No. __________

In The
Supreme Court of the United States

TINA GERLACH,

Petitioner,

v.

TODD ROKITA, in his official capacity as Indiana Attorney General and his individual capacity; DANIEL ELLIOTT, in his official capacity as Indiana Treasurer; CURTIS HILL, in his individual capacity; and AARON NEGANGARD, in his individual capacity,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a state's constitutional obligation to pay just compensation when taking property waives its sovereign immunity from a claim seeking damages for an unconstitutional taking?

2. Whether a property owner may sue state officials in their personal capacity under 42 U.S.C. § 1983 for a violation of the Takings Clause, as the First Circuit holds, or whether such a personal capacity suit is barred, as the Seventh and Sixth Circuits hold?

STATEMENT OF RELATED PROCEEDINGS

- *Gerlach v. Rokita*, 95 F.4th 493 (7th Cir. Mar. 6, 2024)
- *Gerlach v. Rokita*, No. 1:22-cv-00072, 2023 WL 2683132 (S.D. Ind. Mar. 29, 2023)

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PETITION FOR WRIT OF CERTIORARI

Tina Gerlach respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 95 F.4th 493 (7th Cir. 2024), and reprinted at App.1a. The order of the district court granting Respondents' motion to dismiss is reported at 2023 WL 2683132 (S.D. Ind. Mar. 29, 2023), and reprinted at App.14a.

JURISDICTION

The district court had jurisdiction over this case under 28 U.S.C. § 1331 and the Fifth and Fourteenth Amendments to the United States Constitution. The Seventh Circuit issued its decision on March 6, 2024, App.1a. This Court granted an extension of time of 29 days to file a Petition for Certiorari, extending the filing date up to and including July 3, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The Fifth Amendment to the U.S. Constitution provides, "nor shall private property be taken for public use, without just compensation."

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

The Fourteenth Amendment to the U.S. Constitution states, in relevant part, "nor shall any State deprive any person of life, liberty, or property, without due process of law."

42 U.S.C. § 1983 states, in relevant part:

> 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[.]

INTRODUCTION AND SUMMARY OF REASONS FOR GRANTING THE PETITION

This case presents two important and recurring questions pertaining to whether a property owner may sue state officials for an unconstitutional taking of private property. The first question asks whether a state's sovereign immunity bars a suit for just compensation for a state's unconstitutional taking of property. The second question asks whether a property owner may seek damages from the officials in their personal capacity for an unconstitutional taking of property under 42 U.S.C. § 1983.

There is tension in the law. States are generally immune from suit because of their sovereign status, *Edelman v. Jordan*, 415 U.S. 651, 663 (1974), unless they consent to be sued or waive their immunity. *Gunter v. Atl. Coast Line R.R. Co.*, 200 U.S. 273, 284 (1906). On the other hand, this Court has held that,

under the Just Compensation Clause, the government has a duty to pay just compensation when it takes property. *Knick v. Township of Scott*, 588 U.S. 180, 191–94 (2019). Further, states are subject to this constitutional duty through the Fourteenth Amendment's Due Process Clause. *Chicago, Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226, 235–41 (1897). The states' immunity from suits for damages accordingly conflicts with their obligation to compensate owners when states take property without providing contemporaneous compensation. *Community Housing Improvement Program v. City of New York*, 492 F. Supp. 3d 33, 40 (E.D.N.Y. 2020).

In the decision below, the Seventh Circuit resolved this clash in favor of sovereign immunity, holding that it prevents Tina Gerlach from suing state officials for just compensation after they kept interest earned on Gerlach's dormant property while in state custody. This decision creates a gaping loophole in the Just Compensation Clause for states, and is inconsistent with this Court's jurisprudence. *See Chicago, B. & Q.R. Co.*, 166 U.S. at 236 (states are subject to the Just Compensation Clause). Since the constitutional founding, it has been understood that the government impliedly agrees to pay compensation when it exercises the power to take property. *United States v. Great Falls Mfg. Co.*, 112 U.S. 645, 656 (1884) ("The law will imply a promise to make the required compensation, where property . . . is taken[.]"). The act of taking property itself thus negates and waives any asserted immunity from a property owner's subsequent claim for compensation, *see, e.g.*, *PennEast Pipeline Co. v. New Jersey*, 594 U.S. 482,

500 (2021); *Gunter*, 200 U.S. at 284, but the Seventh Circuit held to the contrary.

The second, related, question asks whether a property owner may sue state employees in their personal capacity for unconstitutionally taking private property under 42 U.S.C. § 1983. This Court has previously held that 42 U.S.C. § 1983 allows individuals to sue state officials in their personal capacity without offending sovereign immunity. *Hafer v. Melo*, 502 U.S. 21, 25 (1991). But the Seventh Circuit held that a personal capacity suit is actually a suit against a state that triggers sovereign immunity. App.12a–13a. The Seventh Circuit's decision thus bars personal capacity suits that allege a violation of the Takings Clause.

In so holding, the decision below exacerbates a deep conflict among the federal courts on whether a property owner may raise a personal capacity claim under Section 1983 for a violation of the Takings Clause. *See O'Connor v. Eubanks*, 83 F.4th 1018, 1026 (6th Cir. 2023) (Thapar, J., concurring), *petition for writ of certiorari pending*, docket no. 23-1167; *Merritts v. Richards*, 62 F.4th 764, 776 n.7 (3d Cir. 2023) ("courts have reached different conclusions" on the issue of personal capacity takings suits); *Baker v. City of McKinney*, 93 F.4th 251, 255 (5th Cir. 2024) (Elrod, J., and Oldham, J., dissenting from denial of rehearing en banc) ("[I]t is disputed whether individual officials may be individually liable in damages for violating the Takings Clause at all."); *Hinkle Family Fun Center, LLC v. Grisham*, No. 22-2028, 2022 WL 17972138, at *4 n.2 (10th Cir. Dec. 28, 2022) ("Some circuits and judges have rejected or expressed doubt about such claims," while "[o]thers

have indicated (at least implicitly) that such claims might proceed[.]").

