No. _____

In The
Supreme Court of the United States

DENNIS O'CONNOR,

Petitioner,

v.

RACHAEL EUBANKS, in her personal capacity;
TERRY STANTON, in his personal capacity;
STATE OF MICHIGAN,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth 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 a state official 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 categorically "barred," as the Sixth Circuit holds?

CORPORATE DISCLOSURE STATEMENT

Petitioner has no parent corporation and no stock.

STATEMENT OF RELATED PROCEEDINGS

- *O'Connor v. Eubanks*, 83 F.4th 1018 (6th Cir. Oct. 6, 2023)
- *O'Connor v. Eubanks*, No. 1:21-cv-12837, 2022 WL 4009175 (E.D. Mich. Sept. 2, 2022)
- *O'Connor v. Eubanks*, No. 1:21-cv-12837, 2022 WL 6576955 (E.D. Mich. June 30, 2022)

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PETITION FOR WRIT OF CERTIORARI

Dr. Dennis O'Connor respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 83 F.4th 1018 (6th Cir. 2023) and reprinted at App.1a. The order of the district court granting Respondents' motion to dismiss is reported at 2022 WL 4009175 (E.D. Mich. Sept. 2, 2022), and reprinted at App.21a.

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 Sixth Circuit issued its decision on October 6, 2023, App.1a, and denied rehearing en banc on December 19, 2023. App.51a. This Court granted an extension of time of 40 days to file a Petition for Certiorari, extending the filing date up to and including April 29, 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[.]

Mich. Comp. Laws § 567.223 and §§ 567.242–567.245 and are set out at App.52a–56a.

INTRODUCTION AND SUMMARY OF REASONS FOR GRANTING THE PETITION

This case presents two important and recurring questions pertaining to whether and when a property owner can sue state officials for an unconstitutional taking of private property. The first question asks whether a state's sovereign immunity bars a suit seeking damages from the state or its officials for an unconstitutional taking of property.

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 its obligation to compensate an owner when it takes property without providing contemporaneous compensation. *Community Housing Improvement Program v. City of New York (CHIP)*, 492 F. Supp. 3d 33, 40 (E.D.N.Y. 2020).

In the decision below, the Sixth Circuit resolved this clash in favor of sovereign immunity. App.9a. Its decision carves out 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 promises and agrees to pay compensation when it exercises the power to take property. The act of taking property itself negates the state's sovereign immunity from a claim for compensation, *PennEast Pipeline Co. v. New Jersey,* 141 S. Ct. 2244, 2258 (2021); *Gunter*, 200 U.S. at 284, but the Sixth Circuit held to the contrary.

The second question asks whether a property owner may sue state officials in their personal capacity for an unconstitutional taking of property under 42 U.S.C § 1983. This Court has held that personal capacity suits are permissible against state officials, notwithstanding sovereign immunity. *Hafer v. Melo*, 502 U.S. 21 (1991). Yet, the decision below

holds that personal capacity claims under 42 U.S.C § 1983 are categorically barred in the Sixth Circuit when they assert a violation of the Takings Clause. App.6a n.2; *see also* App.12a (Thapar, J., concurring). Thus, the Sixth Circuit summarily dismissed O'Connor's personal capacity takings claim, without applying the normal "qualified immunity" analysis that governs the viability of such claims.[1] *District of Columbia v. Wesby*, 583 U.S. 48, 62 (2018); *see also* App.11a–12a (Thapar, J., concurring).

