No. 22-_____

IN THE
Supreme Court of the United States

SKATEMORE, INC., ET AL.,
Petitioners,
v.

GRETCHEN WHITMER, ET AL.,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Fifth Amendment's requirement of "just compensation," as incorporated by the Fourteenth Amendment, waive Eleventh Amendment Sovereign Immunity for a takings claim in federal court against a state.

PARTIES TO THE PROCEEDING

Petitioners Skatemore, Inc., d/b/a Roll Haven Skating Center; Slim's Rec, Inc. d/b/a Spartan West Bowling Center/Beamers Restaurant; Mr. K Enterprises, Inc. d/b/a Royal Scot Golf & Bowl; M.B. and D., LLC, d/b/a Fremont Lanes; R2M, LLC, d/b/a Spectrum Lanes & Woody's Press Box were the appellants in the court below.

Respondents Gretchen Whitmer, Robert Gordon, and the Michigan Department of Health and Human Services were the appellees in the court below.

STATEMENT OF RELATED PROCEEDINGS

There are no related proceedings in this matter.

CORPORATE DISCLOSURE STATEMENT

Skatemore, Inc., d/b/a Roll Haven Skating Center; Slim's Rec, Inc. d/b/a Spartan West Bowling Center/Beamers Restaurant; Mr. K Enterprises, Inc. d/b/a Royal Scot Golf & Bowl; M.B. and D., LLC, d/b/a Fremont Lanes; R2M, LLC, d/b/a Spectrum Lanes & Woody's Press Box (hereinafter "Petitioners") state the following:

None of the Petitioners are subsidiaries or affiliates of a publicly owned corporation. There are no publicly owned corporations, party to this appeal, that have a financial interest in the outcome.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-25a) is reported at 40 F.4th 727. The district court's order granting judgment as a matter of law in favor of respondent (App. 26a-40a) is reported at 2021 WL 3930808.

JURISDICTION

The judgment of the court of appeals was entered on July 19, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part that private property shall not "be taken for public use, without just compensation."

The Eleventh Amendment to the United States Constitution provides that "[t]he 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 provides in relevant part that no State shall "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

This case is about whether the Constitution requires Respondents to justly compensate Petitioners when taking Petitioners' private property. The Fifth Amendment Takings Clause, as incorporated by the Fourteenth Amendment (ratified after the Eleventh Amendment), is an exception to, and/or waives, Eleventh Amendment immunity. In this case, Respondents took Petitioners' property pursuant to a state statute that was held unconstitutional by the Michigan Supreme Court. Under these circumstances, Respondents' conduct is not entitled to Eleventh Amendment immunity. Petitioners can, therefore, properly challenge Respondents' conduct in federal court.

The Fifth and Fourteenth Amendments were ratified by the states on December 15, 1791, and July 28, 1868, respectively. Subsequent to the ratification of the Eleventh Amendment, the explicit text of the Fifth Amendment (including the takings clause) was incorporated as applicable against the states through the Fourteenth Amendment in *Chicago, Burlington & Quincy Railroad Company v. Chicago*, 166 U.S. 226 (1897). Thus, by ratifying the Fourteenth Amendment, the states consented to the requirements, duties, limitations, responsibilities, and explicit language of the incorporated amendments, including the Fifth Amendment. Therefore, the Fifth Amendment's unequivocal remedy of "just compensation" as the result of a taking

is enforceable against the states through the Fourteenth Amendment.

Contrary to other COVID-19 cases from around the country, this case is not a debate about the severity of COVID-19, its impact, or the merits of the policies implemented by the State of Michigan. Instead, this case primarily focuses on whether Respondents can take private property from individuals and businesses and fail to provide just compensation. This case is unlike other COVID-19 takings cases brought across the country:

1. This case involves businesses that the State completely closed and wholly prohibited from engaging in any economic activity. While the State's COVID-19 policies severely limited most businesses in Michigan through capacity limitations, gathering restrictions, and other regulations, this case focuses on the few businesses the State forced to fully close. For example, while restaurants in Michigan were prohibited from offering indoor dining, those restaurants could still provide food for take-out orders and therefore were never totally closed. As explained below, if Petitioners prevail in this case, it does not open the door to an unlimited number of additional lawsuits by every business in the country impacted by the COVID-19 restrictions. Thus, while the constitutional import of this legal question is great, its economic impact is narrow.

