No. ____

IN THE

Supreme Court of the United States

DAVID W. FOLEY, JR., AND JENNIFER T. FOLEY,
Petitioners,

v.

ORANGE COUNTY, ASIMA AZAM, TIM BOLDIG, FRED BRUMMER, RICHARD CROTTY, FRANK DETOMA, MILDRED FERNANDEZ, MITCH GORDON, TARA GOULD, CAROL HOSSFIELD, TERESA JACOBS, RODERICK LOVE, ROCCO RELVINI, SCOTT RICHMAN, JOE ROBERTS, MARCUS ROBINSON, TIFFANY RUSSELL, BILL SEGAL, PHIL SMITH, AND LINDA STEWART,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

David and Jennifer Foley
Pro Se
1015 N. Solandra Dr.
Orlando, FL 32807-1931
407 721-6132, 407 491-4319

June 20, 2024

QUESTION PRESENTED

The "due process of law" clause of the Fourteenth Amendment gave respondents a categorical duty to secure state court approval before or reasonably after enjoining petitioners' sale of toucans.

The same clause gave state court a duty to judicially determine the question of state law petitioners raised to defend their right to sell toucans.

However, after seventeen years of percolating in state and federal courts, there is still no judicial determination that the respondents' continuing local administrative injunction of petitioners' sale of toucans is consistent with the Florida constitutional provision that petitioners have always pled as their complete defense to that injunction – Article IV, Section 9, Florida Constitution.

Nevertheless, the Eleventh Circuit rejected the petitioners' due process claim and refused, for a second time in this case, to even acknowledge their defense in Article IV, Section 9, Florida Constitution.

The question presented by this petition is:

> Whether the Due Process Clauses of the Fifth and Fourteenth Amendments require federal and state courts to answer the question of state law that the claimant alleges is dispositive of their claim.

PARTIES TO THE PROCEEDING

Petitioners are:

David W. Foley, Jr., and
Jennifer T. Foley.

Respondents are:

Orange County,
a subdivision of Florida, and,
Asima Azam,
Board of Zoning Adjustment - 2007,
Tim Boldig,
Chief of Operations, Zoning Division,
Fred Brummer,
Comm., Dist. 2, 2006-2014,
Richard Crotty,
County Mayor, 2000-2010,
Frank DeToma,
Board Zoning Adjustment - 2007,
Mildred Fernandez,
Comm., Dist. 3, 2004-2010,
Mitch Gordon,
Zoning Division Manager,
Tara Gould,
Assist. County Attorney,
Carol Hossfield,
Permitting Chief Planner,
Teresa Jacobs,
Comm., Dist. 1, 2000-2008,
President, Florida Assoc. of Counties, 2007-2008,
Roderick Love,
Board of Zoning Adjustment - 2007,
Rocco Relvini,
BZA Coordination Chief Planner,
Scott Richman,
Board of Zoning Adjustment - 2007,
Joe Roberts,
Board of Zoning Adjustment - 2007,

Marcus Robinson,
Board of Zoning Adjustment - 2007,
Tiffany Russell,
Comm., Dist. 6, 2006-2014.
Bill Segal,
Comm., Dist. 5, 2004-2011,
Phil Smith,
Code Enforcement Inspector,
Linda Stewart,
Comm., Dist. 4, 2002-2010.

RELATED PROCEEDINGS

- *Foley, et al. v. Orange County, et al.*, No. 22-13864, US Court of Appeals for the Eleventh Circuit. Judgment entered March 6, 2024.
- *Foley, et al. v. Orange County, et al.*, No. 6:22-cv-456, US District Court for the Middle District of Florida. Judgment entered March 15, 2023.
- *Foley, et al. v. Orange County, et al.*, No. 5D21-233, Florida Fifth District Court of Appeal. Judgment entered January 11, 2022.
- *Foley, et al. v. Orange Cnty, et al.*, No. 2016-CA-7634, Ninth Judicial Circuit Court of Florida. Judgment entered November 10, 2020.
- *Foley, et ux v. Orange County, et al.*, 142 S.Ct. 229 (October 2, 2021).
- *Foley, et al. v. Orange County, et al.*, No. 5D 19-2635, Florida Fifth District Court of Appeal. Judgment entered January 7, 2021.
- *Foley, et al. v. Orange Cnty, et al.*, No. 2016-CA-7634, Ninth Judicial Circuit Court of Florida. Judgment entered October 11, 2019.
- *Azam et al. v. Foley et al.*, SC18-2120, Supreme Court of Florida. Judgment entered March 26, 2019.

- *Foley, et al. v. Azam et al.*, No. 5D18-145,
  Florida Fifth District Court of Appeal.
  Judgment entered October 19, 2018.
- *Foley, et al. v. Azam et al.*, No. 2016-CA-7634,
  Ninth Judicial Circuit Court of Florida.
  Judgment entered October 25, 2017.
- *Foley et ux v. Orange County et al.*, 137 S. Ct. 378
  (October 31, 2016).
- *Foley, et al. v. Orange County, et al.*, No. 6:12-cv-269,
  US District Court for the Middle District of Florida.
  Judgment entered July 27, 2016.
- *Foley, et al. v. Orange County, et al.*,
  638 Fed. Appx. 941,
  US Court of Appeals for the Eleventh Circuit.
  Judgment entered January 29, 2016.
- *Foley, et al. v. Orange County, et al.*, No. 6:12-cv-269,
  US District Court for the Middle District of Florida.
  Judgment entered August 13, 2013.
- *Foley, et al. v. Orange County, et al.*, No. 6:12-cv-269,
  US District Court for the Middle District of Florida.
  Judgment entered December 4, 2012.
- *Foley, et al. v. Orange County*,
  Nos. 5D09-4021 and 5D09-4195,
  Florida Fifth District Court of Appeal.
  Judgment entered August 16, 2010.
- *Foley, et al. v. Orange County*, No. 08-CA-5227,
  Ninth Judicial Circuit Court of Florida.
  Judgment entered October 21, 2009.
- *Foley, et al. v. Orange County*, No. CVA1 07-37,
  Ninth Judicial Circuit Court of Florida.
  Judgment entered September 24, 2009.

TABLE OF CONTENTS

APPENDIX CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

STATUTES AND ORDINANCES

JUDICIAL RULES

OPINION, ATTORNEY GENERAL OF FLORIDA

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

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

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is unpublished but is available at 2024 WL 49134 and reproduced at Pet.App. 1a. The opinion of the United States District Court for the Middle District of Florida is unpublished but is available at 2022 WL 17260688 and is reproduced at Pet.App. 9a.

JURISDICTION

The opinion of the United States Court of Appeals for the Eleventh Circuit was issued January 4, 2024, Pet.App. 1a. Petitioners' requests for rehearing and certification were denied February 21, 2024, Pet.App. 67a and 167a. Justice Thomas extended the time for filing a petition for certiorari to and including June 20, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL & STATUTORY PROVISIONS

The Fifth Amendment of the United States Constitution provides, in relevant part:

> No person shall ... be deprived of ... property, without due process of law ...

