No. _____

In the Supreme Court of the United States

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

V.

DENNIS O'CONNOR, AND ALL THOSE SIMILARLY SITUATED

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

CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where the State recovers abandoned property and later returns that property or its equivalent value to the former owner, does the former owner retain a constitutional right to accrued interest in that abandoned property?

2. Where neither this Court nor the Sixth Circuit had held that a former owner has a constitutional right to accrued interest on abandoned property, and two circuits and many state courts had held that a former owner lacks such a right, should the Sixth Circuit have affirmed the grant of qualified immunity where the State returned the value of abandoned property to the former owner without interest?

PARTIES TO THE PROCEEDING

The Petitioners 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 respective personal capacities and official capacities. The Respondent is Dennis O'Connor, an individual who recovered abandoned property under Michigan's Unclaimed Property Act.

RELATED CASES

- United States Court of Appeals for the Sixth Circuit, *O'Connor* v. *Eubanks*, No. 22-1780, Order issued December 19, 2023 (denying both parties' request for rehearing en banc).

- United States Court of Appeals for the Sixth Circuit, *O'Connor* v. *Eubanks*, 83 F.4th 1018 (6th Cir. 2023) (affirming in part and reversing in part the district court decision).

- United States District Court for the Eastern District of Michigan, *O'Connor* v. *Eubanks*, No. 21-12837, Order issued September 2, 2022 (overruling objections, accepting and adopting the magistrate judge's June 30, 2022 Report and Recommendation, and granting Defendants' motion to dismiss).

- United States District Court Eastern District of Michigan, *O'Connor* v. *Eubanks*, No. 1:21-12837, Report and Recommendation on Defendants' Motion to Dismiss, issued June 30, 2022 (recommending dismissal of Plaintiff's claims).

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The opinion of the Sixth Circuit Court of Appeals, App. 1a–20a,[1] is reported at 83 F.4th 1018 (2023). The opinion of the United States District Court for the Eastern District of Michigan, App. 21a–33a, is not reported but is available at 2022 WL 4009175.

JURISDICTION

The judgment of the court of appeals was entered on October 6, 2023. Timely motions for rehearing en banc were denied on December 19, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. XIV, § 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.

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[1] The appendix cites arise from O'Connor's petition. Cross-Petitioners have not filed a separate appendix.

Mich. Comp. Laws § 567.245(3):

> If a claim is allowed, the administrator shall pay over or deliver to the claimant the property or the amount the administrator actually received or the net proceeds if it has been sold by the administrator, plus any additional amount required by section 22. If the property claimed was interest-bearing to the owner on the date of surrender by the holder, and if the date of surrender is on or after March 28, 1996, the administrator also shall pay interest at a rate of 6% a year or any lesser rate the property earned while in the possession of the holder. Interest begins to accrue when the interest-bearing property is delivered to the administrator and ceases on the earlier of the expiration of 10 years after delivery or the date on which payment is made to the owner. No interest on interest-bearing property is payable for any period before March 28, 1996.

INTRODUCTION

This case presents a recurring issue of nationwide importance on which the federal courts of appeal and state courts are divided: whether, when States return abandoned property to their former owners, the States are constitutionally obligated to return interest earned on that property. Every State has an unclaimed property law, and it appears that 43 States do not return interest when they return principal—at least where the property was not interest-bearing in the first place. Yet the Sixth Circuit here, joining the Seventh Circuit, has held in effect that each of these 43 laws is unconstitutional and that the Constitution requires payment of interest on all returned abandoned property. By contrast, the Ninth and Third Circuits—as well as three state high courts and six other state appellate courts—have reached the opposite conclusion. This Court's review is needed to resolve that conflict.

The conflict among the courts derives in large part from the existence of two different strands of decisions from this Court. On the one hand, in *Texaco, Inc.* v. *Short*, 454 U.S. 516 (1982), this Court held that when property rights are severed by abandonment, States are under no obligation to return the abandoned property. *Id.* at 530. It follows that, without any independent right to the abandoned property apart from what a State provides as a matter of grace, a former property owner cannot claim a right to interest in that abandoned property (unless the State chooses to provide it). On the other hand, in cases outside the abandoned property context, this Court has embraced the common-law rule that "interest follows principal." See, e.g., *Webb's Fabulous Pharmacies, Inc.* v.

Beckwith, 449 U.S. 155, 161–62 (1980); *Phillips* v. *Wash. Legal Found.*, 524 U.S. 156, 172 (1988); *Brown* v. *Legal Found. of Wash.*, 538 U.S. 216, 237 (2003). Courts have diverged concerning which line of decisions governs in the abandoned property context.

As revealed by the Sixth Circuit's decision, following the wrong path will significantly affect the States' administration of their unclaimed property acts. When the court below followed the *Webb's* line of authority, it signed Michigan up to be a broker for abandoned property—to return that property with interest even though state law granted the former owner only the right to claim property "actually received" by the State. The Constitution does not mandate this one-size-fits-all approach to unclaimed property law.