The Seventh Circuit's de facto rejection of personal capacity takings suits under 42 U.S.C. § 1983 is inconsistent with this Court's jurisprudence, *O'Connor*, 83 F.4th at 1025 (Thapar, J., concurring), and with "constitutional history." *Id.* at 1026–27 (Thapar, J., concurring). Further, the decision below ultimately turns the Takings Clause into a "poor relation" among the rights protected under 42 U.S.C. § 1983, *Knick*, 588 U.S. at 189 (quoting *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994)), since courts, including the Seventh Circuit, routinely allow litigants to bring personal capacity suits for the violation of other constitutional rights. *Wilson v. Civil Town of Clayton*, 839 F.2d 375, 382 (7th Cir. 1998).

The Court should grant the Petition to hold that a property owner may sue a state and its officers, in their official and personal capacities, for just compensation or damages for a violation of the Takings Clause, thereby ensuring that a viable federal remedy exists for a taking by a state. *See O'Connor*, 83 F.4th at 1024 (Thapar, J., concurring) (observing that sovereign immunity "has closed the federal courthouse doors on takings claims" by barring claims against state officers).

STATEMENT OF FACTS

A. The Statutory Scheme

Indiana's Unclaimed Property Act (Act) authorizes the state to take custody of property belonging to private citizens that has lain dormant for a specified period of time such as unclaimed wages, insurance proceeds, and uncashed checks held by banks and

insurance companies. Ind. Code § 32-34-1.5-4. When the Indiana Attorney General, acting through the Indiana Unclaimed Property Division, takes possession of unclaimed property, it generally liquidates all tangible property (such as jewelry or marketable securities), so that retained property is in the form of cash. App.45a. The funds are then deposited in a state-controlled, interest-bearing account. App.2a.

Under the Act, the owners of unclaimed property may file a claim for their property, with valid claims paid out of the state accounts holding unclaimed property funds. Ind. Code §§ 32-34-1.5-14, 32-34-1.5-42. When dormant assets remain unclaimed, the state may transfer the funds derived from such assets to Indiana's "Abandoned Property Fund." App.45a. All unclaimed property deposits in the Fund accrue interest. *Id.*; *see also* Ind. Code § 32-34-1.5-42. When the money in the state's Abandoned Property Fund exceeds $500,000, the state transfers the overage to Indiana's general fund. Ind. Code § 32-34-1.5-44(b). Thus, while individual unclaimed property assets may be small, the State's aggregate appropriation of unclaimed property generates millions of dollars in revenue. App.46a.

Indeed, traditionally, the state has retained all interest derived from unclaimed assets for its own use, even when property owners filed timely claims for return of their property in state custody. Further, in *Smyth v. Carter*, 845 N.E.2d 219, 223–24 (Ind. Ct. App. 2006), *rev. denied*, 860 N.E.2d 588 (Ind. 2006), *cert. denied*, 549 U.S. 1181 (2007), which remains good law, an Indiana appellate court rejected a Fifth Amendment takings challenge to the state's

traditional practice of retaining interest earned on unclaimed property.

However, in 2013, the Seventh Circuit held that the Fifth and Fourteenth Amendments require Indiana to pay interest on certain private unclaimed funds. *Cerajeski v. Zoeller*, 735 F.3d 577, 582 (7th Cir. 2013). The Seventh Circuit later expanded *Cerajeski* to require the state to pay interest earned on all funds in its custody. *Goldberg v. Frerichs*, 912 F.3d 1009, 1012 (7th Cir. 2019). Thus, as the law stands now, in federal court, property owners can state a valid Fifth Amendment takings claim based on Indiana's retention of interest earned on unclaimed property, but they cannot do the same in Indiana courts. *Smyth*, 845 N.E.2d at 223–24.

B. The Taking of Gerlach's Property

Tina Gerlach currently resides in Kentucky, but for many years lived in Elkhart, Indiana. She owned two separate pieces of dormant property, each valued at more than $100. The state took custody of this property. App.47a. Gerlach subsequently filed a claim for one of the assets, valued at $100.93. After approving her claim, Indiana returned precisely that amount. *Id.* The state did not compensate her for interest earned on the property while it was in state custody. Gerlach has not yet submitted a claim for the second piece of property in state custody. The state will not permit Gerlach to recover interest earned on her property while in state custody when she submits a claim to recover it. *Id.*

C. Legal Proceedings

In January 2022, Gerlach sued the current and former state Attorneys General and the state Treasurer in federal court, alleging violations of the Fifth Amendment Takings Clause, as applied to Indiana through the Fourteenth Amendment. App.41a–42a. She sought just compensation, as well as declaratory and injunctive relief, against Indiana Attorney General Todd Rokita and Indiana Treasurer Kelly Mitchell in their official capacities. App.43a–44a. Current Treasurer Daniel Elliott automatically substituted for previous Treasurer Kelly Mitchell. App.3a.

Gerlach also sued Rokita and the two Attorneys General who preceded him in their individual capacities under 42 U.S.C. § 1983, seeking damages for an unconstitutional taking. App.43a. Gerlach seeks relief on her own behalf and as representative of a class of similarly situated unclaimed property owners who, collectively, have been deprived of more than $5 million. App.44a.

The state defendants soon moved for judgment on the pleadings. Their motion argued that Gerlach's unconstitutional takings claims were moot to the extent they seek prospective relief because, during the litigation, state officials declared that they would begin paying accrued interest on all returned property. App.28a–29a. The district court agreed and held Gerlach's prospective relief-seeking takings claim moot. App.30a. With respect to Gerlach's claim for compensation for an unconstitutional taking by the defendants in their official capacity, the court held that sovereign immunity barred such claims. App.33a, 37a.

Turning to Gerlach's *personal capacity* takings claims, the district court recognized that the Eleventh Amendment generally "does not block a suit for damages against a state official in his or her individual capacity." App.33a (citing *Hafer*, 502 U.S. at 30–31). However, the court concluded that there is an exception to this general rule for claims arising under the Takings Clause. The district court specifically concluded that (1) "[a]n individual cannot be held liable for a violation of the Takings Clause," App.37a, and (2) "any judgment" on a takings claim "would have to come from the State rather than the named individuals." *Id.* Therefore, the court held that "regardless of how it is pled," a Takings Clause claim seeking damages from state officials in their personal capacity is actually a claim against the state barred by sovereign immunity. App.38a.

On appeal, the Seventh Circuit affirmed in a published decision. App.1a–13a. The court below initially held that Gerlach's claim for equitable relief was moot because, during the appeal, Indiana had enacted a law authorizing reimbursement of interest earned on unclaimed property funds. App.5a–6a. The Seventh Circuit also agreed that "Eleventh Amendment sovereign immunity [] disposes" of Gerlach's unconstitutional taking claim seeking just compensation from the state defendants in their official capacity.[1] App.7a–8a.

