

No. _____

In The
Supreme Court of the United States

BAY POINT PROPERTIES, INCORPORATED,
Petitioner,

v.

MISSISSIPPI TRANSPORTATION COMMISSION
and MISSISSIPPI DEPARTMENT OF
TRANSPORTATION; et al.,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the “self-executing” Just Compensation Clause abrogates a State’s Eleventh Amendment immunity, allowing a property owner to sue the State for a taking of property.

LIST OF ALL PARTIES

Bay Point Properties, Inc., formerly known as BP Properties, Inc., Petitioner on review, was the plaintiff-appellant below.

The Mississippi Transportation Commission; the 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, were the defendants-appellees below.

CORPORATE DISCLOSURE STATEMENT

Bay Point Properties, Inc., has no parent corporation, and no publicly held company owns 10% or more of its stock.

RULE 14.1(b)(iii)
STATEMENT OF RELATED CASES

The proceedings in the federal trial and appellate courts identified below are directly related to the above-captioned case in this Court.

Bay Point Properties, Inc. v. Mississippi Transportation Commission, No. 1:17cv207-HSO-RHW, 2018 WL 3977879 (S.D. Miss. Aug. 20, 2018).

Bay Point Properties, Inc. v. Mississippi Transportation Commission, 937 F.3d 454 (5th Cir. 2019).

TABLE OF CONTENTS

QUESTION PRESENTED i

LIST OF ALL PARTIES ii

CORPORATE DISCLOSURE STATEMENT ii

RULE 14.1(b)(iii) STATEMENT OF
RELATED CASES iii

TABLE OF AUTHORITIES vii

OPINIONS BELOW 1

JURISDICTION..... 1

CONSTITUTIONAL PROVISIONS AT ISSUE 1

INTRODUCTION 2

STATEMENT OF THE CASE..... 3

 I. FACTS 3

 A. The Property and Its Encumbrance by
 a 1952 Highway-Purpose Easement..... 3

 B. The Destruction of Toll Project No. 1
 and Construction of a Public Park on
 Bay Point’s Land 4

 II. JUDICIAL PROCEEDINGS..... 6

 A. Bay Point’s Inverse Condemnation Suit
 and Denial of Compensation..... 6

B.	The Mississippi Supreme Court Decision and Initial Petition for Certiorari	8
C.	The Federal Suit.....	10
	REASONS FOR GRANTING THE PETITION	12
I.	THE DECISION BELOW RAISES AN IMPORTANT QUESTION AS TO WHETHER THE JUST COMPENSATION CLAUSE ABROGATES ELEVENTH AMENDMENT IMMUNITY, ALLOWING TAKINGS CLAIMS AGAINST STATES	12
A.	The Principles of the Just Compensation Clause and Eleventh Amendment Conflict	13
B.	If Sovereign Immunity Bars Takings Claims, State Agencies That Increasingly Take Property May Do So Without Paying Compensation.....	17
C.	The Decision Below Conflicts with This Court's Precedent.....	24
II.	THE DECISION BELOW EXACERBATES A CONFLICT ON WHETHER SOVEREIGN IMMUNITY BARS TAKINGS CLAIMS AGAINST STATES	28
A.	State Courts Are in Conflict with Federal Courts on Whether the Just Compensation Clause Abrogates Sovereign Immunity	28

1. State courts hold that the self-executing Just Compensation Clause abrogates immunity, allowing takings claims against state entities 28

2. Many federal decisions conflict with state decisions, holding that the Eleventh Amendment trumps the Just Compensation Clause 31

B. Federal Courts Are in Conflict on Whether and When a Takings Claim Can Be Raised Against a State in a Federal Forum 33

CONCLUSION..... 36

APPENDIX

A-1 Opinion, U.S. Court of Appeals for the Fifth Circuit, filed August 27, 2019

B-1 Memorandum Opinion and Order Granting Defendants’ Motion to Dismiss, U.S. District Court for the Southern District of Mississippi, filed August 20, 2018

TABLE OF AUTHORITIES

Cases

<i>Alden v. Maine</i> , 527 U.S. 706 (1999)	13-15, 23, 26
<i>Arnett v. Myers</i> , 281 F.3d 552 (6th Cir. 2002)	34-35
<i>Austin v. Arkansas State Highway Comm’n</i> , 895 S.W.2d 941 (Ark. 1995)	19
<i>Bay Point Properties, Inc. v. Mississippi Transp. Comm’n</i> , 137 S. Ct. 2002 (Mem) (2017).....	9, 21
<i>Bay Point Properties, Inc. v. Mississippi Transp. Comm’n</i> , 201 So. 3d 1046 (Miss. 2016).....	4, 6-9, 20-21, 24
<i>Bay Point Properties, Inc. v. Mississippi Transp. Comm’n</i> , 937 F.3d 454 (5th Cir. 2019)	1
<i>Bay Point Properties, Inc. v. Mississippi Transp. Comm’n</i> , No. 1:17cv207- HSO-RHW, 2018 WL 3977879 (S.D. Miss. Aug. 20, 2018)	1
<i>Beck v. Cal.</i> , 479 F. Supp. 392 (C.D. Cal. 1979).....	18, 21
<i>Black v. North Panola School Dist.</i> , 461 F.3d 584 (5th Cir. 2006)	10

<i>Boise Cascade Corp. v. State ex rel. Oregon State Board of Forestry, 991 P.2d 563 (Or. Ct. App. 1999)</i>	30-31
<i>Bragg v. Carter, 367 So. 2d 165 (Miss. 1979)</i>	10
<i>Bryant v. Ark. State Highway Comm’n, 342 S.W.2d 415 (Ark. 1961)</i>	19
<i>California Coastal Comm’n v. Superior Court, 210 Cal. App. 3d 1488 (1989)</i>	21
<i>Cent. Virginia Cmty. Coll. v. Katz, 546 U.S. 356 (2006)</i>	27
<i>Chicago, B. & Q.R. Co. v. City of Chicago, 166 U.S. 226 (1897)</i>	16
<i>City of Fort Worth, Tex. v. United States, 188 F.2d 217 (5th Cir. 1951)</i>	21
<i>City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999)</i>	3
<i>Cory v. White, 457 U.S. 85 (1982)</i>	14
<i>Culebras Enter. Corp. v. Rivera Ríos, 813 F.2d 506 (1st Cir. 1987)</i>	33
<i>DLX, Inc. v. Kentucky, 381 F.3d 511 (6th Cir. 2004)</i>	18-19, 32
<i>Dolan v. City of Tigard, 512 U.S. 374 (1994)</i>	2

<i>Edelman v. Jordan</i> , 415 U.S. 651 (1974)	14, 16, 25
<i>Esposito v. South Carolina Coastal Council</i> , 939 F.2d 165 (4th Cir. 1991)	23
<i>Ex parte Young</i> , 209 U.S. 123 (1908)	11, 14
<i>Fair Assessment in Real Estate Ass'n, Inc. v. McNary</i> , 454 U.S. 100 (1981)	26
<i>First English Evangelical Lutheran Church of Glendale v. County of Los Angeles</i> , 482 U.S. 304 (1987)	2, 15, 24-25, 27
<i>Florida Department of Agriculture v. Dolliver</i> , No. 2D18-1393, 2019 WL 5939283 (Fla. Dist. Ct. App. Nov. 13, 2019)	22
<i>Ford Motor Co. v. Department of Treasury of Indiana</i> , 323 U.S. 459 (1945)	14, 25-26
<i>Fowler v. Guerin</i> , 899 F.3d 1112 (9th Cir. 2018)	34
<i>Fowler v. Guerin</i> , 918 F.3d 644 (9th Cir. 2019)	34
<i>Franchise Tax Board of California v. Hyatt</i> , 139 S. Ct. 1485 (2019)	23
<i>Hair v. United States</i> , 350 F.3d 1253 (Fed. Cir. 2003)	35

