

No. 17-757

In The
Supreme Court of the United States

◆

PATRICIA RAGLAND McGEHEE, et vir,

Petitioners,

v.

KENTUCKY TRANSPORTATION CABINET,
DEPARTMENT OF HIGHWAYS,

Respondent.

◆

**On Petition For Writ Of Certiorari
To The Court Of Appeals Of Kentucky**

◆

BRIEF IN OPPOSITION

◆

JOHN F. ESTILL
FOX, WOOD, WOOD & ESTILL
24 W. Third Street
Maysville, Kentucky 41056
jestill@fwwe.law
(606) 564-5585

Counsel of Record for Respondent

P. KEVIN MOORE, ESQ.
Executive Director & General Counsel
OFFICE OF LEGAL SERVICES
KENTUCKY TRANSPORTATION CABINET
200 Mero Street
Frankfort, Kentucky 40622
(502) 564-7650

QUESTION PRESENTED

The Questions Presented by the McGehees in their Petition for a Writ of Certiorari were not preserved for appeal, because they were not the subject of the Kentucky Court of Appeals' Opinion which the McGehees seek to review. The sole question is whether there is any basis for review under 28 U.S.C. § 1257, when no federal issues or claims were involved in the underlying Kentucky Court of Appeals' Opinion, which only addressed the limited issues of whether the Trial Court abused its discretion in directing the Trial Court's Master Commissioner to execute a deed of conveyance in a condemnation action or erred in ordering sanctions under Kentucky Rule of Civil Procedure (KRCP) 11 against the Petitioners in the amount of \$1,100.00.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED.....	i
STATEMENT OF THE CASE.....	1
ARGUMENT.....	7
A. THE TRIAL COURT PROPERLY ORDERED ITS MASTER COMMISSIONER TO DELIVER A DEED OF CONVEYANCE TO KYTC	7
B. THE COURT OF APPEALS PROPERLY FOUND THAT THE IMPOSITION OF KRCP 11 SANCTIONS WAS BASED UPON SUBSTANTIAL EVIDENCE	8
C. THE STATE LAW CONDEMNATION PROCEEDINGS PROVIDED DUE PROCESS AND SATISFIED THE JUST COMPENSATION CLAUSE.....	10
D. REVIEW OF FEDERAL CLAIMS NOT PART OF THE RECORD OR PRESERVED FOR APPEAL IS INAPPROPRIATE.....	13
E. THERE IS NOTHING TO BE REVIEWED BY THIS COURT ON CERTIORARI, AS THE STATE COURT CASE WAS CONCLUDED BY SETTLEMENT	16

TABLE OF CONTENTS – Continued

	Page
F. THERE IS NO BASIS TO REVIEW THE FINAL STATE COURT JUDGMENTS ON ISSUES INVOLVING STRICTLY STATE LAW	18
CONCLUSION.....	20

APPENDIX INDEX

Opinion, Commonwealth of Kentucky Court of Appeals (February 19, 2010).....	1a
Order Denying Discretionary Review, Supreme Court of Kentucky (October 13, 2010).....	11a
Opinion, United States Court of Appeals for the Sixth Circuit (December 10, 2012)	12a
Order Denying Discretionary Review, Supreme Court of Kentucky (August 16, 2017).....	17a

