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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

CHARLES S. LAMBERT, JR.
Law Offices of Charles S. Lambert, Jr., LLC
10537 Kentshire Court, Suite A
Baton Rouge, LA 70810
Telephone: (225) 367-1073
Chip@grandlawfirm.com

J. DAVID BREEMER
Counsel of Record
Pacific Legal Foundation
930 G Street
Sacramento, CA 95814
Telephone: (916) 419-7111
jbreemer@pacificlegal.org

BRIAN T. HODGES
Pacific Legal Foundation
255 South King Street, Suite 800
Seattle, WA 98104
Telephone: (916) 419-7111
bhodges@pacificlegal.org

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statute

Other Authorities

INTRODUCTION

The Just Compensation Clause requires payment of monetary compensation when the government takes private property. The Eleventh Amendment and general sovereign immunity principles allow states to avoid private damages claims. If the immunity doctrine prevails when a property owner sues a state for a taking of property, as the decision below held, state agencies that restrict property will enjoy a large loophole from the Just Compensation Clause, leaving the right to compensation dependent on the consent of the state. This is inconsistent with the "self-executing," remedial nature of the Just Compensation Clause and the limitations imposed on states by the Fourteenth Amendment, including the requirement that they pay for takings.

Respondents do not address these doctrinal tensions head-on. Instead, they claim that takings claims may be brought against a state in state courts without offending sovereign immunity, but not in federal court. This conclusory assessment simply highlights the problem. It is now settled that Just Compensation Clause and sovereign immunity principles are the same in federal and state court. *See Knick v. Township of Scott*, 139 S. Ct. 2162, 2172 (2019) (property owners may raise claims under the Just Compensation Clause in federal court, just as in state courts); *Franchise Tax Board of California v. Hyatt*, 139 S. Ct. 1485, 1493 (2019) (states enjoy sovereign immunity from suit in all courts). In asserting, without precedential support, that these principles should yield contrary outcomes in state and

federal courts, Respondents highlight the doctrinal confusion in this area and the need for clarity.

Moreover, in acknowledging the "difference in the way federal courts and state courts treat sovereign immunity," Opp. at 15, Respondents prove the existence of conflict between those courts. Again, sovereign immunity and Just Compensation Clause principles are not forum-dependent doctrines, and yet federal and state courts generally come to vastly different conclusions on the issue of which principle prevails. This justifies review.

Failing to reconcile the state/federal conflict, or the core tensions between just compensation and sovereign immunity concepts, Respondents claim that Petitioner (Bay Point) is improperly seeking an "advisory opinion." This obscure argument fails, and Respondents do not raise any valid procedural concern.[1] The issues are thus fit for review, and the Court should grant the Petition. While the power to take property is a sovereign right, its lawful exercise depends upon the payment of compensation. *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304, 314 (1987). The states should not be allowed to use the sovereign power to take property but then avoid the compensatory condition that authorizes that power based on a claim of sovereign immunity from damages suits.

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[1] For instance, although Respondents claim Bay Point's current, federal suit is "virtually identical" to its prior, state court suit, they do not claim that res judicata principles bar the suit or this Court's review.

ARGUMENT

I.

RESPONDENTS FAIL TO NEGATE THE CONFLICT BETWEEN JUST COMPENSATION AND SOVEREIGN IMMUNITY PRINCIPLES OR THE CONFLICT ON THE ISSUE AMONG LOWER COURTS

A. The Conclusory Claim That Federal and State Courts Should Treat State Takings Cases Differently Highlights the Need for Review

Respondents assert that any doctrinal tension between the clause and sovereign immunity can be mitigated by an asymmetrical scheme in which state courts must hear Just Compensation Clause claims but federal courts must deny them under the Eleventh Amendment. Opp. at 5, 8. But Respondents fail to provide any support in the relevant doctrines or this Court's precedent.

Respondents do not and cannot contend there is one Just Compensation Clause for state courts and a different, weaker one, for federal courts. *Knick*, 139 S. Ct. at 2172 ("[B]ecause a taking without compensation violates the self-executing Fifth Amendment at the time of the taking, the property owner can bring a federal suit at that time."); *First English Evangelical Lutheran Church*, 482 U.S. at 316 (clause is self-executing as a damages remedy in state courts). Nor can they argue that sovereign immunity protects

states only in federal courts, not in their own courts.[2] *See Hyatt*, 139 S. Ct. at 1493. If the individual right to compensation prevails over a state's immunity from private suits in state court, how can the opposite result occur in federal court? Respondents do not explain, and without some justification for their federal/state asymmetry argument, it only serves to confirm the confusion in this area and the need for this Court's intervention.

