No. 18-1404

In the
Supreme Court of the United States

DORSEY EUGENE WALLACE,
Petitioner,

v.

GARY EDWARD WALLACE, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Court of Appeals of Georgia

BRIEF IN OPPOSITION

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OBJECTION TO PETITIONER'S QUESTIONS PRESENTED

Respondents object to the three separate questions to this Court. Petitioner seeks to have this Court determine: (1) whether there is such thing as a judicial taking; (2) if so, what the standard is for a judicial taking; and (3) whether the decision entered by the Georgia Court of Appeals amounts to a judicial taking of Petitioner's stock ownership in a private, family owned company. First and foremost, this Court lacks jurisdiction to review the Court of decision because Petitioner's appeal to this Court was not timely filed and failed to preserve his argument that a taking occurred in this case when he failed to assert this argument in his Petition for Certiorari to the Supreme Court of Georgia. Second, this Court has already answered the questions of whether a judicial taking can exist and the standard for a judicial taking. This case does not meet that standard. See *Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection*, 560 U.S. 702, 715 (2010) and *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 163-165 (1980). Third, this is simply a case involving the specific performance of a contract, between private non-government entities. It is not a taking case. There was no transfer of private property to the government or for the benefit of the public that would implicate the Fifth Amendment. Finally, even if this court has jurisdiction, this case does not involve any legitimate question of federal or constitutional law. There are no novel questions of law raised by this current case and this case does not have any importance to persons

other than the parties to this case. Accordingly, the Petition for Certiorari must be denied.

CORPORATE DISCLOSURE STATEMENT

Wallace Electric Company is a privately owned Georgia Corporation whose sole shareholders are brothers Gary Edward Wallace, Phillip Howard Wallace, and Dorsey Eugene Wallace. Wallace Electric Company does not have a parent corporation. No publicly held company owns 10% or more of Wallace Electric Company.

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OBJECTION TO JURISDICTION

This Court lacks jurisdiction because Petitioner failed to appeal his federal constitutional issue or preserve that issue in his Petition to the Georgia Supreme Court. This case originated as a lawsuit filed by Petitioner in 2011 against his brothers and the family business alleging that Respondents breached fiduciary duties owed to Petitioner as a shareholder. (Pet. App. 1). During the ensuing litigation, both Petitioner and Respondents sought specific performance of the company Bylaws or Buy-Sell Agreement to force a buyout of Petitioner's stock in the company, a buyout that should have occurred when Petitioner ceased employment with the company in 1994. (Pet. App. 2). Petitioner has previously plead that the court's decision to order a buyout of Petitioner's stock at its 1994 or 2003 value, rather than its present day current value, amounts to a taking in violation of the Fifth Amendment. However, Petitioner admits in his own Petition that he "did not raise the issue of judicial taking in his Petition for Writ of Certiorari to the Georgia Supreme Court." (Pet. 15). Petitioner did not give the state's highest court an opportunity to rule on this issue and therefore failed to preserve this issue for this Petition.[1] See *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969); *Crowell v. Randell*, 35 U.S. 368 (1836); *Owings v. Norwood's Lessee*, 9 U.S. 344 (1809); *Miller for Use of United State v. Nicholls,* 17 U.S. 311 (1819); *Safeway Stores, Inc. v. Oklahoma Retail Grocers Ass'n,*

[1] 28 U.S.C. § 1257 confers jurisdiction to the United States Supreme Court to review final judgments or decrees rendered to the highest court in the State in which the decision could be had.

Inc., 360 U.S. 334, 342, n. 7 (1959); *State Farm Automobile Ins. Co. v. Duel*, 324 U.S. 154, 160-163 (1945); *McGoldrick v. Compagnie General Transatlantique*, 309 U.S. 430, 434-435 (1940); *Whitney v. California*, 274 U.S. 357, 362-363 (1927); *Dewey v. Des Moines*, 173 U.S. 193, 197-201 (1899); *Murdock v. City of Memphis*, 87 U.S. 590 (1874).

