No. 23-1167

In the Supreme Court of the United States

DENNIS O'CONNOR, PETITIONER

v.

RACHAEL EUBANKS, IN HER PERSONAL CAPACITY;
TERRY STANTON, IN HIS PERSONAL CAPACITY;
STATE OF MICHIGAN

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Where Congress has not abrogated immunity and the State of Michigan has not consented to suit, is the State entitled to sovereign immunity for claims arising under the Fifth Amendment's Takings Clause?

2. Where precedent has consistently held that a personal capacity suit against a state official for a takings claims is not actionable, are state officials who are sued under the Takings Clause entitled to qualified immunity?

PARTIES TO THE PROCEEDING

Respondents are the State of Michigan, Rachael Eubanks, the Treasurer of the State of Michigan, and Terry Stanton, a manager within the Michigan Department of Treasury. Eubanks and Stanton are sued in their individual capacities. Petitioner is Dennis O'Connor, an individual who recovered abandoned property under Michigan's Unclaimed Property Act.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Constitutional Provisions

INTRODUCTION

Under Michigan law, O'Connor abandoned two checks totaling less than $350, and many years later attempted to recoup not only the property but also interest on the non-interest-bearing property. On the important, substantive question of whether it is within the province of the States to decide whether to pay interest on abandoned property that they later return to former owners, Respondents have filed a cross-petition. This petition deals only with issues that are well-settled and do not warrant this Court's review: (1) whether there is a Fifth Amendment takings exception to the general rule that States are entitled to sovereign immunity absent waiver or abrogation, and (2) whether government officials who are sued in their individual capacities under the Takings Clause are entitled to qualified immunity.

Neither question is certworthy.

For the first, the Sixth Circuit's opinion does not conflict with this Court's precedent, and there is not even a hint of a circuit split on the issue, with many United States Courts of Appeals expressly in agreement that there is no takings-clause exception to sovereign immunity. It is no wonder that this Court has repeatedly, and as recently as last term, denied certiorari on this issue. And here, O'Connor filed an action to recover his interest in state court.

For the second question, courts have been reluctant to impose individual liability on government officials when the government takes property for the public's use. Indeed, the only court that appears to have recognized the viability of a personal-capacity takings

suit did so without analysis and ultimately granted qualified immunity anyway. The proposed split is as flimsy as it is shallow. Because O'Connor has an adequate opportunity to seek a remedy via state law and where no court of appeals has greenlit a personal-capacity takings suit, this case is a poor vehicle to address the qualified immunity question.

The petition should be denied.

STATEMENT OF THE CASE

A. Michigan permits former owners to recoup the value of their abandoned property at the time of abandonment.

States generally have the power to define when abandonment occurs and how abandoned property is disposed of. Although the contours of state statutory programs vary, they typically describe circumstances under which property is "presumed abandoned," set forth conditions under which that property is remitted to the State, and determine whether and when an abandoning owner can petition the State for the property or its equivalent.

Michigan, like many States, provides for custodial, or revocable, escheatment. Mich. Comp. Laws. § 567.221 *et seq*. Michigan's scheme is explicit about the character of unclaimed property at each stage of the process. Initially, Michigan law declares unclaimed property to be presumed abandoned when certain conditions are met. Mich. Comp. Laws § 567.223. If the conditions raising a presumption of abandonment are satisfied, the presumed abandoned property is subject to the custody of the State. Mich. Comp. Laws § 567.224.

