UNITED STATES SUPREME COURT

RICHARD E. WARNER & JOHN W. PARENTE,
Co-Personal Representatives of the
Estate of Joseph Ardolino II, and
JOSEPH E. ARDOLINO II,
Petitioners,
v.
CITY OF MARATHON,
a Florida political subdivision,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT (2d Corrected)

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I. QUESTIONS PRESENTED

In this Taking by Regulation case, under the Fifth Amendment and Pennsylvania Coal Co. v. Mahon, 260 US 393, 413 (1922) ("Mahon") et al., Petitioners (the "Estate") ask this Court to clarify the Federal Common Law on the following questions:

A. Who Decides? Did San Remo's and this case's using the Full Faith and Credit Statute/28 USC §1738, mistakenly delegate this Court's final interpretation of the US Constitution's Fifth Amendment, to State Courts?

Do the Supremacy Clause, Marbury v. Madison, Trump v. Anderson, Exxon-Mobil v. Saudi Basic Industries, 42 USC 1983 et al., prevent State Courts from definitively interpreting the Fifth Amendment in Partial Taking-By-Regulation claims?

B. Is "Reverse Spot Zoning" of an existing, legal business, a categorical, per se regulatory taking, under Penn Central?

Are Florida Courts and this case mistakenly only using the multi-factor/development/residual value Penn Central formula, for this partial taking?

Are reverse spot zoning and destroying an existing legal business by a secret zoning amendment and "abandonment" (the "Zoning Amendment") both presumed to be per se Fifth Amendment takings?

C. Who decides, "Was there a 'Taking'?" Should the Fifth Amendment and Due Process,

require (in a state case) a jury to decide: "Was there a regulatory taking?" under City of Montgomery v. DelMonte Dunes?

Is a non-jury, ruling by an elected state Judge, on summary judgment, an "adequate" state-law remedy for a Fifth Amendment regulatory taking under DeVilliers v. Texas, City of Montgomery and SEC v. Jarkesy?

[This question is a good-faith request to extend Federal Jury requirements to State Courts' Fifth Amendment taking cases, with a reasonable chance of success.]

D. Aside from these issues, did the US 11th Circuit wrongly decide the appealed case?

(1) Law of the Case. Was Knick a "Change of Law Exception" to the Law of the Case, when it promised a faster journey to federal court? Did Knick change the ultimate result of providing a federal forum?

(2) Did the Estate wait too long to challenge the 11th Circuit's Warner I direction, while following that direction?

(3) Was the Estate's compelled motion to dismiss the federal case, without prejudice, a "final order" under Fed. R. of Civ.Pro. 60(b)?

(4) Were: (a) the City's secret Reverse Spot Zoning; (b) the 11th Circuit's failing to honor its Warner I direction (that the Estate could return to

federal court, if it lost in state court); and (c) the "San Remo Preclusion Trap"; Due Process?

Though Knick v. Township of Scott, Pennsylvania, 588 US 180, 184-5 (2019) ("Knick") settled some Constitutional zoning questions, the Estate respectfully asks for clarification on these and other issues.

PARTIES TO THE PROCEEDINGS

Petitioners RICHARD E. WARNER and JOHN W. PARENTE are attorneys and Co-Personal Representatives of the Estate of Joseph Ardolino II (the "Estate') at all relevant times the owner of the Property taken.

Petitioner JOSEPH E. ARDOLINO II is a natural person and the sole surviving beneficiary of the Estate

Respondent CITY OF MARATHON, Florida is a Florida political subdivision

All Counts against former Parties Michael Cinque, Ralph Lucignano, The Stuffed Pig, Inc., and CSV Incorporated were dismissed, with prejudice.

Corporate Disclosure Statement:

Undersigned Counsel of Record certifies that:

No parties have stock or other ownership interests issued or provided for. Joseph Ardolino II is the sole remaining beneficiary of the Estate. The City of Marathon is a Florida political subdivision.

There are NO subsidiaries, conglomerates, affiliates, or parent corporation of any publicly-held corporation which have any interest in this case.

There are no other present parties to this matter except those listed on the front cover.

RELATED PROCEEDINGS

[All Cases titled Warner and Parente, Personal Representatives of the Estate of Joseph Ardolino II, and Joseph E. Ardolino, Plaintiffs/Appellants vs. City of Marathon, Michael Cinque, Ralph Lucignano, The Stuffed Pig Inc. & CSV Incorporated, but all Defendants except the City were dismissed with prejudice, affirmed in Warner I.]

THE CASES DIRECTLY APPEALED: Pages

--US 11th Cir. Court, 24-10901(11th Cir. May 27,.1-17 2025) [Appendix 1; Decision Appealed-"Warner III"]

--US Dist. Court, So. Dist. of Florida, No. 4:14-...18-25 cv-10071 JL King (So. Dist. Fla. Dec. 14, 2023) [Appendix 2–trial court decision Warner III affirmed]

PRIOR RELEVANT PROCEEDINGS:

Appendix No. Pages:

3. July29, 2012 Order Granting Certiorari 26-9 from 16th Circuit Court, in & for Monroe Co., Florida ("16th Circuit") Case 2012-CA-10-M [Writ voided Zoning Amendment]

4. (1st) 2016 Appeal to US 11th Circuit 30-43 Court of Appeals ("11th Circuit") No. 16-10086, Dec. 8, 2017, 718 Fed.App'x. 834, 837 (11th Cir. Dec. 8, 2017) ("Warner I") (Excerpt.) [Taking Count remanded to State Court, directed to return to Federal Court, if unsuccessful–the "Williamson Co. Detour" .]

5. 2022. On remand to FL 16th Circuit, 44-63
Florida Court grants the City Summary Judgement.

5A. Same Judge denies fees on City's 64-67
Offer of Judgment, holding that the case involved "close questions of law and fact". Fla. 3rd DCA Affirms, without opinion.

6. [Not in Appendix] Florida Court of Appeals affirms Summary Judgment and Florida Supreme Court denies review, Warner v. City of Marathon, 357 So.3d 188 (Fla. 3d DCA 2023) rev. den. 387 So.3d 1204 (Fla. 2024) ("Warner II")

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2. The US District Court for the So. Dist. of Fla., Docket No. 4:14-cv-10071, Dec.14, 2023 Order by Judge James King, which Warner III affirmed. 17-23

3. July29, 2012 Order Granting Certiorari from 16th Circuit Court, in & for Monroe Co., Florida ("16th Circuit") Case 2012-CA-10-M, by Judge Audlin. [Writ voided Zoning Amendment for lack of Notices and for Targeting the Estate's Liquor Store.] 26-9

4. (1st) 2016 Appeal to US 11th Circuit 30-43
Court of Appeals ("11th Circuit") No. 16-10086, Dec. 8, 2017, 718 Fed.App'x. 834, 837 (11th Cir. Dec. 8, 2017) ("Warner I"–Appendix 4) (Excerpt.)
[Taking Count remanded to State Court, with direction to return to Federal Court, if unsuccessful.]

5. 2022. On remand to FL 16th Circuit, 44-63
Judge Mark Jones grants Summary Judgement to the City.*

5A. Judge Jones denies fees on City's 64-67
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* [Not in Appendix] Summary Judgment Affirmed, Warner v. City of Marathon, 357 So.3d 188 Fla. 3d DCA 2023) review denied 387 So.3d 1204 (Fla. 2023) (Warner II)

III. TABLE OF AUTHORITIES: [Trial Court Decisions are set forth in Related Proceedings.]

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IV. PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully request a Writ of Certiorari to review the final judgment of the US 11th Circuit Count of Appeals, reversing and remanding the judgment and clarifying the issues described herein, for the following reasons:

JUDGMENT FOR WHICH REVIEW IS SOUGHT:

The judgment for which review is sought is Richard Warner & John Parente, Co-Personal Representatives of the Estate of Joseph Ardolino II v. City of Marathon, Florida, No. 24-10901 (11th Cir. May 27, 2025) ("Warner III"--Appendix 1) rendered on May 27, 2025.

V. OPINIONS BELOW: (All titled "Warner v. Marathon", unless otherwise noted)

1. July 25, 2012 Writ of Certiorari from 16th Circuit Court, in & for Monroe County, Florida (the "16th Circuit") Judge David Audlin presiding; Writ voided Zoning Amendment for lack of Notices and for Targeting the Estate's property (the "Overseas") (Appendix 3).

2. 2014, 16th Circuit Civil Case 18-222-M; Judge Mark Jones presiding, alleging a temporary, partial taking. (The City removed this case to federal court.)

3. 2015, US District Court for the Southern District of Florida ("Southern District") No. 14-cv-10071, Senior Judge James L. King presiding: Order granting the City's Motion to Dismiss all Counts.

4. 2016 Appeal to US 11th Circuit Court of Appeals ("11th Circuit") No. 16-10086, Dec.8, 2017, 718 Fed.App'x. 834, 837 (11th Cir. Dec. 8, 2017) ("Warner I"–Appendix 4) Judges Tjoflat, Wm. Pryor & Jordan.

5. On remand to the Florida 16th Circuit, Judge Jones granted Summary Judgment to the City (Appendix 5) under Penn Central Transportation Co. v. City of New York, 438 US 104, 123-4, 133-4 (1978) reh. denied 439 US 883 (1978) ("Penn Central").

6. 2023, Fla. 3rd District Court of Appeals affirms Summary Judgement, 357 So.3d 188 (Fla. 3d DCA 2023) (Per Curiam, Judges Fernandez, Logue and Linsey); Review denied, 387 So.3d 1204 (Fla. 2023) ("")

7. 2023, Return to 2014 So. Dist. No. 14-cv-10071 (SDFL Dec. 14 2023) as Warner I directed; Judge King denies Estate's Motion to Reopen (Appendix 2)

8. Third Appeal. 11th Circuit affirms Judge King's Decision, 11th Cir. Case No. 24-10901 (Per Curiam, Judges Rosenbaum, Branch & Kidd) Opinion Rendered May 27, 2025 (Appendix 1–"Warner III").

VI. JURISDICTION:

Under 28 USC §1254, this appeal is from a final order of the 11th Circuit Court of Appeals (Warner III-Appendix 1) affirming the District Court's final Order, denying the Estate's Motion to Reopen its Federal taking case against the City.

The District Court's (Appealed) Order Denying the Estate's Motion to Reopen was rendered on December 14, 2023 (Appendix 2). Its Order denying the Estate' Reconsideration Motion was rendered on February 27, 2024.

