No. _____

In The
Supreme Court of the United States

EEE MINERALS, LLC, and SUZANNE VOHS, as Trustee for the Vohs Family Revocable Living Trust,
Petitioners,

v.

STATE OF NORTH DAKOTA;
THE BOARD OF UNIVERSITY AND SCHOOL OF LANDS OF THE STATE OF NORTH DAKOTA;
and JOSEPH A. HERINGER as Commissioner for the Board of University and School of Lands of the State of North Dakota,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether sovereign immunity bars a claim asserting the constitutional right to just compensation for a taking of property by a state?

CORPORATE DISCLOSURE STATEMENT

Petitioner EEE Minerals, LLC, is a limited liability company that has no parent corporation and no stock.

STATEMENT OF RELATED PROCEEDINGS

EEE Minerals, LLC v. North Dakota, No. 22-2159, 81 F.4th 809 (8th Cir. Aug. 30, 2023).

EEE Minerals, LLC v. North Dakota, No. 1:20-cv-219, 2022 WL 1814213 (D.N.D. May 31, 2022).

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PETITION FOR WRIT OF CERTIORARI

EEE Minerals, LLC, and Suzanne Vohs, as Trustee for The Vohs Family Revocable Living Trust, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 81 F.4th 809 (8th Cir. 2023) and reprinted at App. 1a. The order of the district court granting North Dakota's motion to dismiss is reported at 2022 WL 1814213 (D.N.D. May 31, 2022) and reprinted at App. 13a.

JURISDICTION

The district court had jurisdiction over this case under 28 U.S.C. § 1331 and the Fifth Amendment to the United States Constitution. The Eighth Circuit issued its decision on August 30, 2023, App. 1a, and denied rehearing on October 27, 2023. App. 43a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AT ISSUE

The Fifth Amendment to the U.S. Constitution provides, in relevant part, "nor shall private property be taken for public use, without just compensation."

The Eleventh Amendment to the U.S. Constitution states: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

The Fourteenth Amendment to the U.S. Constitution states, in relevant part, "nor shall any State deprive any person of life, liberty, or property, without due process of law."

INTRODUCTION AND SUMMARY OF REASONS FOR GRANTING THE PETITION

This case presents an important and recurring question as to whether sovereign immunity bars a claim asserting that a state is liable for an unconstitutional taking of property. States are generally immune from suits for damages because of their sovereign status, *Edelman v. Jordan*, 415 U.S. 651, 663 (1974), unless they consent to suit or waive their immunity. *Gunter v. Atl. Coast Line R.R. Co.*, 200 U.S. 273, 284 (1906).

On the other hand, the states' right to take property is conditional upon payment of just compensation. *United States v. Great Falls Mfg. Co.*, 112 U.S. 645, 656 (1884). The Fifth Amendment reflects this principle by providing property owners with a right to sue for just compensation when the government takes property. *Knick v. Township of Scott*, 139 S. Ct. 2162, 2171–72 (2019). The states are, of course, bound by the Fifth Amendment's Just Compensation Clause through the Fourteenth Amendment's Due Process Clause. *Chicago, Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226, 235–41 (1897).

There is accordingly "obvious tension" between the principles of state sovereign immunity and the Just Compensation Clause. *Community Housing Improvement Program v. City of New York* (*CHIP*), 492 F. Supp. 3d 33, 40 (E.D.N.Y. 2020). While

sovereign immunity bars claims against the state, the "just compensation" requirement demands that states bow to such claims when taking property. *Young v. McKenzie*, 3 Ga. 31, 41–42 (1847) (observing that the just compensation requirement for a taking does not "do anything more than declare a great common law principle, applicable to *all governments*, both state and federal, which has existed from the time of *Magna Charta*" (emphasis added)).

The decision below resolves this clash in favor of sovereign immunity. But there are serious problems with its conclusion. For one, the conclusion that sovereign immunity prevents a property owner from seeking just compensation for a taking by a state is inconsistent with historical understandings about the nature of the sovereign power to take property. Since the beginning of the Republic, the sovereign's right to take property has been conditioned on an implicit agreement to pay compensation when it takes property. *See United States v. Klamath & Moadoc Tribes*, 304 U.S. 119, 123 (1938) ("The established rule is that the taking of property by the United States in the exertion of its power of eminent domain implies a promise to pay just compensation[.]"). As Chancellor Kent explained,

> A provision for compensation is a necessary attendant on the due and constitutional exercise of the power of the lawgiver to deprive an individual of his property without his consent; and this principle in American constitutional jurisprudence, is founded in

> natural equity, and is laid down by jurists, as an acknowledged principle of universal law.