2. Unlike constitutionally enacted COVID-19 regulations in other states, Michigan's Supreme Court declared Respondent Whitmer's Executive

> Orders (EOs) unconstitutional. The State of Michigan, therefore, took Petitioners' private property via unconstitutional state action. Respondents' unconstitutional exercise of government power distinguishes the case at bar from COVID-19 regulations in other states.

Background of Takings Jurisprudence

It is well settled that a takings claim can be brought for a temporary regulatory act. This Court held:

> In this case, the California Court of Appeal held that a landowner who claims that his property has been "taken" by a land use regulation may not recover damages for the time before it is finally determined that the regulation constitutes a "taking" of his property. We disagree, and conclude that, in these circumstances, the Fifth and Fourteenth Amendments to the United States Constitution would require compensation for that period.

First English Evangelical Lutheran Church v. Los Angeles County, 482 U.S. 304, 306-307 (1987). This Court concluded "that 'temporary' takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation." *Id*. at 318.

This Court held that a taking could occur when the state "restricted a property owner's ability to use his own property." *Cedar Point Nursery v. Hassid*, 594 U.S. ___, 141 S.Ct. 2063, 2071 (2021). Further, the

Court's example to illustrate this point was the raisin growers case (*Horne v. Department of Agriculture*, 569 U.S. 513, 133 S.Ct. 2053 (2013)). *Id.* at 2071. Just as the raisin growers were required to "set aside" their crops and not earn an income from those crops, Respondents in this case required Petitioners to "set aside" their businesses, completely shut down, and restricted all physical public access to the property. This Court further held:

> The essential question is not, …, whether the government action at issue comes garbed as a regulation (or statute, or ordinance, or miscellaneous decree). It is whether the government has physically taken property for itself or someone else—by whatever means—or has instead restricted a property owner's ability to use his own property. See *Tahoe-Sierra*, 535 U.S., at 321–323. Whenever a regulation results in a physical appropriation of property, a *per se* taking has occurred, and *Penn Central* has no place.

Cedar Point Nursery, *supra*, at 2072. In this case, Respondents physically took Petitioners' property because they "restricted a property owner's ability to use his own property" to such a degree that they could not allow any member of the public to enter. Indeed, the orders required that Petitioners' businesses be "closed to ingress, egress, use, and occupancy by members of the public." Because such conduct amounts to a *per se* physical taking, *Penn Central* "has no place" and "the government must pay for what it takes." *Id.* at 2071 and 2072.

This case, and its important legal question of federal constitutional law, is significantly different than other takings cases brought around the country. The Eleventh Amendment and the exercise of state power is not absolute. When government totally and completely takes a person's private property, it must provide just compensation.

STATEMENT OF THE CASE

Petitioners brought this action under the Takings Clause of the Fifth Amendment to the United States Constitution, as incorporated by the Fourteenth Amendment, and 42 U.S.C. § 1983, challenging Respondents' acts, orders, policies, practices, customs, and procedures, which deprived Petitioners of their property without just compensation.

Respondent Governor Gretchen Whitmer issued EO 2020-9 on March 16, 2020. This Order required that Petitioners completely close their businesses to the public. No exceptions existed permitting bowling or roller-skating business activity to occur. Respondent Whitmer then issued a series of EOs (2020-9, 2020-20, 2020-43, 2020-69, 2020-100, 2020-110, 2020-160, 2020-176, and 2020-183)[1] which extended the period that Petitioners' businesses had to stay completely closed to the public.

On October 2, 2020, the Michigan Supreme Court confirmed that Respondent Whitmer's EOs were unconstitutional and unenforceable. Respondent Whitmer's actions completely shut down Petitioners'

[1] Available at: https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705---,00.html

businesses from March 16, 2020, to October 2, 2020. Respondents provided no compensation to Petitioners for their unlawful actions in this case.

The Petitioners in this case are small, family businesses located in Michigan who were forcibly closed by Respondent's orders. Respondent's orders required that Petitioners' businesses be "closed to ingress, egress, use, and occupancy by members of the public."[2]

The District Court granted Respondents' motion for summary judgment (App. 26a-40a) and dismissed Petitioners' claims. The Sixth Circuit affirmed the District Court's dismissal on the grounds that Eleventh Amendment Sovereign Immunity trumps any claim for "just compensation" pursuant to a Fifth Amendment takings claim against a state (App. 1a-25a).