Certiorari is further warranted because the Sixth Circuit grievously erred when it denied qualified immunity to Cross-Petitioners Rachael Eubanks and Terry Stanton. Given that two circuits and nine state courts have held that interest does not follow principal in the abandoned property context, it cannot be said that it was clearly established that the law is the opposite. Relying solely on the *Webb's* line of cases and overlooking the import of *Texaco* and other lower court decisions, the Sixth Circuit's blinkered approach defies this Court's qualified immunity precedents.

STATEMENT OF THE CASE

A. Unclaimed property generally

States have substantial latitude in constructing their own regimes to govern unclaimed property. As this Court has recognized, "[t]he state may more properly be custodian and *beneficiary* of abandoned property than any person." *Ct. Mut. Life Ins. Co.* v. *Moore*, 333 U.S. 541, 545 (1948) (emphasis added); see also *Delaware* v. *New York*, 507 U.S. 490, 497 (1993) ("States as sovereigns may take custody of or assume title to abandoned personal property as *bona vacantia*, a process commonly (though somewhat erroneously) called escheat.").

As an example of this latitude, 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.

B. The operation of Michigan's UUPA

Consistent with the States' broad authority over unclaimed property, Michigan, like many States, provides for custodial, or revocable, escheatment. Mich. Comp. Laws. § 567.221 *et seq*. Prior to adopting its current modified version of the Uniform Unclaimed Property Act (UUPA), Mich. Comp. Laws § 567.221 *et seq*., App. 35a, Michigan, as some States still do, had a longstanding practice of revocable escheatment expressly vesting title in the State.

Michigan's current 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. As a general rule, unclaimed property that is held by the holder (for example, in the case of a bank account, the bank) "and remains unclaimed by the owner for more than 3 years after it becomes payable or distributable is presumed abandoned." Mich. Comp. Laws § 567.223(1).

If the conditions giving rise to a presumption of abandonment are satisfied, the property is subject to the custody of the State. Mich. Comp. Laws § 567.224. But before reporting and remitting the property to the State Treasurer, a holder must try to contact the apparent owner. Mich. Comp. Laws § 567.238(5) ("Not less than 60 days or more than 365 days before filing the report required by this section, the holder in possession of property presumed abandoned and subject to the state's custody as unclaimed property under this act shall send written notice to the apparent owner at his or her last known address . . . .").

A holder of property that is presumed abandoned and thus subject to state custody must report it to the Treasurer. Mich. Comp. Laws § 567.238(1). At the time of reporting, the holder "shall . . . pay or deliver to the administrator all abandoned property that is required to be reported." Mich. Comp. Laws § 567.240(1). At that point, the State "assumes custody and responsibility for the safekeeping of the property," and the holder "is relieved of all liability." Mich. Comp. Laws § 567.241(1).

Under state law, the property is then considered abandoned, as made evident by a shift in statutory language. Compare Mich. Comp. Laws § 567.238(1) (explaining that a holder of "property *presumed abandoned* and subject to th[e] state's custody" must file a "report to the administrator concerning the property") (emphasis added), with Mich. Comp. Laws § 567.240(1) (requiring that a person required to file a report to the administrator must "at the time for filing the report pay or deliver to the administrator all *abandoned property* that is required to be reported") (emphasis added). See also Mich. Comp. Laws § 567.243(1) (explaining that "not later than 3 years after the receipt of *abandoned property*, the administrator shall sell it to the highest bidder at public sale") (emphasis added). In other words, once the State becomes the custodian of the property, the property is legally abandoned—not just presumed abandoned—under Michigan law.

Within three years of receipt of property, and after publishing required notice, the State sells any "abandoned property" (other than money) at a public sale. Mich. Comp. Laws § 567.243(1). Upon sale, the purchaser "takes the property free of all claims of the owner or previous holder of the property and of all persons claiming through or under the owner or previous holder." Mich. Comp. Laws § 567.243(4). The State then deposits abandoned money and all of "the proceeds from the sale of abandoned property" in the State's general fund for public use. Mich. Comp. Laws § 567.244(1).

The custodial aspect of Michigan's law conserves the value of the abandoned property in perpetuity.

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. In the case of property that was interest-bearing to the former owner on the date of surrender by the holder to the State, the former owner is entitled under Michigan law to receive the same amount the State received from the holder of the abandoned property, plus interest. Mich. Comp. Laws § 567.245(3). But where, as here, the property was not interest-bearing at the time of surrender, the former owner may receive the same amount Michigan received from the holder of the abandoned property, but no more. Mich. Comp. Laws § 567.245(3).[2]

Michigan's UUPA is more generous than the majority of states, which do not provide for the payment of interest on property in their possession, whether interest-bearing or not. It appears that at least 27 States provide for no interest.[3] Another 16 States

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[2] In Michigan, there is one exception to the rule against payment of 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.