2 James Kent, *Commentaries on American Law* 144 (1827).[1]

The Fifth Amendment enshrined the preexisting understanding that the sovereign power to take property includes a promise to pay compensation. *Great Falls Mfg. Co.*, 112 U.S. at 661; *Young*, 3 Ga. at 43 (The Takings Clause "is an *affirmance* of a great doctrine, *established by the common law for the protection of private property*. It is founded in natural equity, and is laid down by jurists as a principle of universal law." (quoting 3 Joseph Story, *Commentaries on the Constitution of the United States* 661 (1833))). And adoption of the Fourteenth Amendment confirmed that the states' power to take property, like that of the federal government, is conditioned by a constitutional duty—and an implied promise—to pay compensation. *Chicago, Burlington & Quincy R.R.*, 166 U.S. at 233–34. Given this legal tradition, the very act of taking property waives a state's sovereign immunity from a claim for just compensation. *See PennEast Pipeline Co., LLC v. New Jersey*, 141 S. Ct. 2244, 2258 (2021) (The "'plan of the Convention' includes certain waivers of sovereign immunity to which all States implicitly consented at the founding.").

The Eighth Circuit's decision to apply sovereign immunity to bar a claim seeking just compensation for a taking by a state is incompatible with these founding-era understandings. It is also irreconcilable

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[1] Available at https://lonang.com/wp-content/download/Kent-CommentariesVol-2.pdf.

with this Court's precedent on the "self-executing" just compensation remedy. The effect is to encourage states to engage in aggressive, uncompensated use of the power to expropriate property. This case is an example.

Here, North Dakota enacted a statute that redefines privately held mineral rights as state property. App. 4a–5a. Because the law includes no mechanism for compensating affected property owners, the owners sued, alleging they are entitled to just compensation or, alternatively, to a declaration that the state violated their constitutional rights. Yet, the Eighth Circuit held that North Dakota is entirely immune from these claims. App. 10a–11a.

This Court has not yet directly addressed the question of whether the right to seek just compensation for a taking overrides sovereign immunity. Richard H. Seamon, *The Asymmetry of State Sovereign Immunity*, 76 Wash. L. Rev. 1067, 1067–68 (2001); Eric Berger, *The Collision of the Takings and State Sovereign Immunity Doctrines*, 63 Wash. & Lee L. Rev. 493, 496 (2006) (the Court has "avoided the issue"); *CHIP*, 492 F. Supp. 3d at 40 (noting the Court has not "decisively resolved the conflict"). It should do so now, by granting the Petition and holding that states are not immune from unconstitutional takings claims. *Bay Point Props., Inc. v. Mississippi Transp. Comm'n*, 937 F.3d 454, 456 n.1 (5th Cir. 2019) (acknowledging that "'the tension' between state sovereign immunity and the right to just compensation . . . is [an issue] for the Supreme Court").

STATEMENT OF THE CASE

A. Facts

1. The Garrison Dam project

This dispute revolves around the taking of private mineral interests in 276.8 acres of land used in connection with the operation of the Garrison Dam in North Dakota. App. 3a.

The Flood Control Act of 1944 authorized the United States Army Corps of Engineers ("Corps") to construct the Garrison Dam on the Missouri River in North Dakota. App. 2a. As part of the project, and in anticipation of its creation of a reservoir that would become known as Lake Sakakawea, the Corps acquired the surface estate to Missouri River uplands that would form the bed of the lake. App. 46a–47a, ¶ 12. However, the Corps generally left the mineral estate in private ownership. App. 16a–17a.

When the Garrison project was conceived, the Vohses' and EEE Minerals' predecessors owned 276.8 acres of property in McKenzie County, near the Garrison project. App. 47a, ¶ 14. In 1957, five years after completion of the dam, the United States obtained the surface estate in the Vohses' McKenzie County land, anticipating that it would be submerged with the creation of Lake Sakakawea. App. 3a. However, the Vohses' and EEE Minerals' predecessor in interest retained the oil, gas, and other mineral interests in the 276.8 acres of land. *Id.*[2] Based on their

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[2] The warranty deed executed when the United States acquired the surface estate of the Vohses' land specifically states:

> [R]eserving, however, to the owner of the land or the owner of any interest therein, including third party

reservation of mineral interests at the time of the transfer of the surface estate, the Vohses have entered into numerous, recorded oil and gas leases for the property. App. 3a; App. 48a, ¶ 17.

The United States did not obtain any interest in the Vohses' property from the state of North Dakota because the state did not own it. App. 47a. Nor did North Dakota obtain an interest in the land at the time of the transfer of the Vohses' surface estate to the United States. *Id.*

Fifty years after completion of the Garrison Dam project, the state of North Dakota and the United States became embroiled in a dispute over ownership of the property along the portion of the Missouri River underlying Lake Sakakawea. App. 17a–18a. The

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> lessees, their heirs, successors and assigns, all oil and gas rights therein, on or under said described lands, with full rights of ingress and egress for exploration, development, production and removal of oil and gas; upon condition that the oil and gas rights so reserved are subordinated to the right of the United States to flood and submerge the said lands permanently or intermittently in the construction, operation and maintenance of the Garrison Dam and Reservoir, and that any exploration or development of such rights shall be subject to federal or state laws with respect to pollution of waters of the reservoir; provided further that the District Engineer, Corps of Engineers, Garrison District, or his duly authorized representative shall approve, in furtherance of the exploration and/or development of such reserved interests, the type of any structure and/or appurtenances thereto now existing or to be erected or constructed in connection with such exploration and/or development, said structures and/or appurtenances thereto not to be of a material determined to create floatable debris.

