No. 19-

IN THE

Supreme Court of the United States

LYNN LUMBARD; ANITA YU; JOHN BOYER; MARY RAAB,

Petitioners,

v.

CITY OF ANN ARBOR,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Knick v. Township of Scott,* 588 U.S. __, 139 S. Ct. 2162, 2019 U.S. LEXIS 4197 (U.S., June 21, 2019), this Court expressly overruled the state court exhaustion requirement in *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City,* 473 U.S. 172 ("the *Williamson* exhaustion requirement"), thereby enabling takings claimants to go directly to federal court to advance their Fifth Amendment claims. Because the petitioner in *Knick* did not exhaust her state court remedy and, instead, challenged the dismissal of her federal court action, she was not burdened with an adverse state court decision when this Court heard her appeal. The court in *Knick*, therefore, was not called upon to extend its holding to litigants, like the Petitioners in this case, who dutifully exhausted their state court remedies and, as a result, were caught in the preclusion trap set by *San Remo Hotel, L.P, v. City and County of San Francisco*, 545 U.S. 323 (2005).

Given this Court's clear and unequivocal endorsement of the right of takings claimants to pursue their Fifth Amendment claims in federal court without regard to any available state court remedy, should Petitioners' Complaint, seeking just compensation under the Fifth Amendment, this Court's decision in *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419 (1982) and 42 U.S.C. § 1983 for the permanent physical occupation of their homes, be reinstated?

PARTIES TO THE PROCEEDINGS

The parties to the proceeding are Petitioners Lynn Lumbard, Anita Yu, John Boyer and Mary Raab, individually and on behalf of all others similarly situated.

The Respondent is the City of Ann Arbor, Michigan.

PROCEEDINGS
(Rule 14(b)(iii)

Anita Yu, John Boyer and Mary Raab, Plaintiffs vs. City of Ann Arbor, Defendant
22nd Circuit Court, County of Washtenaw, Michigan
Case No. 14-181-cc
Judgment Entered January 21, 2016

Anita Yu, John Boyer and Mary Raab, Plaintiffs vs. City of Ann Arbor, Defendant
United States District Court for the Eastern District of Michigan
Case No. 2:14-cv-11129-AC-MKM
Order to Remand Entered May 29, 2014

Lynn Lumbard, individually and on behalf of all others similarly situated, Plaintiffs vs. The City of Ann Arbor, Defendant
22nd Circuit Court, County of Washtenaw, Michigan
Case No. 15-1100-cc
Judgment Entered March 31, 2016

Anita Yu, John Boyer and Mary Raab vs. City of Ann Arbor, Plaintiffs-Appellants vs. The City of Ann Arbor, Defendant-Appellee
Michigan Court of Appeals
Michigan Court of Appeals No. 332675
Judgment Entered May 9, 2017

Lynn Lumbard, Anita Yu, John Boyer and Mary Raab, individually and on behalf of all others similarly situated, Plaintiffs-Appellants vs. City of Ann Arbor, Defendant-Appellee
Michigan Court of Appeals
Court of Appeals Case No. 331501
Judgment Entered May 9, 2017

Lynn Lumbard, Anita Yu, John Boyer and Mary Raab, individually and on behalf of all others similarly situated, Plaintiffs vs. City Of Ann Arbor, Defendant
United States District Court for the Eastern District of Michigan
Case No. 2:17-cv-13428-SJM-MKM
Judgment Entered February 7, 2018

Lynn Lumbard, Anita Yu, John Boyer and Mary Raab, individually and on behalf of all others similarly situated, Plaintiffs-Appellants vs. City of Ann Arbor, Defendant-Appellee
United States Court of Appeals for the Sixth Circuit
Case No. 18-1258
Judgment Entered January 10, 2019

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Petitioners, Lynn Lumbard, Anita Yu, John Boyer and Mary Raab, individually and on behalf of all others similarly situated, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The panel opinion of the Court of Appeals of the Sixth Circuit is reported at *Lumbard v. City of Ann Arbor*, 913 F.3d 585 (6th Cir. 2019) and is reproduced as Appendix A. The denial of the petition for rehearing *en banc* is unreported. It is reproduced as Appendix C. The opinion of the District Court granting the motion to dismiss is unreported. It is reproduced as Appendix B.

JURISDICTION

On February 7, 2018, the District Court granted Respondent's motion to dismiss (Appendix B). Petitioners filed a timely appeal to the Court of Appeals for the Sixth Circuit, which affirmed dismissal on January 10, 2019 (Appendix A). Petitioners filed a timely petition for rehearing *en banc*. On February 27, 2019, the court denied the petition (Appendix C).[1] This Court has jurisdiction under 28 U.S.C. § 1254(1).

1. By letter dated May 29, 2019, the Petitioners were granted an extension until July 29, 2019, to file their petition with this Court.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS AT ISSUE

42 U.S.C. § 1983. Civil Action for Deprivation of Rights

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, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Fifth Amendment to the Constitution of the United States

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be

deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

18 U.S.C. § 1589 Forced labor

(a) Whoever knowingly provides or obtains the labor or services of a person by any one of, or by any combination of, the following means—

(1) by means of force, threats of force, physical restraint, or threats of physical restraint to that person or another person;

(2) by means of serious harm or threats of serious harm to that person or another person;

(3) by means of the abuse or threatened abuse of law or legal process; or

(4) by means of any scheme, plan, or pattern intended to cause the person to believe that, if that person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint, shall be punished as provided under subsection (d).

(b) Whoever knowingly benefits, financially or by receiving anything of value, from participation in a venture which has engaged in the providing or obtaining of labor or services by any of the means described in subsection (a), knowing or in reckless disregard of the fact that the venture has engaged in the providing or obtaining of labor or services by any of such means, shall be punished as provided in subsection (d).

(c) In this section:

(1) The term "abuse or threatened abuse of law or legal process" means the use or threatened use of a law or legal process, whether administrative, civil, or criminal, in any manner or for any purpose for which the law was not designed, in order to exert pressure on another person to cause that person to take some action or refrain from taking some action.

(2) The term "serious harm" means any harm, whether physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing labor or services in order to avoid incurring that harm.

(d) Whoever violates this section shall be fined under this title, imprisoned not more than 20 years, or both. If death results from a violation of this section, or if the violation includes kidnaping, an attempt to kidnap, aggravated sexual abuse, or an attempt to kill, the defendant shall be fined under this title, imprisoned for any term of years or life, or both.

2:51.1. Program for footing drain disconnect from POTW (City of Ann Arbor).

(1) *Purpose:* The purpose of this Program is to significantly reduce improper stormwater inflows in the most cost-effective manner, in order to eliminate or reduce instances of surcharged sanitary sewers due to improper inflows, which are inimical to public health and

welfare; reduce the chance of a sanitary sewer backup into occupied premises; and to maximize efficient operation of the District's wastewater treatment plants.

(2) *Definitions:* For purposes of Section 2:51.1 of the Ann Arbor City Code:

> 1. Improper stormwater inflow shall mean any direct connections (inflow) to the public sewer of sump pumps (including overflows), exterior floor drains, downspouts, foundation drains, and other direct sources of inflow (including but not limited to visible evidence of ground/surface water entering drains through doors or crack in floors and walls) as noted during field inspections by the Utility Department.
>
> 2. Participating owner(s) shall mean those persons that own property within a target area as may have been defined by the Director and who have notified the Director of their decision to participate in the program within 90 days of having been ordered by the Director to correct improper stormwater inflows from their property and meet the eligibility requirements of Section 2:51.1(4).

(3) *Scope of Program:* All improper stormwater inflow disconnection costs shall be at the owner's expense, except, in accordance with this funded program, the POTW may either reimburse the participating owner of a premises, or pay directly to the participating owner's contractor, for qualifying work up to a maximum of $3,700.00 ("Funding Cap"), or as may be adjusted under 2:51.1(12), for

corrective work to remove improper stormwater inflows for which the initial building construction permit was in existence prior to January 1, 1982 or prior to the date the premises became under City of Ann Arbor jurisdiction. This funding program is referred to in this Section as the "Reimbursement Program," regardless of whether payment is made as reimbursement to the participating property owner or as direct payment to the participating property owner's contractor.

(4) *Eligible Participants.* This program may be utilized only for: (a) Improper stormwater inflows for which the initial building construction permit was in existence prior to January 1, 1982 or, (b) for premises in areas which came into the jurisdiction of the City of Ann Arbor at a later date, improper stormwater inflows which were in existence prior to the date of such inclusion.

(5) In every instance where the Director is required to act or approve an action, the action or approval may be performed by a person designated, in writing, by the Director to act as his or her designee.

(6) *Target Areas; Orders.* The Director may implement and make available this Reimbursement Program throughout the City, or instead only in target areas within the City determined by the Director as having the highest priority for reduction of stormwater inflows based on surcharging problems. When the Director issues orders for removal of improper stormwater inflows in an area where the program is being implemented, the Director shall inform the owner of the availability of the Reimbursement Program. Participation in the Reimbursement Program shall be voluntary; owners

declining to participate shall be required to proceed with removal of the improper inflow at the owner's expense.