Even if Petitioner were allowed to petition directly from the Georgia Court of Appeals, his Petition is not timely. The most recent order addressing Petitioner's takings clause argument is in an opinion from the Georgia Court of Appeals dated August 24, 2018, which found that remand was not necessary to decide the takings issue "because the takings argument is without merit. . . a trial court's Order issuing an award in a case pending before it is simply not an unconstitutional taking." (Pet. App. 15; *Wallace v. Wallace*, 345 Ga. App. 764, 774 (2018)). Because Petitioner seeks to revisit the holding from the Georgia Court of Appeals in an August 24, 2018 opinion, Petitioner's Petition is jurisdictionally barred as being beyond the 90-day window for review by this Court. 28 U.S.C. § 2101(c); Sup. Ct. R. 13.

STATEMENT OF THE CASE

A. FACTUAL BACKGROUND

Petitioner and Respondents, Gary Edward Wallace ("Gary") and Phillip Howard Wallace ("Phil") are brothers. Wallace Electric Company ("Wallace Electric" or the "Company") is a family owned business, incorporated in 1959 by the parties' father, Hubert Dorsey Wallace, II, who owned and managed the

business until his death in 2000. (Pet. App. 24). In 1959, when the Bylaws were first enacted, none of the parties had stock in Wallace Electric. (Pet. App. 24). However, the Bylaws contained language that placed restrictions and obligations on shareholders of Wallace Electric requiring that all shareholders must sell their shares back to Wallace Electric if the shareholder's employment at Wallace Electric terminates for any reason. (Pet. App. 24).

Phil and Gary have been employed by Wallace Electric since the early 1980s and took over management of Wallace Electric following the death of their father. Phil and Gary continue to manage the business to this day. (Pet. App. 25). Petitioner, on the other hand, was only employed at Wallace Electric sporadically over the years, most recently from 1987 to 1994. (Pet. App. 25). In 1988, when Phil, Gary, and Petitioner were all employed by Wallace Electric, their father awarded Gary and Phil each 30 shares (25%) of stock, awarded Petitioner 20 shares (16.67% of stock, and kept 40 shares (33.33%) for himself. (Pet. App. 25). In distributing these shares, the parties and their father entered into the "Buy-Sell Agreement of Wallace Electric" ("Buy-Sell Agreement"). The Buy-Sell Agreement covered many of the same shareholder duties and obligations that were previously set forth in the Bylaws, including that any shareholder of Wallace Electric who ceased employment with Wallace Electric for any reason "shall sell, and [Wallace Electric] shall buy" all of the stock owned by the shareholder. (Pet. App. 25). The Agreement also specified that damages for breach of the Agreement were "immeasurable," and thus, the Agreement contemplated specific performance

or other equitable remedies. (Pet. App. 4, 72-73). In signing the Agreement, the parties expressly waived any defense that they had an adequate remedy at law. (Pet. App. 4, 73). However, the Buy-Sell Agreement expired by its own terms twenty (20) years after the date of its execution. (Pet. App. 25, 71). Petitioner left his employment with Wallace Electric in 1994 and was never employed there again. (Pet. App. 25). Following Petitioner's leave from Wallace Electric, Phil and Gary materially changed the business model of Wallace Electric, which resulted in substantially greater amounts of profit for Wallace Electric than Wallace Electric earned while Plaintiff was employed with the company. (Pet. App. 27). Petitioner admittedly did not contribute in any way to the increased profits and value of Wallace Electric, while Phil and Gary, on the other hand, worked long hours and sacrificed income in order to build the business. (Pet. App. 27-28).