App. 23a.

dispute centered on the location of the ordinary high water mark (OHWM), because this line marks the upland boundary of state-owned land within the riverway. *Id.*

2. The State enacts legislation taking the Vohses' mineral interests

In 2008, the North Dakota Lands Board commissioned a "Phase 1" survey to determine the current ordinary high water mark of the Missouri River. App. 3a. In 2010, it carried out another survey ("Phase 2") to determine the historical OHWM as it existed before the closing of the Garrison Dam. App. 4a.

In 2017, as disputes over the extent of the state's property interests along the Missouri River grew, North Dakota enacted a statute intended to address the issue. App. 4a; App. 19a–20a. The law, known as the "Ownership of Missouri River Act," App. 48a, ¶¶ 15–18, adopted a historical OHWM survey used by the Corps when it acquired land for Lake Sakakawea as the boundary of the state's property along the river. App. 4a. The state subsequently interpreted and applied the Act to grant it fee ownership of the land in which the Vohses reserved mineral interests. App. 5a.

In short, pursuant to the Act, North Dakota redefined the mineral interests reserved to the Vohses by the 1957 deed as state property. App. 48a–49a, ¶¶ 18–20. The state has not provided compensation to the Vohses or to other affected property owners through the Act or otherwise. App. 51a, ¶ 26.

B. Procedural History

In 2020, the Vohs Trust and EEE Minerals (collectively, the Vohses) sued a number of North

Dakota agencies and officials in federal court. In part, their complaint asserted an unconstitutional takings claim against the state pursuant to the Fifth and Fourteenth Amendments. App. 50a–51a. The claim sought just compensation, declaratory relief, an injunction. App. 2a; App. 53a.

The state defendants moved to dismiss under Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6), arguing in part that sovereign immunity barred the Vohses' takings claims. App. 24a. The district court agreed. It held that "the Eleventh Amendment bars any recovery for damages against the state and its employees acting in their official capacities, unless a waiver applies. No waiver applies in this instance, and sovereign immunity bars the recovery of damages." App. 36a–37a.

On appeal, an Eighth Circuit panel upheld the lower court's judgment that the Vohses' claim for just compensation is barred by sovereign immunity. App. 9a–10a. The panel's analysis relies on a Due Process Clause case, *Reich v. Collins*, 513 U.S. 106, 109–10 (1994), which holds that "even though the Fourteenth Amendment provides a right to a remedy for taxes levied in violation of federal law, 'the sovereign immunity States enjoy in *federal* court, under the Eleventh Amendment, does generally bar tax refund claims from being brought in that forum.'" App.10a (quoting *Reich*, 513 U.S. at 110).

The Court below also rejected the Vohses' contention that "if monetary relief is unavailable, then [they are] entitled to pursue equitable relief under *Ex parte Young*, 209 U.S. 123 (1908)." App. 11a. The court concluded that this simply repackages their claim "for monetary relief as a request for an injunction that

cures past injuries and requires the payment of just compensation." It then held that such a "reformulated request for retrospective relief is likewise barred by the Eleventh Amendment." *Id.* Therefore, while states are bound by the Takings Clause through the Fourteenth Amendment, and the constitutionally mandated just compensation remedy for a taking is actionable in federal court, *Knick*, 139 S. Ct. at 2168, the court below held that North Dakota's statute is not accountable to the Takings Clause. App. 9a–11a.

The Vohses filed a petition for rehearing en banc. In a short, published order, the Eighth Circuit denied the petition. However, the order noted that "Judge Grasz would grant the petition for rehearing *en banc*." App. 43a. The Vohses and EEE Minerals now petition this Court for a writ of certiorari.

REASONS FOR GRANTING THE PETITION

The right to take private property against a property owner's will is one of the most significant powers that a sovereign government wields. As a result, in the Anglo-American tradition, that power has always been limited by a responsibility, namely, the duty to pay just compensation to those whose property is taken. Immunity from suits to which the government has not consented is also a core attribute of sovereignty.

These two principles, sovereign immunity from damages suits and the individual's right to seek compensation for a taking, function independently in most cases. However, when a property owner seeks compensation for a taking of property by a state, the principles conflict.

In the decision below, the Eighth Circuit held that North Dakota's sovereign immunity is superior to the Vohses' right to seek compensation for a taking by the state. This decision raises an important and recurring issue of constitutional law, and conflicts with historical understandings about the nature of the sovereign power to take property and with this Court's jurisprudence.

I.

THE DECISION BELOW RAISES AN IMPORTANT ISSUE AS TO WHETHER SOVEREIGN IMMUNITY PRECLUDES A SUIT SEEKING JUST COMPENSATION FOR A TAKING BY A STATE

A. Sovereign Immunity Is in Tension with the Principle of Just Compensation for a Taking

The Eleventh Amendment affirms a principle of state sovereignty inherent in the constitutional structure: that states are sovereignly immune from most non-consensual suits, *Hans v. Louisiana*, 134 U.S. 1, 21 (1890), whether a suit is filed in state or federal court. *Alden v. Maine*, 527 U.S. 706, 712, 733, 749 (1999). In *Blatchford v. Native Village of Noatak and Circle Village*, 501 U.S. 775 (1991), the Court explained:

> [W]e have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition of our constitutional structure which it confirms: that the States entered the federal system with their sovereignty intact; that the judicial authority in Article III is limited by this sovereignty; and

> that a State will therefore not be subject to suit in federal court unless it has consented to suit, either expressly or in the "plan of the convention."

