No. 19-798

In The Supreme Court of the United States

BAY POINT PROPERTIES, INCORPORATED,

Petitioner,

v.

MISSISSIPPI TRANSPORTATION COMMISSION AND MISSISSIPPI DEPARTMENT OF TRANSPORTATION; et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

CHRISTOPHER M. HOWDESHELL
Counsel of Record
PITTMAN HOWDESHELL, PLLC
Post Office Drawer 17138
140 Mayfair Road, Suite 400
Hattiesburg, MS 39404
Telephone: (601) 264-3314
chris@pittmanlawfirm.net

WILSON D. MINOR
Special Assistant Attorney General
State of Mississippi
OFFICE OF THE ATTORNEY GENERAL
Post Office Box 220
Jackson, MS 39205
Telephone: (601) 359-4072
wmino@ago.ms.gov

JACK H. PITTMAN
PITTMAN HOWDESHELL, PLLC
Post Office Drawer 17138
140 Mayfair Road, Suite 400
Hattiesburg, MS 39404
Telephone: (601) 264-3314
jack@pittmanlawfirm.net

Counsel for Respondents

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

RESTATEMENT OF QUESTION PRESENTED

Whether the Eleventh Amendment precludes Petitioner from maintaining an inverse condemnation lawsuit for retroactive monetary damages in federal court.

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INTRODUCTION

This case involves an inverse condemnation claim by Bay Point Properties, Inc. (hereinafter Petitioner) against the Mississippi Transportation Commission, the Mississippi Department of Transportation, and others (hereinafter Respondents) for monetary compensation related to the relocation of a bridge landing on U.S. Highway 90 in Harrison County, Mississippi. The case was initially filed in State court, and the jury awarded Petitioner $500.00. The jury verdict was affirmed by the Mississippi Supreme Court, and this Court denied Petitioner's Writ for Certiorari from the Mississippi Supreme Court. *Bay Point Properties, Inc. v. Mississippi Transportation Commission*, Case No. 16-1077. The Petitioner then filed a virtually identical lawsuit in United States District Court, which was dismissed under the Eleventh Amendment. The Fifth Circuit Court of Appeals affirmed the District Court's Judgment, and Petitioner again has filed a Petition for Writ of Certiorari. The Petition should be denied because 1) The Petition requests an advisory opinion; 2) the Fifth Circuit followed established precedent and therefore there is no question of federal law that should be settled by this Court; 3) the Fifth Circuit's Opinion does not conflict with this Court's precedent or a decision by a state court of last resort; and 4) the Fifth Circuit's Opinion does not conflict with a decision of another United States Court of Appeals on the question presented.

COUNTER STATEMENT OF THE CASE

I. FACTS.

A. BACKGROUND.

On August 20, 2018, the United States District Court for the Southern District of Mississippi, Southern Division, dismissed Petitioner's Complaint for Declaratory Judgment and Damages under the Eleventh Amendment to the United States Constitution. The United States Court of Appeals for the Fifth Circuit affirmed the District Court's decision by Judgment dated August 27, 2019. This Petition for Writ of Certiorari followed.

B. FACTUAL MISSTATEMENTS IN THE PETITION.

Under this Court's Rules, counsel for Respondents have an obligation to note perceived misstatements of fact or law contained in the Petition. Sup. Ct. R. 15. In order that the Court may fully comprehend this Brief in Opposition, perceived omissions of important facts are also included.

1. Petitioner asserts that in 1993, Bay Point purchased a 14.34 acre parcel in Henderson County, Mississippi. (Pet. 3). Respondents would assert that Bay Point purchased a 14.34 acre parcel in Harrison County, Mississippi, on August 1, 1994, from the Estate of Wallace Walker. App. 2, pg. 2.

2. Petitioner asserts that Respondents' predecessor acquired an easement on the land for a

specific highway purpose. (Pet. 4). Petitioner would assert that Wallace Walker granted the Mississippi State Highway Commission, the predecessor to Respondents, an easement over the property for highway purposes. However, the easement obtained was for the specific purpose of constructing Toll Project No. 1, which was a highway bridge crossing the Bay of St. Louis between the cities of Pass Christian and Bay St. Louis, Mississippi. App. 2, pg. 2.

