts err by abstaining under *Colorado River* in light of the Petitioners' strategic decision to forego a constitutional challenge until years after the initial acquisition of their land, which was actually used for road improvement, and in order to circumvent an adverse state court ruling?

PARTIES TO THIS OPPOSITION BRIEF AND CORPORATE DISCLOSURE STATEMENT

This brief is filed on behalf of all Respondents to this petition. The Village of Mount Pleasant and the Village of Mount Pleasant Community Development Authority are municipal entities. David DeGroot, President of the Village, is an individual.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THIS OPPOSITION BRIEF AND CORPORATE DISCLOSURE STATEMENT...... ii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE.................................... 1

REASONS FOR DENYING THE PETITION 7

I. THIS CASE IS NOT A PROPER VEHICLE FOR REVIEW BECAUSE OF THE UNIQUE CIRCUMSTANCES CREATED BY PETITIONERS' GAMESMANSHIP 7

II. RESOLUTION OF THE QUESTION PRESENTED WILL MAKE NO DIFFERENCE BECAUSE THE UNDERLYING CLAIMS LACK MERIT.................... 9

III. THE COURT OF APPEALS' COLORADO RIVER ANALYSIS WAS CORRECT AND NOT IN TENSION WITH ANY OTHER CIRCUIT................ 10

CONCLUSION... 15

TABLE OF AUTHORITIES

Page

CASES

African Methodist Episcopal Church v. Lucien,
756 F.3d 788 (5th Cir. 2014) 11

Ambrosia Coal & Constr. Co. v. Pagés Morales,
368 F.3d 1320 (11th Cir. 2004) 11

Arrowhead Farms, Inc. v. Dodge Cnty.,
21 Wis. 2d 647, 124 N.W.2d 631 (1963).............. 2

Chase Brexton Health Servs., Inc. v. Maryland,
411 F.3d 457 (4th Cir. 2005) 11

City of Milwaukee v. Diller,
194 Wis. 376, 216 N.W. 837 (1927)...................... 1

Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976).............i, 6, 9

Edge Inv., LLC v. Dist. of Columbia,
927 F.3d 549 (D.C. Cir. 2019) 11

Fru-Con Const. Corp. v. Controlled Air, Inc.,
574 F.3d 527 (8th Cir. 2009) 11

Interstate Material Corp., v. City of Chicago,
847 F.2d 1285 (7th Cir. 1988) 12

Kelo v. City of New London, Conn.,
545 U.S. 469 (2005) 10

Knick v. Twp. of Scott, Pennsylvania,
588 U.S. 180 (2019) 4, 8

Lumen Const., Inc. v. Brant Const Co.,
780 F.2d 691 (7th Cir. 1985) 12

Nakash v. Marciano,
882 F.2d 1411 (9th Cir. 1989) 11

TABLE OF AUTHORITIES – Continued

Page

Nationwide Mut. Fire Ins. Co. v. George V. Hamilton Inc., 571 F.3d 299 (3d Cir. 2009)...... 10

Nesbitt Farms, LLC v. City of Madison, 2003 WI App 122, 265 Wis. 2d 422, 665 N.W.2d 379 (Wis. Ct. App. 2003) 1

Norton v. Peck, 3 Wis. 714 (1854) 9

Rademann v. State Dep't of Transp., 2002 WI App 59, 252 Wis. 2d 191, 642 N.W.2d 600 2

Rindge Co. v. Los Angeles Cnty., 262 U.S. 700 (1923) 9

Romine v. Compuserve Corp., 160 F.3d 337 (6th Cir. 1998) 11

Rosser v. Chrysler Corp., 864 F.2d 1299 (7th Cir. 1988) 13

Telesco v. Telesco Fuel & Masons' Materials, Inc., 765 F.2d 356 (2d Cir. 1985) 10

Tyrer v. City of South Beloit, 456 F.3d 744 (7th Cir. 2006) 11

Villa Marina Yacht Sales, Inc. v. Hatteras Yachts, 947 F.2d 529 (1st Cir. 1991)................. 10

Wakaya Perfection, LLC v. Youngevity Int'l, Inc., 910 F.3d 1118 (10th Cir. 2018)................. 11