<i>Hans v. Louisiana</i> , 134 U.S. 1 (1890)	13
<i>Harbert Int’l, Inc. v. James</i> , 157 F.3d 1271 (11th Cir. 1998)	19, 22
<i>Hardman v. Government of Guam</i> , No. 10-00010, 2011 WL 4901054 (D. Guam 2011)	35
<i>Hendler v. United States</i> , 952 F.2d 1364 (Fed. Cir. 1991).....	35
<i>Hess v. Port Authority Trans–Hudson Corp.</i> , 513 U.S. 30 (1994)	14
<i>Hilton v. South Carolina Public Railways Comm’n</i> , 502 U.S. 197 (1991)	28-29
<i>Hise v. Tennessee</i> , 968 S.W.2d 852 (Tenn. Ct. App. 1997).....	19
<i>Hutto v. South Carolina Retirement System</i> , 773 F.3d 536 (4th Cir. 2014)	18, 32
<i>Idaho v. Coeur d’Alene Tribe of Idaho</i> , 521 U.S. 261 (1997)	13
<i>Jacobs v. United States</i> , 290 U.S. 13 (1933)	15
<i>John G. and Marie Stella Kennedy Memorial Foundation v. Mauro</i> , 21 F.3d 667 (5th Cir. 1994)	18
<i>Knick v. Township of Scott, Pennsylvania</i> , 139 S. Ct. 2162 (2019)	14-15, 23

<i>Landgate, Inc. v. California Coastal Comm’n</i> , 953 P.2d 1188 (Cal. 1998)	22
<i>Leistiko v. Secretary of Army</i> , 922 F. Supp. 66 (N.D. Ohio 1996)	16, 35
<i>Liberty v. California Coastal Comm’n</i> , 113 Cal. App. 3d 491 (1980)	22
<i>Long v. Area Manager, Bureau of Reclamation</i> , 236 F.3d 910 (8th Cir. 2001)	19
<i>Lucas v. South Carolina Coastal Council</i> , 505 U.S. 1003 (1992)	18, 25
<i>Manning v. N.M. Energy, Minerals & Natural Resources Dep’t</i> , 144 P.3d 87 (N.M 2006)	16, 20, 29
<i>McMurtray v. Holladay</i> , 11 F.3d 499 (5th Cir. 1993)	21
<i>Medellin v. Texas</i> , 552 U.S. 491 (2008)	15
<i>Mola Development Corp. v. City of Seal Beach</i> , 57 Cal. App. 4th 405 (1997)	21
<i>Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle</i> , 429 U.S. 274 (1977)	17
<i>Nollan v. California Coastal Comm’n</i> , 483 U.S. 825 (1987)	18
<i>Palazzolo v. Rhode Island</i> , 533 U.S. 606 (2001)	18, 25

Principality of Monaco v. Mississippi,
 292 U.S. 313 (1934) 13-14

Reich v. Collins,
 513 U.S. 106 (1994) 26

SDDS, Inc. v. State,
 650 N.W.2d 1 (S.D. 2002) 29-30

Seminole Tribe of Florida v. Florida,
 517 U.S. 44 (1996) 15-16

Seven Up Pete Venture v. Schweitzer,
 523 F.3d 948 (9th Cir. 2008) 31, 36

*Surfside Colony, Ltd. v.
 California Coastal Comm’n*,
 226 Cal. App. 3d 1260 (1991) 22

*Tahoe-Sierra Preservation Council, Inc.
 v. Tahoe Regional Planning Agency*,
 535 U.S. 302 (2002) 16, 25

Williams v. Utah Department of Corrections,
 928 F.3d 1209 (10th Cir. 2019) 32-33

Williams v. Walley,
 295 So. 2d 286 (Miss. 1974)..... 20

Zinn v. Wisconsin,
 334 N.W.2d 67 (Wis. 1983)..... 20

Constitution

U.S. Const. amend. V..... 1

U.S. Const. amend. XIV, § 1 16

U.S. Const. amend. XI	1-2
-----------------------------	-----

Statutes

28 U.S.C. § 1254	1
Miss. Code Ann. § 65-1-51	5, 10
Miss. Code Ann. § 65-1-123 (Rev. 2012).....	6-8, 10

Other Authorities

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Brief for the United States as Amicus Curiae Supporting Appellee, No. 85-1199, 1986 WL 727420 (U.S. Nov. 4, 1986)	24-25
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Mandelker, Daniel R., et al., <i>Federal Land Use Law</i> (1998).....	20
Seamon, Richard H., <i>The Asymmetry of State Sovereign Immunity</i> , 76 Wash. L. Rev. 1067 (2001).....	3, 17, 20
Struve, Catherine T., <i>Turf Struggles: Land, Sovereignty, and Sovereign Immunity</i> , 37 New Eng. L. Rev. 571 (2003).....	25, 27

Bay Point Properties, Incorporated (Bay Point) respectfully requests that this Court issue a writ of certiorari to review the judgment of the Fifth Circuit Court of Appeals.

OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals is reported at 937 F.3d 454 (5th Cir. 2019), and is attached here as Appendix (App.) A. The judgment of the Federal District Court for the Southern District of Mississippi is reported at 2018 WL 3977879 (S.D. Miss. Aug. 20, 2018), and attached here as App. B.

JURISDICTION

The lower courts had jurisdiction over this case under the Fifth Amendment to the United States Constitution. The Court of Appeals entered final judgment on August 27, 2019. On October 21, 2019, Justice Alito granted Petitioner's request for an extension of time to file this Petition, extending the due date until December 20, 2019. This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AT ISSUE

The Fifth Amendment to the U.S. Constitution provides: “[N]or shall private property be taken for public use, without just compensation.” U.S. Const. amend. V.

The Eleventh Amendment to the U.S. Constitution provides: “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.”

INTRODUCTION

This case presents the Court with an opportunity to address a persistent and consequential clash between two bedrock constitutional concepts: state sovereign immunity and the “just compensation” requirement for a taking of property. On the one hand, the Eleventh Amendment and general sovereign immunity principles bar individuals from suing states for damages. On the other, the Just Compensation Clause provides individuals with a “self-executing” damages remedy for a taking of property. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 315-16 (1987). The just compensation requirement binds the states through the Fourteenth Amendment’s Due Process Clause. *Dolan v. City of Tigard*, 512 U.S. 374, 384 n.5 (1994).

Sovereign immunity and Just Compensation Clause principles are accordingly opposed to each other. This collision comes to a head when, as in this case, a property owner attempts to hold a state entity or officials accountable for a taking of property requiring just compensation. The State claims it is entirely exempt from the claim, while the property owner asserts it is entirely accountable under the “self-executing” Just Compensation Clause. The decision below held that sovereign immunity wins this battle, but this conclusion is inconsistent with this Court’s precedent, the decisions of other courts, and threatens to render the Just Compensation Clause of no effect when States take property.

Although this Court has indirectly confronted the clash between sovereign immunity in some of its takings cases, and questioned whether immunity “retains its vitality” in this context, *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 714 (1999), it has never squarely addressed the issue. Richard H. Seamon, *The Asymmetry of State Sovereign Immunity*, 76 Wash. L. Rev. 1067, 1067-68 (2001) (“Surprisingly . . . the United States Supreme Court has never answered that question.”); 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”). The result is continued confusion, injustice, and inconsistency in the enforcement of the Just Compensation Clause against States that take private property. The Court should grant the Petition to resolve these issues.