Respondents' vigorous defense of sovereign immunity in federal court further undermines their argument that there is no conflict between just compensation and sovereign immunity principles. Again, Respondents do not deny that the Just Compensation Clause claim is generally enforceable in federal court. The only reason they claim a right to evade Bay Point's federal takings claim is because they believe compensatory liability conflicts with state sovereign immunity. Thus, their actions and arguments in this case prove the principles of the Just Compensation Clause and sovereign immunity are at odds. Eric Berger, *The Collision of the Takings and State Sovereign Immunity Doctrines*, 63 Wash. & Lee L. Rev. 493, 494 (2006) ("[T]akings and state sovereign immunity cases are fundamentally incompatible with each other."); Note, *Reconciling State Sovereign Immunity with the Fourteenth Amendment*, 129 Harv. L. Rev. 1068, 1082-84 (2016) ("[B]y placing sovereign immunity and the right to just compensation on equal

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[2] The Just Compensation Clause and sovereign immunity are not forum-based doctrines; they are *actor*-based. The former protects individuals, while the latter protects states. As such, the forum should have no relevance, and that is indeed what this Court's precedent holds. *See Alden v. Maine*, 527 U.S. 706 (1999).

footing, [the Court's] cases necessarily set up an irreconcilable clash.").

The question here is, which principle controls? The outcome will determine whether property owners have access to the damages remedy guaranteed by the Just Compensation Clause when a state takes property. Respondents assert sovereign immunity prevails. Bay Point argues that the Just Compensation Clause trumps sovereign immunity because passage of the Fourteenth Amendment directly subjected states to a damages obligation for takings.[3] *Cf. Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (Congress can abrogate immunity through Section 5 of the Fourteenth Amendment). This important issue has festered long enough without resolution. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 714 (1999) (questioning "if the sovereign immunity rationale retains its vitality in cases where [the Fifth] Amendment is applicable"). Respondents have not raised any procedural barrier to addressing the question here and the Court should do so by granting the Petition.

[3] It is not an affront to the sovereignty or dignity of the states to hold them accountable to the Just Compensation Clause in federal court when enactment of the Fourteenth Amendment's Due Process Clause long ago stripped states of any right they may have previously had to take property free of federal constitutional oversight.

B. Respondents Do Not Negate or Reconcile the Conflicts Among the Courts

Respondents concede that most state and federal courts treat sovereign immunity differently in state takings cases. Opp. at 15. State courts generally hold that the self-executing nature of the Just Compensation Clause defeats sovereign immunity and requires states to answer takings claims. Federal courts generally hold that the same principles interact to defeat the takings claim. Despite acknowledging and defending this situation, Respondents paradoxically argue that there is no conflict among courts. *Id.* This could make sense only if an established principle justifies the differential treatment of the issues. But, as noted above, Respondents identify none.

Respondents do briefly suggest that *Alden* did not recognize full immunity for states from private suit in their own courts. Opp. at 8-9. Unfortunately, that ship has sailed—the other way. *Hyatt*, 139 S. Ct. at 1496 (noting that *Alden* bars "suits by private parties against a State in its own courts"); *id.* at 1493; *id.* at 1505 (Breyer, J., dissenting) (describing *Alden* as recognizing "state immunity in a State's 'own courts'"); *see also Ysleta Del Sur Pueblo v. Texas*, 207 F.3d 658, 658 (5th Cir. 2000) (noting *Alden* "may bar a state court [takings] action"). Respondents also suggest that state courts do not apply sovereign immunity to takings claims because *Alden* recognized an exception from sovereign immunity for constitutional claims. But this reading just begs the question of why federal courts do not apply such an

exception, an observation that itself leads one right back to the reality of conflict among state and federal courts.[4]

II.

BAY POINT IS NOT SEEKING AN ADVISORY OPINION

Respondents' last argument is that Bay Point is "requesting an advisory opinion." Opp. at 5. This contention is without merit. It is true that "Article III of the Constitution restricts the power of federal courts to 'Cases' and 'Controversies,'" and this means that a litigant must generally be subject to an "injury" to seek judicial relief. *Chafin v. Chafin*, 568 U.S. 165, 171-72 (2013). This in turn means that federal courts may not "decide questions that cannot affect the rights of litigants in the case before them" or give "opinion[s] advising what the law would be upon a hypothetical state of facts." *Id.* (quoting *North Carolina v. Rice*, 404 U.S. 244, 246 (1971) (per curiam)).

The problem is that none of the foregoing concerns apply here. In this case, state officials have converted Bay Point's valuable private property into a public park, and the state supreme court construed state statutes to authorize only nominal compensation. Since state law prevents Bay Point from receiving the

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[4] Respondents also cite the repudiated state litigation ripeness doctrine in *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194-96 (1985), as a reason why takings claims can be heard in state court, without immunity barriers, but not in federal courts. Obviously, support from an overruled decision is no support at all. In any event, *Williamson County* says nothing about sovereign immunity.