3. Petitioner asserts that the State's appraisal eventually established a value of $8,788,650.00 for the 7.76 acres of land used for the park. (Pet. 5). Respondents would assert that the appraisal witnesses for the State who testified at the state court proceeding agreed that the unencumbered value of the property was $26.00 per square foot, or $8,788,650.00. The same appraisal witnesses for the State testified that the value of the property encumbered by the easement would be a nominal sum of $100.00 to $500.00. This was the only encumbered value presented to the jury. App. 1, pg. 7-8.

4. Respondents state that "despite its [Respondents] previous agreement, MTC told Bay Point that it would not purchase the land." (Pet. 5). Respondents would assert that the Respondents informed Petitioner that the original easement had not been terminated, and that the park was constructed on the easement pursuant to state statute. App. 2, pg. 3.

II. JUDICIAL PROCEEDINGS.

A. PETITIONER'S INVERSE CONDEMNATION SUIT IN STATE COURT.

1. Petitioner states that the jury in the State court matter was "compelled to selected" [sic] compensation option #2, finding that, although the State took Bay Point's property, Bay Point was only entitled to a nominal sum of $500.00 as compensation. (Pet. 8). Respondents would point out that there is nothing in the record to suggest the jury was compelled to select a particular jury instruction or compensation option.

B. THE FIRST PETITION FOR WRIT OF CERTIORARI.

Petitioner asserts that it filed a Petition for Certiorari from the Mississippi Supreme Court asking this Court to decide whether a statute can limit the provision of just compensation for a taking. (Pet. 9). Respondents assert that Petitioner filed a Petition for Writ of Certiorari asking this Court to hold that Mississippi Code Annotated §65-1-123 (amended 2003) could not be utilized to value the property as encumbered. *Id.*, Case No. 16-1077. (Pet. 15).

C. THE FEDERAL SUIT.

Petitioner asserts that the Fifth Circuit's opinion "observed" that resolution of tension between the Eleventh Amendment and just compensation clause is a question for the Supreme Court.

> Respondents would assert that the opinion, in a footnote, stated that the tension between state sovereign immunity and the right to just compensation under the Fifth and Fourteenth Amendments was a determination for the Supreme Court, not the Fifth Circuit. App. 3, pg. 2.

REASONS FOR DENYING THE PETITION

I.

PETITIONER IS REQUESTING AN ADVISORY OPINION.

Petitioner disagrees with the Fifth Circuit's holding that the Eleventh Amendment bars a claim for retroactive monetary damages against Respondents in federal court. Petitioner argues that this will "potentially" allow states to take property without payment of just compensation. As such, Petitioner is requesting an advisory opinion which is prohibited under justiciability rules. *Flast v. Cohen*, 392 U.S. 83, 94-97 (1968). In this case, Respondents never claimed sovereign immunity in the state court matter, and Petitioner was afforded a full jury trial on its takings claim. The Mississippi Supreme Court subsequently affirmed the jury verdict, and this Court declined to review further. Therefore, even assuming that a state could potentially take property without constitutional consequence as Petitioner broadly asserts, such a taking did not occur in this matter, and Petitioner is asking this Court to decide an issue that is not properly presented.

Notwithstanding, Respondents address Petitioner's claims as follows.

A. THE PRINCIPLES OF THE JUST COMPENSATION CLAUSE AND ELEVENTH AMENDMENT DO NOT CONFLICT.

Petitioner attempts to argue that this Court should grant the Petition because the Just Compensation Clause and the Eleventh Amendment conflict. Specifically, Petitioner argues that if the Eleventh Amendment precludes recovery for takings claims, then states may be able to take property without compensation; but if the Fifth Amendment "trumps" the Eleventh Amendment, the states will have to risk a compensatory damage claim in state or federal court. (Pet. 17).

In reality, and as shown below, there is no conflict between the two constitutional provisions. Aggrieved landowners may assert federal constitutional claims against the state agency responsible for the taking in state court, but not federal court. This allows a landowner to seek compensation without violating a state's sovereign immunity in federal court. Further, a state court's treatment of the federal claims can be reviewed by this Court. Sup. Ct. R. 10(b). Therefore, instead of being in conflict with one another, the two constitutional provisions are, in fact, complementary.