STATEMENT OF THE CASE

I.

FACTS

A. The Property and Its Encumbrance by a 1952 Highway-Purpose Easement

In 1993, Bay Point purchased a 14.34-acre parcel in Henderson County, Mississippi, from the estate of Wallace C. Walker. The parcel is on Henderson Point, along the eastern side of the mouth of Bay St. Louis. App. B-2.

In 1952, the Mississippi State Highway Commission (MSHC), predecessor to Respondent

Mississippi Transportation Commission (MTC), acquired an easement on the land for a specific highway purpose. *Id.* The easement was specifically acquired for the construction of a bridge spanning the Bay, a project known as “Toll Project No. 1.” The State subsequently built the Toll Project No. 1 bridge, using the property for the eastern ramp. App. B-2-3.

B. The Destruction of Toll Project No. 1 and Construction of a Public Park on Bay Point’s Land

MTC operated the Toll Project No. 1 bridge for more than 50 years. However, on August 29, 2005, Hurricane Katrina struck the Gulf Coast and destroyed the bridge. *Id.* at B-3. Afterward, MTC elected to redesign and relocate the bridge and the Highway 90 approach, rather than repair it. To do so, it needed a different road bed. MTC discontinued and physically removed the remnants of Toll Project No. 1 from Bay Point’s land, but continued to use 4.6 acres of the land in connection with the new Highway 90 project. *Id.*

Moreover, after the State built the new U.S. Highway 90, MTC began constructing a public park on 7.76 acres of the land formerly used for Toll Project No. 1. *Id.* This park is known as Henderson Point Community Park. It provides public rest, recreation, and parking areas, and includes a perimeter pedestrian track, a concert lawn, two pavilions, and sanitary facilities. App. B-4; *see also, Bay Point Properties, Inc. v. Mississippi Transp. Comm’n*, 201 So. 3d 1046, 1051 (Miss. 2016).

When Bay Point learned the State was building a park on its land, it objected and demanded that MTC cease construction. App. B-3-4. Bay Point asserted that the State's use of its land, including for the park, was outside the scope of the Toll Project No. 1 highway easement. MTC subsequently agreed to appraise the land and to make a good faith offer of purchase in order to continue building without interference from Bay Point. The State appraisal eventually established a value of \$8,788,650 for 7.76 acres of land used for the park.

However, after MTC completed the park, it informed Bay Point that it believed Miss. Code Ann. § 65-1-51¹ authorized it to build the park on Bay Point's land as an exercise of its rights under the original, highway purposes easement. App. B-4. Despite its previous agreement, MTC told Bay Point that it would not purchase the land. Since that time, Harrison County has operated the park for enjoyment by the general public. *Id.*

¹ Miss. Code Ann. § 65-1-51 states that MTC "may acquire and have the Transportation Department develop publicly owned and controlled rest and recreation areas and sanitary and other facilities within or adjacent to the highway right-of-way reasonably necessary to accommodate the traveling public." App B-4.

II.

JUDICIAL PROCEEDINGS

A. Bay Point's Inverse Condemnation Suit and Denial of Compensation

When it became clear that MTC would not pay for converting Bay Point's property into a public park, Bay Point filed an inverse condemnation lawsuit in Harrison County, under the Mississippi Constitution. App. B-4. The suit alleged, in part, that the State's highway easement terminated when it used the subject land to build a park, rather than for Toll Project No. 1. *Bay Point*, 201 So. 3d at 1052. The lawsuit contended, in part, that the occupation of Bay Point's property for park use was a taking of the fee title for which Bay Point was owed just compensation.² On the other hand, MTC argued that, under state law, its highway easement could not terminate through non-use, but would only cease if and when the State formally abandoned the easement pursuant to Miss. Code Ann. § 65-1-123 (Rev. 2012), a step it had not

² Bay Point sought just compensation for a taking of its entire tract of 14.34 acres on the basis that the State was using all of its land for purposes outside the scope of the highway easement for Toll Project No. 1.

taken.³ *Bay Point*, 201 So. 3d at 1051-52. The State accordingly claimed that, even if there was a taking, the land could be valued for compensation purposes only at its value as encumbered by the highway easement.

The case was tried before a jury in 2013. The jury found that the State was not using Bay Point's land for highway purposes, consistent with the original easement, and therefore that it was liable for taking private property. App. B-4. However, the trial court instructed the jury that it could find that Bay Point's land was unencumbered by the highway easement only if the State had abandoned it on the minutes pursuant to Miss. Code Ann. § 65-1-123. *Id.* The court further instructed the jury that if it found MTC was not currently using Bay Point's land for a highway purpose, but that MTC had not formally abandoned the highway easement on its minutes, it could only award a nominal amount of damages for the taking,

³ Miss. Code Ann. § 65-1-123 states, in part:

(5) All easements for highway purposes shall be released when they are determined on the minutes of the commission as no longer needed for such purposes, and when released, they shall be filed by the department in the office of the chancery clerk in the county where the property is located.

(6) In no instance shall any part of any property acquired by the commission, or any interest acquired in such property, including, but not limited to, easements, be construed as abandoned by nonuse, nor shall any encroachment on such property for any length of time constitute estoppel or adverse possession against the state's interests.

between \$100 and \$500. *Id.* at B-5; *see also, Bay Point*, 201 So. 3d at 1054-55.

Alternatively, if the jury found MTC was not using Bay Point's land for highway purposes, and MTC had expressly abandoned the easement under section 65-1-123, the jury could "award [the plaintiff] just compensation for any such taking, just compensation being what you determine to be the difference between the fair market value of the property taken after proper application of the before and after [the taking] rule." *Bay Point*, 201 So. 3d at 1055.

Ultimately, the jury found that MTC's use of Bay Point's land for a park did not fall within its rights under the highway easement, but that MTC had not formally abandoned the easement on its minutes in accordance with 65-1-123. App. B-5. The jury was compelled to selected compensation option #2, finding that, although the State took Bay Point's property, Bay Point was only entitled to a nominal sum of \$500 as compensation. *Id.*

B. The Mississippi Supreme Court Decision and Initial Petition for Certiorari

In 2016, the Mississippi Supreme Court affirmed the trial court in a 5-2 decision. The majority concluded that Miss. Code Ann. § 65-1-123 prohibited MTC from abandoning the highway purpose easement by non-use or a change in use. *Bay Point*, 201 So. 3d at 1052-53. It explained that "[r]elease (*i.e.*, termination or abandonment) requires a determination on the minutes. Therefore, any evidence of abandonment other than minute entries is

irrelevant and inadmissible.” *Id.* at 1053. The Court also rejected Bay Point’s argument that the Just Compensation Clause itself required valuation of the land unencumbered by MTC’s easement. *Id.* at 1059 (Kitchens, J., dissenting). Finally, the Court held that the trial court properly rejected a proposed jury instruction that would have calculated just compensation based on the unencumbered value of the land if the jury concluded that MTC’s “current uses of the Property . . . are outside the limited and specific scope of the Easement granted.” *Id.* at 1055-56. In dissent, two Justices argued that “a state statute cannot be applied in a manner that thwarts a landowner’s state and federal constitutional rights to just compensation for a governmental taking of private property.” *Id.* at 1059 (Kitchens J., dissenting). Bay Point sought rehearing from the Mississippi Supreme Court, but the petition was denied over the same two-Justice dissent.