The Fourteenth Amendment of the United States Constitution provides, in relevant part:

> [N]or shall any state deprive any person of ... property, without due process of law ...

Title 42 US Code Section 1983 provides, in relevant part:

> Every person who, under color of any statute,

> ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States ... to the deprivation of any rights ... secured by the Constitution ... shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress ...

Article IV, Section 9, Florida Constitution is reproduced at Pet.App. 69a, and provides, in relevant part:

> *Fish and wildlife conservation commission* ... The commission shall exercise the regulatory and executive powers of the state with respect to wild animal life ...

STATEMENT OF THE CASE

A. The Regulatory Framework

One question of Florida law decides the Foleys' defense of their property interest and, ultimately, their due process claim. It is whether the controversial separation of powers provision unique to Florida's Constitution – Article IV, Section 9 – deprives respondents of all regulatory authority over the Foleys' sale of toucans. The right-to-bear-toucans, however, is apparently so incendiary, Pet.App. 88a ¶24, and 97a ¶74(1), that state court (twice) and the Eleventh Circuit (twice) have refused to even acknowledge that this question must be answered to resolve the Foleys' defense of their property rights in their toucans.

Article IV, Section 9, of Florida's Constitution creates and vests Florida's Fish and Wildlife Conservation Commission (FWC) with all "the regulatory and executive powers of the state with respect to wild animal life," *supra* page 2, Pet.App. 69a. It has been construed by Florida's Courts, Pet.App. 29a-38a, its Attorney General,[1] Pet.App.

[1] Op. Att'y Gen. Fla. 2002-23: "[A] County is prohibited by Article IV, section 9, Florida Constitution, and the statutes and administrative

92a, ¶52, and FWC, Pet.App. 70a-80a, and Pet.App. 97a, ¶74, to mean that Florida vests in FWC alone all of Florida's executive and regulatory authority over "wild animal life," including the possession and sale of captive exotic birds and any related nuisance. This Court, too, in *United States v. Howard*, 352 US 212 (1957), held that the regulations of FWC's predecessor, the Game and Fresh Water Fish Commission, are the "law of the State."

Consequently, Article IV, Section 9, Florida Const., provides the Foleys with a complete defense to respondents' seventeen year prohibition of the Foleys' sale of toucans.

B. The Foleys' attempts to secure their defense in Art. IV, Sec. 9, Fla. Const.[2]

1. *State Court Review.* In 2007-2008, respondents expressly rejected the Foleys' defense in Article IV, Section 9, Pet.App. 100a, ¶¶83-a, 83-b, and enjoined the Foleys' sale of toucans in a local quasi-judicial administrative proceeding by order of the Orange County Board of County Commissioners (BCC), Pet.App. 65a. State court review of that proceeding, however, as a matter of Florida judicial policy, did not allow the Foleys to raise Article IV, Section 9, as a defense of their right to sell toucans. In that review, Florida's Ninth Circuit Court confirmed this, Pet.App. 63a, *Foleys v. Orange County*, 08-CA-0005227-0 (Fla. 9th Cir., Oct. 21, 2009):

---

rules promulgated thereunder, from enjoining the possession, breeding or sale of nonindigenous exotic birds. The authority to determine initially whether such use constitutes a public nuisance or a threat to the public is vested exclusively in the Florida Fish and Wildlife Conservation Commission."

[2] Because this case is at the Rule 12(b)(6) stage, the complaint's "well-pleaded factual allegations" recited here, and their "reasonable inference[s]," are assumed true. *Ashcroft v. Iqbal*, 556 US 662, 678-679 (2009); *Bell Atlantic Corp. v. Twombly*, 550 US 544, 570 (2007).

> Petitioners' assertion that sections of the Orange County Code are unconstitutional is one that can only be made in a separate legal action, not on certiorari. *See Miami-Dade County v. Omnipoint Holdings, Inc.*, 863 So.2d 195 (Fla. 2003).

Significantly, respondents' gamesmanship prearranged this outcome. There are two methods of code enforcement in Orange County. One allows constitutional challenges on state court review; the other does not. Respondents chose the latter; they deliberately enjoined the Foley's toucan sales in a local proceeding they knew would not allow the Foleys to raise Article IV, Section 9, as a pre-deprivation defense on state court review, Pet.App. 81a-100a, ¶¶2, 36, 49, 51, 53-64, 68-73, 83-c, 83-d.

Consequently, state court review ended without judicial approval of respondents' trespass of Article IV, Section 9, Florida Constitution.

2. *First Federal Suit.* The Foleys then, in 2012, sued respondents in federal court. The Foleys asserted a pendant state law claim for declaratory and injunctive relief; they asked the district court (Judge Dalton) to declare void and enjoin Orange County's regulation of bird sales as inconsistent with Article IV, Section 9, Florida Constitution. The district court did so, Pet.App. 26a-38a, *Foleys v. Orange County et al.*, 6:12-cv-269 (M.D. Fla. August 13, 2013). Building on the premise that Article IV, Section 9, deprived respondents of "legitimate government purpose" with respect to toucans, the Foleys also asserted claims pursuant Title 42 US Code Section 1983 in substantive due process, equal protection, compelled speech, commercial speech, and search and seizure. The district court denied relief, Pet.App. 38a-49a. On the same premise, the Foleys asserted state and federal civil RICO claims. The district court denied relief.

On appeal and cross-appeal, a panel of the Eleventh Circuit (Judges Tjoflat, Rosenbaum, and Anderson) "under *Bell v. Hood*, 327 US 678, 682 (1946) ... held that the district court lacked federal-question jurisdiction to decide the state law claim, vacated the district court's judgment, and ordered the district court to dismiss the case without prejudice," Pet.App. 3a, also *Foley v. Orange County*, 638 Fed. Appx. 941 (11th Cir. 2016). This Court denied certiorari, *Foley et ux v. Orange County et al.*, 137 S. Ct. 378 (October 31, 2016).

Notably, vacatur of the district court's application of Article IV, Section 9, Florida Constitution, was the result respondents sought on cross-appeal.

As a consequence of the panel's *Bell* abstention, this federal suit, like state court review, ended without judicial approval of respondents' trespass of Article IV, Section 9.

3. *State Suit.* August 25, 2016, the Foleys filed suit against the respondents in state court. The Foleys sought declaratory and injunctive relief with respect to specific ordinances to the extent their prohibition of commercial aviculture violated Article IV, Section 9, Florida Constitution. The Foleys also sought the same relief with respect to the continuing force of the BCC order, which, without reference to any ordinance, expressly prohibited aviculture as a home occupation at the Foleys' residence, Pet.App. 65a. Too, the Foleys sought compensatory relief under various tort theories (negligence, conversion, unjust enrichment, abuse of process to invade privacy and rightful activity) and civil theft for respondents' unlawful injunction of their toucan sales.