(7) *Scope of Work.* The Director shall determine for each participating premises the scope of work for reduction of improper stormwater inflows and sewer backup prevention, which may be paid for with Program funds, with the goal of achieving the most cost-efficient and timely reductions. If work paid for under this Program does not eliminate every improper stormwater inflow for a participating premises, the Director is not precluded from issuing supplemental orders under Chapter 28 of Title II concerning the participating premises. For each participating premises the maximum cost which may be paid with POTW funds to an owner or owner selected contractor shall be the Funding Cap set under 2:51.1(3) or as may be adjusted under 2:51.1(12). If additional work is required it shall be performed at owner expense.

(8) *Approved Contractors.* The Director may establish a list of private contractors or contractor teams (referred to as "contractor (s)" throughout this section) approved for performing work under this Program based on qualifications including experience, quality of work and insurance. Participating owners may propose additional contractors for inclusion in the approved list.

(9) *Contractor Selection.* Participating owners shall select an approved contractor in accordance with a process established by the Director. Participating Owners may either select a private contractor from the list or agree to perform the work by him or herself.

1. If the participating owner selects a contractor from the list of approved private contractors

to perform the work, after Director review and approval of the contractor selection and contract price, the owner shall contract with the selected contractor for performance of the approved scope of work. The City of Ann Arbor shall not be a party to the contract. The owner's contract shall require the contractor to secure any building permits as may be necessary and shall specify that the owner's final payment to the contractor shall not be made until (i) the work is inspected and approved by the Director and approved by the owner, whose approval shall not be unreasonable withheld, (ii) a release of lien from all contractors or subcontractors performing work on the premises is obtained.

2. If the participating owner elects to perform the work his or herself, the scope of work, plans and specifications shall be approved in advance by the Director. The Director may establish rules authorizing reimbursement or partial reimbursement for owner-performed work. No payment shall be made until the work is complete, inspected and approved by the Director. To be eligible for reimbursement, a request for payment must be accompanied by supporting receipts for materials, supplies and equipment.

(10) Release. As a condition to participation in the program the owner shall release the City of Ann Arbor, and their officers and employees from all liability relating to the work.

(11) Payment. After the work is inspected and approved by the Director and approved by the owner, the Director shall authorize payment for 100% of the cost of the approved work (subject to the funding cap set under 2:51.1(3) or as may be adjusted under 2:51.1(12)) from POTW funds approved for this purpose. Partial payments may not be made except that, at the sole discretion of the Director, a final payment may be made, less a reasonable retention for ensuring the completion of punch list items. Payment may be made to the owner, to the contractor, or jointly to the owner and contractor, in the Director's sole discretion.

(12) Funding Cap Appeals.

1. Notwithstanding any maximum reimbursement amount stated elsewhere within this section, the Director, upon a written request from a participating owner, may approve an amount 35% greater than the maximum where extraordinary construction or configuration circumstances require additional construction activity that cause extraordinary expense to achieve the program goals. Extraordinary construction or configuration circumstances do not include those situations where upgrades to the property that do or may increase the value of the property are required to accomplish the sanitary sewer disconnect. The written request from a participating homeowner must be received by the Director no later than 30 days after substantial completion of the construction of the approved scope of work.

2. Notwithstanding any maximum reimbursement amount stated elsewhere within this Section, the City Administrator, upon a written request from a participating owner may approve an increase of any amount, notwithstanding any maximum amount stated elsewhere with this Code, in the Funding Cap for a particular premises where extraordinary construction or configuration circumstances require additional construction activity that cause extraordinary expense to achieve the program goals and those expenses can not be accommodated within the 35% available under 2:51.1(12)1. The written request must be delivered to the City Administrator and must be received no later than 30 days after substantial completion of the construction of the approved scope of work.

3. Unless specific appeal procedures are otherwise provided in this code, participating owners aggrieved by a decision regarding a reimbursement amount may appeal that decision. Persons aggrieved by the decision of the Director shall file a written appeal to the City Administrator within 5 days of the decision. Persons aggrieved by the decision of the City Administrator shall file a written appeal of the City Administrator's decision to the City Council within 5 days of the decision.

(13) Maintenance. Participating owners shall be responsible for maintaining any improvements constructed under this Program.

(14) Director Rules. Within the limitations set forth by this Section 2:51.1, the Director may establish such further criteria and rules as are required to implement this Program.

(15) Surcharge; Disconnection; Enforcement.

1. The Director or designee shall provide written notice by certified mail to the sewer user, property owner or other responsible person of any violation of Section 2:51.1 of this Code. This notice shall describe the nature of the violation, the corrective measures necessary to achieve compliance, the time period for compliance, the amount of the monthly surcharge until corrected and the appeal process.

2. For structures or property with actual or potential improper stormwater inflows, the sewer user, property owner or other responsible person shall be given 90 days to correct the illegal or improper activities or facilities contributing to the discharge, infiltration of inflow into the POTW. If corrective measures to eliminate the illegal or improper discharge, infiltration or inflow into the POTW are not completed and approved by the Utility Director or designee, within 90 days from the date of the notice provided in section 2:51.1(15)1, then the director shall impose upon the sewer user, property owner or other responsible person a monthly surcharge in the amount of one hundred dollars ($100.00) per month until the required corrective measures are

> completed and approved. If the property owner or responsible party fails to pay the monthly surcharge when due and payable, then the city may terminate the water and sewer connections and service to the property and disconnect the customer from the system. Any unpaid charges shall be collected as provided under Chapter 29 of Title II.

INTRODUCTION AND STATEMENT OF THE CASE

A. Facts Relevant to the Appeal.

In this case, the Petitioners seek compensation for physical takings resulting from the implementation by the respondent, the City of Ann Arbor (the "City") of a program for mandatory construction ("the Program") inside approximately 2000 homes in selected older neighborhoods within the City. The ostensible justification for the ordinance which authorized the Program was the reduction of sewer overflows into the City's combined sewer system.

The City chose to avoid the cost of increasing the capacity of its waste water treatment plant or upgrading its deteriorating combined sewer system in a way that would have equally burdened all of the citizens and/or taxpayers of Ann Arbor. Instead, the City elected to target approximately 2,000 homes which were compelled to undergo extensive mandatory construction inside and outside of the structures.

The Petitioners allege in their Complaint that they were forced to endure the physical invasion of their

properties and the permanent physical occupation by the City or its agents as a result of the Program. As part of the required construction, the City and its agents, through destructive measures, rerouted storm water which had previously collected in foundation drains around the perimeter of the houses at the basement level and, from there, into the combined sewer in the street (as their homes had been designed and constructed). The City and its agents rerouted the water collected in the Petitioners' foundation drains directly into the Petitioners' previously dry basements and crawl spaces at the foundation level and into a large sump crock excavated and installed by the City in the Petitioners' basements (Complaint ¶¶ 7-9, 100-108, 140, 142-47).[2] The preexisting foundation drain system had been required by the City when the Petitioners' homes were constructed in accordance with then existing City ordinances and were fully permitted (Complaint ¶¶ 44, 44, 45-49). The Petitioners allege that the construction designed and performed by the City and its agents in connection with the Program, as well as the equipment selected and permanently affixed to their property, constitute a permanent physical occupation of their homes for a public purpose (Complaint ¶¶ 138-140).

In the Petitioners' homes and in those of the putative class members, the City accomplished this permanent physical occupation by, first, entering and inspecting their homes without a warrant; second, jackhammering through the original concrete foundation floors around the internal cleanouts in order to excavate sump pits which

2. The Complaint filed in the District Court for the Eastern District of Michigan can be found at Case No. 2:17-cv-13428-SJM-MKM as Docket No. 1.

were generally thirty-six inches in diameter and forty-two inches deep; third, installing in each sump pit a sump crock approximately eighteen to twenty-four inches in diameter; fourth, installing pipes for the discharge of foundation drain flows into the interior sump crock which, before the City's construction, had drained into the existing combined sewer lateral pipe under the homes; fifth, penetrating the homes' building envelopes near street level and installing a four inch pipe for discharges from the sump crock; sixth, installing an electrical sump in the sump crock for the purpose of elevating and discharging the water collected in the sump crock, along with vertical and horizontal piping to carry the water to the exterior of the home; and, seventh, construction of an external drainage system for discharges from the sump pump, which usually included a shallow drainage line below the ground and across the owners' property to convey these discharges to yet another shallow pipe installed by the City in the lawn extension lawn extensions in the front of the homes (Complaint ¶ 101).

Under the City's ordinance, the City's public utilities director was authorized to determine which homes would undergo this construction; the homes selected represented less than 10% of the residences within the City of Ann Arbor (Complaint ¶ 101). Once a home was targeted, participation by its owners was mandatory (Complaint ¶¶ 124, 140, 142-144). The ordinance made clear that, once a home was selected for mandatory "footing drain disconnection ("FDD")", if a homeowner refused, first, he or she be would be fined $1,200.00 per year as a penalty for refusing and, second, risk the imposition of a lien for the unpaid fines, or, worse, the loss of the home at auction if accrued fines were not paid (Complaint Ex. 5, ¶ 15).

