No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ABIGAIL LADD, et al.,
Petitioners,

v.

JACK MARCHBANKS,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

ZACHARY J. MURRY
BARKAN & ROBON, LTD
1701 Woodlands Drive,
Suite 100
Maumee, Ohio 43537
(419) 897-6500
Ohio Bar No. 0087421
Email: zmurry@barkan-robon.com

KATHLEEN R. HARRIS*
CHARLES E. BOYK LAW OFFICES, LLC
1500 Timberwolf Drive
Holland, Ohio 43528
(419)241-1395
Ohio Bar No. 88079
Email: kharris@charlesboyk-law.com

**Counsel of Record* *Attorneys for Petitioners*

QUESTIONS PRESENTED

Following commencement of a $114 million widening and improvement project for Interstate 75, construction activity and/or the design of the project itself has caused storm and groundwater to flood and inundate the Petitioners' respective properties on no fewer than three (3) occasions: July 13, 2017; April 26, 2019; and June 2, 2019. The flooding caused damage to the Petitioners' respective real estate as well as loss of their personal property. The Interstate 75 improvement project was designed and undertaken under the supervision of the Ohio Department of Transportation ("ODOT").

The flooding of Petitioners' respective properties constitutes a physical taking for which just compensation must be paid pursuant to the Fifth Amendment to the United States Constitution. However, Ohio law does not provide any mechanism by which the Petitioners may assert a legal claim for "inverse condemnation" arising from the State's uncompensated taking of their respective properties. Instead, an Ohio property owner must petition the court of general jurisdiction where the property is located for an equitable remedy, i.e. the issuance of a writ of mandamus compelling the State to initiate condemnation proceedings against the property owner. *See Knick v. Twp. of Scott, Pennsylvania*, 139 S. Ct. 2162, 2168 n.1, 204 L. Ed. 2d 558 (2019).

The questions for which Petitioners seek certiorari are as follows:

1. Whether Ohio's mandamus scheme provides its citizens with a reasonable, certain, and/or adequate procedure or process sufficient to meet the

guarantees enshrined within the Fifth Amendment's takings clause.

2. Whether this Court's Decision in *Knick, supra*, permits Ohio citizens to maintain a federal cause of action against the State for an uncompensated physical taking.

3. Whether the Eleventh Amendment immunizes the State of Ohio from a federal lawsuit by its own citizens when Ohio law does not provide a legal remedy for a violation of its citizens' Fifth Amendment right to just compensation.

LIST OF PARTIES

The Petitioner Abigail Ladd is a natural person whom, at all relevant times, was the record owner of certain real property located in Hancock County, Ohio with a permanent parcel no. of 600001008706.

The Petitioner Christina Gonzales is a natural person whom, at all relevant times, was the record owner of certain real property located in Hancock County, Ohio with a permanent parcel no. of 270001000637

The Petitioner Ida Duenke is a natural person whom, at all relevant times, was the record owner of certain real property located in Hancock County, Ohio with a permanent parcel no. of 270001000637.

The Petitioner Gerardo Saldaña is a natural person whom, at all relevant times, was the record owner of certain real property located in Hancock County, Ohio with a permanent parcel no. of 270001000637.

The Petitioner David Saldaña is a natural person whom, at all relevant times, was the record owner of certain real property located in Hancock County, Ohio with a permanent parcel no. of 270001000637.

The Petitioner Marcelino Saldaña is a natural person whom, at all relevant times, was the record owner of certain real property located in Hancock County, Ohio with a permanent parcel no. of 270001000637.

The Petitioner Alicia Roberts is a natural person whom, at all relevant times, was the record owner of certain real property located in Hancock

County, Ohio with a permanent parcel no. of270001000637.

The Petitioner Melinda Addenbrock is a natural person whom, at all relevant times, was the record owner of certain real property located in Hancock County, Ohio with a permanent parcel no. of 270001000637.

The Petitioner Deanna McCrate is a natural person whom, at all relevant times, was the record owner of certain real property located in Hancock County, Ohio with a permanent parcel no. of 270001000637.

The Respondent Jack Marchbanks is, and at all relevant times was, the Director of the Ohio Department of Transportation.

CORPORATE DISCLOSURE STATEMENT

Counsel for Petitioners hereby states and affirms that none of the Petitioners are a subsidiary and/or affiliate of a publicly owned corporation. Counsel for Petitioners further states that Petitioners are not aware of any publicly owned corporation that has a financial interest in the outcome of this appeal.

LIST OF RELATED CASES

Ladd, et al., v. Ohio Department of Transportation v. The Beaver Excavating Company, No. 2019-00783JD (Ohio Ct. of Claims) (Proceedings stayed pursuant to August 26, 2020, Entry)

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PETITION FOR A WRIT OF CERTIORARI

Landowners Abigail Ladd, Christina Gonzales, Ida Duenke, Gerardo Saldaña, David Saldaña, Marcelino Saldaña, Alicia Roberts, Melinda Addenbrock, and Deanna McCrate respectfully petition for a writ of certiorari to review the August 20, 2020, Opinion and Judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The Sixth Circuit Court of Appeals' October 6, 2020, Order denying Petitioners' petition for rehearing en banc is reproduced at Pet.App.1a. The Sixth Circuit Court of Appeals' August 20, 2020, Opinion affirming the dismissal of Petitioners' Complaint is published at *Ladd v. Marchbanks*, 971 F.3d 574 (6th Cir.2020), and is reproduced at Pet.App.3a. The District Court's October 31, 2019, Dismissal Order is reproduced at Pet.App.18a.

STATEMENT OF JURISDICTION

The Opinion and Judgment of the court of appeals was entered on August 20, 2020. A timely petition for rehearing en banc was denied on October 6, 2020. (Pet.App.1a). This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution 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.

