

No. \_\_\_\_\_

---

---

In the  
**Supreme Court of the United States**

---

BAY POINT PROPERTIES, INCORPORATED,

*Petitioner,*

v.

MISSISSIPPI TRANSPORTATION COMMISSION;  
MISSISSIPPI DEPARTMENT OF TRANSPORTATION;  
DICK HALL, in his capacity as Mississippi Transportation Commissioner;  
MIKE TAGERT, in his capacity as Mississippi Transportation Commissioner;  
TOM KING, in his capacity as Mississippi Transportation Commissioner;  
WAYNE H. BROWN, in his capacity as former Mississippi Transportation  
Commissioner; MELINDA MCGRATH, in her capacity as Executive Director of the  
Mississippi Department of Transportation; LARRY BROWN, in his capacity as  
former Executive Director of Mississippi Department of Transportation, also known  
as Butch; DANIEL B. SMITH, in his capacity as Administrator of the Right-of-Way  
Division of Mississippi Department of Transportation,

*Respondents.*

---

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

---

**APPLICATION FOR EXTENSION OF TIME  
TO FILE PETITION FOR WRIT OF CERTIORARI  
TO THE SUPREME COURT OF THE UNITED STATES**

---

J. DAVID BREEMER  
*Counsel of Record*  
Pacific Legal Foundation  
930 G Street  
Sacramento, California 95814  
Telephone: (916) 419-7111  
Email: jbreemer@pacificlegal.org

*Counsel for Petitioner Bay Point Properties, Incorporated*

To the Honorable Samuel A. Alito, Jr., Justice of the Supreme Court of the United States and Circuit Justice for the Fifth Circuit:

Pursuant to Supreme Court Rule 13.5, Petitioner Bay Point Properties, Incorporated, respectfully requests an extension of time of twenty-five (25) days to file a Petition for Writ of Certiorari in this Court. Granting this motion would extend the deadline for the filing of a Petition to **December 20, 2019**.

The Fifth Circuit Court of Appeals issued its judgment on August 27, 2019. A Petition for Certiorari is therefore presently due on or about November 25, 2019. This application for an extension of time is being filed more than ten (10) days prior to that date.

This case arises under the Fifth Amendment to the United States Constitution. The opinion of the Fifth Circuit Court of Appeals interpreting that constitutional provision is reported at 937 F.3d 454 (5th Cir. 2019), a copy of which is attached hereto as Attachment 1. This Court has appellate jurisdiction over the case pursuant to 28 U.S.C. § 1257(a).

Petitioner's lead counsel, Mr. J. David Breemer, requires extra time to file a Petition in this case due to a conflicting workload. Counsel is currently involved in briefing another case in this Court, *Smyth v. Town of Falmouth*, Case No. 19-223. Counsel is also briefing a case in the Ninth Circuit Court of Appeals. *See Ballinger v. City of Oakland*, Ninth Circuit Case No. 19-16550, and is in the midst of motion work in an active federal case in the District Court for the Eastern District of North Carolina, *see Zito v. North Carolina Coastal Commission*, Case No. 2:19-cv-00011-D.

Due to these time constraints, and in order to cogently prepare and draft a Petition in this case, Petitioner requests an additional twenty-five (25) days of time to file a Petition for Writ of Certiorari, allowing the Petition to be filed on or before December 20, 2019.

Petitioner has conferred with opposing counsel about this application and opposing counsel has stated that Respondents **do not oppose** this motion.

Therefore, Petitioner respectfully requests that an order be entered extending their time to file a Petition for a Writ of Certiorari up to and including December 20, 2019.

Dated: October 17, 2019.

Respectfully submitted,



---

J. DAVID BREEMER

*Counsel of Record*

Pacific Legal Foundation

930 G Street

Sacramento, California 95814

Telephone: (916) 419-7111

Email: [jbreemer@pacificlegal.org](mailto:jbreemer@pacificlegal.org)

*Counsel for Petitioner Bay Point Properties, Incorporated*

# **ATTACHMENT 1**

937 F.3d 454

United States Court of Appeals, Fifth Circuit.