[3] See Ala. Code § 35-12-83(c); Ark. Code Ann. § 18-28-211; Cal. Civ. Proc. Code § 1540(c); Colo. Rev. Stat. Ann. § 38-13-606; Conn. Gen. Stat. Ann. § 3-65a(e); Del. Code Ann. tit 12, § 1154(a); Fla. Stat. Ann. § 717.121; Ga. Code Ann. § 44-12-220(c); Iowa Code Ann. §§ 556.15, 556.19; Ky. Rev. Stat. Ann. § 393A.530(1); Md. Code Ann. Comm. Law § 17-319(c); Mont. Code. Ann. §§ 70-9-812(2), 70-9-815(3); Neb. Rev. Stat. Ann. § 69-1314; Nev. Rev. Stat. Ann. § 120A.640(3); N.H. Rev. Stat. Ann. §§ 471-C:23, 471-C:26(III); N.Y. Aband. Prop. Law §§ 1405(1)(a), 1407; N.C. Gen.

(including Michigan) and the District of Columbia appear to provide for the payment of interest but only where the property was interest-bearing prior to its transfer to the State.[4] Only seven States provide for the payment of interest on both interest- and non-interest-bearing property.[5]

Stat. Ann. § 116B-64; N.D. Cent. Code Ann. § 47-30.2-52(1); Okla. Stat. Ann. tit 60, §§ 60-665, 60-674; Or. Rev. Stat. §§ 98.372(1), 98.396(2); 72 Pa. Stat. and Cons. Stat. Ann. §§ 1301.15, 1301.17(d); S.D. Codified Laws §§ 43-41B-22, 43-41B-25(c); Tex. Prop. Code Ann. § 74.501(b); Utah Code Ann. § 67-4a-607(1)–(2); Vt. Stat. Ann. tit. 27, § 1555(a); W. Va. Code Ann. § 36-8-11(b); Wyo. Stat. Ann. §§ 34-24-122, 34-24-125(c). Several of these States, however, do pay interest accruing on the property at or before the State liquidates or converts the property into money. E.g., Nev. Rev. Stat. Ann. § 120A.600. Some of these States also provide certain narrow exceptions on the prohibition against interest-payments. See, e.g., Mont. Code § 70-9-812(2) (securities listed on an established stock exchange); N.Y. Aband. Prop. Law § 1405(1)(a)(ii) (unclaimed deposits and refunds for utility services).

[4] See Alaska Stat. Ann. § 34.45.380(d); Ariz. Rev. Stat. Ann. § 44-311(B); D.C. Code Ann. § 41-156.07(a); Haw. Rev. Stat. § 523A-12; Idaho Code Ann. § 14-524(3)(b); Kan. Stat. Ann. § 58-3954(b); La. Stat. Ann. § 9:163; Me. Rev. Stat. Ann. tit. 33, § 2117(1); Mich. Comp. Laws § 567.242; Minn. Stat. Ann. § 345.451; Mo. Ann. Stat. § 447.565(2); N.M. Stat. Ann. § 7-8A-11; R.I. Gen. Laws Ann. § 33-21.1-24(c); S.C. Code Ann. § 27-18-250(C); Tenn. Code Ann. § 66-29-137; Va. Code Ann. § 55.1-2533(C); Wash. Rev. Code Ann. § 63.30.380.

[5] See 765 Ill. Comp. Stat. Ann. 1026/15-607(c); Ind. Code Ann. § 32-34-1.5-33(b), (c); Mass. Gen. Laws Ann. ch. 200A, § 10(e); Miss. Code Ann. § 89-12-39(4); N.J. Stat. Ann. § 46:30B-79; Ohio Rev. Code Ann. § 169.08(A), (D); Wis. Stat. Ann. § 177.0607(2), (3). Two of these States, Illinois and Indiana, amended their statutes to provide for interest generated while in the State's custody following the Seventh Circuit's decision in *Goldberg* v. *Frerichs*,

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

On December 3, 2021, Cross-Respondent Dennis O'Connor filed a two-count putative class action complaint under 42 U.S.C. § 1983 against two state employees, Cross-Petitioners 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, as well as the State of Michigan (collectively, the State Defendants). App. 35a–37a. The complaint alleged damages arising from the State's handling of its unclaimed property program under the UUPA, Mich. Comp. Laws § 567.221 *et seq*.; App. 35a–37a. Later, on December 10, 2021, O'Connor submitted a claim to the Michigan Department of Treasury to recover the same unclaimed property.

The parties agree on the basic facts underlying this due process claim: O'Connor presumptively abandoned property, two checks worth under $350; Michigan took custody of the abandoned checks by the proper operation of state law in 2003 and 2018, respectively; and in 2021, O'Connor filed a claim for the property. Both of O'Connor's properties were reported to Treasury as non-interest bearing on the dates they were reported (December 22, 2003, and April 30, 2018, respectively). Consistent with Michigan law, Treasury maintained an account from which all successful unclaimed property claims are to be paid. Mich. Comp.