The Eleventh Amendment to the United States Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The Fourteenth Amendment to the United States Constitution states, in relevant part:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

INTRODUCTION

It has long been recognized that a government's physical occupation of one's private property is "the most serious form of invasion of an owner's property interests," slicing every strand of the owner's "bundle" of property rights. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435, 102 S. Ct. 3164, 3176, 73 L. Ed. 2d 868 (1982). Such an occupation occurred on July 13, 2017, April 26, 2019, and June 2, 2019, when Petitioners' properties were flooded as a consequence of ODOT's construction activity on its Interstate 75 (I-75) project. In addition, these properties are the homes of Petitioners' Abigail Ladd and Ida Duenke, respectively. Thus, in the aftermath of each flooding event, Ms. Ladd and Ms. Duenke were left with destroyed personal property and an arduous remediation effort.

ODOT did not have an easement to flood the Petitioners' properties and no condemnation proceeding has ever been initiated against the Petitioners, either prior to or after the initial flood in July 2017. Nonetheless, and no different than if ODOT had had driven a bulldozer into Petitioners' living rooms, there can be little disagreement that a physical taking of their respective property occurred in this case. There is also no dispute that no compensation, just or otherwise, has ever been paid by ODOT. As such, ODOT and the State of Ohio's actions run afoul of the guarantees enshrined in the Fifth Amendment's takings clause. However, under Ohio law, Petitioners are unable to assert a legal claim against the State for its violation of their rights---both under the Fifth Amendment as well as Article 1, Section 19 of the Ohio Constitution. Instead, Petitioners are forced to avail themselves of *equitable*

remedies and navigate a labyrinthian morass of multi-forum litigation to obtain even a *partial* remedy for the loss of their property.

This Court has consistently held that the "just compensation" guarantee of the takings clause mandates that a complainant be provided "a plain, adequate, and complete remedy at law." *Hurley v. Kincaid*, 285 U.S. 95, 105, 52 S. Ct. 267, 269, 76 L. Ed. 637 (1932). In *Knick* this Court further explained that the Fifth Amendment's irrevocable right to just compensation is self-executing, entitling the property owner to "compensation as if it had been "paid contemporaneously with the taking."" *Knick*, 139 S. Ct. at 2170 (quoting *Jacobs v. United States*, 290 U.S. 13, 54 S.Ct. 26, 78 L.Ed. 142 (1933)).

In adherence to these principles, the federal government and every State in the Union---save Ohio---permit citizens to assert a legal cause of action for inverse condemnation. *Knick*, 139 S. Ct. at 2168 n.1. Ohio's condemnation statute, codified at Ohio Rev. Code Chapter 163 does not afford victims of uncompensated takings any legal remedy. Instead, an injured landowner must petition the Common Pleas Court where the property is situated to issue a writ of mandamus, forcing the government actor to initiate appropriation proceedings. *Id.*, *see also Coles v. Granville*, 448 F.3d 853, 861 (6th Cir.2006)

This means that the individual must first initiate legal action as a petitioner. If the petitioner is successful---and is able to prove the taking by "clear and convincing evidence"---his or her "reward" is to then be sued by the State and act as a defendant in an eminent domain proceeding, culminating in a compensation award by a jury. *State ex rel. Love v.*

O'Donnell, 81 N.E.3d 1250, 1251 (Ohio 2017) ("To obtain a writ of mandamus, [relator] must establish by clear and convincing evidence that (1) he has a clear legal right to the requested relief, (2) [the court] has a clear legal duty to provide it, and (3) [relator] lacks an adequate remedy in the ordinary course of the law.").

In addition, Ohio law does not have a mechanism whereby an individual can obtain just compensation for the taking of personal property in the same proceeding as where the compensation for the real property is determined. Indeed, Ohio does not provide any mechanism whatsoever by which a citizen can assert a claim for the taking of his or her chattel. Instead, litigants are required to assert a potpourri of artfully-pled tort claims against the State in the Ohio Court of Claims. *State ex rel. Wasserman v. Fremont*, 140 Ohio St.3d 471, 2014-Ohio-2962, 20 N.E.3d 664, 671-72 (Ohio 2014) (citing *Masheter v. Boehm,* 37 Ohio St.2d 68, 307 N.E.2d 533 (Ohio 1974)).

The U.S Court of Appeals for the D.C. Circuit, sitting en banc, recently noted that the issuance of a writ of mandamus was an extraordinary remedy, and one strictly confined to those circumstances where a litigant has no other remedy at law. *In re Flynn*, 973 F.3d 74, 78 (D.C. Cir. 2020). The Sixth Circuit's endorsement of Ohio's mandamus scheme---an extraordinary, equitable, and partial remedy---as a constitutionally appropriate means of vindicating the Petitioners' rights under the Fifth Amendment is in conflict with the holdings articulated by this Court in *Knick* as well as contrary to the plain language of the Amendment itself.

Petitioners, solely by virtue of the location of their property in Ohio, have been constitutionally wronged, but denied a complete remedy for the violations. "A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense." *Romer v. Evans*, 517 U.S. 620, 633, 116 S.Ct. 1620, 1628, 134 L.Ed.2d 855 (1996).

The State of Ohio---through its adoption and perpetuation of its deficient and untenable mandamus scheme which precludes a complete remedy for victims of uncompensated takings by the State---has failed to provide for the protection of its citizens' constitutional rights. Such conduct precludes the State from availing itself of its Eleventh Amendment Immunity from suit in this case. These issues are of vital constitutional importance and the Opinion of the Sixth Circuit, if allowed to stand, will perpetuate the profound truncation of Ohioans' rights under the Fifth---and also the Fourteenth---Amendments.

Petitioners pray the Court grant certiorari.

STATEMENT OF THE CASE

I. Factual Background

The Petitioners in this case own two (2) parcels of residential property located in Hancock County, Ohio. One parcel of property, identified as parcel number 600001008706 and having an address of 1426 Morrical Boulevard, Findlay, Ohio is owned by Petitioners Abigail Ladd. (Compl., RE 1, PageID # 3,

at ¶ 6). The property serves as Ms. Ladd's home and personal residence.