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[1] The Seventh Circuit noted an unresolved question as to whether the Fifth Amendment provides a direct cause of action for just compensation. App.6a–7a (citing *DeVillier v. Texas*, 601 U.S. 285, 292 (2024) (declining to answer that question)). However, this issue was not raised, argued, or passed on in the

Finally, the Seventh Circuit rejected Gerlach's takings claims seeking damages from the defendants in their individual capacities. The court stated: "A plaintiff cannot circumvent the sovereign immunity enjoyed by states and their employees in their official capacities simply by pleading a cause of action against those same employees as individuals." App.11a–12a. The court then observed, "the money Gerlach seeks is in the state coffers, not the personal bank accounts of Indiana's current and former attorneys general. Targeting individual state employees for those funds does not change the fact that the amount she claims she is owed should have been paid by the state." App.12a. Concluding that Gerlach's personal capacity takings claim "for compensatory relief is actually against the State of Indiana," the court below held it was barred by sovereign immunity. App.13a. in its view, the claim was "doubly barred—first because § 1983 does not create a cause of action against a state and second because Indiana enjoys sovereign immunity under the Eleventh Amendment." *Id.*

This Petition follows.

REASONS FOR GRANTING THE PETITION

The Just Compensation Clause "places a condition on the exercise" of the government's power to take private property, *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304, 314 (1987), and confers an automatic right to compensation on affected property owners. *Knick*, 588

district court proceedings, and was therefore not before the Seventh Circuit on appeal. In any event, the Seventh Circuit avoided addressing the issue, choosing to resolve Gerlach's official capacity takings claim based on sovereign immunity grounds alone. App.7a.

U.S. at 193–94. 42 U.S.C. § 1983 similarly provides property owners with a federal cause of action for relief from the deprivation of their right to just compensation. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 710 (1999) (recognizing that takings claimants may sue under 42 U.S.C. § 1983 for "damages for the unconstitutional denial of [] compensation").

In the decision below, the Seventh Circuit held that (1) sovereign immunity bars Gerlach from suing Indiana for unconstitutionally taking interest income earned on her private funds, and that (2) Gerlach cannot sue state officials in their personal capacity for causing an unconstitutional taking under Section 1983 because such a suit is really against the state, which is shielded from suits for just compensation by sovereign immunity.

This decision leaves property owners in the Seventh Circuit without a meaningful federal court remedy for an unconstitutional taking of property by a state. *Cf. O'Connor*, 83 F.4th at 1024 (Thapar, J., concurring) (observing that sovereign immunity "has closed the federal courthouse doors on takings claims"). Moreover, the decision below conflicts with this Court's precedent and constitutional history, while magnifying a conflict among federal courts on whether a property owner can sue state officials in their personal capacity for a violation of the Takings Clause.

I.

THE DECISION BELOW RAISES AN IMPORTANT QUESTION AS TO WHETHER SOVEREIGN IMMUNITY PRECLUDES A SUIT SEEKING JUST COMPENSATION FOR A TAKING BY A STATE

A. The Legal Landscape

The Eleventh Amendment affirms a principle of state sovereignty inherent in the constitutional structure: states are immune from most non-consensual suits, *Hans v. Louisiana*, 134 U.S. 1, 21 (1890). A state's immunity from suit applies whether a suit is filed in state or federal court. *Alden v. Maine*, 527 U.S. 706, 712, 733, 749 (1999). In *Blatchford v. Native Village of Noatak & Circle Village*, 501 U.S. 775 (1991), the Court explained:

> [W]e have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition of our constitutional structure which it confirms: that the States entered the federal system with their sovereignty intact; that the judicial authority in Article III is limited by this sovereignty; and that a State will therefore not be subject to suit in federal court unless it has consented to suit, either expressly or in the "plan of the convention."

Id. at 779 (citations omitted).

It is particularly well-settled that sovereign immunity shields states from non-consensual suits for damages. *Edelman*, 415 U.S. at 666–67 (sovereign immunity does not allow a suit seeking retroactive monetary relief). However, there are exceptions. For

instance, sovereign immunity does not apply when it has been "waived" or states "have consented" to suit "pursuant to the plan of the [Constitutional] Convention or to subsequent constitutional Amendments." *Alden*, 527 U.S. at 755; *PennEast*, 594 U.S. at 499–500.

At the same time, this Court has emphasized that the states' power to take property is conditional upon payment of just compensation. *Great Falls Mfg. Co.*, 112 U.S. at 656. Indeed, since the beginning of the Republic, it has been understood that the government's exercise of its right to take property triggers an implicit agreement to pay for what it takes. *See United States v. Klamath & Moadoc Tribes*, 304 U.S. 119, 123 (1938) ("the taking of property by the United States in the exertion of its power of eminent domain implies a promise to pay just compensation"). The Fifth Amendment reflects this understanding by imposing an inexorable duty on the government to pay compensation as the price of exercising the power to take property. *First English*, 482 U.S. at 314. These principles—that states owe compensation when taking property, yet also enjoy sovereign immunity from suits for damages—exist in uneasy tension. Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 Yale L.J. 1, 116 (1988) (The "clarity of this textual provision for a monetary remedy is inconsistent with a premise of sovereign immunity as a constitutional doctrine[.]").

Of course, states were not always bound by the Fifth Amendment's "just compensation" requirement. In *Barron v. City of Baltimore*, 32 U.S. (7 Pet.) 243, 247–51 (1833), the Court held that the Takings Clause

does not apply to the states. Enactment of the Fourteenth Amendment changed this, however, by "requir[ing] the States to surrender a portion of the sovereignty that had been preserved to them by the original Constitution." *Alden*, 527 U.S. at 756. Most importantly, the Amendment subjected states to the Due Process Clause and its command not to "deprive any person of . . . property, without due process of law." U.S. Const. amend. XIV, § 1. A principal drafter of the Fourteenth Amendment, John Bingham, contended that the amendment was necessary to reverse *Barron*'s holding that states are exempt from the Takings Clause. Cong. Globe, 39th Cong., 1st Sess., 1089–90 (1866); *see also id.* at 1090 ("[T]he people are [now] without remedy. . . . [T]he State Legislatures may by direct violations of their duty and oaths avoid the requirements of the Constitution[.]").