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912 F.3d 1009 (7th Cir. 2019), which found a constitutional right to that interest under the Takings Clause of the U.S. Constitution.

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 for failing to reimburse him for post-liquidation interest accrued on the property and for failing to provide him with statutorily required notices. App. 36a–37a.

The State Defendants moved to dismiss under Federal Rule Civil Procedure 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 found 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 on the ground that these Defendants were immune under the Eleventh Amendment. *Id.* She further found that Eubanks and Stanton were entitled to qualified immunity and recommended that the State Defendants' second motion to dismiss be granted. *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 with the magistrate 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 because "there is no dispute that the individual Defendants' actions related to the UUPP and Plaintiff's claims were in accordance with the Act." App. 29a. The court further noted 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." App. 30a.

D. The Sixth Circuit reverses in part.

The Sixth Circuit affirmed in part and reversed in part. App. 1a–20a. The Sixth Circuit opined that O'Connor retained title to the properties presumed abandoned under Michigan's unclaimed property laws. *Id*. This stemmed from the court's conclusion that under Michigan's UUPA, the State "did not acquire title outright" and thus that individuals retain certain rights in properties in the State's custody under its unclaimed property laws. App. 2a. As to the takings claims against the Cross-Petitioners, the Sixth Circuit held that individualized liability for takings claims was not clearly established and the Cross-Petitioners were therefore entitled to qualified immunity. App. 5a–6a. But as to the due process claim asserted against them, the court of appeals, relying on the line of cases holding that interest follows

principal, held that O'Connor had a clearly established property right to interest on presumed non-interest-bearing abandoned property. App. 6a–7a. Having found a property right, the Sixth Circuit then held that O'Connor had alleged a plausible due process claim against Eubanks and Stanton personally, and thus they were not entitled to qualified immunity. App. 7a–9a.

All parties sought rehearing en banc. App. 51a. The Sixth Circuit denied the petitions on December 19, 2023. *Id.*

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

This cross-petition follows.

REASONS FOR GRANTING THE PETITION

I. The case warrants this Court's review.

The Sixth Circuit held that the State must pay interest generated from property that is abandoned under operation of state law. In doing so, the court sidestepped this Court's precedent on abandoned property, *Texaco, Inc.* v. *Short*, 454 U.S. 516 (1982), in favor of the common-law rule that interest follows principal, e.g., *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 161–62 (1980); *Phillips* v. *Wash. Legal Found.*, 524 U.S. 156, 172 (1988); *Brown* v. *Legal Found. of Wash.*, 538 U.S. 216, 238–39 (2003).

This path was an errant one, as this Court has been crystal clear: "after abandonment, the former owner retains no interest for which he may claim compensation." *Texaco*, 454 U.S. at 530. While *Texaco* involved lapsed mineral rights, *id.* at 518, its core principle is true in the context of escheatment, too, and has been for centuries, see *Ct. Mut. Life Ins. Co.* v. *Moore*, 333 U.S. 541, 547 (1948); *Anderson Nat'l Bank* v. *Luckett*, 321 U.S. 233, 241 (1944). Accordingly, without any interest in the abandoned property, O'Connor is not entitled to any rights that flow from such property other than what the State provides as a matter of grace. And Michigan granted him the right to reclaim the value of the abandoned property but not interest derived from it.

Circuits have diverged on this fundamental issue. Some have applied *Texaco* and its rationale for recognizing that States have wide latitude over abandoned property. Others give a nod to *Texaco* but rely on common-law property rules, notably the rule that interest

follows principal. This Court should grant certiorari to resolve that conflict and clarify that *Texaco*'s core holding—that the former owner of abandoned property has no rights in the property—applies to a State's decision not to pay interest when it returns unclaimed property.

A. The circuits are split on whether the Constitution requires States to pay interest on abandoned property they return to former owners.

Two approaches have emerged in determining whether a former owner has a constitutional right to interest on abandoned property. The first, adopted by the Ninth and Third Circuits and many state courts, follows *Texaco* and holds that the State is not required to compensate individuals for the consequences of their own neglect, including interest their property may generate while in the custody of the State. See *Turnacliff* v. *Westly*, 546 F.3d 1113, 1119 (9th Cir. 2008); *Simon* v. *Weissmann*, 301 F. App'x 107, 114 (3d Cir. 2008). The second, adopted by the Seventh and Sixth Circuits, follows another line of cases and holds that the State must pay interest on abandoned property because the interest follows the principal in ownership. Notably, this line of cases relied on by the Seventh and Sixth Circuits did not involve abandoned property.