The other parcel, identified as parcel number 270001000637 with an address of 1421 Morrical Boulevard, Findlay, Ohio, is owned collectively by the members of the Saldaña family: Petitioners Christina Gonzales; Ida Duenke; Gerardo Saldaña; David Saldaña; Marcelino Saldaña; Alicia Roberts; Melinda Addenbrock; and Deanna McCrate. The property was built by the Petitioners' father more than 60 years ago[1] and is the home and residence of Ida Duenke. (*Id*., PageID # 3, at ¶¶ 4-5; Pet.App.4a).

Beginning in 2017, ODOT commenced a portion of its $114 million Interstate 75 widening project on land near and adjacent to the Petitioners' respective properties. On July 13, 2017, Defendant's construction activity caused massive flooding on the Petitioners' respective properties, causing significant property damage and rendering the residences uninhabitable by the Petitioners Ladd and Duenke, respectively, for a prolonged period of time. (Pet.App.5a; RE 1, PageID # 5-6, at ¶¶ 18-19, 24-25).

Since this initial flooding, Petitioners' have endured at least two (2) additional subsequent flooding events---causing water intrusion into the Petitioners' residences and further damaging their respective properties---on or about April 26, 2019, and June 2, 2019. (*Id*., PageID # 6, at ¶¶ 20, 26). As a direct result of the activities of the Defendant, and the flooding on Petitioners' properties resulting therefrom, Petitioners' respective properties are now prone to flooding and may no longer be utilized

1 Hence the interest of each sibling in the property.

according to their highest and best use. (*Id.*). Indeed, as any such flooding events/damage would need to be disclosed to any potential purchaser of the properties prior to a sale, and given the magnitude of the damage, the homes built on the Petitioners' respective properties have essentially no market value following Defendant's taking. (*Id.*).

Petitioners' respective properties were never subject to flooding prior to July 2017, and the Gonzalez Petitioners'---in particular---had no flooding on their property since the house was first built by their father more than 60 years ago. (*Id.*, PageID # 5-6, at ¶¶ 17, 20).

On the basis of the facts alleged in the Complaint, there can be no legitimate dispute that the Petitioners have suffered an uncompensated taking and a violation of their fundamental constitutional rights at the hands of the State of Ohio.

II. Procedural History

Petitioners initiated this action with the filing of their Complaint on July 15, 2019. (RE 1). The District Court's jurisdiction over the subject matter of Plaintiff's claims was premised upon 28 U.S.C. §1331 as Petitioners' alleged that the State of Ohio, through Director Marchbanks and the Ohio Department of Transportation, had taken their property without payment of just compensation. Petitioners' Complaint contained two counts. The first was asserted directly under the Fifth Amendment seeking, *inter alia*, declaratory judgment that a taking had occurred. The second count was brought pursuant to "42 U.S.C. § 1983 seeking damages for the alleged taking." (Pet.App.5a).

Petitioners' decision to initiate this federal proceeding was based upon the *Knick's* confirmation of the self-executing nature of the Fifth Amendment's takings clause and its overruling of its prior holding in *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985). In addition, the holding in *Knick* exposed the mandamus scheme employed by the State of Ohio for uncompensated taking claims as constitutionally inadequate.

The necessity of a federal forum for this litigation was further emphasized by the fact that Ohio does not currently provide any procedure whatsoever for a litigant to pursue claims for the taking of personal property/chattel. Indeed, the State subsequently admitted this fact in its appellate briefing by acknowledging that it has not made any changes to its procedure following the Supreme Court's holding in *Horne v. Dept. of Agriculture*, 576 U.S. 350, 352, 135 S.Ct. 2419, 2422, 192 L.Ed.2d 388 (2015), that "[t]he Fifth Amendment requires that the Government pay just compensation when it takes personal property, just as when it takes real property." (Appellee Br., R. 24, at PAGEID 34).

In addition to their federal claims, Petitioners also filed a separate, state-court action in the Ohio Court of Claims at Case No. 2019-00783JD. Ohio Rev. Code § 2743.16 establishes a two (2) year statute of limitations for claims against the State. As such, Petitioners were forced to duel-file in order to protect the availability of all potential claims. Petitioners' pleading in the state court action arises from the same factual nexus as the federal case, but asserts claims for negligence and trespass as opposed to a takings claim. The State of Ohio subsequently filed a third-

party Complaint against its general contractor on the project. Proceedings in the state court litigation have been largely held in stayed, with the exception of fact discovery, pending the resolution of this appeal.

Respondent, following service of the Complaint in the federal proceeding, first moved to transfer venue of the case to the U.S. District Court for the Southern District of Ohio on August 16, 2019. (RE 7). The Court denied Defendant's Motion on August 21, 2019. (RE 9). Defendant then sought leave to file a Motion to Dismiss Petitioners' Complaint on September 12, 2019. (RE 12). The basis for Defendant's Motion was that the Eleventh Amendment to the U.S. Constitution rendered the State of Ohio immune from suit and barred Petitioners' claims. (Def. Mot. Dismiss, RE 12-1, PageID # 57). The District Court accepted Defendant's Motion and established a briefing and oral argument schedule in its Order of September 13, 2019. (RE 13).

Petitioners filed their Memorandum in Opposition to the Defendant's Motion on October 7, 2019. (RE 15). Oral argument was held before the District Court on October 11, 2019, and on October 31, 2019, the District Court issued its Dismissal Order and Judgment Entry, dismissing Petitioners' claims on the basis of Eleventh Amendment Sovereign Immunity. (Pet.App.18a-20a).

Petitioners timely filed their Notice of Appeal to the United States Court of Appeals for the Sixth Circuit on November 21, 2019. (RE 19). Oral argument was held on August 6, 2020. On August 20, 2020, the Sixth Circuit issue its Opinion affirming the

dismissal of Petitioners' Complaint on the basis of Eleventh Amendment Immunity. (Pet.App. 4a).

Petitioners' timely petitioned the Court of Appeals for rehearing en banc on September 15, 2020. The petition for rehearing was denied on October 6, 2020. (Pet.App.1a).