B. STATE COURTS ARE THE PROPER FORUM IN WHICH TO LITIGATE FIFTH AMENDMENT TAKINGS CLAIMS ASSERTED AGAINST A STATE.

Petitioner complains that established precedent under the Eleventh Amendment requires owners to "play their just compensation cards" in state court, where they "may" face sovereign immunity barriers. (Pet. 19). Petitioner cites cases from Arkansas, Tennessee and Florida in support of this very general proposition. However, these cases are not before this Court.

In this case, Petitioner admits that sovereign immunity would not have been barred it from filing a Fifth Amendment claim for compensation in state court. Petitioner claims, however, that the lawsuit was "controlled and conditioned" by state compensation procedures which led to an unsatisfactory verdict and which, in turn, prompted Petitioner to file a virtually identical lawsuit in federal court. (Pet. 20).

The statement that Petitioner's claim was controlled and conditioned by state compensation procedures is a mischaracterization. The state court proceeding involved the application of Mississippi Code Annotated §65-1-123 (amended 2003), which provides that an easement acquired by the State for highway purposes may only be released by the Mississippi Transportation Commission on its official minutes. *See*, *Bay Point Props. v. Mississippi Transportation Comm'n*, 201 So.3d at 1046, 1052-1053 (Miss. 2016). Thus, the statute did not bar the state court jury from awarding Petitioner

"full monetary compensation"; rather, the statute was considered by the jury in determining whether Petitioner's property was encumbered by a highway easement or not. The jury found after six (6) days of trial that the property was still encumbered by an easement, and then awarded Petitioner the only amount offered in evidence for an encumbered value, $500.00. This Court had the opportunity to review this statute, but denied the Petition for Writ of Certiorari in that matter. Thus, Petitioner is asking this Court to issue an advisory opinion because Respondents did not attempt to invoke sovereign immunity in the state court proceeding and Petitioner is relying on cases and facts that have no application here.

Petitioner asserts that the decision in *Alden v. Maine*, 527 U.S. 706 (1999) will allow state governments to assert the same sovereign immunity claims in state court that are invoked in federal court. (Pet. 23). However, a closer reading of the *Alden* decision does not suggest such a sweeping statement. Initially, it must be noted that the *Alden* decision did not involve a taking's claim under the Fifth Amendment. In addition, the Court in *Alden* held that Congress cannot abrogate through Article I legislation the states' sovereign immunity from suit in their own courts; and more specifically, that Congress could not require state courts to hear a cause of action under the Fair Labor Standards Act. *Alden*, 527 U.S. at 754. The *Alden* decision also emphasized that "[t]he constitutional privilege of a state to assert its sovereign immunity in its own courts does not confer upon the state a

concomitant right to disregard the Constitution or valid federal law." *Alden*, at 754-755. Further, the Court noted that it was "unwilling to assume the states will refuse to honor the Constitution or obey the binding laws of the United States." *Id.* at 755.

State courts are obligated to enforce the United States Constitution and are just as capable of doing so as federal courts. *See*, *Burt v. Titlow*, 571 U.S. 12, 19 (2013) ("Indeed, 'state courts have the solemn responsibility equally with the federal courts to safeguard constitutional rights,' and this Court has refused to sanction any decision that would 'reflec[t] negatively upon [a] state court's ability to do so.' ") (quoting *Trainor v. Hernandez*, 431 U.S. 434, 443 (1977); alterations in original). Petitioner's concern that sovereign immunity will prevent landowners from litigating takings claims in state court unless this Court carves out an exception to the Eleventh Amendment is, therefore, unfounded.

C. THE OPINION OF THE FIFTH CIRCUIT DOES NOT CONFLICT WITH THIS COURT'S PRECEDENT.

Petitioner argues that this Court should grant the Petition to resolve the conflict between the lower court's strict application of sovereign immunity to a takings claim and precedent from this Court that immunity is subject to claims asserted under the Just Compensation Clause. (Pet. 26). The problem with

Petitioner's argument is that it can provide no precedent in direct conflict with the Fifth Circuit's opinion.

