No. 24-21

IN THE
Supreme Court of the United States

TINA GERLACH,
Petitioner,
v.

TODD ROKITA, IN HIS OFFICIAL CAPACITY AS INDIANA ATTORNEY GENERAL AND IN HIS INDIVIDUAL CAPACITY, ET AL.,
Respondents.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

When property is abandoned, the State of Indiana takes custody of that property until it is claimed or escheats to the State. In 2021, Tina Gerlach, a Kentucky citizen, sought the return of $100.93 in abandoned funds that were held in the State's treasury. State officials returned that property to her, but under a now-superseded state statute, did not pay Gerlach interest that accrued on the funds while they were in the State's treasury. Rather than seek relief in state court, Gerlach filed a damages action in federal court against state officials in their official and personal capacities for an alleged violation of the Fifth Amendment's Takings Clause. The questions presented are:

1. Whether the Eleventh Amendment shields a nonconsenting State and state officials acting in their official capacities from a private suit for damages in federal court for an alleged Takings Clause violation.

2. Whether Gerlach's claim for damages against state officials in their personal capacities—which seeks the disbursement of interest earned on funds held in the state treasury—is in essence one for recovery of money from the State itself and thus barred by the Eleventh Amendment and 42 U.S.C. § 1983.

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INTRODUCTION

The decision below is unremarkable. It holds that sovereign immunity bars a private damages claim brought in federal court against a nonconsenting State for an alleged taking. Every court of appeals to have addressed the issue agrees that the Fifth Amendment's Takings Clause does not implicitly abrogate a sovereign's traditional immunity from suit. There is no need for this Court to address an issue on which there is no circuit split, especially as sovereign immunity would not prevent the petitioner from seeking damages in state court for the alleged taking. The decision below also holds that the petitioner cannot circumvent the State's immunity by recasting her claim as against state officials in their personal capacities. In so holding, however, the court of appeals declined to address whether sovereign immunity generally bars takings claims against state officials in their personal capacities. The court merely held that the specific claim asserted here—which seeks interest earned by the state treasury—was "in essence one for recovery of money from the state." *Edelman* v. *Jordan*, 415 U.S. 651, 663 (1974) (quoting *Ford Motor Co.* v. *Dep't of Treasury*, 323 U.S. 459, 464 (1945)).

STATEMENT

I. Factual Background

A. Indiana's unclaimed property laws

Indiana, like other States, receives, holds, and attempts to return unclaimed property on behalf of its citizens. Under Indiana's Revised Unclaimed Property Act, property is presumed abandoned, or un-

claimed, if the property's owner takes no action regarding the property for a specified period of time. See Ind. Code §§ 32-34-1.5-4 to 32-34-1.5-11. Common types of unclaimed property include unclaimed wages, uncashed checks, dormant bank accounts, and unclaimed insurance proceeds. See § 32-34-1.5-4.

When property goes unclaimed, the Act authorizes the Indiana Attorney General to take custody of it. Ind. Code §§ 32-34-1.5-14(b), (e), 32-34-1.5-15. The Attorney General then holds the property while seeking to reunite the property with its rightful owner. §§ 32-34-1.5-25, 32-34-1.5-45, 32-34-1.5-48. As part of his efforts to return unclaimed property to its rightful owners, the Attorney General regularly publishes notices in newspapers, maintains an online database (indianaunclaimed.gov), posts on social media, issues press releases, and mails checks to owners. See § 32-34-1.5-25. Those efforts allowed the Attorney General to return more than $65.1 million in unclaimed property in 2024 alone. See State of Indiana, Office of the Attorney General, Unclaimed Property Division, https://www.indianaunclaimed.gov/ (Dec. 2, 2024).

Whenever unclaimed property in the Attorney General's custody takes the form of funds or is converted into funds, the Attorney General transfers those funds to the state Treasurer. § 32-34-1.5-42(a). The Treasurer then deposits in an "abandoned property fund" an amount of funds sufficient to pay anticipated claims. § 32-34-1.5-42. By law, however, the Treasurer must at least annually transfer any funds in excess of $500,000 from the abandoned property fund to the State's general fund. § 32-34-1.5-44(b). The general fund "consists of all moneys paid into the

state treasury which are not by the constitution, statute, or requirement of the donor dedicated to another fund or for another purpose." § 4-8.1-1-3. The Treasurer also must annually transfer any interest earned on the abandoned property fund to the general fund. § 32-34-1.5-44(e). As a result, "[m]ost unclaimed property is kept in the State's general fund maintained by the Treasurer." D. Ct. Dkt. 41-2 at 2 (¶ 9).

To obtain unclaimed property in the State's custody, any person may file a claim with the Attorney General. Ind. Code § 32-34-1.5-48(a). If the Attorney General determines the claimant is the property's rightful owner, that claim is paid either out of the abandoned property fund, or if the amount in that fund is insufficient, out of the State's general fund. See §§ 32-34-1.5-42(b), 32-34-1.5-44(c), 32-34-1.5-49.

B. Gerlach's unclaimed property

In years past, Indiana's payments to property owners did not include "interest the property earned while in state custody." Pet. App. 2a. In 2013, however, the Seventh Circuit held that it would violate the Fifth Amendment for Indiana to keep interest earned on a deposit in an "interest-bearing account." *Cerajeski* v. *Zoeller*, 735 F.3d 577, 579–580 (7th Cir. 2013). In response, Indiana lawmakers directed the Attorney General to pay interest on "interest bearing property," *i.e.*, property earning interest before coming into the State's custody, such as funds deposited in interest-bearing accounts. Ind. Pub. L. No. 56-2014, § 5 (codified at Ind. Code § 32-34-1-30.1 (2014)).

While that statute was in place, the Attorney General took custody of two pieces of unclaimed property owned by Tina Gerlach, a former Indiana resident

who is now a Kentucky resident and citizen. Pet. App. 42a–43a, 47a (¶¶ 3, 25). Neither piece of property was interest bearing because the property previously had been held in "non-interest bearing account[s]." Pet. App. 47a (¶ 26). In 2021, Gerlach claimed one of the pieces of property and received $100.93. Pet. App. 47a (¶ 26). The amount that Gerlach received did not include interest accruing on funds in the State's treasury. *Ibid.* Gerlach has not yet submitted a claim for the other piece of property. Pet. App. 47a (¶ 28).

