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 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

REPLY BRIEF FOR THE PETITIONER

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INTRODUCTION AND SUMMARY OF REPLY ARGUMENT

The fundamental issue raised by Tina Gerlach's (Gerlach) Petition is whether a federal damages remedy exists under the Constitution or 42 U.S.C. § 1983 when state agencies take property without just compensation. Gerlach sued Indiana officials for damages after the state unconstitutionally took her interest funds, but they argued that sovereign immunity barred the claim, and the Seventh Circuit agreed. App. 6a-9a.

Gerlach also pressed a compensation claim against the officials in their individual capacity under 42 U.S.C. § 1983. App. 11a. But the state argued this claim was also barred by sovereign immunity because it was "actually" a claim against the state itself, not individuals. The Seventh Circuit agreed, *id.* at 11a-13a, despite this Court's holding that an individual capacity claim under 42 U.S.C. § 1983 is *not* a claim against a state that triggers sovereign immunity. *Hafer v. Melo*, 502 U.S. 21, 25 (1991).

The result is that, under the Seventh Circuit's decision, Gerlach and others whose property is taken by a state have no viable federal damages remedy for a violation of the Fifth Amendment's Takings Clause. According to the decision below, they cannot sue the state for damages and they cannot sue officials in their personal capacity.

Closing the federal courthouse to claims seeking compensation for a taking by a state entity cannot be reconciled with founding-era understandings that the state consents to a claim for compensation as a condition of exercising the power to take property. The

possibility that *state* courts might provide relief from an uncompensated taking changes nothing, as overlapping state remedies are irrelevant to the availability of a federal remedy. *Knick v. Township of Scott*, 588 U.S. 180, 194 (2019); *Wilson v. Hawaii*, No. 23-7517, 2024 WL 5036306 (U.S. Dec. 9, 2024) (Thomas, J., dissenting from the denial of certiorari). In any case, Indiana state courts do not recognize the type of takings claim asserted by Gerlach. Pet. 23-24. That is why she filed in federal court. But, according to the Seventh Circuit, she has no viable claim there, either.

In their Brief in Opposition (Opp.), the State Officials' (Officials) misrepresent the scope of the decision below and Gerlach's arguments. With respect to the first question presented, the Officials claim that the court below ruled that Gerlach lacks a valid cause of action, Opp. 7-8, and that this prevents the Court from reaching the sovereign immunity issue. Not so. The Seventh Circuit did not address whether Gerlach lacks a cause of action. The first question is fairly presented and it has fully percolated through the courts of appeals in a manner inconsistent with long-established constitutional principles. This Court should address it.

With respect to the second question presented, whether one may sue state officials in their individual capacity for damages for a violation of the Takings Clause under 42 U.S.C. § 1983, the Officials assert that the decision below does not "bar" such claims.[1]

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[1] This Court recently denied certiorari on a similar question in *O'Connor v. Eubanks*, No. 23-1167 (cert. denied Oct. 15, 2024). But in that case, respondents opposed certiorari on the ground

Yet, the court's rationale for rejecting Gerlach's personal capacity claim—that the taking undergirding the claim "benefits" the state, not individual officials, App. 12a-13a—applies to *every* type of taking. The court's conversion of personal capacity takings claims into barred claims against the state conflicts with this Court's precedent and with the decisions of other courts.

The Court should grant the Petition to hold that claims seeking to hold state officials accountable in their personal capacity for a taking under 42 U.S.C. § 1983 are not subject to sovereign immunity and are no less viable than any other type of constitutionally grounded personal capacity claim. More generally, it should grant the Petition to hold that a federal path exists to obtain damages for an unconstitutional taking by state actors. *Cf. O'Connor v. Eubanks*, 83 F.4th 1018, 1024 (6th Cir. 2023) (Thapar, J., concurring) (noting, in a takings case against a state, "our circuit has closed the federal courthouse doors on takings claims").