Twenty-five years later, in *Chicago, B. & Q.R. Co.*, this Court held that the Due Process Clause incorporates the Fifth Amendment and indeed binds states to that amendment's "self-executing" just compensation requirement for a taking of property. 166 U.S. at 233–34, 239–41; *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 306 n.1 (2002). With this extension of the Takings Clause to the states, "[t]he principles of sovereign immunity and just compensation [were set] on a collision course." Richard H. Seamon, *The Asymmetry of State Sovereign Immunity*, 76 Wash. L. Rev. 1067, 1067–68 (2001); Eric Berger, *The Collision of the Takings and State Sovereign Immunity Doctrines*, 63 Wash. & Lee L. Rev. 493, 494 (2006).

The tension between the states' sovereign immunity and their obligation to provide just

compensation for a taking has become increasingly important as states assert a more active role in regulating private property. *O'Connor*, 83 F.4th at 1025 (Thapar, J., concurring) ("Sometimes, a plaintiff can find a municipality to sue for a taking. But other times . . . there aren't any involved."). Today, states are often the source of rules that intrude on property rights to the point of causing an unconstitutional taking. *See, e.g.*, *Cedar Point Nursery v. Hassid*, 594 U.S. 139 (2021) (takings challenge to state agency's property access regulation); *Brown v. Legal Found. of Wash.*, 538 U.S. 216 (2003) (takings claim against state rule requiring confiscation of interest).

Yet, when property owners attempt to assert that a state owes them compensation, many courts hold that sovereign immunity absolves them of that obligation. *See, e.g.*, *EEE Minerals, LLC v. North Dakota*, 81 F.4th 809, 816 (8th Cir. 2023) (sovereign immunity barred a claim after the state legislatively redefined private mineral interests as public property); *Zito v. N.C. Coastal Res. Comm'n*, 8 F.4th 281, 290 (4th Cir. 2021) (sovereign immunity barred a claim that a state's refusal to allow construction of one home caused a taking); *Ladd v. Marchbanks*, 971 F.3d 574, 576 (6th Cir. 2020) (sovereign immunity barred a takings claim after state construction activities "flooded Plaintiffs' properties three times and caused significant damage"); *Citadel Corp. v. Puerto Rico Highway Auth.*, 695 F.2d 31, 33 n.4 (1st Cir. 1982) (sovereign immunity barred a claim that a property owner was owed compensation for a decades-long state "freeze" on development).

The decision below joins this trend. Although there is no dispute that state officials kept interest earned

on Gerlach's funds while in state custody, the decision below holds that the officials are immune from her suit seeking just compensation for the violation of the Takings Clause. *See* App.8a–11a. As the following shows, this decision cannot be reconciled with history and precedent related to the conditional nature of the state's power to take private property.

B. The Decision Below Conflicts with History and Precedent

1. The decision conflicts with founding-era understandings

Since the inception of the Anglo-American legal tradition, it has been understood that a government's power to take property is contingent on a duty to provide just compensation to property owners. *See In the Case of the King's Prerogative in Salt-peter*, 12 Coke R. 13, C2 (1606) (in taking property, the king's ministers "are bound to leave the Inheritance of the Subject in so good Plight as they found it"). In 1625, the scholar Grotius stated that the "State" may take private property, "[b]ut it is to be added that when this is done the State is bound to make good the loss to those who lose their property." Philip Nichols, *The Power of Eminent Domain* 8, § 7 (1909) (quoting Hugo Grotius, *De Jure Belli et Pacis (On the Law of War and Peace)*, lib. ii, e. 20 (1625)). Blackstone similarly observed that the legislature can compel a person to submit to a taking of property only "by giving a full indemnification and equivalent for the injury thereby sustained." 1 William Blackstone, *Commentaries on the Laws of England* 139 (1753).

Thus, by the time of the American founding, the sovereign power to take property was tethered to a

commitment to pay compensation to affected property owners. In 1827, Chancellor Kent described "compensation" as a "*necessary attendant* on the due and constitutional exercise of the power of the lawgiver to deprive an individual of his property without his consent." 2 James Kent, *Commentaries on American Law* 144 (1827) (emphasis added). An early state court decision similarly stated that

> the right to compensation, *is an incident to the exercise of that power* [to take property]: *that the one is so inseparably connected with the other, that they may be said to exist not as separate and distinct principles*, but as parts of one and the same principle.

Sinnickson v. Johnson, 17 N.J.L. 129, 145 (1839) (emphasis added). *See also Proprietors of Piscataqua Bridge v. New Hampshire Bridge*, 7 N.H. 35, 66 (1834) (The power of eminent domain "has always been understood necessarily to include, as a matter of right, and as one of the first principles of justice, the further limitation, that in case his property is taken without his consent, due compensation must be provided" or else "[s]uch a power would be essentially tyrannical, and in contravention of other articles in the Bill of Rights.").

Given these views, early courts and commentators considered the act of taking property to include an implied promise and agreement on the part of the government to compensate the owner. *Great Falls Mfg. Co.*, 112 U.S. at 656 ("The law will imply a promise to make the required compensation, where property, to which the government asserts no title, is taken[.]"); *Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18, 21 (1940) ("[I]f the authorized action in this

instance does constitute a taking of property for which there must be just compensation under the Fifth Amendment, the Government has impliedly promised to pay that compensation[.]"). Indeed, the idea that a taking incorporated a promise to pay was so ingrained that some commentators described a taking simply as a compelled sale of property to the government. Thomas M. Cooley, *A Treatise on the Constitutional Limitations* 559 (4th ed. 1878) (A taking is "in the nature of a payment for a compulsory purchase."); Henry E. Mills & Augustus L. Abbott, *Mills on the Law of Eminent Domain* 6, § 1 (2d ed. 1888) (a taking is "in the nature of a compulsory purchase of the property of a citizen for the purpose of applying it to public use").

Of course, the Fifth Amendment reflects these pre-existing principles, 2 Joseph Story, *Commentaries on the Constitution of the United States* § 1790, at 596 (3d ed. 1858) (The Fifth Amendment "is an affirmance of a great doctrine, established by the common law for the protection of private property."), and the Due Process Clause of the Fourteenth Amendment applied that Amendment and the understandings from which it arose to the states. *Chicago, B. & Q.R. Co.*, 166 U.S. at 236–37.