"full and perfect equivalent" of the value of the land for the taking, as required by federal constitutional law, *United States v. Miller*, 317 U.S. 369, 373 (1943), Bay Point sued state officials in federal court to remedy the uncompensated taking it suffered. Lack of just compensation for a taking is a cognizable injury. *Knick*, 139 S. Ct. at 2172. Bay Point is not asking this Court to opine on whether the Eleventh Amendment applies "upon a hypothetical state of facts." *Chafin*, 568 U.S. at 171-72. It is asking the Court to opine on whether the Just Compensation Clause overrides the Eleventh Amendment (and general state sovereign immunity principles that underlie it) in this case, allowing Bay Point to pursue its takings claim against state officials in federal court.

Nevertheless, Respondents press their "advisory ruling" argument, seemingly out of misplaced fear that Bay Point seeks a ruling that there is never a takings remedy in state courts. For support, they point to the Petition's observation that the federal courts' narrow view of the Just Compensation Clause (relative to immunity) can undermine takings remedies in state court. Petition at 17. Respondents make a lion out of a lamb.

Bay Point pointed out that, under the rationale of the decision below, states "can potentially[5] take property without facing just compensation liability" in

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[5] Respondents suggest Bay Point's use of the word "potentially" proves that Bay Point's broader concerns are inchoate. Again, it sees things that do not exist. Bay Point used the term to take account of the fact that the states may always *consent* to takings suits in their own courts even where they could otherwise invoke sovereign immunity and deny a remedy.

any court, Petition at 19, to illustrate the far-reaching consequences of holding the Just Compensation Clause subservient to sovereign immunity. This concern is premised on (1) the equivalency of the relevant constitutional doctrines in state and federal court under this Court's precedent, *Ysleta Del Sur Pueblo*, 207 F.3d 658, and (2) the fact that relegation of the Just Compensation Clause remedy to state courts (in state takings cases) allows the state to unduly limit the remedy by burdening it with local procedures.

Notably, Respondents do not deny that in at least two states (Arkansas and Tennessee) there is no Just Compensation Clause remedy at all for a state taking because sovereign immunity shields the state in both federal and state courts. *See* Petition at 19. Nor do they deny that, in several other states that allow takings suits against state entities in their own courts, property owners must use unique state law procedures that severely burden and limit the right to receive just compensation. *Id.* at 20-23. To this latter list of states, one should add the State of Ohio, which does not allow a direct suit for damages for a state taking. Instead, the aggrieved owner "must seek a writ of mandamus to compel the government to initiate condemnation proceedings." *Knick*, 139 S. Ct. at 2168 n.1; *J. P. Sand & Gravel Co. v. Ohio*, 367 N.E.2d 54, 59 (Ohio Ct. App. 1976). These points are designed to illustrate the importance of the question presented, not to coax an impermissibly broad opinion about state courts.

It may be that Respondents' "advisory opinion" concerns ultimately arise from disagreement with Bay Point's description of the posture of this case. Opp. at 5, 7-8. The description was accurate, though. Petition at 21. When the state's high court affirmed a $500 award of compensation, derived from application of Miss. Code Ann. § 65-1-123 for the taking its property, Bay Point's only option for securing constitutionally adequate compensation was to sue the state in federal court.[6] Unfortunately, the decision below dismissed Bay Point's takings claims for lack of jurisdiction under the Eleventh Amendment. The case accordingly squarely presents the issue of whether sovereign immunity must give way to the Just Compensation Clause. Factually speaking, the bottom line is that the state has a public park on Bay Point's land and Bay Point has $500. If the Fifth Circuit's refusal to apply the Just Compensation Clause stands, there will have been a tremendous wrong without a remedy.

[6] It would have been pointless, after all, for Bay Point to seek recourse in the same state courts that had just upheld the statute and minimally compensated taking. *See Samaad v. City of Dallas*, 940 F.2d 925, 934 (5th Cir. 1991) (state takings procedures are futile and unnecessary if they "almost certainly will not justly compensate the claimant").

CONCLUSION

The Court should grant the Petition.

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Respectfully submitted,

CHARLES S. LAMBERT, JR.
Law Offices of Charles S. Lambert, Jr., LLC
10537 Kentshire Court, Suite A
Baton Rouge, LA 70810
Telephone: (225) 367-1073
Chip@grandlawfirm.com

J. DAVID BREEMER
Counsel of Record
Pacific Legal Foundation
930 G Street
Sacramento, CA 95814
Telephone: (916) 419-7111
jbreemer@pacificlegal.org

BRIAN T. HODGES
Pacific Legal Foundation
255 South King Street, Suite 800
Seattle, WA 98104
Telephone: (916) 419-7111
bhodges@pacificlegal.org

Counsel for Petitioner