REASONS FOR GRANTING THE WRIT

I. The Fifth Amendment's Self-Executing Guarantee of Just Compensation is a Foundational Constitutional Right and that Right May Not be Qualified or Abridged.

Given that this appeal involves analysis of the Fifth Amendment's takings clause, it may seem self-evident to note the fundamental right of the Petitioners in this case to own and control their own property. However, in affirming the dismissal Petitioners' claims, the Court of Appeals appeared to lose sight of the magnitude of the violation of Petitioners' rights at the hands of the State of Ohio. In so doing the Court of Appeals also lost sight of a foundational tenet of the Republic "to be the last great experiment for promoting human happiness." George Washington, Jan. 9, 1790. Indeed, and as subsequently explained by Justice Johnson "[t]he great and paramount purpose [of the constitution], was to unite this mass of wealth and power, for the protection of the humblest individual; his rights, civil and political, his interests and prosperity, are the sole *end;* the rest are nothing but the *means*. *Gibbons v. Ogden*, 22 U.S. 1, 223, 6 L. Ed. 23 (1824) (Johnson, J. dissenting) (emphasis in original).

This view as to inviolate nature of individual liberty, and particularly of private property rights, was universally held at the founding of the Republic. As explained by the U.S. Court of Appeals for the Eleventh Circuit, "the Founding Fathers placed the right to private property upon the highest of pedestals," ensuring our country's commitment to protecting the 'three-legged stool' of individual liberties---"personal security, personal liberty, and private property." *GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244, 1265 (11th Cir.2012). In exploring the role of protecting private property rights in the founding of the Republic, the Court provided the additional historical context:

> It is simply beyond rational dispute that the Founding Fathers, through the Constitution and the Bill of Rights, sought to *protect* the fundamental right of private property, not to eviscerate it. *See* John Adams, Defense of the Constitutions of Government of the United States (1787), *reprinted in* 6 John Adams, *The Works of John Adams,* 3, 9 (Charles Francis Adams ed., 1851) ("The moment the idea is admitted into society that property is not as sacred as the laws of God, and that there is not a force of law and public justice to protect it, anarchy and tyranny commence."); James Madison, Property (1792), *reprinted in* 6 *The Writings of James Madison* 101, 102 (Gaillard Hunt ed., 1906) ("Government is instituted to protect property of every sort; as well that which lies in the various rights of individuals,

> as that which the term particularly expresses. This being the end of government, that alone is a *just* government which *impartially* secures to every man whatever is his own." (emphasis in original)); Thomas Paine, Essay dated December 23, 1776, *reprinted in* Thomas Paine, *The Crisis* 8 (2009 ed.) (1776) ("[I]f a thief breaks into my house, burns and destroys my property, and kills or threatens to kill me, or those that are in it, and to 'bind me in all cases whatsoever' to his absolute will, am I to suffer it? What signifies it to me, whether he who does it is a king or a common man; my countryman or not my countryman; whether it be done by an individual villain, or an army of them? If we reason to the root of things we shall find no difference; neither can any just cause be assigned why we should punish in the one case and pardon in the other.").

Id. at 1265-66 (emphasis in original).

The paramount importance of private property ownership, and the United States' commitment to its protection, is laid bare in the plain language of the Fifth Amendment's takings clause, which states that "nor shall private property be taken for public use, without just compensation." This language constitutes a two-fold guarantee on the part of the United States: (1) that private property will only be taken for a public purpose; and (2) that just compensation will be paid for any taking. This

guarantee extends to the States, not only by the ratification of the Fourteenth Amendment, but also by virtue of their ratification of the Federal Constitution and Bill of Rights as a condition of their admission into the Union.

In reviewing the guarantees of the takings clause, lower courts previously concluded that the Fifth Amendment's guarantee is "self-executing", meaning "that the United States has waived sovereign immunity for properly-pled takings claims when the Fifth Amendment was ratified, and no statute is required to waive sovereign immunity." *Rhodes v. U.S. I.R.S.*, No. CV10–1074–PHX–DGC, 2011 WL 1771034, *1 (D. Ariz. May 10, 2011) (citing *Jacobs v. United States,* 290 U.S. 13, 16, 54 S.Ct. 26, 78 L.Ed. 142 (1933) ("The form of the remedy ... rested upon the Fifth Amendment. Statutory recognition was not necessary."); and *Arnsberg v. United States,* 757 F.2d 971, 980 n. 7 (9th Cir.1984) ("Actions brought under the taking clause of the fifth amendment are, of course, an exception to the rule that sovereign immunity is a bar to damages against the United States for direct constitutional violations." (citation omitted)).

The consequences of the self-executing guarantee of the Fifth Amendment were fully explained by the this Court in *Knick*, which explicitly held that "no matter what sort of procedures the government puts in place to remedy a taking, a property owner has a Fifth Amendment entitlement to compensation as soon as the government takes his property without paying for it." *Knick*, 139 S.Ct. at 2170. In essence, the Fifth Amendment creates a ***legal*** cause of action---and remedy---for a taking: "in the event of a taking, the compensation remedy is

required by the Constitution." *Id*. at 2172 (emphasis added) (quoting *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 316, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987).

Most importantly, *Knick* unequivocally held that the Fifth Amendment's guarantee of payment and its creation of a constitutional cause of action and remedy for uncompensated takings applied with equal force to takings by the State of Ohio:

> the same reasoning applies to takings by the States. The availability of any particular compensation remedy, such as an inverse condemnation claim under state law, cannot infringe or restrict the property owner's federal constitutional claim.

Id. at 2171. This holding is critical because it confirms that Ohio's obligation to provide a compensation procedure that affords a complete remedy under the Fifth Amendment ***is constitutionally mandated***. Thus, a complete remedy under the Fifth Amendment is not discretionary based upon the whims and "legislative grace" of Ohio, but is in fact a requirement of the State by virtue of its inclusion in the Republic.