Justice Thomas' Order extended the Estate's original due date to file this Petition (August 25, 2025--90 days after the 11th Circuit issued the Judgment in Warner III on May 27, 2025) until September 24, 2025, when this Petition was filed. On October 1, 2025 the Clerk of this Court gave the Estate 60 days (until November 30, 2025) to correct this Petition.

Warner I ruled that the Estate had met the Williamson County Reg'l. Planning Comm'n v. Hamilton Bank of Johnson City, 473 US 172, 186 (1985) ("Williamson Co.") Ripeness--Exhaustion of Administrative Remedies–requirement.

Warner I imposed Williamson Co.'s other, Exhaustion of State Court Remedies/Ripeness requirement, on the Estate.

(The Estate would only have to come back to federal court, though, if it lost in state court.)

The Florida Courts' Warner II was not a final order in this case, because the US 11th Circuit had directed in Warner I that the Estate could return to Federal Court, after exhausting its state court remedies.

There was no need to directly appeal to this Court, under 28 USC §1257 and §1983

The Estate can return to Federal District Court, because the City's acts–the Zoning Amendment–were "legislative".

The City needed no action to enforce the Zoning Amendment. Its disclosure and the City's announcement that it deemed the liquor uses "abandoned" were enough to kill its sale.

Exxon-Mobil v. Saudi Basic Industries, 544 US 280, 286-7, 293 (2005) described this distinction, quoting Dist. of Columbia Ct. of Appeals v. Feldman, 460 US 462, 482, 485-6 (1983):

> "...to the extent that...Feldman sought review in the District Court of the District of Columbia Court of Appeals' denial of [his] petition for waiver, the District Court lacked subject- matter jurisdiction over their complaints." [Feldman] at 482.

But that determination did not dispose of the entire case, for in promulgating the bar admission rule, this Court said, the D. C. court

> had acted legislatively, not judicially. Id., at 485-486. "Challenges to the constitutionality of state bar rules" the Court elaborated, "do not necessarily require a United States district court to review a final state-court judgment in a judicial proceeding." Id., at 486.
>
> Thus, the [Feldman] Court reasoned, 28 U. S. C. § 1257 [on direct appeals to this Court] did not bar District Court proceedings addressed to the validity of the accreditation Rule itself. Feldman, 460 U. S., at 486. The Rule could be contested in federal court...so long as plaintiffs did not seek review of the Rule's application in a particular case. Ibid.

In this case, the City "legislatively" enacted the Zoning Amendment, which only covered the Estate's property. It needed no action to enforce it. Disclosure to the $750,000 buyer was enough.

The City's actions reduced the Overseas' market price by $275,000.

VII. CONSTITUTIONAL PROVISIONS INVOLVED:

US Constitution:

Fifth Amendment: "nor shall private property be taken for public use without just compensation."

Judiciary Clause, art. III §2: "The judicial Power shall extend to all cases, in law and equity, arising under this Constitution....

In all other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

Supremacy Clause, art. VI, cl. 2: "This constitution... shall be the supreme Law of the Land; and the Judges in any State shall be bound thereby...."

Seventh Amendment: "In suits at common law... the right of trial by jury shall be preserved."

14th Amendment: "nor shall any State deprive any person of...property, without due process of law"

FLORIDA Constitution, Art. X, §6(a):
"No private property shall be taken except for a public purpose and with full compensation therefor.."

VIII. STATEMENT OF THE CASE ON APPEAL

FACTS: Taking by Reverse Spot Zoning: the City's Secret Taking Legislation ("Rezoning")

In 2005-6, the City secretly zoned away the Estate's two 55+ year old, liquor uses–a bar and package liquor store--making them "non-conforming uses" (the "Rezoning Amendment").

The City did not give the Estate its required notice of the Rezoning Amendment.

Reverse Spot Zoning:

The Rezoning Amendment was neutral on its face–forbidding bars and liquor stores within 1,500 feet from a school.

However, in fact, the only existing use the Rezoning Amendment covered, was the Overseas' package store. (It competed with an influential local politician's liquor store.)

Abandonment The Rezoning Amendment also let the City's Zoning Director rule that these "non-conforming uses" were "abandoned" after 18 months, but only after giving another advance notice--which again the City failed to give.

In 2008, the Overseas' "net" tenant moved out. Before the Overseas could be sold to pay Estate Taxes, the Estate had to foreclose on the liquor license and have the old US-1 right-of -way abandoned to the property. This took until mid-2009, the beginning of the Great Recession.

More Concealment. In April 2009, the Estate's real estate broker asked City land use officials, if the property had "any zoning problems". The City failed to disclose any, though the property had been vacant since 2008.

Exhausting Administrative Remedies.

In 2011 the City finally disclosed–to a contracted $750,000 buyer–both the Zoning Amendment and the City's ruling that both of the property's liquor uses were "abandoned".

No Advance Notice of "Abandonment":

The City's Zoning Ordinance also required advance notices to the Estate that the Overseas' grandfathered "non-conforming" liquor uses were about to be deemed "abandoned"–a single letter.

The City had also failed to send this second required notice.

Throughout the City's full three-tier appeal process, City officials ruled that the Estate had "abandoned" those liquor uses by 2011, but that it could apply to the City for a Conditional Use Permit, for the bar, only.

(Warner I ruled that the City had made its final Administrative decision on the property's permitted uses–as Williamson Co., 473 US 186 required for administrative "ripeness".)

Before the Taking Case–The Florida Court Voids the Zoning Amendment:

2012 State Case, Voiding the Rezoning. (Appendix 3)After exhausting its City appeals, the Estate promptly moved for a Writ of Certiorari in the Florida 16th Circuit Court in & for Monroe County, Florida (the "16th Circuit Court").

In 2012, the 16th Circuit Court voided the Amendment for the Overseas, because it only applied to one property with an existing package store, and because it was enacted and enforced without the required Notices to the Estate.

The City did not appeal. (Damages are not available in this action, though.)

In spite of this ruling, until the Overseas sold in 2013, the City still tried to enforce its voided Zoning Amendment. The City claimed that the Overseas still needed a zoning variance from the City, to even operate a bar.

Damages.

By 2013 the (long-out-of-contract) $750,000 buyer withdrew from his contract. Even after the 16th Circuit Court voided the Zoning Amendment, all the Estate could get for the Overseas was $475,000.

THIS TAKING CASE ON APPEAL:

The Estate spent 11 years of actions and appeals, to patiently exhaust its State Court remedy:

1. 2014 State Case. Because the 2012 Writ– voiding the Zoning Amendment–did not allow damages and as required by Williamson Co., the Estate sued the City in Florida's 16th Circuit Court.

The Estate's Complaint pled a Taking under the US and Florida Constitutions and under 42 USC §1983 (hereinafter "§1983").

The Complaint also sued the City and influential individuals–a competitor and a neighbor-- in civil rights claims under §1983.

(The 11th Circuit affirmed striking all Counts, except for the Estate's Taking Count.)

The Estate demanded a jury trial.

Under Florida law, liquor zoning is a "zoning entitlement"/property that a City can "take", particularly by "improper rezoning," City of Tampa v. Redner, 852 So.2d 270, 271, 272 (Fla. 2d DCA 2003) ("Redner").

2. 2014 Federal Case–Removal to Federal District Court. Because the Complaint included Federal and State law claims, the City removed the case to the US District Court for the Southern District of Florida, Senior Judge James L. King presiding.

Judge King dismissed the §1983 Counts against individuals, generally on privilege grounds. He dismissed the Taking Count on the ground that the Estate's claim was not "ripe".

3. 2016 Federal Appeal ("Warner I")

The Estate appealed to the US 11th Circuit, which affirmed dismissing the purely §1983 Counts, but reversed dismissing the Taking Count, 718 Fed. App'x 834, 837 (11 Cir. Dec. 8, 2017). (Appendix 4–excerpt)

The 11th Circuit ruled the Estate had exhausted its local government, administrative remedies, but had not yet exhausted its State Court remedies, as Williamson Co. required.

The 11th Circuit remanded the case to the So. Fla. District Court, with instructions to dismiss the case without prejudice, while the Estate pursued its

taking remedies in Florida State Courts (the "Williamson Co. Detour").

Significantly, the 11th Circuit promised the Estate that it could return to Federal Court, if Florida Courts denied relief.

Warner I stated:

> A federal court has jurisdiction to review a federal takings claim for money damages stemming from a regulatory taking of property when the plaintiff can establish that...there is no adequate state remedy to obtain just compensation, or an adequate remedy exists but the plaintiff has been denied relief.
>
> ****
>
> Notwithstanding the possibility that [appellants] were attempting to assert an inverse condemnation clam in Florida state court before the case was removed to federal court, we cannot review the claim until the plaintiffs have been denied relief by a Florida court...

The City did not appeal this ruling.

(No party or Court mentioned San Remo Hotel, L P v. City & County of San Francisco, 545 U.S. 323 (2005) ("San Remo") or preclusion by 28 USC §1738.)

As ordered, the District Court dismissed the Federal case, but without prejudice.

4. 2018 State Case–(Revived 2014 16th Cir. State Case on remand, where the Estate loses in State Court, on Summary Judgment.)

The Estate sued again in the 16th Circuit Court. It amended its original Complaint, to drop its §1983 claims against individuals, and to sue only on the Florida Constitution's taking clause, Fla. Const., Art. X, §6(a), to avoid another Removal. It included Count I's §1983 claim.

All the Estate's Complaints ask for a jury trial, though Florida does not provide a jury trial on the key question in a Regulatory Taking claim–Was there a taking?

On remand from Warner I, on December 31, 2018, the 16th Circuit denied the City's Motion to Dismiss, ruling "the Complaint sets forth a legally sufficient cause of action for 'As Applied' Inverse, Temporary Regulatory Taking."

However, without a trial, the 16th Circuit gave the City Summary Judgment, based on Penn Central's "residual value" analysis, Appendix 5.

5A Except the City got no fees from its Offer of Judgment. Ironically, when it later denied the City's Fee Motion on its Offer of Judgment, the 16th Circuit Court ruled "The case raised close questions of law and fact." Affirmed by Marathon v. Warner, 3D22-1509 (Fla. 3rd DCA Sept. 27, 2023) (Appendix 5A)

5. 2021-2023 State Appeal–(The Estate's unsuccessful Florida Appeal.)

Citing Penn Central, Florida's Third District Court of Appeal affirmed the trial court, in Warner v. Marathon, 357 So.3d 188 (Fla. 3rd DCA 2023) rev. denied 387 So.3d 1204 (Fla. 2023) ("Warner II").