REASONS FOR GRANTING THE PETITION

THIS COURT'S ELEVENTH AMENDMENT SOVEREIGN IMMUNITY JURISPRUDENCE DOES NOT RECOGNIZE THE IMPORTANT CONSTITUTIONAL EFFECT THAT THE SUBSEQUENT RATIFICATION OF THE FOURTEENTH AMENDMENT HAD ON THE INCORPORATION OF THE FIFTH AMENDMENT.

Whether the Fifth Amendment Takings Clause is an exception to a state's Eleventh Amendment sovereign immunity, is a question of significant

[2] Available at: https://www.michigan.gov/whitmer/news/state-orders-and-directives/2020/03/16/executive-order-2020-9

constitutional import in need of resolution by this Honorable Court.

> [T]he Supreme Court has never applied sovereign immunity in a Takings case against a state government and has questioned whether "sovereign immunity retains its vitality" in that context. In *First English Evangelical Lutheran Church v. County of Los Angeles*, the Court clarified that the Fifth Amendment requires damages for a Taking; that opinion expressly disregarded California's argument that "principles of sovereign immunity" suggested otherwise. In *Palazzolo v. Rhode Island*, the state of Rhode Island asserted sovereign immunity as a defense against a Taking claim but the Court ignored that argument in its final decision against the state. Although sovereign immunity can be raised at any time, the Court has decided other Takings claims against state governments without addressing the issue.[3]

The Fifth Amendment's explicit language provides a remedy for "just compensation." It would make no sense for the Fifth Amendment to apply to the states through incorporation by the Fourteenth Amendment, but then have the Eleventh Amendment nullify it completely by barring all "just compensation" from those same states. Ironically, the Sixth Circuit's opinion only permits a remedy to a Fifth Amendment violation which is not explicitly stated in its text:

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[3] "Can State Governments Claim Sovereign Immunity In Takings Cases?" J.P. Burleigh, University of Cincinnati Law Review, January 15, 2020. https://uclawreview.org/2020/01/15/can-state-governments-claim-sovereign-immunity-in-takings-cases/

prospective equitable relief. Instead, the Fifth Amendment should be properly interpreted as an exception to the Eleventh Amendment by its explicit text authorizing "just compensation."

It is time for the People to know if they can hold their state government accountable for Fifth Amendment Takings violations in federal court. Pursuant to Rule 10, whether the Fifth Amendment, as incorporated by the Fourteenth Amendment, waives Eleventh Amendment sovereign immunity is an important question of federal law that must be settled by this Court. COVID-19 may have been the first time in recent memory that states aggressively abused their power to take private property on such a scale, but it certainly will not be the last.

If this issue becomes settled and states know that federal courts have the authority to order "just compensation," the explicit remedy required in the Fifth Amendment, as incorporated by the Fourteenth Amendment, they may tread more carefully before shuttering businesses, taking property, and destroying a person's entire life's work.

To accept the assertion that the Eleventh Amendment bars compensation for a violation of the Fifth Amendment undermines a protection guaranteed by the Bill of Rights and produces illogical results. If the Eleventh Amendment bars compensation against a state, then it would create the paradoxical scenario in which a federal court has the authority to hear a case for a violation of the Fifth Amendment, and yet is unable to provide the explicit

remedy prescribed by the Fifth Amendment itself: "just compensation."

Consider the following: A state confiscates and completely destroys a private farm to build a state governmental complex without providing any compensation to the owner. The owner of the farm sues in federal court for a violation of the Fifth Amendment takings clause. The court accepts the case and finds that the state did violate the farmer's Fifth Amendment rights by taking his property without providing just compensation. It would be illogical for the court to then rule that it was powerless to provide any injunctive relief (because the farm has been destroyed and a governmental building now sits on the property), and it could not provide any compensation because of the Eleventh Amendment. This sort of ruling would completely negate not only the constitutional protections provided by the Fifth Amendment, but would nullify the explicit language of the Fifth Amendment itself that the farmer is entitled to "just compensation." Clearly this is an untenable approach and creates an impossible conflict within the law.