Finally, in addition to the permanent physical occupation of the Petitioners' homes, the ordinance imposes an ongoing obligation upon all targeted homeowners to assume the costs and burden of maintenance, repair, monitoring and operation of the installed operating equipment and water flows from their respective basements (Complaint ¶¶ 88, 108, 142-144, Ex. 5, §13). According to the Petitioners, these ongoing burdens have been onerous and they have had to deal with flooding resulting from the failure of installed equipment or the freezing of curb drains and other drainage pipes installed above the frost line on or near their properties (Complaint ¶¶ 108-123, 142-147). Because the ordinance requires the targeted homeowners to maintain, operate, power and finance these permanent physical occupations in perpetuity, the physical occupation of their properties is ongoing.

B. Relevant History of the Case.

1. The *Yu* Case.

On or about February 24, 2014, Petitioners, Anita Yu, John Boyer and Mary Raab (the "*Yu* Petitioners") commenced an action against the City of Ann Arbor in the 22nd Circuit Court, County of Washtenaw, Michigan under Case No. 14-181-CC, bearing the caption: "Anita Yu, John Boyer and Mary Raab, Plaintiffs v. City of Ann Arbor, Defendant" (the "*Yu* Case"). The Summons and Complaint were served on the City on March 7, 2014 (Complaint ¶ 149).

On March 17, 2014, the City removed the *Yu* Case to the United States District Court for the Eastern District

of Michigan (Southern Division) by filing a Notice of Removal and Supporting Petition asserting that the District Court had jurisdiction over the action based upon federal question jurisdiction under 28 U.S.C. § 1331[3]. Thereafter, on March 24, 2014, the City filed a motion to dismiss for failure to state claims upon which relief may be granted and for lack of subject matter jurisdiction because the claims were not ripe. (Complaint ¶¶ 150-151).

On April 3, 2014, the *Yu* Petitioners filed a motion to remand pursuant to 28 U.S.C. § 1447(c) also upon the grounds that their claims were not ripe in federal court under the *Williamson* exhaustion requirement as enunciated by the United States Supreme Court in *Williamson County Regional Planning Comm. v. Hamilton Bank*, 473 U.S. 172 (1985) and as interpreted by the Decisions of the Sixth Circuit Court of Appeals at that time. On May 29, 2014, the District Court, Hon. Avern Cohn, U.S.D.J. presiding, granted the motion to remand and the *Yu* case was sent back to the Washtenaw County Circuit Court in Ann Arbor for further proceedings (Complaint ¶¶ 152).

In his Decision from the bench, District Court Judge Cohn acknowledged that the *Yu* Petitioners had the right to return to federal court once they had sought a remedy under Michigan law: "[a]ll of these claims have to be adjudicated – there is a remedy under State law, which includes the Constitution, for these violations, and if you prevail under State law that's the end of it. And if you don't succeed, you have the right to come into federal court" [Case No. 2:14-cv-11129-AC-MKM, Docket No. 14].

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3. The docket in the removed proceeding can be found under Case No. 2:14-cv-11129-AC-MKM.

The *Yu* Petitioners relied on this statement of the law by the Court.

On September 12, 2014, the *Yu* Petitioners filed with the clerk of the Washtenaw County Circuit Court a Notice of *England* Reservation in accordance with this Court's decision in *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 4011 (1964) and the Sixth Circuit's decisions in *DLX, Inc. v. Kentucky*, 381 F.3d 511 (6th Cir. 2004) and *Braun v. Ann Arbor Charter Twp.*, 519 F. 3d 564 (6th Cir. 2008). With this *England* Reservation, the *Yu* Petitioners reserved their rights to pursue all federal claims arising under the laws and Constitution of the United States of America, including all claims arising under the Fifth and Fourteenth Amendments to the United States Constitution (Complaint Ex. 6).

On or about December 10, 2015, the City filed a motion for summary disposition, arguing that there was no taking because the *Yu* Petitioners "owned the FDD installations and therefore, suffered no physical invasion or occupation." On January 15, 2016, an order was signed and entered granting the City's motion (Complaint ¶ 156). The Circuit Court relied upon the opinion of the United States Court of Appeals for the Third Circuit in *Cape Ann Citizens Ass'n v. City of Gloucester*, 121 F.3d 695, Case No. 96-2327 (1st Cir. 1997), a case decided under *Agins v Tiburon*, 447 U.S. 255 (1980).[4]

4. *Cape Ann* is a factually distinguishable regulatory takings case in which there was no physical taking at all. It was decided by application of the "substantially advances a legitimate state interest" standard created in *Agins v City of Tiburon*, 447 U.S. 255 (1980), a standard that was forcefully abandoned by this Court in *Lingle v. Chevron USA, Inc.*, 544 U.S. 528 (2005) as ill-conceived. *Cape Ann* has been bad law since then. *It has never been cited.*

2. The Lumbard Class Action.

On October 30, 2015, Petitioner Lynn Lumbard, on her own behalf and on behalf of a putative class of persons similarly situated, commenced an action against the City in the 22nd Circuit Court, County of Washtenaw, Michigan as Case No. 15-1100-cc, bearing the caption: "Lynn Lumbard, individually and on behalf of all others similarly situated v. The City of Ann Arbor" (the "*Lumbard* Case"). The Summons and Complaint were served upon the City on the day the action was commenced (Complaint ¶ 157). On January 21, 2016, a Notice of *England* Reservation was filed with the Clerk of the Washtenaw County Circuit Court in the *Lumbard* Case (Complaint Ex. 7), similar to the one filed in the *Yu* case.

On February 11, 2016, the City filed a motion for summary disposition arguing, once again, on the basis of the Third Circuit's *Cape Ann* opinion, that there was no taking because Ms. Lumbard "owned" the FDD installation and, therefore, suffered no physical invasion or occupation. On March 31, 2016, an Order was signed and entered, granting the City's motion. In its order, the Court granted the City's motion and dismissed the class action with prejudice "[f]or the same reasons Defendant City of Ann Arbor's motion was granted in Yu, et al v. City of Ann Arbor, Case No. 14-181-cc (Circuit Court for Washtenaw County), which was heard and granted on January 7, 2016, and as otherwise stated on the record in this case" (Docket No. 9-6, Ex. "D").

3. The Consolidated Appeal.

The *Yu* Petitioners and Petitioner Lynn Lumbard, timely appealed the orders, dismissing their respective

cases, to the Michigan Court of Appeals. These appeals were later consolidated on consent. By Decision dated May 9, 2017, the Court of Appeals affirmed the lower court orders in both cases. *Yu v. City of Ann Arbor,* 2017 Mich. App. LEXIS 739 (Mich. Ct. App., May 9, 2017). In its Opinion, the Court of Appeals ruled that, with respect to all Plaintiffs in the consolidated appeal, "there was no taking by permanent physical occupation in this case because the Plaintiffs owned the installations on their properties" (Complaint ¶¶ 161-162), citing no authority other than the decision of the lower court itself.

4. The District Court.

After exhausting their available remedies under Michigan State law and receiving no compensation for the permanent physical invasion of their homes, the Petitioners commenced a single action in the United States District Court for the Eastern District of Michigan ("District Court").[5] On December 15, 2017, the City moved to dismiss this Complaint pursuant to Fed. R. Civ. 12(d)(6), arguing that the Petitioners' Complaint failed to state any claims upon which relief could be granted. After the motion was fully briefed, and on February 7, 2018, the District Court issued its Opinion and Order granting the City's motion to dismiss. In its Opinion, the District Court held that: "Plaintiffs failed to state a claim upon which relief can be granted because their action is barred

5. The Petitioners were not required by *Williamson* to appeal the Michigan Court of Appeals Decision before filing their Complaint in federal court. *HRT. Enters. v. City of Detroit*, 2013 U.S. Dist. LEXIS 42611 at *16 (E.D. Mich., March 26, 2013); *Costa v. City of Detroit*, 2013 U.S. Dist. LEXIS 10847 at *8 (E.D. Mich., January 28, 2013).

by *res judicata*." The District Court concluded that the Petitioners had "overstated the exhaustion requirement" (Appendix B, Page 19A) and should have instead remained in District Court. The Petitioners then appealed to the Sixth Circuit.

5. The Sixth Circuit.

The District Court's Opinion and Order were affirmed by the Sixth Circuit on January 10, 2019 (Appendix A). The Petitioners then timely sought rehearing *en banc* which was denied on February 27, 2019 (Appendix C).

REASONS FOR GRANTING THE PETITION

A. Failing to Rescue Claimants Already Ensnared in the *San Remo* Preclusion Trap Would Undermine the *Knick* Holding.

In *Knick*, this Court held that taking claimants alleging that local governments violated the Takings Clause may proceed directly to federal court and are not required to exhaust alternate state remedies. In so doing, this Court overruled, in part, *Williamson County Regional Planning Comm. v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985) which, *inter alia*, held that an aggrieved property owner could not pursue a takings claim in federal court under the Fifth Amendment or 42 U.S.C. § 1983 without first seeking compensation in state court. As this Court noted in *Knick*, at the time *Williamson County* was decided, it was expected that, in the event takings claimants were unable to secure just compensation using available state procedures, they could proceed to federal court to have their federal claims adjudicated.