6. 2023 Federal Case (Revived 2014 US So. Fla. Dist. Case; The "San Remo Preclusion Trap" Lives.)

The Estate moved to reopen the Federal Case, based on the 11th Circuit's above promise of ultimate access to Federal Courts.

The District Court denied the Motion to Reopen, however, based on 28 USC §1738 and San Remo, because the Estate lost in State Court and that loss precluded the Estate from trying again in Federal Court. (Appendix 2)

Over-Ripeness? The District Court also ruled that the Estate had waited too long to reopen the Federal case, after Knick closed the lid to the "San Remo Preclusion Trap" [San Remo at 341-2, so described in Knick at 139 S.Ct. 2167] in 2019. (The Estate was exhausting its state court appellate remedies, as the 11th Circuit directed.)

7. 2023 Second Appeal to 11th Circuit–Warner III. (The Order appealed–Appendix 1.)

The 11th Circuit ruled that, in 2019 Knick had triggered the "change in law" exception to the Law of

the Case rule, during the Estate's Williamson Co. Detour.

The 11th Circuit used the timeliness rule under Fed. Rule of Civil Procedure 60(b)--"Motions to Rehear Final Judgments"--to evaluate the Estate's timeliness, to try to return to federal court.

Section D of the Estate's Argument addresses this ruling in detail.

9. September 24, 2025 Federal (3rd) Appeal--this Petition for Certiorari.

IX. REASONS TO GRANT THE WRIT:

A. Who Decides? The Supremacy Clause et al., make this Court the final interpreter of the Fifth Amendment's Taking Clause, not state courts.

The rules on Fifth Amendment Takings by Regulation claims are "Federal Common Law". They are entirely Judge-made, without enabling legislation (except §1983) or regulations.

Each case, including this one, contains both a legislative aspect–a "rule" where the Court determines what facts constitute a taking–and often an adjudicative aspect–What are the facts and how do they fit this rule?

"Those who apply [a] rule to particular cases...must of necessity expound and interpret that rule." Marbury v. Madison, 1 Cranch 137, 177 (1803) quoted by the three-Justice concurrence in Trump v. Anderson ("Anderson") 601 US 100, 117, 118 (2024) at 118.

Since Mahon in 1922, taking-by- regulation is a court-made, Constitutional claim, where the Courts act "legislatively" (Feldman, 460 US 486) to define its boundaries.

U.S. Constitution, Art. VI, cl. 2 states that the US Constitution is "the supreme Law of the Land".

US Constitution, Art. III, Section 2 states "The judicial Power shall extend to all Cases, in law or in equity, arising under this Constitution..."

San Remo erroneously ruled, without citing any precedent, that the literal language of the Full Faith and Credit Act/28 USC §1738 makes State courts the final interpreters of what constitutes a Fifth Amendment Taking.

Knick roundly criticized San Remo, but failed to address the Constitutional problem with 28 USC §1738 preclusion.

Though Congress enacted 28 USC §1738's predecessor at the same time as the Fifth Amendment, the Estate could find no other case where a State court's interpretation of the US Constitution controlled. (For example, Brown v. Board of Education, 347 US 485 (1954) did not mention 28 USC §1738, though it reversed a Delaware Supreme Court decision.)

Article III Section 2, Exxon Mobil, and 28 USC §1257 give this Court jurisdiction over "all Cases, in Law and Equity, arising under this Constitution" and appellate jurisdiction over "all

cases, in Law and Equity, arising under this Constitution,...with such exceptions [not relevant]".

Need for Uniformity. Letting State Courts finally interpret the US Constitution under 28 USC §1738 preclusion, without the right to appeal to Federal Courts, could lead to many different results for the same set of facts. (For example, if there is no relevant Tennessee precedent on point, should a Tennessee Court follow the Vermont Rule or the Idaho Rule?)

In Trump v. Anderson, 601 US 110, 116 (2024) ("Anderson"), after a trial, the Colorado Supreme Court ruled that the US 14th Amendment barred former President Trump from running for President in Colorado in 2024.

Nonetheless, without mentioning 28 USC §1738, this Court unanimously ruled that multiple, possibly-inconsistent State rulings could not definitively interpret the US Constitution to preclude former President Trump from running:

> But state-by-state resolution of the question whether Section 3 bars a particular candidate for President from serving would be quite unlikely to yield a uniform answer consistent with the basic principle that "the President . . . represent[s] all the voters in the Nation." [Anderson v. Celebrezze, 460 US 780 (1983)] at 795...

> Conflicting state outcomes concerning the same candidate could result not just from differing views of the merits, but from variations in state law governing the proceedings that are necessary to make [14th Amendment] Section 3 disqualification determinations. Some States might allow a Section 3 challenge to succeed based on a preponderance of the evidence, while others might require a heightened showing.
> ....The result could well be that a single candidate would be declared ineligible in some States, but not others, based on the same conduct (and perhaps even the same factual record).

The three-Justice Anderson concurrence agreed on the need for uniformity (only).

Knick and Anderson show how mistaken San Remo was, to delegate final interpretation of the Fifth Amendment to 50 State Courts.

B. "Reverse Spot Zoning" of an existing, legal business, is a categorical, per se regulatory taking. Penn Central is inappropriate for this case, except as it says that it does not apply.

Introduction: Mahon ruled that a Pennsylvania coal mine regulation "went too far" and made the

mine unprofitable. This Court ruled that the regulation was a Fifth Amendment "taking" of private property–the coal company's mine.

The en banc opinion in Shands v. City of Marathon ("Shands"), 411 So.3d 452, 458 (Fla. 3rd DCA 2025) describes the problem Florida Courts have had with applying this Federal "rule":

> As observed by Judge Shepherd in his dissent in Ganson v. City of Marathon, 222 So.3d 17, 20 (Fla. 3d DCA 2016), '[t]he Takings Clause is clear and concise,'but [r]egrettably, takings jurisprudence is cryptic and convoluted.'

For example, Lucas v. So. Carolina Coastal Council, 505 US 1003, 1059, 1073 (1992) ("Lucas") had five opinions, trying to fit the facts to answer: What degree of regulation becomes a taking?

Similarly, Shands took 30 well-reasoned pages to rule that a total prohibition on developing an undeveloped island was a Lucas, per se taking.

This Court recognizes two exceptions to the Penn Central multi-factor, residual value formula. These regulations are "categorical" per se takings:

(1) Physical Invasions of Private Property:

Loretto v. Teleprompter Manhattan CATV, 458 U.S. 419, 427 (1982)--requiring owners to allow even a slight physical invasion of their property, "took" that part of their property./...18

Knick ruled that a law requiring private cemetery owners to keep them open to the public during the day, was a partial taking.

(2) Preventing all development of “raw land”.

Lucas ruled that regulation that forbade all meaningful development of vacant land was a taking. Accord, Shands v. City of Marathon supra.

Florida and this case use Penn Central, only.

Between these two categorical poles, Florida almost always uses the multi-factor, residual value Penn Central formula to decide taking by regulation claims.

Shands v. City of Marathon, supra at 411 So.3d 458, stated:

> In...Penn Central, the [US Supreme] Court developed a framework for assessing partial, rather than categorical, regulatory takings claims,...438 U.S. at 123-24. The Court articulated a fact-specific, ad hoc inquiry, consisting of the following three factors: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment- backed expectations; and (3) the character of the governmental action. ...Keshbro, Inc. v. City of Miami, 801 So.2d 864, 871 n.12 (Fla. 2001):

> "Those regulations which fall short of effecting a categorical taking, are appropriately analyzed under the ad-hoc factual inquiry outlined in [Penn Central]."

Restricting Future Development v. Destroying an Existing Business

Most taking-by-regulation claims involve owners or developers objecting to restrictive zoning or rezoning, of "raw" or partially-developed land, that thwarts their development plans.

Penn Central is a "future development" case. (New York City stopped Penn Central from further developing Grand Central Station, but did not stop its trains and subways.) Its reference to "distinct investment- backed expectations" shows that it assumes the case involves development.

Penn Central's multi-factor, residual value formula is a rational way to decide development cases of raw (or nearly-raw) land.

But it is not appropriate in this case of reverse spot zoning of a long-existing business.

"Reverse Spot Zoning" of an existing, legal business, is a per se, categorical taking:

Penn Central itself says that it does not apply to "reverse spot zoning" 438 US at 133-4.

New York City's Landmark Law applied to to 400 buildings, and so, did not target a particular property, 438 US 133:

> landmark laws are not like discriminatory, or "reverse spot zoning": that is, a land-use decision which arbitrarily singles out a particular parcel for different, less-favorable treatment than the neighboring ones.

In this case, the Overseas was the only existing business the Amendment covered.

Justice Stevens' dissent to Lucas, 505 US 1023, 1073 (1992) stated:

> Courts have long recognized the difference between a regulation that targets one or two parcels of land and a regulation that enforces a statewide policy. See, e.g., A.A. Profiles, Inc. v. Ft. Lauderdale, 850 F.2d 1483, 1488 (CA11 1988); Wheeler v. Pleasant Grove, 664 F.2d 99, 100 (CA5 1981)...As one early court stated with regard to a waterfront regulation,
>
> > If such restraint were in fact imposed upon the estate of one proprietor only, out of several estates on the same line of shore, the objection would be much more formidable. Commonwealth v. Alger, 61 Mass. 53, 102 (1851).

Justice Stevens' dissent in Lucas at 505 US 1073, also states "conversely, 'spot zoning' is far more likely to constitute a taking, see Penn Central, 438 U.S., at 132, and n. 28."

The City's Amendment Targeted the Overseas.

In 2012, the 16th Circuit (Appendix 3) found that the Zoning Amendment affected only one existing business–the Overseas' liquor store–and that the City did not give the Estate any required notices. The City did not appeal.

Accordingly, the City's rezoning was a "reverse spot zoning."

Nonetheless, in the case at bar, Florida and federal Courts ignored this prohibition, Redner; and A.A. Profiles, Inc. v. City of Fort Lauderdale, 850 F.2d 1483,1485-7 (11th Cir. 1988) cert. den. 490 US 1020 (1989) and [on remand] 253 F.3d 576, 582, 584 (11th Cir. 2001) ("AA Profiles").

Instead, these Courts used the multi-factor, raw land, residual value, Penn Central formula which values a future development and alternate uses for the land.

Existing Business v. Proposed Development

The Estate's property (the "Overseas") had operated as a bar and package store since at least 1950. The Florida Legislature had issued its combined bar and package store permit in 1959 and 1980. (The City was incorporated in 1999.)