Citing *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 317 n.9 (1983), Petitioner asserts that the Just Compensation Clause creates an exception to sovereign immunity. (Pet. 24-25). There are several logical misfires in this argument. First, the Court in *First English* did not address the issue of Eleventh Amendment immunity, i.e., whether states can be sued for damages in federal court for a taking under the Fifth Amendment. Indeed, *First English* involved a Fifth Amendment takings claim filed in state court against a county government. Second, the footnote at issue "makes clear that the Solicitor General was not directly arguing that sovereign immunity barred just-compensation claims"; rather, he was arguing that the clause "should be interpreted only to prospectively nullify government action that has caused an un-compensated taking of private property for public use, and not to create a cause of action for retroactive monetary relief." *See*, Richard H. Seamon, *The Asymmetry of State Sovereign Immunity*, 76 Wash. L. Rev. 1076-1077 (2001). The Court's refutation of the Solicitor General's argument, therefore, could not be a refutation of Eleventh Amendment immunity for takings claims; rather, it was an affirmation that the term "self-executing" means that the Takings Clause, by itself, furnishes a basis for relief of violation of its provisions.

Petitioner then cites *Lucas v. South Carolina Coastal Council*, 505 U.S. 103 (1992); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002), and *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001) for the proposition that the fact that the Court did not, but could have, addressed sovereign immunity in these cases creates some sort of direct conflict of precedent. Petitioner then admits that these cases "did not directly reject sovereign immunity." (Pet. 25). The absence of discussion of sovereign immunity in these cases, however, may be explained in that the *Lucas* and *Palazzolo* matters originated in state court, where the Eleventh Amendment immunity is not available.[1] *Lucas v. South Carolina Coastal Council*, 505 U.S. at 1007; *Palazzolo v. Rhode Island*, 533 U.S. at 611. Likewise, it is unclear why sovereign immunity was not raised in the *Tahoe-Sierra* case, but it is also equally unclear as to whether this agency was, in fact, a state agency that could assert an Eleventh Amendment defense. Petitioner also cites *Reich v. Collins*, 513 U.S. 106 (1994), for the proposition that the Court has rejected a sovereign immunity defense in cases involving a refund of unconstitutionally exacted taxes. Petitioner has to admit though that "*Reich* has little force in the takings context." (Pet. 26).

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[1] These cases present an excellent example of how landowners' property rights can be protected in state court matters because this Court has the power to review a decision in a state court of last resort.

II.

NO CONFLICT EXISTS BETWEEN STATE COURTS ON THE APPLICATION OF THE ELEVENTH AMENDMENT CLAIMS, AND NO CONFLICT EXISTS AMONG THE FEDERAL COURTS.

A. STATE COURTS ARE NOT IN CONFLICT WITH FEDERAL COURTS AS TO WHETHER THE JUST COMPENSATION CLAUSE ABROGATES SOVEREIGN IMMUNITY.

1. State Courts Hold That a Claim Under the Just Compensation Clause in State Court Is Not Barred by Sovereign Immunity.

Petitioner asserts that, post-*Alden*, state courts have unanimously concluded that the Fifth Amendment "abrogates a state's immunity from suit in the takings context." Pet. 28. Petitioner cites three cases in support of its argument that a conflict exists between federal and state courts regarding whether sovereign immunity, as preserved by the Eleventh Amendment, shields states from Fifth Amendment takings claims. These cases are: *Boise Cascade Corp. v. State ex rel. Oregon State Board of Forestry*, 991 P. 2d 563 (Or. Ct. App. 1999); *SDDS, Inc., v. State*, 650 N.W. 2d 1 (S.D. 2002); and *Manning v. N.M. Energy, Minerals & Natural Resources, Dep't*, 144 P. 3d 87 (N.M. 2006). Petitioner's assertion that the holdings in these cases conflict with the Fifth Circuit decision in this case is incorrect.