In so doing, the decision below exacerbates a deep conflict among the federal courts on whether a personal capacity suit under Section 1983 is viable when it asserts an unconstitutional taking of property. *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.") (citing *Vicory v. Walton*, 730 F.2d 466, 467 (6th Cir. 1984), and *O'Connor v. Eubanks*, 83 F.4th 1018, 1026 (6th Cir. 2023) (Thapar, J., concurring)); *Hinkle Family Fun Center, LLC v. Grisham*, No. 22-2028, 2022 WL 17972138, at *4 n.2 (10th Cir. Dec. 28, 2022) ("[s]ome circuits and judges have rejected or expressed

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[1] Under this Court's "qualified immunity" doctrine, a personal capacity claim under Section 1983 is generally subject to dismissal unless the plaintiff shows that (1) the officials violated a federal right, and (2) the unlawfulness of their conduct was "clearly established at the time." *District of Columbia v. Wesby*, 583 U.S. 48, 63 (2018) (quoting *Reichle v. Howards*, 566 U.S. 658, 664 (2012)).

doubt about such claims, while "[o]thers have indicated (at least implicitly) that such claims might proceed").

The Sixth Circuit's rejection of personal capacity takings suits under 42 U.S.C § 1983 is also inconsistent with this Court's jurisprudence, App.11a (Thapar, J., concurring), and with "constitutional history." App.13a–15a (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 Sixth Circuit, routinely allow litigants to bring personal capacity suits for the violation of other constitutional rights. *See* App.6a–9a (adjudicating a personal capacity due process claim).

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 damages for an unconstitutional taking of property, thereby ensuring that a viable federal remedy exists for a taking by a state. *See* App.10a (Thapar, J., concurring) ("[O]ur circuit has closed the federal courthouse doors on takings claims."); *see also* App.18a.

STATEMENT OF THE CASE

A. Legal Background

Michigan's Uniform Unclaimed Property Act ("UUPA") governs the disposition of unclaimed (but not abandoned) property. Such property can include monies from checking and savings accounts, unpaid wages, securities, life insurance payouts, uncashed checks, unredeemed rebates, and the contents of

inactive safe deposit boxes. App.3a. When these assets are held by third parties without activity for a period of time, they become treated under Michigan law as "unclaimed property," and are subject to the state's UUPA. *Id.*

When the state acquires unclaimed property under the Act, it "assumes custody and responsibility for the safekeeping of the property," Mich. Comp. Laws § 567.241(1), holding it "in trust for the benefit of the rightful owner." App.3a (citation omitted).

The state may liquidate assets in its custody after the owner is given notice and fails to file a claim for return of the property. App 3a. If the state liquidates assets, the UUPA allows the owner to file an administrative claim for the "net proceeds" of the liquidation sale. *Id.* The Act also allows property owners to recover interest earned on their assets while in state control, but only if the property was generating interest before the state took custody. *Id.* If the assets were not accruing interest before the state took custody, the owner cannot recover any interest that accrued on their property. App.3a–4a.

B. Facts and Procedure

Two corporations holding monies belonging to O'Connor delivered the funds to the state pursuant to the UUPA. App.4a. When O'Connor discovered that state officials were holding his private property under the UUPA, he filed an administrative claim to recover his funds. *Id.* The state subsequently returned the principal amount to O'Connor, but did not provide him with the interest generated by his funds while in state custody. *Id.*

O'Connor subsequently filed a class action against the State of Michigan and two Michigan officials—Rachael Eubanks, the State Treasurer, and Terry Stanton, the State Administrative Manager of the Unclaimed Property Program (UPP)—in their personal capacity. App.4a. O'Connor's complaint asserted that the state and its officials had unconstitutionally taken his property, namely, the interest earned on his funds, without just compensation or due process. *Id.*; s*ee also Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980) (finding a taking from the confiscation of interest). O'Connor sought damages against the state directly under the Fifth Amendment, and against the two state officials in their personal capacities under 42 U.S.C. § 1983. *Id.*

1. The district court decision

The state defendants moved to dismiss O'Connor's complaint on the ground that sovereign immunity barred his claims against the state, and that qualified immunity shielded the officials in their personal capacities.[2] App.4a–5a. A Magistrate Judge soon issued a report recommending that the district court grant the motion. The Magistrate concluded that sovereign immunity barred O'Connor's takings and due process claims against the state and against Eubanks and Stanton, in their official capacities. App.39a–41a. She further concluded that the state officials were immune from O'Connor's personal