Though Florida 16th Circuit Judge Jones ruled (without citing authority) at summary judgment, in the Estate's Williamson Co. Detour, that the Overseas's liquor uses were "abandoned", when its net tenant moved out in 2008, he apparently relied on the time limits and

procedure from the voided Zoning Amendment. Need for Clarification: Though Justice Stevens' dissent cited AA Profiles, the Estate could find no case where this Court definitively ruled that reverse spot zoning of an existing business creates at least a rebuttable taking presumption. This case can clarify this.

C. The Fifth Amendment should require a jury trial in State Court on whether there was a regulatory taking.

[This position is a good-faith attempt to extend federal practice to State Constitutional cases, with a reasonable chance of success.]

In Federal Court, under the Seventh Amendment, City of Monterey v. Del Monte Dunes, 526 US 687 (1999) requires a jury to decide if a regulatory taking occurred.

In Florida Courts, however, Judges alone make that decision, Dep't of Agric. & Consumer Servs. v. Polk, 568 So.2d 35, 40 (Fla. 1990). Locally-elected Florida Judges--rather than juries–make the key factual finding in inverse taking cases: Did a taking by regulation occur?

Same Amendment, but differing procedural rules that often affect a case's outcome.

SEC v. Jarkesy 603 US 109, 118-119 (2024) ("Jarkesy") describes the need for juries and independent, lifetime-appointed federal judges to decide factual/Constitutional questions.

In this case, this is the question: Did a taking occur? City of Monterey v. Del Monte Dunes, supra at 708-9, 718-9, 722 ruled:

> Almost from the inception of our regulatory takings doctrine, we have held that whether a regulation of property goes so far that "there must be an exercise of eminent domain and compensation to sustain the act, depends upon the particular facts." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922); accord Keystone Bituminous Coal [v. DeBenedictis, 480 U.S. 470 (1987)] at 473-474.
>
> ....we have described determinations of liability in regulatory takings cases as " 'essentially ad hoc, factual inquiries,' Lucas...at 1015 (quoting Penn Central ...438 U.S. 104, 124 (1978)), requiring "complex factual assessments of the purposes and economic effects of government actions," Yee [v. Escondido, 503 U.S. 519, 523 (1992).]

Justice Scalia's concurrence–the 5th vote for this Court's City of Monterey decision quoted above:

> I concur in the Court's assessment that the 'economically viable use' issue presents primarily a question of fact appropriate for consideration by a jury.

In contrast, Florida has its locally-elected Circuit Judges by themselves, decide if a regulatory taking has occurred, without a jury.

Dep't of Agric. & Consumer Servs. v. Polk, supra at 40, ruled:

> "[T]he trial judge in an inverse condemnation suit is the trier of all issues, legal and factual, except for the question of what amount constitutes just compensation"

(quoting Dep't of Agric. & Consumer Servs. v. Mid-Florida Growers, 521 So.2d 101, 103 (Fla. 1988).

These Florida cases took this rule from regular, formal-taking cases, where the condemning authority openly takes the property. There, the only remaining crucial factual question is the value of the property taken, which Florida juries decide.

In taking-by-regulation cases such as this one, however, the crucial factual/legal question is: "Did a taking take place?"

This question is often unfair to a locally-elected Judge to have to decide, Jarkesy, supra.

In a formal taking of property for a public use, local government openly debates the need– and the needed funds--for the taking. And the public "gets something" for its money–a park, land for a widened road or a school, etc.

A regulatory taking, however, does not bring local government any property to show for it– only a liability. (The Estate does not imply that taxpayer and political pressure sways elected state trial judges, only that it is unfair to put them under such pressure.)

Jarkesy held that the US Seventh Amendment gives parties the right to a jury trial in federal court, in spite of a contrary federal jurisdictional Statute [like 28 USC §1738] and an adverse court, non-jury judgment.

Jarkesy ruled that the Constitution forbids federal courts from losing jurisdiction to courts or agencies, where the parties have no right to a jury trial--if they had that right in federal court.

(The SEC had imposed a fine, in a statutory, administrative, non-jury procedure. Dodd-Frank required federal courts to give that judgment near-preclusive effect.)

The US Supreme Court affirmed reversing the administrative judgment, on Jarkesy's right to a federal judge and jury:

> The Constitution prohibits Congress from "withdraw[ing] from judicial cognizance, any matter which, from its nature, is the subject of a suit at the common law." Murray's Lessee v. Hoboken Land & Improvement Co., 18 How. 272, 284 (1856).
>
> Once such a suit "is brought within the bounds of federal jurisdiction," an Article III court must decide it, with a jury if the Seventh Amendment applies, Stern v. Marshall, 564 U. S. 462, 484 (2011).

Justice Gorsuch's concurrence (J. Thomas joining) summed up Jarkesy's application to taking cases:

> The Seventh Amendment's jury-trial right does not work alone. It operates together with Article III and the Due Process Clause of the Fifth Amendment to limit how the government may go about depriving an individual of life, liberty, or property.
> The Seventh Amendment guarantees the right to trial by jury. Article III entitles individuals to an independent judge who will preside over that trial. And due process promises any trial will be held in accord with time-honored principles. Taken together, all three provisions vindicate the Constitution's promise of a "fair trial in a fair tribunal." In re Murchison, 349 U.S. 133, 136 (1955).

In the same way that Dodd-Frank does not repeal Constitutional rights, the Full Faith & Credit Act/ 28 USC §1738 should not repeal the Estate's Constitutional right to a jury, to claim its Fifth Amendment rights.

Florida's remedy to obtain just compensation in inverse condemnation cases, for a long-existing, licenced business, was also not "adequate" under Devillier v. Texas, 601 US 285, 293 (2024) because:

(1) Florida Courts use Penn Central's "raw land, residual value" analysis for nearly all non-per se, inverse taking cases, but Penn Central is a "development case" which does not apply to

"reverse spot zoning" or destroying existing businesses, per AA Profiles.

(2) Jarkesy held the Seventh Amendment gives Appellants the right to a jury trial, in federal court, notwithstanding a contrary federal Statute (28 USC §1738) and an adverse, non-jury summary judgment.

There is precedent for requiring juries to decide Fifth Amendment regulatory takings in State courts. For example, this Court requires juries in state death penalty cases. Hurst v. Florida, 577 US 92, 94 (2015) held:

> The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death.

Pragmatic Consideration. Prospectively requiring juries in state court, Fifth Amendment taking-by-regulation cases, with Federal review, would bring many of these cases back to State Courts, where Williamson Co. believed they should begin in the first place.

This would spare federal courts from some cases which try to "constitutionalize every run-of-the-mill dispute between a developer and a town planning agency." Gardner v. Baltimore Mayor and City Council, 969 F.2d 63, 68 (4th Cir. 1992).

D. Aside from the above, Constitutional problems, Warner III was wrongly-decided.

Summary of this Argument:

(1) Knick was not a Change of Law exception to the Law of the Case when it promised a faster journey to federal court, because it did not "dictate a different result" from Warner I

(2) The Estate did not wait too long to challenge the 11th Circuit's Warner I ruling and take Knick's escape from the San Remo Preclusion Trap.

(3) The District Court's Ordered dismissal of the federal case in 2018, without prejudice, was not a voluntary "final order" under Fed. Rule of Civil Pro. 60(b).

(4) (a) The City's secret Reverse Spot Zoning; (b) the 11th Circuit's failing to honor its Warner I promise--that the Estate could return to federal court, if it lost in state court; and (c) the "San Remo Preclusion Trap"; were not due process.

Argument:

(1). Knick was not a Change of Law exception to the Law of the Case, when it allowed a faster journey to federal court, because it did not "dictate a different result" from Warner I.

In Warner I, the 11th Circuit promised the Estate "a second bite of the apple" IF it did not recover in a State lawsuit. As such, Warner I was the Law of the Case, binding on the District Court, Winn Dixie Stores v. Dolgencorp, 881 F.3d 835,

843-844 (11th Cir. 2018).

Knick was not a Change in Law exception to the Law of the Case:

Stout v. Jefferson Cnty. Bd. of Educ., 882 F.3d 988, 1014 (11th Cir. 2018) held the "change in law" exception to the law of the case only applies, if the change "dictates a different result":

> Although there are limited exceptions to the law-of-the-case doctrine, [if] "there is new evidence, an intervening change in controlling law dictates a different result, or the appellate decision, if implemented, would cause manifest injustice because it is clearly erroneous," [United States v. Anderson, 772 F.3d 662, 668-9 (11th Cir. 2014)] at 668–69 (quoting Litman v. Mass. Mut. Life Ins. Co., 825 F.2d 1506, 1510 (11th Cir. 1987) (en banc))....

Knick did not change Warner I's ruling that the Estate could have its Fifth Amendment claim ultimately heard in federal court. Knick was a procedural change– eliminating the Williamson Co. Detour--but it did not "dictate a different result" from the 11th Circuit's Warner I ruling.

(2). The Estate did not wait too long to challenge the 11th Circuit's Warner I mandate for its Williamson Co. Detour.

Over-ripe? Warner III claims the Estate waited too long to return to Federal court, that the

time to reopen the federal case was 2019. This penalized the Estate for following the 11th Circuit's clear Warner I direction.

The Estate did not wait too long to return to federal court.

Knick did not state if its procedural change was retroactive, Thomas v. State, 461 F.Supp.3d 849, 866 (WD Tenn. 2020) or tell any plaintiffs in their Williamson Co. Detours, how to proceed.

Knick closed the lid on the "San Remo Preclusion Trap", but it did not release those owners who were already caught in it, Tejas Motel, LLC v. City of Mesquite ex rel. Bd. of Adjustment, 63 F.4th 323, 334 (5th Cir. 2023) et al.

Since 2017, the Estate has pursued its state-court remedies, as the 11th Circuit directed. (By 2018 the Florida 16th Circuit had ruled that its Complaint set forth a claim for a regulatory taking.)

In analogous Younger v. Harris, 401 US 37 (1971) abstention cases, plaintiffs must finish their state appeals, before they can return to the federal court which had deferred to the State Court, Huffman v. Pursue, 420 US 592, 608 (1975).

City of Columbus v. Leonard, 443 US 905, 908 (1979) quoted Huffman, at 443 US 908:

> Even though the State trial court judgment might have become final, "a necessary concomitant of Younger is that a party...must exhaust his state appellate remedies before seeking relief in the District Court." 420 U.S., at 608.