Once the holder reports and remits the presumptively abandoned property, under state law the property is then considered abandoned. But Michigan law grants the former owner an opportunity to later claim an interest in that abandoned property by filing a claim. Mich. Comp. Laws § 567.245. Relevant here, for property that was not interest-bearing at the time of surrender, the abandoning owner may receive the same amount Michigan received from the holder of the abandoned property, but no more. Mich. Comp. Laws § 567.245(3).[1]

B. O'Connor claims entitlement to interest on non-interest-bearing abandoned property.

On December 3, 2021, O'Connor filed a two-count putative class action complaint alleging damages arising from the State of Michigan's handling of its unclaimed property program under the Uniform Unclaimed Property Act (UUPA). Mich. Comp. Laws § 567.221 *et seq*. App. 35a–37a. O'Connor sued the State of Michigan, as well as Rachael Eubanks, the Treasurer of the State of Michigan, and Terry Stanton, a manager within the Michigan Department of Treasury, in their personal and official capacities (collectively, "State Defendants"). Later, on December 10, 2021, O'Connor submitted a claim to the Michigan

[1] There is an exception to the rule against interest for non-interest-bearing property. The State will pay "any dividends, interest, or other increments realized or accruing on the property" if the property is claimed "at or before liquidation or conversion of the property into money." Mich. Comp. Laws § 567.242.

Department of Treasury to recover the same unclaimed property.

Both of O'Connor's properties were reported to Treasury as non-interest-bearing on the date they were reported. Consistent with Michigan law, Treasury maintained an account from which all successful unclaimed property claims are to be paid. Mich. Comp. Laws § 567.244(1). After O'Connor filed a claim, Treasury approved it and paid O'Connor the amount of the claim, which was the original amount of the property at the time of abandonment—without interest, as directed by statute. App. 46a.

The State Defendants filed a motion to dismiss. *Id*. Two days later, O'Connor filed his First Amended Class Action Complaint, alleging that the State Defendants violated the Fifth and Fourteenth Amendments to the U.S. Constitution. App. 36a–37a. O'Connor again named Eubanks and Stanton, in their personal and official capacities, as well as the State of Michigan. *Id*.

The State Defendants moved to dismiss under Rule 12(b)(1) for lack of subject matter jurisdiction and Rule 12(b)(6) for failure to state a claim. App. 34a–38a. A federal magistrate judge issued a Report and Recommendation on the motion to dismiss. App. 34a–50a. The magistrate judge concluded that the district court lacked subject matter jurisdiction over the claims for money damages against the State of Michigan and the official capacity claims against Eubanks and Stanton. *Id*. She further concluded that Eubanks and Stanton were entitled to qualified immunity. *Id*.

The district court issued a memorandum opinion and a judgment granting the State Defendants' motion and dismissing the case. App. 21a–33a. The court agreed that the Eleventh Amendment barred any claims against the State of Michigan and Eubanks and Stanton in their official capacities. App. 29a.

As to qualified immunity, the district court held that Eubanks and Stanton were entitled to qualified immunity on the personal-capacity claims because "there is no dispute that the individual Defendants' actions related to the UUPP and Plaintiff's claims were in accordance with the Act." *Id.* The court went on to note that even if O'Connor could show a constitutional violation, "the individual Defendants are entitled to qualified immunity because Plaintiff has not shown that it is clearly established, either under the Taking Clause or the Due Process Clause, that he has the right to collect interest on funds that were non-interest-bearing when abandoned." *Id.*

C. The Sixth Circuit reverses in part.

O'Connor appealed, and on October 6, 2023, the Sixth Circuit issued its opinion affirming in part and reversing in part the district court's grant of qualified immunity as to the due process claims. App. 1a–20a.

The Sixth Circuit affirmed the dismissal of O'Connor's takings claims against the State, holding that the district court's dismissal of those claims should be without prejudice. *Id.* Following circuit precedent, the court held that " 'the Eleventh Amendment bars takings claims against states in federal court, as long as a remedy is available in state court.' " App. 9a (quoting *Skatemore, Inc.* v. *Whitmer*, 40 F. 4th 7272, 734

(6th Cir. 2022)). The court cited Michigan decisions adjudicating takings claims, recognizing that there is an available remedy through Michigan state courts. App 9a–10a.