The Seventh Circuit's conclusion that Indiana is immune from Gerlach's claim that it owes her compensation for taking her property cannot be reconciled with founding-era understandings about the conditional nature of the power to take property. Since a state's duty to pay just compensation, and an owner's claim to such compensation, is "baked into" the state's use of its power to take property, sovereign immunity is inapplicable to such a claim. Put another

way, since the government "has impliedly promised to pay [] compensation" when it takes property, *Yearsley*, 309 U.S. at 21, the taking itself waives a state's immunity from the resulting claim for just compensation, and/or functions as consent to that claim. *Gunter*, 200 U.S. at 284; *PennEast*, 594 U.S. at 499–500.

The Seventh Circuit's contrary conclusion leads to the strange result that states are constitutionally bound to pay just compensation when directly condemning property, yet can avoid payment by evading its duty, forcing a property owner to sue, and then invoking sovereign immunity to escape unscathed. *Cf. Howell v. Miller*, 91 F. 129, 136 (6th Cir. 1898) ("A state cannot authorize its agents to violate a citizen's right of property, and then invoke the constitution of the United States to protect those agents against suit instituted by the owner for the protection of his rights against injury by such agents."). As Justice Stevens lamented, "This Court's expansive Eleventh Amendment jurisprudence is not merely misguided as a matter of constitutional law; it is also an engine of injustice. . . . [T]hroughout the doctrine's history, it has clashed with the just principle that there should be a remedy for every wrong." *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 54 (1994) (Stevens, J., concurring) (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803)). "A right without a remedy is not a legal right; it is merely a hope or a wish." Donald H. Zeigler, *Rights Require Remedies: A New Approach to the Enforcement of Rights in the Federal Courts*, 38 Hastings L.J. 665, 678 (1987).

But the principle of just compensation for a taking is not a wish. It is a long-established promise and agreement attached to a state's use of the power to take property. The Seventh Circuit's application of sovereign immunity to bar Gerlach's claim for just compensation for a taking by state officials is inconsistent with this bedrock principle.

2. The decision below conflicts with this Court's precedent

The Seventh Circuit's decision also cannot be reconciled with this Court's precedent. In *Chicago, B. & Q.R. Co.*, this Court stressed that the "prohibitions of the [Fourteenth] amendment refer to all the instrumentalities of the state,—to its legislative, executive, and judicial authorities,—and therefore whoever, by virtue of public position under a state government, deprives another of any right protected by that amendment against deprivation by the state, 'violates the constitutional inhibition.'" 166 U.S. at 233–34 (citation omitted). Turning to the question of a state's due process-based duty to abide by the Fifth Amendment, the Court stated: "it must be that the requirement of due process of law in that [Fourteenth] amendment is applicable to the direct appropriation by the state to public use, and without compensation, of the private property of the citizen." *Id.* at 236. The *Chicago, B. & Q.R. Co.* Court therefore held that a judgment of a state court, even if it be authorized by statute, whereby private property is taken for the state or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the Fourteenth Amendment of the Constitution of the United States, and the affirmance

of such judgment by the highest court of the state is a denial by that state of a right secured to the owner by that instrument. *Id.* at 241. *Chicago, B. & Q.R. Co.* thus recognized that, upon adoption of the Due Process Clause, the states' power to take property became subject to the same compensatory condition and duty that animates the Fifth Amendment. The Court recently suggested as much in *Sheetz v. County of El Dorado*, 601 U.S. 267, 276 (2024), noting that "the [Fourteenth] Amendment constrains the power of each 'State' as an undivided whole." As such, it makes no difference whether the taker is the state itself, or a subdivision thereof.

The Seventh Circuit's conclusion that Indiana is immune from Gerlach's claim that it is liable for a violation of the Takings Clause conflicts with the conclusion in *Chicago, B. & Q.R. Co.* that a state's refusal to compensate is actionable. *See Chicago, B. & Q.R. Co.*, 166 U.S. at 236; *Vill. of Norwood v. Baker*, 172 U.S. 269, 277 (1898) ("[T]he due process of law prescribed by that amendment requires compensation to be made or secured to the owner when private property is taken by a state, or under its authority, for public use."); *see also* Nichols, *The Power of Eminent Domain* § 259, at 302 ("[T]he Fourteenth Amendment throws the protection of the United States courts over an individual whose property is taken by authority of a State without compensation.").

In *First English*, this Court appeared to agree that the states' constitutional duty to provide just compensation negates sovereign immunity. There, the United States argued as amicus that "principles of sovereign immunity" prevented the Court from interpreting the Just Compensation Clause as "a

remedial provision." Brief for the United States as Amicus Curiae Supporting Appellee, No. 85-1199, 1986 WL 727420, at *26–30 (U.S. Nov. 4, 1986). The Court rejected this contention. *First English*, 482 U.S. at 316 n.9. Although this portion of the *First English* opinion does not "directly confront" the sovereign immunity/takings issue, *DeVillier*, 601 U.S. at 291–92, it strongly suggests that sovereign immunity does not bar just compensation claims. *Del Monte Dunes*, 526 U.S. at 714 (questioning whether sovereign immunity "retains its vitality" in the context of compensation-seeking takings claims); *Lucien v. Johnson*, 61 F.3d 573, 575 (7th Cir. 1995) (stating that *First English* held that "the Constitution requires a state to waive its sovereign immunity to the extent necessary to allow claims to be filed against it for takings of private property for public use"); *see also* Catherine T. Struve, *Turf Struggles: Land, Sovereignty, and Sovereign Immunity*, 37 New Eng. L. Rev. 571, 574 (2003); 1 Laurence H. Tribe, *American Constitutional Law* § 6-38, at 1272 (3d ed. 2000) (observing, based on *First English*, that the Takings Clause "trumps state (as well as federal) sovereign immunity").

Moreover, since *First English*, the Court has regularly resolved takings claims against states without concern for sovereign immunity barriers. *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); *Tahoe-Sierra*, 535 U.S. 302; *see generally*, *Manning v. N.M. Energy, Minerals, & Natural Res. Dep't*, 144 P.3d 87, 90 (N.M. 2006) (noting the Court "has consistently applied the Takings Clause to the states, and in so doing recognized, at least tacitly, the right of a citizen to sue the state under the Takings Clause"). Indeed, in *Palazzolo v. Rhode Island*, 533

U.S. 606 (2001), one amicus curiae brief directly raised sovereign immunity as a potential bar to the takings claim, but the Court ignored the argument. *See* Amicus Brief of the Board of County Commissioners of the County of La Plata, Colorado, in Support of Respondents, No. 99-2047, 2001 WL 15620, at *20–21 (U.S. Jan. 3, 2001).