II. Procedural Background

A. District court proceedings

In January 2022, Gerlach filed this suit against the Indiana Attorney General, his predecessors, and the Indiana Treasurer, in their official and personal capacities. Pet. App. 43a–44a (¶¶ 4–7). She alleged that defendants had violated the Fifth and Fourteenth Amendments because the State had "earned income" on her property but had failed to compensate her "for the income earned or time value of her money." Pet. App. 47a (¶ 26). Gerlach requested both damages and prospective relief. Pet. App. 57a. In particular, she sought orders that would require the Attorney General and Treasurer to "place[]" unclaimed property "into a separate account" held apart from the State's general fund, to "track the earnings on each piece of property in their custody," and to compensate claimants for "the income earned" on their property and the "time value of [their] property." Pet. App. 51a–52a.

While Gerlach's suit was pending, the Indiana Attorney General and Treasurer began paying interest on non-interest bearing property, including Gerlach's,

at a rate equal to what the State's treasury earned (called the State's "internal rate of return"). D. Ct. Dkt. 32-1 at 2 (¶ 4); see Pet. App. 17a–18a. In light of that policy change, the defendants moved for judgment on the pleadings. They argued that Gerlach's claims for prospective relief were moot and that her claims for retrospective monetary relief were barred by the Eleventh Amendment. D. Ct. Dkt. 32 at 2.

The district court agreed. It held that there was no longer any live case or controversy with respect to Gerlach's claims for prospective relief. Pet. App. 30a. It also held that "Gerlach's claims for damages are barred by the Eleventh Amendment and are not proper under § 1983." Pet. App. 38a. Any claims, the court noted, could be brought in state court. Pet. App. 36a–37a. Shortly after the district court's decision, Indiana lawmakers enacted a new statute codifying the policy change. See Ind. Code § 32-34-1.5-33(b)–(c).

B. The Seventh Circuit's decision

The Seventh Circuit affirmed. The court held that Gerlach's claims for prospective relief were moot in view of Indiana's newly enacted statute. Pet. App. 5a–6a. The court also rejected Gerlach's claims for monetary relief against the defendant state officials, observing that she "face[d] two obstacles." Pet. App. 6a–7a. "First," the court stated, Gerlach lacked a cause of action. Pet. App. 7a. "Neither we nor the Supreme Court have ever recognized a direct cause of action for compensation under the Takings Clause." *Ibid.* Second, the court stated, "Eleventh Amendment sovereign immunity" bars Gerlach's damages claims. *Ibid.*

The court rejected Gerlach's argument that the Fifth Amendment abrogates a State's sovereign immunity in federal court where state courts are allegedly "closed" to takings claims. Pet. App. 8a. "Even if there is a viable exception to a state's sovereign immunity where its courts are not open to Takings Clause compensation claims—an exception this court has never recognized—Indiana courts are open to hear Gerlach's claim for just compensation." Pet. App. 8a–9a. Indiana law, the Seventh Circuit explained, "recognizes a cause of action for a takings claim." Pet. App. 9a; see Pet. App. 10a.

Finally, the court held that Gerlach could not "circumvent" Indiana's sovereign immunity by suing its officials in their individual capacities. Pet. App. 11a. Under this Court's precedent, "[w]here 'the judgment sought would expend itself on the public treasury or domain,' the suit is against the sovereign, not the individual." Pet. App. 12a (quoting *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89, 101 n.11 (1984)). That describes this case. Gerlach's claim is that she "should have been paid by the state" the interest that the State earned on her property while in its custody. *Ibid.* "The money Gerlach seeks is in the state coffers, not the personal bank accounts of Indiana's current and former attorneys general." *Ibid.*

ARGUMENT

I. The First Question Presented—Whether the Eleventh Amendment Bars a Federal Suit for Damages Against a Nonconsenting State by a Citizen of Another State for an Alleged Taking—Does Not Warrant Review

The Court should decline to revive Gerlach's federal suit against Indiana and its officials for an alleged taking. The petition seeks review of only one of the two independent grounds the Seventh Circuit gave for rejecting Gerlach's damages claim against the State. Moreover, the Seventh Circuit's holding that sovereign immunity bars suit against a nonconsenting State and its officials in federal court is correct and does not conflict with any decision of this Court or any other court of appeals. Indeed, the Eleventh Amendment's plain language bars Gerlach, a Kentucky citizen, from suing Indiana in federal court. Lastly, the constitutional question that Gerlach raises does not warrant review for the same reasons that this Court recently declined to reach a related constitutional question in *DeVillier* v. *Texas*, 601 U.S. 285 (2024)—Gerlach has a state-court remedy available, making it unnecessary to reach any constitutional question. The petition should be denied.

A. An unchallenged, independent ruling bars the damages claim against Indiana

The decision below expressly holds that Gerlach "faces two obstacles" to recovering damages against Indiana for an alleged taking—(1) the lack of a cause of action and (2) the Eleventh Amendment. Pet. App. 6a–7a. The petition, however, only addresses the sec-

ond obstacle. It does not challenge the Seventh Circuit's decision that there is no "direct cause of action for compensation under the Takings Clause." Pet. App. 7a. Thus, resolving the first question presented would not affect the ultimate deposition of her claim against the State itself. And this Court reviews judgments, not statements in opinions. See *FCC* v. *Pacifica Found.*, 438 U.S. 726, 734 (1978).

In a footnote, Gerlach asserts that "the Seventh Circuit avoided addressing the [cause-of-action] issue." Pet. 9–10 n.1 (citing Pet. App. 7a). But she overlooks the Seventh Circuit's express ruling that her suit against Indiana faces, not one, but "two obstacles." Pet. App. 6a–7a. The page that Gerlach cites from the Seventh Circuit's decision does not suggest otherwise. Rather, that page unequivocally states that Gerlach "must demonstrate that the Fifth Amendment Takings Clause creates an implied direct cause of action," but that neither this Court nor the Seventh Circuit has "ever recognized a direct cause of action for compensation under the Takings Clause." Pet. App. 7a; see *ibid.* (noting "th[is] Court's reticence to create additional implied causes of action for constitutional violations because, '[a]t bottom, creating a cause of action is a legislative endeavor'") (quoting *Egbert* v. *Boule*, 596 U.S. 482, 491 (2022)). The Seventh Circuit's observation that Gerlach's suit against Indiana faces a "second obstacle—Eleventh Amendment sovereign immunity"—only reinforces that the lack of a cause of action is an independent barrier. *Ibid.*

B. The decision below creates no conflict

Regardless, the Seventh Circuit's holding that the Eleventh Amendment prevents Gerlach, a Kentucky

citizen, from suing Indiana in federal court for an alleged taking does not warrant this Court's review. The Seventh Circuit's decision does not conflict with any decision of this Court or of a court of appeals.