The Fifth Circuit held that the Eleventh Amendment barred Petitioner from maintaining an action

in federal court seeking monetary damages from the State for the taking of its property. By contrast, the state court cases cited by Petitioner hold that a state may not invoke sovereign immunity to bar consideration of a Fifth Amendment takings claim filed in state court. *See*, *Boise Cascade Corp.*, 991 P. 2d 563, 568 (Or. Ct. App. 1999) ("We conclude that *Alden* should not be read so broadly as to dictate that states may not be sued in state courts on federal takings claims unless they have specifically waived their sovereign immunity."); and *SDDS, Inc.*, 650 N.W. 2d at 18 (" . . . the Oregon Court concluded that a state could be sued in state court for takings in violation of the federal constitution. We agree with the statement of the Oregon Court in *Boise Cascade Corp.* and with the Trial Court's analysis."); and *Manning*, 144 P. 3d at 94 ("we hold, therefore, that *Alden* did not alter the historical practice of applying the takings clause to the state, and nothing in that opinion permits a state to bar a claim for 'just compensation' from its courts"). These cases confirm that states may be held liable for taking property without payment of just compensation in their own courts.

Petitioner has attempted to create a conflict that does not exist. These cases do not hold that a state may be sued in federal court on a takings claim despite the Eleventh Amendment. Instead, these cases confirm that states are liable for takings claims in their courts.

2. The Federal Decisions Do Not Conflict with the State Decisions, Because States Must Abide by Section 1 of the Fourteenth Amendment.

Petitioner cites several federal circuit court of appeals opinions that hold the Eleventh Amendment bars takings claims against a state in federal court. (Pet. 31). In fact, it appears that all Circuits which have addressed this issue are in agreement regarding the applicability of the Eleventh Amendment to federal takings claims. Nonetheless, Petitioner contends that the federal courts' interpretation of the Eleventh Amendment conflicts with state courts' rejection of sovereign immunity in this context. (Pet. 33). However, Petitioner's argument does not tell the whole story. The Fifth Amendment to the Constitution requires payment of just compensation upon the taking of property. The Eleventh Amendment precludes federal courts from exercising jurisdiction over takings claims brought against states or state agencies. Thus, takings claims under the Fifth Amendment to the Constitution must be brought in state court. This is consistent with the requirement of the Fourteenth Amendment, which forbids any state from "depriving any person of life, liberty or property without due process of law." U.S. CONST. amend. XIV, §1. This Court has interpreted this Amendment as requiring states to provide reasonable, certain and adequate provisions for obtaining compensation. *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194 (1985). *See also*, Seamon, at 1108 (a state must provide proper

procedures for obtaining compensation for a taking). *See also*, *Reich v. Collins*, 513 U.S. at 109.

Indeed, this system allows aggrieved landowners to file a claim under the Fifth Amendment to the U.S. Constitution in state court, without violating the long-recognized principle of the sovereignty of the states. *See*, *Alden*, at 755 ("the principle of sovereign immunity as reflected in our jurisprudence strikes the proper balance between the supremacy of federal law and the separate sovereignty of the states") (*citing Pennhurst State School and Hospital v. Haldermann*, 465 U.S. 89, 105 (1984)). In *Franchise Tax Board v. Hyatt*, 139 S. Ct. 1485 (2019) the Court stated that "an integral component of the state sovereign immunity" was "their immunity from private suits, and that the state's immunity from suit is a fundamental aspect of the sovereignty which the states enjoyed before the ratification of the Constitution, and which they retain today." This fundamental aspect of the state's inviolable sovereignty was well-established and widely accepted at the founding. *Franchise Tax Board v. Hyatt*, 139 S. Ct. at 1493.

Thus, the very difference in the way federal courts and state courts treat sovereign immunity undermines Petitioner's arguments; landowners can obtain redress for their grievances under the Just Compensation Clause in state court without violating States' Eleventh Amendment immunity from suit in federal court. Further, as mentioned above, any alleged constitutional violation not redressed by a state's highest appellate court can be reviewed by this Court. This is how

the judicial system historically has dealt with the interplay between the Eleventh Amendment and the Fifth Amendment, and this system has worked well since the decision in *Hans v. Louisiana*, 134 U.S. 1 (1890).

B. THERE IS NO CONFLICT BETWEEN FEDERAL COURTS AS TO WHETHER THE ELEVENTH AMENDMENT BARS TAKINGS CLAIMS AGAINST A STATE IN FEDERAL COURT.

Petitioner attempts to establish a conflict between the federal courts of appeal as to whether the Eleventh Amendment precludes a takings claim against a state in federal court. (Pet. 33-34). The cases cited by Petitioner do not support this contention.