Id. at 779 (citations omitted).

It is particularly well-settled that sovereign immunity principles shield states from non-consensual suits for damages. *Edelman*, 415 U.S. at 666–67 (sovereign immunity does not allow a suit seeking retroactive monetary relief). However, there are exceptions.

For instance, state sovereign immunity does not apply when states "have consented" to suit "pursuant to the plan of the [Constitutional] Convention or to subsequent constitutional Amendments." *Alden*, 527 U.S. at 755. Pursuant to Section 5 of the Fourteenth Amendment, Congress can override the state's sovereign immunity when acting to enforce federal civil rights. *Id.* at 755–57. Moreover, the "'plan of the Convention' includes certain waivers of sovereign immunity to which all States implicitly consented at the founding." *PennEast*, 141 S. Ct. at 2258. Finally, states may waive their immunity from suit by taking voluntary actions inconsistent with a claim of immunity. *Gunter*, 200 U.S. at 284 ("Immunity is a privilege which may be waived; and hence, where a state voluntarily become a party to a cause . . . it will be bound thereby, and cannot escape the result of its own voluntary act by invoking the prohibitions of the 11th Amendment.").

At the same time, this Court has recognized that property owners have a constitutional (and common law) right to compensation when the government

takes property. *Knick*, 139 S. Ct. at 2171 (property owners have a "claim for just compensation at the time of the taking" (citing *First English Evangelical Lutheran Church of Glendale v. Los Angeles Cnty.*, 482 U.S. 304, 315 (1987))). Indeed, the Constitution provides an owner with a "self-executing" right to seek just compensation when a taking occurs. *First English*, 482 U.S. at 316 n.9 (The Just Compensation Clause, "of its own force, furnish[es] a basis for a court to award money damages against the government." (citation omitted)); *Jacobs v. United States*, 290 U.S. 13, 16 (1933) (claims "based on the right to recover just compensation for property taken" do not require "[s]tatutory recognition" but are "founded upon the Constitution"); *Knick*, 139 S. Ct. at 2171. The principle that a property owner may demand payment for a taking and that the states are sovereignly immune from claims for damages exist in an uneasy tension. Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 Yale L.J. 1, 116 (1988) (The "clarity of this textual provision for a monetary remedy is inconsistent with a premise of sovereign immunity as a constitutional doctrine[.]").

Of course, the states were not originally bound by the Fifth Amendment's "just compensation" requirement for a taking. *Barron v. City of Baltimore*, 32 U.S. (7 Pet.) 243, 247–51 (1833). However, this changed with the enactment of the Fourteenth Amendment. This event "'fundamentally altered the balance of state and federal power'" by "requir[ing] the States to surrender a portion of the sovereignty that had been preserved to them by the original

Constitution." *Alden*, 527 U.S. at 756 (citation omitted).[3]

The Due Process Clause is particularly relevant to the Fourteenth Amendment's limitation of state power. That Clause prohibits states from "depriv[ing] any person of . . . property, without due process of law." U.S. Const. amend. XIV, § 1. In *Chicago, B. & Q.R. Co.*, this Court held that the Due Process Clause incorporated the Fifth Amendment and bound states to the just compensation requirement. 166 U.S. at 233–34, 239–41; *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 306 n.1 (2002) (The Just Compensation Clause "applies to the States as well as the Federal Government.").[4] Jurists and commentators have recognized that state sovereign immunity is antithetical to the states' obligation to abide by the Just Compensation Clause through the Fourteenth Amendment. Seamon, 76 Wash. L. Rev. at 1067–68 ("The principles of sovereign immunity and just compensation are on a collision course."); Berger, 63 Wash. & Lee L. Rev. at 494.

This doctrinal conflict has become increasingly important as states have taken a more active role in the regulation of private property. In the modern era,

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[3] After the Civil War, secessionist states were required to ratify the Fourteenth Amendment as a condition of readmission to the Union, thus accepting the primacy of the United States Constitution and corresponding reduction in individual state sovereignty. *United States v. States of Louisiana, Texas, Mississippi, Alabama & Florida*, 363 U.S. 1, 125 (1960).

[4] *See also, Dolan v. City of Tigard*, 512 U.S. 374, 383 (1994); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 122 (1978); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 827 (1987); *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot.*, 560 U.S. 702, 717 (2010).

state entities, rather than local ones, are often the source of property rules and conditions that unconstitutionally take property rights. *See, e.g.*, *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021) (takings challenge to state agency's property access regulation); *Brown v. Legal Found. of Wash.*, 538 U.S. 216 (2003) (takings challenge to state rule requiring confiscation of interest on lawyer funds).