TABLE OF AUTHORITIES

	Page
CASES	
<i>Adams v. Robertson</i> , 520 U.S. 83 (1997).....	15, 16
<i>Brooks v. Lexington-Fayette Urban County Housing Authority</i> , 244 S.W.3d 747 (Ky. Ct. App. 2007)	19
<i>Brown v. Legal Foundation of Washington</i> , 538 U.S. 216 (2003)	11
<i>Christianson v. Colt Indus. Operating Corp.</i> , 486 U.S. 800 (1988)	18
<i>Clark Equipment Co., Inc. v. Bowman</i> , 762 S.W.2d 417 (Ky. Ct. App. 1988).....	6, 9
<i>Columbia Basin Land Protection Assoc. v. Schlesinger</i> , 643 F.2d 585 (9th Cir. 1981).....	16
<i>Parker v. White</i> , 4 S.W.2d 380 (Ky. 1928).....	20
<i>Penn Central Transp. Co. v. City of New York</i> , 438 U.S. 104 (1978)	11
<i>Street v. New York</i> , 394 U.S. 576 (1969).....	16
<i>Taylor v. Mills</i> , 320 S.W.2d 111 (Ky. 1958).....	19
<i>Union Light, Heat & Power Co. v. Blackwell's Adm'r</i> , 291 S.W.2d 539 (Ky. 1956).....	19
<i>Van Abbema v. Fornell</i> , 807 F.2d 633 (7th Cir. 1986)	16
<i>West v. Secretary of Dept. of Transp.</i> , 206 F.3d 920 (9th Cir. 2000).....	16

TABLE OF AUTHORITIES – Continued

	Page
CONSTITUTIONAL PROVISIONS	
U.S. Const. Art. V	11
KY. Const. 1891, § 13	11
KY. Const. 1891, § 242	11
STATUTES	
5 U.S.C. § 706	14
28 U.S.C. § 1257(a).....	10, 11, 17
28 U.S.C. § 1257	6, 15
Clean Water Act (CWA) (33 U.S.C. § 1344)	3, 14
Kentucky Eminent Domain Act, KRS 416.540, <i>et</i> <i>seq.</i>	8, 12, 18
KRS 177.081	12
KRS 177.081(1)	1
KRS 416.610	12
KRS 416.610(2)(d)	5, 8
KRS 416.620	12
KRS 426.570	5, 8
KRS 426.571	58, 8
National Environmental Protection Act (NEPA) (42 U.S.C. § 4321, <i>et seq.</i>)	3, 14
National Historic Preservation Act (NHPA) (16 U.S.C. § 470f)	3
Safe Drinking Water Act (42 U.S.C. § 300f)	3, 14

TABLE OF AUTHORITIES – Continued

	Page
Uniform Relocation Assistance and Real Property Acquisition Policies Act (42 U.S.C. § 4601, <i>et seq.</i>)	3
RULES	
KRCP 11.....	4, 7

Comes the Respondent Commonwealth of Kentucky, Transportation Cabinet, Department for Highways (“KYTC”), and respond to the Petition for a Writ of Certiorari filed herein by the Petitioners, Patricia Ragland McGehee and Richard McGehee (hereinafter “the McGehees”), as follows:

◆

STATEMENT OF THE CASE

KYTC will not describe in full the entire procedural history of this case (or cases), which has been protracted and often convoluted. The Kentucky Court of Appeals Opinion Affirming details the “Factual and Procedural History,” which commenced with the filing of KYTC’s Petition to condemn a portion of the McGehees’ property for the construction of a public highway project. SEE Petitioners’ Appendix A, at p. 2a.

After a lengthy bench trial, an Interlocutory Order and Judgment was entered finding that KYTC met its burden in the right to take, that KYTC was entitled to condemn a portion of the McGehees’ property, and that the McGehees failed to prove that KYTC acted in bad faith, committed fraud, or abused its discretion in condemning the property under KRS 177.081(1), which would have precluded the acquisition by KYTC. SEE Petitioners’ Appendix F, at p. 23a. The Kentucky Court of Appeals dismissed the McGehees’ initial appeal as premature because the Trial Court had not yet ruled on their motion for relief from the Interlocutory Judgment. SEE Petitioners’ Appendix A, at pp. 3a-4a.

After the Trial Court overruled the McGehees' motion to amend or vacate the Interlocutory Judgment, the McGehees appealed again, alleging that KYTC failed to issue proper service of process and that the Trial Court erred in its determination that KYTC had the right to condemn the property. SEE Kentucky Court of Appeals Opinion Affirming, Case No. 2008-CA-001568-MR, appended hereto as Respondent's Appendix A. The Kentucky Court of Appeals affirmed the Trial Court's Interlocutory Order and Judgment that KYTC had the right to condemn the McGehees' property. *Id.* The opinion of the Court of Appeals (Respondent's Appendix A) affirming the Trial Court's Interlocutory Order and Judgment (Petitioners' Appendix F) became final when the Kentucky Supreme Court denied the McGehees' Motion for Discretionary Review. SEE Order Denying Discretionary Review, Kentucky Supreme Court Case No. 2010-SC-000317-D, appended hereto as Respondent's Appendix B.