Four weeks later, on Sept. 23, 2016, Orange County amended specific provisions of its code to avoid the Foleys' second challenge to "the language that had been challenged by the Foleys in prior litigation," Pet.App. 134a. The

County, however, did not rescind the binding BCC order, which did not reference any code provision. In response, the Foleys amended their complaint, Pet.App. 112a.

The Foleys' amended complaint sought declaratory and injunctive relief with respect to the amended ordinances to the extent they perpetuated the prohibitions of the original ordinances. The amended complaint again clearly sought declaratory and injunctive relief with respect to the continuing effect of the BCC order, Pet.App. 122a, (Count One, Wherefore prayer, referencing "order," and clause 3 quoting language from order). The amended complaint reasserted the Foleys' tort claims, all of which alleged the BCC order as the cause of the Foleys' injuries, Pet.App. 123a ¶62, and 126a ¶70. The amended complaint clearly alleged a contested property interest in toucans and the sale of toucans, Pet.App. 116a-127a, ¶¶28, 35-37, 40, 42, 44, 45, 46, 47, 50, 54, 56-f, 56-g, 62-a-2, 71-b-2, 72-a. And it clearly relied upon Art. IV, Sec. 9, Fla. Const., to defend those interests. State court, however, did not make any express or implied ruling as to the BCC order, toucans, bird sales, or Art. IV, Sec. 9, in any of the orders that followed.

a. *First state order*. In its first order, state court dismissed the suit as time-barred. This decision was reversed on appeal pursuant Title 28 US Code Section 1367(d), *See Foley v. Azam*, 257 So.3d 1134 (Fla. 5th Dist. 2018). The Florida Supreme Court denied respondents certiorari, *Azam et al. v. Foley et al.*, SC18-2120 (Fla. 2019), Pet.App. 165a.

b. *Second state order*. In its second order, Pet.App. 56a, state court granted the individual respondents immunity from suit per Section 768.28(9)(a), Florida Statutes. This order closely tracked respondents' motions to dismiss. It ignored the Foleys' allegations of bad faith and legal malice and their basis in Article IV, Section 9, Florida Const.

For example, the order found "[t]here are no allegations in the Amended Complaint that the named Defendants acted in bad faith or with malicious purpose," Pet.App. 57a. This tracks the respondent employees' assertions that "[n]othing alleged suggests that the county employees acted in bad faith, with malicious purpose, or in wanton and willful disregard of human rights," Pet.App. 147a and 152a, and that, "there are no factual allegations whatsoever that suggest that any of the six Employees acted in bad faith [or] with malicious purpose," Pet.App. 151a.

Yet, the Foleys' amended complaint clearly alleged: (1) that respondents' actions were "*colore officii*, but not *virtute officii*," and were "in absence of subject matter jurisdiction, pursuant Art. IV, §9, Fla. Const.," Pet.App. 125a, ¶69; (2) that such unauthorized actions were not within the "scope of [their] employment," Pet.App. 127a, ¶72-a; (3) that such actions were instead acts of legal malice (i.e., without legal justification) sufficient to establish malicious purpose, Pet.App. 127a, ¶72-b, Pet.App. 128a, ¶74-b; and, (4) that respondents' actions involved a bad faith misrepresentation of regulatory subject matter jurisdiction, and a bad faith manipulation of local enforcement proceedings with the intent to deny the Foleys an adequate pre-deprivation remedy and to avoid state court review of respondents' violation of Article IV, Section 9, Florida Constitution, Pet.App. 112a page 1, and ¶¶40-b, 71-a-4, 72-b, 74-a.

Despite its oversights, this state dismissal granting immunity from suit is a dismissal for lack of subject matter jurisdiction, and it is not an adjudication on the merits of the Foleys' defense in Article IV, Section 9, Florida Const.

c. *Third state order*. In its third order, Pet.App. 51a, state court granted Orange County's motion to dismiss. This order not only ignored the substance of the Foleys' suit – the BCC order and its violation of Article IV, Section 9 – but exceeded, or transcended, the jurisdiction established

by the frame and outline of the Foleys' pleading.

The court, for instance, inexplicably held that the Foleys had no property right at issue: "[T]he only 'right' that Plaintiffs claim is Mr. Foley's state-issued permit, which is not a property right. *Hernandez v. Dept. of State, Div. of Licensing*, 629 So.2d 205, 206 (Fla. 3rd DCA 1993)," Pet.App. 53a. The court reiterated this in a footnote: "[The Foleys] do not allege and cannot prove that they were deprived of life, liberty or property," Pet.App. 53a, †3.

These rulings track the County's motion to dismiss. There, the County said: "The only 'right' the Foleys arguably ever had was a 'right' granted to Mr. Foley alone by a state-issued permit or license, not a property right," Pet.App. 138a. The County also said: "[T]he Foleys were deprived at most of their rights under a permit, which does not constitute a property right. *See Hernandez*, 629 So.2d at 206. Thus, the Foleys were not deprived of life, liberty or property," Pet.App. 141a.

Yet, the Foleys' pleading did not put Mr. Foley's "state-issued permit or license" at issue. It did not contend that a "state-issued permit or license" was property or allege a deprivation of a "state-issued permit or license," or seek to recover a "state-issued permit or license." And the BCC order affecting the injunction says nothing about a "state-issued permit or license," Pet.App. 65a. At issue in the Foleys' pleading was Article IV, Section 9, and the extent to which that separation of powers provision of Florida's Constitution prohibits county interference with the Foleys' sale of the toucans they raise at their home.

In this third order, state court completely changed the subject of the Foleys' suit. It adjudicated nothing relevant to the Foleys' claim and applied no rules of law that resolved the dispute the Foleys put before it.

The state court's second and third orders did not merely

deny relief; they were entirely unresponsive to and exceeded the jurisdiction limited by the Foleys' allegations. They entirely abandoned the frame and outline of the dispute. They did not answer its dispositive question of law – i.e., whether Art. IV, Sec. 9, deprived respondents of authority to enjoin the sale of birds. Without justification, the court replaced the dispute to be resolved by that question with a dispute and a question the Foleys never pled – i.e., whether a "state-issued permit" is property.

On rehearing, state court refused to correct its evasion of the dispositive state constitutional question. Florida's Fifth District Court of Appeal, on *de novo* review, by per curiam affirmance without opinion, also refused, Pet.App. 163a, 164a. Because the Circuit and District courts ignored Article IV, Section 9, the Foleys could not present their state constitutional defense to Florida's Supreme Court.

As in all prior local, state, and federal proceedings, evasion of Article IV, Section 9, was the result the respondents sought.

Ultimately, this state suit, like the preceding federal suit and the earlier state court review, ended without judicial approval of respondents' trespass of Article IV, Section 9, Florida Constitution.

C. The Proceedings Below

March 3, 2022, the day the state suit ended, the Foleys initiated the present suit in federal court. The gist of the Foleys' claim in Title 42 US Code Section 1983 is that the respondents first deprived them of their right to sell toucans without securing a judicial determination that their actions were consistent with Article IV, Section 9, Fla. Const., and since have deliberately evaded and obstructed the Foleys' pursuit of a judicial application of Article IV, Section 9, to the Foleys' compensatory claims. In sum, the Foleys now seek compensation from respondents not only

because they deprived the Foleys of their state right to sell toucans but also because they have subjected the Foleys and caused the Foleys to be subjected to a denial of the "due process of law" guaranteed by Amendment Fourteen.