If the Estate had interrupted its Williamson Co. Detour, to ask the 11th Circuit on appeal to change its Warner I decision, the 11th Circuit could have invoked "Younger [or similar] abstention", setting back this case for at least a year

(3) The District Court's required dismissal of the federal case, without prejudice, was not the Estate's voluntary "final order" under Fed. Rule of Civil Pro. 60(b)--"Grounds for Relief from a Final Judgment, Order or Proceeding."

(The 11th Circuit directed the Estate to then finish its Williamson Co. Detour, in State Court.)

Though Waetzig v. Haliburton Energy Services, 605 US 305 (2025) apparently expanded the meaning of the word "final" to include some voluntary dismissals with prejudice. Waetzig did not expand the word "voluntary" to include Judge King's obeying the 11th Circuit's interim Order, however.

(4) As Exxon-Mobil ruled, preclusion is an affirmative defense, not a jurisdictional barrier.

Exxon-Mobil, at 292-3 described how dismissal of the federal case and preclusion do not deprive the District Court of jurisdiction:

> Comity or abstention doctrines may, in various circumstances, permit or require the federal court to stay or dismiss the federal action in favor of the state-court litigation. [citations omitted] See, e. g., Colorado River Water Conservation Dist. v. United States,

> 424 U. S. 800 (1976); Younger v. Harris, 401 U. S. 37 (1971)....
>
> But neither Rooker nor Feldman supports the notion that properly invoked concurrent jurisdiction vanishes if a state court reaches judgment on the same or related question while the case remains sub judice in a federal court. ****
>
> Preclusion, of course, is not a jurisdictional matter. See Fed. R. Civ. Proc. 8(c) (listing res judicata as an affirmative defense).
>
> In parallel litigation, a federal court may be bound to recognize the claim and issue-preclusive effects of a state-court judgment, but federal jurisdiction over an action does not terminate automatically on the entry of judgment in the state court.

Warner III does not address Florida's law of res judicata/estoppel, but this area and others described herein would benefit from this Court's clarification.

CONCLUSION:

This case addresses serious Constitutional issues raised by San Remo's interpretation of 42 USC 1738 preclusion, and asks for additional relief under Knick, for owners still caught in "the San Remo Preclusion Trap."

It asks this Court to restrict Penn Central's thwarted-future-development-formula, to the usual development cases, and to expand the right to a jury trial, to Fifth Amendment taking cases in state court.

This case gives this Court a chance to: end some of the uncertainty in partial taking-by-regulation cases; tie up some of their loose ends; and give the Estate some belated justice.

DATED: April 9, 2026
Respectfully submitted,

/s/ Richard E. Warner, Esq.
Richard E. Warner. Esq., Pro Se
Counsel for Petitioner
FL Bar No. 0283134

XI. APPENDICES– Pages

1. The case appealed, Warner v. City of Marathon, No. 24-10901 (11th Cir. May 27, 2025) ("Warner III"). 1-16

2. The US District Court for the So. District of Florida, Docket No. 4:14-cv-10071, December14, 2023 decision by Judge James King, which Warner III affirmed. 17-23

3. July29, 2012 Order Granting Certiorari from 16th Circuit Court, in & for Monroe Co., Florida ("16th Circuit") Case 2012-CA-10-M, by Judge David J. Audlin. [Writ voided Zoning Amendment for lack of Notices and for Targeting the Estate's Liquor Store.] 26-9

4. (1st) 2016 Appeal to US 11th Circuit Court of Appeals ("11th Circuit") No. 16-10086, Dec. 8, 2017, 718 Fed.App'x. 834, 837 (11th Cir. Dec. 8, 2017) ("Warner I") Judges Tjoflat, Wm. Pryor & Jordan. (Excerpt.) [Taking Count remanded to State Court, with direction to return to Federal Court, if unsuccessful there.] 30-43

5. 2022. On remand to FL 16th Circuit, Judge Jones grants ths City Summary Judgement. 44-63

5A. Judge Jones denies fees on City's Offer of Judgment, holding the case involved "close questions of law and fact". Fla. 3rd DCA Affirms. 64-67

CITED CASE NOT IN OFFICIAL REPORTER:
Marathon v. Warner, 3D22-1509 (Fla. 3rd DCA Sept. 27, 2023) [the City's appeal from Judge Jones' Order denying the City fees from its offer of judgement] Affirmed, per curiam, without opinion. [Appendix 5A, page 67.]

RELEVANT RECENT CASE:
Bush v. Phila. Redevelopment Authority, 24-3070 (3rd Cir. Apr 3, 2025) Footnote 1:

> [1] In Knick, the Supreme Court held that a property owner may bring a Fifth Amendment takings claim in federal court without first seeking compensation in state court. Knick, 588 U.S. at 185. In affirming the dismissal of Bush's complaint, we determined that his claims were barred by res judicata because Bush could have raised his claims in a state court action he had filed. Bush [v. Philadelphia Redevelopment Auth.], 822 Fed.Appx. at 134-35. The Supreme Court's decision in Knick does not undermine our analysis. See Tejas Motel, L.L.C. v. City of Mesquite ex rel. Bd. of Adjustment, 63 F.4th 323, 334 (5th Cir. 2023).

DATED: April 9, 2026

s/Richard E. Warner, Esq.
Richard E. Warner. Esq., Pro Se
Counsel for Petitioner/the Estate

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1 APPENDIX 1

RICHARD E. WARNER, as Co-Personal Representatives of the Estate of Joseph Ardolino II, JOHN W. PARENTE, as Co-Personal Representatives of the Estate of Joseph Ardolino II, JOSEPH E. ARDOLINO, individually,

Plaintiffs-Appellants,

v.

CITY OF MARATHON, a political subdivision of the State of Florida, MICHAEL CINQUE, individually and as a City of Marathon Official, RALPH LUCIGNANO, individually and as a City of Marathon Official, THE STUFFED PIG, INC., a Florida corporation, CSV, INCORPORATED, et al.,

Defendants-Appellees.

No. 24-10901

United States Court of Appeals, Eleventh Circuit

May 27, 2025

DO NOT PUBLISH

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Appeal from the United States District Court for the Southern District of Florida D.C. Docket No. 4:14-cv-10071-JLK

Before ROSENBAUM, BRANCH, and KIDD, Circuit Judges.

PER CURIAM:

Plaintiffs, the Estate of Joseph Ardolino II and Joseph Ardolino (Joseph Ardolino II's son), appeal the denial of their motion to reopen their action and amend their complaint against the City of Marathon

under the Takings Clause of the Fifth Amendment.

Under our mandate, the district court dismissed Plaintiffs' case without prejudice in 2018. See *Warner v. City of Marathon*, 718 Fed.Appx. 834, 838 (11th Cir. 2017) (per curiam). At the time, the Supreme Court's decision in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City* dictated that Plaintiffs
3
could not pursue their takings claim in federal court until they first litigated their case in state court. 473 U.S. 172, 194-95 (1985).

But in 2005, the Supreme Court also decided *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005). There, the Court held that federal courts "are not free to disregard the full-faith-and-credit statute [28 U.S.C. § 1738] solely to preserve the availability of a federal forum" for takings claims. Id. at 347-48. So a state court's judgment on a takings claim has "preclusive effect" in later federal suits on that claim. See id. at 347. In plain English, federal courts can't hear a takings claim if a Plaintiff already lost on that claim in state court.

Williamson County and *San Remo*, together, created "[t]he San Remo preclusion trap," -a "Catch-22." *Knick v. Twp. of Scott*, 588 U.S. 180, 184-85 (2019). A takings plaintiff couldn't "go to federal court without going to state court first; but if he [went] to state court and los[t], his claim [would] be barred in federal court." Id. So the Supreme Court overruled *Williamson County* in its 2019 decision *Knick v. Township of Scott*. Id. at 185, 206. But it left *San Remo* in place. See id. at 185, 204, 206.

Knick issued as the parties litigated their claim in state court. But rather than seek to remove the case back to federal court after Knick, Plaintiffs pursued their case fully in state court. And they lost. Now, several years later, we are precluded from entertaining their takings claim under 28 U.S.C. § 1738. So we conclude the district court didn't abuse its discretion when it denied Plaintiffs'
4
motion to reopen their case and amend their complaint, and we affirm its order.

I. BACKGROUND

In August of 2014, Plaintiffs sued the City of Marathon and several co-defendants in Florida state court under multiple causes of action. See *Warner*, 718 Fed.Appx. at 836. The City of Marathon removed the case to federal court. Id. Proceeding in federal court, Plaintiffs' operative complaint alleged, as relevant, that through the City's enforcement of zoning regulations, the City violated Plaintiffs' rights under the Takings Clause of the Fifth Amendment and 42 U.S.C. § 1983. Id. at 837.

The district court dismissed the complaint with prejudice, and Plaintiffs appealed. Id. On December 8, 2017, we affirmed the dismissal of the complaint except as to Plaintiffs' takings claim. Id. at 840. As to the takings claim, we vacated the district court's judgment with instructions to dismiss the claim without prejudice for lack of subject-matter jurisdiction. Id. at 838. We explained that under *Williamson County*, a federal court couldn't "review the claim until the plaintiffs have been denied relief by a Florida court." *Warner*, 718 Fed.Appx. at 838. On February 5, 2018, the district court dismissed the takings claim without prejudice for lack of subject

matter jurisdiction.[1]

The parties then litigated the takings claim in state court, and the state trial court granted summary judgment to the City of
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Marathon on March 25, 2022. On January 4, 2023, Florida's Third District Court of Appeal affirmed the grant of summary judgment, explaining that "the fact that a regulation causes a diminution in the property value alone does not establish a taking." See *Warner v. City of Marathon*, 357 So.3d 188 (Fla. Dist. Ct. App. 2023) (per curiam) (citing *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 131 (1978)). The Florida Supreme Court denied a petition for review on May 18, 2023. *Warner v. City of Marathon*, No. SC2023-0433, 2023 WL 3521698 (Fla. May 18, 2023).

While Plaintiffs litigated their claim in state court, on June 21, 2019, the Supreme Court overruled *Williamson County* in *Knick*, 588 U.S. at 185, 206. After *Knick*, no longer must takings plaintiffs first seek relief in state court before filing a claim directly in federal court. Id. The Supreme Court highlighted that under its decision in *San Remo*, 545 U.S. 323, "a state court's resolution of a claim for just compensation under state law generally has preclusive effect in any subsequent federal suit." *Knick*, 588 U.S. 184. So paired with *Williamson County* which required plaintiffs to proceed in state court first-*San Remo* created "a Catch-22" for a takings plaintiff, where he could never receive relief in federal court. Id. at 184. Recognizing this problem, the Court overruled *Williamson County*'s state-litigation requirement, without disturbing *San Remo*. See id. at 185, 204, 206.