The McGehees then filed a separate lawsuit against KYTC in the Franklin Circuit Court alleging violation of the Kentucky Model Procurement Code located in KRS Chapter 45A. SEE Petitioners' Appendix A, at p. 3a. The Franklin Circuit Court litigation is not particularly germane to the issues presented in the McGehees' Petition before this Court, but rather it is mentioned to further illustrate the protracted history of the dispute between the parties. The Franklin Circuit Court's Order of Dismissal of the McGehees' Complaint was affirmed by the Kentucky Court of Appeals in its Case No. 2009-CA-00611-MR, and the Kentucky

Supreme Court thereafter denied the McGehees' Motion for Discretionary Review of the opinion affirming. Kentucky Supreme Court, Case No. 2011-SC-000098.

Subsequently, the McGehees filed an action in the United States District Court for the Western District of Kentucky, Case No. 3:11-cv-160-H, alleging KYTC violated various federal statutes, including Section 404 of the Clean Water Act (CWA) (33 U.S.C. § 1344), the Safe Drinking Water Act (42 U.S.C. § 300f), the National Environmental Protection Act (NEPA) (42 U.S.C. § 4321, *et seq.*), Section 106 of the National Historic Preservation Act (NHPA) (16 U.S.C. § 470f), and the Uniform Relocation Assistance and Real Property Acquisition Policies Act (42 U.S.C. § 4601, *et seq.*). Although there was no federal funding for the project and the project had been redesigned to avoid federal jurisdiction through the U.S. Army Corps of Engineers' nationwide permit program, the McGehees and KYTC settled all issues before the Federal District Court. SEE Settlement Agreement at Petitioners' Appendix K. The settlement included an agreement as to the amount of damages payable by KYTC to the McGehees in the original condemnation case, which was still pending before the Trial Court, and also provided for possession of the property by KYTC. *Id.* The judgment of the United States District Court dismissing the federal action as settled was affirmed on an appeal taken by the McGehees to the United States Court of Appeals for the Sixth Circuit. SEE Opinion of the United States Court of Appeals for the Sixth Circuit, Case No. 12-5112, appended hereto as Respondent's Appendix C.

The Sixth Circuit denied the McGehees' motion for an injunction to prevent completion of the road, concluding that "the District Court properly dismissed the action for lack of jurisdiction after the controversy was rendered moot by the settlement agreement." *Id.* at p. 3.

Long after the right to take issue became final (Respondent's Appendix A), and the amount of compensation due to the McGehees for the acquisition was determined in the District Court settlement agreement (Petitioners' Appendix K), KYTC moved the Trial Court for an Order directing the Master Commissioner to convey the property described in the Interlocutory Order and Judgment (Petitioners' Appendix F) and for sanctions pursuant to KRCP 11 for the McGehees' repetitive and baseless filing of pleadings despite finality on both the right to take and compensation issues. SEE Petitioners' Appendices D and E. As a result, the Trial Court sustained both motions and after a hearing imposed sanctions against the McGehees in the amount of \$1,100.00. The McGehees again appealed to the Kentucky Court of Appeals on the limited issues relating to the orders authorizing the Master Commissioners' deed and the imposition of KRCP 11 sanctions. SEE Petitioners' Appendix A, at pp. 5a-6a. The right to take issue was not an issue in the appeal as it had already been resolved in favor of KYTC with a final judgment. SEE Respondent's Appendices A and B. Further, the McGehees claimed that the settlement agreement in the U.S. District Court case, which established the compensation in the State Court condemnation action,

was procured through undue influence. However, the McGehees did not preserve for appeal an objection to the order of the Trial Court determining that the Federal District Court settlement agreement was binding on the parties as to the remaining issues in the condemnation case; therefore, such allegations are precluded from further review. SEE Petitioners' Appendix D.