Bay Point then filed a Petition for Certiorari, asking this Court to decide whether a statute can limit the provision of just compensation for a taking. On June 26, 2017, this Court denied the petition. *Bay Point Properties, Inc. v. Mississippi Transp. Comm’n*, 137 S. Ct. 2002 (Mem) (2017). Justices Gorsuch and Thomas issued a statement respecting the denial. *Id.* Their statement noted that the Mississippi Supreme Court “decision seems difficult to square with the teachings of this Court’s cases holding that legislatures generally cannot limit the compensation due under the Takings Clause of the Constitution,” and that the case presented issues the “Court ought take up at its next opportunity.” *Id.*

C. The Federal Suit

Following the denial of certiorari, Bay Point filed a federal lawsuit against MTC, the Mississippi Department of Transportation (MDOT), and various individuals in their official capacity as Mississippi State officials.⁴ App. B-5-6. The suit alleged, in part, that “Defendants’ enforcement of Mississippi Code sections 65-1-123 and 65-1-51 to take Bay Point’s land without just compensation is unconstitutional.” App. B-6. Bay Point also alleged that Defendants applied Miss. Code Ann. §§ 65-1-51 and 65-1-123 “to preclude Plaintiff from recovering just compensation,” and “to award Bay Point only a nominal sum of \$500 in damages, rather than the just compensation due of \$16,214,926.” *Id.* at B-16. Bay Point sought injunctive and declaratory relief and/or actual damages and just compensation in the amount of \$16,214,926. *Id.* at B-7.

The State defendants subsequently filed a motion to dismiss the suit, alleging in part that Eleventh Amendment immunity barred Bay Point’s takings claims in federal court. *Id.* The district court initially

⁴ Respondents asserted below that the federal suit is barred by claim and/or issue preclusion. However, neither the district court nor the Fifth Circuit addressed this issue, deciding the case solely on sovereign immunity grounds. In any event, there is no preclusion concern in this matter since (1) constitutional claims are exempt from res judicata barriers under Mississippi law, *Bragg v. Carter*, 367 So. 2d 165 (Miss. 1979), and (2) Bay Point’s federal suit includes different causes of action and subjects, such as its challenge to the constitutionality of Miss. Code Ann. §§ 65-1-123 and 65-1-51, than the state suit. See *Black v. North Panola School Dist.*, 461 F.3d 584, 588-89 (5th Cir. 2006) (summarizing Mississippi’s res judicata standards).

held that the Eleventh Amendment barred Bay Point's claims against MTC and MDOT since those state agencies had not consented to be sued in federal court. App. B-11. The Court then considered whether the Eleventh Amendment also barred Bay Point's claims against state officials, or whether the claims were proper under the *Ex parte Young*, "prospective relief" exception to sovereign immunity. See 209 U.S. 123, 159-60 (1908). App. B-14.

Noting that the monetary damages sought by Bay Point "would come from the State's treasury," the court held that Bay Point's demands for full and just compensation for a taking were outside the scope of the *Ex parte Young* exception and precluded by sovereign immunity. *Id.* at B-15-16. The district court further held that *Ex parte Young* was inapplicable to Bay Point's declaratory relief claim because it believed that Bay Point sought that relief only "to receive greater compensation and money damages than it did in state court based upon a past violation of federal law." *Id.* at B-14-17. Bay Point argued throughout that "the Eleventh Amendment should not immunize Defendants from the obligation to pay just compensation," but the court rejected this position. *Id.* at B-16.

On appeal to the Fifth Circuit Court of Appeals, Bay Point asked the court to "address the tension" between state sovereign immunity and the right to just compensation under the Fifth and Fourteenth Amendments" and to reverse the trial court. App. A-2-3 n.1. However, relying on prior circuit precedent holding that sovereign immunity bars takings claims against state entities, the Fifth Circuit affirmed the

district court's application of the Eleventh Amendment to Bay Point's claims. In so doing, it observed that resolution of the tension between the Eleventh Amendment and Just Compensation Clause is "for the Supreme Court," not the Fifth Circuit. *Id.*

REASONS FOR GRANTING THE PETITION

I.

THE DECISION BELOW RAISES AN IMPORTANT QUESTION AS TO WHETHER THE JUST COMPENSATION CLAUSE ABROGATES ELEVENTH AMENDMENT IMMUNITY, ALLOWING TAKINGS CLAIMS AGAINST STATES

The Eleventh Amendment and the Fifth Amendment's Just Compensation Clause express two of the most venerable constitutional principles in existence: sovereign immunity for states and just compensation for citizens whose property is taken for public use. These principles function independently and adequately in most cases. However, when a state takes property without compensation, the Eleventh Amendment and Just Compensation Clause—applicable to states through the Fourteenth Amendment—come into direct conflict. While the former bars a damages award, the latter positively requires it.

The Fifth Circuit's conclusion that state sovereign immunity bars a claim for just compensation for a taking by a state raises a critical issue of constitutional law. Unlike other classes of constitutional plaintiffs, takings claimants generally

cannot seek equitable relief from their injury; they must seek monetary compensation. Therefore, if the lower court is correct that a state's immunity from damages suits trumps a property owner's right to compensation for a taking, states can potentially take property without any constitutional consequence. The Court should grant the Petition to address this unresolved constitutional clash, and to ensure that property owners have a meaningful compensatory remedy for state takings.

A. The Principles of the Just Compensation Clause and Eleventh Amendment Conflict

The Eleventh Amendment 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." Although this provision appears to apply only to suits by citizens of other states, this Court has held that it generally bars all suits against a state entity absent the state's consent to the suit. *Hans v. Louisiana*, 134 U.S. 1, 21 (1890). Indeed, this Court has explained that the text of the Eleventh Amendment is not a full expression of the scope of sovereign immunity. For example, the Court has confirmed that immunity generally applies in state, as well as federal, courts. *Alden v. Maine*, 527 U.S. 706, 712, 733, 749 (1999).

There are exceptions to sovereign immunity. It is inapplicable where there has been "a surrender of this immunity in the plan of the convention." *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 267 (1997) (quoting *Principality of Monaco v. Mississippi*, 292

U.S. 313, 322-23 (1934)), or where Congress abrogates state sovereign immunity pursuant to its Fourteenth Amendment, Section 5, enforcement powers. *Alden*, 527 U.S. at 755-57. Moreover, through the *Ex parte Young* doctrine, the Court recognizes an exception from state immunity when a person sues state officials for prospective relief from an ongoing violation of federal law, 209 U.S. 123; *Edelman v. Jordan*, 415 U.S. 651, 663 (1974).

Under this framework, states and their officials enjoy robust immunity from suits requiring a payment of damages. *Edelman*, 415 U.S. at 666-67 (*Ex parte Young* does not allow a suit seeking an injunction that would result in retroactive monetary relief); *Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. 459, 464 (1945) (Eleventh Amendment bars a damages action against a State in federal court); *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 48 (1994) (“[T]he impetus for the Eleventh Amendment [is] the prevention of federal-court judgments that must be paid out of a State’s treasury.”); *Cory v. White*, 457 U.S. 85, 90 (1982) (Eleventh Amendment applies when State officials are sued for damages).

While the Eleventh Amendment shields states from damages claims, the Just Compensation Clause provides property owners with a right to recover monetary compensation when the government takes private property. *Knick v. Township of Scott, Pennsylvania*, 139 S. Ct. 2162, 2171-73 (2019). In fact, in most takings cases, property owners can only seek compensation for a taking; equitable relief is unavailable. *Id.* at 2176-77. While this compensatory

takings remedy may be narrow, it is mandatory and automatic whenever there is a taking because the Just Compensation Clause is “self-executing” as a remedy.⁵ *First English*, 482 U.S. at 315-16. This means no legislative action is needed to render the constitutional right to compensation for a taking effective. *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 of the United States”); *see also Medellin v. Texas*, 552 U.S. 491, 504-05 (2008) (discussing the term “self-executing” in the context of treaties). “Because of ‘the self-executing character’ of the Takings Clause ‘with respect to compensation,’ a property owner has a constitutional claim for just compensation at the time of the taking.” *Knick*, 139 S. Ct. at 2171 (quoting *First English*, 482 U.S. at 315).