The parties agree that ownership of stock in Wallace Electric is intended to be reserved for employees of the company. (Pet. App. 25). Petitioner even testified at trial in this matter that he has "known it from the very, very beginning," and testified that no other employee has ever kept stock beyond their period of employment. (Pet. App. 25). Unfortunately, it wasn't until 2003, a few years after Phil and Gary took control of Wallace Electric that Phil and Gary contacted Petitioner to request that he sell his stock back to the company. (Pet. App. 5). It was at this time that Petitioner adamantly refused to sell his stock. (Pet. App. 5). Phil and Gary even reached out to Petitioner after 2003 to discuss the company's repurchase of Petitioner's stock, but to no avail. (Pet. App. 5). During

these discussions, the parties never discussed a purchase price for the stock because Petitioner adamantly refused to sell. (Pet. App. 5). This litigation was initiated in 2011 when Petitioner filed a complaint for an accounting and damages against Gary and Phil, alleging breach of fiduciary duty and tortious deprivation of his interest in Wallace Electric. (Pet. App. 5). Respondents then filed an answer and counterclaim seeking damages and fees for abusive litigation, and eventually an amended counterclaim arguing that, as a matter of equity, Petitioner should be ordered to sell his stock back to Wallace Electric at the stock's value in 1994, when Petitioner ceased his employment with Wallace Electric. (Pet. App. 5). The trial court and Georgia Court of Appeals both found that Respondent's counterclaims were timely because Petitioner's breach of the Buy-Sell Agreement and refusal to sell his stock to Wallace Electric Company continued through 2008, therefore, the complaint was filed within the statute of limitations, and the counterclaims related back to the timely-filed complaint. (Pet. App. 7). At a bench trial, the parties agreed that there should be a buyout of Petitioner's shares, but the parties disagreed about which document controlled the buyout and the appropriate year for valuing Petitioner's stock. (Pet. App. 6, n. 4). The trial court determined that an equitable remedy was appropriate to give effect to the parties' intent and required the conclusion that Petitioner be held to the terms of the Buy-Sell Agreement and that as a matter of equity, the company should only have to pay Petitioner the 1994 value of his stock (because Petitioner had a duty to sell his stock in 1994 when he ceased employment with the company). (Pet. App. 7).

The Georgia Court of Appeals agreed with the trial court's determination that the equitable remedy of specific performance is appropriate in this case. (Pet. App. 8). The Georgia Court of Appeals stated,

> "Equity jurisdiction is established and allowed for the protection and relief of parties where, from any peculiar circumstances, the operation of the general rules of law would be deficient in protecting from anticipated wrong or relieving for injuries done." O.C.G.A. § 23-1-3. "Equity considers that done which ought to be done and directs its relief accordingly." O.C.G.A. § 23-1-8. "Specific performance is an equitable remedy available when the damages recoverable at law would not be an adequate compensation for nonperformance." *Simpson v. Pendergast*, 290 Ga. App. 293, 297 (2008).

(Pet. App. 8). The Georgia Court of Appeals found that, "[h]ere there is no adequate remedy at law given the nature of the stock in this small, family-owned business, and the explicit acknowledgement in the Agreement that specific performance was the appropriate remedy in the event of a breach. Moreover, given the failure of all parties to strictly follow the terms of either the Agreement or Bylaws, an equitable remedy 'considers that done which ought to be done.' See O.C.G.A. § 23-1-8." (Pet. App. 8).

Based on the evidence in the record, the Georgia Court of Appeals concluded that, "there is no other reasonable explanation for the parties' inaction but to infer that the parties' mutual failure to adhere to the 60-day repurchase and sale term in the Agreement was