Underlying the first approach is this Court's consistent endorsement of the concept of statutory abandonment. It is settled law that "States as sovereigns may take custody of or assume title to abandoned personal property as *bona vacantia*, a process commonly

(though somewhat erroneously) called escheat." *Delaware*, 507 U.S. at 497; see also *Ct. Mut. Life Ins. Co.*, 333 U.S. at 546 ("The state may more properly be custodian and beneficiary of abandoned property than any person."). Indeed, from an early time, this Court has recognized that "[s]uch laws have frequently passed in review . . . ; and occasions have occurred in which they have been particularly noticed, as laws not to be impeached on the ground of violating private rights." *Hawkins* v. *Barney's Lessee*, 30 U.S. 457, 463 (1831).

Texaco applied these settled principles to Indiana's Mineral Lapse Act, which provided an automatic lapse of property rights to certain mineral interests after a period of nonuse. 454 U.S. at 519. After that period elapsed by automatic operation of law, the mineral interest reverted to the surface owner of the property. *Id.* Several parties challenged the Act after the lapse of their mineral interests, alleging in part that the State deprived them of property without due process of law. *Id.* at 521, 522. After confirming that the States have the power to deem private property abandoned "upon the failure of its owner to take reasonable actions imposed by law," the Court also rejected the plaintiffs' argument that they were entitled to compensation for the abandoned property: "[T]his Court has never required the State to compensate the owner for the consequences of his own neglect. . . . [I]t follows that, after abandonment, the former owner retains no interest for which he may claim compensation." *Id.* at 530.

Both the Ninth and Third Circuits followed the *Texaco* principle—that, after abandonment, a former owner has no constitutional right for which he is entitled to compensation—in holding that the State need not compensate owners of abandoned property for interest earned by the property while in the State's custody. *Turnacliff*, 546 F.3d at 1119–20 ("The [former owner] has no Fifth Amendment right to 'actual' or 'constructive' interest earned by its property while held by the State[.]"); *Simon*, 301 F. App'x at 114.

The Ninth Circuit, for example, held in *Turnacliff* v. *Westly*, 546 F.3d 1113, 1115 (9th Cir. 2008), that California was not required to pay claimants of unclaimed property the interest that the unclaimed property earned while in California's custody. Instead, the only interest due was a lesser amount provided by statute. *Id*. Relying on *Texaco*, the court concluded that no further compensation could be due "because when the Estate abandoned its property, it forfeited any right to interest earned by that property." *Id*. at 1119.

The Third Circuit similarly held in *Simon* v. *Weissman*, 301 F. App'x 107, 114 (3d Cir. 2008), that statutory abandonment foreclosed any claim of a property right to interest generated from that property after abandonment. In doing so, the court set aside the "common law rule of 'interest follows the principal[,]' " concluding that the rule was not intended to be applied in every instance in which an individual's property is held by another. *Id*. at 110–11; see *id*. at 111 (explaining that "the rule is not immutably without exception" or "a static principle"). In fact, the court specifically disclaimed reliance on *Webb's*, *Phillips*,

and *Brown*—cases on which the Sixth Circuit relied—because none of those cases implicated abandoned property. *Id.* at 111–12.[6]

Numerous state courts to address this issue—including three state supreme courts—have adopted the *Texaco* approach as well. See *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); *Rowlette* v. *State*, 656 S.E.2d 619, 626 (N.C. Ct. App. 2008), *appeal denied*, 666 S.E.2d 487 (N.C. 2008); *Morris* v. *Chiang*, 163 Cal. App. 4th 753, 759 (Cal. Ct. App. 2008); *Smolow* v. *Hafer*, 959 A.2d 298, 303 (Penn. 2008); *Hooks* v. *Treasurer*, 961 So.2d 425, 432 (La. Ct. App. 2007); *Smyth* v. *Carter*, 845 N.E.2d 219, 223–24 (Ind. Ct. App. 2006); *Clark* v. *Strayhorn*, 184 S.W.3d 906, 913 (Tex. Ct. App. 2006).

The Seventh Circuit (like the Sixth Circuit) departed from *Texaco*'s principles and held that Illinois

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[6] It bears mention that the Third, Seventh, and Ninth Circuit decisions were not premised on due-process protections, but on a governmental taking. See U.S. Const. amend. V & amend. XIV; *Goldberg*, 912 F.3d at 1010; *Simon*, 301 F. App'x at 109; *Turnacliff*, 546 F.3d at 1115. But the difference in the constitutional basis for relief was contingent on the finding (or not) of a property interest owned by the claimant. Just as the preliminary question for a due process claim is whether the claimant has a protected property interest, see, e.g., *Town of Castle Rock* v. *Gonzales*, 545 U.S. 748, 756 (2005), the same goes for the Taking Clause, see *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1000 (1984) (asking whether a party had "a property interest protected by the Fifth Amendment's Takings Clause"). In other words, the crux of each of the cases depended not on the constitutional guarantee on which it was based, but on the relationship of the person to the property.

owed interest generated on presumed abandoned property in its custody. In *Goldberg* v. *Frerichs*, 912 F.3d 1009, 1011 (7th Cir. 2019), the Seventh Circuit held that a provision in Illinois' Disposition of Unclaimed Property Act—which, at the time, did not authorize the State to pay interest earned on presumptively abandoned property—was unconstitutional because " 'the Takings Clause protects the time value of money just as much as it does money itself.' " *Id.* at 1010 (quoting *Brown*, 538 U.S. at 235; *Phillips*, 524 U.S. at 165–72; and *Webb's*, 449 U.S. at 162–65). At issue there was an undeposited check, and the court reasoned that "[i]f the state turns the check into cash and makes an investment on the owner's behalf . . . , then it is vital to turn any gain over to the owner." *Id.* at 1011.