In short, the lower court's conclusion that sovereign immunity prevents Gerlach from suing Indiana for just compensation for a taking is at odds with precedent and history. *Hair v. United States*, 350 F.3d 1253, 1257 (Fed. Cir. 2003) ("sovereign immunity does not protect the government from a Fifth Amendment Takings claim"); *Leistiko v. Sec'y of Army*, 922 F. Supp. 66, 73 (N.D. Ohio 1996) ("The Just Compensation Clause, with its self-executing language, waives sovereign immunity because it can fairly be interpreted as mandating compensation by the government for the damage sustained."); Eric Grant, *A Revolutionary View of the Seventh Amendment and the Just Compensation Clause*, 91 Nw. U. L. Rev. 144, 199 (1996) ("It is a proposition too plain to be contested that the Just Compensation Clause of the Fifth Amendment is 'repugnant' to sovereign immunity and therefore abrogates the doctrine[.]").

Finally, in justifying its decision to immunize state entities from takings suits in federal court, the Seventh Circuit observed that takings claims can be brought against the state in Indiana *state* courts even if they cannot be brought in federal court. This is factually inaccurate and inconsistent with this Court's precedent. It is factually inaccurate because Indiana courts explicitly refuse to acknowledge a takings

cause of action arising from unpaid interest accrued on custodial funds. *Smyth*, 845 N.E.2d at 223–24. This decision stands as the law of Indiana and forces Indiana state trial courts to dismiss any suits claiming just compensation for the time value of property held by the state under the unclaimed property regime. Indiana courts take vertical stare decisis seriously, with the Indiana Court of Appeals cautioning trial court judges and magistrates that failure to apply binding precedent violates the Indiana Code of Judicial Conduct. *Matter of M.W.*, 130 N.E.3d 114, 116 (Ind. Ct. App. 2019). Even when an Indiana Court of Appeals decision conflicts with later decisions of the Seventh Circuit Court of Appeals on the same issue, Indiana trial courts must follow the state appellate court decision. *Indiana Dep't of Public Welfare v. Payne*, 622 N.E.2d 461, 468 (Ind. 1993).

Moreover, sovereign immunity is forum-neutral; it shields the state equally in federal and state courts. *Franchise Tax Bd. of Cal. v. Hyatt*, 587 U.S. 230, 237–39 (2019). If states can invoke sovereign immunity to bar Fifth Amendment takings claims in federal court, they can do so in state courts as well. *See Austin v. Arkansas State Highway Comm'n*, 895 S.W.2d 941, 944 (Ark. 1995) (sovereign immunity bars a damages-seeking takings claim against a state); *cf.* Julia Grant, Note, *A Clash of Constitutional Covenants: Reconciling State Sovereign Immunity and Just Compensation*, 109 Va. L. Rev. 1143, 1161–62 (2023) (finding it "unclear why state courts must be open to hear these claims, while federal courts can remain closed. In other words, why are state courts the default for hearing these federal claims?"). In any event, as noted above, Indiana courts do not provide an adequate remedy for Gerlach's takings claim.

Smyth, 845 N.E.2d at 223–24. Therefore, even if there were some principle in this Court's precedent allowing federal courts to apply sovereign immunity to bar a takings claim as long as state courts remain open to the claims (there is not), that principle does not apply here.

The Court should grant the Petition to ensure a viable remedy exists by holding that a state's constitutional duty to provide just compensation for a taking waives its sovereign immunity from a claim seeking damages for a taking by the state.

II.

THE DECISION BELOW PRESENTS AN IMPORTANT QUESTION, ON WHICH COURTS CONFLICT, AS TO WHETHER A PROPERTY OWNER MAY SUE OFFICIALS IN THEIR PERSONAL CAPACITY FOR AN UNCONSTITUTIONAL TAKING

In the decision below, the Seventh Circuit also held that state officials cannot be sued for damages for a taking in their personal capacity under Section 1983 because it believes such a suit is really against the state and the state is protected by sovereign immunity. App.12a–13a. The court thus bars personal capacity takings claims under Section 1983. In so doing, the decision below magnifies a federal conflict on the issue, and is inconsistent with this Court's precedent. Moreover, the decision once again relegates the Clause to the status of a second-class constitutional right.

A. The Decision Below Magnifies a Federal Conflict on the Viability of Personal Capacity Takings Claims Under 42 U.S.C. § 1983

Fifty years ago, this Court held that, in an action arising under 42 U.S.C. § 1983, "damages against individual defendants are a permissible remedy in some circumstances notwithstanding the fact that they hold public office." *Scheuer v. Rhodes*, 416 U.S. 232, 238 (1974). In *Kentucky v. Graham*, the Court further held that "to establish *personal* liability in a § 1983 action, it is enough to show that the official, acting under color of state law, caused the deprivation of a federal right." 473 U.S. 159, 166 (1985). More recently, *Hafer* held that, in their personal capacity, state officials are "persons" within the scope of Section 1983, and are thus subject to suit in their individual capacity for a constitutional violation. 502 U.S. at 31.

Unfortunately, in the decades since *Hafer*, lower federal courts have failed to reach a consensus on whether the right to sue officials in their personal capacity under 42 U.S.C. § 1983 includes unconstitutional takings claims. Indeed, courts remain in conflict on the issue.

1. The Seventh Circuit is in conflict with the First Circuit

Some courts explicitly recognize the viability of Section 1983 personal capacity takings suits. For example, the First Circuit expressly approves of personal capacity takings claims. *See Asociación de Subscripción Conjunta del Seguro de Responsabilidad Obligatorio v. Flores Galarza*, 484 F.3d 1, 26 (1st Cir. 2007). In *Flores Galarza*, property owners alleged, in part, that state officials were personally liable for

taking their property. While a concurring First Circuit judge asserted that he was not "convinced that federal takings claims may ever properly lie against state officials acting in their individual capacities," *id.* at 37 (Howard, J., concurring in judgment), the majority disagreed. *Id.* at 26.