a waiver of the breach and a decision to treat the remaining contract as in force." (Pet. App. 13; see *Ansley v. Ansley*, 307 Ga. App. 388, 393 (2010); see also *Eckerd Corp. v. Alterman Props., Ltd*. 264 Ga. App. 72, 75 (2003); *Forsyth County v. Waterscape Svcs., LLC,* 303 Ga. App. 623, 630 (2010). "Based on the undisputed facts, we [the Georgia Court of Appeals] conclude that Doss breached the Agreement in 2003 when he refused Phillip's request to repurchase the stock." (Pet. App. 14). The Georgia Court of Appeals further found that the Agreement is an executory contract, which means that when Phillip requested Petitioner to sell his shares in 2003, it triggered Petitioner's obligation to sell and Petitioner's refusal to comply at that time constituted an anticipatory breach. (Pet. App. 14). "Once Doss unequivocally indicated that he would never sell his stock, the [Respondents'] obligation to tender payment in 2003 was waived." (Pet. App. 14-15; citing *Simpson,* supra, 290 Ga. App. at 297(2)(a)). For these reasons, the Georgia Court of Appeals found, "the relevant year for purposes of the breach is 2003, when Wallace Electric exercised its obligation to repurchase the stock, and Petitioner refused to sell." (Pet. App. 15). The Court of Appeals noted that the Agreement required the purchase price to be "current value" of stock, which the Agreement quantified at $1,806 per share, but the Agreement also called for this figure to be re-evaluated annually – which was undisputedly never done. (Pet. App. 16, 56). On remand, the Georgia Court of Appeals directed the trial court to "determine in the first instance, whether the parties waived this valuation provision establishing the current value. If the trial court determines that this provision establishing 'current value' has been waived, it must

then determine how to establish the 'current value.'" (Pet. App. 16-17).

The first time Petitioner expressed a willingness to sell his stock back to Wallace Electric was in 2015, but not withstanding Petitioner's longstanding breaches of the Agreement, Petitioner expressed that he expected to receive the 2015 value for his shares. (Pet. App. 6). Petitioner then filed a motion for specific performance demanding that Wallace Electric repurchase his stock at Wallace Electric's 2015 book value. (Pet. App. 6). Now, Petitioner is arguing that he is entitled to receive the 2018 value for his stock, as it was in 2018 that the Georgia Court of Appeals decided to order the sale of Petitioner's stock back to Wallace Electric. (Pet. 20). However, 2018 was not the first time a court ordered Petitioner to sell his stock back to Wallace Electric. (Pet. App. 23-40). In effect, Petitioner is attempting to use his breaches of the Agreement and continued refusal to sell his shares to increase the purchase price for his shares, and to demand the latest possible date of valuation for his shares.

While Petitioner has raised this takings issues in the past, Petitioner admits that he did not raise the issue of judicial taking in his Petition for Writ of Certiorari to the Georgia Supreme Court. (Pet. 15). Therefore, the most recent court order/opinion addressing Petitioner's takings argument is an August 25, 2018 opinion from the Georgia Court of Appeals, which found that remand was not necessary to decide the takings issue "because the takings argument is without merit. . . a trial court's Order issuing an award in a case pending before it is simply not an

unconstitutional taking." (Pet. 15; *Wallace v. Wallace*, 345 Ga. App. 764, 774 (2018)).

REASONS FOR DENYING PETITION

I. NO CONSTITUTIONAL ISSUES WERE RAISED OR DECIDED IN THE GEORGIA SUPREME COURT

Despite the Constitutional arguments raised in the Petition, the constitutional claims actually raised by Petitioner in the matter below were not presented to the highest court in the State of Georgia for consideration. The Supreme Court of Georgia is the highest court in the state. See Ga. Const. art. VI, § 6. Petitioner admits that he failed to raise this takings issue in his petition to the Supreme Court of Georgia and that said petition only raised contractual arguments. (Pet. 15). Petitioner seeks to have this Court review an order of the Georgia Court of Appeals entered on May 16, 2018. Pursuant to 28 U.S.C. § 1257(a),

> ***Final judgments or decrees rendered by the highest court of a State in which a decision could be had***, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or any commission held or authority exercised under, the United States. *(emphasis added).*