1. This Court has never held that the Fifth Amendment's Takings Clause implicitly abrogates a sovereign's immunity from suit. To the contrary, in the context of takings claims, this Court has observed that the "United States cannot be used in their courts without their consent." *Schillinger* v. *United States*, 155 U.S. 163, 166 (1894). "The sovereign's immunity from suit exists whatever the character of the proceeding or the source of the right sought to be enforced." *Lynch* v. *United States*, 292 U.S. 571, 582 (1934). "It applies alike to causes of action arising under acts of Congress and to those arising from some violation of rights conferred upon the citizen by the Constitution." *Ibid.* (internal citations omitted). So embedded is that principle in this Court's precedent that Justice Scalia could remark: "No one would suggest that, if Congress had not passed the Tucker Act, 28 U.S.C. § 1491(a)(1), the courts would be able to order disbursements from the Treasury to pay for property taken under lawful authority (and subsequently destroyed) without just compensation." *Webster* v. *Doe*, 486 U.S. 592, 613 (1988) (Scalia, J., dissenting).

Although Gerlach asserts that *Chicago, B. & Q.R. Co.* v. *City of Chicago*, 166 U.S. 226 (1897), "conflicts with" the decision below, Pet. 20–21, *Chicago* does not address sovereign immunity. In *Chicago*, the Court held that the Fourteenth Amendment makes the Takings Clause "applicable to the States." *Dolan* v. *City*

of Tigard, 512 U.S. 374, 383 (1994). But the Fourteenth Amendment's incorporation of a right against the States does not itself abrogate their immunity from suit for damages. Ordinarily, abrogation requires "valid" congressional action. *Kentucky* v. *Graham*, 473 U.S. 159, 169–170 (1985); see *Corn* v. *Mississippi Dep't of Pub. Safety*, 954 F.3d 268, 275–276 (5th Cir. 2020); *Callahan* v. *Poppell*, 471 F.3d 1155, 1158–1159 (10th Cir. 2006). And in *Chicago*, the Court had no occasion to address whether an exception exists for takings claims because that case involved an alleged taking by a municipality. 166 U.S. at 230. "[M]unicipal corporations" do not enjoy sovereign immunity. *Mt. Healthy City Sch. Dist. Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 280 (1977).

As Gerlach herself concedes, the other decisions she cites do not "'directly confront' the sovereign immunity/takings issue" either. Pet. 22 (quoting *DeVillier*, 601 U.S. at 291–292). *First English Evangelical Lutheran Church of Glendale* v. *Los Angeles County*, 482 U.S. 304 (1987), and several other cases involved suits against municipalities and other bodies that do not enjoy sovereign immunity, which meant the Court had no occasion to address it. See *First English*, 482 U.S. at 307–309 (suit against political subdivision); *Tahoe-Sierra Preservation Council, Inc.* v. *Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 306 (2002) (suit against interstate compact entity held not to be an arm of the State entitled to immunity); *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1007 (1992) (suit against council held not to be an arm of the State entitled to immunity). And in *Palazzolo* v. *Rhode Island*, 533 U.S. 606 (2001), the State had consented to suit in state court by creating a cause of action for takings

claims. See *id.* at 615–616; *Palazzolo* v. *State ex rel. Tavares*, 746 A.2d 707, 711 (R.I. 2000).

Lacking a direct conflict, Gerlach seizes on *First English*'s footnote nine. Pet. 21–22. In that footnote, this Court rejected the United States's merits argument that a California court could not award damages against a local government unit for an alleged taking because "legislative action" is needed to implement the Takings Clause's guarantee. Brief for United States as Amicus Curiae at 14, *First English*, 482 U.S. 304 (No. 85-1199); see *First English*, 482 U.S. at 316 n.9. But *First English*'s comment on the Takings Clause's self-executing character "does not establish" that the clause itself "provides a cause of action for just compensation," *DeVillier*, 601 U.S. at 291–292—much less that the Takings Clause permits a person to sue a nonconsenting sovereign for damages, *Brott* v. *United States*, 858 F.3d 425, 432 (6th Cir. 2017).

Knick v. *Township of Scott*, 588 U.S. 180 (2019), does not suggest otherwise. In that case, the Court held that § 1983 does not require a property owner to exhaust administrative remedies before suing a county (which does not enjoy sovereign immunity) in federal court for an alleged taking. *Id.* at 185. But far from suggesting that the United States or another sovereign could be haled into court without its consent, the Court reaffirmed that Congress may constitutionally require takings claims against the United States to be brought in the Court of Federal Claims. See *id.* at 195–196 (citing *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986 (1984)); see also *Pakdel* v. *City & Cnty. of San Francisco*, 594 U.S. 474, 481 (2021) ("Congress always has the option of imposing a strict

administrative-exhaustion requirement" for takings claims against States). "[N]obody disputed that takings claims against the federal government require the waiver of sovereign immunity contained in the Tucker Act." *Bay Point Props., Inc.* v. *Mississippi Transp. Comm'n*, 937 F.3d 454, 457 (5th Cir. 2019), cert. denied, 140 S. Ct. 2566 (2020); see *Ladd* v. *Marchbanks*, 971 F.3d 574, 579–580 (6th Cir. 2020), cert. denied, 141 S. Ct. 1390 (2021).

