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,

Respondents.

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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION AND SUMMARY OF REPLY ARGUMENT

The State Officials' (Officials) brief in opposition (BIO) fails to negate Petitioner Dennis O'Connor's (O'Connor) argument that the decision below conflicts with history and precedent, and ultimately bars property owners from seeking a federal remedy when state officials unconstitutionally take private property.

With respect to the first question, the Officials fail to adequately address O'Connor's contention that the Sixth Circuit's holding that the state is sovereignly immune from O'Connor's claim for just compensation is inconsistent with the state's historic obligation (and implicit promise) to pay when taking property. The Officials argue that the tension between sovereign immunity and the state's duty to compensate for a taking does not justify review because property owners can potentially litigate their federal takings claim in state court. BIO at 14–15. But the reality is that, in many states, there is no procedure allowing property owners to directly sue for just compensation for a taking by a state. If sovereign immunity precludes a property owner from suing a state in federal court for just compensation for an unconstitutional taking, as the decision below holds, property owners in some states will have no meaningful compensatory remedy. App.10a (Thapar, J., concurring).

As to the second question, whether a property owner may sue state officials in their personal capacity for an unconstitutional taking, the Officials assert that the decision below did not bar personal capacity takings claims, but held only that that State

Officials enjoy "qualified immunity" from O'Connor's claim. BIO at 16–17.

This is a meritless argument. The Sixth Circuit held that O'Connor is barred from raising his personal capacity takings claim under Section 1983 because such claims are not established and allowed by circuit law. App.6a; *id.* n.2. That the court framed its holding in the language of "qualified immunity" out of deference to the parties' arguments does not change the fact that, under the decision below, a court need do no more than identify a claim as a personal capacity takings claim to conclude it must be dismissed. App.6a; *see also*, App.10a–12a (Thapar, J., concurring). That is a categorical barrier. The second question is properly presented, and given the conflict and confusion among federal courts on the issue of personal capacity takings claims, which the Officials do not refute in any meaningful way, the question is worthy of review.

REPLY ARGUMENT

I.

THE CONFLICT BETWEEN SOVEREIGN IMMUNITY AND THE STATES' DUTY TO PAY COMPENSATION WHEN TAKING PROPERTY IS RIPE FOR REVIEW

A. The Officials Fail to Show That the Sixth Circuit's Application of Sovereign Immunity to Takings Claims Is Consistent With Founding-Era Understandings About the Just Compensation Requirement

The Officials largely fail to address O'Connor's argument that the Sixth Circuit's application of sovereign immunity to shield the state from

O'Connor's Fifth Amendment takings claim is incompatible with founding-era understandings about the conditional nature of the state's power to take property. The Officials argue that the Constitution has "no bearing on the State's sovereign immunity from suit." BIO at 9–10. Yet, they ignore O'Connor's primary assertion that, under historic, common law understandings, use of the sovereign power to take property is subject to an agreement to compensate property owners, and this waives sovereign immunity when an owner seeks damages for a taking. *Dep't of Transp. v. Mixon*, 864 S.E.2d 67, 71 (Ga. 2021) (holding that "the principle that private property may not be appropriated by the government without compensation" waives sovereign immunity from a claim seeking relief from an uncompensated taking).

The Officials refuse to directly confront this argument because they believe the authority on which it rests applies only to "the *federal* government." BIO at 8 (emphasis in original). This is inaccurate, as a cursory glance at the Petition shows. Pet. at 17–21. In any event, the Officials' position is baseless. The founding-era understanding that the power to take property carries an obligation and implied agreement to pay property owners is *a universal principle of western sovereignty*. *Young v. McKenzie*, 3 Ga. 31, 44 (1847) (The Fifth Amendment "does not create or declare any new principle of restriction, either upon the legislation of the National or State government, but simply recognized the existence of a great common law principle, founded in natural justice, especially applicable to all republican governments, and which derived no additional force, as a principle, from being incorporated into the Constitution of the United States."). Thus, at the time of the American founding,

it was understood that a taking by a state or federal government included an implied promise to pay the property owner. *See id.*; *see also*, *Parham v. Justices of Inferior Court of Decatur County*, 9 Ga. 341, 349 (1851) ("It is not, therefore, necessary to go to the Federal Constitution for [the principle of just compensation]. It came to us with the Common Law—it is part and parcel of our social polity—it is inherent in ours, as well as every other free government.").