Ten years later, however, in *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005), this Court determined that a state court's disposition of a claim for just compensation under state law precludes a comparable claim under the Fifth Amendment in federal court. In *Knick*, this Court referred to the dilemma faced by taking claimants as "the *San Remo* preclusion trap." 139 S. Ct. at 2167. According to this Court, the trap is set because "[t]he adverse state court decision that, according to *Williamson County*, gave rise to a ripe federal takings claim simultaneously barred that claim, preventing the federal court from ever considering it." *Id.* at 2169.

The Petitioners in this case have been caught squarely in the *San Remo* preclusion trap: they litigated their claims first in state court and assiduously avoided litigating any federal claims there in order to preserve them. Based upon what Petitioners contend is an unwarranted interpretation of this Court's decision in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), they were denied compensation. However, when they then pursued their federal takings claims in federal court, those claims were dismissed based on issue preclusion. Their story typifies the "Catch-22" to which the *Knick* Court referred. *Id.* at 2167.

Clearly, this Court in *Knick* overruled the *Williamson* exhaustion requirement not only because the reasoning in *Williamson County* was unsound but because the state court exhaustion requirement, when coupled with *San Remo* preclusion, wrongfully deprives takings claimants of their federal constitutional rights. "The fact that the State has provided a property owner with a procedure that may subsequently result in just compensation

cannot deprive the owner of his Fifth Amendment right to compensation under the Constitution, leaving only the state law right." *Id,* at 2171. This Court's decision in *Knick* makes clear that a claimant's Fifth Amendment rights cannot and should not be compromised by anything that takes place in state court, particularly if the claimant is in state court involuntarily. "If a local government takes private property without paying for it, that government has violated the Fifth Amendment – just as the takings clause says – without regard to subsequent state court proceedings." *Id*. at 2170.

This Petition should be granted because the federal courts should be explicitly instructed that *Knick* applies, not just to claimants who, prior to this Court's decision in *Knick*, *ignored* the requirements of *Williamson County,* avoided state courts and pursued their Fifth Amendment takings claim directly in federal court, but also to takings claimants, like the Petitioners here, who *observed* the requirements of *Williamson County*, exhausted their state court remedies, and were then shut out of federal court because of *San Remo.* In other words, by granting the Petition, this Court can afford takings claimants like the Petitioners a federal forum to adjudicate their Fifth Amendment claims, regardless of the disposition of the state court claim they were forced to advance under then existing law.[6]

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6. Correspondingly, application of the *Knick* holding to Petitioners would restore Petitioners' claims under 42 U.S.C. § 1983. "A property owner may bring a takings claim under § 1983 upon the taking of his property without just compensation by a local government." *Id.* at 2179.

Having dismantled the *San Remo* preclusion trap to spare *future* takings claimants, this Court should also free *past* claimants, like the Petitioners, who have already been caught in its grasp. Unless Petitioners and other takings claimants still in the pipeline are freed from the *San Remo* preclusion trap and allowed to pursue their Fifth Amendment claims in federal court, their Fifth Amendment rights will remain forever out of reach. "Fidelity to the Takings Clause and/or cases construing it requires overruling *Williamson County* and restoring takings claims to the full-fledged Constitutional status the Framers envisioned when they included the Clause among the other protections in the Bill of Rights." *Id.* at 2170. [7] In short, claimants like the Petitioners who have already been deprived of their Fifth Amendment rights as a result of the mischief caused by *Williamson County* and *San Remo* are just as entitled to litigate their Fifth Amendment claims in federal court as a claimant who

7. If any takings claims should be restored to "full-fledged Constitutional status" it is the claims advanced by the Petitioners in this case. Under federal law, "[w]hen faced with a Constitutional challenge to a permanent physical occupation of real property, this Court has invariably found a taking." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427 (1982). *Loretto* and its progeny, including *Horne v. Dep't of Agriculture*, 569 U.S. 513 (2013), stand for the proposition that the most serious and least defensible form of taking under federal law is a taking by physical invasion or permanent physical occupation. "The paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property." *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 536 (2005). Indeed, when a government action results in a permanent physical occupation of property, a taking is found, and further analysis is unnecessary as to "whether the action achieves an important public benefit or has only minimal economic impact on the owner." *Loretto, supra,* at 434.

ignored *Williamson County* and began litigating there in the first instance.

B. The Rules Governing Retroactivity Favor Application of *Knick* to the Petitioners' Case.

This Petition presents for consideration the question of whether the District Court and, in turn, the Sixth Circuit erred in dismissing the Petitioner's Complaint and, thereby, consigned them to the *San Remo* preclusion trap forever. Because the case is still open on direct review to this Court, *Knick* should be applied, the determinations below should be vacated and the Complaint should be reinstated in order to fulfill *Knick's* promise that property owners may pursue their Fifth Amendment takings claims in federal court.

> When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.

Harper v. Va. Dep't of Taxation, 509 U.S. 86, 97 (1993). In *Harper*, this Court reversed a state court which had refused to retroactively apply a non-discrimination principle in a dispute over retirement benefits. The Court addressed a previously unresolved question as to whether or not the presumptively retroactive effect of Supreme Court decisions could be limited in civil cases. Relying on an issue resolved by a majority of the justices in *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 521 (1991), this Court eschewed the selective application of new rules. *Id.*

"In both civil and criminal cases, we can scarcely permit 'the substantive law [to] shift and spring 'according to 'the particular equities of [individual parties'] claims' of actual reliance on an old rule and of harm from a retroactive application of a new rule." *Harper, supra* at 97, *quoting Beam* at 543. As Justice Blackmun said in his concurrence in *Beam*, ". . . I agree that failure to apply a newly declared Constitutional rule to cases pending on direct review violates basic norms of Constitutional adjudication." *Beam* at 547.

In this case, the harm wrought by *Williamson County* and *San Remo* can be remedied by explicitly extending the holding in *Knick* to the Petitioners.[8] If the objective of *Knick* is to protect property owners with legitimate Fifth Amendment takings claims from the risk that they will be effectively barred from federal court due to the "unanticipated consequences" of *Williamson County*, 139 S. Ct. at 2169, then this Court can further that objective by granting the Petition and, upon review, reversing the lower courts whose hands were tied by the now discredited *Williamson County* and *San Remo* opinions.

C. The Petitioners Did Not Waive Their Rights to Remain in Federal Court Following the Removal of the *Yu* Case by the City.

In its opinion, the Sixth Circuit found that the Petitioners had waived their right to litigate their cases in federal court:

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8. Indeed, but for the *San Remo* preclusion trap having been sprung on the Petitioners, they would have satisfied the state court exhaustion requirement of *Williamson County*, thus ripening their claim for adjudication in federal court.

> Because *Williamson* is a waivable defense for state defendants, and it was the City that removed this case to federal court, the Appellants could have litigated their claims in federal court. By moving to remand to state court, they waived that opportunity.

(Appendix A. Page 8a). This conclusion is simply inconsistent with the history of the case and the evolution of the "waiver by removal" doctrine that is part of the post-*Williamson County* jurisprudence.[9]

The *Yu* case was commenced on February 27, 2014. The City of Ann Arbor removed the case to the United Stated District Court for the Eastern District of Michigan on March 17, 2014, and, on March 24, 2014, moved for dismissal of the complaint for failure to state a claim and lack of subject matter jurisdiction based upon *Williamson County* [Case No. 2:14-cv-11129-AC-MKM, Docket No.

9. Before the *Yu* Petitioners sought remand, the only Circuit Court case in which there was any suggestion that removal from state court to federal court by a municipality might serve as a waiver was *Sansotta v. Town of Nags Head*, 724 F. 3d 533 (4th Cir. N.C. 2013). The other Circuit Court opinion finding a waiver which pre-dated oral argument on the *Yu* Petitioners' motion to remand, *Sherman v. Town of Chester*, 752 F.3d 554 (2d Cir. 2014), was not decided until two weeks before oral argument in the *Yu* case. As of April 4, 2014, the law in the Eastern District of Michigan clearly required the *Yu* Petitioners to seek remand. *See, Eaton v. Charter Twp. of Emmett*, 2008 U.S. App. LEXIS 6603 (6th Cir., March 21, 2008); *Oakland 40, LLC v. City of South Lyon*, 2011 U.S. Dist. LEXIS 53158 (E.D. Mich., May 18, 2011). Accordingly, the Sixth Circuit's position that the Petitioners, in seeking remand, made a strategic decision is not supported by the chronology of the "waiver by removal" exception to *Williamson County*.