On June 20, 2023, a little over thirty days after the Florida Supreme Court's denial of review in their case, Plaintiffs moved in federal court to reopen their case and amend their complaint. The
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district court denied that motion on December 14, 2023, interpreting the motion to reopen the case to be a motion under Federal Rule of Civil Procedure 60(b). The court highlighted that "Plaintiffs waited two years after a change in the law was issued by the Supreme Court to seek relief before this Court." It also noted that "the issues were litigated to finality in state court, where both the trial court and the court of appeals applied federal law when deciding the issues." So the district court determined "that to reopen the case and allow Plaintiffs to amend would effectively give Plaintiff[s] a second opportunity to have their case tried, which could result in conflicting rulings." Because the case remained closed, the court denied the motion to amend the complaint as well.

On January 11, 2024, Plaintiffs filed a motion to reconsider the court's December 14, 2023, order.[2] The district court denied that motion on February 27, 2024. On March 22, 2024, Plaintiffs filed their notice of appeal on the denial of their motions to reopen their case and amend their complaint and for reconsideration.

II. STANDARD OF REVIEW

We review the denial of post-judgment motions under an abuse-of-discretion standard. *Green v. Union Foundry Co.*, 281 F.3d 1229, 1233 (11th Cir. 2002). We find an abuse of discretion if the court made "a clear error of judgment, fail[ed] to follow the proper legal standard or process for making a determination, or relie[d] on clearly erroneous

findings of fact." *Johnston v. Borders*, 36 F.4th 1254, 1282 (11th Cir. 2022)
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(per curiam) (internal quotation marks and citation omitted).

III. DISCUSSION

Plaintiffs argue the law-of-the-case doctrine demands we allow them to reopen their case. They highlight that in our prior decision in their case, we said a federal takings plaintiff must show "there is no adequate state remedy to obtain just compensation, or an adequate remedy exists but the plaintiff has been denied relief" before seeking relief in federal court. *Warner*, 718 Fed.Appx. at 838. So we could not "review the[ir] claim until the plaintiffs have been denied relief by a Florida court." *Id.* Based on these statements, they contend we held that they could return to their case after having been denied relief in state court.

Plaintiffs also assert that Florida state law provides an inadequate remedy for takings violations, so Plaintiffs must be allowed to pursue a federal remedy. And they argue that San Remo does not bar our review of their takings claim because, they claim, 28 U.S.C. § 1738 does not apply to civil-rights suits filed under 42 U.S.C. § 1983.

In its response, the City of Marathon asserts that we lack jurisdiction to hear this appeal because Plaintiffs filed an untimely notice of appeal. They note that Plaintiffs filed a notice of appeal more than 30 days after the denial of their initial motion to reopen the case, and they argue the reconsideration motion does not toll the deadline. Specifically, they contend that the second of two

successive motions of the same type does not toll the deadline to file a notice of appeal, and both motions were Rule 59 or 60 motions.

In response, Plaintiffs seem to argue that their reopening motion was not a motion under Rules 59 and 60, but a "cleanup motion." So they contend the reconsideration motion was their first Rule 59 or 60 motion in the case, which tolls the deadline.

We agree that Plaintiffs' notice of appeal was timely, and we have jurisdiction over this appeal. But we hold 28 U.S.C. § 1738, as *San Remo* construes it, bars Plaintiffs from re-litigating their takings claim in federal court. And Plaintiffs did not file their motion to reopen their case within a reasonable time. So we affirm the denial of their motion to reopen the case. For that reason, we also must affirm the denial of their motion to amend their complaint since the case has not been reopened. We explain below.

A. Plaintiffs' notice of appeal was timely.

We start, as we must, with the jurisdictional issue. Federal Rule of Appellate Procedure 4(a)(1)(A) provides that, "[i]n a civil case, except as provided in Rule[] . . . 4(a)(4), . . . the notice of appeal . . . must be filed . . . within 30 days after the entry of the . . . order appealed from." "[T]he timely filing of a notice of appeal in a civil case is a jurisdictional requirement." *Bowles v. Russell*, 551 U.S. 205, 214 (2007). So if the notice of appeal was untimely, we can't hear this case.

Plaintiffs appeal the district court's denial, on December 14, 2023, of their motion to reopen their case and amend their

complaint. They filed the notice of appeal on March 22, 2024, over three months later. So under the default rule, Plaintiffs' notice of appeal would be untimely because they filed it after 30 days passed from the order they appealed.

But Plaintiffs also filed a motion for reconsideration of that order. And the district court did not dispose of that motion until February 27, 2024. Plaintiffs did file the notice of appeal within thirty days of that order. So the question before us is whether the reconsideration motion extended the time to file a notice of appeal challenging the original order.

It did. The Supreme Court has explained that "[a] timely motion for reconsideration filed within a window to appeal does not toll anything; it 'renders an otherwise final decision of a district court not final' for purposes of appeal. "*Nutraceutical Corp. v. Lambert*, 586 U.S. 188, 197 (2019) (quoting *United States v. Ibarra*, 502 U.S. 1, 6 (1991) (per curiam)). So until the district court disposed of the motion for reconsideration, its decision remained nonfinal. And the thirty-day clock did not start to run.

The parties focus their attention on another part of Rule 4. They both assume that the December 2023 order was final notwithstanding the reconsideration motion, so the reconsideration motion had to toll the period to appeal that order. Based on that thinking, they look to Rule 4(a)(4)(A) to see whether the reconsideration motion did just that.

Rule 4(a)(4)(A) provides that if a party files certain post-judgment motions, including Rule 59

and 60 motions within 28 days of
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the entry of the judgment, the 30-day clock doesn't run for all orders in the case until the Court disposes of the last such motion. See FED. R. APP. P. 4(a)(4)(A). That's important because "a party must ordinarily raise all claims of error in a single appeal following final judgment on the merits." *Firestone Tire &Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981). So by filing one of the Rule 4(a)(4)(A) motions, a party extends the window to appeal, in its one opportunity, all the issues it preserved in the original judgment. See FED. R. APP. P. 4(a)(4)(A).

But we make an exception and allow for later appeals to challenge the resolution of post-judgment motions. "We treat the postjudgment proceeding as a free-standing litigation, in effect treating the final judgment as the first rather than the last order in the case." *Mayer v. Wall St. Equity Grp., Inc.*, 672 F.3d 1222, 1224 (11th Cir. 2012) (cleaned up and citation omitted) (per curiam). And "[o]nly if a post-judgment order is apparently the last order to be entered in the action is it final and appealable." See id. (internal quotation marks and citation omitted). But it isn't until a reconsideration motion is resolved. See *Nutraceutical Corp.*, 586 U.S. at 197.

Once that post-judgment order is final, the litigant may bring a second appeal in the case to challenge the order. They can do so long after the window to appeal the original judgment closed. See, e.g., *Waetzig v. Haliburton Energy Servs.*, 604 U.S. -, 145 S.Ct. 690, 694-95 (2025) (reviewing on appeal the denial of a Rule 60(b) motion filed after arbitration proceedings occurred between the initial judgment and the post-judgment motion). That makes sense
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because there often isn't an opportunity to challenge the order in the first appeal. That's especially true in a case like this one, where the court entered the order after we resolved the first appeal.

The City of Marathon notes we have said that a motion for reconsideration of the Rule 4(a)(4)(A) motions "d[oes] not toll the time for filing [a] notice of appeal." *Ruiz v. Wing*, 991 F.3d 1130, 1138 n.4 (11th Cir. 2021) (citing *Wright v. Preferred Rsch., Inc.*, 891 F.2d 886, 889 (11th Cir. 1990) (per curiam)). That's so because "the language and purpose of Rule 4(a)(4) indicate that the time for appeal is postponed only by an original motion of the type specified." Id. (quoting *Wright*, 891 F.2d at 889).

But this precedent on Rule 4(a)(4)(A) does not come into play here. Plaintiffs appeal only the resolution of their motion to reopen their case. They don't seek to toll the period to appeal the 2018 dismissal of their claim. Nor could they-even considering their original reopening motion to be a Rule 60(b) motion for relief, see *Waetzig*, 145 S.Ct. at 693 (reviewing a motion to reopen a dismissal without prejudice as a Rule 60(b) motion), it would have to have been filed within 28 days of the dismissal to toll the period to appeal. See FED. R. APP. P. 4(a)(4)(A)(vi) (requiring a Rule 60 motion to have been filed within the time to file a Rule 59 motion to toll the period to appeal); FED. R. CIV. P. 59 (giving 28 days post judgment to file a Rule 59 motion). We are dealing with a subsequent post-judgment appeal, not the first appeal of the judgment.

In sum, the reconsideration motion altered the time to appeal the denial of the motion to reopen. It did so because it

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rendered that denial nonfinal. See *Nutraceutical Corp.*, 586 U.S. at 197. But neither motion did anything to toll the period to appeal any other order in the case. See FED. R. APP. P. 4(a)(4)(A).

For these reasons, Plaintiffs' appeal is timely because Plaintiffs filed their notice of appeal within 30 days of the district court's denial of their motion for reconsideration.

B. Plaintiffs are precluded from pursuing their takings claim in federal court.

Having concluded that we have jurisdiction over this appeal, we move now to the merits of the dispute. Plaintiffs appeal the denial of their motion to reopen the case and amend their complaint.

A motion to reopen a dismissal without prejudice is a Rule 60(b) motion.[3] See, e.g., *Waetzig*, 145 S.Ct. at 693. Rule 60(b) permits a federal court, "[o]n motion and just terms," to "relieve a party . . . from a final judgment, order, or proceeding ...." One such final judgment or proceeding is a dismissal without prejudice. See *Waetzig*, 145 S.Ct. at 693. And a court may grant this relief for one of six enumerated reasons, two of which are relevant here.

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First, Rule 60(b)(5) allows relief when "the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable." See FED. R. CIV. P. 60(b)(5). And second, Rule 60(b)(6) provides for relief for "any other reason that justifies relief." See id. (6). Rule 60(b)(6) is "a grand reservoir of equitable power to do justice

in a particular case when relief is not warranted by the preceding clauses." *Griffin v. Swim-Tech Corp.*, 722 F.2d 677, 680 (11th Cir. 1984) (citation omitted). But it is "an extraordinary remedy which may be invoked only upon a showing of exceptional circumstances." Id. Plus, relief under Rule 60(b) must be sought "within a reasonable time." FED. R. CIV. P. 60(c)(1).