Yet, when property owners challenge a state taking of property in federal court, the defendant state entities are quick to assert that sovereign immunity prevents accountability. This occurs even in cases that involve classic unconstitutional takings that should be quickly resolved in favor of an award of compensation. *See O'Connor v. Eubanks*, 83 F.4th 1018, 1024 (6th Cir. 2023) (sovereign immunity barred a takings claim challenging state officials' confiscation of interest); *Zito v. N.C. Coastal Res. Comm'n*, 8 F.4th 281, 290 (4th Cir. 2021) (dismissing, on sovereign immunity grounds, a claim that a state's refusal to allow construction of a home prevented all economic use of land and caused a taking)*; Ladd v. Marchbanks*, 971 F.3d 574, 576 (6th Cir. 2020) (sovereign immunity barred a claim in federal court seeking compensation after state construction activities "flooded Plaintiffs' properties three times and caused significant damage"); *Citadel Corp. v. Puerto Rico Highway Auth.*, 695 F.2d 31, 33 n.4 (1st Cir. 1982) (sovereign immunity barred a claim that a property owner was owed compensation for a decades-long state "freeze" on development).

This Court's precedent holds that, of its own force, the Fifth Amendment provides property owners with an actionable compensation remedy for a taking in

federal court, whether that taking is caused by a state or its subdivisions. *Knick*, 139 S. Ct. at 2172 (affirming that *First English* rejected "the view that 'the Constitution does not, of its own force, furnish a basis for a court to award money damages against the government'" (citing *First English*, 482 U.S. at 316 n.9)). But this important constitutional right is hollow if states can simply invoke sovereign immunity to escape takings claims resting on the right to compensation. *Davis v. Mills*, 194 U.S. 451, 457 (1904) ("Constitutions are intended to preserve practical and substantial rights, not to maintain theories."). The Court should close this loophole in the Just Compensation Clause.

B. The Decision Below Conflicts with Common Law Understandings and This Court's Precedent

The Eighth Circuit's conclusion that North Dakota is immune from Vohses' claim that its laws effect an unconstitutional physical taking of their mineral interests is incompatible with the conditional nature of the state's power to take property and this Court's precedent.

1. The decision below conflicts with historical common law understandings about the limited, conditional nature of the sovereign power to take property

Since the beginning of the Anglo-American legal tradition, it has been understood that the sovereign has the power to press private property into public service. *See In The Case of the King's Prerogative in Salt-peter*, 12 Coke R. 13, C2 (1606) (The ability to take property for the sovereign's use "is an Incident

inseparable to the Crown, and cannot be granted, demised, or transferred to any other, but ought to be taken only by the Ministers of the King[.]"). At the same time, the common law has long recognized that use of the sovereign power to take property is conditioned upon provision of compensation. *Id.* at C1 (concluding that the king's ministers "are bound to leave the Inheritance of the Subject in so good Plight as they found it").

In 1625, the legal scholar Grotius stated that

> "the property of subjects is under the eminent domain of the State, so that the State or he who acts for it may use and even alienate and destroy such property . . . . But it is to be added that *when this is done the State is bound to make good the loss to those who lose their property*."

Philip Nichols, *The Power of Eminent Domain* 8, § 7 (1909) (quoting Hugo Grotius, *De Jure Belli et Pacis* (*On the Law of War and Peace*), lib. ii, e. 20 (1625)) (emphasis added). Blackstone made similar comments when examining the sovereign's power in post-Magna Carta England, stating that the legislature can "compel the individual to acquiesce," to a taking, though "[n]ot by absolutely stripping the subject of his property in an arbitrary manner; but *by giving a full indemnification* and equivalent for the injury thereby sustained." 1 William Blackstone, *Commentaries on the Laws of England* 139 (1753) (emphasis added).

Thus, by the time of the American founding, it was well-established that the sovereign power of eminent domain was tethered to a duty to pay just compensation to affected property owners. Such

payment was viewed as a "necessary attendant on the due and constitutional exercise of the power of the lawgiver, to deprive an individual of his property without his consent." 2 Kent, *Commentaries* at 144. As an early state court decision explained, it was

> a settled principle of universal law, that the right to compensation, *is an incident to the exercise of that power* [of eminent domain]: that the one is so inseparably connected with the other, that they may be said to exist not as separate and distinct principles, but as parts of one and the same principle.

Sinnickson v. Johnson, 17 N.J.L. 129, 145 (1839) (emphasis added); *see also*, *Cairo & Fulton R.R. Co. v. Turner*, 31 Ark. 494, 500 (1876) ("The duty to make compensation . . . is regarded, by most enlightened jurists, as founded in the fundamental principles of natural right and justice, and as lying at the basis of all wise and just government, independent of all written constitutions or positive law.").