Current Ohio law fails to meet the mandate established by the Fifth Amendment. Ohio's mandamus scheme provides an incomplete remedy that qualifies, restricts, and infringes upon the Plaintiff's federal constitutional rights---in direct conflict with *Knick*. In the post-*Knick* landscape, Ohio's mandamus and uncompensated takings procedure utterly fails to protect the inviolate Fifth Amendment rights of the Petitioners. Accordingly, Ohio may not prevent Petitioners from seeking

redress for their injuries in federal court where the procedures available through state court proceedings leave the Petitioners constitutionally wronged, but without a complete remedy. *Ubi jus ibi remedium.*

II. Ohio's Mandamus Scheme Does Not Provide Reasonable, Certain, and/or Adequate Procedures to Provide its Citizens with a Complete Remedy for the State's Violation of their Constitutional Rights.

Given the magnitude of property rights in the founding and organization of our Country, it has long been required that States provide "reasonable, certain, and adequate procedures" for seeking just compensation to individuals who have suffered an uncompensated taking, or risk running afoul of the guarantees enshrined in the Fifth Amendment. *See, Williamson Cty.*, 473 U.S. at 194. *Accord*, *Knick:*

> As long as an adequate provision for obtaining just compensation exists, there is no basis to enjoin the government's action effecting a taking. But that is because, as the Court explained in [*First English Evangelical Lutheran Church of Glendale v. Los Angeles Cty., Cal.*, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987)], such a procedure is a remedy for a taking that violated the Constitution, not because the availability of the procedure somehow prevented the violation from occurring in the first place.

139 S.Ct. at 2176-77.

As noted above, every State but Ohio provides for inverse condemnation proceedings to be initiated against the state by individuals who allege an uncompensated taking. *Knick*, 139 S.Ct. at 2168; *see also*, *Coles*, 448 F.3d at 861. Under Ohio law, citizens whose land has been taken must petition the Common Pleas Court where the property is situated to issue a writ of mandamus, forcing the government actor to initiate appropriation proceedings. *Id*.

In addition, Ohio law currently allows for mandamus actions and eminent domain proceedings for takings of real property only. There is no dispute that Ohio does not currently have any procedure to address takings of personal property---in violation of the U.S. Supreme Court's mandate in *Horne*. *See*, *State ex rel. Wasserman v. City of Fremont*, 140 Ohio St. 3d 471, 20 N.E.3d 664 (Ohio 2014). Instead, the type of compensation to which a landowner is entitled in an eminent domain proceeding is strictly proscribed by Ohio law. Under Ohio law:

> the landowner in an eminent domain action is entitled both to the value of the taken land and to "damages" to the "residue" of the property. Damages to the residue compensate for any injury that may result to the remaining lands by reason of the construction of the proposed improvement, measured by the difference in the residue's fair market value before and after the taking. In determining fair market value, the [trier of fact] should take into consideration every element that can fairly enter into the question of value.

Rockies Exp. Pipeline, LLC v. 4.895 Acres of Land, More or Less, in Butler Cty., Ohio (Pipeline Right-of-Way Servitude), 2011 WL 4337054, at *6 (S.D. Ohio Sept. 15, 2011), *affirmed*, 734 F.3d 424 (6th Cir. 2013). Thus, the sole measure of compensation available to plaintiffs in a state appropriation proceeding is the fair market value of the land taken plus severance damages on the remainder.

Thus, Ohio's current procedures and processes affirmatively preclude any recovery by the Petitioners in an eminent domain proceeding for any of the damage sustained by their respective personal property. As explained by the Ohio Supreme Court:

> When real property is appropriated by eminent domain, damages for loss of personal property may be recoverable in an appropriation proceeding if the personal property is so affixed to the real property as to be considered a part thereof.

See State ex rel. Wasserman v. Fremont, 140 Ohio St.3d 471, 2014-Ohio-2962, 20 N.E.3d 664, ¶ 42 (Ohio 2014). Ohio law also does not permit landowners in an appropriation proceeding to claim non-economic damages, such as damages for pain and suffering, associated with or arising from the unconstitutional taking of their property.

As the above makes clear, Ohio's current procedures for obtaining compensation for an uncompensated taking fail to provide a complete remedy to the Petitioners in this case. Petitioners have suffered damages to their real property as a result of the State's taking. The taking in violation of their respective constitutional rights has also caused

the Petitioners to incur damages associated with the loss of their personal property and to experience tremendous pain and suffering associated with the circumstances surrounding the take---i.e. being forced to flee their homes while flood water rose and destroyed their property in front of their eyes. Finally, given that the taking by the State was associated with the construction of a roadway, Petitioners are not entitled to an award of any of their attorney fees or costs at the conclusion of any state court eminent domain proceedings. Ohio Rev. C. § 163.21(C)(2).[2]

Indeed, in order for Petitioners to obtain anything approaching a complete remedy under existing Ohio procedures, they would have to litigate multiple claims in multiple forums. Specifically, in addition to the mandamus proceedings and subsequent eminent domain action, Petitioners will need to maintain a separate action against the State in the Ohio Court of Claims, asserting causes of action for conversion/trespass to chattels---for which Petitioners would be entitled to either the diminished value of the chattel or the value of the property at the time of its conversion[3]---and for pain, suffering, and non-economic damages associated with the destruction of their respective properties.

While the two (2) separate proceedings would deal with the same factual nexus, the inquiry by the

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2 The Plaintiffs may be able to recover some of their attorney fees and costs incurred in the maintenance of the mandamus action itself, but not the subsequent appropriation proceeding.

3 *Schafer v. RMS Realty*, 138 Ohio App.3d 244, 285, 741 N.E.2d 155, 185 (2nd Dist.2000); *see also* Baldwin's Oh. Prac. Tort L. § 29:6 (2d ed.)

court in each proceeding, as well as the proofs required of Petitioners therein, would be markedly different. In the mandamus proceeding, Petitioners would potentially be required to show only that an uncompensated taking occurred on their respective properties. *See State ex rel. Love, supra*. In the Court of Claims proceeding, Petitioners would be required to prove specific causation of the State's flooding of their property. Such proofs would likely require the engagement of engineering and other experts, costing Defendants thousands of dollars which, as with the attorney fees expended in the course of the Court of Claims proceeding, there is no guarantee of recovery under Ohio law. In addition, Petitioners have no right to a jury trial in the Court of Claims.