Waller v. Am. Transmission Co., 2013 WI 77, 350 Wis. 2d 242, 833 N.W.2d 764 2

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. V 5

STATUTES

Wis. Stat. § 32.05 3
Wis. Stat. § 32.05(1) 3
Wis. Stat. § 32.05(3) 2, 4
Wis. Stat. § 32.05(5) 2
Wis. Stat. § 32.05(7) 4
Wis. Stat. § 32.05(9)-(11) 2
Wis. Stat. § 32.06(5) 2
Wis. Stat. § 32.09(5)(b) 3

JUDICIAL RULES

Sup. Ct. R. 10 .... 9, 11

STATEMENT OF THE CASE

1. This Petition arises from a comprehensive redevelopment project in the Village of Mount Pleasant, Wisconsin (the "Village") that began in 2017. To effectuate the redevelopment, Wisconsin's legislature enacted special legislation authorizing the creation of a Tax Incremental Financing District (TID). The TID legislation enabled the Village to finance land acquisition, utility improvements, transportation infrastructure and other expenses necessary to support new development. App.18a. The Village created TID No. 5 under these rules in late 2017. App.3a, 18a. The Village rezoned all of the property in the TID as "Business Park." App.3a; Wis. Stat. § 66.1105.

The Village entered into an agreement with Foxconn, a Taiwan-based electronics company, to develop a high-tech manufacturing facility in TID No. 5. App.2a-3a. Foxconn agreed to invest in building the facility in TID No. 5, while the Village agreed to make improvements to transportation and utility infrastructure in the area that would be necessary for the facility. App.3a. The result would be a broad economic benefit, including job creation.

2. Chapter 32 of the Wisconsin Statutes provides the "exclusive procedure for appealing condemnation awards." *Nesbitt Farms, LLC v. City of Madison*, 2003 WI App 122, ¶ 10, 265 Wis. 2d 422, 665 N.W.2d 379. As a whole, these statutes create a "complete, workable scheme for acquiring property under eminent domain . . . this state." *City of Milwaukee v. Diller*, 194 Wis. 376, 381, 216 N.W. 837 (1927).

Under state law, a landowner who seeks to challenge a taking for any reason other than the adequacy

of the compensation must commence a "right to take" action within 40 days of the issuance of the jurisdictional offer to purchase the land. *See* Wis. Stat. §§ 32.05(3), (5) and 32.06(3), (5); *Arrowhead Farms, Inc. v. Dodge Cnty.*, 21 Wis. 2d 647, 652, 124 N.W.2d 631 (1963) (enforcing 40-day limitations period). The "right to take" action must raise all issues other than the amount of compensation, such as whether the taking was necessary, or was for a public purpose, or whether correct procedures were followed. *See Waller v. Am. Transmission Co.*, 2013 WI 77, 350 Wis. 2d 242, 833 N.W.2d 764; *Rademann v. State Dep't of Transp.*, 2002 WI App 59, ¶ 38, 252 Wis. 2d 191, 642 N.W.2d 600 (holding that all challenges to condemnation other than the amount of compensation must be raised in a "right to take" action). A "right to take" action takes precedence over all other cases not then on trial in the circuit court, reflecting the government's interest in finality. Wis. Stat. §§ 32.05(5) and 32.06(5). If a "right to take" action is not commenced within the 40-day period, the property owner is barred from later raising any challenge to the condemnation, other than the amount of just compensation. *Id.*

The property owner also has the right to commence an action to seek greater compensation. Wis. Stat. §§ 32.05(9)-(11) and 32.06(10). That is the route Petitioners took in state court.

As part of determining just compensation for a taking, Wisconsin law includes the "project influence rule":

> 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). The project influence rule reflects a policy determination: if the project causes a decrease in value, the landowner should not shoulder that depreciation; if the project causes an increase in value, the government should not have to pay for that appreciation caused by its own actions.

3. Some of the improvements required and funded by TID No. 5 required the Village to exercise its eminent domain authority. The Petition addresses one of these actions. Here, the Village determined that it was necessary that 90th Street be realigned and rerouted to the County Highway (CTH) KR intersection through part of the Petitioners' property. App.3a. This road improvement was one of many infrastructure improvement projects and it affected ten parcels of property. App.19a.