2. In line with this Court's decisions on sovereign immunity, lower courts have "consistently held" that the Takings Clause does not implicitly subject sovereigns to damages suits in other sovereigns' courts. *74 Pinehurst LLC* v. *New York*, 59 F.4th 557, 570 & n.7 (2d Cir. 2023), cert. denied, 2024 WL 674658 (U.S. Feb. 20, 2024); see, *e.g.*, *Citadel Corp.* v. *Puerto Rico Highway Auth.*, 695 F.2d 31, 33 & n.4 (1st Cir. 1982), cert. denied, 464 U.S. 815 (1983); *Frein* v. *Pennsylvania State Police*, 47 F.4th 247, 257–258 (3d Cir. 2022); *Zito* v. *North Carolina Coastal Res. Comm'n*, 8 F.4th 281, 286–288 (4th Cir.), cert. denied, 142 S. Ct. 465 (2021); *Bay Point Props.*, 937 F.3d at 456–457, cert. denied, 140 S. Ct. 2566 (2020); *O'Connor* v. *Eubanks*, 83 F.4th 1018, 1024 (6th Cir. 2023), cert. denied, 2024 WL 4486357 and 2024 WL 4486360 (U.S. Oct. 15, 2024); *Pavlock* v. *Holcomb*, 35 F.4th 581, 589 (7th Cir.), cert. denied, 143 S. Ct. 374 (2022); *EEE Minerals, LLC* v. *North Dakota*, 81 F.4th 809, 815–816 (8th Cir. 2023), cert. denied, 144 S. Ct. 1097 (2024); *Seven Up Pete Venture* v. *Schweitzer*, 523 F.3d 948, 954–956 (9th Cir.), cert. denied, 555 U.S. 885 (2008); *Williams* v. *Utah Dep't of Corr.*, 928 F.3d 1209, 1213–1214 (10th Cir. 2019); *Robinson* v. *Georgia Dep't of Transp.*, 966

F.2d 637, 640 (11th Cir.), cert. denied, 506 U.S. 1022 (1992). Gerlach admits this is the "trend." Pet. 15.

Hair v. *United States*, 350 F.3d 1253 (Fed. Cir. 2003), is no exception. *Contra* Pet. 23. That case concerned a damages claim brought against the United States under the Tucker Act—a statute that waives the federal government's immunity from suit for damages—so sovereign immunity was not at issue. See *Hair* v. *United States*, 52 Fed. Cl. 279, 281 (2002). And in *Hair*, the Federal Circuit rejected the argument that the self-executing character of the Takings Clause prevents Congress from imposing a six-year statute of limitations on takings claims. 350 F.3d at 1260. *Hair*'s holding thus reinforces that the existence of a substantive right to just compensation implies nothing about the procedure for vindicating that right. There is no conflict for this Court to resolve.

C. The decision below is correct

The Seventh Circuit's holding that the Eleventh Amendment prevents Indiana from being sued for damages in federal court by a Kentucky citizen is not only consistent with decisions from this Court and other courts of appeals. It is also correct.

1. When the Constitution was drafted and ratified, it was "well established" that a sovereign "could not be sued without consent." *Alden* v. *Maine*, 527 U.S. 706, 715 (1999). The founding generation considered "immunity from private suits" a "central" aspect of sovereignty. *Ibid.* To them, it was "an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission." *Beers* v. *Alabama*, 61 U.S. (20 How.) 527, 529 (1857); see

Cohens v. *Virginia*, 19 U.S. (6 Wheat.) 264, 411–412 (1821). "The suability of a State, without its consent, was a thing unknown to the law." *Hans* v. *Louisiana*, 134 U.S. 1, 16 (1890). In fact, "leading advocates of the Constitution assured the people in no uncertain terms that the Constitution would not strip the States of sovereign immunity." *Alden*, 527 U.S. at 716. As Alexander Hamilton explained, "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent." *The Federalist No. 81*, at 486 (Clinton Rossiter ed., 1961).

If the founding generation wished to limit a fundamental aspect of sovereignty, doubtless that generation would have addressed the issue in the Fifth Amendment. See *Schillinger*, 155 U.S. at 167–169; cf. *Livingston* v. *City of New York*, 8 Wend. 85, 102 (N.Y. 1831) (explaining that textual silence on a comparable provision of the New York constitution indicated that the matter was left to "the legislature"). But the Fifth Amendment makes no mention of judicial enforcement against a sovereign. Its text places only "two conditions" on the State's activity: "the taking must be for a 'public use' and 'just compensation' must be paid to the owner.'" *Brown* v. *Legal Found. of Wash.*, 538 U.S. 216, 231–232 (2003) (quoting U.S. Const. Amend. V). The Takings Clause says nothing about whether citizens may sue the United States or a State for compensation without consent. Its silence falls well short of an "'unmistakably clear'" waiver of the government's immunity from suit. *Fin. Oversight & Mgmt. Bd. for Puerto Rico* v. *Centro de Periodismo Investigativo, Inc.*, 598 U.S. 339, 346 (2023).

2. The Constitution's structure reinforces that the Fifth Amendment does not tacitly subject a nonconsenting sovereign to a private suit for damages, particularly in another sovereign's courts. The Fifth Amendment's Takings Clause is not the only provision of the Constitution that governs the payment of money by the United States. The Appropriations Clause vests Congress—not the federal judiciary—with the authority to direct disbursements from the federal treasury, providing that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. Art. I, § 9, Cl. 7. Thus, as this Court has held, courts do not have authority to "grant [persons] a money remedy that Congress has not authorized." *Off. of Pers. Mgmt.* v. *Richmond*, 496 U.S. 414, 425–426 (1990). Construing the Takings Clause to subject sovereigns to suits for damages without legislative authorization would create a textual conflict.

The Constitution also directs Congress—not the judiciary—to arrangement for the "pay[ment]" of "Debts . . . of the United States." U.S. Const. Art. I, § 8, Cl. 1. That provision, too, reflects that resolution of "claims for money against the United States" is "a function which belongs primarily to Congress as an incident of its power to pay the debts of the United States." *Williams* v. *United States*, 289 U.S. 553, 569 (1933). And while Congress has elected to provide a judicial forum in which takings claims can be resolved, this Court has made clear that "all [such] matters . . . are equally susceptible of legislative or executive determination." *Id.* at 579–80. Simply put, the Constitution leaves to Congress decisions about how payment of just compensation should be made. Its

text does not mandate that just compensation be paid through damages suits brought in court.

It would be triply odd for the Takings Clause to authorize damages remedies against the United States without its consent considering that no constitutional provision explicitly vests federal courts with the power to hear claims under the Takings Clause. The Constitution does not require the existence of lower federal courts. *Patchak* v. *Zinke*, 583 U.S. 244, 252 (2018) (plurality op.); see U.S. Const. Art. III, § 1. Nor does the Constitution include Takings Clause claims within the original jurisdiction of this Court. This Court's original jurisdiction does not extend to "controversies to which the United States shall be a party." U.S. Const. Art. III, § 2. And it is difficult to imagine that the founding generation—which took sovereign immunity "as given"— would have assumed that the newly formed United States could be haled into state courts without its consent. *Franchise Tax Bd. of California* v. *Hyatt*, 587 U.S. 230, 239 (2019).