BAY POINT PROPERTIES,  
INCORPORATED, Plaintiff-Appellant

v.

MISSISSIPPI TRANSPORTATION COMMISSION;

Mississippi Department of Transportation;

Dick Hall, in his capacity as Mississippi  
Transportation Commissioner; Mike Tagert,  
in his capacity as Mississippi Transportation

Commissioner; Tom King, in his capacity as

Mississippi Transportation Commissioner; Wayne

H. Brown, in his capacity as former Mississippi  
Transportation Commissioner; Melinda McGrath, in  
her capacity as Executive Director of the Mississippi

Department of Transportation; Larry Brown,  
in his capacity as former Executive Director  
of Mississippi Department of Transportation,

also known as Butch; Daniel B. Smith, in  
his capacity as Administrator of the Right-  
of-Way Division of Mississippi Department  
of Transportation, Defendants-Appellees

No. 18-60674

|

FILED August 27, 2019

### Synopsis

**Background:** After state court jury found Mississippi state officials violated Takings Clause by exceeding scope of easement over private property and jury awarded considerably less damages than property owner sought, property owner brought action against Mississippi Transportation Commission in federal court. The United States District Court for the Southern District of Mississippi, Halil Suleyman Ozerden, J., 2018 WL 3977879, dismissed action. Property owner appealed.

The Court of Appeals, Ho, Circuit Judge, held that Mississippi Transportation Commission was entitled to sovereign immunity.

Affirmed.

\*455 Appeal from the United States District Court for the Southern District of Mississippi, Halil S. Ozerden, U.S. District Judge

### Attorneys and Law Firms

Charles Sterling Lambert, Jr., Baton Rouge, LA, William Alex Brady, II, Brady Law Firm, PLLC, Long Beach, MS, for Plaintiff-Appellant.

Wilson Douglas Minor, Esq., Assistant Attorney General, Office of the Attorney General for the State of Mississippi, Jackson, MS, Christopher Martin Howdeshell, I, Pittman Law Firm, Hattiesburg, MS, for Defendants-Appellees.

Before DAVIS, HO, and ENGELHARDT, Circuit Judges.

### Opinion

JAMES C. HO, Circuit Judge:

A state court jury found that Mississippi state officials violated the Takings Clause by exceeding the scope of a state easement on private property. But the jury granted a monetary award considerably lower than the amount of “just compensation” sought \*456 by the property owner. So the property owner, after losing on appeal in state court and unsuccessfully seeking certiorari in the U.S. Supreme Court, brought this suit in federal court. The State moved to dismiss on sovereign immunity grounds, and the district court granted the motion in an exhaustive opinion. We agree and accordingly affirm.

While this case was pending on appeal, the Supreme Court issued its decision in *Knick v. Township of Scott*, — U.S. —, 139 S. Ct. 2162, 204 L.Ed.2d 558 (2019). In its supplemental briefing, the property owner contends, in effect, that *Knick* overturns prior sovereign immunity law in cases arising under the Takings Clause. But we find nothing in *Knick* to support that claim.<sup>1</sup>

<sup>1</sup> In its original brief, the property owner asked us to “address the tension” between state sovereign immunity and the right to just compensation under the Fifth and Fourteenth Amendments. That determination, however, is one for the Supreme Court—not this panel. *See, e.g., McMurtry v. Holladay*, 11 F.3d 499, 504 (5th Cir. 1993) (holding that takings claims under the Fifth Amendment are “barred because under the Eleventh Amendment, a citizen may not sue his own state in federal court”) (citing U.S. CONST. amend. XI; *Pennhurst State Sch. & Hosp.*

v. *Halderman*, 465 U.S. 89, 98, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984)).