Following the procedures in Wis. Stat. § 32.05, the Village condemned and acquired a portion of the Petitioners' property in 2019. App.3a-4a. The Village's first step in this process was to send a letter to the Petitioners on June 3, 2019, explaining the need for road improvements was driven by TID No. 5 and "an industrial development that is commonly known as the Foxconn development." App.3a (internal quotations omitted). Next, the Village filed a Relocation Order pursuant to Wis. Stat. § 32.05(1). App.3a-4a. After completing all statutory requirements, the Village issued a Jurisdictional Offer on September 19, 2019,

pursuant to Wis. Stat. § 32.05(3). App.4a. The Jurisdictional Offer triggered the statutory time period for the Petitioners to challenge the Village's right to take the property in state court.

After the Petitioners did not challenge the Village's right to acquire the Property, the Village recorded an award of damages on November 20, 2019 and paid Petitioners what it deemed just compensation. App.4a. By recording the award, the Village acquired interests in the property by operation of law. App.4a, 19a; Wis. Stat. § 32.05(7). The acquisitions consisted of: 1) a fee area containing 2.074 acres; 2) a temporary 0.335-acre easement; and 3) all access rights. R.23-3.

Petitioners did not accept the Jurisdictional Offer, and they also did not initiate a "right to take" challenge in state court. App.4a. Nor did they file a federal lawsuit at the time of the taking, which was an option available to them after this Court's June 2019 decision to *Knick v. Twp. of Scott, Pennsylvania*, 588 U.S. 180 (2019). Rather, the Petitioners only commenced an action in the Racine County Circuit Court on December 4, 2019 seeking greater compensation for their property than what the Village had paid. App.4a.

Two years into the state court litigation (and in accordance with the scheduling order), the Village filed a motion in limine based on the project influence rule in order to define the scope of issues at trial. App.5a. Specifically, the motion in limine addressed the scope of expert testimony regarding the zoning of the Petitioners' property; that is, whether in determining just compensation the jury could hear evidence of the new Business Park zoning of the property (the rezoning in conjunction with the creation of TID No. 5) or only hear evidence of Agricultural zoning (the zoning prior

to TID No. 5). App.5a. Petitioners opposed this motion because the Business Park zoning would lead to a higher price per acre. App.5a. The state court granted the Village's project influence rule motion at a January 5, 2022 final pretrial conference and limited Petitioners to presenting evidence of the value of their property zoned as Agricultural. App.5a, 20a.

4. On January 28, 2022—four days before the state court trial—Petitioners filed the federal action, arguing for the first time that the taking was for a private purpose. App.6a. Petitioners alleged the following claims:

1. Violation of the 5th Amendment on the grounds that there was no "public purpose," because their property was taken "for the private Foxconn project."
2. Denial of substantive due process and equal protection because the property was taken "under the guise" of a road project when it was "really for the private Foxconn project."
3. Denial of equal protection because Petitioners were not offered "the same level of compensation" as "similarly situated neighbors."

App.6a, 20a-21a; R.23.

The Petitioners' claims rely on the state court's project influence ruling, contending they were unaware of the "true" purpose of the taking. App.11a. Incredibly, they contend they did not know the acquisition of their property was for "the private Foxconn project," rather than a road until the project influence ruling. Petitioners'

counsel also acted surprised, despite representing other landowners in litigation against the Village involving acquisitions in TID No. 5. App.34a.

In response to the federal filing, the state court stayed the jury trial, but noted the federal court filing "essentially circumvent[ed] the Court of Appeals process" and led to "an end run of [his] decision." App.21a.