Then there is the Eleventh Amendment. Enacted after the Fifth Amendment, the Eleventh Amendment declares that "[t]he 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." U.S. Const. Amend. XI (emphasis added). That amendment not only reflects that the Founding generation understood the Constitution's fundamental structure to prohibit suits against nonconsenting States by any plaintiff (including citizens of the defendant State). *Hans*, 134 U.S. at 12. But the Eleventh Amendment

expressly forbids what Gerlach says the Fifth Amendment implicitly requires: construing the federal judicial power to authorize a "suit . . . against one of the United States" (Indiana) by a "Citizen[] of another State" (Kentucky). The constitutional text and structure foreclose her position.

3. Historical practice cuts against Gerlach's position too. Before the Fourteenth Amendment's adoption, the United States was the sole object of the Takings Clause. See *Barron* v. *City of Baltimore*, 32 U.S. (7 Pet.) 243, 247 (1833). Yet even though the Fifth Amendment, like the rest of the Constitution, operated directly on the federal government—see *Jacobs* v. *United States*, 290 U.S. 13, 16 (1933)—takings claims against the United States were not initially heard in court. "[N]o general statute gave the consent of the United States to suit on claims for money damages." *United States* v. *Mitchell*, 463 U.S. 206, 212 (1983).

Rather, "Congress' early practice was to adjudicate each individual money claim against the United States, on the ground that the Appropriations Clause forbade even a delegation of individual adjudicatory functions where payment of funds from the Treasury was involved." *Richmond*, 496 U.S. at 430. So "a citizen's only means of obtaining recompense from the Government was by requesting" monetary payments "through private Acts of Congress." *Library of Congress* v. *Shaw*, 478 U.S. 310, 316 n.3 (1986). The private bills operated as "individually tailored waivers of sovereign immunity." *Ibid.* That citizens could not sue the United States for an alleged taking for decades after the Fifth Amendment's drafting and ratification

forecloses the notion that the Fifth Amendment itself implicitly abrogates a sovereign's immunity from suit.

Not until 1855 did Congress create the Court of Claims to assist it with processing claims against the federal government. See *Mitchell*, 463 U.S. at 212–213. In allowing the United States to be a defendant in court, however, Congress "proceeded slowly and with great caution." *Langford* v. *United States*, 101 U.S. 341, 344 (1879); see Floyd D. Shimomura, *The History of Claims Against the United States: The Evolution from a Legislative Toward a Judicial Model of Payment*, 45 La. L. Rev. 625, 643–653 (1985) (describing development of compensation methods in early 1800s). The Court of Claims' jurisdiction was limited to cases involving "[s]ome element of contractual liability." *Schillinger*, 155 U.S. at 167. And Congress itself remained involved in the claims process. See Act of Feb. 24, 1855, ch. 122, § 7, 10 Stat. 612, 613. In this early period, the Court of Claims effectively served "merely [as] an auditing board" for certain types of claims. *Langford*, 101 U.S. at 344.

After eight years, Congress authorized the Court of Claims to render final judgments. *Mitchell*, 463 U.S. at 213 (citing Act of Mar. 3, 1863, ch. 92, 12 Stat. 765). But the court's jurisdiction was still limited to contractual claims. *Schillinger*, 155 U.S. at 167. And Congress itself retained the authority to appropriate the compensation awarded. See Act of Mar. 3, 1863, ch. 92, § 7, 12 Stat. 765, 766 (meritorious claims paid out of a "general appropriation made by law for the payment and satisfaction of private claims"); *id.* § 14, 12 Stat. at 768 (no amount paid until appropriation was "estimated for by the Secretary of the Treasury").

Only with the Tucker Act in 1887 did Congress give the Court of Claims a general power to resolve "claims founded upon the constitution of the United States or any law of Congress." *Schillinger*, 155 U.S. at 167. (citing Act of Mar. 3, 1887, ch. 359, 24 Stat. 505). This history demonstrates that Congress understood that legislative action was required to waive the United States's immunity from suit for alleged takings.

Early congressional administration of the Takings Clause informs its application to the States. "[I]ncorporated Bill of Rights protections apply identically to the States and the Federal Government." *McDonald* v. *City of Chicago*, 561 U.S. 742, 766 n.14 (2010). And at the time the Fourteenth Amendment was enacted, Congress was still satisfying takings claims through specific legislative appropriations, and Congress had not yet granted federal courts jurisdiction to hear takings claims. See *Knick*, 588 U.S. at 199–201; Shimomura, 45 La. L. Rev. at 659–662. So while those who drafted and ratified the Fourteenth Amendment may have thought that it imposed a substantive obligation to pay just compensation on States, see Pet. 14, that fact alone does not demonstrate that the Taking Clause's incorporation against the States abrogates their sovereign immunity. As this Court has recognized in the context of other constitutional rights incorporated against the States, abrogation of States' traditional immunity requires Congress to exercise its power under Section 5 of the Fourteenth Amendment. See *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 66 (1989). Congress, however, has not.

4. In arguing that the Fifth Amendment implicitly abrogates sovereign immunity, Gerlach does not

address the structural features of the Constitution or historical practice. She focuses entirely on the principle that the Takings Clause creates a substantive entitlement to just compensation. See Pet. 13–19. But the issue here is not whether an obligation to pay exists; the issue is whether the obligation necessarily entails a waiver of immunity from suit for damages. As Congress's practice of providing compensation through private bills and, later, through an Article I tribunal shows, payment need not be made through a suit for damages brought against a sovereign without its consent. See *Williams*, 289 U.S. at 580–581.

The general statements that Gerlach lifts from scattered sources (at 16–19) do not suggest otherwise. None of her historical sources address whether the remedy for a taking is a suit against the sovereign without its consent. Not all of them even require the sovereign to compensate the owner for a taking. See *In the Case of the King's Prerogative in Salt-Peter*, 12 Coke R. 13, C2 (1606) (stating that the King was entitled to raw materials necessary for "the Defence of the whole Realm, in which every Subject hath Benefit"). And those that do largely involve suits against defendants who could not invoke sovereign immunity (*e.g.*, private contractors). See *Sinnickson* v. *Johnson*, 17 N.J.L. 129, 129–131 (1839); *Proprietors of Piscataqua Bridge* v. *New Hampshire Bridge*, 7 N.H. 35, 35–39 (1834); *Yearsley* v. *W.A. Ross Constr. Co.*, 309 U.S. 18, 19 (1940).