2].[10] On April 3, 2014, the *Yu* Petitioners, reasonably believing that they were bound by the *Williamson County* exhaustion doctrine to first litigate in state court, prudently moved for remand. Following oral argument on May 28, 2014, the District Court Judge, Hon. Avern Cohn, granted the motion to remand, holding that: "[a] ll I know is that I don't have subject matter jurisdiction to deal with a claim of inverse condemnation under the Federal Constitution until there is an adjudication – an exhaustion, rather, of the remedies available under State Law." [Case No. 2:14-cv-11129-AC-MKM, Docket No. 14]. Presumably, Judge Cohn did not consider the *Williamson* exhaustion requirement a "waivable defense" at that time.

In its opinion, the Sixth Circuit cites as authority for its determination that the *Williamson* exhaustion requirement was a "waivable defense," *Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Prot.,* 560 U.S. 702, 729 (2010 and *Lilly Investments v. City of Rochester,* 674 Fed. Appx. 523, 531 (6th Cir. 2017). These two cases, however, would not have served as an invitation to the *Yu* Petitioners to ignore the removal or provide any assurance that, if they litigated the entire *Yu* Case in federal court without seeking remand, a successful outcome would survive because of their failure to first litigate in Michigan state court.

In *Stop the Beach*, the case was initiated in federal court and litigated there; neither party objected to the

10. In *A Forever Recovery, Inc. v. Twp. of Pennfield*, 606 Fed. Appx. 279 (6th Cir.2015), the Sixth Circuit characterized the practice of removing a state court initiated takings case to federal court followed by a motion to dismiss for lack of ripeness as "bad-faith motivation to remove for the purpose of prolonging litigation and imposing costs on the opposing party." 606 Fed. Appx. at 284.

case being disposed of in federal court. The case was not removed to federal court from state court so the Supreme Court never addressed the issue of whether a municipality that removes an inverse condemnation case waives the *Williamson* exhaustion requirement through removal. As a result, this case provided the *Yu* Petitioners and their counsel little comfort that litigating the case in federal court in Michigan, following the City's removal, would have insulated them forever from the harsh consequences of *Williamson County*. And, even though the City removed the *Yu* Case to federal court, it still moved to dismiss the *Yu* Plaintiffs' federal claims as unripe [Case No. 2:14-cv-11129-AC-MKM, Docket No. 2].

Lilly Investments surely could not have served as a guide to the *Yu* Petitioners either. While the Sixth Circuit in *Lilly Investments* held that a municipality which removes to federal court an inverse condemnation case commenced in state court waives the *Williamson* exhaustion requirement, the decision in that case was made public on January 5, 2017, *nearly three years after* the *Yu* Petitioners moved to remand their case back to state court.[11] The state of the law as of April of 2014 strongly suggested that whatever time and resources were expended in federal court would be wasted because the failure to exhaust the state court remedy would ultimately be invoked to invalidate any successes achieved in federal court.

Importantly, the Sixth Circuit (and the District Court) glossed over the materially different procedural histories in the *Yu* and *Lumbard* Cases when it found that *all the*

11. The Sixth Circuit acknowledged that its opinion in *Lilly Investments* came long after the motion for remand was decided in the *Yu* case (Appendix A, Page 7a).

plaintiffs had forfeited the purported waiver by removal defense: "the *Appellants* could have litigated their claims in federal court." (Appendix A, Page 8a) (emphasis added). In fact, the City never removed the *Lumbard* Case so there was no "defense" to waive.[12]

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be granted. While the Petitioners submit that summary reversal of the Sixth Circuit opinion and judgment and reinstatement the Petitioners' complaint are warranted, they respectfully request that, if a summary disposition is deemed inappropriate, the matter be heard by this Court due to its nationwide significance and because the logical extension of the *Knick* ruling to include the Petitioners and those similarly situated is well warranted.

Dated: July 26, 2019

Respectfully submitted,

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12. Of course, this contention by both the District Court and the Sixth Circuit that the Petitioners somehow waived their right to litigate their takings claims in federal court by seeking remand of the *Yu* Case just compounds the harm caused by the *Williamson* exhaustion requirement.

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, FILED JANUARY 10, 2019

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 18-1258

LYNN LUMBARD; ANITA YU; JOHN BOYER; MARY RAAB,

Plaintiffs-Appellants,

v.

CITY OF ANN ARBOR,

Defendant-Appellee.

December 5, 2018, Argued,
January 10, 2019, Decided and Filed

Appeal from the United States District Court for the Eastern District of Michigan at Detroit.
No. 2:17-cv-13428—Stephen J. Murphy, III
District Judge.

Before: BATCHELDER, COOK, and KETHLEDGE, Circuit Judges

OPINION

ALICE BATCHELDER, Circuit Judge. In 2000, the City of Ann Arbor passed an ordinance requiring

certain homeowners to undergo structural renovations to their homes to alleviate storm water drainage problems affecting the city and surrounding areas. The City paid or reimbursed the homeowners for the renovations. In 2014, the Appellants, homeowners affected by the ordinance, pursued litigation in Michigan state courts alleging that the City's actions amounted to a taking without just compensation under the Michigan Constitution. At the outset of litigation, the Appellants filed an *England* Reservation in an attempt to preserve a federal takings claim for subsequent adjudication in federal court. The Appellants lost in state court and then filed suit in federal court alleging causes of action under the Fifth Amendment of the United States Constitution and under 42 U.S.C. § 1983. The federal district court dismissed the Fifth Amendment claim as issue precluded and the § 1983 action as claim precluded. We **AFFIRM**.

I.

The Appellants in this case are property owners in and around the City of Ann Arbor, Michigan ("City"). The houses on their properties were built between 1946 and 1973. At the time of their construction, in accordance with City regulations, the houses were outfitted with drainage piping that emptied both storm water and sanitary sewage into a single "combined sewer system." In 1973, the City modernized its sewer system by adding a separate sewer system exclusively for storm water. After the completion of the new sewer system in 1973, the City passed an ordinance requiring that any new structures be built to discharge storm water to the storm sewer system

and sanitary sewage to the old combined sewer system. Existing structures were exempted from the ordinance.

The City's population continued to grow and the strain on the sewer systems came to a head in the years between 1997 and 2002. In each of those years the City experienced several tremendous rainfall events which resulted in overflows of the old combined sewer system including sewage overflow into public streets and the Huron River, and backups of sewage into City residents' basements. In early 2001, the City established a City Task Force and retained engineering consultants to study the problem and devise a solution. The City Task Force ultimately recommended a public works program that would disconnect the exempted homes in the older neighborhoods of the City from the old combined sewer system. The "Disconnect Program" would reroute the storm water drainage from selected homes to the storm sewer system, while maintaining the sanitary sewage outflow to the sanitary sewer system.

In August 2001, the City enacted Ordinance 32-01 ("Ordinance"). This Ordinance effectively repealed the 1973 exemption by declaring that all homeowners with pre-existing combined outflow drainage piping were in violation of City regulations. The Ordinance empowered the Director of the Utility Department ("Director") to select properties within the "Target Areas"[1] to be required to undertake the sewer work required by the Disconnect

1. The "target areas" were the older neighborhoods of the City that were built prior to construction of the storm water sewer system.

Program. Owners of selected properties had 90 days to comply, after which they would be fined $100 per month of noncompliance. All selected properties were eligible for a publicly funded installation by contractors preselected by the Director or up to $3,700 in reimbursement for an installation done by private contractors selected by the property owners.

The Disconnect Program required the excavation of a three-foot-by-four-foot sump pit in the foundation of the structure, connection of an electric pump, and the installation of piping that would send the ground water and storm water from the house to the storm water sewer nearby. This project could involve jackhammering into the foundation, penetrating walls, ripping up lawns, and hanging visible piping in and around the house through which the electric pump would pump water to the outside. After installation of the system, the homeowner would be responsible for its maintenance and operation costs. The Appellants lived in the "Target Areas," were selected for the Disconnect Program, and complied with the Program's requirements between the years of 2001-2003.

In February 2014, a group of homeowners, including Anita Yu ("Yu"), filed a complaint in Michigan state court against the City, alleging violation of the Michigan Constitution for a taking without just compensation (inverse condemnation) by a physical, permanent occupation of her property for a public purpose. The City removed the case to federal district court and Yu moved to remand to state court on the basis that her federal claims were unripe pursuant to the *Williamson* exhaustion

doctrine. *See Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985). The federal district court agreed and remanded the case to state court. Yu then filed a Notice of *England* Reservation informing the state court that she wanted to litigate only the state claims. *See England v. Louisiana State Bd. of Med. Examiners*, 375 U.S. 411, 415, 84 S. Ct. 461, 11 L. Ed. 2d 440 (1964). After discovery, the state court granted the City's motion to dismiss, finding that Yu owned the installation from the Disconnect Program and that the "issue of ownership . . . falls squarely on point" as dispositive in deciding the claim under Michigan takings law.

In October 2015, a group of similarly situated homeowners, the Lumbard plaintiffs ("Lumbard"), filed a complaint against the City in Michigan state court alleging identical state-law claims. Lumbard also attempted to preserve federal claims by filing a Notice of *England* Reservation with the court. The Michigan state court found that the legal issues were the same as those in the Yu case and granted the City's motion to dismiss.