In a brief discussion, the Sixth Circuit also affirmed the grant of qualified immunity to Eubanks and Stanton for O'Connor's takings claims. App. 5a–6a. Bound by circuit precedent, the court held that individual liability for takings claims is not clearly established. App. 5a–6a. But the court held that O'Connor had alleged a plausible due process claim against Eubanks and Stanton personally, and, therefore, that they were not entitled to qualified immunity as to that claim. App 6a–9a. This ruling is the subject of the cross-petition, filed May 17, 2024.

All parties sought rehearing en banc. App. 51a. The Sixth Circuit denied the petitions.

O'Connor filed a petition here raising two questions: (1) whether a State's constitutional obligation to pay just compensation when taking property waives its sovereign immunity from a takings claim seeking damages; and (2) whether a property owner may sue a state official in their individual capacity under 42 U.S.C. § 1983 for a violation of the Takings Clause, as the First Circuit holds, or whether such a suit is categorically "barred," as the Sixth Circuit holds.

Defendants now file this brief in opposition to O'Connor's petition.

REASONS FOR DENYING THE PETITION

I. The first question presented does not warrant this Court's review.

The sovereign immunity decision below is consistent with this Court's longstanding, firm precedent that, absent a waiver or abrogation, a State retains its sovereign immunity for all claims against it. And all the federal courts of appeal that have reviewed the question have agreed that there is no takings-clause exception to this bedrock principle.

It is not surprising then that this Court has recently and repeatedly denied petitions contesting a State's sovereign immunity for takings claims. See *EEE Minerals, L.L.C.* v. *North Dakota*, cert. denied, No. 22-2159 (Mar. 24, 2024); *Canada Hockey, L.L.C.*, *dpa Epic Sports* v. *Texas A&M Univ. Athletic Dep't*, cert. denied, No. 21-1603 (Oct. 3, 2022); *Bay Point Props., Inc.*, v. *Miss. Transp. Comm.*, cert. denied, No. 19-798 (Mar. 20, 2020). And just this past term this Court deferred the issue of whether there was a cause of action for money damages under the Fifth Amendment. See *DeVillier* v. *Texas*, 601 U.S. 285, 293 (2024) (finding no need to decide whether the Takings Clause itself contains a built-in cause of action where state law offers a vehicle to vindicate rights). This Petition does not warrant different treatment.

Moreover, this is not a circumstance where O'Connor lacks some other avenue for relief. A similar suit can be filed in Michigan state courts, and indeed, O'Connor filed such a suit in the Michigan Court of Claims.

A. The decision below is consistent with this Court's longstanding and consistent precedent that all claims against a State are barred by sovereign immunity absent the State's waiver.

O'Connor does not present a genuine conflict with either "founding-era understandings" or this Court's precedent. It is well settled that sovereign immunity is not abrogated on the ground that a case arises under the Constitution, and this Court's precedent has not disturbed this principle.

States do not lose their sovereign immunity "on the mere ground that the case is one arising under the constitution or laws of the United States." *Hans* v. *Louisiana*, 134 U.S. 1, 10 (1890). Indeed, this Court has broadly recognized that "[t]he sovereign's immunity from suit exists whatever the character of the proceeding or the source of the right sought to be enforced," including claims that the government has violated "rights conferred upon the citizen by the Constitution." *Lynch* v. *United States*, 292 U.S. 571, 582 (1934). This is because "the Constitution was understood, in light of its history and structure, *to preserve the States' traditional immunity from private suits*." *Alden* v. *Maine*, 527 U.S. 706, 724 (1999) (emphasis added).