[2] Defendants did not challenge O'Connor's right to sue directly under the Fifth Amendment. *See DeVillier v. Texas*, 601 U.S. ---, --- S. Ct. ---, 2024 WL 1624576 (2024) (observing that the Court has not yet identified the Fifth Amendment as a source of a cause of action for damages).

capacity claims under "qualified immunity" principles because the officials' "actions were mandated by Michigan statute" and "non-discretionary." App.47a.

The district court subsequently issued an order adopting the Magistrate's report. *See* App.21a–33a. The district court judge agreed that "'the States' sovereign immunity protects [state defendants] from takings claims for damages in federal court,'" and that "no exception applies to Plaintiff's claims." App.29a. The court further agreed with the Magistrate Judge's conclusion that the "individual Defendants are entitled to qualified immunity," because their actions were "in accordance with the Act," *id.*, and "Plaintiff has not shown that it is clearly established, either under the Takings Clause or the Due Process Clause, that he has the right to collect interest on funds that were non-interest-bearing when abandoned." App.30a.

2. The decision below

On appeal, the Sixth Circuit affirmed the district court's decision in part and reversed in part. The court upheld the district court's conclusion that sovereign immunity barred O'Connor's takings claim against the state. It stated "circuit precedent holds that 'the Eleventh Amendment bars takings claims against states in federal court, as long as a remedy is available in state court'" and "[a] remedy is available [to O'Connor] in state court." App.9a (quoting *Skatemore, Inc. v. Whitmer*, 40 F.4th 727, 734 (6th Cir. 2022)).

The Sixth Circuit also affirmed the dismissal of O'Connor's unconstitutional takings claim against state officials in their personal capacity, but on different grounds than the district court. Pointing to

Sterling Hotels, LLC v. McKay, 71 F.4th 463, 468 (6th Cir. 2023), which itself relies on *Vicory*, 730 F.2d at 467, the court below ruled that "individual liability for takings claims is not 'clearly established,'" and, thus, the officials are not subject to suit. App.6a (quoting *Sterling Hotels*, 71 F.4th at 468). In the Sixth Circuit's view, the officials were immune simply because they are "being sued in their individual capacities *for takings claims*." App.6a (emphasis added).

Thus, the court emphasized it was applying a "clear" Sixth Circuit rule that "*bars* individual liability for takings claims under 42 U.S.C. § 1983," App.6a n.2 (emphasis added). The court therefore affirmed dismissal of O'Connor's personal capacity takings claims without engaging in the standard qualified immunity analysis applied by the district court. *See* App.42a (determining whether qualified immunity shielded the officials from O'Connor's personal capacity takings claim based on whether they violated his "clearly established" constitutional rights); *see also* App.29a–30a.

However, with respect to O'Connor's *due process claim* against the officials in their personal capacity, the Sixth Circuit reversed the district court's judgment of dismissal. In so doing, the court below applied the traditional qualified immunity analysis, considering whether the defendant state officials violated a "clearly established" due process right. App.7a–9a. The court initially determined that O'Connor had a constitutionally protected property right in interest income, and that the officials had failed to give him notice that the state was taking such interest. App.7a ("When the government takes

custody of private property and earns interest on it, that interest belongs to the owner."). Concluding that the notice is a "clearly established" due process right, and that the officials violated that right, the court held that the officials were not qualifiedly immune from O'Connor's claim that they were liable in their personal capacity for violating the Due Process Clause.[3]