Petitioner first cites the opinion of the Ninth Circuit Court of Appeals in *Guerin v. Fowler*, 899 F. 3d 1112 (9th Cir. 2018), and the subsequent dissent from the denial of rehearing, *Fowler v. Guerin*, 918 F. 3d 644 (9th Cir. 2019) (Bennett, J., dissenting from denial of rehearing en banc). The Ninth Circuit treated the Plaintiff's complaint as an injunction for prospective relief requiring the Director of the Washington State Department of Retirement Systems to return savings taken from the teachers, which it distinguished from a compensatory damages award. *Guerin v. Fowler*, 899 F. 3d at 1120. As to compensatory damage awards claimed under the Takings Clause, which was the remedy requested in this case, the Ninth Circuit has

held in no uncertain terms that the federal courts have no jurisdiction to hear such claims against states. *See*, *Seven Up Pete Venture v. Schweitzer*, 523 F. 3d 948, 956 (9th Cir. 2007); and, *Jachetta v. United States*, 653 F. 3d 898, 910 (9th Cir. 2011) (holding that Plaintiff's inverse condemnation claim against Alaska was barred). The Ninth Circuit's opinions in these two cases are consistent with the Fifth Circuit opinion reviewed here, and, therefore, no conflict exists. Judge Bennett, in his dissent from the denial of rehearing, did assert that the Ninth Circuit's opinion in *Guerin* created a circuit split. 918 F. 3d at 645. However, this Court denied the petition for writ of certiorari filed in that case. *Guerin v. Fowler*, 140 S. Ct. 390 (2019).

Petitioner also cites *Arnett v. Myers*, 281 F. 3d 552 (6th Cir. 2002) stating the Sixth Circuit allowed a hearing to go forward in the federal district court on whether the removal or destruction of duck blinds constituted a taking. (Pet. 35). However, a closer reading of this case also establishes that the Plaintiffs sought prospective equitable relief under *Ex Parte Young*, 209 U.S. 123 (1908). *Arnett v. Myers*, 281 F. 3d at 567. As with the Ninth Circuit's decision in *Guerin v. Fowler, supra*, the issue of prospective injunctive relief is not part of the review requested by this Court. However, like the Ninth Circuit and the Fifth Circuit, the Sixth Circuit also clearly holds that claims for monetary relief under the Just Compensation Clause may not

be brought against a state in federal court. *DLX v. Kentucky*, 381 F. 3d 511, 526 (6th Cir. 2004).

Petitioner then cites cases from the Federal Circuit and an Ohio Federal District Court for the proposition that a split exists between the circuit courts of appeal, being *Hair v. United States*, 350 F. 3d 1253 (Fed. Cir. 2003), and *Leistiko v. Secretary of Army*, 992 F. Supp. 66 (N.D. Ohio 1996). These cases involved claims against the United States, not the several states, do not mention the Eleventh Amendment, and are, therefore, clearly inapplicable to this case.

CONCLUSION

The Petition should be denied. Petitioner is requesting an advisory opinion, and fails to demonstrate that the Fifth Circuit opinion in this matter is in conflict with this Court's precedent, precedent from another circuit court of appeals, or state court precedent. State courts are the proper forum to adjudicate federal constitutional claims against the state, and if a state court falters in upholding constitutional guarantees, this Court is able to provide redress.

Respectfully submitted on this, the 20th Day of February, A.D., 2020.

CHRISTOPHER M. HOWDESHELL
Counsel of Record
PITTMAN HOWDESHELL, PLLC
Post Office Drawer 17138
140 Mayfair Road, Suite 400
Hattiesburg, MS 39404
Telephone: (601) 264-3314
chris@pittmanlawfirm.net

JACK H. PITTMAN
PITTMAN HOWDESHELL, PLLC
Post Office Drawer 17138
140 Mayfair Road, Suite 400
Hattiesburg, MS 39404
Telephone: (601) 264-3314
jack@pittmanlawfirm.net

WILSON D. MINOR
Special Assistant Attorney General
State of Mississippi
OFFICE OF THE ATTORNEY GENERAL
Post Office Box 220
Jackson, MS 39205
Telephone: (601) 359-4072
wmino@ago.ms.gov

Counsel for Respondents