The respondents filed motions to dismiss, motions for attorney fees,[3] a motion for sanctions, and a joint motion to declare the Foleys vexatious.[4]

In disposing of the motions to dismiss, the district court (Judge Dalton) correctly found, as it had in the Foleys' first federal suit, that the Foleys allege the sale of birds to be the private interest affected by respondents' actions, Pet.App. 9a: "This long-running case arises out of the County prohibiting the pro se Plaintiffs from selling birds out of their residential property."

The district court, nevertheless, summarily dismissed the Foleys' suit as res judicata. In doing so, however, the court erred by relying exclusively upon the federal principles of res judicata respondents advanced. The district court refused to correct that error on rehearing, and the Foleys appealed.

A panel of the Eleventh Circuit (Judges Rosenbaum, Grant, and Brasher) affirmed but denied respondents' motion for Rule 38 sanctions. The panel held that res judicata barred the Foleys' takings claim but not their due

---

[3] The district court granted entitlement to fees. Though this order was not before the appellate panel, this Court may take judicial notice of it at Pet.App. 159a, pursuant *National Fire Ins. Co. v. Thompson*, 281 US 331, 336 (1930). Resolution as to amount remains pending in the district court.

[4] The district court declared the Foleys vexatious, issued a pre-filing injunction, and declared the motion for sanctions moot. Though this order was not before the appellate panel, this Court may take judicial notice of it at Pet.App. 156a, *see National Fire*. Appeal of that order is pending before the Eleventh Circuit in appeal No. 23-12740.

process claim. The panel entertained the Foleys' due process claim but gave it only cursory consideration. The panel's analysis did not incorporate the Foleys' property interest in their toucans or their defense of that interest in Article IV, Section 9, Florida Constitution. The Foleys moved for rehearing to correct these oversights. They also moved to certify to the Florida Supreme Court a question on the construction of Article IV, Section 9. The panel denied both motions without comment, Pet.App. 67a, 167a.

The panel's omission of the substance of the Foleys' claim is not its only error. Like the state court, the panel completely changed the substance of the suit.

1. *The panel's substitute property interest.* The panel, in the first sentence of its order, incorrectly held – contrary to the record, the district court finding, and the complaint's allegations – that the property interest at issue was the destruction of an *aviary*[5]: "[The Foleys] sued [respondents] for ordering the Foleys to destroy an aviary they used to maintain and sell a small flock of toucans," Pet.App. 1a.

This conclusion is an entirely obfuscating substitution for what the BCC order says, what the district court found, and what the Foleys alleged and argued. *One*, the BCC order prohibits *aviculture* (i.e., breeding and rearing birds) as a *home occupation*: "Aviculture with associated aviaries is not permitted as a home occupation in the R-1A (single-family-7,500 sq. ft. lots) zone district," Pet.App. 65a. *Two*, the district court correctly found that the interest at issue was *selling birds*: "This long-running case arises out of the County prohibiting the pro se Plaintiffs from selling birds out of their residential property," Pet.App. 9a. *Three*, the Foleys clearly alleged that the interest at issue was *selling birds*, Pet.App. 81a-108a, ¶¶1, 3, 4, 11-f-1, 35, 46, 50-a, 50-

---

[5] *Aviary* shall mean an enclosure for holding birds, excluding poultry, in confinement. Ch. 38, § 38-1, Orange County Code.

b, 53, 79, 83, 88, 90-b, 98, 100.

The panel's substitution of ultimate fact is not harmless. It subverts the substance of the dispute and evades the question of state law dispositive of the Foleys' claim. Contrary to the panel's conclusion, respondents did not prohibit *aviaries*, Pet.App. 96a, ¶72-c. So, the Foleys had no legal ground in Article IV, Section 9, to object to respondents' actions concerning their *aviaries*,[6] Pet.App. 94a-95a, ¶¶62-67. Respondents did, however, prohibit *aviculture*, or "raising birds to sell," Pet.App. 99a, ¶81 and Pet.App. 92a, ¶53. Nevertheless, the Foleys had no factual basis to assert their legal defense in Article IV, Section 9, until the BCC issued its order, Pet.App. 99a, ¶81.

2. *The panel's substitution of the claim.* Contrary to the complaint's allegations, the panel also incorrectly held that Florida provided the Foleys with a remedy for the BCC order: "[S]tate court provided a means for the Foleys to remedy their alleged violations," Pet.App. 6a.

This unelaborated conclusion jettisons the "frame and outline" of the dispute; it replaces the Foleys' claim with a false substitute. Like a Cuckoo, it lays its own egg in the Foleys' nest. It's dead wrong.

Contrary to the panel's conclusion, state court explicitly said it could not provide a means to remedy an unconstitutional regulation on review of the BCC order, Pet.App. 63a, *Foleys v. Orange County*, 08-CA-0005227-0:

> Petitioners' assertion that sections of the Orange County Code are unconstitutional is one that can only be made in a separate legal action, not on certiorari. *See Miami-Dade County v.* Omnipoint

---

[6] The aviary was ultimately rebuilt, but only after the Foleys, under duress, agreed to abandon their bird business as a pre-condition to issuing a building permit, Pet.App. 99a, ¶¶79-80.

Holdings, Inc., 863 So.2d 195 (Fla. 2003).

Moreover, the Foleys' complaint, Pet.App. 91a-100a, summarizes at ¶89, the preceding allegations at ¶¶49-83, which carefully and methodically outline the complex factual and legal context of the unorthodox "procedural custom" that the respondents used deliberately to deny the Foleys state appellate consideration of their defense in Art. IV, Sec. 9, Fla. Const. Again, the panel is just dead wrong.

Finally, contrary to the panel's conclusion, the Foleys' complaint is not directed at respondents' denial of a pre-deprivation remedy; that denial cannot be corrected. The complaint instead clearly alleges that the Foleys' due process claim is directed at the state's denial of any post-deprivation remedy – the judgment of the state lawsuit that concluded the day the Foleys filed their federal suit, Pet.App. 82a-108a, ¶¶4, 5-c, 10-f, 11-f, 87, 88, 94-e, 100.

On its own Cuckoo substitutions for the Foleys' ultimate Toucan facts, the Eleventh Circuit, for a second time in this case, has excused itself from ruling upon – or even mentioning – the provision of the Florida Constitution the Foleys have consistently asserted provides them a complete defense to respondents' prohibition of their sale of toucans – Article IV, Section 9. The panel's omission of any reference to this provision in its summary of the first federal suit suggests the panel deliberately intended to affect a silent, stealth extension of the 2016 *Bell* abstention. For example, the panel at Pet.App. 2a, says the Foleys in that earlier suit sought "a declaratory judgment that the ... ordinance is void," but omits that Article IV, Section 9, was the legal basis for the judgment sought. Likewise, the panel at Pet.App. 2a, says in that suit the "district court held that [the] regulations were unlawful," but omits that Article IV, Section 9, was the legal basis for the district court's twelve-page opinion on that point,

Pet.App. 26a-38a. These omissions are conspicuous.