In September 2016, the court consolidated the Yu and Lumbard cases for appeal in the Michigan Court of Appeals. The court found that Yu and Lumbard did not contest that they owned the installations, so the only question was whether, as a matter of law, a takings challenge for physical invasion[2] could occur if

2. The Michigan Court of Appeals noted that Plaintiffs did not allege a regulatory taking, but a "physical invasion" taking theory.

the homeowners owned the installations. Noting that the "[Michigan] Takings Clause is 'substantially similar' to its federal counterpart," the court applied Supreme Court takings caselaw, namely *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982). *Yu v. City of Ann Arbor*, No. 331501, 2017 Mich. App. LEXIS 739, 2017 WL 1927846, 4 (Mich. Ct. App. May 9, 2017). The Michigan Court of Appeals found that "a permanent physical occupation does not occur so long as the owner can exercise the rights of ownership over the installation," and affirmed both trial court decisions. *Id.*

In October 2017, Yu and Lumbard filed a complaint against the City in the United States District Court for the Eastern District of Michigan alleging several "causes of action" arising under the Fifth Amendment of the United States Constitution and 42 U.S.C. § 1983. The City moved to dismiss asserting that the claims were barred by issue and claim preclusion or, in the alternative, time-barred. The district court issued an opinion and order granting the City's motion to dismiss, holding that the Fifth Amendment takings claim was barred by issue preclusion and the § 1983 claim was barred by claim preclusion.

II.

We review *de novo* an order dismissing for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). *Theile v. Michigan*, 891 F.3d 240, 243 (6th Cir. 2018). While the district court succinctly and ably applied the labyrinth of federal takings caselaw in its decision to

grant summary judgment, the Appellants raise several arguments that we address explicitly.

First, the Appellants argue that *Williamson, supra*, is a jurisdictional bar to adjudication in federal court and thus they were forced to seek remand of their action to state court. But in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, 560 U.S. 702, 729, 130 S. Ct. 2592, 177 L. Ed. 2d 184 (2010), the Supreme Court considered two objections from the state agency, one of which was based on *Williamson*, for not having first "sought just compensation," and the Court dismissed the objections saying, "[n]either objection appeared in the briefs in opposition to the petition for writ of certiorari, and since neither is jurisdictional, we deem both waived." *Id.* The Court has also held that "[n]onjurisdictional defects of this sort should be brought to our attention no later than in respondent's brief in opposition to the petition for certiorari; if not, we consider it within our discretion to deem the defect waived." *Oklahoma City v. Tuttle*, 471 U.S. 808, 815-816, 105 S. Ct. 2427, 85 L. Ed. 2d 791 (1985). The Appellants urge that because *Stop the Beach* began in federal court, and thus was never removed, it does not apply to cases such as theirs which were initially removed to federal court. We disagree. The procedural posture of removal and remand neither strips nor grants subject-matter jurisdiction. Indeed, this court has already affirmed that the exhaustion requirement of *Williamson* is waivable, *see Lilly Invs. v. City of Rochester*, 674 Fed. Appx. 523, 531 (6th Cir. 2017), [3] as have our sister circuits

3. This holding post-dates the Appellants' initiating their litigation in federal district court.

in the years since *Stop the Beach*. *See Sansotta v. Town of Nags Head*, 724 F.3d 533, 544 (4th Cir. 2013); *Sherman v. Town of Chester*, 752 F.3d 554, 564 (2d Cir. 2014). Because *Williamson* is a waivable defense for state defendants, and it was the City that removed this case to federal court, the Appellants could have litigated their claims in federal court. By moving to remand to state court, they waived that opportunity.

Second, the Appellants spend considerable time urging that *England* Reservations are available absent a *Pullman* abstention order, such as when litigants are forced into state court under *Williamson*. The Appellants cite our decision in *DLX, Inc. v. Commonwealth of Kentucky*, 381 F.3d 511 (6th Cir. 2004), as an example of our upholding *England* Reservations in a nearly identical factual situation. But even if that is true, that language is dicta; the decision in *DLX* affirmed dismissal of the claim based on Eleventh Amendment Immunity, regardless of the DLX plaintiff's *England* Reservation. *DLX*, 381 F.3d at 528.[4] In any event, we need not take a position on the outer limit of an *England* Reservation's effect outside of *Pullman* abstention because our doing so would have no impact on our holding here.

Third, the Appellants argue that our opinion in *DLX* means that, in the Sixth Circuit, claims properly reserved under *England* are not subject to claim preclusion when

4. The separate opinion of Judge Baldock concurring only in the judgment seems to most accurately reflect where these tangled legal doctrines have ended up. *DLX*, 381 F.3d at 528-34 (Baldock, J., concurring).

litigants are involuntarily forced into state court under *Williamson*. On this point, the Appellants correctly characterize our ruling in *DLX*. However, the Supreme Court in *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323, 125 S. Ct. 2491, 162 L. Ed. 2d 315 (2005), clearly overruled this circuit, along with others, with respect to our *DLX* claim-preclusion exemption. *San Remo*, 545 U.S. at 345 (overruling *Santini v. Conn. Haz. Waste Mgmt. Serv.*, 342 F.3d 118 (2d Cir. 2003)). The *San Remo* court held that there are no judicial exceptions to the Full Faith and Credit Statute, 28 U.S.C. § 1738, "simply to guarantee that all takings plaintiff can have their day in federal court." *Id.* at 339. "Even when the plaintiff's resort to state court is involuntary . . . we have held that Congress must clearly manifest its intent to depart from § 1738." *Id.* at 345 (internal quotation marks omitted). When § 1738 applies to a state court decision, both issue preclusion and claim preclusion apply. "This statute has long been understood to encompass the doctrines of res judicata, or 'claim preclusion,' and collateral estoppel, or 'issue preclusion.'" *Id.* at 336 (citing *Allen v. McCurry*, 449 U.S. 90, 94-96, 101 S. Ct. 411, 66 L. Ed. 2d 308 (1980)). The preclusion doctrines under § 1738 apply to subsequent litigation in federal court to the same extent that they would in the state courts in which the judgment was rendered. *See Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 81, 104 S. Ct. 892, 79 L. Ed. 2d 56 (1984). Here, the district court applied Michigan preclusion doctrines to find that the federal takings claim under the Fifth Amendment was issue precluded and the § 1983 claim was claim precluded.

It is important to point out that while the district court, relying on Michigan law, found the subject matter of the Takings Clause of the Michigan Constitution and Takings Clause of the Fifth Amendment of the United States Constitution to be the same, such a finding is irrelevant to the ultimate disposition of the case. If the takings jurisprudence of the two constitutions is "coextensive" (to use the language of the *San Remo* court), then issue preclusion bars subsequent litigation of the federal takings claim after litigation of the state takings claim on the merits. If the takings jurisprudence of the two constitutions is not "coextensive," then claim preclusion bars subsequent litigation of the federal takings claim because it should have been brought with the state claim in the first instance in the Michigan court. Because in either event the Appellants' federal takings claim is precluded, we decline to opine on the "coextensiveness" of Michigan's Taking Clause jurisprudence.

III.

Appellants are precluded by the Full Faith and Credit Statute, 28 U.S.C. § 1738, from litigating these claims in federal court. We **AFFIRM**.

Appendix A

CONCURRENCE

KETHLEDGE, Circuit Judge, concurring. To find a good illustration of the law of unintended consequences, one need look no further than the Supreme Court's decision in *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985). The Court's actual holding was pedestrian: that Hamilton Bank's takings claim was unripe because the bank had not exhausted its administrative remedies, specifically its right to ask the County for a variance to develop the property in the manner proposed. *Id.* at 193-94. In dictum, however—dictum in the sense that the Court's pronouncement was at that point unnecessary to its decision—the Court went on to say that the bank's claim was "not yet ripe" for a "second reason[.]" *Id.* at 194. That reason too was couched in terms of exhaustion: that under state law "a property owner may bring an inverse condemnation action to obtain just compensation for an alleged taking of property"; and that, until the bank "has utilized that procedure, its takings claim is premature." *Id.* at 196-97. The Court's implicit assurance, of course, was that once a plaintiff checks these boxes, it can bring its takings claim back to federal court.

That assurance has proved illusory, as the plaintiffs in this case are only the latest to learn. For *Williamson County* seemed to overlook that, unlike a state or local body in an administrative proceeding, state courts issue *judgments*. And state-court judgments are things to which the federal courts owe "full faith and credit[.]" 28 U.S.C.

§ 1738; *see also* U.S. Const. art. IV, § 1. That obligation means that takings claims litigated in state court cannot be relitigated in federal. *See San Remo Hotel, L.P. v. City and County of San Francisco, Cal.*, 545 U.S. 323, 337-38, 125 S. Ct. 2491, 162 L. Ed. 2d 315 (2005). Thus—by all appearances inadvertently—*Williamson County* "all but guarantees that claimants will be unable to utilize the federal courts to enforce the Fifth Amendment's just compensation guarantee" against state and local governments. *Id.* at 351 (Rehnquist, C.J., concurring in the judgment).