Further, such an interpretation does not nullify the meaning of the Eleventh Amendment. The Fifth Amendment is the only amendment that specifically provides the ability to obtain damages or "just compensation." Thus, a damage claim, for example, for a First or Second Amendment claim against a state could still be barred by the Eleventh Amendment. However, a Fifth Amendment takings claim for "just compensation" would not. Petitioners believe that a proper review of Fifth and Fourteenth Amendment

history and jurisprudence indicates that the Eleventh Amendment is not a bar to a Fifth Amendment takings claim for "just compensation" against a state or state official.

Thus, as explained below, the Eleventh Amendment does not prohibit a valid Fifth Amendment takings claim against a state.

A. History of Eleventh Amendment Immunity.

The Eleventh Amendment to the United States Constitution states:

> 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.

One of the first cases to discuss the doctrine of sovereign immunity at length is *United States v. Lee*, 106 U.S. 196 (1882), which held:

> Courts of justice are established, not only to decide upon the controverted rights of the citizens as against each other, but also upon rights in controversy between them and the government, and the docket of this court is crowded with controversies of the latter class. Shall it be said, in the face of all this, and of the acknowledged right of the judiciary to decide in proper cases, statutes which have been passed by both branches of congress and approved by the president to be unconstitutional, that the courts cannot give remedy when the citizen has been deprived of his property by force, his estate

> seized and converted to the use of the government without any lawful authority, without any process of law, and without any compensation, because the president has ordered it and his officers are in possession?
>
> If such be the law of this country, it sanctions a tyranny which has no existence in the monarchies of Europe, nor in any other government which has a just claim to well-regulated liberty and the protection of personal rights.

Id. at 220-221.

In *Cedar Point Nursery, supra*, this Court began its Fifth Amendment analysis by stating:

> As John Adams tersely put it, "[p]roperty must be secured, or liberty cannot exist." Discourses on Davila, in 6 Works of John Adams 280 (C. Adams ed. 1851). This Court agrees, having noted that protection of property rights is "necessary to preserve freedom" and "empowers persons to shape and to plan their own destiny in a world where governments are always eager to do so for them." *Murr v. Wisconsin*, 582 U. S. ___, ___ (2017) (slip op., at 8).

Id. at 2071.

In this case, Respondents illegally acted pursuant to a state statute held unconstitutional by the Michigan Supreme Court. Hence, Respondents' taking of private property was without any valid authority. "If the Constitution provided no protection against such unbridled authority, all property rights

would exist only at the whim of the sovereign." *Id*. Respondents acted in an unlawful and unconstitutional manner to take Petitioners' property and they cannot use the Eleventh Amendment to shield their unlawful taking. Petitioners can, therefore, properly challenge the government's conduct in federal court.

B. The Fifth Amendment and the Impact of the Ratification of the Fourteenth Amendment on Sovereign Immunity.

Petitioners brought this action pursuant to the Fifth Amendment's takings clause, as incorporated by the Fourteenth Amendment. The right to bring a takings claim is guaranteed by the United States Constitution itself. This Court has held:

> "The suits were based on the right to recover just compensation for property taken by the United States for public use in the exercise of its power of eminent domain. *That right was guaranteed by the Constitution.* The fact that condemnation proceedings were not instituted and that the right was asserted in suits by the owners did not change the essential nature of the claim. The form of the remedy did not qualify the right. It rested upon the Fifth Amendment. Statutory recognition was not necessary. A promise to pay was not necessary. Such a promise was implied because of the duty to pay imposed by the Amendment. The suits were thus founded upon the Constitution of the United States." *Jacobs*, moreover, does not stand alone, for the Court has frequently

> repeated the view that, in the event of a taking, the compensation remedy is required by the Constitution.

First English, supra, at 315-316 (emphasis in original) (citing *Jacobs v. United States*, 290 U.S. 13 (1933)).

Petitioners' right to obtain "just compensation" is founded in the Constitution itself and is the supreme law of the land. Every state is subject to the Constitution's explicit requirements as incorporated through the Fourteenth Amendment. *First English* does not hold that the Fifth Amendment may only require a state to provide prospective equitable relief. Instead, "the compensation remedy is required by the Constitution."

The *First English* Court noted that the Solicitor General argued that sovereign immunity must limit such takings claims. This Court rejected that argument and held:

> The Solicitor General urges that the prohibitory nature of the Fifth Amendment, see *supra*, at 482 U.S. 314, 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. The cases cited in the text, we think, refute the argument of the United States that "the Constitution does not, of its own force, furnish a basis for a court to award money damages against the government." Brief for United States as *Amicus Curiae* 14. Though arising in various factual and jurisdictional settings, these cases make clear that it is the

> Constitution that dictates the remedy for interference with property rights amounting to a taking.