O'Connor does not dispute these principles. Pet. 12–13. But he posits that founding-era understandings of government takings are at odds with States' sovereign immunity. *Id*. at 19. The cases he cites, however, stand for the proposition that the *federal* government cannot take property without payment. What O'Connor ignores is that "[b]efore 1855 no general

statute gave the consent of the United States to suit on claims for money damages; the only recourse available to private claimants was to petition Congress for relief." *United States* v. *Mitchell*, 463 U.S. 206, 212 (1983). "Congress enabled property owners to obtain compensation for takings in federal court when it passed the Tucker Act in 1887, and . . . [the Court] subsequently joined the state courts in holding that the compensation remedy is required by the Takings Clause itself." *Knick* v. *Twp. of Scott*, 588 U.S. 180, 200–01 (2019). See also *Maine Cmty. Health Options* v. *United States*, 590 U.S. 296, 323 n.12 (2020) (citing *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1016–17 (1984) ("Although there is no express cause of action under the Takings Clause, aggrieved owners can sue through the Tucker Act under our case law.")). The Tucker Act, 28 U.S.C. § 1491(a)(1), waives the federal government's immunity takings claims that are rooted in the Fifth Amendment. *Knick*, 588 U.S. at 200–01.

The Fifth Amendment itself has no bearing on the States' sovereign immunity from suit, as this Court has plainly held that a State does not lose its sovereign immunity simply because a case arises under the constitution. *Hans*, 134 U.S. at 10. Nor does the history of the Fourteenth Amendment abrogate immunity here. *Alabama* v. *Pugh*, 438 U.S. 781, 782 (1978) ("There can be no doubt, however, that suit against the State and its Board of Corrections is barred by the Eleventh Amendment, unless Alabama has consented to the filing of such a suit."). See also *Skatemore, Inc.* v. *Whitmer*, 40 F.4th 727, 736 (6th Cir. 2022) ("There is no indication that at the time Michigan ratified the Fourteenth Amendment in 1867 that the Fifth

Amendment's Takings Clause would apply to the states. In fact, the Takings Clause was the first right to be incorporated and that did not occur until 30 years after the Fourteenth Amendment was ratified."). Thus, history does not support a waiver of the States' immunity on this issue.

Nor does this Court's more modern precedent. Rather, the cases O'Connor cites involve distinct circumstances—not at issue here—demonstrating a waiver of sovereign immunity. Take, for example, *PennEast Pipeline* v. *New Jersey*, which involved the federal eminent domain power over state-owned property to which "the States consented *in the plan of the Convention*[.]" 594 U.S. 482, 501 (2021) (emphasis added); see also *id.* at 502 ("Put another way, when the States entered the federal system, they renounced their right to the 'highest dominion in the lands comprised within their limits.' ") (citation omitted).

Gunter v. *Atlantic Coast Line Railroad* is similarly distinguishable. 200 U.S. 273 (1906). That case involved a State voluntarily joining a lawsuit "and submit[ting] its rights for judicial determination." *Id.* at 284. Under that unique circumstance, a State "cannot escape the result of its own voluntary act by invoking the prohibitions of the [Eleventh] Amendment." *Id.* No such voluntary waiver of sovereign immunity exists here.

O'Connor also cites to several takings cases against municipalities, see *First English Evangelical Lutheran Church of Glendale* v. *Los Angeles County*, 482 U.S. 304, 309–10 (1987); *Chicago Burlington & Quincy Railroad* v. *City of Chicago*, 166 U.S. 226 (1897), and entities that were not held to be arms of

the State, see *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1007 (1992) (suit against a legislatively created council and no finding that the council was an arm of the State); *Tahoe-Sierra Preservation Council, Inc.* v. *Tahoe Regional Planning Agency*, 535 U.S. 302, 306 (2002) (suit against two-state compact, which the Court had previously held was not an arm of the state); *Palazzolo* v. *Rhode Island*, 533 U.S. 606, 614 (2001) (suit against a legislatively created council and no finding that the council was an arm of the State). But municipalities and those entities not found to be an arm of the state have no entitlement to sovereign immunity, and thus, reliance on these cases is inapposite here.