The Village moved to dismiss the federal action, arguing that the Petitioners' suit was an attempt to circumvent the state trial judge's ruling and that the Amended Complaint failed to state a claim upon which relief could be granted. The district court indicated that the Petitioners' position—that they were unaware the taking was for infrastructure improvements associated with TID No. 5—was "patently absurd." App.34a. Like the state court judge, the district court viewed the Petitioners' filing of the federal action as "gamesmanship" and an attempt to get a "do-over" "to avoid a ruling they do not like without taking the steps necessary to appeal." App.32a. The district court concluded, "this suit is a thinly veiled attempt to change horses midstream following an unfavorable motion in limine ruling." App.34a-35a. In a thorough written decision, the district court dismissed the Petitioners' complaint on *Colorado River* abstention grounds. App.16a-35a.

5. In a published decision, the court of appeals affirmed the district court's decision to abstain under *Colorado River*. App.1a-15a. Reviewing the district court's decision through the established, two-part *Colorado River* analysis, the court of appeals first determined the Petitioners' state and federal actions were parallel. It then affirmed the district court's discretionary determination on whether exceptional circumstances warranted abstention. Like the district

court, the court of appeals did not approve of what it considered to be gamesmanship.

REASONS FOR DENYING THE PETITION

I. THIS CASE IS NOT A PROPER VEHICLE FOR REVIEW BECAUSE OF THE UNIQUE CIRCUMSTANCES CREATED BY PETITIONERS' GAMESMANSHIP.

The Court should not grant review because of the unique circumstances of this case caused by Petitioners' litigation choices. These choices make the case unsuitable for review because multiple courts have already concluded the timing and focus of Petitioners' lawsuit—which lacks merit, *infra* at 9-10—was "utter gamesmanship" intended to circumvent a state court ruling.

Of course, the Petition omits discussion of the lower courts' scathing rebukes of Petitioners and their counsel. But this fact should not be ignored. The lower courts did not mince their words in their rebukes of Petitioners and their counsel. For example, the district court got straight to the point:

> This lawsuit is thus 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 steps necessary to appeal. <u>This is utter gamesmanship</u>.

App.32a (emphasis added).

The Petition even doubles down on the factual narrative that the lower courts simply did not buy. To no avail, Petitioners tried to convince the courts below —and now do the same in the Petition—that, at the time of the taking and when they sought additional compensation, Petitioners had no idea the acquisition

was associated with TID No. 5, which was widely known to include development by Foxconn. The district court called this claimed unawareness as a proffered reason to justify a two-plus year delay "patently absurd." App.34a; *id.* ("Counsel's suggestion at oral argument that he was 'shocked' to discover that the taking of the property related to Foxconn when motions in limine were filed is impossible to accept at face value.").

The court of appeals agreed and explained the record "belies the assertion." App.11a. Petitioners must have been aware the acquisition was to facilitate the Foxconn development. App.11a. "Given the extensive local and national media coverage that the 2,800 acre Foxconn development received, it is hard to believe that [Petitioners] failed to connect the dots between the road improvements and Foxconn." App.11a. The court of appeals further noted that the appraisal letter sent early in the condemnation process stated the road improvement was to "allow for construction of an industrial development that is commonly known as the Foxconn development." App.11a. And, ironically, Petitioners even spent two years in state court seeking additional compensation because, they claimed, neighboring landowners received a higher price per acre when their land was acquired for the redevelopment. App.11a-12a.

Thus, if the Petitioners thought the acquisition of their land was unconstitutional, they should have immediately filed a "right to take" action in state court or a federal challenge.[1]

---

[1] This Court specifically approved of an immediate federal challenge in *Knick*, *supra* at 4, when it eliminated the state remedy exhaustion requirement. (Of course, the Court's removal of the exhaustion requirement does not guarantee the right to bring

Because of these unique circumstances, review of the lower courts' application of *Colorado River* will not be helpful to clarify the law. It is (or should be) the rare event where a federal action is filed as "a strategic attempt to bypass an unfavorable state-court ruling two years into that litigation." App.12a. The question presented is based on facts that are unlikely to recur and, therefore, does not satisfy this Court's criteria for review. *See* Sup. Ct. R. 10.

II. Resolution of the Question Presented Will Make No Difference Because the Underlying Claims Lack Merit.

The Petition does not present a question the reversal of which will affect the ultimate outcome of the case. Even if the district court did not abstain, the Petitioners have no likelihood of success on their underlying constitutional claims—the Village used the land acquired via direct condemnation for highway purposes (relocating and improving, specifically).