Of course, when the Bill of Rights was originally ratified, its provisions did not bind the States; they applied only to the federal government. This changed with ratification of the Fourteenth Amendment, which “required the States to surrender a portion of the sovereignty that had been preserved to them by the original Constitution” and “fundamentally altered the balance of state and federal power.” *Alden*, 527 U.S. at 756 (quoting *Seminole Tribe of Florida v.*

⁵ The Just Compensation Clause is one of only two constitutional provisions that refers to a remedy for a violation of an individual right. The only remedial provision besides the Just Compensation Clause is the prohibition against “suspension” of the writ of habeas corpus in Article I, § 9, cl. 2 of the Constitution. The framers’ explicit inclusion of a just compensation remedy for a taking of property underscores the importance of ensuring that government pays for every taking.

Florida, 517 U.S. 44, 59 (1996)). The Fourteenth Amendment confirmed that no state shall “deprive any person of life, liberty, or property, without due process of law.” U.S. Const. amend. XIV, § 1. This Court subsequently held the Due Process Clause incorporates the requirement of compensation for a taking of private property. *Chicago, B. & Q.R. Co. v. City of Chicago*, 166 U.S. 226, 239-41 (1897). Through incorporation of the Just Compensation Clause into the Fourteenth Amendment, the compensatory requirement for a taking “applies to the States as well as the Federal Government.” *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 306 n.1 (2002).

These principles indicate that states should be subject to claims for compensation when they cause a taking. *Manning v. N.M. Energy, Minerals & Natural Resources Dep’t*, 144 P.3d 87, 97-98 (N.M. 2006); *Leistiko v. Secretary of Army*, 922 F. Supp. 66, 73 (N.D. Ohio 1996). “The “self-executing” character of the Just Compensation Clause means the governmental obligation to pay for a taking became effective in 1791, when the Clause was ratified, while enactment of the Fourteenth Amendment applied the just compensation remedy to the states. *Id.*; 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.”). Yet, the Eleventh Amendment principle that states are *immune* from compensation claims stands in opposition to this logic. *Edelman*, 415 U.S. at 666-67.

There is accordingly a direct clash between the Eleventh Amendment and the Just Compensation Clause, Berger, 63 Wash. & Lee L. Rev. at 494 (“takings and state sovereign immunity cases are fundamentally incompatible with each other”); Seamon, 76 Wash. L. Rev. at 1067-68 (“The principles of sovereign immunity and just compensation are on a collision course.”). This clash raises issues of great importance. If the Eleventh Amendment controls in takings cases, states may be able to take private property without paying for it, as mandated by the U.S. Constitution. Conversely, if the Just Compensation Clause trumps the Eleventh Amendment, states must answer a compensatory claim in federal and state courts in takings cases, a result in tension with strict versions of sovereign immunity.

B. If Sovereign Immunity Bars Takings Claims, State Agencies That Increasingly Take Property May Do So Without Paying Compensation

With the rise of the administrative state, the states have increasingly injected themselves into land use issues that were previously the province of local governments that do not enjoy Eleventh Amendment protection and can be sued for a taking. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977). Representative state agencies include the California Coastal Commission, which regulates property along the California coast, the North Carolina Coastal Resources Commission and South Carolina Office of Ocean and Coastal Resources Management, agencies tasked with regulating coastal

building along the Carolina shore, the Texas General Land Office, which regulates property on the Texas coast, the Massachusetts Department of Environmental Protection, and many state transportation agencies, including the defendants in this case. All of these state bodies regulate private property in ways sufficient to create a physical or regulatory taking of property in certain circumstances. *See Palazzolo v. Rhode Island*, 533 U.S. 606 (2001) (takings claim arising from regulatory actions of Rhode Island Coastal Resources Management Council); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

When sued for a taking of property, state land use agencies often invoke sovereign immunity protection to avoid liability. *Beck v. Cal.*, 479 F. Supp. 392, 396-97 (C.D. Cal. 1979) (California Coastal Commission); *John G. and Marie Stella Kennedy Memorial Foundation v. Mauro*, 21 F.3d 667, 669 (5th Cir. 1994) (Texas General Land Office). The defense has largely succeeded in federal court. *Hutto v. South Carolina Retirement System*, 773 F.3d 536, 553 (4th Cir. 2014) (collecting federal appellate sovereign immunity/takings cases). Federal courts often conclude that immunity is strict in the federal forum, and bars takings claims there, but does not necessarily have the same effect in state courts. *Id.* at 552 (“[W]e conclude that the Eleventh Amendment bars Fifth Amendment taking claims against States *in federal court* when the *State’s courts* remain open to adjudicate such claims.”); *DLX, Inc. v. Kentucky*, 381 F.3d 511, 527-28 (6th Cir. 2004) (“[H]ad DLX brought a federal claim with its state claim in state

court, the Kentucky courts would have had to hear that federal claim . . . but this court is powerless to hear it.” (citation omitted)); *Harbert Int’l, Inc. v. James*, 157 F.3d 1271, 1279 (11th Cir. 1998) (holding that a takings claim was barred under the Eleventh Amendment, where state courts are available for such claims).

This rigid application of the Eleventh Amendment pushes property owners to play their just compensation cards in state court. But there too, they may face sovereign immunity barriers. *See, e.g., Austin v. Arkansas State Highway Comm’n*, 895 S.W.2d 941 (Ark. 1995) (sovereign immunity barred a damages-seeking takings claim against a state); *Hise v. Tennessee*, 968 S.W.2d 852, 853-55 (Tenn. Ct. App. 1997) (holding an inverse condemnation claim against the State barred by sovereign immunity). In states that apply sovereign immunity to takings suits in state courts, state regulators can potentially take property without facing just compensation liability in federal or state court. *Compare DLX, Inc.*, 381 F.3d at 527 (states are immune from takings claims in the 6th Circuit) *with Hise*, 968 S.W.2d at 853-55 (holding that Tennessee, within the jurisdiction of the 6th Circuit, is immune from inverse condemnation claims in state courts); *and compare Long v. Area Manager, Bureau of Reclamation*, 236 F.3d 910, 916-17 (8th Cir. 2001) (Eleventh Amendment bars takings claims against states in the 8th Circuit), *with Bryant v. Ark. State Highway Comm’n*, 342 S.W.2d 415 (Ark. 1961) (Arkansas, within the jurisdiction of the 8th Circuit, is immune from inverse condemnation claims in state courts.).

To be sure, many state courts do not apply immunity when takings claims are prosecuted in state court through state law procedures. *See* Seamon, 76 Wash. L. Rev. at 1119-20 nn.252, 253 (collecting cases); *Zinn v. Wisconsin*, 334 N.W.2d 67, 77 (Wis. 1983) (Due to sovereign immunity, “the legislature can provide specific procedures governing the recovery of such compensation If such legislation is enacted, the property owner must follow those procedures in order to receive the compensation.); *Manning*, 144 P.3d at 91 (“We are not suggesting that the legislature cannot prescribe terms and conditions that govern recovery under the Takings Clause When a statutory framework provides for recovery, individuals must abide by it.”). Unfortunately, state law takings procedures are often burdensome, complex, and may fail to provide a prompt and adequate compensatory remedy for a state taking. Daniel R. Mandelker, et al., *Federal Land Use Law* § 4A.02[5][d] (1998) (“[I]n many states the availability of a compensation remedy in land use cases is not clear.”). Thus, even when state courts appear open to Fifth Amendment just compensation claims against a state, that remedy is often lacking in substance.