3. Judge Thapar's concurrence

In a concurring opinion, Judge Thapar took issue with the court's treatment of O'Connor's personal capacity takings claim. The concurrence explained that the Sixth Circuit wrongly holds that "there isn't [a cause of action] against individual officials" for a violation of the Takings Clause. App.12a (citing *Vicory*, 730 F.2d at 467). Judge Thapar considered this categorical bar to personal capacity takings suits against state officers "wrong," *id.*, because such claims were common "in the early decades of our republic." App.15a. Thus, he deemed the court's refusal to allow personal capacity takings claims "inconsistent with our constitutional history." *Id.*

Judge Thapar also objected to the majority decision, and the circuit precedent on which it relies, on the ground that it entirely "forecloses" takings claims in federal court against state defendants. App.16a. He explained that, under Sixth Circuit precedent, sovereign immunity bars takings claims against state officials in their official capacity, while

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[3] Defendants plan to file a Petition for Certiorari asking the Court to review the portion of the Sixth Circuit's decision reviving O'Connor's personal capacity due process claim. *See Eubanks v. O'Connor*, Supreme Court Docket No. 23A758, Application to Extend Time to File a Petition (Feb. 9, 2024).

cases like *Vicory*, 730 F.2d at 467, prohibit takings claims against officials in their individual capacity. *Id.* Judge Thapar's concurring opinion noted that this framework forces plaintiffs to "litigate takings claims in state court," and thereby revives a state litigation rule that this Court deemed "wrong" in *Knick*. App.16a.

Given these concerns, Judge Thapar concluded that "[a]t the very least ... our circuit should permit takings claims against officials under section 1983" in their personal capacity. App.19a. The concurrence observed that "section 1983 can provide [such] a remedy" "when a state official 'subjects' a person to an unconstitutional taking." *Id.* (citing 42 U.S.C. § 1983); *see also* Cong. Globe, 42d Cong., 1st Sess. 85 (1871) (Rep. Bingham) (citing states' failure to adequately compensate takings as a basis for enacting section 1983). O'Connor subsequently petitioned the Sixth Circuit for rehearing en banc, but the request was denied.

O'Connor now petitions this Court for a writ of certiorari.

REASONS FOR GRANTING THE PETITION

This Court has held that 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 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 Sixth Circuit held that (1) sovereign immunity bars O'Connor from suing Michigan for unconstitutionally taking interest income earned on his private funds, and that (2) Section 1983 does not allow him to sue state officials in their personal capacity for unconstitutionally taking his property. App.5a, 9a; *see also* App.10a–11a (Thapar, J., concurring).

This decision leaves property owners in the Sixth Circuit without a meaningful federal compensatory remedy for an unconstitutional taking of property by a state. App.10a–11a (Thapar, J., concurring). Moreover, the decision below conflicts with this Court's precedent, with constitutional history, and magnifies a conflict among the 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*, 141 S. Ct. at 2258.

At the same time, this Court has affirmed that the states' power to take property is conditional upon payment of just compensation. *United States v. Great Falls Mfg. Co.*, 112 U.S. 645, 656 (1884). 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. App.11a (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 (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 little dispute that the state kept interest earned on O'Connor's funds while in state custody, it contends that it is immune from his suit seeking just compensation for this violation of the Takings Clause. *See* App.9a. 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).

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 engrained 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 arose from 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 Sixth Circuit's conclusion that Michigan is immune from O'Connor's claim that it owes him compensation for taking his property cannot be reconciled with these 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, a 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*, 141 S. Ct. at 2258.

The Sixth Circuit's contrary conclusion leads to the strange result that states are constitutionally bound to pay just compensation, yet can avoid that duty simply by refusing to pay and then invoking sovereign immunity to avoid a lawsuit. *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.").

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

The Sixth 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; emphasis added). 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 Sixth Circuit's conclusion that Michigan is immune from O'Connor's takings claim conflicts with this Court's 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.") (emphasis added); *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). But the Court rejected this contention. *First English*, 482 U.S. at 316 n.9. Although this portion of the *First*

English opinion does not fully address the sovereign immunity/takings issue, it strongly suggests that the Court did not consider sovereign immunity as a bar to 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 Sixth Circuit's conclusion that sovereign immunity prevents O'Connor from suing Michigan 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[.]").