Indeed, the power to appropriate property was often viewed simply as a power to compel a *sale* of property to the government. Thomas M. Cooley, *A Treatise on the Constitutional Limitations* 559 (4th ed. 1878) (The power is "in the nature of a payment for a compulsory purchase."); Henry E. Mills & Augustus L. Abbott, *Mills on the Law of Eminent Domain*, § 1, p. 6 (2d ed. 1888) (the power to take property is "in the nature of a compulsory purchase of the property of a citizen for the purpose of applying to public use"). This view itself rests on the understanding that a taking carries a sovereign obligation, and a concomitant implied promise, to pay for the property. *Great Falls Mfg. Co.*, 112 U.S. at 656 ("The law will imply a

promise to make the required compensation, where property, to which the government asserts no title, is taken[.]"); *Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18, 21 (1940) ("[I]f the authorized action in this instance does constitute a taking of property for which there must be just compensation under the Fifth Amendment, the Government has impliedly promised to pay that compensation[.]").[5]

The adoption of the Fifth Amendment to the Constitution enshrined the preexisting common law understanding that use of the sovereign power to take property is contingent on a promise to pay compensation. 3 Story, *Commentaries* 661 (The Fifth Amendment "is an *affirmance* of a great doctrine, *established by the common law for the protection of private property*. It is founded in natural equity, and is laid down by jurists as a principle of universal law." (emphasis added)); *Young*, 3 Ga. at 44 (The Just Compensation Clause "does not create or declare any *new principle of restriction*, either upon the legislation of the National or State government, but simply recognized the existence of a great common law principle, founded in natural justice, especially applicable to all republican governments, and which derived no additional force, as a *principle*, from being incorporated into the Constitution of the United States."). While the states were not bound by the Fifth Amendment at the time of its adoption, they were subject to the preexisting, underlying common law

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[5] If the government did not fulfill the implied promise to pay compensation when taking property, the use of the power to take property was considered illegitimate and void. Nichols, *The Power of Eminent Domain* at 304, § 261 ("An act which contains no sufficient provision for compensation may be treated by the landowner as void[.]").

principle that a taking of property comes with a promise to compensate. *Johnson*, 17 N.J.L. at 146; *Cairo & Fulton R.R. Co.*, 31 Ark. 494.

The Eighth Circuit's conclusion that North Dakota is immune from a claim for just compensation simply cannot be reconciled with these founding-era understandings about the conditional nature of the power to take property. More precisely, the lower court's conclusion is incompatible with the historical understanding that the exercise of the sovereign right to take property triggers a duty to compensate the owner. *Great Falls Mfg. Co.*, 112 U.S. at 656. The states have known from the earliest days of the Union that an obligation and promise to pay compensation adheres to the power to confiscate private property. *Rogers v. Bradshaw*, 20 Johns. 735, 745 (N.Y. 1823) ("This equitable and constitutional title to compensation, undoubtedly, imposes it as an absolute duty on the legislature to make provision for compensation whenever they authorize an interference with private right.").

Given the compensatory condition (and implied promise to pay) attached to the power to take property, when a state takes property, that *action itself* waives immunity from an owner's claim for compensation. *Gunter*, 200 U.S. at 284 (A state "cannot escape the result of its own voluntary act by invoking the prohibitions of the 11th Amendment."); *PennEast*, 141 S. Ct. at 2258.

2. The decision below conflicts with this Court's Just Compensation Clause precedent

In a long line of decisions culminating in *Knick*, this Court has held that the Just Compensation Clause provides a "self-executing" remedy for a taking. The Clause itself gives property owners a "claim for just compensation at the time of the taking." *Knick*, 139 S. Ct. at 2171 (citing *First English*, 482 U.S. at 315). *Knick* confirmed that a federal takings claim premised on the right to compensation is actionable in federal court as well as in state courts. *Id.* at 2171–73.

Moreover, as previously noted, the Court has repeatedly held that states are subject to the Just Compensation Clause through its incorporation in the Due Process Clause of the Fourteenth Amendment. In *Chicago, B. & Q.R. Co.*, this Court recognized that the Due Process Clause applied to the states the same preexisting, common law "just compensation" principle that animates the Fifth Amendment. 166 U.S. at 238 (describing the just compensation principle incorporated in the Due Process Clause as "a principle of natural equity, recognized by all temperate and civilized governments, from a deep and universal sense of its justice"); *see also*, *McDonald v. City of Chicago*, 561 U.S. 742, 760 (2010). The adoption of the Due Process Clause confirmed that states, too, are subject to the historical understanding that use of the power to take property implies a promise to pay compensation.

The Eighth Circuit's conclusion that sovereign immunity bars a claim seeking relief from an uncompensated taking cannot be reconciled with this

jurisprudence. If (1) the Just Compensation Clause authorizes a claim for relief from an uncompensated taking (it does), (2) the states are bound by the Clause through the Fourteenth Amendment (they are), and (3) suits seeking relief under the Just Compensation Clause are actionable in federal and state courts (they are), there is no room to conclude that states are immune from takings suits. *See Allen v. Cooper*, 555 F. Supp. 3d 226, 239 (E.D.N.C. 2021) ("the text of the Fifth Amendment seems to require the government to provide money damages despite any applicable sovereign immunity bars"); Nichols, *The Power of Eminent Domain* at 302, § 259 ("[T]he Fourteenth Amendment throws the protection of *the United States courts* over an individual whose property is taken *by authority of a State* without compensation; such a deprivation would not be by due process of law." (emphasis added)).