In sum, this federal suit, like the state suit, the preceding federal suit, and the earlier state court review, ended without judicial approval of respondents' trespass of Article IV, Section 9, Florida Constitution.

This, again, is the result the respondents sought.

At the end of their seventeen-year ordeal, the Foleys now petition this Court for a writ of certiorari to compel the Eleventh Circuit to squarely address the Foleys' claim that the respondents have caused the Foleys to be denied any adjudication of the respondents' trespass of Article IV, Section 9, Florida Constitution.

REASONS FOR GRANTING THE PETITION

The question presented complements the Court's pending consideration of *Williams v. Washington*, No. 23-191. Where that case arises from *overt* defiance of due process precedent, this case arises from *covert* defiance.

The question presented can never arise from a state or federal court *decision*. It can only arise from *non-decision*. The long history of *non-decision* in this case is important and reviewable because it is a gross, obvious, wholesale departure from the promises of "due process of law." This petition labels this *non-decision* Stealth Abstention.

For seventeen years, the petitioners have been censured by the silent abstention of state and federal courts on the controversial question of Florida constitutional law dispositive of their claim. In none of the multitude of court orders, in this case, is there a binding judicial application of the Florida constitutional provision the Foleys have consistently pled as their complete defense to respondents' prohibition of their sale of toucans – Article IV, Section 9, Florida Constitution. Each order demonstrates that respondents have deliberately prevented the application of

that defense. Each also demonstrates that neither state nor federal court has issued an order that conforms to or is responsive to the Foleys' defense.

This Stealth Abstention cannot be the meaning of "due process of law." It cannot be that the Due Process Clause empowers the judicial branch to evade adjudication of the substance of a pleading by a judgment that is correct in nothing but form.

"It is the duty of [this Court] to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. [Its] motto should be *obsta principiis*." *Boyd v. United States*, 116 US 616, 635 (1886).

If the Court still agrees with *Boyd*, it should grant review *obsta principiis*[7] on its supervisory power despite the absence of an *overt* state or circuit split because *covert* Stealth Abstention is the silent killer of due process.

The Court can slow the hardening of the arteries of "due process of law" and reduce both government overreach and unnecessary civil rights litigation by granting certiorari to restate the first principles overlooked by every court in this case for seventeen years.

I. The panel's stealth abstention calls for an exercise of this Court's supervisory power.

This Court, in *Fayerweather v. Ritch*, 195 US 276, 298 (1904), said that a Circuit Court violates the Fifth Amendment if it gives effect to a state court order that violates the Fourteenth Amendment:

> If a judgment of a state court can be reviewed by this court on error upon the ground that, although the

---

[7] *Obsta principiis,* or *resist the first approach,* is the epitaph on the memorial marking the resting place in Boston of the first signatory of our Declaration of Independence, John Hancock.

> forms of law were observed, it necessarily operated to wrongfully deprive a party of his property ... a judgment of the Circuit Court of the United States, claimed to give such unwarranted effect to a decision of a state court as to accomplish the same result, may also be considered as presenting the question how far it can be sustained in the view of the prohibitory language of the Fifth Amendment, and thus involve the application of the Constitution.

The Eleventh Circuit panel has done that in this case. If this Court agrees that "due process of law" requires a court to rule on a claimant's property defense, then the panel has not only denied due process but also given unwarranted effect to the state court's denial of due process.

This Court was not required in *Fayerweather* to redress a Circuit Court's violation of the Fifth Amendment. So, it did not say where, when, or how such a violation should be remedied. Nevertheless, as the error is constitutional in proportion and goes directly to a substantive element of procedure, the Foleys seek redress here, now, in Rule 10(a) of this Court's rules.

II. There is a historic and jurisdictional split on the question presented.

The Foleys' federal suit would have moved forward prior to the Cold War and the Vinson Court. And it could have been avoided in fifteen states.

The panel's refusal, and that of state court, to acknowledge the Foleys' right to a state court judgment on the dispositive legal question of their claim, is contrary to the Court's early precedent. It represents a split from history in the circuits and many states on the question presented. Like the panel's error, the split is apparent only by omission; (1) this Court through 1915 said a variance between judgment and pleading denied due process, but it

has not said so since; (2) in eight federal circuits through 1946 such a variance denied due process, but even in those circuits the rule has not been restated since; and, (3) through 1924 in all but thirteen states such a variance could be challenged on appeal or collaterally, but today only fifteen states report cases doing so.

The following survey of federal and state decisions demonstrates that the guarantee of due process to a judgment that conforms to the complaint – and answers the legal questions it presents – began to fade with the advent of the Red Scare and since has been left to the whim of time and the accident of place.

The Court should answer the question presented to restate the judiciary's duty in due process to conform its judgment to the complaint and to answer the legal questions the complaint alleges are dispositive.

1. *Federal courts have forgotten the original rule.*

a. In 1822, squarely between the Founding and the Great Rebellion, to resolve a turf war between the fathers of folkloric icons "Davy" Crocket and "Bobby" Lee, Justice Marshall, in *Crocket v. Lee*, 20 US (7 Wheat.) 522, 525 (1822), said that correspondence between judgment and pleading was critical to justice: "No rule is better settled than that the decree must conform to the allegations ... The rule ... is not only one that justice requires, but one which necessity imposes on courts."

The only circuits to cite *Crocket* for this rule are the Second and Ninth: *In re Eastern Palliament Corporation*, 67 F.2d 871, 874 (2nd Cir. 1933); and *Christian v. Waialua Agr. Co.*, 93 F.2d 603, 613 (9th Cir. 1937).

b. In 1866, the Court in *Graham v. Railroad Co.*, 70 US (3 Wall.) 704, 710 (1866), confirmed the *Crocket* rule of correspondence by stating its inverse: "It is our duty to construe the decree with reference to the issue it was

meant to decide." On review, in other words, the required correspondence is assumed but is a rebuttable assumption.

The Court restated this inverse rule of conformance in *Haskell v. Kansas Natural Gas*, 224 US 217, 223 (1912): "[T]he decree must be read in view of the issues made and the relief sought and granted."

c. In 1870, in *Washington R. Co. v. Bradleys*, 77 US 299, 303 (1870), the Court restated the rule of conformance in a way that suggested it thought the rule too obvious to be overlooked: "It is hardly necessary to repeat the axioms in the equity law of procedure ... that the decree must conform to the scope and object of the prayer, and cannot go beyond them."