Thus, the compensation procedures currently available under Ohio law are, at best, a jumbled quagmire that precludes a complete remedy and recovery by the Petitioners. Moreover, the fact that Petitioners will be required to litigate claims arising from the same factual nexus in at least[4] two (2) different forums and proceedings raises a significant risk of uncertainty and contradictory results.

The inadequate, unreasonable, and uncertain nature of Ohio's compensation procedures is cast in even starker relief when compared to the process that would be undertaken by Petitioners if allowed to proceed with their claims in the federal system. Under the federal case, Petitioners would need to prove---**by a preponderance of the evidence**---that an uncompensated taking, in violation of their Fifth Amendment rights, occurred. *Texas Dept. of*

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4 Potentially Three (3) proceedings if the Plaintiffs are forced to initiate a separate action against the general contractor.

Community Affairs v. Burdine, 450 U.S. 248, 253, 101 S.Ct. 1089, 1094, 67 L.Ed.2d 207 (1981) (Plaintiff must prove its claims by preponderance of evidence in 1983 claims). Once proven, Petitioners would then prove their respective damages and the jury would render a verdict on all aspects of the Petitioners' claims. Such a verdict would include compensation for the Defendants' illegal taking as well as compensation for damaged personal property and Petitioners' non-economic damages. *Windsor v. Eaves*, 318 F.R.D. 153, 157-58 (N.D.Fla.2016) (non-economic damages recoverable in action brought pursuant to 42 U.S.C. § 1983). Finally, in the federal system the Petitioners would be entitled to an additional recovery of their attorney fees and costs pursuant to 42 U.S.C. § 1988.

The above bluntly evidences the deficient nature of Ohio's inverse condemnation procedure, or lack thereof. Mandamus is an extraordinary equitable remedy that may only issue when the petitioner has no remedy *at law*. Accordingly, on its face, Ohio does not provide a legal remedy for an uncompensated taking, only an equitable one---and only a partial equitable remedy at that. The Fifth Amendment's taking clause, in contrast, establishes a self-executing: legal right; cause of action; and remedy for an uncompensated taking.

Thus, if the Sixth Circuit's Opinion is allowed to stand, the Petitioners in this case--- solely by virtue of the presence of their property within the geographic confines of the State of Ohio---will be foreclosed from pursuing their legal remedy under the Fifth Amendment and forced to avail themselves of a deficient equitable remedy under Ohio law. Moreover, as there is no means by which Petitioners' can litigate

their claims for the taking of their personal property in the same proceeding as their claims for an uncompensated taking of the real estate. Thus, Ohio's existing procedures do not even provide an equitable remedy as Petitioners will have to initiate and/or defend against no fewer than three (3) separate lawsuits in order to obtain only a partial remedy for the State's infringement of their inviolate property rights. Viewed in contrast to the streamlined procedure available through federal litigation---i.e. a procedure and process that also permits a complete remedy for the harms suffered---the deficiencies, inadequacies, and uncertainties "baked-in" to Ohio's procedures could not be more stark. Indeed, Ohio's current procedures constitute both the labyrinth and the minotaur, splitting and limiting a litigant's claims, and requiring a party who has had its land taken to bear all the costs associated with vindicating its **federal** constitutional rights.

To allow Ohio's current mandamus scheme to continue imperils the constitutionally protected property rights of all Ohio citizens. The Fifth Amendment creates a guarantee, at law, of just compensation for property taken. As citizens of the United States and owners of private property located therein, Petitioners are absolutely entitled to the benefit of their bargain. The Court must grant certiorari and reverse the August 20, 2020, Opinion of the Sixth Circuit Court of Appeals.

III. The Holding of *Knick v. Twp. of Scott, Pennsylvania* Necessarily Abrogates the Eleventh Amendment Immunity Claims Advanced by Ohio and the Sixth Circuit's Conclusion to the Contrary Arbitrarily Circumscribes the Scope of this Court's Decision in that Case.

In *Knick v. Twp. of Scott, Pennsylvania*, this Court unequivocally held that:

> 1. **A government** violates the Takings Clause when it takes property without compensation, and a property owner may bring a Fifth Amendment claim under § 1983 at that time.

Id. at syllabus (emphasis added). The Court's holding---which as noted above, overruled its prior Opinion *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, *supra*---concluded that persons whom have suffered a taking of their property in violation of the Fifth Amendment need no longer exhaust all available state court compensation proceedings as a prerequisite to filing a federal claim. Explaining the basis for its ruling, the Court noted the following:

> The Civil Rights Act of 1871, after all, guarantees "a federal forum for claims of unconstitutional treatment at the hands of **state** officials," and the settled rule is that "exhaustion of state remedies 'is *not* a prerequisite to an action under [42 U.S.C.] § 1983.' " *Heck v. Humphrey*, 512 U.S. 477, 480, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994) (quoting *Patsy v. Board of Regents of Fla.*, 457 U.S. 496,

> 501, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982)). But the guarantee of a federal forum rings hollow for takings plaintiffs, who are forced to litigate their claims in state court.
>
> We now conclude that the state-litigation requirement imposes an unjustifiable burden on takings plaintiffs, conflicts with the rest of our takings jurisprudence, and must be overruled. A property owner has an actionable Fifth Amendment takings claim when **the government** takes his property without paying for it. That does not mean that **the government** must provide compensation in advance of a taking or risk having its action invalidated: So long as the property owner has some way to obtain compensation after the fact, **governments** need not fear that courts will enjoin their activities. But it does mean that the property owner has suffered a violation of his Fifth Amendment rights when **the government** takes his property without just compensation, and therefore may bring his claim in federal court under § 1983 at that time.