"The judgment of the Appellate Division is not that of the 'highest court of a State in which a decision could be had' within the meaning of 28 U.S.C. § 1257." *Gotthilf v. Sils*, 375 U.S. 79, 80 (1963). Furthermore, "[i]t was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions." *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969); see *Crowell v. Randell*, 35 U.S. 368 (1836); *Owings v. Norwood's Lessee*, 9 U.S. 344 (1809); *Miller for Use of United State v. Nicholls,* 17 U.S. 311 (1819); *Safeway Stores, Inc. v. Oklahoma Retail Grocers Ass'n, Inc.*, 360 U.S. 334, 342, n. 7 (1959); *State Farm Automobile Ins. Co. v. Duel*, 324 U.S. 154, 160-163 (1945); *McGoldrick v. Compagnie General Transatlantique*, 309 U.S. 430, 434-435 (1940); *Whitney v. California*, 274 U.S. 357, 362-363 (1927); *Dewey v. Des Moines*, 173 U.S. 193, 197-201 (1899); *Murdock v. City of Memphis*, 87 U.S. 590 (1874). "[T]he Judiciary Act of 1789, c. 20, s 25, 1 Stat. 85, vested this Court with no jurisdiction unless a federal question was raised and decided in the state court below." *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969) citing *Crowell v. Randell*, 35 U.S. 368 (1836); *Owings v. Norwood's Lessee*, 9 U.S. 344 (1809). As Petitioner did not raise this issue in his appeal to the Georgia Supreme Court and give the Georgia Supreme Court the opportunity to pass on the question, the United State Supreme Court lacks jurisdiction to hear this case. See *State Farm Mut. Auto. Ins. Co. v. Duel*, 324 U.S. 154, 160-161 (1945). Furthermore, if this issue was not ripe for review as Petitioner so argues, then neither the orders of the Georgia Supreme Court nor the Georgia Court of Appeals constitute a final judgment or decree as required by 28 U.S.C. § 1257.

Petitioner is seeking to have this Court grant certiorari to review a of holding from the Georgia Court of Appeals in an August 24, 2018 opinion. (Pet. App. 1). The Georgia Court of Appeals denied the request for rehearing and entered an order remanding this case to the trial court on May 16, 2018. (Pet. App. 22). Even if Petitioner could have this Court directly review the opinion of the Georgia Court of Appeals, the Petition for Certiorari to this Court should have been filed within ninety days after the entry of the Georgia Court of Appeal's opinion. 28 U.S.C. § 2101(c); Sup. Ct. R. 13. The Petition for Certiorari was not filed until May 8, 2019. "This 90-day limit is mandatory and jurisdictional. We have no authority to extend the period for filing as Congress permits." *Missouri v. Jenkins,* 495 U.S. 33, 45 (1990). Therefore, Petitioner failed to timely appeal this issue or preserve it for this Court's review.

No jurisdictional grounds for review are present under 28 U.S.C. § 1257(a) because no federal question or constitutional issue was raised by Petitioner or decided by the Georgia Supreme Court and Petitioner failed to timely appeal the May 16, 2018 order of the Georgia Court of Appeals. Because this Court lacks jurisdiction to review a state court decision that is not from the highest state court and because this Court lacks jurisdiction when appeals are not timely filed, this Court has no jurisdiction in this case and the Petition must be denied. Respondents therefore respectfully request that the Petition be denied.

II. THE TAKINGS CLAUSE OF THE FIFTH AMENDMENT DOES NOT APPLY IN THIS CASE

The Fifth Amendment to the United States Constitution states, "nor shall private property be taken for public use, without just compensation." "The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens, which in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). "The Fifth Amendment 'is a limitation only upon the power of the General Government,' and is not directed against the action of individuals." *Corrigan v. Buckley*, 271 U.S. 323, 330 (1926) citing *Talton v. Mayes*, 163 U.S. 376, 382 (1896).

The classic Fifth Amendment taking occurs when property rights are transferred via eminent domain, but the clause applies to other state actions that achieve the same result, including those that recharacterize as public property what was previously private property. See *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 163-165 (1980). More specifically, this Court has previously recognized the following actions as takings: (1) when the government uses its own property in such a way that it destroys private property; (2) when a state regulation forces a property owner to submit to a permanent physical occupation; (3) when a regulation deprives a property owner of all economically beneficial use of his property; and (4) when a state recharacterizes as public property

what was once private property. *See* Id. at 713 citing *Yates v. Milwaukee*, 10 Wall. 497, 504 (1871); *United States v. Causby*, 327 U.S. 256, 261-262 (1946); *Pumpelly v. Green Bay Co.*, 13 Wall. 166, 177-178 (1872); *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 418, 425-426 (1982); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 163-165 (1980). In short, a taking must involve the government taking or using private property for the benefit of the public.