It is well established under the Supreme Court’s sovereign immunity precedents that there are “only two circumstances in which an individual may sue a State”: (1) Congressional abrogation of state sovereign immunity consistent with the Enforcement Clause of the Fourteenth Amendment; or (2) State waiver of immunity. *See Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 670, 119 S.Ct. 2219, 144 L.Ed.2d 605 (1999). As the district court correctly concluded, neither of these circumstances are present in this case.

Nothing in *Knick* alters these bedrock principles of sovereign immunity law. To begin with, the Court did not even have occasion to reconsider sovereign immunity law in *Knick*, because that case involved a suit against a locality, and it is well established that local governments are not entitled to the sovereign immunity enjoyed by states. *See, e.g., N. Ins. Co. of N.Y. v. Chatham County*, 547 U.S. 189, 193, 126 S.Ct. 1689, 164 L.Ed.2d 367 (2006) (“[T]his Court has repeatedly refused to extend sovereign immunity to counties.”); *Jinks v. Richland County*, 538 U.S. 456, 466, 123 S.Ct. 1667, 155 L.Ed.2d 631 (2003) (“[M]unicipalities, unlike States, do not enjoy a constitutionally protected immunity from suit.”).

Nor does anything in *Knick* even suggest, let alone require, reconsideration of longstanding sovereign immunity principles protecting states from suit in federal court. Rather, *Knick* held only that “a property owner has a claim for a violation of the Takings Clause” cognizable in federal court

“as soon as a government takes his property for public use without paying for it.” 139 S. Ct. at 2170. Accordingly, *Knick* did away with the previous rule requiring “a property owner [to] pursue state procedures for obtaining compensation before bringing a federal suit.” *Id.* at 2173.

In other words, to the extent that *Knick* has any effect on suits against state governments, the Court simply put takings claims against state governments on equal footing with claims against the federal government. *See id.* at 2170 (“We have long recognized that property owners may bring Fifth Amendment claims against the Federal Government as soon as their property has been taken.”). And nobody \*457 disputes that takings claims against the federal government require the waiver of sovereign immunity contained in the Tucker Act. *See id.* (citing 28 U.S.C. § 1491(a)(1)); *id.* at 2186 (Kagan, J., dissenting) (“The Tucker Act waives the Federal Government’s sovereign immunity.”).

Not surprisingly, then, the Tenth Circuit has already held that *Knick* does not alter traditional principles of state sovereign immunity. *See, e.g., Williams v. Utah Dep’t of Corr.*, 928 F.3d 1209, 1214 (10th Cir. 2019) (“*Knick* did not involve Eleventh Amendment immunity, which is the basis of our holding in this case. Therefore, we hold that the takings claim against the [Utah Department of Corrections] must be dismissed based on Eleventh Amendment immunity.”). We therefore affirm.

#### All Citations

937 F.3d 454

## CERTIFICATE OF SERVICE

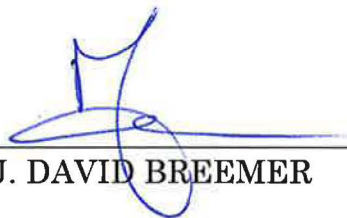
I hereby certify that three copies of Petitioner's Application for Extension of Time to File Petition for Writ of Certiorari were served this 17th day of October, 2019, via first-class mail, postage pre-paid, and e-mail upon the party required to be served pursuant to this Court's Rule 29.3, namely the following:

Wilson D. Minor  
Special Assistant Attorney General  
Office of the Attorney General  
for the State of Mississippi  
550 High Street, Suite 1200  
Walter Sillers Building  
Jackson, MS 39201  
Telephone: (601) 359-4072

Email: [wmino@ago.state.ms.us](mailto:wmino@ago.state.ms.us)

Christopher M. Howdeshell  
Pittman Howdeshell, PLLC  
140 Mayfair Road, Suite 400 (39402)  
Post Office Drawer 17138  
Hattiesburg, MS 39404-7138  
Telephone: (601) 264-3314

Email: [chris@pittmanlawfirm.net](mailto:chris@pittmanlawfirm.net)



---

J. DAVID BREEMER