Indeed, this Court has held that Congress can enact legislation to enforce rights protected by the Fourteenth Amendment without violating sovereign immunity. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976). If so, enactment of the Due Process Clause should itself abrogate sovereign immunity from takings claims because it incorporates the "self-executing" just compensation remedy for a taking. Berger, 63 Wash. & Lee L. Rev. at 519 ("[T]he straight textual argument seems to require the government to provide money damages [for a taking], notwithstanding otherwise applicable sovereign immunity bars.").

In *First English*, this Court appeared to agree that the self-executing and explicitly remedial nature of the Just Compensation Clause overrides sovereign

immunity. There, the United States argued as amicus that "principles of sovereign immunity" prevented the Court from interpreting the Just Compensation Clause as "a remedial provision." Brief for the United States as Amicus Curiae Supporting Appellee, No. 85-1199, 1986 WL 727420, at *26–30 (U.S. Nov. 4, 1986). But the Court rejected this contention. *First English*, 482 U.S. at 316 n.9. Although this portion of the *First English* opinion does not fully address the sovereign immunity/takings issue, it strongly suggests that the Court did not consider just compensation claims to be impeded by sovereign immunity. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 714 (1999) (citing *First English* in questioning whether sovereign immunity "retains its vitality" in the context of compensation-seeking takings claims); *Lucien v. Johnson*, 61 F.3d 573, 575 (7th Cir. 1995) (stating that *First English* held that "the Constitution requires a state to waive its sovereign immunity to the extent necessary to allow claims to be filed against it for takings of private property for public use"); *see also*, Catherine T. Struve, *Turf Struggles: Land, Sovereignty, and Sovereign Immunity*, 37 New Eng. L. Rev. 571, 574 (2003); 1 Laurence H. Tribe, *American Constitutional Law* § 6–38, at 1272 (3d ed. 2000) (observing, based on *First English*, that the Takings Clause "trumps state (as well as federal) sovereign immunity").

Moreover, since *First English*, the Court has regularly resolved takings claims against states without concern for sovereign immunity barriers, reinforcing the perception that there is no such barrier. *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992), *Tahoe-Sierra*, 535 U.S. 302; *see generally*, *Manning v. N.M. Energy, Minerals & Natural Res.*

Dep't, 144 P.3d 87, 90 (N.M. 2006) (noting the Court "has consistently applied the Takings Clause to the states, and in so doing recognized, at least tacitly, the right of a citizen to sue the state under the Takings Clause"). Indeed, in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), one amicus curiae brief directly raised sovereign immunity as a potential bar to the takings claim, but the Court ignored the argument. *See* Amicus Brief of the Board of County Commissioners of the County of La Plata, Colorado, in Support of Respondents, No. 99-2047, 2001 WL 15620, at *20–21 (U.S. Jan. 3, 2001).

In short, the Eighth Circuit's conclusion that sovereign immunity prevents the court from adjudicating the Vohses' federal takings claim cannot be squared with this Court's Takings Clause precedent. *Hair v. United States*, 350 F.3d 1253, 1257 (Fed. Cir. 2003) ("[S]overeign immunity does not protect the government from a Fifth Amendment Takings claim because the constitutional mandate is 'self-executing.'"); *Leistiko v. Sec'y of Army*, 922 F. Supp. 66, 73 (N.D. Ohio 1996) ("The Just Compensation Clause, with its self-executing language, waives sovereign immunity because it can fairly be interpreted as mandating compensation by the government for the damage sustained."); Eric Grant, *A Revolutionary View of the Seventh Amendment and the Just Compensation Clause*, 91 Nw. U. L. Rev. 144, 199 (1996) ("It is a proposition too plain to be contested that the Just Compensation Clause of the Fifth Amendment is 'repugnant' to sovereign immunity and therefore abrogates the doctrine[.]").

II.

THE EIGHTH CIRCUIT'S RELIANCE ON THE DUE PROCESS ANALYSIS IN *REICH* CONFLICTS WITH THIS COURT'S PRECEDENT

The decision below relies largely on this Court's decision in *Reich v. Collins*, 513 U.S. 106, in concluding that the self-executing right to seek compensation does not exempt takings claimants from state sovereign immunity barriers. *See* App. 10a. This conclusion cannot be squared with this Court's precedent.

In *Reich*, the Court held that the Due Process Clause requires states to provide a refund remedy when the state unconstitutionally collects taxes. 513 U.S. at 108–09; *see also McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 32 (1990) (noting the "State's obligation to provide retrospective relief as part of [a] postdeprivation procedure"). In so holding, *Reich* concluded that sovereign immunity is not a bar: "'[A] denial by a state court of a recovery of taxes exacted in violation of the laws or Constitution of the United States by compulsion is itself in contravention of the Fourteenth Amendment,' the sovereign immunity States traditionally enjoy in their own courts notwithstanding." 513 U.S. at 109–10 (citation omitted).