In this case, there is no benefit received by the public and no governmental actor that is a party. In support of his claim that a taking occurred in this case, Petitioner states, "it has long been accepted that the sovereign may not take the property of A for the sole purpose of transferring it to another party B, even though it was paid just compensation." Pet. 25; citing *Kelo v. City of New London, Connecticut, et al.*, 545 U.S. 469, 477 (2005). However, Petitioner takes this quotation out of context as the next sentence in *Kelo* goes on to say, "[o]n the other hand, it is equally clear that a State may transfer property from one private party to another if future 'use by the public' is the purpose of the taking; the condemnation of land for a railroad with common-carrier duties is a familiar example." *Kelo v. City of New London, Connecticut, et al.*, 545 U.S. 469, 477 (2005). In *Kelo* the Court is talking about a one-to-one transfer undertaken by the government, not private individuals. *See* Id. at 486-487. If it wasn't already clear in the plain language of the Fifth Amendment itself, this Court has made it very

clear that the Fifth Amendment Takings Clause only applies to action taken by the government and for the benefit of the public. See U.S. Const. amend. V.; see *Kelo*, *supra*, at 486-487, n. 17; citing *99 Cents Only Stores v. Lancaster Redevelopment Agency*, 237 F. Supp. 2d 1123 (C.D. Cal. 2001); cv. *Cincinnati v. Vester*, 281 U.S. 439, 448 (1930) (taking invalid under state eminent domain statute for lack of a reasoned explanation); *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000) (*per curiam*). In *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Committee*, 483 U.S. 522, 542 (1987), this Court held that the fundamental inquiry was whether or not the USOC is a governmental actor to whom the prohibitions of the Fifth Amendment apply. If the individual against whom Fifth Amendment Takings claims are brought is not a government actor, then the Fifth Amendment Takings Clause does not apply. See *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Committee*, 483 U.S. 522, 542 (1987)

This case is akin to *Araya v. JPMorgan Chase Bank, N.A.*, 775 F.3d 409, 414-5 (D.C. Cir. 2014), in which plaintiff brought suit against Chase Bank and Chase's legal counsel, Shapiro & Burson, LLP, alleging breach of contract, illegal foreclosure, breach of fiduciary duty, forgery, misrepresentation, negligence, statutory violations, and violation of the takings clause of the Fifth Amendment. The court in *Araya* dismissed plaintiff's Fifth Amendment takings claims on the grounds that it was insufficient to sustain jurisdiction as the named defendants are not government actors and there is no plausible argument that either of the defendants are governmental actors. *Araya v.*

JPMorgan Chase Bank, N.A., 775 F.3d 409, 414-5 (D.C. Cir. 2014) citing *Pub. Utils. Comm'n of D.C. v. Pollak*, 343 U.S. 451, 461 (1952)(the Fifth Amendment "appl[ies] to and restrict[s] only the Federal Government and not private persons."); see also *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Committee*, 483 U.S. 522, 542 (1987); *Corrigan v. Buckley*, 271 U.S. 323, 330 (1926) ("The Fifth Amendment is a limitation only upon the powers of the General Government and is not directed against the action of individuals.") (citations omitted) (internal quotation marks omitted); *Barrow v. Baltimore*, 32 U.S. 243, 250-51 (1833) ("[T]he fifth amendment to the constitution … is intended solely as a limitation on the exercise of power by the government of the United States.").

In this case, Petitioner claims that an equitable order entered by a state court which specifically performs a contract Petitioner signed and requires Petitioner to sell his stock as required by contract amounts to a judicial taking in violation of the Takings Clause of the Fifth Amendment to the Constitution of the United States. Ironically, it was Petitioner himself who signed the Agreement, who initiated legal action and who sought to have a court order a buyout of his stock in Wallace Electric. (Pet. App. 6). While Respondents also filed motions for specific performance to force the sale, Petitioner himself is taking action in regards to his property interest, not a state actor nor the judiciary. These are private individuals trying to enforce the terms of a private contract. Similar to *Araya*, none of the parties in this case are government actors and there are no plausible arguments that any

of the parties are governmental actors. See *Araya, supra*, at 414-5. Thus, the Fifth Amendment Takings Clause is inapplicable.