The exercise of eminent domain authority to improve a road undoubtedly serves a public purpose. *See Norton v. Peck*, 3 Wis. 714, 721 (1854) ("[L]and which is taken and used for a common highway is devoted to a public use"); *Rindge Co. v. Los Angeles Cnty.*, 262 U.S. 700, 706 (1923) ("[t]hat a taking of property for a highway is a taking for public use has been universally recognized, from time immemorial.") (emphasis added). That the Village improved the road as part of a comprehensive redevelopment plan makes no difference. Contrary to Petitioners' theories, this does not turn an otherwise permissible public use into an impermissible

---

that action years later to circumvent state law or that a federal court may not abstain on other grounds.)

private use. To the contrary, this Court recognized in *Kelo* that taking land for economic redevelopment may be a public use. *Kelo v City of New London, Conn.*, 545 U.S. 469, 477, 481-82 (2005).

Each of the Petitioners' federal claims, therefore, fail to state a claim because the taking was for a valid public purpose. The district court seemed inclined to agree, noting the Village's arguments for dismissal centering on the fact that the land was taken for and actually used for a road were "compelling." App.22a. Therefore, even if the district court did not abstain, the result would be the same: dismissal of the federal claims. Review is, therefore, unwarranted.

III. THE COURT OF APPEALS' COLORADO RIVER ANALYSIS WAS CORRECT AND NOT IN TENSION WITH ANY OTHER CIRCUIT.

1. The *Colorado River* analysis applied by the courts below is consistent with this Court's abstention cases as well as the analysis employed by other circuits. In fact, all of the circuits employ a functionally equivalent analysis to deciding *Colorado River* cases.

Petitioners walk the Court through a hornbook-like summary of each circuit's version of the *Colorado River* standard, but this effort demonstrates consistency, rather than a split of authority. Each circuit looks to whether the state and federal proceedings are parallel and, if so, then determines whether exceptional circumstances support abstention by considering a number of factors. *See Villa Marina Yacht Sales, Inc. v. Hatteras Yachts*, 947 F.2d 529 (1st Cir. 1991); *Telesco v. Telesco Fuel & Masons' Materials, Inc.*, 765 F.2d 356 (2d Cir. 1985); *Nationwide Mut. Fire Ins. Co. v. George V. Hamilton Inc.*, 571 F.3d 299 (3d Cir. 2009); *Chase*

Brexton Health Servs., Inc. v. Maryland, 411 F.3d 457 (4th Cir. 2005); *African Methodist Episcopal Church v. Lucien*, 756 F.3d 788 (5th Cir. 2014); *Romine v. Compuserve Corp.*, 160 F.3d 337 (6th Cir. 1998); *Tyrer v. City of South Beloit*, 456 F.3d 744 (7th Cir. 2006); *Fru-Con Const. Corp. v. Controlled Air, Inc.*, 574 F.3d 527 (8th Cir. 2009); *Nakash v. Marciano*, 882 F.2d 1411 (9th Cir. 1989); *Wakaya Perfection, LLC v. Youngevity Int'l, Inc.*, 910 F.3d 1118 (10th Cir. 2018); *Ambrosia Coal & Constr. Co. v. Pagés Morales*, 368 F.3d 1320 (11th Cir. 2004); *Edge Inv., LLC v. Dist. of Columbia*, 927 F.3d 549 (D.C. Cir. 2019).

Although Petitioners point to the different phrasing used by some circuits, that does not carry their burden to show the court of appeals decision is "in conflict with another United States court of appeals on the same important matter." Sup. Ct. Rule 10. Petitioners do not even show the court of appeals decision is in direct conflict with a decision from any court involving equivalent facts. Petitioners merely show slight differences in how courts describe the *Colorado River* abstention standard, while recognizing all of the circuits agree on the same core questions and concerns. Review is unwarranted.

Petitioners further do not show that the court of appeals committed error, let alone an error with an impact justifying this Court's review.

2. Petitioners ultimately contend the court of appeals erred at both steps of the analysis. This Court's role is not to correct alleged errors in the application of an established legal standard. The Court need not even consider Petitioners' error-correction arguments.