One more comment is warranted. In justifying its decision, the Sixth Circuit observed that sovereign immunity "bars a claim against the State in federal court as long as state courts remain open to entertain the action." App. 9a. But this Court has made clear that sovereign immunity is not forum-dependent; it applies 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 close federal courts to Fifth Amendment takings claims, 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).

The Court should grant the Petition to hold 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 Sixth Circuit also held that state officials cannot be sued in their personal capacity under Section 1983 for taking property. This decision magnifies an entrenched conflict among the federal courts, 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*, this 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). In *Hafer*, the Court confirmed these principles, holding 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 extends to unconstitutional takings claims. Indeed, courts remain in conflict on the issue.

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

Some courts have explicitly recognized the viability of Section 1983 personal capacity takings suits, or have implicitly approved them. *See Hinkle Family Fun Center*, 2022 WL 17972138, at *4 n.2 (some federal courts "have indicated (at least implicitly) that such claims might proceed but have denied relief").

The First Circuit is among those courts that have expressly sanctioned 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, "have [] concluded that individual capacity defendants are not liable for federal takings claims." *Bridge Aina Le'a, LLC v. Hawaii Land Use Comm'n*, 125 F. Supp. 3d 1051, 1079 (D. Haw. 2015). 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. 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 Seventh Circuit is in the same camp as the Fourth. In *Gerlach v. Rokita*, 95 F.4th 493 (7th Cir. 2024), the Seventh Circuit considered whether a plaintiff alleging Indiana's Unclaimed Property laws unconstitutionally took her interest income could sue officials in their personal capacity under 42 U.S.C. § 1983. The *Gerlach* court noted that "even though Gerlach names individual current and former state employees, we are 'obliged to consider whether [this claim] may really and substantially be against the state.'" *Id.* at 500 (quoting *Luder v. Endicott*, 253 F.3d 1020, 1023 (7th Cir. 2001) (additional citations omitted)). The *Gerlach* court then held: "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." *Id.* at 500–01. The court reasoned that "[t]he 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." *Id.* at 501. The Seventh Circuit further explained that, "[b]ecause the State of Indiana benefited from retaining interest earned on Gerlach's property, we conclude that Gerlach's suit for compensatory relief is actually against the State of Indiana." *Id.* The *Gerlach* court thus held that Gerlach was barred from asserting a personal capacity takings claim under 42 U.S.C. § 1983. *Id.*

The decision below aligns the Sixth Circuit with the Fourth and Seventh 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 Sixth rejects them under a "clear" rule "bar[ring] individual liability for takings claims under 42 U.S.C. § 1983." App.5a–6a & n.2; *see also* App.11a–13a (Thapar, J., concurring). The decision below thus solidifies the Sixth 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. *Bridge Aina Le'a*, 125 F. Supp. 3d at 1075.

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 have allowed 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*, 730 F.2d at 467).

For its part, the Third Circuit appears skeptical of personal capacity suits asserting a Takings Clause violation under 42 U.S.C. § 1983. *See Merritts v. Richards*, 62 F.4th 764, 769 (3d Cir. 2023). In *Merritts*, 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 has taken 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 on the issue is similar to 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, and yet more disjointed. The Eleventh Circuit itself 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," in tension 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 intervention.

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

The Sixth Circuit's decision to bar personal capacity Section 1983 claims in the takings context also cannot be reconciled with this Court's precedent. Of particular relevance is *Hafer*. There, 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." *Hafer*, 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*, 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 then 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.").