The *Flores Galarza* majority held that if the takings claimant "wishes to seek a personal judgment against Flores Galarza . . . for actions that he took as the Commonwealth Treasurer to serve the interests of the Commonwealth, they are entitled to do that." *Id.* Lower courts in the First Circuit thus permit suits against officials in their individual capacity for Fifth Amendment takings violations. *PDCM Associates, SE v. Quiñones*, No. 15-1615, 2016 WL 8711711, at *4 (D.P.R. Apr. 1, 2016) (accepting "a Section 1983 Takings violation claim against the individually named Defendants").

Conversely, other courts, particularly the Fourth Circuit, disallow federal takings claims against individual capacity defendants. In *Langdon v. Swain*, 29 F. App'x 171, 172 (4th Cir. 2002), the Fourth Circuit dismissed a takings claim against state officials in their individual capacity after concluding that "takings actions sound against governmental entities rather than individual state employees in their individual capacities." Federal district courts in the Fourth Circuit have followed suit. *See Donnelly v. Maryland*, No. 20-3654, 2022 WL 4017437, at *2 (D. Md. Sept. 1, 2022) (dismissing an individual capacity claim because the court concluded that the sovereignly immune state was the true party in interest); *Reyes v. Dorchester Cnty. of South Carolina*, No. 2:21-cv-00520, 2022 WL 820029, at *10 (D.S.C.

Mar. 18, 2022) ("[M]onetary relief is unavailable against persons sued in their individual capacities for a taking.") (quoting *Marina Point Dev. Assocs. v. Cnty. of San Bernardino*, No. 5:19-CV-00964, 2020 WL 2375221, at *3 (C.D. Cal. Feb. 19, 2020) (citing *Langdon*, 29 F. App'x at 172)).

The Sixth Circuit also rejects personal capacity takings claims under 42 U.S.C. § 1983. In *O'Connor v. Eubanks*, 83 F.4th at 1020 (pet. cert. pending, docket no. 23-1167), Dennis O'Connor challenged Michigan's Uniform Unclaimed Property Act for withholding interest income when he reclaimed his property from state custody. The Sixth Circuit affirmed the dismissal of O'Connor's unconstitutional takings claim against state officials in their personal capacity because that court has adopted a "clear rule" that "bars individual liability for takings claims under 42 U.S.C. § 1983." *Id.* at 1022 n.2. The *O'Connor* court thus summarily dismissed the property owner's takings claim against state officials in their individual capacity without applying the established qualified immunity analysis that governs the viability of such claims. In a concurring opinion, Judge Thapar considered this categorical bar to personal capacity takings suits to be "wrong," because such claims were common "in the early decades of our republic" and part of "constitutional history." *Id.* at 1027 (Thapar, J., concurring).

The decision below aligns the Seventh Circuit with the Fourth and Sixth Circuits, in conflict with the First, on the issue of whether a property owner may sue state officials in their individual capacity for an unconstitutional taking of property. While the First Circuit allows such suits, *Flores Galarza*, 484 F.3d at

26, the Seventh Circuit rejects them. App.12a–13a (holding that Gerlach's suit is "actually" against the state because the state benefited from retaining the interest on her property, not the individual officials). The decision below thus solidifies the Seventh Circuit as a jurisdiction that forbids personal capacity takings claims under 42 U.S.C. § 1983, in tension with the First Circuit and other lower federal court decisions. *See Bridge Aina Le'a, LLC v. Hawaii Land Use Comm'n*, 125 F. Supp. 3d 1051, 1075 (D. Haw. 2015) (noting conflict).

2. The case law in most circuits is in disagreement on the issue of personal capacity takings claims

The jurisprudence on the issue in the remainder of the circuits is confused and contradictory. The Second Circuit has not directly "addressed whether a Takings claim may be brought against state officials in their individual capacities." *Herman v. Town of Cortlandt, Inc.*, No. 18-CV-2440, 2023 WL 6795373, at *4 (S.D.N.Y. Oct. 13, 2023). District courts in the Second Circuit have addressed the issue, but with conflicting results. Some allow personal capacity takings claims. *See Everest Foods Inc. v. Cuomo*, 585 F. Supp. 3d 425, 434 (S.D.N.Y. 2022) (adjudicating personal capacity takings claims). Others reject such claims "as a matter of law." *Herman*, 2023 WL 6795373, at *4; *Katsaros v. Serafino*, No. Civ. 300CV288, 2001 WL 789322, at *5 (D. Conn. Feb. 28, 2001) ("Only governmental entities, and not individuals, can be liable for takings violations.") (citing *Vicory v. Walton*, 730 F.2d 466, 467 (6th Cir. 1984)).

For its part, the Third Circuit appears skeptical of personal capacity suits asserting a Takings Clause

violation under 42 U.S.C. § 1983. In *Merritts v. Richards*, 62 F.4th at 769, the Third Circuit stated that its rejection of a personal capacity takings claim on jurisdictional grounds "does not validate the legal viability of just-compensation claims under § 1983 against individual-capacity defendants who did not personally acquire any interests in the property taken." *Id.* at 776 n.7. At least one district court took the hint in *Merritts* and rejected a personal capacity takings claim as "a matter of law." *Simonds v. Boyer*, No. 2:21-cv-841, 2022 WL 11964613, at *4 (W.D. Pa. Oct. 20, 2022) (because the plaintiff "only brings claims against Judge Hanley and Ms. Boyer as 'individuals' . . . her Takings claim under the Fifth Amendment fails as a matter of law").