We don't think that the district court abused its discretion here. 28 U.S.C. § 1738, the full-faith-and-credit statute, provides that "parties should not be permitted to relitigate issues that have been resolved by courts of competent jurisdiction," most relevantly state courts. See *San Remo*, 545 U.S. at 336. In *San Remo*, the Supreme Court held that that statute precludes plaintiffs from relitigating in federal courts their takings claims that state courts have already resolved. See *id.* at 347-48. So looming large over Plaintiffs' attempt to reopen their case is the fact that were it to be reopened, it would have to be quickly dismissed. And that fact ultimately proves fatal to their attempt to invoke Rule 60(b).

We start with Rule 60(b)(5). True, as a formal matter, the dismissal without prejudice was "based on an earlier judgment that has been reversed": *Williamson County*. See *Knick*, 588 U.S. at 185, 206.
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But even if we were to think relief under Rule 60(b)(5) was warranted, we can't say the district court abused its discretion in finding that Plaintiffs failed to file their motion to reopen their case "within a reasonable time." *Knick* overruled *Williamson County* in June 2019, when no state court had yet ruled on Plaintiffs' takings claim. No state court would until March 2022. Yet Plaintiffs waited until four years after Knick, having fully exhausted their

state remedies, to file in federal court. Because Plaintiffs fully exhausted their state remedies, *San Remo* requires dismissal of any attempted reopening of a federal case. So by pursuing a judgment in the state court system, Plaintiffs effectively forfeited their federal claim. And the district court did not abuse its discretion by concluding that their Rule 60(b) motion was not timely.

Because relief, in theory at one point, could have been sought under Rule 60(b)(5), our precedent forecloses relief under Rule 60(b)(6). See *BUC Int'l Corp. v. Int'l Yacht Council Ltd.*, 517 F.3d 1271, 1275 n.4 (11th Cir. 2008) ("Rule 60(b)(6) applies only to cases that do not fall into any of the other categories listed in parts (1)(5) of Rule 60(b)." (internal quotation marks and citation omitted)) But even if Plaintiffs could seek Rule 60(b)(6) relief, we don't think a district court could properly grant it here. As we explained, relief under Rule 60(b)(6) is only appropriate in "exceptional circumstances." And that high bar can't be met when Plaintiffs' claim must be swiftly thrown out under *San Remo.*

To get around *San Remo*, Plaintiffs suggest that *Knick* casts doubt on the decision. But that is a misreading. The opinion held
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that "the state-litigation requirement [of *Williamson County*] rests on a mistaken view of the Fifth Amendment"; it said nothing to undermine *San Remo. Knick*, 588 U.S. at 185. When faced with a perceived conflict between *Williamson County* and *San Remo*, the Court chose to preserve San Remo.[4] So *San Remo* remains binding precedent.

Plaintiffs also contend that we are bound to let them reopen their case under the law-of-the-case

doctrine. "Under the law of the case doctrine, both district courts and appellate courts are generally bound by a prior appellate decision in the same case." *Alphamed Inc. v. B. Braun Med., Inc.*, 367 F.3d 1280, 1285-86 (11th Cir. 2004). But that doctrine does not support Plaintiffs' position. "The law of the case doctrine . . . bars consideration of only those legal issues that were actually, or by necessary implication, decided in the former proceeding." *Oladeinde v. City of Birmingham,* 230 F.3d 1275, 1288 (11th Cir. 2000) (cleaned up and citation omitted). And in our first decision in this case, we only summarized the holding of *Williamson County* and explained it required Plaintiffs to exhaust their state-court remedies before seeking federal relief. *Warner,* 718 Fed.Appx. at 838. We did not comment or decide how *San Remo* would affect any attempt by Plaintiffs to reopen their case after a final state court judgment. See generally *id.*
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Finally, we cannot grant Plaintiffs relief based on their arguments that Florida lacked an adequate remedy to adjudicate their takings claim for two reasons. First, *San Remo* unambiguously holds that if a state court adjudicates the takings claim, we are bound under 28 U.S.C. § 1738 to respect that judgment. See *San Remo,* 545 U.S. at 347-48. There is no room to assess the adequacy of the relief available in state courts. But second, even if we could make that assessment, we are bound by the law-of-the-case doctrine to find Florida's remedy adequate. That's because *Williamson County* allowed a federal takings action only if "there is no adequate state remedy to obtain just compensation, or an adequate remedy exists but the plaintiff has been denied relief." *Warner,* 718 Fed.Appx. at 838. So we explained that Plaintiffs "did not allege in their complaint that Florida fails to provide an adequate

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16

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procedure to obtain just compensation-nor could they. Florida does provide an adequate procedure to obtain monetary relief through an inverse condemnation claim." Id. We necessarily decided that Florida had an adequate procedure for inverse-condemnation actions because had it not had one, Plaintiffs could have pursued their claim directly in federal court.[5] See id.
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At bottom, *San Remo* bars Plaintiffs' federal claim since they waited to reopen their case until after they received a state-court judgment. So the district court did not abuse its discretion in denying Plaintiffs Rule 60(b) relief. And because the case remained closed, the district court did not abuse its discretion in denying Plaintiffs' motion to amend their complaint.

IV. CONCLUSION

For the above reasons, we affirm the denial of Plaintiffs' motion to reopen their case and amend their complaint.

AFFIRMED.

Notes:
[1] The district court docketed the order the next day, on February 6, 2018.

[2] Three days later, Plaintiffs amended their motion to correct a factual error.

[3] We are not certain what kind of motion Plaintiffs are referring to by a "cleanup" motion. But no matter what the "movant so labels it ....the court must determine independently what type of motion was before the district court, depending upon the type of

relief requested." *Wright*, 891 F.2d at 889. And a motion to reopen a case after more than 28 days is treated as a Rule 60(b) motion. See, e.g., *Waetzig*, 145 S.Ct. at 693.

[4] Plaintiffs also urge that *Trump v. Anderson*, 601 U.S. 100 (2024), casts doubt on *San Remo*. Because Anderson concerns the interpretation of Section 3 of the Fourteenth Amendment, we fail to see its relevance here in a takings action. See id.

[5] Still, Plaintiffs insist that Florida's inverse condemnation procedure is inadequate, in part, because there is no right to a jury for these claims under Florida law. They stress that the Seventh Amendment demands that certain factual issues central to takings claims be submitted to a jury. And they note the Court recently zealously guarded the Seventh Amendment right in *SEC v. Jarkesy*, 603 U.S. 109 (2024). It's true that the Seventh Amendment requires certain factual issues for takings claims brought in federal court under 42 U.S.C. § 1983 to be adjudicated by a jury. See *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 720-21 (1999). But the Seventh Amendment has never been extended to apply to claims brought in state court. See *id.* at 719 ("It is settled law that the Seventh Amendment does not apply" in "suits decided by state courts," including takings claims). So a state's procedure for resolving inverse condemnation claims isn't inadequate because it does not provide for a right to a jury.

APPENDIX 2

Case 4:14-cv-10071-JLK Document 123 Entered on FLSD Docket 12/14/2023

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
KEY WEST DIVISION
CASE NO. 4:14-cv-10071-JLK

RICHARD E. WARNER &
JOHN W. PARENTE, as Co-Personal Representatives of the Estate of Joseph Ardolino, II & JOSEPH E. ARDOLINO, Individually,

Plaintiffs,

v.

CITY OF MARATHON, a political subdivision of the State of Florida, MICHAEL CINQUE, individually and as a City of Marathon official, & RALPH LUCIGNANO, individually and as a City of Marathon official,

Defendants.

ORDER DENYING PLAINTIFF'S MOTION TO REOPEN CASE AND AMEND COMPLAINT

THIS CAUSE comes before the Court upon Plaintiffs' Motion to Reopen Case and Amend Complaint (the "Motion") (DE 111), filed June 20, 2023. The Court has also considered Defendants' Response (DE 112), filed June 29, 2023, and Plaintiffs' Reply (DE 115), filed July 11, 2023. The Court also had the benefit of Oral Argument, which was held on July 19, 2023. DE 118.

I. BACKGROUND

This case stems from Plaintiffs' taking claims pursuant to the Fifth Amendment of the United States Constitution, which allege that Defendants took and inversely condemned Plaintiffs' liquor store and liquor lounge business. *See generally* Third Am. Compl., DE 26. Specifically, Plaintiffs' Third Amended Complaint alleges that Defendants improperly made zoning changes that resulted in both Plaintiffs' liquor store and liquor lounge being deemed "non-conforming" and "abandoned," without prior notice. *See Id.; see also* Mot. at 1.

As background, Plaintiffs filed an Amended Complaint in the Sixteenth Judicial Circuit in and for Monroe County on August 14, 2014. DE 1-2. Thereafter, on September 8, 2014, Defendants removed this action to federal court invoking the Court's original jurisdiction since the Amended Complaint presented a federal question. *See* Not. of Removal, DE 1. Plaintiffs amended the complaint twice with leave of Court, making the Third Amended Complaint the operative complaint. DE 26. Defendants moved to dismiss the Third Amended Complaint (DE 33, 34), which the Court granted, entering its Final Order of Dismissal on September 4, 2015. DE 67. Each claim in the Third Amended Complaint was dismissed with prejudice. *Id.*

Plaintiffs appealed, and the Eleventh Circuit affirmed this Court's Order of Dismissal in all respects, except as to Count I. *Warner v. City of*

Marathon, 718 F. App'x 834, 840 (11th Cir. 2017). As to Count I, the Eleventh Circuit vacated the dismissal because the federal taking claim was not yet ripe for review and thus remanded for this Court to dismiss Count I without prejudice. *Id.* at 840. The Eleventh Circuit held that Count I should be dismissed without prejudice because, under *Williamson County,* the court could not "review the claim until the plaintiffs have been denied relief by a Florida court." *Id.* at 838; *see also Williamson Cnty Reg'l Plan Comm 'n v. Hamilton Bank of Johnson City,* 473 U.S. 172, 186 (1985). The Court then vacated its prior dismissal of Count I with prejudice and, instead, dismissed Count I without prejudice for lack of subject matter jurisdiction. DE 104.

The parties then litigated the taking claim in the state circuit court in Monroe County, Florida. *See Warner v. City of Marathon,* Case No. 2018-CA-00222-M. Following cross-motions

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for summary judgment, the Monroe County state trial court entered an order on March 25, 2022 that granted the City of Marathon's motion for summary judgment and denied the Plaintiffs' motion for partial summary judgment. *See* DE 112-1. On January 4, 2023, Florida's Third District Court of Appeal affirmed the order granting summary judgment in favor of the City of Marathon. *Warner v. City of Marathon,* 357 So. 3d 188 (Fla. 3d DCA 2023), rehearing denied (Feb. 21, 2023).