In opposition to O'Connor's argument that the application of sovereign immunity in the decision below conflicts with the state's historic just compensation obligation, the Officials highlight the Tucker Act. They assert that the "Tucker Act[1] . . . waives the federal government's immunity [from] takings claims that are rooted in the Fifth Amendment." BIO at 9 (footnote added). Although their point is not entirely clear, the Officials may be suggesting that a legislative act is needed to waive state sovereign immunity from just compensation claims. If so, the contention fails, and the purported Tucker Act analogy is inapt.

This Court has never held that enactment of the Tucker Act was necessary to waive the United States' sovereign immunity from claims seeking the constitutionally enshrined remedy of just

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[1] The Tucker Act, 28 U.S.C. § 1491, provides in pertinent part:

> The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

compensation for a taking.[2] In the takings context, the Court has simply stated that the Tucker Act granted jurisdiction to the Court of Federal Claims over claims seeking just compensation for a taking by the federal government. *Knick v. Twp. of Scott*, 588 U.S. 180, 189–90 (2019).

This Court's takings cases avoid describing the Tucker Act as a waiver of sovereign immunity for the obvious reason that congressional action was never needed to waive the United States' immunity in takings cases; the government's pre-existing obligation to pay just compensation accomplished that. *Hair v. United States*, 350 F.3d 1253, 1257 (Fed. Cir. 2003) ("[S]overeign immunity does not protect the government from a Fifth Amendment Takings claim because the constitutional mandate is 'self-executing.'"); *Jacobs v. United States*, 290 U.S. 13, 16 (1933) (Suits for just compensation for a taking "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."). In the same way, the just compensation obligation that has always been part of the state's exercise of its power to take property waives its immunity from a property owner's claim for compensation.

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[2] In *United States v. Mitchell*, 463 U.S. 206 (1983), a breach of contract dispute, the Court concluded that the Tucker Act operates as a conditional waiver of sovereign immunity in some suits seeking damages from the United States in the Court of Federal Claims. *Mitchell* did not involve or mention a Takings Clause claim.

B. Some State Courts Are Not Open to Suits for Just Compensation Against a State; as a Result, the Decision Below Leaves Many Property Owners Without a Reliable Federal Takings Remedy

The Officials contend that the federal court conflict between state sovereign immunity and the right to just compensation for a taking does not warrant review because state courts may be available to hear takings claims against a state, even if federal courts cannot. But the possibility of state court litigation in certain jurisdictions does not resolve the tension between state sovereign immunity and just compensation because a substantial number of state courts are *not* open to suits seeking just compensation for a taking by a state. Indeed, in some jurisdictions, sovereign immunity bars takings claims against states in state courts.

Under this Court's precedent, sovereign immunity applies equally in state court and federal court. *Alden v. Maine*, 527 U.S. 706, 731, 754 (1999) ("the States retain immunity from private suit in their own courts"). Thus, if sovereign immunity shields states from claims seeking just compensation for a taking in federal court, as the decision below holds, there is no doctrinal reason why states cannot also invoke immunity from takings claims in *state* court. *McDonald v. City of Chicago*, 561 U.S. 742, 765 (2010) ("[I]t would be 'incongruous' to apply different standards 'depending on whether the claim was asserted in a state or federal court.'" (quoting *Malloy v. Hogan*, 378 U.S. 1, 10–11 (1964)). And in fact, some state courts have concluded that sovereign immunity does bar a compensation-seeking takings claim

against a state. *See Hise v. Tennessee*, 968 S.W.2d 852, 853–55 (Tenn. Ct. App. 1997) (holding that sovereign immunity precluded an inverse condemnation claim against the state); *Austin v. Arkansas State Highway Comm'n*, 895 S.W.2d 941 (Ark. 1995) (sovereign immunity barred a damages-seeking takings claim against a state); *Alabama v. Cornelius*, 36 So. 3d 504, 507 (Ala. 2009) (state agencies have absolute immunity from claims for damages, including those based on a taking).

Other state courts are closed to just compensation claims against states because they do not provide a procedure allowing property owners to directly sue for just compensation for a taking. *See* Amicus Brief of the Ohio Farm Bureau Fed'n at 6–14 (discussing lack of a procedure to sue for just compensation for a taking in Ohio state courts); *West Virginia Lottery v. A-1 Amusement, Inc.*, 807 S.E.2d 760, 763 (W. Va. 2017) (property owners seeking damages for a taking by the state must file a "writ of mandamus requiring [it] to institute condemnation proceedings"). Therefore, if sovereign immunity bars takings claims against a state in federal court, as the Sixth Circuit's decision holds, then property owners in many states, including Ohio and others, do not have a reasonable federal compensatory remedy for a taking by a state entity. *See Esposito v. S.C. Coastal Council*, 939 F.2d 165, 173 n.3 (4th Cir. 1991) (Hall, J., dissenting) (If sovereign immunity bars takings cases, "a recalcitrant state could nullify the Just Compensation Clause by simply refusing to furnish a procedure to assess and award compensation. The Clause could be converted from a fundamental constitutional right into an empty admonition.").