The Kentucky Court of Appeals applied the abuse of discretion standard and in affirming the order of the Trial Court directing the Master Commissioner to execute a deed of conveyance for the property, concluded that the law of the case doctrine controlled and that the order was statutorily authorized by KRS 416.610(2)(d), KRS 426.570, and KRS 426.571. SEE Petitioners' Appendix A, at p. 8a. The Court of Appeals found the McGehees' arguments unpersuasive and characterized the appeal as an effort to relitigate matters already addressed in the prior final opinion of the Court of Appeals:

The trial court made the requisite findings necessary to allow condemnation. Further, this Court had affirmed those findings, making them binding law of the case . . . [citations omitted] . . . This Court specifically held in 2009-CA-01568-MR that the trial court "did not err in entering an interlocutory order condemning the property." That conclusion, under the law of the case doctrine, became inescapably binding on the trial court, depriving the trial court of any discretion to act in a manner inconsistent with the ruling. The trial

court was thus authorized only to enforce the ruling.

Petitioners' Appendix A, at p. 7a.

As to the sanctions imposed upon the McGehees by the Trial Court, the Court of Appeals applied the clearly erroneous standard applicable to findings of fact, as established by *Clark Equipment Co., Inc. v. Bowman*, 762 S.W.2d 417 (Ky. Ct. App. 1988), and concluded that the sanctions were appropriate in light of the filing by the McGehees of a voluminous affidavit, which the Court referred to as a "47 page diatribe" detailing the proceedings from the federal proceedings which were settled and dismissed. Petitioners' Appendix A, at p. 9a.

After the Court of Appeals Opinion Affirming (Petitioners' Appendix A) was entered, the McGehees filed a motion for discretionary review with the Kentucky Supreme Court, which was ultimately denied. SEE Order Denying Discretionary Review, Kentucky Supreme Court Case No. 2017-SC-000095-D, appended hereto as Respondent's Appendix D.

After finality in the Kentucky Court system, the McGehees now attempt to invoke jurisdiction under 28 U.S.C. § 1257 and seek a Writ of Certiorari from this Court. Regardless of the procedurally exhausting history of this case as described above and the McGehees' attempts to rehash final judgments before both the state and federal courts on multiple occasions, there are only two very limited issues which were properly preserved for the State Court appeal that could be

considered in the Petition. First, whether the Trial Court properly authorized the Master Commissioner to execute a deed of conveyance to KYTC when the McGehees failed or refused to execute a deed. Second, whether the Kentucky Court of Appeals was correct in its determination that the imposition of the \$1,100.00 KRCP 11 sanctions were appropriate. No other issues remain for proper review herein.

◆

ARGUMENT

A. THE TRIAL COURT PROPERLY ORDERED ITS MASTER COMMISSIONER TO DELIVER A DEED OF CONVEYANCE TO KYTC.

The settlement agreement entered between the McGehees and KYTC in the federal action determined the amount of compensation due to the McGehees for the taking in the State Court condemnation case, and further required the McGehees to execute and deliver a deed of conveyance for the property acquired by KYTC. SEE Petitioners' Appendix K, at p. 51a. After the consideration was paid and no deed was executed by the McGehees as required by paragraph 9 of the settlement agreement (Appendix K), KYTC moved the Trial Court for a Master Commissioner's Deed. Thereafter, in accordance with the Trial Court's order, the Master Commissioner executed a deed in favor of KYTC, which was subsequently recorded. SEE Petitioners' Appendices E and J.