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that the court of appeals had held only that personal capacity suits alleging a takings violation are not "clearly established," and thus, that the defendants were entitled to qualified immunity. Eubanks Opp. 16-17 (quoting *O'Connor v. Eubanks*, 83 F.4th 1018, 1022 (6th Cir. 2023)). This case presents no similar obstacle, as the court below definitively held that personal-capacity claims alleging a takings violation are "barred" by sovereign immunity, without regard for qualified-immunity defenses.

REPLY ARGUMENT

I.

THE ISSUE OF WHETHER THE COMPENSATION CONDITION ON A STATE'S POWER TO TAKE PROPERTY WAIVES ITS SOVEREIGN IMMUNITY IS SQUARELY PRESENTED AND WORTHY OF REVIEW

A. The Seventh Circuit disposed of Gerlach's official capacity claims solely on the basis of sovereign immunity

The Officials assert that the Court should avoid review of the first question presented because an "unchallenged, independent ruling bars [Gerlach's] damages claim against Indiana." Opp. 7. They argue that the decision below dismissed Gerlach's claim for just compensation in part by "ruling" that Gerlach lacks a cause of action. Opp. 7-8. Not so.

In dismissing Gerlach's takings claim against state officials in their official capacity, the court held: "Because Indiana state courts are open to hear Gerlach's claims and because no exception to Eleventh Amendment sovereign immunity applies, she cannot obtain compensation in federal court from Indiana-official defendants." App. 11a.

It is true that the court below noted that this Court was considering the availability of a constitutional cause of action for just compensation at the time of the Seventh Circuit proceedings,[2] and that this issue may pose an "obstacle." App. 7a. But the Seventh Circuit

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[2] During the Seventh Circuit appeal in this case, the Court granted certiorari and held oral argument in *DeVillier v. Texas*, 601 U.S. 285 (2024).

did not go any further. It did not hold that Gerlach lacked a cause of action. Instead, the court concluded that even if a cause of action for compensation arises directly under the Fifth Amendment, "*sovereign immunity* [ ] disposes of Gerlach's claim." *Id.* (emphasis added). In other words, the lower court refrained from passing on the cause of action issue, dismissing Gerlach's claim based on sovereign immunity alone. App. 7a, 11a.

There was good reason for the Seventh Circuit's restraint. No party briefed or argued the issue of whether Gerlach possessed a valid cause of action in the district court or in the Seventh Circuit. Thus, no cause of action issue was ever before the district court or Seventh Circuit and it was never passed on by any court. As a result, it is not before this Court.[3]

B. The Officials fail to address the conflict between sovereign immunity and the deeply-rooted compensation condition on the state's takings power

The Officials claim that applying sovereign immunity to bar Gerlach's takings claim against Indiana officials does not conflict with this Court's precedent or constitutional tradition. This argument fails because it ignores the heart of Gerlach's arguments.

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[3] The Court has refused to decide issues which were not presented to the court of appeals, *McCullough v. Kammerer Corp.*, 323 U.S. 327 (1945); *Duignan v. United States*, 274 U.S. 195, 200 (1927), and where the court of appeals did not consider the issue, *Adickes v. S. H. Kress and Co.*, 398 U.S. 144, 147 n.2 (1970).

As the Petition emphasizes, the historic common law understanding that a sovereign's power to take property is conditioned on its accession to an owner's right and claim to compensation renders sovereign immunity inapplicable to a takings claim. Pet. 18-19. The states' power to take property has always been linked to, and contingent upon, the understanding that the sovereign is subject to a demand for payment for what it takes. Therefore, when a state takes property without just compensation, the pre-existing principle that the owner has a right to claim compensation from the state operates as consent to an owners' suit for compensation and/or a waiver of its sovereign immunity from such a suit. Pet. 3; *id.* at 18-19.