In fact, several of Gerlach's sources undermine her argument that the right to just compensation equals an automatic right to sue a nonconsenting sovereign for damages in court. Blackstone, Kent, Cooley, and

Story all describe the exercise of the sovereign's power of eminent domain—and attendant decisions about the payment of just compensation—as "an exertion of power . . . which nothing but the legislature can perform" and make clear that the legislature itself can provide "a full indemnification and equivalent for the injury thereby sustained." 1 William Blackstone, *Commentaries on the Laws of England* 139 (1753); see 2 James Kent, *Commentaries on American Law* 275–276 (1827); Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union* 563 (4th ed. 1878); 2 Joseph Story, *Commentaries on the Constitution of the United States* § 1790, at 596 & n.1 (3d ed. 1858). Those sources reflect that the Fifth Amendment's Takings Clause does not strip Congress and state legislatures of the power to designate the procedures for the payment of just compensation.

Besides, even if the character of the Takings Clause entails that the United States and States must provide a judicial remedy, it would not follow that a property owner must be able to sue a nonconsenting State in federal court for damages as opposed to state court. See *Reich* v. *Collins*, 513 U.S. 106, 109–110 (1994) (observing that the Eleventh Amendment bars tax refund claims from being brought in federal court but not state court). Only by demonstrating that the Fifth Amendment guarantees a property owner the right to sue a sovereign in the forum of the property owner's choosing—a position that would not only subject States to suit in federal court but the United States to suit outside the Court of Federal Claims—can Gerlach prevail. But none of her authorities support so sweeping a view of the Fifth Amendment.

D. There is no need to address the constitutional question the petition raises

In any event, there is no need for this Court to reach the constitutional question the petition raises. Gerlach litigated this federal case on the premise that she cannot seek redress in state court for an alleged taking. See Pet. App. 8a; Gerlach C.A. Br. 9. Since her claim rests on the premise that sovereign immunity would bar suit for the alleged taking in state court, it "would be imprudent to decide" whether the Fifth Amendment overrides Indiana's sovereign immunity in federal court "without satisfying ourselves of the premise" that sovereign immunity would bar a suit in state court. *DeVillier*, 601 U.S. at 292.

Gerlach's premise that Indiana's sovereign immunity would bar suit for the alleged taking in state court "does not hold." *DeVillier*, 601 U.S. at 293. As the Seventh Circuit observed, "the state allows for inverse condemnation and uncompensated takings claims." Pet. App. 10a; see Ind. Code § 32-24-1-16 (authorizing inverse-condemnation suit against the State for damages); *Murray* v. *City of Lawrenceburg*, 925 N.E.2d 728, 731 (Ind. 2010) (similar); *State* v. *Kimco of Evansville, Inc.*, 902 N.E.2d 206 (Ind. 2009) (adjudicating Fifth Amendment claim). And Indiana allows them precisely because the "United States Constitution requires just compensation." *Town of Linden* v. *Birge*, 204 N.E.3d 229, 234 (Ind. 2023).

Gerlach's assertion that the State "refuse[s] to acknowledge a takings cause of action arising from unpaid interest accrued on custodial funds," Pet. 23–24, is incorrect. (citing *Smyth* v. *Carter*, 845 N.E.2d 219, 223–224 (Ind. Ct. App. 2006)). *Smyth* nowhere

holds that sovereign immunity bars suit for takings in the context of unclaimed property or that a cause of action for the taking does not exist. Rather, in *Smyth*, an intermediate Indiana court held that a takings claim involving abandoned property failed on the merits "[b]ecause it [wa]s the owner's failure to act, and not the State's exercise of its sovereign power," that caused the loss. *Smyth*, 845 N.E.2d at 224.[1]

As the Seventh Circuit observed, whether state courts are open to takings claims does not depend on whether the underlying claims would succeed. Pet. App. 9a–10a. This Court has not considered a claim's merits in determining a forum's adequacy. See *Elgin* v. *Dep't of the Treasury*, 567 U.S. 1, 9, 15–21 (2012); *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200, 212–215 (1994). Nor it is clear that federal courts would be any more receptive to Gerlach's taking claim than a state court. The Seventh Circuit has expressed skepticism that a taking occurs where a State does not pay

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[1] In determining that the owner's failure to act caused the loss, moreover, the intermediate state court relied on statutory provisions that have been superseded. Compare *Smyth*, 845 N.E.2d at 223–224 (explaining that, under the state statutes then in force, the State did not hold unclaimed property in a "purely custodial" manner and the owner had no right to interest), with Ind. Code §§ 32-34-1.5-45, 32-34-1.5-33 (providing that unclaimed property today "is held in custody for the benefit of the owner" and that the owner is entitled to interest earned by the State). So it is not clear that *Smyth* would come out the same today. Nor would *Smyth* prevent another panel of the Indiana Court of Appeals or the Indiana Supreme Court from reaching a different conclusion on the same facts. See *In re C.F.*, 911 N.E.2d 657, 658 (Ind. Ct. App. 2009) (one panel of the Indiana Court of Appeals "is not bound by th[e] decisions" of another panel of that court).

interest earned on "small amounts" of unclaimed funds like "$100"—about the same amount Gerlach seeks, Pet. App. 47a (¶ 26)—because any interest is likely less than administrative expenses. *Goldberg* v. *Frerichs*, 912 F.3d 1009, 1011 (7th Cir. 2019).

At the very least, the existence of a dispute over whether Gerlach could proceed in state court renders this case unsuitable for certiorari. Not only would this Court need to wade through conflicting views over state law to reach the constitutional question raised. But the Court would have to address an issue that would be unlikely to recur. Indiana law now requires the payment of interest earned on both interest-bearing and non-interest-bearing funds. See Ind. Code § 32-34-1.5-33(b)–(c). So whether Indiana law recognizes "a takings cause of action arising from unpaid interest accrued on custodial funds," Pet. 23–24, is of vanishing importance.