True, this Court in *First English* stated in a footnote that "the Constitution . . . dictates the remedy for interference with property rights amounting to a taking," 482 U.S. at 316 n.9. But this Court in *Knick* pointed to that footnote as reaffirming that just compensation is a constitutionally required remedy, 588 U.S. at 193, not that the Fifth Amendment abrogated sovereign immunity. *Knick* addressed only a claim against a municipality—a township in Pennsylvania. 588 U.S. at 181. See also *Ladd* v. *Marchbanks*, 971 F.3d 574, 579 (6th Cir. 2020) ("*Knick* says nothing about sovereign immunity" because "the defendant in *Knick* was a municipality, so it had no sovereign immunity to assert."). To suggest otherwise would ignore that *Knick* pointed to the Tucker Act as the vehicle for achieving just compensation against the federal government. *Knick*, 588 U.S. at 200–01. See also *Me. Cmty. Health Options*, 590 U.S. at 323 n.12.

These distinctions matter, because sovereign immunity "does not extend to suits prosecuted against a municipal corporation or other governmental entity which is not an arm of the State." *Alden*, 527 U.S. at 756. Accordingly, O'Connor is wrong when he asserts that these cases stand for the proposition that this Court routinely ignored sovereign immunity in favor of allowing takings claims against the State. Pet. 22.

B. The circuits are unanimous that States have sovereign immunity from takings-based suits.

Circuit decisions are of no greater help to O'Connor. In fact, he implicitly acknowledges that the decision below does not conflict with the decision of any other court of appeals. Pet. 16. And rightly so, for even a cursory review of decisions across the country shows that the many circuits to have considered the issue agree that States enjoy sovereign immunity for takings claims.

The Eighth Circuit in *EEE Minerals, LLC* v. *North Dakota*, 81 F.4th 809, 815–16 (8th Cir. 2023), for example, rejected the argument that "takings claims must be allowed to proceed despite state sovereign immunity." The court emphasized that while it "has not directly addressed the interplay between the Fifth Amendment and the Eleventh Amendment," it has addressed an analogous situation involving the Fourteenth Amendment's self-executing "right to a remedy for taxes levied in violation of federal law," concluding that "even though the Fourteenth Amendment provides a right to a remedy for taxes levied in violation of federal law, 'the sovereign immunity

States enjoy in *federal* court, under the Eleventh Amendment, does generally bar tax refund claims from being brought in that forum.' " *Id*. at 816 (quoting *Reich* v. *Collins*, 513 U.S. 106, 109–110 (1994)). "Instead, state courts were required to entertain suits against a State to recover taxes unlawfully exacted." *Id*.

Other circuits have similarly affirmed the States' sovereign immunity from suit for takings claims. *E.g*., *Zito* v. *N.C. Coastal Res. Comm'n*, 8 F.4th 281, 287 (4th Cir. 2021) ("[E]very circuit to address *Knick*'s effect on sovereign immunity has concluded that *Knick* did not abrogate State sovereign immunity in federal court."); *Bay Point Props., Inc.* v. *Miss. Transp. Comm'n*, 937 F.3d 454, 456 (5th Cir. 2019) (holding that "nothing in *Knick*" "overturns prior sovereign immunity law in cases arising under the Takings Clause"); *Pavlock* v. *Holcomb*, 35 F.4th 581, 589 (7th Cir. 2022) ("But unlike *Knick*, which involved a suit against a town, the Owners' suit is against a state, and states enjoy sovereign immunity."); *Jachetta* v. *United States*, 653 F.3d 898, 909–10 (9th Cir. 2011) (holding that the Eleventh Amendment bars claims brought against the state in federal court*); Williams* v. *Utah Dep't of Corr.*, 928 F.3d 1209, 1214 (10th Cir. 2019) (same)*; Robinson* v. *Ga. Dep't of Transp.*, 966 F.2d 637, 638, 640–41 (11th Cir. 1992) (same).

Given the unanimity of the courts of appeals and the correctness of their holdings, this Court should deny the petition.