The underlying State Court action is a condemnation action, which is a special statutory proceeding. SEE Kentucky Eminent Domain Act, KRS 416.540, *et seq.* In its Opinion Affirming, the Kentucky Court of Appeals concluded that the legislation required the Court to provide in its judgment for “[p]roper provision for the conveyance of the title to the land” acquired. KRS 416.610(2)(d). SEE Petitioners’ Appendix A, at p. 8a. Under Kentucky law, the Master Commissioner is specifically authorized to convey title to real estate as required by a judgment. KRS 426.570 and KRS 426.571. *Id.*

The deed was ultimately required when the Interlocutory Order and Judgment on the right to take order became final. Petitioners’ Appendices A and F. Moreover, the deed was contemplated and required by the settlement agreement executed by the McGehees in the settlement procured in the Federal District Court action. SEE Petitioners’ Appendix K.

B. THE COURT OF APPEALS PROPERLY FOUND THAT THE IMPOSITION OF KRCP 11 SANCTIONS WAS BASED UPON SUBSTANTIAL EVIDENCE.

As is described above, the McGehees compromised and settled in the federal lawsuit against KYTC the amount due to them in the State Court condemnation action. SEE Petitioners’ Appendix K. In considering the McGehees’ response to KYTC’s motion for a master commissioner deed, the Trial Court concluded that the

response was a 47 page “diatribe rehashing all of the proceedings, including those in federal court” filed in an effort “to delay and to harass the opposing party.” SEE Petitioners’ Appendix E, at pp. 20a-21a. Sanctions were imposed against the McGehees for KYTC’s attorneys’ fees in the amount of \$1,100.00. *Id.*

The McGehees only preserved for the State Court appeal the findings of fact of the Trial Court supporting the imposition of CR 11 sanctions, requiring the Court of Appeals to apply the clearly erroneous standard in its review. *Clark Equipment Company v. Bowman*, 762 S.W.2d 417 (Ky. Ct. App. 1988). In imposing sanctions, the Trial Court recognized the important public policy of the finality of judgments, considering that the “determination of this Court of the Commonwealth’s right to take was appealed, and that decision was affirmed, and discretionary review was denied by the Kentucky Supreme Court.” SEE Petitioners’ Appendix E, at p. 19a.

Kentucky case law establishes that different standards of review apply to findings of fact determining that sanctions should be imposed, to legal conclusions drawn by the court in imposing sanctions, and to the determination of the severity of the sanctions. *Clark Equipment Co., Inc. v. Bowman, supra*. On appeal, the McGehees only preserved a claim that the Trial Court made erroneous findings of fact in imposing sanctions. SEE Petitioners’ Appendix A, at p. 9a. The Court of Appeals found that the imposition of sanctions was supported by substantial evidence in the record and affirmed the Trial Court’s order, finding

that the McGehees' pleading triggering the sanction was indeed "an attempt to relitigate settled and concluded issues." *Id.*

C. THE STATE LAW CONDEMNATION PROCEEDINGS PROVIDED DUE PROCESS AND SATISFIED THE JUST COMPENSATION CLAUSE.

The McGehees seek review by this Court of a final decision of the Kentucky Court of Appeals, on the very limited issues detailed above. SEE Petitioners' Appendix A. The McGehees' brief in support of their Petition reiterates their failed arguments from the Trial Court, defies the settlement agreement entered as to compensation in the Federal Court action (Petitioners' Appendix K), and disregards several final decisions of the Kentucky Courts which constitute the law of the case. Respondent's Appendix A and Petitioners' Appendix A.

The McGehees seek such review by this Court under 28 U.S.C. § 1257(a), which permits review of state court decisions:

. . . by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties

or statutes of, or any commission held or authority exercised under, the United States.

28 U.S.C. § 1257(a). In this case, there are no federal treaties or statutes arguably involved. However, KYTC recognizes that the Kentucky statutory framework for eminent domain and the judicial procedures employed to acquire property for public projects must meet Constitutional muster under the Fifth Amendment to the United States Constitution, and its mandate that private property not be taken for public use “without just compensation.” U.S. Const. Art. V.

Although typically recited in the context of “takings” cases involving regulatory restriction on the use of real property, rather than in state court condemnation proceedings, KYTC also acknowledges the application of the Fifth Amendment’s “just compensation” protections to the states. *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978); *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003).