The Court should grant review to hold that the states' sovereign immunity from suit does not bar suits seeking just compensation for a taking of property by a state.

II.

THE SIXTH CIRCUIT'S DECISION BARS PERSONAL CAPACITY TAKINGS CLAIMS

In urging the Court not to grant review of the second question presented, the Officials take issue with O'Connor's characterization of the Sixth Circuit's decision. They assert that O'Connor's description of the holding below as "a categorical bar" to personal capacity takings suits under 42 U.S.C. § 1983 is "incorrect and is fatal to any suggestion that this case presents a vehicle to address the question he wants answered." BIO at 16. The Officials specifically assert that O'Connor errs in asserting that the decision holds "that state officials cannot be sued in their personal capacity under Section 1983 for taking property." Pet. at 24. In the Officials' view, the decision below arrives at a run-of-the-mill conclusion that the Officials are "entitled to qualified immunity." BIO at 16.

The Officials' argument is all form and no substance. The Sixth Circuit dismissed O'Connor's personal capacity takings claim because circuit precedent does not recognize such claims. *See* App.6a; App.10a (the circuit has "arguably foreclosed [takings] claims against officials" in their personal capacity) (Thapar, J., concurring); *see also Vicory v. Walton*, 730 F.2d 466, 467 (6th Cir. 1984) ("[W]e can find [no case] that suggests that an individual may commit, and be liable in damages for, a 'taking' under the fifth amendment.").Further, the Sixth Circuit's summary

rejection of O'Connor's personal capacity claim is "categorical," because the court's ruling rests entirely on the nature of O'Connor's claim as one arising under the Takings Clause. App.10a.

Under the decision below, a court need do nothing more than identify a personal capacity suit as arising under the Takings Clause to determine that dismissal is warranted. App.6a; *see also*, *Waste Services of the Bluegrass, LLC v. City of Georgetown*, No. 5:20-410, 2024 WL 843959, at *7 (E.D. Ky. Feb. 28, 2024) (citing *O'Connor* in summarily dismissing a personal capacity takings claim). If there was any doubt on this point, all one has to do is compare the Sixth Circuit's open-and-shut approach to O'Connor's personal capacity takings claim to the in-depth "qualified immunity" analysis it applied to his personal capacity *due process* claim. App.6a–9a.

It is true that the Sixth Circuit couched its decision in the language of "qualified immunity." But this was simply a result of the court "[d]eferring to the parties' framing of the issue." App.12a (Thapar, J., concurring). The court's casual use of "qualified immunity" language does not change the essential nature of the Sixth Circuit's determination that personal capacity takings claims are not cognizable. App.6a; App.11a–12a (Thapar, J., concurring). The decision below forecloses personal capacity takings claims in substance, if not in explicit word, App.10a–12a (Thapar, J., concurring), and it is thus proper to treat the decision as sanctioning a "categorical barrier" to such claims.

In any event, the Officials ultimately defend the lower court's decision, arguing that "no circuit court," including the Sixth Circuit, "has permitted a personal-

capacity takings suit to go forward." BIO at 16. While this is an exaggeration, it is true that a number of circuits have adopted a prohibitive approach to personal capacity takings suits. *See, e.g.*, *Gerlach v. Rokita*, 95 F.4th 493 (7th Cir. 2024), petition for cert pending, docket no. 24-21. This highlights the fact that, on the issue of personal capacity takings claims, many circuits, including the Sixth, are out of line with precedent from this Court that broadly allows personal capacity suits under 42 U.S.C. § 1983. *See Tanzin v. Tanvir*, 592 U.S. 43, 48 (2020) ("[T]his Court has long interpreted [42 U.S.C. § 1983] to permit suits against officials in their individual capacities."). The Court should grant the Petition to hold that personal capacity suits resting on a violation of the Takings Clause by state officials are no different than other types of personal capacity suits under 42 U.S.C. § 1983, and are justiciable to the same degree.

CONCLUSION

The Court should grant the Petition.

DATED: July 2024.

Respectfully submitted,

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