Significantly, *Goldberg* extended the holdings of two earlier Seventh Circuit decisions, *Cerajeski* v. *Zoeller*, 735 F.3d 577 (7th Cir. 2013) and *Kolton* v. *Frerichs*, 869 F.3d 532 (7th Cir. 2017)—both involving unclaimed *interest-bearing* accounts. The *Goldberg* court opined that the State must pay interest regardless of whether the property was interest-bearing prior to the State taking custody of it. 912 F.3d at 1011.

In line with the Seventh Circuit, the court below concluded that "O'Connor has a right in his principal," and that "[w]hen the government takes custody of private property and earns interest on it, that interest belongs to the owner." App. 6a, 7a. It flowed from those conclusions that O'Connor was entitled to that interest. *Id.* Unlike the other circuits, the Sixth Circuit did not discuss in detail the impact of the state

abandoned property statutes, which are *the source* of any of O'Connor's property rights. Instead, it found that O'Connor was deprived of his right to interest without adequate process because he had not received " 'the full procedural protections of the Due Process Clause.' " App. 9a (quoting *Texaco*, 454 U.S. at 534). As discussed below, this inverts the lessons from *Texaco*.

B. This case presents an issue of national importance.

All 50 States, along with the District of Columbia, have unclaimed property acts.[7] While these acts vary in regard to dormancy periods and notification requirements, 43 States have chosen not to provide for the payment of interest generated after the State takes custody of non-interest-bearing property. See p. 8, *supra*. Now, however, as a result of the split among the circuits and state courts, certain States that would otherwise choose not to pay post-abandonment interest are obligated to do so, while others are not. But whether the Constitution requires interest to follow principal in the context of abandoned property should not depend on which particular State holds and then returns the abandoned property.

This inconsistency not only strips the choice from certain States, contrary to *Texaco*, but may also incentivize States to fully utilize their abandonment powers by not providing a right to return any property at all.

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[7] *Unclaimed Property*, National Association of State Treasurers https://nast.org/unclaimed-bonds/ (last visited May 16, 2024).

These conflicting understandings of the States' constitutional obligations regarding abandoned or unclaimed property, and the resulting contradictory holdings, underscore the need for this Court to grant review.

C. The Sixth Circuit erred in holding that former owners of abandoned property have a constitutional right to post-abandonment interest.

Rather than following the core principle this Court set forth in *Texaco*—that a State may condition the retention of property rights on the affirmative actions by the former owner, and that no additional process is due to an owner who fails to take those actions—the Sixth Circuit chose to follow a different line of precedent. The court started down the wrong path right at step one of the due process analysis—the establishment of the property right at issue—and so inevitably reached the wrong destination. It held that "O'Connor has a property right in his net interest," App. 7a, relying on this Court's precedent in non-abandonment cases such as *Webb's*, 449 U.S. at 161–62 (interest-generated property deposited by known litigant into court's fund); *Phillips*, 524 U.S. at 172 (interest generated in attorney IOLTA accounts belongs to principal or known client); and *Brown*, 538 U.S. at 238–39 (same).

While these cases support the general concept that interest follows principal, that is the secondary, downstream question. The starting point is whether O'Connor *had any right to the principal* from which that interest could spring and for which due process

principles would apply. And *Texaco* established that, as a constitutional matter, he did not. Again, *Texaco* held that "after abandonment, the former owner retains no interest for which he may claim compensation." 454 U.S. at 530. "It is the owner's failure to make any use of the property—and not the action of the State—that causes the lapse of the property right . . . ." *Id.*

Under *Texaco*, because O'Connor's properties were abandoned once the holders transferred them to the State, Mich. Comp. Laws § 567.240(1) (and O'Connor does not challenge these abandonments), O'Connor lacks any remaining interest in the property. He possesses only a statutory right to reclaim the property itself or the amount received upon sale. See Mich. Comp. Laws § 567.245(3). Under Michigan's UUPA, O'Connor has no entitlement to interest derived from that abandoned, non-interest-bearing principal to support his due process claim. See *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972).