This decision was cited by the Sixth Circuit, but only once for the distinct corollary that allegations and proof must agree: "[T]he well-recognized principle that the allegations of the pleadings and the proofs must agree should be enforced," *Horvath v. McCord Radiator & Mfg. Co.*, 100 F.2d 326 (6th Cir. 1938).

d. Six years later, Justice Field, in *Windsor v. McVeigh*, 93 US 274, 282 (1876), took the rule of conformance a step further and said judgments that "transcend" the legal authority conferred by the pleading "would not be merely erroneous they would be absolutely void; because the court in rendering them would transcend the limits of its authority in those cases." *Windsor* offered several examples of judgments that "transcend" the authority of the pleading: e.g., an action upon a money demand but a judgment of imprisonment; an action for libel or tort but a judgment in contract; an action to possess real property but a judgment on probate of a will.

Windsor, however, turned on the actual denial of a hearing to "a resident within the city of Richmond, within the Confederate lines, and a rebel." So, while the First,

Second, and Third Circuits cite *Windsor* for its holding, none adopted its rule of transcendence.

Nevertheless, *Windsor* cites *ex parte Lange*, 85 US 163 (1873), to support its rule. *Lange*, though decided on double jeopardy, at 176-7, also offered examples of judgments made void by exceeding the issue presented, despite jurisdiction over person and subject: e.g., a misdemeanor but a judgment to "be hung;" an indictment of libel but "a judgment of death or confiscation of property."

e. In 1891, Justice Brewer in *Reynolds v. Stockton*, 140 US 254, 264 (1891), reiterated the rule of conformance while construing the "full faith and credit" clause of section 1 of Article IV:

> [T]he full faith and credit demanded ... does not demand that a judgment ... which is in no way responsive to the issues tendered by the pleadings ... must be recognized as valid.

Justice Brewer offered as an example "an extreme case" of a failed and void correspondence between judgment and pleading – "a complaint ... for the possession of certain specific property ... a judgment ... for the recovery of ... certain real property."

This example is an apt parallel to the Foleys' case. The Foleys complained that respondents were liable for depriving their right to sell birds because Article IV, Section 9, Florida Constitution, denied respondents authority over that right. But instead of a judgment on that point, the Foleys received a judgment that their "state-issued permit" was not property, when no permit was put at issue between the parties by the Foleys' pleading.

Through 1946 *Reynolds* is cited in the First, Second, Third, Eighth, Ninth, and Tenth Circuits for its rule that a judgment must be "responsive to the issues tendered by the

pleadings": e.g., *Armand Co. v. Federal Trade Commission*, 84 F.2d 973, 975 (2nd Cir. 1936) (suggesting the test for variance in a criminal case is proof the judgment "abandoned the very frame and outline" of the indictment); *Sylvan Beach v. Koch*, 140 F.2d 852, 861-2 (8th Cir. 1944) ("A court may not, without the consent of all persons affected, enter a judgment which goes beyond the claim asserted in the pleadings. [citations omitted] ... [T]he court can consider only the issues made by the pleadings, and the judgment may not extend beyond such issues nor beyond the scope of the relief demanded."); *ex parte Equitable Trust Co.*, 231 F. 571 (9th Cir. 1916) ("[J]urisdiction is always limited to the subject-matter in the case before it ... [T]he point decided must be, in substance and effect, within the issue ..." The court provided as a counter-example a suit in foreclosure involving a married couple but a judgment of divorce.); *Farmers' & Merchants' Bank v. Arizona Mut. Sav. & Loan Ass'n.*, 220 F. 1 (9th Cir. 1915) ("[A] judgment is conclusive only so far as it determines matters which by the pleadings are put in issue."); *Gelinas v. Buffum*, 52 F.2d 598, 600 (9th Cir. 1931) (reversed, judgment "not responsive to the pleadings."); *Wire Tie Mach. Co. v. Pacific Box Corporation*, 102 F.2d 543, 551 (9th Cir. 1939) ("It is a fundamental concept of equity procedure that adjudication must be based upon the issues created by the pleadings."); *Osage Oil & Refining v. Continental Oil*, 34 F.2d 585, 588 (10th Cir. 1929) ("A decree, in so far as it undertakes to decide issues not made by the pleadings, is void.").

After 1946 *Reynolds* is cited for its rule by only the First, Second, and Third Circuits: *Motta v. Samuel Weiser, Inc.*, 768 F.2d 481, 486 (1st Cir. 1985) (judgment was responsive); *First Nat. Bk. of Hollywood v. Am. Foam Rubber Corp.*, 530 F.2d 450 †3 (2nd Cir. 1976) (same); *Scully v. US WATS*, 238 F.3d 497, 515 (3rd Cir. 2001) ("A judgment may only be properly given for something raised in the course of a litigation between the parties [citations

omitted] This right derives not only from the proper role of an Article III court but also from due process protections. The core of due process is the right to notice and a meaningful opportunity to be heard.").

f. Pleading and judgment are definitively equated with the due process requirements of notice and hearing in *Standard Oil Co. of Ind. v. Missouri*, 224 US 270, 281 (1912) :

> Under the Fourteenth Amendment [Standard Oil Company and Republic Oil Company] were entitled to notice and an opportunity to be heard. That necessarily required that the notice and the hearing should correspond, and that the relief granted should be appropriate to that which had been heard and determined on such notice. For even if a court has original general jurisdiction, criminal and civil, at law and in equity, it cannot enter a judgment which is beyond the claim asserted, or which, in its essential character, is not responsive to the cause of action on which the proceeding was based.

In *Standard Oil*, the Court effectively held that due process required the same correspondence between judgment and pleading as is required of hearing and notice.

Though *Standard Oil* is widely cited for its application to punitive damages, it has only been cited twice by the Sixth and Eighth Circuits to resolve other challenges to "a judgment which goes beyond the claim asserted in the pleadings," and the last of these was in 1954: *In re Conservative Mortgage & Guaranty Co.*, 24 F.2d 38, 41 (6th Cir. 1928) ("A material variance between the relief sought and that awarded is fatal to the judgment."); *Steffen v. United States*, 213 F.2d 266, 272 (6th Cir. 1954) ("A court may not properly enter a judgment which goes beyond the claim asserted in the pleadings."); *United States v. Turner*,

47 F.2d 86, 89 (8th Cir. 1931) (quoting *Standard Oil* and *Windsor*); *Sylvan Beach v. Koch*, 140 F.2d 852, 861-2 (8th Cir. 1944); ("A court may not, without the consent of all persons affected, enter a judgment which goes beyond the claim asserted in the pleadings. [citations omitted] ... [T]he court can consider only the issues made by the pleadings, and the judgment may not extend beyond such issues nor beyond the scope of the relief demanded.")

In sum, the rule (*secundum allegata*) in *Crocket*, *Windsor*, *Reynolds*, and *Standard Oil* fades from federal decisions after the Stone Court.

2. *Only fifteen States continue to apply the rule.*

The situation in the states is similar. The Corpus Juris Secundum (2021), 49 C.J.S. Judgments, Sec. 65, recognizes that since 1943, fifteen states[8] are reported to have applied some version of the following rule, "A judgment must conform to the pleadings and proof." On the other hand, the Corpus Juris (1924), 33 C.J. Judgments, Sec. 87, recognizes that prior to 1924, all but thirteen states[9] reported cases that applied some version of the following rule, "The judgment must conform to, and be supported by, the pleadings in the case."