Gerlach raises the specter that a State might one day refuse to provide any forum for bringing a takings claim, leaving a property owner without compensation. Pet. 24. But "[w]e should not 'assume the States will refuse to honor the Constitution,' including the Takings Clause." *DeVillier*, 601 U.S. at 293 (quoting *Alden*, 527 U.S. at 755). And Gerlach cites no instance in which a State has refused to provide any mechanism for paying just compensation. In fact, in the case she cites, see Pet. 24, the State provided two mechanisms for the payment of just compensation—the landowner just declined to use them. See *Austin* v. *Arkansas State Highway Comm'n*, 895 S.W.2d 941, 942–943 (Ark. 1995) (holding that, while the landowner could not sue a state entity for damages in court, the

landowner could either seek "prospective injunctive relief" that would bar "taking the property until an amount sufficient to cover the damages is first deposited in court," or seek "damages from the State Claims Commission").

That Gerlach identifies no instance in which state remedies are unavailable demonstrates that there is no need to disturb sovereigns' traditional immunity from suit to ensure payment of just compensation. Practically, the impact of siding with Gerlach here would be to excuse parties from having to follow the Tucker Act and other legislatively designed procedures for obtaining payment of just compensation. The Court should not needlessly unleash the chaos that would follow from setting aside time-honored rules—and should be doubly hesitant to do so where no court of appeals has embraced Gerlach's position.

II. The Second Question Presented—Whether Gerlach's Claims Against State Officials Are Really and Substantially Claims Against the State Itself—Does Not Warrant Review

Having held that sovereign immunity barred damages claims against the State itself, the Seventh Circuit held that Gerlach could not "circumvent" the State's sovereign immunity by suing current and former officials for failing to expend the public treasury. Pet. App. 11a–12a. That ruling does not warrant review either. The Seventh Circuit's application of this Court's precedent to the particulars of this case is correct. And Gerlach identifies only one other court of appeals that has taken a position on whether individuals can be sued under § 1983 for an alleged taking of

interest. As the paucity of decisions suggests, the question is not so important as to warrant review.

A. The court of appeals correctly applied this Court's precedents

1. Section 1983 makes "person[s]"—not States or their officials acting in their official capacities—liable for constitutional violations. 42 U.S.C. § 1983; see *Will*, 491 U.S. at 71. Sovereign immunity otherwise shields States and their officials acting in their official capacities from suit for damages. *Will*, 491 U.S. at 71. To determine whether a claim is against a person or the State itself, courts must "look to whether the sovereign is the real party in interest." *Lewis* v. *Clarke*, 581 U.S. 155, 161–162 (2017). They cannot "simply rely on the characterization of the parties." *Id.* at 162.

Under this Court's precedents, where a claim "is in essence one for the recovery of money from the state," the claim must be treated as against the sovereign. *Edelman* v. *Jordan*, 415 U.S. 651, 663 (1974) (quoting *Ford Motor Co.* v. *Dep't of Treasury*, 323 U.S. 459, 464 (1945)); see *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89, 101 n.11 (1984) (claim is against sovereign where "the judgment sought would expend itself on the public treasury or domain"). Thus, in *Edelman*, this Court ruled that the Eleventh Amendment barred an award of money that "should have been paid, but was not." 415 U.S. at 664. "A suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment." *Id.* at 663.

2. As the Seventh Circuit perceived, Gerlach's takings claim against current and former state officials is a claim "against the State itself." Pet. App.

12a. "The money Gerlach seeks is in the state coffers, not the personal bank accounts of Indiana's current and former attorneys general." *Ibid.* In fact, "[m]ost unclaimed property is kept in the State's general fund maintained by the Treasurer." D. Ct. Dkt. 41-2 at 2 (¶ 9). Gerlach's allegation, moreover, is not that officials converted her money for their personal use. Rather, her allegation is that "the State of Indiana benefited from retaining interest earned on Gerlach's property." Pet. App. 13a. In short, Gerlach's claim is that the State "should have" but did "not" pay her money from its treasury. *Edelman*, 415 U.S. at 664.

To see why Gerlach's claim is against the State, it is helpful to consider what Gerlach alleges the state officials should have done. According to Gerlach, state officials should have taken interest earned on funds in the state treasury and paid it over to her. Pet. App. 12a. And since the state officials did not appropriate funds from the public treasury and transfer them to Gerlach's bank account, Gerlach now seeks from the officials damages equal to the amount she believes she should have been paid from the public coffers. Pet. App. 12a n.5. Here, there can be no doubt that Gerlach's claim "is in essence one for the recovery of money from the state." *Edelman*, 415 U.S. at 663 (quoting *Ford Motor*, 323 U.S. at 464); cf. *Dwyer* v. *Regan*, 777 F.2d 825, 836–37 (2d Cir. 1985) (claim against official for back pay was against the State since it rested on the theory that the sums "should have been paid by the State"); *Henley* v. *Simpson*, 527 F. App'x 303, 307 (5th Cir. 2013) (similar).

3. The Seventh Circuit's application of *Edelman* to this case is fully consistent with *Hafer* v. *Melo*, 502

U.S. 21 (1991), and *Lewis* v. *Clarke*, 581 U.S. 155 (2017). Contra Pet. 32–35. *Hafer* arose from a § 1983 suit against a state official for wrongfully terminating employees. 502 U.S. at 23. In *Hafer*, this Court rejected the official's sweeping argument that "§ 1983 does not authorize suits against state officers for damages arising from official acts." *Ibid.* State officers, the Court clarified, are not "absolutely immune from personal liability under § 1983 solely by virtue of the 'official' nature of their acts." *Id.* at 31. But the Court never abrogated *Edelman*'s holding that a claim for the recovery of money from the State is against the State itself. And here the Seventh Circuit did not rely "solely" on the "official" nature of any acts in holding that Gerlach sought funds from the State itself.

Lewis—a case about tribal immunity—is no more helpful to Gerlach. In that decision, this Court held that "an indemnification provision cannot, as a matter of law, extend sovereign immunity to individual employees who would otherwise not fall under its protective cloak." 581 U.S. at 164–165. But in this case, the Seventh Circuit did not invoke any indemnification provision to extend sovereign immunity to officials who otherwise would have lacked it. Instead, it ruled that Gerlach's claims against state officials fell outside § 1983 and were barred by sovereign immunity because they sought money from the State itself. See Pet. App. 12a–13a. The Seventh Circuit's case-specific application of this Court's precedent to the particulars of this case does not warrant review.