C. There is an adequate state court remedy, of which O'Connor has already availed himself.

This Court's recent opinion in *DeVillier* illustrates that this Court defers to the state-law remedy for asserting a takings claim, although it did not address sovereign immunity because Texas consented to suit in federal court after removal. 601 U.S. at 290, 293. Deferring to an existing state-law remedy respects the history of the Takings Clause and permits each State's highest court to define the contours of the State's own property laws.

And in Michigan, the law is clear: the State provides a cause of action for money damages against the State under the Fifth Amendment Takings Clause and under the Michigan Constitution, both as a takings action and as an inverse condemnation action. See, e.g., *K & K Constr., Inc.* v. *Dep't of Nat. Res.*, 575 N.W.2d 531, 534–35 (Mich. 1998) (citing both the Fifth Amendment and Michigan's constitutional takings provision, Mich. Const. art. X, § 2, in an action against a state agency); *Peterman* v. *State Dep't of Nat. Res.*, 521 N.W.2d 499, 505 (Mich. 1994) (recognizing an inverse condemnation action under state law in action against a state agency).

Thus, in light of *DeVillier*, O'Connor is hard pressed to complain that he is left without a meaningful remedy from the State absent a waiver of its sovereign immunity. Pet. 12. In fact, he actually asserted an inverse condemnation in the Michigan Court of

Claims[2] before filing his suit in this matter. O'Connor's focus on sovereign immunity seems to sidestep *DeVillier* and the state-court remedy that was both available and actually utilized by him.

Since the "Eleventh Amendment bars a claim against the State in federal court as long as state courts remain open to entertain the action," *EEE Minerals*, 81 F.4th at 816, and Michigan courts remain open to takings and inverse condemnation claims, review is not warranted here.

II. The second question presented does not warrant this Court's review.

Contrary to the second question presented in the petition, the Sixth Circuit did not analyze, let alone resolve, the issue whether "a personal capacity suit is categorically 'barred.' " Pet. i. Rather, the court found only that such claims are not clearly established. App. 5a–6a. O'Connor contests the Sixth Circuit's qualified immunity holding but does not seek certiorari on it, making this a singularly inappropriate case to address either question.

In any event, Respondents *are* entitled to qualified immunity. As described in Respondents' cross-petition, two circuits, three state supreme courts, and

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[2] *O'Connor* v. *Dep't of Treasury*, No. 360002, 2023 WL 2335292, at *1 (Mich. Ct. App. Mar. 2, 2023) ("Among other claims, plaintiff alleged that she had the right to recover interest earned on her asset while held by the state."). O'Connor was a plaintiff in the Michigan Court of Claims, but he declined to participate in the appeal to the Michigan Court of Appeals. *Id*. at *1 n.1 ("Plaintiffs Dennis O'Connor and Andrew Nagy are not parties to this appeal.").

several other state appellate and federal district courts have rejected takings claims based on States' refusal to return interest on abandoned property. See Cross-Pet. 15–20. The law was not clearly established that there is a compensable taking under those circumstances.

The fact of the matter is that, whether based on qualified immunity or O'Connor's underlying view of the viability of personal-capacity takings suits, no circuit court has permitted a personal-capacity takings suit to go forward. There is simply nothing for this Court to resolve.

Even if there is a conflict on the question that Petitioner would present to this Court—are personal-capacity takings suits viable?—the split is a shallow one, and O'Connor had a ready state-law cause of action to vindicate claims under the takings clause.

A. The Sixth Circuit did not address whether a personal-capacity Takings Clause suit is categorically barred, and Eubanks and Stanton are entitled to qualified immunity in any event.

O'Connor's characterization of the Sixth Circuit's holding is incorrect and is fatal to any suggestion that this case presents a vehicle to address the question he wants answered. O'Connor leads off the discussion of the second proposed question by stating that, "the Sixth Circuit also held that state officials cannot be sued in their personal capacity under Section 1983 for taking property." Pet. 24. Not so. Instead, the court looked to its recent circuit precedent, which "held that that individual liability for takings claims is not

'clearly established.' " App. 5a–6a (citing *Sterling Hotels, LLC* v. *McKay*, 71 F.4th 463, 468 (6th Cir. 2023)). Therefore, without further analysis, the court below found itself bound by that precedent and ruled that Eubanks and Stanton were entitled to qualified immunity. In short, the question presented does not reflect a question resolved by the Sixth Circuit.