The Officials fail to address these principles. Instead, they argue that the text of the Takings Clause and Fourteenth Amendment do not alone abrogate sovereign immunity. Yet, under Petitioner's position, the Fifth Amendment and Fourteenth Amendment are relevant not because they did something new to abrogate state immunity, but because they incorporate and confirm the pre-existing common law tradition that a state consents to pay for what it takes out of its treasury. Pet. 18. This long-established principle negates application of sovereign immunity to compensation-seeking takings claims against states. The Seventh Circuit's application of sovereign immunity to Gerlach's takings claim conflicts with these historic understandings. *See Dep't of Transp. v. Mixon*, 312 Ga. 548, 551 (2021) (holding "the principle that private property may not be appropriated by the government without compensation" waives sovereign immunity from a claim seeking relief from an uncompensated taking).

C. That the circuit courts have wrongly resolved the sovereign immunity/takings issue justifies immediate review

The Officials highlight the fact that most circuit courts, including the court below, have concluded that sovereign immunity bars claims seeking compensation for a taking by a state. Opp. 12. But this demonstrates that the issue has percolated enough for the Court to grant certiorari. *Cf. Baker v. City of McKinney*, No. 23-1363, 2024 WL 4874818, at *2 (U.S. Nov. 25, 2024) (Sotomayor and Gorsuch, JJ., respecting denial of certiorari) (whether "there is an 'objectively necessary' exception to the Takings Clause" is "an important and complex question that would benefit from further percolation").

This is particularly true where the circuit courts' decisions are irreconcilable with common law just compensation principles and the American constitutional tradition. *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[.]"). In holding that sovereign immunity bars takings claims against states, the appellate courts have overlooked the fact that states exercise their power to take property only by consenting, *a priori*, to property owner claims on the state's treasury for just compensation. Their error continues to undermine the ability of property owners to vindicate their constitutional property rights against state entities, as federal courts continue to routinely dismiss unconstitutional takings claims on sovereign immunity grounds. *Heights Apartments, LLC v. Walz*, No. 23-2686, 2024 WL 4850745, at *1 (8th Cir. Nov. 21, 2024) ("Heights argues that the self-

executing damages remedy of the Just Compensation Clause overrides a State's Eleventh Amendment immunity. But we have rejected this argument."); *Clemente Properties, Inc. v. Pierluisi Urrutia*, 693 F. Supp. 3d 215, 247-48 (D.P.R. 2023) (noting that the "Court has not addressed whether Eleventh Amendment immunity applies to takings claims against states or territories").

This Court has never shied away from an important question, like whether states can avoid their common law and constitutionally-based agreement to pay for a taking by invoking sovereign immunity, just because the lower courts have incorrectly decided it. It should not do so here. *See Rehaif v. United States*, 588 U.S. 225, 238-39 (2019) (Alito, J., dissenting) (majority decision overturns interpretation of statute adopted by "every single Court of Appeals").

II.

THE QUESTION OF WHETHER ONE CAN RAISE A PERSONAL CAPACITY TAKINGS CLAIM UNDER 42 U.S.C. § 1983 IS PRESENTED

The Officials agree that the Seventh Circuit held that sovereign immunity "barred" Gerlach's personal capacity takings claim under 42 U.S.C. § 1983. App. 13a. Yet, they assert that the ruling was limited to Gerlach's particular claim, and thus, that the lower court's summary rejection of a personal capacity takings claim is limited to the facts of the case. Opp. 29. The reasoning of the decision belies this assertion, and it would turn every type of takings claim that

could be raised by a personal capacity suit into a barred claim against the state itself.

In ruling that Gerlach's individual capacity takings claim is actually a claim against the state that triggers sovereign immunity, the Seventh Circuit emphasized that the property allegedly taken from Gerlach (i.e., her interest funds) "flowed to the state, not individual state employees," App. 12a-13a. The court explained: "Because the State of Indiana benefitted from retaining interest earned on Gerlach's property," Gerlach's suit "is actually against the State of Indiana." App. 13a.