The Kentucky Constitution affords similar guarantees to “just compensation.” Section 13 of the Kentucky Constitution provides that property shall not be “taken or applied to public use without the consent of his representatives, and without just compensation being previously made to him.” KY. Const. 1891, § 13. Section 242 of the Kentucky Constitution prohibits “taking private property for public use [without making] just compensation for property taken injured or destroyed by them; which compensation shall be paid before such taking . . .” KY. Const. 1891, § 242.

The constitutionally required safeguards are contained in the Kentucky Eminent Domain Act, codified at KRS 416.540, *et seq.* A condemnation action is typically litigated in two separate and distinct phases. First, the court determines if the property is necessary for the construction of a public project. KRS 416.610. Under Kentucky law, there is a presumption of such public necessity once KYTC administratively determines that a public highway project should be undertaken, unless the property owner establishes bad faith, fraud or abuse of discretion. KRS 177.081. Commissioners are appointed to evaluate and appraise the property to be acquired, and then fix damages which are deposited with the Court prior to the taking to satisfy the constitutional requirements that damages be paid in advance of the taking. KRS 416.620. Next, an Interlocutory Order and Judgment is entered on the right to take issue if it is not contested by the responsive pleadings or after a finding on the issue by the court during a bench trial. *Id.* After entry of an Interlocutory Judgment on the right to take issue, either party can file exceptions as to the amount of the award. If these exceptions are filed, then the case is concluded by a jury trial to determine damages to compensate for the taking. KRS 416.620.

It is within this statutory framework that the initial condemnation proceedings were commenced against the McGehees in state court. The McGehees had the benefit of counsel and were afforded the opportunity to be heard during a four day bench trial on the right to take issue. Possession of the property was not

taken by KYTC until entry of the Interlocutory Order and Judgment following the trial and the posting of the Commissioners' award. Exceptions were filed by both parties as to the amount of compensation fixed by the Commissioners. The McGehees availed themselves of the right to appeal the Interlocutory Order and Judgment on the right to take issue, and the judgment was affirmed by the Appellate Court. SEE Respondent's Appendix A. Compliance with the statutory procedures fully satisfied both the Kentucky Constitutional provisions and statutes, as well as the Fifth Amendment to the United States Constitution. Additionally, the multiple appeals, motions for discretionary review in the Kentucky Supreme Court, the Federal District Court case and the subsequent review by the Sixth Circuit, demonstrates due process was not only afforded, but any such requirements have long been met. There is no action by any Court or KYTC which this Court could consider "repugnant" to any of the laws or Constitution of the United States. Accordingly, this Petition should be denied.

**D. REVIEW OF FEDERAL CLAIMS NOT
PART OF THE RECORD OR PRESERVED
FOR APPEAL IS INAPPROPRIATE.**

The McGehees asserted federal claims against KYTC in the Federal District Court action, which were resolved by a settlement agreement, and the dismissal of the action was affirmed by the Sixth Circuit. SEE Petitioners' Appendix K and Respondent's Appendix B. As is established above, there are very limited State

Court issues preserved for the most recent appeal to the Kentucky Court of Appeals, and sought to be reviewed herein, those issues being only whether the Court should have ordered a Master Commissioner's deed and whether sanctions should have been imposed. SEE Petitioners' Appendix A.

The McGehees' Petition for a Writ of Certiorari attempts to invoke federal jurisdiction under 5 U.S.C. § 706, which provides for review of actions of federal, and not state agencies. SEE Petition, at pp. 1-2. The Petition also renews allegations that KYTC violated the Clean Water Act (CWA) (33 U.S.C. § 1344), the Safe Drinking Water Act (42 U.S.C. § 300f), the National Environmental Protection Act (NEPA) (42 U.S.C. § 4321, *et seq.*), and federal regulations promulgated pursuant to such federal statutes. SEE Petition at pp. 26-31. None of the cited statutory or regulatory authorities are a part of the record in the Court of Appeals case sought to be reviewed, and therefore none of the federal claims were preserved for appeal therein. SEE Petitioners' Appendix A. While the McGehees have repetitively asserted these claims in the Trial Court in the right to take action, in the Kentucky Appellate Courts, in the Federal District Court and then in the Sixth Circuit, all of those claims were resolved in favor of KYTC, were affirmed, and became final judgments, and therefore not subject to review by this Court herein. SEE Petitioners' Appendices F and K; SEE ALSO Respondent's Appendices A, B and C. Again, the issues preserved for appeal and addressed by the Kentucky Court of Appeals in Petitioners' Appendix A

involve no federal statutes, regulations, or authority whatsoever.