Even under Petitioner's qualified-immunity approach, the law is not clearly established. As explained at length in the cross-petition, several circuits, state courts of last resort, and others have rejected takings claims based on a State's decision not to grant abandoning owners interest on their abandoned property. See, e.g., *Turnacliff* v. *Westly*, 546 F.3d 1113, 1119 (9th Cir. 2008); *Simon* v. *Weissman*, 301 F. App'x 107, 114 (3d Cir. 2008); *Hall* v. *State*, 908 N.W.2d 345, 353–55 (Minn. 2018); *Dani* v. *Miller*, 374 P.3d 779, 794 (Okla. 2016); *Cwik* v. *Giannoulias*, 930 N.E.2d 990, 995–96 (Ill. 2010). See also generally Cross-Pet. 15–20. This authority shows that an entitlement to interest on abandoned property is not clearly established.

B. No circuit court has permitted a personal-capacity takings suit to proceed.

Several circuits have addressed whether personal-capacity suits are viable and either outright rejected takings claims against governmental officials in their individual capacities or resolved the issue by granting qualified immunity. While these two pathways may differ, they nevertheless lead to the same result—dismissal. Whatever the focus of analysis,

there is no resolvable conflict warranting this Court's review.

O'Connor relies on *Asociación De Subscripción Conjunta Del Seguro De Responsabilidad Obligatorio* v. *Flores Galarza*, 484 F.3d 1 (1st Cir. 2007). This is curious authority to put front and center, since the First Circuit actually *granted qualified immunity* to the personal-capacity defendant, finding that the relevant law was either not clearly established or that a reasonable officer would not have believed that the actions would have violated the plaintiff's rights. *Id.* at 36–37.

Before issuing this holding, the First Circuit did find, tepidly, that a personal-capacity takings suit is possible. *Id.* at 25–26. But one would be hard pressed to assert that the First Circuit "expressly sanctioned personal capacity takings claims." Pet. 25. Instead, the court was "troubled by the notion that the personal-capacity claim . . . is really a subterfuge for an official-capacity suit that seeks payment from the Commonwealth Treasury." 484 F.3d at 25. And the court chided the plaintiff for "the unusual nature of this personal capacity suit," stating, "If the [plaintiff] wishes to seek a personal judgment against Flores Galarza in a ruinous and probably uncollectible amount for actions that he took as the Commonwealth Treasurer to serve the interests of the Commonwealth, they are entitled to do that." *Id.* at 25.[3]

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[3] The court also explicitly acknowledged that "[t]here is a plausible view of this case that the demand for damages from Flores Galarza is, in essence, a demand for the recovery of money from the Commonwealth." 484 F.3d at 25. If damages were paid out of

It is difficult to imagine how a governmental official could be *personally* liable for a *governmental* taking. By its nature, a taking "presupposes that the government has acted in pursuit of a valid public purpose." *Lingle* v. *Chevron U.S.A. Inc.*, 544 U.S. 528, 543 (2005). For that reason, "the taking is not by a private person for private purposes, and the property does not belong to a private person who must accordingly pay just compensation out of private funds." *Bridge Aina Le'a, LLC* v. *Haw. Land Use Comm'n*, 125 F. Supp. 3d 1051, 1079–80 (D. Haw. 2015) ("[M]onetary relief is not available against persons sued in their individual capacities for takings."), aff'd, 950 F.3d 610 (9th Cir. 2020).