According to these sources, the rule of correspondence and conformance, though nowhere expressly denied, has diminished in importance in thirty-six states.

---

[8] California (1943), Connecticut (1986), Rhode Island (2004), Florida (2013), Illinois (2004), Indiana (1968), Louisiana (2020), Missouri (2013), North Carolina (1992), Oklahoma (1981), South Carolina (1936), Tennessee (2015), Texas (Tex. R. Civ. P., Rule 301), Virginia (2011), Wyoming (1953).

[9] Alaska, Delaware, Hawaii, Maryland, Minnesota, Mississippi, New Hampshire, New Mexico, Rhode Island, South Carolina, Virginia, Washington, Wyoming.

III. The Circuit's second refusal to rule on petitioners' state law defense is wrong and doubles the importance of this timely QP.

1. The question presented is a timely sequel to *Parratt* and *Hudson* (*Parratt v. Taylor*, 451 US 527 (1981), *Hudson v. Palmer*, 468 US 517 (1984)). Those cases told petitioners to seek remedy in state court. Petitioners did so and now seek a federal remedy because state court provided none.

Just weeks ago, the Court clarified that *Parratt* and *Hudson* do not relieve the government of its burden in due process to secure a prompt, timely resolution of a contested property interest, *Culley v. Marshall*, No. 22-585 (U.S. May 9, 2024). The Foleys have pressed toward that resolution since February 2007, while their government adversaries have resisted at every turn.

In the October term, the Court is scheduled to take up a due process question arising from an *overt* defiance of the Court's precedent, *Williams v. Washington*, No. 23-191. Here, the question presented involves a *covert*, stealth defiance – an unprincipled, silent, evasion of the dispositive, controversial state constitutional separation of powers provision that state and federal court did not, and could not, even attempt to excuse with the constitutional avoidance canon.

Only days ago, Justice Sotomayor, for a unanimous court, reiterated that the pleading standards of *Iqbal* and *Twombly* have corresponding judgment standards, *National Rifle Association of America v. Vullo*, No. 22-842 (May 30, 2024) (judgment failed to draw inferences in favor of NRA). Here, the panel's Stealth Abstention – its second refusal to even acknowledge the dispositive legal question – calls for a bolder restatement of *secundum allegata*.

2. The Court frequently grants certiorari to clarify the duties encompassed by the words "due process of law" as

applied to property rights. In search of an answer to the question presented, the Foleys followed the trail of those decisions to the Court's door:

a. "Where only property rights are involved, mere postponement of the judicial inquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate." *Phillips v. Commissioner*, 283 US 589, 596-7 (1931) (Justice Brandeis).

As they were obliged to do by *Phillips, Parratt,* and *Hudson*, the Foleys have endured a "mere postponement" of *seventeen years* yet still have *no* judicial determination whatsoever of their claim.

b. "[T]he final judgment of a state court ... is to be deemed the act of the State within the meaning of [the Fourteenth Amendment])." *Chicago, B.&QR Co. v. Chicago*, 166 US 226, 234 (1897).

The Foleys finally have that "final judgment of a state court," yet that judgment does not answer the question of state law dispositive of their claim.

c. "The Fifth Amendment, like the Fourteenth, declares that property may not be taken without due process of law ... When dealing with [these] constitutional rights ... there must be the opportunity of presenting ... to some court, every question of law raised." *St. Joseph Stock Yards Co. v. United States*, 298 US 38, 77 (1936) (Justice Brandeis, concurring).

The Foleys' right to an "opportunity" to present "every question of law" was toothless. It will remain so until this Court reminds the respondents, state court, and the panel that they have a corresponding duty to be "responsive to" the "question of law" presented.

d. "Under the Fourteenth Amendment ... a court ...

cannot enter a judgment which is beyond the claim asserted, or which, in its essential character, is not responsive to the cause of action on which the proceeding was based." *Standard Oil Co. of Ind. v. Missouri*, 224 US 270 (1912).

Here, state court went "beyond the claim asserted" when it ruled on the legal status of a "state-issued permit" never put at issue. And its judgment was not in any way "responsive to the cause of action" that the Foleys grounded in Article IV, Section 9, Florida Constitution, on nearly every page of their state pleading.

e. "If the effect of the judgment of the state court has been to take the property of the citizen without compensation, no matter what form the procedure has taken, it is violative of the Fourteenth Amendment." *Brand v. Union Elevated R. Co.*, 238 US 586, 597 (1915).

Here, there was such a *judicial taking* because "the effect of the judgment" was to extinguish property and due process rights that Florida previously recognized in wildlife owners, *Barrow v. Holland*, 125 So.2d 749, 751 (Fla. 1960):

> Once such animals *ferae naturae* have been legitimately reduced to private control ... they become private property. When this occurs the owner thereof can not be deprived of the use thereof, except in accord with all of the elements of due process which protect one's ownership of private property generally.

f. "[A] judgment of the Circuit Court of the United States [giving] unwarranted effect to a decision of a state court as [to wrongfully deprive a party of property] [conflicts with] the prohibitory language of the Fifth Amendment." *Fayerweather v. Ritch*, 195 US 276, 298 (1904).

Here, the Eleventh Circuit panel violated its Fifth Amendment duty in due process when it, too, went "beyond the claim asserted" and replaced the property interest the Foleys put at issue – the right to sell toucans – with its own substitute – an *aviary*. By doing so, the panel, like state court, was not "responsive to the cause of action" that the Foleys grounded in Article IV, Section 9, Florida Constitution, throughout their federal pleading.

3. The Eleventh Circuit's first abstention in 2016, per *Bell*, though ungenerous, may have had legal justification. But the panel's second, anomalous, stealth abstention undermines uniform enforcement of the Fourteenth Amendment and confidence in the judiciary.

Restating the *Crocket* rule of conformance, this Court will make it "king of the wild frontier" where it is now a stranger. Doing so will give "due process of law" uniform meaning. A civil rights plaintiff in Florida, Georgia, and Alabama will enjoy the same Fourteenth Amendment protections as a similarly situated plaintiff in Texas, Connecticut, North Carolina, and Rhode Island.

On the front end – at the local enforcement stage, before a tort occurs – a rule of correspondence discourages the local enforcement gamesmanship that occurred here. If a dispute arises because local enforcement has deliberately evaded adequate state court review, as here, the rule of correspondence gives all parties to an original tort action one mutual interest – a judicial determination of the validity of any alleged deprivation. A local government is less likely to resort to obstructive gamesmanship when it is on notice that state court cannot approve its proposed order if that proposed order does not directly respond to the questions of law raised by the complaint of its adversary.