In *Adams v. Robertson*, 520 U.S. 83 (1997), the U.S. Supreme Court granted a petition for certiorari to review the Alabama Supreme Court's order affirming a lower court's approval of a class action settlement agreement. In this Court's opinion, it was noted that the Alabama Supreme Court only addressed state law issues in its opinion affirming, while the petitioners claimed violations of the Due Process Clause. The Court dismissed the writ as improvidently granted because the Alabama Supreme Court did not address any federal issues. "With very rare exceptions, we have adhered to the rule in reviewing state court judgments under 28 U.S.C. § 1257 that we will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review." *Adams v. Robertson*, at 86 (citations omitted). Further, the Supreme Court declared that if a State Court decision to be reviewed is silent on federal questions, then the Court should assume that the federal issue was not properly presented. *Id.*

In the present case, there is no reference to a federal issue in the opinion sought to be reviewed, other than the tangential reference to the proceedings in the Federal District Court. Petitioners' Appendix A, at pp. 5a-6a. The Kentucky Appellate Court failed to reference any federal issues, therefore this Court can assume that no such issues were present, and the Petition should be denied accordingly. *Adams v.*

Robertson, supra, at 86. SEE ALSO *Street v. New York*, 394 U.S. 576, 581-582 (1969).

**E. THERE IS NOTHING TO BE REVIEWED
BY THIS COURT ON CERTIORARI, AS
THE STATE COURT CASE WAS CON-
CLUDED BY SETTLEMENT.**

Much of the McGehees' Petition is devoted to arguing that the "mootness doctrine" was somehow improperly used to deprive them of their multiple appeals. SEE Petition, at pp. 24-33 (relying upon *Columbia Basin Land Protection Assoc. v. Schlesinger*, 643 F.2d 585, 591 (9th Cir. 1981), *West v. Secretary of Dept. of Transp.*, 206 F.3d 920, 925 (9th Cir. 2000), and *Van Abbema v. Fornell*, 807 F.2d 633, 636-637 (7th Cir. 1986)). In their Petition, and in the state and federal court proceedings described above, the McGehees seek the unusual and extraordinary relief that the courts require "KYTC to promptly remove the Ring Road . . ." from their property. Petition, at p. 33. KYTC agrees that the completion of a project before a judgment is entered does not make it necessarily immune from the final judgment of a court pertaining to the completed project. However, in this case, the project was completed after the Interlocutory Order and Judgment was entered and the opinion of the Appellate Court affirming the public necessity finding was made final. SEE Petitioners' Appendix F, Interlocutory Order and Judgment; SEE ALSO Respondent's Appendix A, Kentucky Court of Appeals Opinion Affirming.

The McGehees misconstrue and misrepresent the mootness doctrine, and KYTC's argument concerning same. KYTC does not argue that the completion of the roadway project moots the McGehees' claims, but instead posits that the issues are moot because the Interlocutory Order and Judgment on the right to take issue is final and the issue of compensation for the taking was the subject of a settlement agreement fixing the compensation owed to the McGehees. SEE Petitioners' Appendices D, F and K; Respondent's Appendix A. The United States Court of Appeals for the Sixth Circuit determined that the "controversy was rendered moot by the settlement agreement" between the parties, and that decision was not preserved for appeal, nor subject to review herein. SEE Respondent's Appendix B.