In addition to requiring government action, whether condemnation by eminent domain, a regulatory taking, a legislative taking, or a judicial taking, another thing that all Fifth Amendment Taking cases have in common is that a state or municipality effected the taking so the property could be utilized for a legitimate public purpose or a benefit was conveyed to the public as a direct result of the taking. See Id.; *Eastern Enterprises v. Apfel,* 524 U.S. 498 (1998); *Armstrong v. United States*, 364 U.S. 40 (1960); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980); *United States v. Causby*, 328 U.S. 256 (1946); *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 418 (1982); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Kelo v. City of New London, Connecticut, et al.*, 545 U.S. 469 (2005). In further support of his position, Petitioner relies upon this Court's decision in *Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection*, 560 U.S. 702 (2010), which determined that the Florida Supreme Court did not engage in an unconstitutional taking of littoral property owners' rights to future accretions, and contact with the water, by upholding the State's decision to restore eroded beach by filling in submerged land. In *Stop the Beach*, the State sought to fill in submerged portions of the beach that eroded away during recent storms. *Stop the Beach, supra*, at 731. Even though a taking did not occur in *Stop the Beach,* on the grounds that the State's interest in

preserving the beach was determined to be greater than that of littoral property owners, it was a state agency that was taking action against the littoral owners' property interests and the state agency was doing so in an effort to preserve the beach for the public's enjoyment, elements you would expect to see in a takings case. Id. at 730-731.

In this case, the only individuals affected by the Court's decision to require the repurchase of Petitioner's stock by Respondents are the private parties to this case. The Court's decision was not made in furtherance of a public purpose nor does it confer any benefit upon the public whatsoever. As no public interest nor benefit is being served in light of the Court's decision, no Fifth Amendment Taking has occurred. See *Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection*, 560 U.S. 702 (2010); *Eastern Enterprises v. Apfel,* 524 U.S. 498 (1998); *Armstrong v. United States*, 364 U.S. 40 (1960); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980); *United States v. Causby*, 328 U.S. 256 (1946); *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 418 (1982); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

As for Petitioner's claims that this was a judicial taking, Respondents are only aware of one case where a judicial action was determined to be a taking. In *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, the purchaser of an insolvent corporation interpled the corporation's creditors, placing the purchase price in an interest-bearing account in the registry of the Circuit

Court of Seminole County. *Beckwith*, 449 U.S. 155 (1980). The Florida Supreme Court interpreted an applicable statute to mean that interest earned on the account belonged to the county, because the account was "considered 'public money.'" *Beckwith v. Webb's Fabulous Pharmacies*, 374 So. 2d 951 (1979). This Court held this to be a taking and noted "[t]he usual and general rule is that any interest on an interpleaded and deposited fund follows the principal and is to be allocated to those who are ultimately to be the owners of that principal." *Beckwith*, 449 U.S. 155, 162 (1980). It was determined by this Court that "[n]either the Florida Legislature by statute, nor the Florida courts by judicial decree, may accomplish the result the county seeks simply by recharacterizing the principal as 'public money' because it is held temporarily by the court." Id. at 164. In *Beckwith*, the Court was in possession of private money belonging to a private company when it entered an order conveying a portion of said private money to the county for the benefit of the public. *See* Id. This was a taking because the judiciary caused a governmental entity (the county) to receive money for public benefit when the court was supposed to be holding the money in trust for a private party and gave it to the county for the benefit of the public. *See* Id. In this case, the Georgia Court of Appeals entered an order instructing the trial court as to how Petitioner's stock purchase price was to be calculated in light of the terms of the Agreement and the date when Petitioner first breached the Agreement. (Pet. App. 1-22). The Georgia Court of Appeals has never been in possession of Petitioner's stock, has never taken Petitioner's stock, has never ordered that Petitioner's stock be transferred to a governmental

entity and has never rendered any benefit to the public using Petitioner's stock. The Georgia Court of Appeals has simply enforced the term of the Agreement Petitioner signed and ordered equitable remedies based on the date of breach by Petitioner.