Id. at 2167–68 (emphasis added).

As *Knick* dealt with the actions of a Pennsylvania township and not a State government, as is the case here, the Court was not forced to directly address the interplay between the Fifth Amendment's takings clause and the state sovereign immunity of

the Eleventh Amendment. However, as the plain language of its Opinion makes clear, the Court did not define or limit its expansion of a claimant's ability to bring Fifth Amendment suits to merely cases where a taking occurred as a result of the actions of a municipal corporation. The Court's holding speaks to the activity of "a government", "the government", and "state officials". These terms connote a broad application and an implicit, if not explicit, recognition that the fact of the taking should be the critical component of this Court's inquiry, with little regard for the entity conducting the take. Accordingly, the Court's Opinion in *Knick* should, and indeed must, be read to permit the federal litigation of Fifth Amendment taking claims without regard for state sovereign immunity expressed in the Eleventh Amendment.

This reading of *Knick* is further supported by the jurisprudence regarding the application of the Fourteenth Amendment to state action. "The Fifth Amendment's Takings Clause prohibits the federal government from taking private property for public use without just compensation . . . [t]he Clause applies to state governments through the Fourteenth Amendment." *Nw. Ohio Properties, Ltd. v. Lucas Cty., Ohio*, 634 F. App'x 579, 580 (6th Cir. 2016). Lower courts, including the Sixth Circuit, have previously held that, in a physical taking case, a plaintiff's Fourteenth Amendment claims are subsumed by its Fifth Amendment takings claim. See *Banks v. City of Whitehall*, 344 F.3d 550 (6th Cir.2003); *Montgomery v. Carter County, Tennessee*, 226 F.3d 758 (6th Cir.2000). This holding was previously deployed by governmental entities to preclude litigants from reclassifying takings claims as Fourteenth

Amendment claims in order to avoid *Williamson's* ripeness requirement on the basis that "a substantive due process claim that merely restates the more specific claim will not lie." *Buckles v. Columbus Mun. Airport Auth.*, 90 F. App'x 927, 931 (6th Cir. 2004)(citing *Montgomery*, 226 F.3d at 769, *Armendariz v. Penman*, 75 F.3d 1311, 1323-27 (9th Cir.1996) (en banc)).

In 1976, U.S. Supreme Court held in *Fitzpatrick v. Bitzer*, 427 U.S. 445, 452 56, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976), that the U.S. Congress has the power to abrogate the Eleventh Amendment sovereign immunity of the states, if this is done pursuant to its Fourteenth Amendment power to enforce upon the states the guarantees of the Fourteenth Amendment. If a substantive due process violation for an uncompensated taking is subsumed under the Fifth Amendment then logic requires that, in *Knick's* aftermath, Eleventh Amendment immunity has been abrogated by the application of the Fourteenth Amendment. Several law review articles, published prior *Knick*, foreshadow such a conclusion---i.e. that the passage of the Fourteenth Amendment means that a state's immunity under the Eleventh Amendment must yield to the Fifth Amendment right to just compensation.

For example, a February 10, 2016, Note entitled *Reconciling State Sovereign Immunity with the Fourteenth Amendment*, appearing in the Harvard Law Review stated:

> In *Fitzpatrick v. Bitzer*, the Court recognized that the Fourteenth Amendment marked a fundamental shift in the federal-state relationship. As a

> result of that shift, state sovereign immunity must give way in the face of congressional action under section 5 of the Fourteenth Amendment.

and

> *Fitzpatrick* reveals that the Fourteenth Amendment reshuffled the constitutional deck, subjugating sovereign immunity to those rights that spring from the Fourteenth Amendment.

129 Harv. L. Rev. 1068. The Note, while acknowledging that this Court has not directly addressed the conflict between sovereign immunity and the takings clause, suggested that the Court "showed its hand" in its holding in *First English Evangelical Lutheran Church of Glendale v. Los Angeles Cty., Cal.* that:

> We have recognized that a landowner is entitled to bring an action in inverse condemnation as a result of "'the self-executing character of the constitutional provision with respect to compensation. . . .'

Id. at 315 (quoting *United States v. Clarke*, 445 U.S. 253, 257, 100 S.Ct. 1127, 1130, 63 L.Ed.2d 373 (1980), and 6 P. Nichols, Eminent Domain § 25.41 (3d rev. ed. 1972)).

Other aspects of the Court's Opinion in *First English* provide additional support for the contention that Eleventh Amendment Immunity may not be deployed to defeat uncompensated taking claims

violative of the Fifth Amendment. In particular, footnote nine (9) of the Court's Opinion specifically rejects arguments made by the Solicitor General "that the prohibitory nature of the Fifth Amendment, combined with principles of sovereign immunity, establishes that the Amendment itself is only a limitation on the power of the Government to act, not a remedial provision." *Id*. at 315, n9. (internal citations omitted). Commentators and academics have viewed this footnote as an implicit acknowledgement by this Court that sovereign immunity appears to, and must, play a more limited role in 'takings' cases. *See,* Richard H. Fallon et al., Hart & Wechsler's The Federal Courts and the Federal System 1002 (4th ed. 1996).

The necessary limitation on the application of Eleventh Amendment Immunity with respect to physical taking claims was also previously advocated in *The Collision of the Takings and State Sovereign Immunity Doctrines*, 63 Wash. & Lee L. Rev. 493 (2006), which opines:

> that the Takings Clause does trump state sovereign immunity by automatically abrogating-or stripping-the immunity that states usually enjoy in actions at law. An action to recover damages for a temporary taking therefore arises directly out of the Constitution and requires no statutory authorization, either to provide a cause of action or to abrogate state sovereign immunity.

Id.