This case provides an apt example. Sovereign immunity did not prevent Bay Point from filing a Fifth Amendment claim for compensation from a state taking in Mississippi courts. *Williams v. Walley*, 295 So. 2d 286 (Miss. 1974). However, the claim was controlled and conditioned by state compensation procedures. *Bay Point*, 201 So. 3d at 1052-53. State statutes specifically prohibited the state courts from awarding full monetary compensation for the taking of Bay Point’s land, contrary to the mandate of the

Just Compensation Clause. *Id.* at 1055-56. *Bay Point Properties*, 137 S. Ct. at 2002 (statement of Justices Gorsuch and Thomas) (questioning the state courts' decision to limit compensation based on a statute). Bay Point would not have faced this problem in federal court, *City of Fort Worth, Tex. v. United States*, 188 F.2d 217, 223 (5th Cir. 1951) (“‘just compensation’ means a full and perfect equivalent for the property taken”), but Fifth Circuit immunity precedent deterred it from suing there initially. *McMurtray v. Holladay*, 11 F.3d 499, 504 (5th Cir. 1993). Of course, the inadequate state compensation system prompted Bay Point to file a new (and different) claim for compensation in federal court in this phase of the proceedings. But the decision below held that its suit against state agencies is barred by the Eleventh Amendment, leaving Bay Point without the remedy required by the Just Compensation Clause in either state or federal court. App. A-2-5.

A similar story plays out in Florida.⁶ The Eleventh Circuit, which includes Florida, has held that that

⁶ In California, property owners also must proceed through a burdensome system to claim just compensation for a taking by a state regulator like the California Coastal Commission. Courts have held that the Eleventh Amendment bars one from suing the Commission in federal court, *Beck*, 479 F. Supp. at 396-97, but a takings suit is possible in state court. However, to raise a just compensation claim in state court, state law requires the claimant to first seek a writ of administrative mandamus to invalidate the offending action, a time-consuming process that cannot result in damages. *California Coastal Comm'n v. Superior Court*, 210 Cal. App. 3d 1488, 1496 (1989) (property owner could not sue in inverse condemnation because he failed to file a petition for writ of administrative mandamus); *Mola Development Corp. v. City of Seal Beach*, 57 Cal. App. 4th 405 (1997). If the challenged action is held invalid, the property

sovereign immunity bars takings claims against states in federal court, while noting that state courts may allow the claims. *Harbert Int'l, Inc.*, 157 F.3d at 1279. Accordingly, in 2003, Florida citrus tree owners whose trees were destroyed by the state sued for just compensation in state court. *Florida Department of Agriculture v. Dolliver*, No. 2D18-1393, 2019 WL 5939283, at *2 (Fla. Dist. Ct. App. Nov. 13, 2019). In 2014, the agencies were found liable for a taking. *Id.* at *1. The culpable defendants refused to provide compensation, though, relying on state statutes that require a special allocation of funds from the legislature. *Id.* The relevant statute allowed the owners to petition the legislature for the funds, and they took this step, *id.* at *2-3, but no money was forthcoming. So, despite establishing a taking years ago, the state process rendered the owners' "self-executing" compensatory remedy an illusion. Again, the lesson is that the application of sovereign immunity in the federal forum, and resulting litigation of taking disputes through state court processes, often limits or nullifies the Just Compensation Clause. Moreover, after this Court's decision in *Alden*, there is nothing to stop states from

owner's injury is converted into a temporary one, which California precedent holds is not compensable. *Landgate, Inc. v. California Coastal Comm'n*, 953 P.2d 1188 (Cal. 1998). On the other hand, if the action is held valid in the mandamus phase, the owner lacks a cognizable inverse condemnation takings claim. Under this "mandamus first" process, the powerful California Coastal Commission has never had to pay compensation for actions amounting to a taking. *See, e.g., Surfside Colony, Ltd. v. California Coastal Comm'n*, 226 Cal. App. 3d 1260, 1267-69 (1991) (finding a taking in the mandamus proceeding, but no damages awarded); *Liberty v. California Coastal Comm'n*, 113 Cal. App. 3d 491, 503 (1980) (same).

asserting the same takings-sovereign immunity barrier in state court that they often successfully invoke in federal courts. *Alden*, 527 U.S. at 745 (“[T]he States retain their immunity from private suits prosecuted in their own courts.”); see also *Franchise Tax Board of California v. Hyatt*, 139 S. Ct. 1485, 1493 (2019). They can of course, choose not to—a form of consent to suit—but such a scenario leaves the right of just compensation to the discretion of the state. *Esposito v. South Carolina Coastal Council*, 939 F.2d 165, 173 n.3 (4th Cir. 1991) (Hall, J., dissenting) (If state immunity applies to takings cases, “a recalcitrant state could nullify the Just Compensation Clause by simply refusing to furnish a procedure to assess and award compensation. The Clause could be converted from a fundamental constitutional right into an empty admonition.”).

In every other constitutional context, a litigant could respond to a strict immunity-based damages barrier by electing to pursue prospective relief in federal court under *Ex parte Young*, potentially securing some relief. But this avenue is unavailable in takings cases because litigants generally *must* seek monetary compensation. *Knick*, 139 S. Ct. at 2176-77. Consequently, if sovereign immunity overrides the Just Compensation Clause, as the court below held, states can potentially escape the proscriptions of the Takings Clause imposed on them by the Fourteenth Amendment in all forums. *Esposito*, 939 F.2d at 173 n.3 (Hall, J., dissenting); Berger, 63 Wash. & Lee L. Rev. at 554 (noting that “to the extent *Alden* suggests that Eleventh Amendment immunity applies symmetrically in state and federal court,” applying sovereign immunity in takings cases “would leave the

takings plaintiff unable to protect her property rights in any judicial forum, an outcome virtually impossible to square with our constitutional structure”).

In this case, Bay Point’s property has been taken for use as a public park and new highway purpose, and state statutes prevented it from recovering just compensation in state court. *Bay Point*, 201 So. 3d at 1052-56. The only possible forum for Bay Point to challenge the lack of just compensation for the taking is in the federal court. But the decision below holds that the Eleventh Amendment prevents Bay Point from protecting its rights under the Just Compensation Clause. App. A-2-5. If that is true, the federal just compensation remedy to which Bay Point is entitled, and which the state must obey under the Fourteenth Amendment, has been rendered void. The Court should grant the Petition to decide whether sovereign immunity bars enforcement of the Constitution’s self-executing just compensation remedy against states.

C. The Decision Below Conflicts with This Court’s Precedent

The Fifth Circuit’s conclusion that sovereign immunity is superior to the right of compensation for a taking is inconsistent with this Court’s jurisprudence. Most importantly, in *First English*, the Court rejected the argument that “principles of sovereign immunity” prevented the Court from interpreting the Fifth Amendment as “a remedial provision.” 482 U.S. at 316 n.9. The issue arose when the United States argued, as amicus curiae, that “[t]he application of the Takings Clause of the Fifth Amendment to the states through section 1 of the

Fourteenth Amendment [] does not give rise to a constitutionally compelled damage remedy against the government.” Brief for the United States as Amicus Curiae Supporting Appellee, No. 85-1199, 1986 WL 727420, at *26-30 (U.S. Nov. 4, 1986). In the United States’ view, only congressional action under Section 5 of the Fourteenth Amendment could subject states to a damages remedy in takings cases. *Id.* But this Court rejected this argument, *First English*, 482 U.S. at 316 n.9, a position that “strongly suggests” it viewed the Just Compensation Clause as an exception to sovereign immunity. Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 Yale L.J. 1, 115 n.454 (1988); see also Catherine T. Struve, *Turf Struggles: Land, Sovereignty, and Sovereign Immunity*, 37 New Eng. L. Rev. 571, 574 (2003).