Furthermore, Petitioner's property interest in his 20 shares of stock was not reduced prior to the calculation of the purchase price for his stock. The Georgia Court of Appeals determined that Petitioner's 20 shares of stock should be valued at its 2003 purchase price because that is the date Petitioner first breached the Buy-Sell Agreement by refusing to tender his stock back to the company upon request by Respondents. (Pet. App. 2). Petitioner asserts that the Court's decision to reduce the value he is to receive for his shares via the buyout from their value in 2018 to their value in 2003 is a taking (Pet.25) However, the Court's Order gives Petitioner a purchase price based on all shares of Wallace Electric that Petitioner owns. It merely established a date and method for determining the value Petitioner is entitled to receive for his 20 shares based upon the date Petitioner breached the Agreement, the terms of the Agreement on the purchase price, and principles of the equity which govern per the terms of the Agreement (and because of the nature of the Petitioner's breach). (Pet. App. 1-22). The Court of Appeals order gave Petitioner payment for all 20 shares of stock that he originally received in 1988, and accordingly, the Court of Appeals did not wrongfully take or diminish any of Petitioner's property interests. See *Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection*, 560 U.S. 702, 728 (2010); (Pet. App. 1-22).

The crux of this case has always been the interpretation of the term "current value" within the governing Buy-Sell Agreement. (Pet. App. 1-22). A dispute over the interpretation of a defined term in a contract is not a case of wrongful government taking, nor does this case have any importance to anyone other than Petitioner and Respondents. This case creates a slippery slope. If a state court's decision in a case involving private individuals that centers around the enforcement of a private contract amounts to a taking, then literally every order entered in a state court that interprets a contract and has monetary implications to one party would amount to a Taking. A decision that a Fifth Amendment Taking occurred in this case would interrupt the entire United States judicial system and turn everything we know about the Fifth Amendment and its application on its head. For these reasons, this Court should deny the Petition.

III. CURRENT VALUE UNDER THE AGREEMENT HAS ALREADY BEEN ESTABLISHED AND PETITIONER HAS NEVER BEEN ENTITLED TO RECEIVE THE CURRENT, PRESENT DAY VALUE FOR HIS STOCK

Petitioner's claims of entitlement to the 2018 value for his stock are mere fantasy. Petitioner was contractually obligated to sell his stock back to Wallace Electric upon termination of his employment in 1994, an obligation Petitioner testified he has "known [about] from the very, very beginning." (Pet. App. 25). The Georgia Court of Appeals found Petitioner is entitled to receive the "current value" of his stock as of 2003 since

2003 was the first time either party sought to enforce the contract. (Pet. App. 5). The Court of Appeals left the issue of whether the 2003 "current value" of the stock meant $1806 per share as defined in the Agreement or some other 2003 value up to the trial court to decide on remand. There is no question that the Buy-Sell Agreement is the contract being enforced in this case. There is no question that Petitioner breached the Buy-Sell Agreement in 2003 and continued to breach up through the Agreement's expiration. There is no question that the Bell-Sell Agreement calls for payment for the sale of a shareholder's shares at "current value", and that the Buy-Sell Agreement defines "current value" as $1806 per share. (Pet. App. 16-17, 56). The only questions raised by Petitioner are whether "current value" means fair market value rather than the $1806 per share as defined by the Agreement and whether the courts below could require the valuation date to be 2003 rather than 2018 due to the Petitioner's knowing and willful breach of the Agreement in 2003. None of these issues implicate the Fifth Amendment. These are contract interpretation and breach of contract remedy questions governed solely by state law, over which this court has no jurisdiction and which are not matters of public importance that would merit certiorari to this Court.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

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Respectfully submitted,

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