B. The petition misstates the holding below and overstates any conflict

Not only is the Seventh Circuit's decision correct, but Gerlach is wrong to suggest that the decision "magnifies" a "deep, decades-long federal court conflict" over whether state officials can "be sued for damages for a taking in their personal capacity." Pet. 25, 32. For one thing, the Seventh Circuit did not erect an absolute "bar[]" to bringing "personal capacity takings claims under Section 1983." Pet. 25. The court held only that "*Gerlach's* claim for compensatory relief is against the state" and thus "barred." Pet. App. 13a (emphasis added). The Seventh Circuit left for another day "whether an individual can be held liable for a Fifth Amendment takings violation." *Ibid.*

Other courts of appeals have not taken a firm stance either. In *O'Connor* v. *Eubanks*, 83 F.4th 1018, 1022 (6th Cir. 2023), cert. denied, 2024 WL 4486357 (U.S. Oct. 15, 2024), the Sixth Circuit held that "qualified immunity bars individual liability for takings claims under 42 U.S.C. § 1983." 83 F.4th at 1022 n.2. But it so held precisely because "no court in th[e Sixth] circuit had yet decided whether an officer can be liable for a taking in his individual capacity." *Sterling Hotels, LLC* v. *McKay*, 71 F.4th 463, 468 (6th Cir. 2023); see *O'Connor*, 83 F.4th at 1028 (Thapar, J., concurring) (agreeing that the court's statement in *Vicory* v. *Walton*, 730 F.3d 466 (6th Cir. 1984), was not "a ruling on the merits" and was not "binding").

The decisions that Gerlach cites from the Third, Eighth, and Eleventh Circuits are of a piece. Gerlach admits (at 29–31) that each "le[aves] 'open'" whether takings claims can be brought against individuals.

Pet. 30 (quoting *Garvie* v. *City of Ft. Walton*, 366 F.3d 1186, 1189 n.2 (11th Cir. 2004)); see *Merritts* v. *Richards*, 62 F.4th 764, 776 n.7 (3d Cir. 2023) (leaving "the legal viability of just-compensation claims under § 1983 against individual-capacity defendants who did not personally acquire any interests in the property taken" for the district court to address); *Glow In One Mini Golf, LLC* v. *Walz*, 37 F.4th 1365, 1375 (8th Cir. 2022), cert. denied, 143 S. Ct. 574 (2023) (rejecting claim based on qualified immunity).

The question remains open in the Fourth Circuit too. In an unpublished, 22-year-old decision, the Fourth Circuit stated that "takings actions sound against governmental entities rather than individual state employees in their individual capacities." *Langdon* v. *Swain*, 29 F. App'x 171, 172 (4th Cir. 2002). But "unpublished opinions are not precedential" and their citation is not favored, which means that the issue remains open in the Fourth Circuit. *Hogan* v. *Carter*, 85 F.3d 1113, 1118 (4th Cir. 1996). And the Fourth Circuit's passing observation about takings was not even necessary to the judgment in *Langdon* itself. The court also stated that "res judicata" separately barred the takings claim. 29 F. App'x at 172.

That leaves only the First Circuit. In *Asociación de Subscripción Conjunta del Seguro de Responsabilidad Obligatorio* v. *Flores Galarza*, 484 F.3d 1 (1st Cir. 2007), the court evaluated a claim against a Puerto Rico official for withholding funds that he was required to disburse to insurance companies. *Id.* at 9–13. The insurers sued him in his personal capacity for tens of millions of dollars. *Id.* at 12. "[T]roubled," the court expressed concern that the claim was "really a

subterfuge for an official-capacity suit that seeks payment from the Commonwealth Treasury." *Id.* at 25; see *ibid.* ("There is a plausible view of this case that the demand for damages from Flores Galarza is, in essence, a demand for the recovery of money from the Commonwealth."). But the court stated that the claim could proceed on the theory that "[i]f the [insurers] wish[] to seek a personal judgment against Flores Galarza in a ruinous and probably uncollectible amount for actions that he took as the Commonwealth Treasurer to serve the interests of the Commonwealth, they are entitled to do that." *Id.* at 26.

Although the First Circuit stated that the takings claim could be asserted against an official in his personal capacity, it ultimately resolved the takings claim on qualified-immunity grounds. It held that that the official was "immune" from liability "because the law was not clearly established that [he] effected an unconstitutional taking." 484 F.3d at 37. And in the 17 years since the First Circuit decided *Asociación*, only a single district court has invoked it to hold that takings claims can be brought against individuals under § 1983. See *Spell* v. *Edwards*, 2013 WL 5232341 (E.D. La. Sept. 13, 2013). To the extent there is a conflict between *Asociación* and the decision below, any circuit conflict could not be shallower.[2]

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[2] Even the disagreement among district courts is less than the petition suggests. Gerlach argues that, in the Second Circuit, some district courts "allow personal capacity takings claims" while others do not. Pet. 29. But her single example of a case

C. The question does not warrant review

Given how few lower-court decisions have addressed whether takings claims can be brought against individuals, it is difficult to see how that question could possibly be so important as to warrant this Court's review. And that question is not even presented by the Seventh Circuit's decision in this case. The Seventh Circuit made plain that it was "not resolv[ing] whether an individual can be held liable for a Fifth Amendment takings violation." Pet. App. 13a. All that the Seventh Circuit held that "Gerlach's claim"—which sought to hold state officials liable for failing to pay her interest earned by funds in the State's custody—"is really against the State." *Ibid.* That case-specific ruling does not warrant review, particularly considering that Gerlach could bring a takings claim in state court against the State itself.

"allow[ing]" such a claim did not specifically address whether takings claims can be brought against individuals. Rather, the district court announced that the due process, equal protection, contact, and takings claims asserted in that case were "individual capacity" claims because the plaintiff so labeled them. *Everest Foods Inc.* v. *Cuomo*, 585 F. Supp. 3d 425, 435 (S.D.N.Y. 2022). It did not address binding precedent holding that claims seeking money from the State are against the State, however labeled. See *Edelman*, 415 U.S. at 663; *Dwyer*, 777 F.2d at 836–37. Similarly, while Gerlach argues there is disagreement among district courts in the Eleventh Circuit, the court on one side of the alleged spat merely expressed "doubt[]" about whether a takings claim can be brought against individuals. Pet. 31 (quoting *Reed* v. *Long*, 506 F. Supp. 3d 1332, 1337 n.14 (M.D. Ga. 2020)).

CONCLUSION

The petition should be denied.

Respectfully submitted,

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