There is no basis under 28 U.S.C. § 1257(a) for this Court to review the very limited procedural issues preserved for appeal in the now final opinion of the Kentucky Court of Appeals. SEE Petitioners' Appendix A. The only nexus of this controversy to federal jurisdiction is that it was within the Federal District Court proceedings that the settlement was reached between the parties on the State Court condemnation case. SEE Petitioners' Appendix K. The case is moot, as being final and concluded, and there are no questions presented as to Federal Constitutional or statutory claims that would make review under 28 U.S.C. § 1257(a) appropriate.

**F. THERE IS NO BASIS TO REVIEW THE
FINAL STATE COURT JUDGMENTS ON
ISSUES INVOLVING STRICTLY STATE
LAW.**

The proceedings between the parties are condemnation proceedings for KYTC, a state agency, to construct a state highway upon a portion of the McGehees' property acquired pursuant to the Kentucky Eminent Domain Act, codified at KRS 416.540, *et seq.* There was a Federal District Court case filed by the McGehees, but it was settled and dismissed, out of which the amount of compensation due to the McGehees in the State Court condemnation action was determined. SEE Petitioners' Appendix K.

A review of the extensive record in the litigation and various appeals between the parties makes clear that the McGehees have in no way been deprived of their "day in Court." Rather, the McGehees have had many opportunities to be heard, primarily while represented by counsel, and yet have time-and-time again refused to abide by final decisions of the Trial Court, the Kentucky Appellate courts, the Federal District Court, or the Sixth Circuit.

KYTC acknowledges that this Court has authority to review final decisions of the Kentucky Courts under 28 U.S.C. § 1257(a), the "law of the case" doctrine notwithstanding. *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817-18 (1988) ("[A] court of appeals' adherence to the law of the case cannot insulate an issue from this Court's review".)

However, in considering the Petition it is critical that the Court recognize that the McGehees have had opportunity to be heard, and that all litigation in the Kentucky Court system has concluded and is final under the law of the case doctrine.

The law of the case doctrine is described as:

. . . an iron rule, universally recognized, that an opinion or decision of an appellate court in the same cause is the law of the case for a subsequent trial or appeal however erroneous the opinion or decision may have been. The doctrine is predicated upon the principle of finality . . . It has been often said that it would be intolerable if matters once litigated and determined finally could be relitigated between the same parties, for otherwise litigation would be interminable and a judgment supposed to finally settle the rights of the parties would be only a starting point for new litigation.

SEE *Brooks v. Lexington-Fayette Urban County Housing Authority*, 244 S.W.3d 747, 751 (Ky. Ct. App. 2007) (quoting *Union Light, Heat & Power Co. v. Blackwell's Adm'r*, 291 S.W.2d 539, 542 (Ky. 1956)). SEE ALSO *Taylor v. Mills*, 320 S.W.2d 111 (Ky. 1958) (“The final decision of this Court is the law of the case, whether right or wrong, and is conclusive of the questions therein resolved and may not be reopened and reconsidered by prosecuting an appeal from a judgment entered in conformity herewith.”)

While it is axiomatic and inherent in all concepts of due process that litigants have the opportunity to be

heard, it is equally important that eventually all litigation must come to an end. In *Parker v. White*, 4 S.W.2d 380, 381 (Ky. 1928), the Kentucky Supreme Court stated that there “should be an end of litigation, and upon reasonable necessity which impels protection of the individual from the vexation of repeated suits.” The time for the end of this litigation has long passed, and accordingly the Petition should be denied.



CONCLUSION

FOR THE FOREGOING reasons, KYTC prays that the Petition be DENIED.

Respectfully submitted,

JOHN F. ESTILL
FOX, WOOD, WOOD & ESTILL
24 W. Third Street
Maysville, Kentucky 41056
jestill@fwwe.law
(606) 564-5585
Counsel of Record for Respondent

P. KEVIN MOORE, ESQ.
Executive Director &
General Counsel
OFFICE OF LEGAL SERVICES
KENTUCKY TRANSPORTATION CABINET
200 Mero Street
Frankfort, Kentucky 40622
(502) 564-7650