Id. at 322, fn 9. This Court must make it eminently clear that it is the Constitution's explicit text that requires "just compensation" be paid. The Eleventh Amendment is no bar to such a claim because the unambiguous requirements of the Constitution supersede any claims of sovereignty by a state.

This Court recently summarized a takings claim:

> 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.

Knick v. Township of Scott, 588 U.S. ___; 139 S.Ct. 2162, 2167-2168 (2019). While the facts in *Knick* dealt with the conduct of a municipality, Petitioners in this case allege that a Fifth Amendment taking took place, no just compensation was paid, and the principle of *Knick* equally applies. Respondents took Petitioners' property without providing just compensation, and

Petitioners now bring this § 1983 action to vindicate their rights. This Court further held:

> Compensation under the Takings Clause is a remedy for the "constitutional violation" that "the landowner has already suffered" at the time of the uncompensated taking. A later payment of compensation may remedy the constitutional violation that occurred at the time of the taking, but that does not mean the violation never took place. The violation is the only reason compensation was owed in the first place. A bank robber might give the loot back, but he still robbed the bank. The availability of a subsequent compensation remedy for a taking without compensation no more means there never was a constitutional violation in the first place than the availability of a damages action renders negligent conduct compliant with the duty of care. . . In sum, because a taking without compensation violates the Fifth Amendment at the time of the taking, the property owner can bring a federal suit at that time.

Id. at 2172-2173 (internal citations omitted). In this case, Respondents eventually ceased their restrictions on Petitioners' property and allowed them to reopen their businesses, but this does not mean the violation did not take place. Just because Respondents were forced by the Michigan Supreme Court to cease their unconstitutional actions, they still "robbed the bank" and just compensation is owed.

The language implemented in the orders by Respondents was sweeping, broad, and all-encompassing. The orders required that Petitioners' businesses be "closed to ingress, egress, use, and occupancy by members of the public." Such language destroyed all economically beneficial or productive use of Petitioners' property. Indeed, the EO specifically stated that the public could not "use" Petitioners' property.

Petitioners were forced to sit back and watch their businesses suffer millions of dollars in losses, while most other businesses in the state were permitted to be open in at least some limited capacity to provide their primary service. Since Petitioners were forced to completely shutter their businesses and not allow any "use" by the public, it destroyed "all economically beneficial or productive use" of Petitioners' property. This taking demands "just compensation."

Recently, this Court issued an opinion involving Eleventh Amendment immunity in *Penneast Pipeline Co., LLC v. New Jersey*, 594 U.S. ___, 141 S.Ct. 2244 (2021). It involved a pipeline company (acting as an arm of the federal government) who was utilizing takings authority to appropriate property to build energy infrastructure. *Id.* at 2251. While the facts in *Penneast* do not involve the same actions as Respondents in this case, this Court outlined Fifth Amendment principles which would apply in this case.

This Court held:

> Those vested with the [taking] power could either initiate legal proceedings to secure the right to build, or they could take property up

> front and force the owner to seek recovery for any loss of value.

Id. at 2255 (emphasis added). In this case, Petitioners' property was taken "up front" and they are now seeking recovery for their "loss of value."

This Court further held:

> As a final point, the other dissent offers a different theory— that even if the States consented in the plan of the Convention to the proceedings below, the Eleventh Amendment nonetheless divests federal courts of subject-matter jurisdiction over a suit filed against a State by a diverse plaintiff. But under our precedents that no party asks us to reconsider here, we have understood the Eleventh Amendment to confer "a personal privilege which [a State] may waive at pleasure." When "a State waives its immunity and consents to suit in federal court, the Eleventh Amendment does not bar the action." Such consent may, as here, be "'inherent in the constitutional plan.'"

Id. at 2262 (internal citations omitted).

Because the Fifth and Fourteenth Amendments were ratified by the states on December 15, 1791, and July 28, 1868, respectively, both of these Amendments are "inherent in the constitutional plan." Further, the states were fully aware of the Eleventh Amendment when they ratified the Fourteenth. Thus, the states consented to the requirements, duties, limitations, and responsibilities of those amendments when they adopted them. The Fifth Amendment explicitly

requires "just compensation" as the result of a taking, and the Fifth Amendment applies to the states through the Fourteenth Amendment pursuant to *Chicago, Burlington & Quincy Railroad Company v. Chicago*, *supra*.