This nuanced application of Eleventh Amendment immunity in takings cases is further supported by the fact that the cases cited by the State of Ohio and the Sixth Circuit to support the imposition of Eleventh Amendment Immunity are all premised on the fact that a litigant **must have a state court remedy** before the Eleventh Amendment may be invoked. *See Hutto v. S.C. Ret. Sys*., 773 F.3d 536, 552 (4th Cir. 2014) (concluding "that the Eleventh Amendment bars Fifth Amendment taking claims against States in federal court when the State's courts remain open to adjudicate such claims"); *Jachetta v. United States*, 653 F.3d 898, 909-10 (9th Cir. 2011) (holding the Eleventh Amendment bars claims brought against the state in federal court under the federal Takings Clause, **but state courts must be available to adjudicate such claims**); *DLX, Inc.* 381 F.3d at 526-28 (holding Eleventh Amendment Immunity barred federal takings claim; stating state court "would have had to hear that federal claim"), *overruled on other grounds by San Remo Hotel, L.P. v. City & Cty. of San Francisco*, 545 U.S. 323 (2005); *see also John G. & Marie Stella Kenedy Mem'l Found. v. Mauro*, 21 F.3d 667, 674 (5th Cir. 1994) (holding "Fifth Amendment inverse condemnation claim brought directly against the State of Texas [was] barred by the Eleventh Amendment"); *Robinson v. Ga. Dep't of Transp.*, 966 F.2d 637, 638, 640-41 (11th Cir. 1992) (holding Eleventh Amendment barred plaintiffs' claim "for violation of the Fifth and Fourteenth Amendments for a taking of their property"); *Garrett v. Illinois*, 612 F.2d 1038, 1039-40 (7th Cir. 1980) (holding Fifth Amendment takings claim against the state based on plaintiff's inability to earn income while incarcerated was barred by the Eleventh Amendment).

The logic employed in each of the above-cited cases parallels the "ripeness" reasoning of the Opinion in *Williamson Cty.* that this Court has unequivocally rejected. Simply stated, if a violation of an individual's Fifth Amendment Rights has occurred as a result of a taking, the individual has an absolute right, pursuant to *Knick*, to bring claims for relief under 42 USC §1983 and 28 U.S. Code §2201. It is the constitutional violation caused by the act of the taking that matters, not the entity that allegedly did the taking. The Eleventh Amendment may not shield a state from violating an individual's Fifth Amendment property right. To hold otherwise would artificially narrow *Knick's* holding and render the principles articulated therein hollow and unenforceable. Furthermore, such a holding fails to acknowledge the fact, discussed at length *infra*, that the State of Ohio **does not** have adequate, reasonable, or certain compensation procedures of which the Plaintiffs could avail themselves in this case.

Finally, the post-*Knick* cases cited by Sixth Circuit are distinguishable from the present case as neither Opinion by its Sister Circuits addresses Ohio law or its lack of an adequate inverse condemnation process or procedure. As Ohio is the only State without a formalized inverse condemnation process or procedure, the Decisions of the Tenth and Fifth Circuits have little probative value in the present dispute.

This Court should use the present case to directly address the tension between the State of Ohio's right to immunity under the Eleventh Amendment with the Petitioners' rights to just compensation under the Fifth Amendment and, further, find that the Eleventh Amendment immunity

of Ohio must yield to the right of a landowner to obtain just compensation guaranteed under the self-executing Fifth Amendment.[5]

Certiorari is warranted in this case and Petitioners pray the Court grant their Petition.

CONCLUSION

The August 20, 2020, Opinion of the Sixth Circuit Court of Appeals has closed and locked the doors to the Courthouse on federal takings claims that this Court had only recently reopened by virtue of its overruling of *Williamson Cty*. Petitioners presented well-pleaded and valid claims that the District Court was vested with subject matter jurisdiction to entertain. The antiquated interpretation of the Fifth Amendment's takings clause and Eleventh Amendment Immunity adopted by the Court of Appeals, is simply incompatible with the post-*Knick* landscape. The Sixth Circuit also erred in failing to appropriately consider the inability of the Petitioners

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5 Petitioners would also note that Justice Souter's Dissenting Opinion in *Alden v. Maine*, 527 U.S. 706, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999), which carefully tracks the historical basis and origins of state sovereign immunity from federal suit under the 11th Amendment to show that the scope of the that amendment is not so expansive as to preclude citizens of a state from seeking to enforce their *federal* constitutional rights against the state in which they reside has been borne out to be the better position, and one that more fully comports with the Court's holding in *Knick*. To conclude otherwise would be to perpetuate the same catch-22 that so offended the majority in *Knick*---barring the doors of the federal courts to plaintiffs whom have suffered a violation of their federal constitutional property rights.

in this case to obtain adequate, certain, and reasonable relief for their injures through Ohio's deficient mandamus process.

Finally, the Opinion of the Sixth Circuit, in its focus on the immunity of Ohio at the expense of the Petitioners' fundamental constitutional rights, failed to adhere "to the rule that constitutional provisions for the security of person and property should be liberally construed." *Boyd v. United States*, 116 U.S. 616, 635, 6 S.Ct. 524, 535, 29 L.Ed. 746 (1886). As this Court has long recognized:

> It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis*. We have no doubt that the legislative body is actuated by the same motives; but the vast accumulation of public business brought before it sometimes prevents it, on a first presentation, from noticing objections which become developed by time and the practical application of the objectionable law.

Id.

Accordingly, Petitioners respectfully request that this Court train its vigilant eye upon the constitutional injury that they have suffered in this case and grant certiorari on all questions presented by and through this Petition.

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Respectfully Submitted:

ZACHARY J. MURRY
BARKAN & ROBON, LTD
1701 Woodlands Drive
Suite 100
Maumee, Ohio 43537
(419) 897-6500
Ohio Bar No. 0087421
Email: zmurry@barkan-robon.com

KATHLEEN R. HARRIS*
CHARLES E. BOYK LAW OFFICES, LLC
1500 Timberwolf Drive
Holland, Ohio 43528
(419)241-1395
Ohio Bar No. 88079
Email: kharris@charlesboyk-law.com

**Counsel of Record*

Attorneys for Petitioners