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). Yet, in the decision below, the Sixth Circuit held that the recognized right to sue officials in their personal capacity does not exist at all when the suit asserts an unconstitutional taking. App.6a n.2 (noting that Circuit precedent bars "individual liability for takings claims under 42 U.S.C. § 1983"). The Sixth Circuit's rationale is also contrary to this Court's precedent. The circuit rests its rejection of personal capacity takings suits on the belief that an unconstitutional taking is a "wrong committed by a government body." *Vicory*, 730 F.2d at 467. It reasons that a "[p]laintiff may not maintain a constitutional [takings] cause of action against these defendants who neither have nor claim the eminent domain power, nor any power similar to it." *Id.*

Yet, this Court has made clear that unconstitutional takings can arise from routine exercises of the *police power*, as well as from the power of eminent domain. A regulatory decision that purports to advance environmental, economic, safety, or other public goals, and which has nothing to do with eminent domain, can cause a taking. *Cedar Point*, 594 U.S. at 148–49 (listing a multitude of regulatory actions that can result in a taking). Since state officials can take property even when not clothed with eminent domain authority, the lack of such authority does not justify barring personal capacity takings claims.

In short, 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.

C. The Decision Below Is Inconsistent with Constitutional History

As Judge Thapar's concurring opinion in the decision below emphasizes, the Sixth Circuit's rejection of personal capacity takings claims against state officials is also "inconsistent with our constitutional history." App.15a (Thapar, J., concurring). This is because "[u]ntil the 1870s, the typical recourse of a property owner who had suffered an uncompensated taking was to bring a common law trespass action against the responsible corporation or *government official*." *Knick*, 588 U.S. at 199 (emphasis added). The defendant officials in early takings cases "couldn't raise statutory authorization as a defense" to an unconstitutional taking. "If a state took property without compensation, *the relevant officials* were on the hook for damages." App.14a–15a (Thapar, J., concurring) (emphasis added).

In short, "in the early decades of our republic, lawsuits against officials were a viable remedy for takings." App 15a (Thapar, J., concurring.) Thus, in concluding that people like Dennis O'Connor cannot

personally sue state officials for unconstitutionally taking their property under color of state law, the decision below is contrary to the American legal tradition.

Ultimately, in refusing to allow personal capacity suits under 42 U.S.C. § 1983 when a property owner raises a Takings Clause claim, the Sixth Circuit's decision makes the Fifth Amendment into an inferior constitutional right relative to other constitutional guarantees. After all, courts routinely allow property owners to raise personal capacity claims under 42 U.S.C. § 1983 which rest on the Fourteenth Amendment's Due Process Clause. *See, e.g.*, *Romano v. Bible*, 169 F.3d 1182, 1185 (9th Cir. 1999) (holding that one suing state officials in their personal capacity for a deprivation of property "need to allege nothing more" than that "defendants deprived [plaintiff] of a protected property interest in violation of due process" under "color of state law"); *Wilson v. Civil Town of Clayton*, 839 F.2d 375, 382 (7th Cir. 1988) (reversing the dismissal of due process claims against Town officials). Indeed, in the instant matter, the court below allowed a due process claim to proceed against the defendant officials in their personal capacity, but not a takings claim. App.6a–9a. Closing the courthouse door to 42 U.S.C. § 1983 claims when they are based on the Takings Clause "relegates the Takings Clause 'to the status of a poor relation' among the provisions of the Bill of Rights." *Knick*, 588 U.S. at 189 (quoting *Dolan*, 512 U.S. at 392).

Congress enacted 42 U.S.C. § 1983 "to enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity." *Scheuer*, 416 U.S. at

243 (quoting *Monroe v. Pape*, 365 U.S. 167, 171–72 (1961)). People asserting a violation of the Takings Clause should not be left out of this enterprise. The Court should grant the Petition in part to hold that 42 U.S.C. § 1983 suits seeking to hold state officials personally accountable for an unconstitutional taking "should be handled the same as other claims under the Bill of Rights." *Knick*, 588 U.S. at 202.

CONCLUSION

The Court should grant the Petition.

DATED: April 2024.

Respectfully submitted,

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