

App No. \_\_\_\_\_

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IN THE  
**Supreme Court of the United States**

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America West Bank Members, LC,

*Applicant*

v.

State of Utah, *et al.*

*Respondents.*

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**On Application for an Extension of Time to File Petition for a Writ of  
Certiorari to the United States Court of Appeals for the Tenth Circuit**

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March 7, 2025

## **Corporate Disclosure Statement**

Pursuant to Supreme Court Rule 29.6, America West Bank Members, LC states that it has no parent corporation and that no publicly held company owns 10% or more of Applicant's stock.

To the Honorable Neil M. Gorsuch, as Circuit Justice for the United States Court of Appeals for the Tenth Circuit:

In accordance with this Court's Rules 13.5, 22, 30.2, and 30.3, Applicant American West Bank Members, LC (AWBM) respectfully requests that the time to file its petition for a writ of certiorari be extended for 30 days, up to and including Wednesday, April 16, 2025. The Court of Appeals issued its opinion on August 14, 2024 (Exhibit A) and denied rehearing en banc on December 16, 2024 (Exhibit B). Absent an extension of time, the petition would be due on March 17, 2022. The jurisdiction of this Court is based on 28 U.S.C. 1254(1). This request is unopposed by either Respondent, the United States or the State of Utah.

### **Background**

This case presents a question of exceptional importance. The State of Utah seized an allegedly troubled bank with more than \$300 million in assets in an ex parte proceeding and immediately transferred the assets to the Federal Deposit Insurance Corporation (FDIC), thereby foreclosing as a matter of federal law any challenge authorized by state law to the seizure by state officials.

On May 1, 2009, the Utah Department of Financial Institutions (UDFI) seized America West Bank (the "Bank"), the solely-owned asset of AWBM, along with its assets. App. A, at A-1, A-4-8. UDFI utilized an ex parte petition to the Second District Court for the State of Utah seeking an order granting the commissioner of UDFI possession of the Bank. *Id.* at 7. The Utah court granted the petition for possession without notice to AWBM. *Id.* at 6-7.

Immediately after obtaining the Order of Possession, the UDFI appointed the Federal Deposit Insurance Corporation (FDIC), which attended the ex parte hearing, as the receiver for the Bank. *Id.* at 8. Thus, the commissioner no longer had possession of the bank and could not “surrender possession” of the Bank pursuant to Utah Code Ann. § 7-2-3(1)(c), which authorizes a post-deprivation hearing that could “order the commissioner to surrender possession of the institution,” provided that a challenge is filed within 10 days.

AWBM sued in state court and had its complaint dismissed in the trial court, but a successful review in the Utah Supreme Court revived the case. *Am. W. Bank Members, L.C. v. State*, 342 P.3d 224 (Utah 2014). The refiled state court case was removed to federal court. The operative complaint alleged violations of both procedural and substantive due process, as well as takings violations. It further alleged that a post-seizure injunction could not have protected the rights or injuries sustained by AWBM and that the change of possession from Utah to the FDIC foreclosed effective equitable relief.

The UDFI moved for summary judgment, arguing that AWBM lacked standing because its claims now belonged to the FDIC, as the Bank’s receiver, by virtue of 12 U.S.C. § 1821(d)(2)(A). *Am. W. Bank Members v. Utah*, No. 2:16-CV-326, 2023 WL 4108352, at \*4 (D. Utah June 21, 2023), *aff’d*, No. 23-4091, 2024 WL 3812451 (10th Cir. Aug. 14, 2024). The district court agreed. *Id.* at \*6.

On appeal, the Tenth Circuit held that AWBM failed to plead that it was deprived of a post-deprivation hearing in violation of due process and that, when it

raised the issue, it was too late as it occurred “for the first time” in a May 2022 summary-judgment motion. App. A, at A-12. To reach that conclusion, the panel relied, in part, on the district court’s observation that it “saw no allegation that AWBM was “precluded from objecting” to the seizure under Utah Code Ann. § 7-2-3(1)(a),” *id.* at 14, despite the procedure’s inapplicability to the FDIC as receiver.