On the back end – after a tort claim is brought against a local government in state court – a rule of correspondence

encourages state court to resolve the common law tort as pled, before its failure to do so morphs into a federal constitutional tort. This is precisely the purpose of the due process clause – to encourage state court resolution of disputes with state actors and to discourage judicial complacency. After all, "the common law usually supplies a sound remedy when life, liberty, and property are taken," *Browder v. City of Albuquerque*, 787 F.3d 1076, 1083 (10th Cir. 2015) (Gorsuch, concurring).[10] But when, as here, state court by stealth abstention extinguishes historic property and due process rights in wildlife, its variance from the rule of correspondence will give the injured party the recourse to federal court Amendment Fourteen provides.

IV. This case is the right vehicle to restate the first principles that resolve the question presented.

1. The basis for the question presented is fully litigated; the decision below is final, and the question's two-part predicate requires no further development. The question assumes that (1) state court did not rule on the Foleys' defense in Article IV, Section 9, Florida Constitution, and (2) the panel, nevertheless, ruled that due process was provided. These two elements have been established and are readily confirmed by comparison of five documents in the Appendix: the panel's order, Pet.App. 1a; the Foleys' federal complaint, Pet.App. 81a; the two state court orders, Pet.App. 51a and 56a; and, the Foleys' amended state complaint, Pet.App. 112a.

2. The answer to the question presented is also outcome determinative. Certiorari will validate the Foleys' due process claim and allow them on remand to pursue a

---

[10] Early bird case parallel: *Keeble v. Hickeringill*, Queen's Bench, 11 East 574, 103 Eng. Rep. 1127 (1707). Keeble recovered damages from Hickeringill who fired guns that frightened ducks from the pond Keeble owned and used to capture ducks to sell for gain.

judicial determination of their property defense in Article IV, Section 9, Florida Constitution. Unless the Court certifies petitioners' Florida constitutional question to Florida's Supreme Court, per Rule 9.150 Florida Rules of Appellate Procedure, remand will decide the question in the Foleys' favor; remand to the district court will put the Florida constitutional question before Judge Dalton who previously decided it in the Foleys' favor in his 2013 decision *Foleys v. Orange County et al.*, 6:12-cv-269 (M.D. Fla. August 13, 2013) (vacated without prejudice on appeal), Pet.App. 26a-38a.

3. The question presented will only arise as it has here; it will never arise from a state or circuit split. The question springs from omission, not commission, an omission of the most fundamental component of "due process of law" – correspondence between judgment and pleading. Consequently, the right vehicle for the Court's answer will never be a decision acknowledging a split with another jurisdiction. None will ever appear. Omission cannot acknowledge omission. Instead, the only vehicle is a case like this one, where the omission of that component is wholesale and obvious in the orders of the circuit panel, the district court, and the state court. The question will only arise, as it has here, in reaction to a cursory, unpublished, non-precedential decision affirming a Rule 12(b)(6) dismissal, that applies only circuit precedent, to deny a claim in due process, made by *pro se* litigants, to defend a right they value more than anyone else with a settled but controversial provision of state law the respondents and the judiciary have silently brushed under a courthouse rug.

4. Though judicial neglect and oversight may be common and recurring, vehicles like this case are not. This case, in a 12(b)(6) posture, is not encumbered by extraneous, unresolved factual or legal issues. Moreover, the panel here did not merely "overlook" an insignificant

pair of *pro se* toucan farmers. The panel here overlooked what was impossible to miss – the Foleys' seventeen-year defense of their interest in the sale of toucans provided by a unique (and apparently contentious) separation of powers provision in Florida's Constitution – Article IV, Section 9. And this was the second time, in this case, the Eleventh Circuit has "abstained" from ruling on that dispositive defense, see Pet.App. 13a-20a. Whatever answer the Court gives to Stealth Abstention, this is the vehicle with the feathers to fly it all the way home.

5. The record vividly illustrates the stakes of the question presented. Resolving it is necessary to provide guidance. Seventeen years of litigation is costly for all involved, the parties and the courts.

Guidance is needed because quixotic *pro se* litigants have a long history dating to 1940 BC[11] of being difficult and persistent.[12] They are more likely than attorneys to press a case against a government defendant that involves a contested rule of law; attorneys, or others governed by financial restraints, more readily submit to the rule of man and forego such contests.[13] *Just the Facts: Trends in Pro Se Civil Litigation from 2000 to 2019*, uscourts.gov/news/2021/02/11/just-facts-trends-pro-se-civil-litigation-2000-2019, also *Who Sues the Supreme Court, and Why? Pro Se Litigation and the Court of Last Resort*, 8 Indiana Journal of Law and Social Equality 181 (2020).

---

[11] Parkinson, R.B. (1997). *The Tale of Sinuhe and other Ancient Egyptian Poems 1940-1640BC*. Oxford University Press. Ch. 2, *The Tale of the Eloquent Peasant*, p.74. Khunanup sought to recover a donkey and trade goods wrongly taken by the Dual King's servant. In his ninth petition, he aligns his cause with the King's own desire for justice, saying, "Act for he who acts for you."

[12] Luke 18:1-8. The Parable of the Persistent Widow. The disrespectful judge gives justice only because the widow persists.

[13] Proverbs 18:18: "Flipping a coin can end arguments."

Guidance is needed because local governments are also difficult. The Court acknowledged this just weeks ago in *Culley*. Here, respondents deliberately chose a mode of local enforcement they knew prevented state court review of their state constitutional violation. In doing so, respondents unfairly shifted the burden in due process to the Foleys. Reversal of that burden required the Foleys, per *Phillips*, *Parratt*, and *Hudson*, to initiate an original action to prove what most would assume – that toucans are property. The Foleys did so in federal court in 2013. Respondents vacated that victory per *Bell* on appeal. The Foleys then attempted an encore of their district court victory in state court. But in state court, the Foleys discovered that the respondents had home-court advantage and that state judges are too busy or unwilling to do more than copy-and-paste the governments' arguments into their orders. And though this cat's paw practice, like the adoption of proposed orders, is not *per se* a denial of due process, it becomes so when, as here, the respondents misuse motions to dismiss to persuade state and federal court to do what is prohibited by *Crocket*, *Windsor*, *Reynolds*, and *Standard Oil*.

The law should settle disputes with a government that promises to rule by law. Seventeen years without an answer to the only question of law that can settle this dispute replaces Due Process of Law with Trial by Combat.

There are only two ways to avoid a recurrence of what happened here: perfect Stealth Abstention or perfect "due process of law." Either categorically bar *pro se* litigants from court as vexatious, as the respondents have done, or address their legal defenses up front as due process requires. The question presented invites the Court to discuss these two options: the dilemma of *pro se* litigants, now invigorated with a wealth of inexpensive online AI-enriched resources, and the need, made evident by this case, to remind local governments and the judiciary that

they have a duty in due process to squarely address at the first available opportunity the legal question a claimant alleges is dispositive of their claim.

CONCLUSION

For all the foregoing reasons, the Court should grant certiorari.

Respectfully submitted,

David and Jennifer Foley
1015 N. Solandra Dr.
Orlando, FL 32807-1931
407 721-6132, 407 491-4319
david@pocketprogram.org,
jtfoley60@hotmail.com

APPENDIX CONTENTS