Yet *Williamson County* has its defenders, notably state and local governments, who say that, if a state's procedure for providing "just compensation" happens to be a lawsuit in state court, an aggrieved property owner should be obligated to seek compensation there. The problem with that argument (apart from the catch-22 described above) is its premise: that, taking or not, the property owner cannot show a denial of "just compensation" until the state courts deny relief. But the Takings Clause does not say that private property shall not "be taken for public use, without just compensation, and without remedy in state court." Instead the Clause says that private property shall not "be taken for public use, without just compensation" *period*. U.S. Const. Amend. V. And that plainly means that, if the taking has happened and the compensation has not, the property owner *already* has a constitutional entitlement to relief. *See Arrigoni Enterprises, LLC v. Town of Durham, Conn.*, 136 S.Ct. 1409, 1409-10, 194 L. Ed. 2d 821 (2016) (Thomas, J., dissenting from denial of certiorari). Whether a local planning commission or the

state courts have recognized that entitlement is beside the point for purposes of whether the constitutional entitlement exists. That is why pre-judgment interest on a federal takings claim runs from the date the property was taken, not from some later date on which a state court denied relief. *See, e.g., Phelps v. United States*, 274 U.S. 341, 344, 47 S. Ct. 611, 71 L. Ed. 1083, 63 Ct. Cl. 689 (1927).

Williamson County thus turns away from federal court constitutional claimants who have every right to seek relief there. And in doing so *Williamson County* leaves those claimants without any federal forum at all. *Williamson County* itself did not foresee that result, and thus offered no justification for it. Nor has any later case explained why takings claims should be singled out for such disfavored treatment. And meanwhile, as this case and others illustrate, *Williamson County* has left the lower federal courts with plenty to do in cases where plaintiffs seek to assert federal takings claims against state or local defendants. Rather than actually adjudicate those claims, however, we adjudicate federal-court esoterica: things like *Pullman* abstention, the scope of state jurisdictional and venue provisions, the efficacy of so-called "*England* reservations," and whether state law disfavors the adjudication of federal takings claims in violation of *Haywood v. Drown*, 556 U.S. 729, 129 S. Ct. 2108, 173 L. Ed. 2d 920 (2009). *See, e.g., Wayside Church v. Van Buren County*, 847 F.3d 812, 818-822 (6th Cir. 2017); *id.* at 823-25 (dissenting opinion).

As to *Haywood*, in particular, "[o]ne further irony remains." *Id.* at 825 (dissenting opinion). There, the

Supreme Court held that state jurisdictional statutes that discriminate against "disfavored federal claim[s]" are invalid under the Supremacy Clause. 556 U.S. at 738-39. But so far as disfavored federal claims are concerned, the federal courts should consider their own advice: for "if anyone has undermined the adjudication of federal takings claims against states and local governments, it is the federal courts—by the application of *Williamson County*." *Id.* at 825 (dissenting opinion).

Federal courts have a "virtually unflagging" obligation to exercise the jurisdiction that Congress has given them. *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 77, 134 S. Ct. 584, 187 L. Ed. 2d 505 (2013). Congress has given us jurisdiction to hear these takings claims. Our constitutional order would be better served, I respectfully suggest, if we simply adjudicated them.

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION, FILED FEBRUARY 7, 2018

UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION

Case No. 2:17-cv-13428

LYNN LUMBARD, *et al.*,

Plaintiffs,

v.

CITY OF ANN ARBOR,

Defendant.

February 7, 2018, Decided;
February 7, 2018, Filed

HON. STEPHEN J. MURPHY, III

OPINION AND ORDER GRANTING ANN ARBOR'S MOTION TO DISMISS [6]

Plaintiffs are residents of Ann Arbor affected by a city ordinance regulating residential drainage and sewage systems. They allege that the implementation and enforcement of the ordinance violates, *inter alia*, their rights under the Fifth Amendment. Before the Court is

Ann Arbor's motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). After reviewing the briefs, the Court finds that a hearing is unnecessary. E.D. Mich. LR 7.1(f). For the reasons set forth below, the Court will grant the motion.

BACKGROUND

After bouts of heavy rainfall, Ann Arbor's sanitary-sewer system kept overflowing. ECF 6, PgID 150. To remedy the issue, Ann Arbor passed an ordinance requiring some citizens to connect their drainage systems to Ann Arbor's storm-sewer system instead of the sanitary-sewer system. *Id.* In some cases, this change required installation of sump pits, sump pumps, and related equipment. *Id.* Plaintiffs believed the ordinance violated their rights, so they filed lawsuits in Michigan courts alleging violations of Michigan's Takings Clause. ECF 6-5, 6-6, 6-7. Ann Arbor removed one of the cases to federal court. *Yu v. City of Ann* Arbor, Case No. 2:14-cv-11129, ECF 1. But the plaintiffs filed a motion to remand, which the Court granted. *Id.*, ECF 7, 12. After the remand, the Michigan trial courts dismissed the lawsuits with prejudice; Plaintiffs then appealed. ECF 6-2. The Michigan Court of Appeals consolidated the appeals, heard the case, and affirmed the dismissals. *Id.* Plaintiffs then filed the present suit in federal court seeking relief under the federal Takings Clause.

STANDARD OF REVIEW

The Court may grant a Rule 12(b)(6) motion to dismiss if the complaint fails to allege facts "sufficient 'to raise a

right to relief above the speculative level,' and to 'state a claim to relief that is plausible on its face.'" *Hensley Mfg. v. ProPride, Inc.*, 579 F.3d 603, 609 (6th Cir. 2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). The Court views the complaint in the light most favorable to the plaintiff, presumes the truth of all well-pled factual assertions, and draws every reasonable inference in favor of the non-moving party. *Bassett v. Nat'l Collegiate Athletic Ass'n*, 528 F.3d 426, 430 (6th Cir. 2008). If "a cause of action fails as a matter of law, regardless of whether the plaintiff's factual allegations are true or not," then the Court must dismiss. *Winnett v. Caterpillar*, Inc., 553 F.3d 1000, 1005 (6th Cir. 2009).

DISCUSSION

Plaintiffs allege five "causes of action": (1) violations of the Fifth Amendment; (2) 42 U.S.C. § 1983 claims for violations of the Fifth Amendment and the "right to be free from mandatory work"; (3) injunctive relief; (4) declaratory relief; and (5) attorney's fees. ECF 1. The complaint confuses the important differences between substantive rights, causes of action, and remedies. Even forgiving that technical imprecision, however, Plaintiffs fail to state a claim upon which relief can be granted because their action is barred by res judicata. The Court will therefore dismiss the case.

I. ***Res Judicata***

Generally, *res judicata* principles govern the relationship between separate lawsuits about the same

subject matter. 18 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 4401 (3d ed. 2017). The concept governs two subtly different scenarios: (1) the litigation of matters that have been previously litigated and decided; and (2) the litigation of matters that have not been previously litigated but should have been raised in an earlier lawsuit. The first scenario is known as issue preclusion, the second is known as claim preclusion.[1] *Id.* at § 4402. Under the doctrines, if certain conditions are met, then a plaintiff is barred from litigating particular issues or claims. The principles serve the dual purpose of protecting litigants from the burden of relitigating issues and promoting judicial economy. *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 326, 99 S. Ct. 645, 58 L. Ed. 2d 552 (1979). For the reasons set forth below, the Court finds that the decision in *Yu v. City of Ann Arbor* bars litigation of the issues presented here. No. 331501, 2017 Mich. App. LEXIS 739, 2017 WL 1927846, at *1 (Mich. Ct. App. May 9, 2017).

A. Applicability of Res Judicata

As a preliminary matter, the Court finds that *res judicata* applies. Plaintiffs contend that, pursuant to *Williamson Cty. Reg'l Planning Comm'n v. Hamilton*

1. As Professors Wright and Miller note in their influential treatise, the terminology has fluctuated over time—which has often led to confusion in the doctrine. Claim preclusion is sometimes called res judicata or true *res judicata*; issue preclusion is sometimes called collateral estoppel. 18 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 4402 (3d ed. 2017). For clarity, the Court will use the terms issue preclusion and claim preclusion.

Bank of Johnson City, 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985), they were required to litigate their Takings Clause claims in state court before proceeding in federal court. And because of that "requirement," Plaintiffs contend that they properly proceeded in state court while preserving their federal claims in accord with *England v. Louisiana State Bd. of Med. Examiners*, 375 U.S. 411, 84 S. Ct. 461, 11 L. Ed. 2d 440 (1964). Plaintiffs' argument is unpersuasive for several reasons.

First, Plaintiffs overstate the exhaustion requirement. Exhaustion of Takings-Clause claims is not a mandatory jurisdictional requirement but rather a waivable defense. *Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Prot.*, 560 U.S. 702, 729, 130 S. Ct. 2592, 177 L. Ed. 2d 184 (2010); *Lilly Investments v. City of Rochester*, 674 F. App'x 523, 531 (6th Cir. 2017). So when Ann Arbor removed the original state case to federal court, Plaintiffs did not need to litigate in state court to exhaust their Takings Clause remedies.