Ratification is the clearest form of consent. When the states ratified the Fifth and Fourteenth Amendments, they consented to be governed under the explicit language of those amendments. Because the Fifth Amendment unambiguously provides for "just compensation" and the states ratified said language, the states have thus consented to a mechanism that is "inherent in the constitutional plan." Therefore, because the states consented to the ratification of the Fifth and Fourteenth Amendments, those states cannot claim sovereign immunity as a defense to a Fifth Amendment takings claim.

Again, this is an important question of federal law that must be settled by this Court. Because nothing else in the Constitution provides for a remedy of "just compensation," an opinion in Petitioners' favor would only apply to a Fifth Amendment takings claim, and no other constitutional claims.

This Court has recognized three typical exceptions to the Eleventh Amendment: (1) congressional abrogation, id. at 66; (2) express consent or waiver by the State, id.; and (3) official capacity suits for prospective equitable relief based on ongoing violations of federal law, *Ex parte Young*, 209 U.S. 123 (1908). The Sixth Circuit relied upon *Ladd v. Marchbanks*, 971 F.3d 574 (6th Cir. 2020) because it held that the Fifth Amendment does not abrogate the

Eleventh Amendment. *Ladd*, however, only dealt with the first exception to Eleventh Amendment Sovereign Immunity: abrogation. Petitioners in this case argue the second exception: waiver, or, in the alternative, an exception created by the explicit language of the Fifth Amendment itself requiring "just compensation" be paid.

The *Penneast* Court held that "[w]hen a State waives its immunity and consents to suit in federal court, the Eleventh Amendment does not bar the action. Such consent may, as here, be explicitly in the text of the Fifth Amendment, as incorporated by the Fourteenth Amendment, or may be "'inherent in the constitutional plan.'" *Penneast, supra.* at 2262 (internal citations omitted). Either way, it amounts to a waiver.

Petitioners' position in this case is that the states waived the Eleventh Amendment when the states consented to the enactment of the Fourteenth Amendment, which incorporated the Fifth Amendment. The Fifth Amendment explicitly requires "just compensation" as the result of a taking, and the Fifth Amendment applies to the states through the Fourteenth Amendment. *Chicago, Burlington & Quincy Railroad Company, supra.*

The Sixth Circuit erred by holding that the incorporation of the Fourteenth Amendment cannot amount to a waiver because incorporation of the Fifth Amendment took place 30 years after the Fourteenth Amendment was adopted, and because Petitioners could have brought their claims in state court. Such a holding contradicts this Court's precedent.

First, the Sixth Circuit erred by ignoring that this Court has expressly abandoned any state-litigation requirement for takings claims. This Court held:

> The state-litigation requirement relegates the Takings Clause "to the status of a poor relation" among the provisions of the Bill of Rights. *Dolan v. City of Tigard*, 512 U.S. 374, 392, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994). Plaintiffs asserting any other constitutional claim are guaranteed a federal forum under § 1983, but the state-litigation requirement "hand[s] authority over federal takings claims to state courts." *San Remo*, 545 U.S. at 350, 125 S.Ct. 2491 (Rehnquist, C.J., concurring in judgment). Fidelity to the Takings Clause and our cases construing it requires overruling *Williamson County* and restoring takings claims to the full-fledged constitutional status the Framers envisioned when they included the Clause among the other protections in the Bill of Rights.

Knick, supra, at 2169-2170. This Court held that when a state violates the Fifth Amendment and takes property without providing just compensation, a plaintiff can sue in federal court "at that time." *Id*. at 2170. Therefore, the Sixth Circuit's holding that a state court's availability affects Petitioners' ability to bring this case is mistaken.

Next, the Sixth Circuit's holding violates *McDonald v. City of Chicago*, 561 U.S. 742 (2010). The *McDonald* Court held:

> Finally, the Court abandoned "the notion that the Fourteenth Amendment applies to the States only a watered-down, subjective version of the individual guarantees of the Bill of Rights," stating that it would be "incongruous" to apply different standards "depending on whether the claim was asserted in a state or federal court." Instead, the Court decisively held that incorporated Bill of Rights protections "are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment."

Id. at 765 (internal citations omitted).