The panel’s ruling conflicts with rules, precedent, and sister circuit holdings. It conflates pleading necessary facts, which are amply contained in the complaint, with the relief sought, which remains available even if “the party has not demanded that relief in its pleadings.” Fed. R. Civ. P. 54(c). Sister circuits uniformly permit cases to go forward under those circumstances. *See, e.g., A.W. by & Through J.W. v. Coweta Cnty. Sch. Dist.*, 110 F.4th 1309, 1315 (11th Cir. 2024); *Cole v. Cardoza*, 441 F.2d 1337, 1343 (6th Cir. 1971); *Hawkins v. Frick-Reid Supply Corp.*, 154 F.2d 88, 89 (5th Cir. 1946); *Keiser v. Walsh*, 118 F.2d 13, 14 (D.C. Cir. 1941).

AWBM filed a timely petition for rehearing en banc. Although the Tenth Circuit ordered the State of Utah and the FDIC to respond to AWBM’s petition, as it had for the merits briefing, the FDIC filed, and Utah joined the FDIC brief. The petition for rehearing en banc was denied. App B, at B-1.

The central issue in this case remains whether the sequence of events that Utah utilized in seizing and transferring this bank to the FDIC, thereby insulating it and the FDIC from further review of the seizure, and lodging any rights to complain in the FDIC, which had no basis to object.

### **Reasons For Granting an Extension of Time**

After requesting a response to Applicant’s petition for rehearing en banc, the Tenth Circuit denied rehearing on November 16, 2024. Since that time, Counsel of Record, a solo practitioner, has had substantial commitments in pending cases, including:

- An amicus brief in *Cunningham v. Cornell University*, No. 23-1007, filed in the Supreme Court of the United States on November 21, 2024;
- A motion for judgment notwithstanding the verdict or a new trial in *Shugars v. Glismann*, No. 2024CA1256, filed in the U.S. District Court for the District of Colorado on November 25, 2024;
- A brief opposing a motion to dismiss in *6064 LLC v. City of Orlando*, No. 6:24-cv-01665, filed in the U.S. District Court for the Middle District of Florida on December 11, 2024;
- A reply brief in support of a motion for judgment notwithstanding the verdict or a new trial in *Shugars v. Glismann*, No. 2024CA1256, filed in the U.S. District Court for the District of Colorado on January 7, 2025;
- An amicus brief in *Smith & Wesson v. Estados Unidos Mexicanos*, No. 23-1141, filed in the Supreme Court of the United States on January 17, 2025;
- An amicus brief in *Mayor and City Council of Baltimore v. BPP.L.C.*, No. ACM-REG-1290-2024, filed in the Appellate Court of Maryland on January 21, 2025;
- An amicus brief in *Fuld v. Palestinian Liberation Organization*, Nos. 24-20 & 24-151, in the Supreme Court of the United States on February 4, 2025;

- A motion for and brief in support of a preliminary injunction in *6064 LLC v. City of Orlando*, No. 6:24-cv-01665, filed in the Middle District of Florida on February 26, 2025;
- A motion for admission to the Colorado Bar filed on February 28, 2025;
- An amicus brief in *Brown v. Saint-Gobain Performance Plastics Corp.*, No. 24-1869, to be filed in the First Circuit on March 10, 2025;
- An answer brief and cross-appeal in *Whitt v. Colorado Retina Associates*, No. 2024CA1256, to be filed in the Colorado Court of Appeals on March 12, 2025;
- Participation in the inaugural member advisory group meeting of the American Law Institute in Philadelphia on the Restatement of Law, Constitutional Torts.
- Attendance at the members advisory group meeting of the American Law Institute in Philadelphia on the Restatement of the Law, Constitutional Torts on March 14, 2025;
- A motion for judgment notwithstanding the verdict or a new trial in *McCluskey v. Janssen*, No. 2022CV30533, in the Colorado District Court for Adams County on March 17, 2025; and,
- An amicus brief in *Beaubien v. Trivedi*, No. 167831, to be filed in the Michigan Supreme Court on March 24, 2025.

### **Conclusion**

Applicant requests that the time to file a writ of certiorari in the above-captioned matter be extended 30 days to and including April 16, 2025.

Dated this 7th day of March, 2025.

Respectfully submitted,

/s/ Robert S. Peck

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