Curiously, the decision below relies on *Texaco* not for its applicable core holding but instead for the proposition that "[b]efore the State can extinguish O'Connor's title in 'abandoned' property, it must give him 'the full procedural protections of the Due Process Clause.' " App. 9a (quoting *Texaco*, 454 U.S. at 534). The State agrees that if O'Connor's suit were an adjudicative quiet-title action, typical notice and opportunity to be heard would be required. See *Texaco*, 454 U.S. at 534; see also *id.* at 535 ("The reasoning in *Mullane* [v. *Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306 (1950)] is applicable to a judicial proceeding brought to determine whether a lapse of a mineral estate did

or did not occur, but not to the self-executing feature of the Mineral Lapse Act."). But that kind of judicial proceeding is not at issue here.

Rather, as in *Texaco*, state law laid out the consequences of inaction with regard to property—reversion of mineral rights to the surface owner, *id.* at 529, or the passing to the State of O'Connor's property. As *Texaco* made clear, the Due Process Clause has never demanded "that each citizen must in some way be given specific notice of the impact of a new statute on his property before that law may affect his property rights." *Id.* at 536.

Without an interest in property that bears protection, a former owner can have no right to interest that the abandoned property accrues. The Sixth Circuit's holding to the contrary contradicts the very principles that undergird *Texaco*. The claim here that a former owner is entitled to interest on two checks totaling under $350—both of which were abandoned, one nearly 20 years earlier—conflicts with *Texaco*.

Texaco's guiding principles are not altered by the fact that a State affords former owners the ability to assert a claim for the property they abandoned. Michigan's decision to allow O'Connor and others to reclaim this is a matter of state discretion, not of right. Indeed, how States choose to exercise their authority after abandonment is a question of state law and one for those sovereigns themselves to decide. The Constitution does not require a specific outcome after abandonment.

II. The Sixth Circuit improperly denied qualified immunity to Eubanks and Stanton.

The Sixth Circuit erred in another critical regard: it denied Eubanks and Stanton qualified immunity on O'Connor's due process claim, holding that it was clearly established that O'Connor has a protected property right to interest in the property at issue. App. 7a ("When the government takes custody of private property and earns interest on it, that interest belongs to the owner.").

For the reasons discussed in Part I, the Sixth Circuit erroneously found a constitutional violation here. But even if there is now a cognizable property right to interest on abandoned property requiring due process, the Sixth Circuit disregarded settled principles in holding that the right was clearly established. In determining that it was clearly established that O'Connor had a property right in his net interest, the court relied on three cases that did not involve abandoned property and therefore did not establish any clearly established rights in the abandoned-property context. And its holding was contrary to both this Court's and numerous other courts' precedents.

For these reasons, too, this Court should grant this petition.

A. The Sixth Circuit erred in holding that the right to interest on statutorily abandoned property was clearly established because the cases it relied on did not involve abandoned property.

Under the doctrine of qualified immunity, government officials "are entitled to qualified immunity under § 1983 unless (1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was 'clearly established at the time.' " *Dist. of Columbia* v. *Wesby*, 583 U.S. 48, 62–63 (2018) (quoting *Reichle* v. *Howards*, 556 U.S. 658, 664 (2012)). This Court has explained that "conduct violates clearly established law when, at the time of the challenged conduct," the law was " 'sufficiently clear' that every 'reasonable official would [have understood] that what he is doing violates that right.' " *Ashcroft* v. *al-Kidd*, 563 U.S. 731, 741 (2011) (quoting *Anderson* v. *Creighton*, 483 U.S. 635, 640 (1987)). In other words, "[t]he rule must be 'settled law,' " *Wesby*, 583 U.S. at 63 (quoting *Hunter* v. *Bryant*, 502 U.S. 224, 228 (1991), "which means it is dictated by 'controlling authority' or 'a robust consensus of cases of persuasive authority,' " *id.* (quoting *al-Kidd*, 563 U.S. at 741–72). "It is not enough that the rule is suggested by then-existing precedent." *Id.* Instead, "[t]he precedent must be clear enough that every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply." *Id.*

Under these principles, Eubanks and Stanton are entitled to qualified immunity on O'Connor's due process claim. Below, the Sixth Circuit relied on three cases—*Webb's*, *Phillips*, and *Brown*—that stand for the general proposition that "[w]hen the government

takes custody of private property and earns interest on it, that interest belongs to the owner." App. 7a. But those cases involved fundamentally different property interests than the one at issue here. Indeed, in none of the cases was the property deemed abandoned. *Webb*'s, 449 U.S. at 156; *Phillips*, 542 U.S. at 162–63; *Brown*, 538 U.S. at 223–24. In contrast, the property in this case was statutorily abandoned, and O'Connor has not attempted to rebut that conclusion. Given these differences, it would not have been clear to Eubanks and Stanton that, under the circumstances of this case, O'Connor had a property right to his interest.