The Sixth Circuit erred by holding that there are two different applications of the Fifth Amendment, simply depending on in which Court the claim is brought. According to the Sixth Circuit, if a Fifth Amendment claim is brought in state court, "just compensation" is available. If it is brought in federal court, however, it is not. This contradicts *McDonald*.

It was "incongruous" for the Sixth Circuit to hold that whether the explicit remedy of the Fifth Amendment (just compensation) is available depends on "whether the claim was asserted in a state or federal court." *Id*. Similarly, a Fifth Amendment claim against a state should be held to "the same standards that protect those personal rights against federal encroachment." *Id*. If a plaintiff can obtain "just compensation" in federal court for federal takings, then that same plaintiff can obtain "just compensation" in federal court for state takings.

When the states ratified the Fourteenth Amendment, which incorporated the Fifth Amendment, they consented to be governed under the explicit language of those amendments. Because the Fifth Amendment provides for "compensation" and the states consented to the language of the Fifth and Fourteenth Amendments, the states have thus consented to a mechanism that is "inherent in the constitutional plan." In other words, when the states consented to the Fourteenth Amendment (which incorporated the Fifth Amendment), they waived the Eleventh Amendment only as to "just compensation" for takings claims. Since the states consented to be governed by the United States Constitution and its explicit language, they consented and waived any Eleventh Amendment defense to the explicit requirement that states provide "just compensation" for their takings of private property.

In the alternative, beyond the exceptions provided in *Ex parte Young, supra*, the states cannot claim the immunity of the sovereign because they are beholden to the ultimate authority of the United States Constitution which requires that "just compensation" be paid, regardless of what prior exceptions to the Eleventh Amendment exist.

Such a holding would not nullify the Eleventh Amendment. Since this waiver would only apply to the explicit language of the Constitution, it would only apply to the Fifth Amendment's requirement for "compensation." This waiver would be inapplicable to every other provision in the Constitution that does not explicitly require that "compensation" be provided. Thus, this waiver would not, for example, apply to

claims of damages for a First, Second, or Fourth Amendment claim because those constitutional provisions make no mention of "compensation" or any other language authorizing damages. Therefore, since the only time the states agreed to provide "compensation" was in the Fifth Amendment, a takings claim is the only waiver to which the states explicitly consented.

Moreover, if this Court were to clearly hold that the Eleventh Amendment does not bar Fifth Amendment takings claims in federal court, this would not provide automatic victories to every possible plaintiff. Instead, it only means that those cases can be heard on the merits. Petitioners request that this Honorable Court hold that their claims can proceed and the Eleventh Amendment is no bar to their case being heard.

Finally, the Sixth Circuit erred by holding that the states could not have waived their immunity because the takings clause was not incorporated against the states until 30 years after the Fourteenth Amendment was ratified. There is no such temporal requirement in this Court's incorporation doctrine. What matters is whether the explicit text of each amendment is applicable to the states, regardless of when it was incorporated.

The First Amendment right to freedom of speech was incorporated 57 years after the Fourteenth Amendment was ratified (*Gitlow v. New York,* 268 U.S. 652 (1925)); the First Amendment right to free exercise of religion was incorporated 66 years later (*Hamilton v. Regents of the University of California*, 293 U.S. 245 (1934)); the Fifth Amendment right

against self-incrimination was incorporated 96 years later (*Malloy v. Hogan*, 378 US 1 (1964)); and the Second Amendment right to keep and bear arms was incorporated as recently as 2010 (*McDonald, supra*)). None of our incorporated rights are diluted or unenforceable against a state merely because a requisite amount of time has passed since the ratification of the Fourteenth Amendment. Instead, a proper analysis requires an examination of the explicit text of each amendment and how they apply to the states. In the case at bar, it is clear that the Fifth Amendment not only contemplates, but requires, that damages be paid because it explicitly states "just compensation" is the constitutional remedy. Regardless of the date of incorporation, all states must submit to the specific language of all incorporated rights, including the right of a citizen to obtain "just compensation" for a taking.

Since Congress has the authority to abrogate a State's sovereign immunity, certainly a Constitutional Amendment explicitly authorizing "just compensation" must do so as well. The Fifth Amendment is the one and only exception to the Eleventh Amendment that "just compensation" be paid. The Fifth Amendment's explicit text requires it.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that their petition for a writ of certiorari be granted.

Respectfully submitted,

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