Second, Plaintiffs' "reservations of rights" is inoperative. Congress has ordered that state judicial proceedings shall have "full faith and credit in every court within the United States[.]" 28 U.S.C. § 1738. And the Supreme Court has made clear that federal courts "are not free to disregard 28 U.S.C. § 1738 simply to guarantee that all takings plaintiffs can have their day in federal court." *San Remo Hotel, L.P. v. City & Cty. of San Francisco, Cal.*, 545 U.S. 323, 338, 125 S. Ct. 2491, 162 L. Ed. 2d 315 (2005). Consequently, an *England* reservation does not grant a plaintiff a "second bite at the apple" when,

as here, a plaintiff already sought state review of the same substantive issue. *Id.* 346. As Justice Thomas later clarified, *San Remo Hotel* "dooms" a plaintiff's ability to seek review of federal claims in federal court after proceeding in state court. *Arrigoni Enters., LLC v. Town of Durham, Conn.*, 136 S. Ct. 1409, 1410, 194 L. Ed. 2d 821 (2016) (Thomas, J. dissenting from denial of certiorari).

In addition to comporting with a Congressional mandate, the *San Remo Hotel* holding is consistent with the purpose of an *England* reservation. In *England*, the Supreme Court clarified that a plaintiff could reserve his federal claims if he was sent to state court under the abstention doctrine. 375 U.S. at 420-21. The Supreme Court's decision makes sense given the logistics of abstention. Generally, a federal court abstains to determine whether the resolution of a distinct state issue obviates the need to answer a federal question. *San Remo Hotel*, 545 U.S. at 339. Consequently, state litigation after abstention is usually about a state issue distinct from a plaintiff's federal claims. And the federal claims are typically not litigated because of a Court order—not a party's strategic decision. Under those circumstances, it can be unfair to let the state decision bar federal litigation of the federal claims because doing so would deprive the plaintiff of an opportunity to advance his federal claims through no fault of his own. That scenario is inapposite to the one here. The federal court did not deprive Plaintiffs of their forum of choice. Rather, Plaintiffs moved to remand the case to state court. And once in state court, Plaintiffs advanced claims that are nearly identical to the ones presented here. Consequently, applying *res judicata*

does not unfairly deprive Plaintiffs of the opportunity to advance their claims—they had their day in court.

In sum, while the Court recognizes that applying *res judicata* in Takings Clause cases can result in harsh consequences, s*ee Arrigoni Enters.*, 136 S. Ct. at 1410-12 (2016), that is exactly what Congress and the Supreme Court have said the law requires. Moreover, applying *res judicata* in situations like the one at bar ensures federal courts are not arrogantly second-guessing the work of their state court colleagues, returning inconsistent verdicts, and ignoring the important principles of federalism, comity, and judicial economy.

B. Issue Preclusion

Plaintiffs' Takings Clause claims are barred under the issue preclusion doctrine. A state-court judgment has the same preclusive effect in federal court as it would have in the state where it was rendered. *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 81, 104 S. Ct. 892, 79 L. Ed. 2d 56 (1984). Under Michigan law, issue preclusion applies if Ann Arbor can prove that: (1) the subject matter of the case here is the same as was previously litigated in state court; (2) the parties in both suits are the same; and (3) the judgment in state court was on the merits. *Southfield Educ. Ass'n v. Southfield Bd. of Educ.*, 570 F. App'x 485, 488 (6th Cir. 2014). The Court finds that all three prongs have been satisfied.

The subject matter of the claims are the same. In pertinent part, Plaintiffs seek relief under the Takings

Clause of the Fifth Amendment of the United States Constitution. In state court, Plaintiffs sought relief under the Takings Clause of the Michigan Constitution. Although the clauses are from different constitutions, that difference does not preclude finding that the subject matter is the same. *Id.* (holding that the subject matter was the same when the only difference between the first and second actions was that the first stemmed from the Michigan Constitution and the second stemmed from the United States Constitution). That is particularly true when, as here, the clauses in each constitution are "substantially similar." *Tolksdorf v. Griffith*, 464 Mich. 1, 2, 626 N.W.2d 163 (2001).

The parties in both actions are the same. Here, Lynn Lumbard, Anita Yu, John Boyer, and Mary Raab are suing Ann Arbor. In *Yu v. City of Ann Arbor*, No. 331501, 2017 Mich. App. LEXIS 739, 2017 WL 1927846, at *1 (Mich. Ct. App. May 9, 2017), the Michigan Court of Appeals consolidated two cases brought, collectively, by the same Plaintiffs against Ann Arbor. The Michigan Court of Appeals then rendered a judgment, and that judgment bound the exact same parties present here.

The judgment in state court was on the merits. The Michigan Court of Appeals' decision thoroughly analyzed the Takings Clause issue, decided Ann Arbor was entitled to summary disposition, and affirmed the resolution of the case with prejudice. *Yu*, 2017 Mich. App. LEXIS 739, 2017 WL1927846, at *1. The Takings Clause analysis was necessary to the court's decision, and the time has passed for Plaintiffs to seek further review in the Michigan

courts. *See* Mich. Ct. R. 7.305(C)(2). Because a resolution with prejudice "finally disposes of a party's claim and bars any future action on that claim," the Court finds that the third prong is satisfied. *With Prejudice*, Black's Law Dictionary (10th ed. 2014).

Because all three prongs are satisfied, the state court judgment bars Plaintiffs from relitigating the Takings Clause issue here. Plaintiffs consequently cannot obtain any legal relief, so a dismissal of the Takings Clause claims is proper.

C. Claim Preclusion

To the extent Plaintiffs are bringing an additional claim under their "right to be free from mandatory work," that too is barred but under the claim preclusion doctrine.[2] The Court again applies state law to determine the preclusive effect of a state judgment under the claim preclusion doctrine. *Southfield Educ. Ass'n*, 570 F. App'x at 489 (citing *Hapgood v. City of Warren*, 127 F.3d 490, 493-94 (6th Cir.1997)). Under Michigan law, claim preclusion applies when: (1) the original decision was on the merits; (2) an issue in the subsequent action should have been litigated in the original action; and (3) the parties in the subsequent action are the same as the parties in the original action. *Id.* (citing *Dart v. Dart*, 460 Mich. 573, 586, 597 N.W.2d 82 (1999)). The first and third prongs are duplicative of the analysis under issue

2. The Court assumes, arguendo, that Plaintiffs' claim is cognizable.

preclusion, so those prongs are satisfied for the same reasons provided in Section I.A.

As to the second prong, whether any new issues presented here should have been litigated in the earlier state court proceedings, Michigan courts have adopted a "broad approach" meaning that "all claims arising from the same transaction that could have been raised in state court, but were not, are barred." *Id.* All claims here arise from the exact same transaction underlying the state court proceedings. And although the claims here are federal, nothing suggests Plaintiffs could not have raised the federal issues in the state court proceedings.[3] *See Migra*, 465 U.S. at 84 (holding that res judicata principles apply even when plaintiffs opt not to bring related federal claims in state court proceedings); *San Remo Hotel*, 545 U.S. at 342 (rejecting argument that plaintiffs "have a right to vindicate their federal claims in a federal forum"). Accordingly, the Court finds that the second prong is satisfied.

Because all three prongs are satisfied, the state court judgment bars Plaintiffs from raising the new federal issues presented here. Plaintiffs consequently cannot obtain any legal relief, so a dismissal of any remaining claims is proper.

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3. The one exception may be Plaintiffs' claim for declaratory relief because 28 U.S.C. § 2201 provides that a "court of the United States" can provide declaratory relief. But "the availability of such relief presupposes the existence of a judicially remediable right." *Schilling v. Rogers*, 363 U.S. 666, 677, 80 S. Ct. 1288, 4 L. Ed. 2d 1478 (1960). Because no remediable rights remain, the relief sought is unavailable.

II. Conclusion

Because Plaintiffs cannot obtain any legal relief based on the claims listed in the complaint, the Court will grant Ann Arbor's motion and dismiss the case.

ORDER

WHEREFORE, it is hereby **ORDERED** that Defendant's Motion to Dismiss [6] is **GRANTED**.

This is a final order that closes the case.

SO ORDERED.

/s/ Stephen J. Murphy, III
STEPHEN J. MURPHY, III
United States District Judge

Dated: February 7, 2018

APPENDIX C — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, FILED FEBRUARY 27, 2019

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 18-1258

LYNN LUMBARD; ANITA YU;
JOHN BOYER; MARY RAAB,

Plaintiffs-Appellants,

v.

CITY OF ANN ARBOR,

Defendant-Appellee.

ORDER

BEFORE: BATCHELDER, COOK, and KETHLEDGE, Circuit Judges.

The court received a petition for rehearing *en banc*. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing *en banc*.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/_____
Deborah S. Hunt, Clerk