However, in dicta, the Court observed that "the sovereign immunity States enjoy in *federal court,* under the Eleventh Amendment, *does* generally bar tax refund claims from being brought in that forum." *Id.* at 110 (citing *Ford Motor Co. v. Dep't of Treasury of Ind.*, 323 U.S. 459 (1945)) (emphasis added). Some

circuit court decisions, including the one below, conclude that *Reich*'s due-process-based sovereign immunity analysis resolves the issue of whether sovereign immunity bars an unconstitutional taking claim. This conclusion lacks any support in this Court's precedent.

Reich itself says nothing about the Takings Clause or the just compensation remedy. It deals with the "recovery of taxes," which does not implicate the Takings Clause. *Tyler v. Hennepin Cnty.*, 598 U.S. 631, 637 (2023). Moreover, the Court has repeatedly held that cases decided under the Due Process Clause fail to provide an analytic template for takings cases. Takings questions cannot be resolved by due process precedent. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 536–37, 541–42 (2005) (divorcing takings and due process principles; the "Takings Clause . . . 'is designed not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of otherwise proper interference amounting to a taking'" (quoting *First English*, 482 U.S. at 315)); *Knick*, 139 S. Ct. at 2174 ("[T]he analogy from the due process context to the takings context is strained . . . .").

The precedent also reveals two specific distinctions that preclude treating the Just Compensation Clause remedy like the tax refund remedy available under the Due Process Clause and discussed in *Reich*. First, the Due Process Clause tax refund remedy does not have the same historical pedigree as the Just Compensation Clause. No ancient common law principle holds that the sovereign power to tax is contingent on the provision of a tax refund remedy. *McKesson*, 496 U.S. at 32. On the other hand, as

discussed above, the just compensation remedy for a taking does trace to a historical common law rule that the sovereign power to take property includes an implied agreement to compensate. *Reich*'s due process-based sovereign immunity analysis does not account for this difference.

Second, unlike the Just Compensation Clause, the due process tax remedy is not self-enforcing in federal court. It is enforceable only in *state court*. *Reich*, 513 U.S. at 109 ("a denial by *a state court* of a recovery of taxes exacted in violation of the laws or Constitution of the United States by compulsion is itself in contravention of the Fourteenth Amendment" (emphasis added; citation omitted)); 28 U.S.C. § 1341 ("The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."); *see also Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100, 105 (1981) (holding tax claims non-justiciable in federal court). Again, the Just Compensation Clause *is* self-executing in federal court (as well as in state court). *Knick*, 139 S. Ct. at 2172 ("[B]ecause a taking without compensation violates the self-executing Fifth Amendment at the time of the taking, the property owner can bring a *federal* suit at that time." (emphasis added)); *United States v. Clarke*, 445 U.S. 253, 257 (1980) ("A landowner is entitled to bring such an [inverse condemnation] action as a result of the self-executing character of the constitutional provision with respect to compensation[.]" (quotations & citation omitted)).

Given this important difference, *Riech*'s due process-based sovereign immunity analysis is

inapplicable to a takings claim. Since due process tax refund claims are not enforceable in federal court, while just compensation claims are, *Knick*, 139 S. Ct. at 2171–73, *Reich*'s conclusion that sovereign immunity bars a due process claim in federal court, 513 U.S. at 110, has no bearing on Just Compensation Clause claims. In sum, *Reich* simply does not address the issue here: whether a constitutional remedy that is self-executing and enforceable in federal court functions as an exception to sovereign immunity in that forum. The lower court's reliance on *Reich* to hold that sovereign immunity bars the Vohses' claims is not consistent with this Court's Just Compensation Clause precedent.

One additional comment is warranted. In justifying its decision, the Eighth Circuit observed that sovereign immunity "bars a claim against the State in federal court *as long as state courts remain open* to entertain the action." App. 10a (emphasis added). The lower court cites several circuit court opinions in support of this proposition, but these decisions ultimately also rely on *Reich*, *see, e.g.*, *Seven Up Pete Venture v. Schweitzer*, 523 F.3d 948, 955 (9th Cir. 2008), and are inapposite for the reasons stated above. Moreover, this Court has made clear that sovereign immunity applies equally in federal and state courts. *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485, 1493 (2019); *Alden*, 527 U.S. at 731, 754 ("we hold that the States retain immunity from private suit in their own courts"). If state courts are "open" to claims under the Just Compensation Clause notwithstanding sovereign immunity, *Manning*, 144 P.3d 87, there is no basis for a different result in federal court. *McDonald*, 561 U.S. at 765 ("[I]t would be 'incongruous' to apply different standards

'depending on whether the claim was asserted in a state or federal court.'" (quoting *Malloy v. Hogan*, 378 U.S. 1, 10–11 (1964))).

Takings claims seeking a remedy under the Just Compensation Clause are either exempt from sovereign immunity or they are not. They are—not because of what state courts are doing, but because of what the Constitution already did: enshrined the preexisting understanding that a duty to pay compensation accompanies an exercise of the power to take property and waives a state's claim of sovereign immunity.

CONCLUSION

The Court should grant the Petition.

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