This rationale logically extends to every type of taking claim that one might raise under 42 U.S.C. § 1983. After all, when state officials take property pursuant to their authority to advance a state program or goal, the property they appropriate *always* flows to the state, not to individual officials. The state always "benefits" from a taking carried out by officials in furtherance of state programs. Indeed, a benefit to the public is a necessary predicate to a lawful taking. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 543 (2005).

The court's ruling effectively eliminates the personal liability of state officials when they unconstitutionally take private property, creating a strict and unprecedented sovereign immunity barrier to personal capacity takings claims under 42 U.S.C. § 1983.[4]

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[4] Consequently, the Seventh Circuit's final refrain, that it did not "resolve whether an individual can be held liable for a Fifth Amendment takings violation," is hollow. The court did exactly

The resulting closure of the federal courts to personal capacity takings claims on sovereign immunity grounds directly conflicts with this Court's decision in *Hafer*, in which the Court stated: "Insofar as respondents seek damages against Hafer personally, the Eleventh Amendment does *not* restrict their ability to sue in federal court. . . . The Eleventh Amendment does not bar such suits[.]" 502 U.S. at 31 (emphasis added); *see also*, *New Orleans Towing Ass'n v. Foster*, 248 F.3d 1143, at *4 (5th Cir. 2001) (holding that *Hafer* rejected the argument that state officials "are protected from [a personal capacity] suit by the Eleventh Amendment because, at the time of the alleged injury to the Plaintiffs, they were enforcing state law").

The Officials do not seriously deny that the decision below is in tension with *Hafer*, but they assert that there is little development of the issue in the lower courts and, thus, little conflict. This is incorrect. In *Suever v. Connell*, 579 F.3d 1047, 1060-61 (9th Cir. 2009), the Ninth Circuit relied on *Hafer* in coming to the opposite conclusion as the court below, holding that "a plaintiff *may* pursue a 42 U.S.C. § 1983 claim against a state official seeking to impose personal liability on that official, such that the money comes from the official's *own* resources. . . . In that instance, the Eleventh Amendment is *not* implicated[.]") (emphasis added); *see also Buckles v. King County*, 191 F.3d 1127, 1132 n.6 (9th Cir. 1999) ("The Board members assert that the suit is also barred by the

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that for all practical purposes in concluding that sovereign immunity bars a compensation-seeking takings claim against individual officers whenever the taking benefits the state, as it always does.

Eleventh Amendment because the suit is 'truly against the Hearings Board,' a state agency. The Buckles, however, alleged claims against the Board members in their personal capacities, thus avoiding the Eleventh Amendment bar." (citing *Hafer*, 502 U.S. at 25)).

The Officials also may think the Fourth and Sixth Circuit's precedent does not foreclose personal capacity takings claims, in conflict with the First Circuit, but the federal courts have come to the opposite conclusion and recognize the conflict. *See Untalan v. Stanley*, No. 2:19-CV-07599, 2020 WL 6078474, at *9 (C.D. Cal. Oct. 15, 2020) (noting that the Fourth and Sixth Circuits have found that "Fifth Amendment takings claim cannot be brought against individuals sued in their personal capacities"); *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 the Fourth Circuit's caselaw for the proposition that "monetary relief is unavailable against persons sued in their individual capacities for a taking"); *see generally*, *Bridge Aina Le'a, LLC v. Hawaii Land Use Comm'n*, 125 F. Supp. 3d 1051, 1075 (D. Haw. 2015) (noting the conflict among the courts).

The Court should grant the Petition to address the conflict among the federal courts on the viability of personal capacity suits seeking damages for a violation of the Takings Clause. The Court should hold that people like Gerlach may sue state officials in federal court in their personal capacity for unconstitutionally taking property, without facing preclusive, threshold barriers, like sovereign immunity, that do not apply to other types of personal capacity suits.

CONCLUSION

The Court should grant the Petition.

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Respectfully submitted,

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