The Eighth Circuit's jurisprudence resembles the Third Circuit's. In *Glow In One Mini Golf, LLC v. Walz*, 37 F.4th 1365, 1373–74 (8th Cir. 2022), the Eighth Circuit frowned on a personal capacity takings claim, stressing that "it is traditionally the government itself that is responsible for compensating an individual who has suffered a governmental taking." *Id.* at 1375. Yet, after acknowledging that none of this Court's decisions "expressly *reject* appellants' theory that a government official can be held personally liable for a government taking," *id.*, the Eighth Circuit adjudicated a personal capacity takings claim on standard qualified immunity grounds. *Id.*

The case law in the Eleventh Circuit is a bit more developed, yet more disjointed. It has left "open the question of whether the plaintiffs would be able to make out Fifth Amendment Takings Clause or Due Process Clause claims against the individual

governmental defendants who allegedly engaged in the illegal behavior." *Garvie v. City of Ft. Walton Beach*, 366 F.3d 1186, 1189 n.2 (11th Cir. 2004). District courts have accordingly arrived at contrary conclusions on whether such claims may lie. *Compare Spencer v. Benison*, No. 7:16-cv-01334, 2018 WL 4896389, at *7 (N.D. Ala. Oct. 9, 2018) (concluding that "within the Eleventh Circuit a takings claim may be brought against a government official in his individual capacity"), *with Reed v. Long*, 506 F. Supp. 3d 1322, 1337 n.14 (M.D. Ga. 2020) ("It is doubtful whether a takings claim, which seeks just compensation for land taken by the government for a public purpose, can be brought against an individual defendant in his individual capacity.") (citing *Langdon*, 29 F. App'x at 172).

In the Ninth Circuit, federal district courts consistently hold that litigants cannot sue officials in their personal capacity for a violation of the Takings Clause. In *Bridge Aina Le'a*, 125 F. Supp. 3d at 1078, a district court ruled:

> The very nature of a taking is that a public entity is taking private property for a public purpose, and must provide just compensation in return. This concept is inconsistent with the notion that someone acting in an individual capacity has taken property or could be personally liable for a taking.

Holding "that monetary relief is not available against persons sued in their individual capacities for takings," the *Bridge Aina* court therefore dismissed a personal capacity takings claim. *Id.* at 1080; *see also Marina Point Dev. Assocs.*, 2020 WL 2375221, at *3 ("The Court agrees that monetary relief is unavailable

against persons sued in their individual capacities for a taking.") (citing *Langdon*, 29 F. App'x at 172; *Vicory*, 730 F.2d at 467).

The decision below sides with federal court decisions that reject personal capacity takings claims as "a matter of law," conflicting with other federal decisions that allow such claims to proceed. The decision below therefore exacerbates a deep, decades-long federal court conflict on the issue, one that warrants this Court's review.

B. The Seventh Circuit's Decision Is Inconsistent with This Court's Precedent

The Seventh Circuit's decision to bar personal capacity Section 1983 claims in the takings context cannot be reconciled with this Court's precedent, especially *Hafer*, where, this Court "address[ed] the question whether state officers may be held personally liable for damages under § 1983 based upon actions taken in their official capacities." 502 U.S. at 24.

The defendant in *Hafer*, an official of the commonwealth of Pennsylvania, asserted "that she may not be held personally liable under § 1983 for discharging respondents because she 'act[ed]' in her official capacity as auditor general of Pennsylvania." *Id.* at 26. This Court rejected the claim. It first reaffirmed that "officers sued in their personal capacity come to court as individuals. A government official in the role of personal-capacity defendant thus fits comfortably within the statutory term 'person'" in 42 U.S.C. § 1983. *Id.* at 27 (citing *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 n.10 (1989)). The *Hafer* Court then refuted the argument that sovereign immunity barred the personal capacity claims. The

Court observed that "damages awards against individual defendants in federal courts 'are a permissible remedy in some circumstances notwithstanding the fact that they hold public office.'" *Id.* at 30 (quoting *Scheuer v. Rhodes*, 416 U.S. at 238).

Thus, *Hafer* concluded that "the Eleventh Amendment does not erect a barrier against suits to impose 'individual and personal liability' on state officials under § 1983." *Id.* at 30–31. It held "that state officials, sued in their individual capacities, are 'persons' within the meaning of Section 1983. The Eleventh Amendment does not bar such suits, nor are state officers absolutely immune from personal liability under Section 1983 solely by virtue of the 'official' nature of their acts." *Id.* at 31; *see also Lewis v. Clarke*, 581 U.S. 155, 166 (2017) ("Nor have we ever held that a civil rights suit under 42 U.S.C. § 1983 against a state officer in his individual capacity implicates the Eleventh Amendment[.]"); *Hopkins v. Clemson Agric. College*, 221 U.S. 636, 643 (1911) ("Public agents must be liable to the law, unless they are to be put above the law. For how 'can these principles of individual liberty and right be maintained if, when violated, the judicial tribunals are forbidden to visit penalties upon individual offenders . . . whenever they interpose the shield of the state?" (citation omitted)).

Nothing in *Hafer* or related precedent involving 42 U.S.C. § 1983 holds that the availability of a personal capacity suit against state officials depends on the nature of the underlying constitutional claim. *Del Monte Dunes*, 526 U.S. at 711 ("we have declined . . . to classify § 1983 actions based on the nature of the underlying right"); *see also Tindal v. Wesley*, 167 U.S.

204, 221 (1897) (approving a takings claim against state officials in their personal capacity); *People of Colo. ex rel. Watrous v. Dist. Ct. of U.S. for Dist. of Colo.*, 207 F.2d 50, 57 (10th Cir. 1953) (holding, in takings case, that "the remedy is against the state officer, individually, to prevent his unlawful act or for appropriate redress if it has been consummated"). Yet, in the decision below, the Seventh Circuit held that the right to sue officials in their personal capacity recognized in *Hafer* does not exist when the suit asserts an unconstitutional taking. App.12a–13a (concluding that sovereign immunity bars personal capacity takings claims under 42 U.S.C. § 1983).

The Seventh Circuit's rationale is also contrary to this Court's precedent. In rejecting Gerlach's claim, the court below relied heavily on its belief that any payment of damages would have to come from the state, not the individual defendants. App.12a ("[T]he amount she claims she is owed should have been paid by the state."). This Court has "not before treated a lawsuit against an individual employee as one against a state instrumentality," *Lewis*, 581 U.S. at 166, and nothing in this Court's precedent justifies an exception for personal capacity claims arising under the Takings Clause. That governments typically pay "just compensation" when a court finds a taking is irrelevant. "The critical inquiry is who may be legally bound by the court's adverse judgment, not who will ultimately pick up the tab." *Id.* at 165. This Court has made clear that state officials may be legally bound by a judgment against them in their personal capacity under 42 U.S.C. § 1983. *Hafer*, 502 U.S. at 30–31; *see Alden*, 527 U.S. at 757. The decision below flouts this precedent in concluding that state officials cannot be

sued in their personal capacity when the plaintiff asserts a violation of the Takings Clause.

CONCLUSION

The Court should grant the Petition.

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Respectfully submitted,

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