Moreover, this Court has decided a number of takings cases against states or their arms without ever raising or addressing a potential sovereign immunity barrier. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002). Indeed, in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), amici directly raised the sovereign immunity issue, but the Court ignored it. See Amicus Brief for the Board of County Commissioners of the County of La Plata, et al., in Support of Respondents, No. 99-2047, 2001 WL 15620, at *20-21 (U.S. Jan. 3, 2001). Obviously, these takings cases did not directly reject sovereign immunity. But given that sovereign immunity is a quasi-jurisdictional concern that can be raised at any stage, *Edelman*, 415 U.S. at 678; see *Ford Motor Co.*, 323

U.S. at 467, the fact that the Court chose not to address the issue indicates that it did not view immunity as a barrier to a claim for just compensation.

Federal courts that ignore these signals and choose to strictly apply sovereign immunity in the takings context often rely on *Reich v. Collins*, 513 U.S. 106, 110 (1994). In *Reich*, the Court held that the Due Process Clause allows a person to sue a state in state court for a refund of unconstitutionally exacted taxes, notwithstanding sovereign immunity. *Id.* at 109-10. In so doing, the Court noted that “the sovereign immunity States enjoy in federal court, under the Eleventh Amendment, does generally bar [Due Process-based] tax refund claims from being brought in that forum.” *Id.* at 110. Some federal courts point to the latter statement and *Reich* in general in reasoning that sovereign immunity bars takings claims in federal court. However, *Reich* has little force in the takings context for three reasons: (1) it does not involve the Just Compensation Clause; (2) it predates *Alden*, and (3) its statement that states need not answer to Due Process tax claims in federal court is best understood as a restatement of “comity” principles that bar tax cases in federal courts, not a general immunity principle. See *Fair Assessment in Real Estate Ass’n, Inc. v. McNary*, 454 U.S. 100 (1981); see also *Alden*, 527 U.S. at 740 (citing *Fair Assessment* in discussing *Reich*).

The Court should grant the Petition to resolve the conflict between the lower court’s strict application of sovereign immunity to a takings claim and precedent from this Court indicating that immunity must bow to

the claims asserted under the Just Compensation Clause. *First English*, 482 U.S. at 316 n.9; *see also Cent. Virginia Cmty. Coll. v. Katz*, 546 U.S. 356, 377 (2006) (holding that state sovereign immunity did not bar a claim based on bankruptcy proceedings under Article I, Section 8, Clause 4, because “States agreed in the plan of the Convention” to such suits); 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”).⁷

⁷ Numerous legal scholars have concluded that this Court’s precedent supports an exception from sovereign immunity for Just Compensation Clause claims. 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”); Richard H. Fallon, Jr., *The “Conservative” Paths of the Rehnquist Court’s Federalism Decisions*, 69 U. Chi. L. Rev. 429, 485 (2002) (noting that *First English* “suggested that state sovereign immunity must yield in suits asserting takings claims”); Catherine T. Struve, *Turf Struggles: Land, Sovereignty, and Sovereign Immunity*, 37 New Eng. L. Rev. 571, 573-74 (2003) (citing *First English* for the proposition that “the Fifth Amendment’s Just Compensation Clause also appears to furnish an exception to the prohibition on damages relief”).

II.**THE DECISION BELOW
EXACERBATES A CONFLICT ON
WHETHER SOVEREIGN IMMUNITY
BARS TAKINGS CLAIMS AGAINST STATES**

There is a deep and pervasive conflict between state and federal courts on whether sovereign immunity principles bar claims that seek just compensation for a taking of property by a state. While state courts consistently hold that the “self-executing” Just Compensation Clause abrogates sovereign immunity, most federal courts have come to the opposite conclusion. Yet, even among the federal courts, there is conflict on the intersection between the Fifth and Eleventh Amendments.

**A. State Courts Are in Conflict
with Federal Courts on Whether
the Just Compensation Clause
Abrogates Sovereign Immunity****1. State courts hold that the self-executing
Just Compensation Clause abrogates
immunity, allowing takings claims
against state entities**

Post-*Alden* state court decisions are unanimous in holding that the Fifth Amendment’s Just Compensation Clause abrogates a state’s immunity from suit in the takings context.⁸ For instance, in a

⁸ The state/federal immunity conflict highlighted here is limited to decisions that post-date this Court’s decision in *Alden*. This is necessary because, prior to *Alden*, it was believed that “the Eleventh Amendment does not apply to state courts.” *Hilton v.*

2006 decision, the New Mexico Supreme Court comprehensively reviewed the issue and came to the conclusion that the Eleventh Amendment must bow to the Just Compensation Clause. *Manning*, 144 P.3d 87.

The New Mexico court recognized that, under *Alden*, sovereign immunity applies in the state's courts. *Id.* at 89. However, the court rejected the "assertion that there must be a specific waiver of immunity before the state can be sued for 'just compensation' under the Takings Clause [because] the Fifth Amendment is 'self-executing.'" *Id.* at 97. The Court stated that "[i]t is Section 1 of the Fourteenth Amendment in conjunction with the 'just compensation' remedy found in the Takings Clause that abrogates state sovereign immunity." *Id.* It further noted that "the United States Supreme 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 for just compensation." *Id.* at 90.

The South Dakota Supreme Court reached the same conclusion in *SDDS, Inc. v. State*, 650 N.W.2d 1 (S.D. 2002). There, the State urged the court "to hold that its sovereign immunity, recognized in the Eleventh Amendment to the United States Constitution, shields it from SDDS's claim" for just compensation. *Id.* at 8. The South Dakota court recognized that *Alden* held that "the States retain immunity from private suit in their own courts." *Id.*

South Carolina Public Railways Comm'n, 502 U.S. 197, 204-05 (1991). *Alden*, of course, corrected this understanding, making clear that states have immunity from suits in state and federal courts.

However, like the New Mexico Supreme Court, the South Dakota Supreme Court held that “the Eleventh Amendment will not immunize states from compensation specifically required by the Fifth Amendment.” *Id.* at 9. It explained that the “takings clause” is “made applicable to the states through the Fourteenth Amendment. It follows that South Dakota’s sovereign immunity is not a bar to SDDS’s Fifth Amendment takings claim.” *Id.* at 8-9 (citation omitted).

To the same effect is an Oregon court’s decision in *Boise Cascade Corp. v. State ex rel. Oregon State Board of Forestry*, 991 P.2d 563 (Or. Ct. App. 1999). In *Boise*, a logging company brought an action in “inverse condemnation, arguing that the refusal to permit it to log . . . constituted a taking under . . . the Fifth Amendment, as applied to the states through the Fourteenth Amendment.” *Id.* at 565. The State argued the “court lacked jurisdiction by reason of the Eleventh Amendment to the United States Constitution.” *Id.* The court reasoned that the core question was whether Boise could seek damages in state court “based on an alleged violation of the Fifth Amendment to United States Constitution, in the absence of congressional action pursuant to section five of the Fourteenth Amendment.” *Id.* at 567. Relying on *First English* and language in the *Alden* decision, the *Boise Cascade* court concluded that the Supreme Court “in its recent Eleventh Amendment decisions, did not intend to abandon the notion that at least some constitutional claims are actionable against a state, even without a waiver or congressional abrogation of sovereign immunity, due to the nature of the constitutional provision involved.”