This conclusion is further buttressed by this Court's rationale in *Tyler* v. *Hennepin County*—that abandoned property is distinct from other properties. 598 U.S. 631, 647 (2023). There, the Court distinguished the facts of *Texaco*—in which the property owner " 'fail[ed] to make *any* use of the property' "—from the facts at issue in that case—in which the statutory scheme required forfeiture of a home regardless of the delinquent taxpayer having "live[d] in [the] house for years after falling behind in taxes[.]" *Id.* While Indiana's actions in *Texaco* were permissible because a State "has the power to condition the permanent retention of [a] property right on the performance of reasonable condition that indicate a *present intention to retain the interest*," *id.* at 646 (quoting *Texaco*, 454 U.S. at 526) (emphasis added in *Tyler*), "Minnesota's forfeiture scheme [was] not about abandonment at all," *id.* at 647. Here, Michigan's statutory scheme is comparable to the scheme at issue in *Texaco* because it involves abandoned property.

To that end, the Sixth Circuit erred in holding that *Webb's*, *Phillips*, and *Brown* clearly established the law such that Eubanks and Stanton should have known that the failure to pay interest on abandoned property could give rise to a property right, thus implicating the Due Process Clause.

B. The large number of courts that have ruled in favor of the States on the first question presented shows that the claimed right to interest is not clearly established.

Prior to the opinion below, the only federal circuit to apply the interest follows principal rule to abandoned property was the Seventh Circuit. See *Goldberg*, 912 F.3d at 1010–12 (right to interest under Illinois' Disposition of Unclaimed Property Act). By contrast, two circuits and nine state courts had held that interest does *not* follow principal in the abandoned property context.[8] Thus, it cannot be said that the purported right to accrued interest was clearly established because there was no "controlling authority or a robust consensus of cases of persuasive authority[.]" *Wesby*, 583 U.S. at 589–90 (cleaned up). To deny

[8] Before 2022, no Michigan court had found a right to interest on abandoned property. But on June 15, 2022, the Michigan Court of Claims in *Kemerer* v. *State of Michigan*, No. 21-000224-MZ, slip op. at 7–8 (Mich. Ct. Cl. June 15, 2022), held that such a right exists, relying on *Webb's* and *Phillips*. The *Kemerer* court, however, acknowledged that its "conclusion represents the minority approach across jurisdictions." *Id.*, slip op. at 8. *Kemerer* is pending before the Michigan Court of Appeals. O'Connor's lawsuit, filed on December 3, 2021, predated *Kemerer*.

qualified immunity for Stanton and Eubanks goes against this Court's precedent.

Further illustrating the lack of clearly established law is a host of federal district court decisions rejecting similar constitutional challenges to state unclaimed property statutes. E.g., *Dillow* v. *Garity*, No. CV-22-1852, 2024 WL 1975458, at *4 (E.D. PA. May 3, 2024) (noting the unique context of abandoned property and holding that *Webb's* and *Phillips* "are inapposite, as neither concerned a state's custody of property deemed abandoned under a state statute"); *Light* v. *Davis*, No. CV 22-611-CJB, 2023 WL 6295387, at *13 (D. Del. Sept. 27, 2023) ("Plaintiff cannot have a cognizable property interest in that property—or to any income that accrues as to the property—while the property is in the State's possession."); *Maron* v. *Patronis*, No. 4:22-cv-00255-RH-MAF (N.D. Fla. Sept. 5, 2023) (explaining that the interest follows the principal cases "say nothing about whether an owner who abandons property is entitled to interest or other compensation when the property is turned over to the state—especially when the property, while in the holder's possession, was sitting idly and generating no interest or other earnings"). *Garza* v. *Woods*, No. CV-22-01310-PHX-JJT, 2023 WL 5608414, at *6 (D. Ariz. Aug. 30, 2023) (rejecting a procedural due process violation related to pre- and post-transfer notice under Arizona's version of the Uniform Unclaimed Property Act);

Given that the overwhelming majority of courts to consider the issue favor the State Defendants' position, and in light of the disagreement among multiple circuits, it cannot be said that any purported right to

interest on abandoned property was based on "controlling authority or a robust consensus of cases of persuasive authority[.]" *Wesby*, 583 U.S. at 589–90 (cleaned up). "If judges thus disagree on a constitutional question, it is unfair to subject [officials] to money damages for picking the losing side of the controversy." *Wilson* v. *Layne*, 526 U.S. 603, 618 (1999). See also *Citizens in Charge*, *Inc.* v. *Husted*, 810 F.3d 437, 443 (6th Cir. 2016) ("[W]e should not punish public officials for reasonably picking one side or the other of the debate."). The right to interest on abandoned property is the minority position, and neither Eubanks nor Stanton should be held *personally* liable for following a presumptively constitutional state statute.

For these reason, Eubanks and Stanton are entitled to qualified immunity and reversal on that issue is warranted.

CONCLUSION

This Court should grant the petition, or alternatively, summarily reverse the Sixth Circuit's denial of qualified immunity.

Respectfully submitted,

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