Recently, in *Gerlach* v. *Rokita*, a district court in the Seventh Circuit was faced with substantially similar arguments as in this case, namely, that the State of Indiana, the State Attorney General, and the State Treasurer violated the Fifth and Fourteenth Amendments " 'by taking earnings on unclaimed property while in state custody and failing to compensate owners for those earnings.' " No. 1:22-CV-00072-TWP-MG, 2023 WL 2683132, at *9 (S.D. Ind. Mar. 29, 2023). The district court found that the takings claims against the state officials were improper for two reasons. First, the district court held that "[a]n individual cannot be held liable for a violation of the Takings Clause." *Id.* (citing *Vicory* v. *Walton*, 730 F.2d 466, 467 (6th Cir. 1984)). Second, "because any taking was done for the benefit of the State, any judgment for just compensation would be paid out by the State

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the state treasury rather than the individual's pockets, a different result may be reached.

treasury[,]" and therefore, "the individual capacity claims are in reality claims against the State barred by the Eleventh Amendment regardless of how it is pled." *Id*. at *10.

The Tenth Circuit similarly stated that it was not "aware of any circuit court that has explicitly held that a takings action can be brought against a state official in an individual capacity." *Hinkle Family Fun Ctr., L.L.C.* v. *Grisham*, No. 22-2028, 2022 WL 17972138, at *4 n.2 (10th Cir. Dec. 28, 2022). Although it followed what it "believe[d] to be an easier path resolving the issue" by granting qualified immunity, the court acknowledged that the district court's rejection of takings claims brought against government officials in their personal capacity had substantial support. *Id*.

And in an earlier decision, the Fourth Circuit explained that "takings actions sound against governmental entities rather than individual state employees in their individual capacities[.]" *Langdon* v. *Swain*, 29 F. App'x 171, 172 (4th Cir. 2002). The consistent theme throughout these decisions is a recognition that it is the government, rather than the individual employee, that has taken the property and received the benefit.

The bottom line: courts have been loath to impose individual liability on government officials for a government's act of taking of property for the public's use. Regardless of the answer to whether such claims are viable under § 1983, the Sixth Circuit granted qualified immunity to Stanton and Eubanks rather than outright rejecting the viability of such claims.

C. Any split of authority is a shallow one, and O'Connor already has an adequate state-law remedy available to vindicate his rights.

Even if the petition properly presented a split of authority concerning the viability of a personal-capacity takings suit, the split is shallow.

O'Connor's lodestar for his proposed circuit split is *Flores Galarza*, from the First Circuit. But again, *Flores Galarza* ultimately dismissed the claim on qualified immunity grounds. 484 F.3d at 36–37. And rather than clearly holding that a personal-capacity takings claim is viable, *Flores Galarza* seems more to assume, begrudgingly and without direct analysis, that it is. Indeed, the court's discussion of personal-capacity suits focused on whether the complaint actually alleged an official-capacity or personal-capacity suit. *Id*. at 25–26. O'Connor's proffered circuit split is not only shallow in that it offers one court in disagreement with the others, but also even that court's "holding" is devoid of analysis on the central question of whether a personal-capacity takings suit is viable.

What's more, a decision by this Court would have little effect on O'Connor and others similarly situated, who can bring state-law claims. This case concerns state property law and an alleged entitlement to money from the State's coffer. O'Connor had the ability to bring his claims in state court (which he has done, in a separate suit). In Michigan, the law is clear: the State provides a cause of action for money damages against the State under the Fifth Amendment Takings Clause and under the Michigan Constitution, both as a takings action and as an inverse

condemnation action. See *K & K Constr., Inc.*, 575 N.W.2d at 534–35.

Even in the face of Michigan's generous state law regarding abandoned property, the availability of a state-court cause of action, and the potential damages remedy from Michigan's treasury, O'Connor wishes to hail Eubanks and Stanton into federal court—despite the Eleventh Amendment, qualified immunity, and the nature of takings actions that foreclose personal-capacity suits.

CONCLUSION

O'Connor's petition for a writ of certiorari should be denied.

Respectfully submitted,

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