Id. at 568. The Oregon court concluded, consistent with the New Mexico and South Dakota decisions, that “because of the ‘self-executing’ nature of the Fifth Amendment, as applied to the states through the Fourteenth Amendment, a state may be sued in state court for takings in violation of the federal constitution.” *Id.* at 569.

2. Many federal decisions conflict with state decisions, holding that the Eleventh Amendment trumps the Just Compensation Clause

In conflict with the decisions of state courts, federal courts generally hold that the Just Compensation Clause does not abrogate sovereign immunity. Such courts reject the position, adopted by state court decisions, that the Just Compensation Clause overrides state sovereign immunity due to its “self-executing” remedial nature and its application to the states through the Fourteenth Amendment.

The Ninth Circuit has held that “the constitutionally grounded self-executing nature of the Takings Clause does not alter the conventional application of the Eleventh Amendment.” *Seven Up Pete Venture v. Schweitzer*, 523 F.3d 948, 954 (9th Cir. 2008). The Ninth Circuit acknowledges that this Court’s takings “cases have not spoken directly to [the] question” about whether the Just Compensation Clause abrogates Eleventh Amendment immunity. It also recognizes that, after *Alden*, “immunity is . . . applicable equally in federal and state court.” *Id.* at 954-55. Nevertheless, the Ninth Circuit has held, in *Seven Up Pete Venture* and other cases, that the Eleventh Amendment bars takings claims in federal

court, while implying it may have a different effect in state court.

The Sixth Circuit came into line with the Ninth Circuit in *DLX, Inc.*, 381 F.3d at 526-28. There, the Sixth Circuit concluded sovereign immunity operates differently in federal courts than in state courts in the context of Takings Clause claims for just compensation. The *DLX* court held that had the plaintiff “brought a federal claim with its state claim in state court, the Kentucky courts would have had to hear that federal claim,” without respect to sovereign immunity, due to the “self-executing” character of the Just Compensation Clause. *Id.* at 527. Yet, it held the Clause did not have that same self-executing character in federal court suits involving the state, and therefore that the state “enjoys sovereign immunity in the federal courts from [a] federal takings claim.” *Id.* at 528.

The Fourth Circuit agreed with the Sixth and Ninth Circuits in *Hutto*, 773 F.3d 536. While recognizing “tension” between the Takings Clause and Eleventh Amendment, the Fourth Circuit rejected the argument “that the Takings Clause provides an absolute guarantee of just compensation when private property is taken for public use.” *Id.* at 551. It concluded the “Eleventh Amendment bars Fifth Amendment taking claims against States *in federal court* when the *State’s courts* remain open to adjudicate such claims.” *Id.* at 552.

Other circuits are in accord. See *Williams v. Utah Department of Corrections*, 928 F.3d 1209, 1214 (10th Cir. 2019) (“[T]he takings claim against the UDOC Defendants must be dismissed based on Eleventh

Amendment immunity.”); *Culebras Enter. Corp. v. Rivera Ríos*, 813 F.2d 506, 516 (1st Cir. 1987) (“The eleventh amendment precludes such [regulatory takings] actions to the extent money damages are sought.”).

Many federal courts have accordingly adopted an understanding of the interplay between the Just Compensation Clause and sovereign immunity that is very different than the state courts’ understanding. While state courts conclude that the just compensation requirement applied to the states through the Fourteenth Amendment supersedes sovereign immunity, a number of federal courts disagree. The decision below adds to this clash by siding with courts that believe the Eleventh Amendment is superior to the Takings Clause in state takings disputes. This conflict cannot be reconciled simply by noting that it spans different state and federal forums, given *Alden’s* conclusion that sovereign immunity applies equally in federal and state courts. Under this Court’s precedent, there is one state sovereign immunity doctrine and one Just Compensation Clause. Yet, state and federal courts have come to conflicting conclusions on the enforceability of the “self-executing” Just Compensation Clause when states claim sovereign immunity from a takings allegation.

B. Federal Courts Are in Conflict on Whether and When a Takings Claim Can Be Raised Against a State in a Federal Forum

There is also conflict between federal courts on the issue of whether property owners can bring takings claims against state agencies, notwithstanding

sovereign immunity. As we have seen, many federal courts conclude that sovereign immunity trumps the Fifth Amendment right of just compensation for a taking. But not all agree.

For instance, in the recent case of *Fowler v. Guerin*, 899 F.3d 1112 (9th Cir. 2018), the Ninth Circuit allowed a takings claim against the State of Washington to go forward. The case was brought by public school teachers alleging that the state had taken their property by confiscating interest earned on state retirement accounts. The teachers asked to be monetarily reimbursed in the amount of the appropriated interest. The Ninth Circuit shoe-horned this takings claim into the *Ex parte Young* doctrine, concluding that the “Eleventh Amendment does not stand in the way of a citizen suing a state official in federal court to return money skimmed from a state-managed account.” *Id.* at 1120. A dissent from a denial of a petition for rehearing observed that the “panel has wrongfully stripped the State of Washington of its Eleventh Amendment immunity from suit by permitting a damages claim to proceed against the State under the guise of an injunction requiring the State to return to Plaintiffs ‘their’ property.” *Fowler v. Guerin*, 918 F.3d 644, 645 (9th Cir. 2019) (Bennett, J., dissenting from denial of rehearing en banc). The dissent further noted that the decision “creates a circuit split [and] strips the Eleventh Amendment of much of its vitality.” *Id.*

In a case predating *DLX, Inc.*, the Sixth Circuit also concluded that claims under the Takings Clause are not barred by sovereign immunity. In *Arnett v. Myers*, 281 F.3d 552 (6th Cir. 2002), property owners

filed takings claims against Tennessee officials after the state destroyed personal property (duck blinds). The *Arnett* court held that “Eleventh Amendment sovereign immunity does not bar the Arnetts’ claims in this case,” allowing a trial on “whether the removal and destruction of the duck blinds constituted a ‘taking’ and, if so, the amount of just compensation.” *Id.* at 566-68.

The Federal Circuit has stated that “sovereign immunity does not protect the government from a Fifth Amendment Takings claim because the constitutional mandate is ‘self-executing,’” *Hair v. United States*, 350 F.3d 1253, 1257 (Fed. Cir. 2003); *see also, Hendler v. United States*, 952 F.2d 1364, 1371 (Fed. Cir. 1991) (noting that, because a federal takings suit is “based upon the constitutional provision protecting property rights, and the provision was considered to be self-executing with respect to compensation, it escaped the problems of sovereign immunity”). Other federal decisions are in accord. For instance, a district court in Ohio concluded that “[t]he 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.” *Leistiko v. Secretary of Army*, 922 F. Supp. at 73; *see also Hardman v. Government of Guam*, No. 10-00010, 2011 WL 4901054, at *4 (D. Guam 2011) (“The ‘just compensation’ provision is self-executing in nature, and as such, a landowner may bring an action for inverse condemnation directly under the Constitution.”).

These federal decisions conflict with other federal circuit decisions, such as *Seven Up Pete Venture, DLX, Inc.*, and *Hutto*, which hold that “the constitutionally grounded self-executing nature of the Takings Clause does not alter the conventional application of the Eleventh Amendment” to bar suits against states. *Seven Up Pete Venture*, 523 F.3d at 954. The Court should grant the Petition to resolve the conflict among the federal courts, and the clash between state and federal courts, on the issue of whether property owners may sue state entities for a taking of property requiring damages under the Just Compensation Clause.

CONCLUSION

The Court should grant the Petition.

DATED: December 2019.

Respectfully submitted,

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