Regardless, the court of appeals got it right. It started its analysis by recognizing abstention "is the exception, not the rule" and is guided by "underlying principles of equity, comity, and federalism." App.7a (citations omitted). Next it applied the Seventh Circuit's two-step abstention inquiry.

At step one, which presents an issue of law, the court of appeals determined the two actions were parallel. App.8a-12a. A federal action is parallel when there is "a substantial likelihood that the state litigation will dispose of all claims presented in the federal case," *Lumen Const., Inc. v. Brant Const Co.*, 780 F.2d 691, 695 (7th Cir. 1985), or when "substantially the same parties are contemporaneously litigating substantially the same issues in another forum," *Interstate Material Corp., v. City of Chicago*, 847 F.2d 1285, 1288 (7th Cir. 1988). Exact duplication between the actions is not required.

The Petitioners' federal and state actions are parallel for a number of reasons. Both cases involved the same land, parties, and factual backdrop. Although the claims were different, the court of appeals recognized the claims Petitioners <u>could have</u> pursued in state court (but chose not to for strategic reasons) are important to the analysis: Petitioners chose to forego a state law "right to take" challenge knowing full well the taking was associated with TID No. 5 and, necessarily, the Foxconn development. They only reversed course from only pursuing compensation after they lost an evidentiary ruling in state court. "That [Petitioners'] own litigation decisions have created a mismatch between the federal and state actions is <u>not enough to destroy the parallel nature of the actions, where exercising federal jurisdiction would offend fundamen-</u>

tal principles of federalism." App.12a (emphasis added); *see Rosser v. Chrysler Corp.*, 864 F.2d 1299, 1308 (7th Cir. 1988) (upholding abstention where state court lacked jurisdiction over a federal defendant because plaintiff could have, but did not, sue the defendant before the limitations period ran).

Here, not only is the state statute of limitations long-expired, the federal court action is a transparent attempt to circumvent a state law ruling on an evidentiary matter. In fact, the Petitioners' attempt to use the federal action as an end run around the state court's evidentiary ruling is effectively an admission by Petitioner that the two actions are parallel.

This Petitioners' litigation choices matter to the parallel analysis for a practical reason as well. Petitioners waived their right to take challenge available in state court years ago; by dragging their feet until they faced an adverse evidentiary ruling in state court, Petitioners allowed the acquisition to proceed, construction to occur, and for the road to enter public use. Now, the only practical remedy is compensation, which will be addressed in the Petitioners' pending state court action.

Finally, it should not be ignored that abstention's roots are in federalism, comity, and parity—finding the two actions are parallel and abstaining in the instant case serves these ends by upholding the institutional integrity of Wisconsin's state courts. Otherwise, litigants will be encouraged to turn to federal court in response to adverse state court rulings as a "do-over," as the district court recognized. App.32a-33a. In sum, the court of appeals did not err by concluding the actions are parallel.

Next, at step two, the court of appeals agreed with the district court's discretionary determination that "exceptional circumstances justify [the] decision to dismiss without prejudice." App.13a-15a. Weighing heavily in favor of abstention was that both cases were about rights in the same piece of real property—a property that, by this point, the Village acquired four years ago and used to relocate and improve a public road. App.13a. The avoidance of piecemeal litigation, especially the timing of the second, repetitive suit by the same plaintiff, also supports abstention. App.13a.

Petitioners' litigation conduct, or the "vexatious and contrived nature of the federal claims," also strongly favors abstaining:

> 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."

App.14a (quoting App.32a).

Viewing all of these factors together, the court of appeals affirmed the district court's discretionary decision. Petitioners may disagree with the Seventh

Circuit's application of the governing legal standard, but that does not make their case suitable for review by the Court.

CONCLUSION

For all the aforementioned reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

Christopher E. Avallone
Counsel of Record
Alan H. Marcuvitz
Andrea H. Roschke
von Briesen & Roper, s.c.
411 East Wisconsin Ave, Suite 1000
Milwaukee, WI 53202
(414) 276-1122
christopher.avallone@vonbriesen.com

Counsel for Respondents

November 4, 2024