Now, Plaintiffs move this Court to reopen the

federal case and allow Plaintiffs to amend !heir complaint since they have followed the Eleventh Circuit's Mandate by pursuing their claims in state court first. *See* Mot.

II. LEGAL STANDARD

Federal Rule of Civil Procedure 60(b) governs relief from a final judgment, order or proceeding. Rule 60(b) states that the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
(1) mistake, inadvertence, surprise, or excusable neglect;
(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(6);
(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
(4) the judgment is void;
(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
(6) any other reason !hat justifies relief.

Fed. R. Civ. P. 60(b). Further, Rule 60© states that a motion under 60(b) must be made within a reasonable time.

Additionally, Rule 15(a) governs amending pleadings. Rule 15(a)(2) provides that leave to amend should be freely given when justice so requires, however the court need not allow an amendment

"where (1) there has been undue delay or bad faith; (2) allowing an amendment would
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cause undue prejudice to the opposing party; or (3) an amendment would be futile." *Ray v. Equifax Info. Servs., LLC,* 327 F. App'x 819, 822 (11th Cir. 2009).

III. DISCUSSION

Plaintiffs argue that the Court should reopen the case and allow Plaintiffs to amend the complaint because the Eleventh Circuit specifically allowed the return of this matter to this Court after seeking relief in the state court. Mot. at 2. Further, Plaintiffs argue that relief is warranted because they waited only 30 days after the Supreme Court of Florida denied review of the Third District Court of Appeal's decision to seek relief in this Court. Reply at 7. Finally, Plaintiffs argue that the doctrines of *res judicata* and issue preclusion do not bar Plaintiffs claims because there is
still a federal remedy available. Reply at 6.

In response, Defendants argue that Plaintiffs unduly delayed seeking to reopen the case and amend the complaint. Resp. at 2. Defendants assert that on June 21, 2019, the Supreme Court issued its opinion in *Knick,* which removed the *Williamson County* state-litigation requirement, and held that "a property owner has a claim for a violation of the Takings Clause as soon as a government takes his property for public use without paying for it." *Knick v. Twp. of Scott, Penn.,* 588 U.S.-, 139 S. Ct. 2162, 2168, 204 L.Ed.2d 558 (2019). According to *Knick,*

claimants no longer "need to pursue post-taking remedies in state court before filing suit in federal court under § 1983." *Kessler v. City of Key West,* No. 21-11069, 2022 WL 590892, at *5 (11th Cir. Feb. 28, 2022). However, Defendants argue that despite this Ruling in 2019, Plaintiffs continued to litigate their taking claim in state court without engaging in any effort to reopen this federal case or to amend their pleading. Resp. at 4.

Additionally, Defendants argue that Plaintiffs claims are barred by *res judicata* and issue preclusion since the claims were fully litigated in state court and affirmed by the Third District

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Court of Appeal. Resp. at 2. Specifically, Defendants argue that in affirming the grant of summary judgment in favor of the City on the Plaintiffs taking claim, Florida's Third District Court of Appeal cited federal law in determining that the Plaintiffs could not establish a viable claim. *Id.*

Here, the Court finds that Plaintiffs' Motion should be denied. Plaintiffs waited two years after a change in the law was issued by the Supreme Court to seek relief before this Court. Further, the issues were litigated to finality in state court, where both the trial court and the court of appeals applied federal law when deciding the issues. The Court finds that to reopen the case and allow Plaintiffs to amend would effectively give Plaintiff a second opportunity to have their case tried, which could result in conflicting rulings. Finally, since the Court finds that

the case should remain closed for the reasons stated above, the Plaintiffs Motion to Amend the Complaint is also denied.

IV. CONCLUSION

Accordingly, it is **ORDERED, ADJUDGED, and DECREED,** that Plaintiffs' Motion to Reopen Case and Amend Complaint **(DE 111)** be, and the same is, hereby **DENIED.**

DONE AND ORDERED in Chambers at the James Lawrence King Federal Justice Building and United States Courthouse in Miami, Florida this 14th day of December, 2023.

/s/ James Lawrence King
JAMES LAWRENCE KING
UNITED STATES DISTRICT JUDGE

cc: All Counsel of Record

APPENDIX 3

IN THE CIRCUIT COURT OF THE 16th
JUDICIAL CIRCUIT OF THE STATE OF
FLORIDA IN AND FOR MONROE COUNTY

APPELLATE DIVISION

CASE NO: 2012--CA-10-:M

RICHARD E. WARNER and
JOHN PARENTE, as Co-Personal
Representatives of the Estate of
Joseph Ardolino, II
Plaintiffs

vs.

CITY OF MARATHON, a political
Subdivision of the State of Florida,
Defendant

SECOND AMENDED1 ORDER GRANTING CERTIORARI

PER CURIAM:

On Defendant's Motion for Clarification, the court hereby withdraws the prior order granting certiorari, and enters the following Amended Order:

Petitioners RICHARD E. WARNER and JOHN PARENTE;. as Co-Personal Representatives of the Estate of Joseph

Ardolino II, seek certiorari from this court regarding a land use decision by the Marathon City Council. The court, having reviewed the pleadings, all exhibits submitted for consideration, and having considered the argument of counsel, hereby finds and Orders as follows:

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1 Amended to correct scrivener's error in para. 2, substituting "Ordinance" for · "Resolution."

1. The record reflects that the Estate of Joseph Ardolino, II, owns real property located at 3574 Overseas Highway, Marathon, Florida, which was used for many years as a liquor store.
2. The City of Marathon, by Ordinance 2007-014 and/or 2007-003, added a 1,500 foot "package store prohibition" requiring that all liquor stores be at least that distant from schools within the City of Marathon. This provision only applied to one liquor store within the city, the "Overseas Package Store", which is now the property of the subject estate.
3. Section 108.09 of the Marathon City Code requires and mandates individual notice to landowners regarding land use changes, so any non-conforming use can be registered as such:

"The use of any building, structure or land that becomes non-conforming because of the

LDR's or subsequent amendments, shall comply with the LDR's or be approved by the Director as a continuing non-conforming use. The nonconforming uses in the zoning district or the adopted land use designation shall not be changed to another non-conforming use.

a. Notification: The Department will provide individual notice by mail to all landowners of record according to the most recent listing of the Property Appraiser of Monroe County of the effective date of the LDR's or any amendment and requirement to register non-conforming uses."

4. The record is clear that (a) the property was in use as a liquor store in 2007, when the ordinance creating the distance prohibition was enacted, and (b) the City of Marathon failed to notify any property owner pursuant to Section 108.09, when it passed the distance requirement for package stores in 2007. The City's failure to accord the property owner the required notice thus foreclosed the opportunity to register the then-existing use as a grandfathered non-conforming use,

5. Therefore, Marathon LDR Section 104.05(6)(2), regarding the 1,500 foot package store distance limitations from schools, may not be lawfully applied to Plaintiffs' property until the notice requirement has been complied with, which will allow Plaintiffs an

opportunity to register the non-conforming use as it existed in 2007, at the time the Ordinance was enacted, and when the City failed to give the required notice.

6. The City's finding in Resolution 2011-177 that the Overseas Package Store became a "non-conforming use · without having given notice of, and opportunity to seek grandfathering to the landowner through the registration process, fails to comply with the essential requirements of law.

7. Accordingly, Resolution 2011-177, filed on December 16, 2011, is hereby QUASHED by this court, and this matter is REMANDED to the City of Marathon for further proceedings, consistent with this Opinion.

DONE and ORDERED at Key West, Monroe County, Florida, this 29th day of June, 2012.

[STAMP]
CONFORMED COPY
JUN 29, 2012
DAVID J. AUDLIN, JR.
DAVID J. AUDLIN
CHIEF JUDGE

cc: Richard E. Warner, Esq.
Jose M. Jimenez, Esq.

APPENDIX 4

RICHARD E. WARNER, as Co-Personal Representatives of the Estate of Joseph Ardolino II, JOHN W. PARENTE, as Co-Personal Representatives of the Estate of Joseph Ardolino II, JOSEPH E. ARDOLINO, individually,

Plaintiffs - Appellants,

v.

CITY OF MARATHON, a political subdivision of the State of Florida,
MICHAEL CINQUE, individually and as a City of Marathon Official,
RALPH LUCIGNANO, individually and as a City of Marathon Official,
THE STUFFED PIG, INC., a Florida corporation, CVS, INCORPORATED,

Defendants - Appellees.

No. 16-10086
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

December 8, 2017

[DO NOT PUBLISH]
Non-Argument Calendar

D.C. Docket No. 4:14-cv-10071-JLK
Page 2
Appeal from the United States District Court for the Southern District of Florida

Before TJOFLAT, WILLIAM PRYOR, and JORDAN, Circuit Judges.
PER CURIAM:

Richard E. Warner and John W. Pariente—co-personal representatives of the Estate of Joseph Ardolino II—and Mr. Ardolino's son, Joseph E. Ardolino, appeal the district court's order dismissing their Third Amended Complaint against the City of Marathon, Michael Cinque, Ralph Lucignano, the Stuffed Pig, Inc., and CSV, Inc., as well as the district court's order denying their motion for reconsideration. Upon review of the record and the parties' briefs, we affirm in part, vacate in part, and remand with instructions to the district court.

I

Because we write for the parties, we assume their familiarity with the underlying record and set out only what is necessary to resolve this appeal. We set out the facts as set forth in the Third Amended Complaint. We accept the allegations in the complaint as true, and construe them in the light most favorable to the plaintiffs. See *Leib v. Hillsborough Cty. Pub. Transp. Comm'n*, 558 F.3d 1301, 1305 (11th Cir. 2009).

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A

The underlying complaint in this case is centered on a property known as the Overseas Property, which was owned by Mr. Ardolino before he passed away in 2005. The property operated as a package liquor store and cocktail lounge, and housed rental apartments. It is located in Marathon, Florida.

When Mr. Ardolino passed away, his Estate became the sole owner of the property

and its liquor license. Until 2008, the Estate leased the property. The Estate then attempted to improve the property, lease it, and sell it. The Estate hired a real estate agent, Brenda Tarella, to help sell the property.

In March of 2009, Ms. Tarella contacted the City's Planning Director to ask whether the property had any encumbrances, particularly with regard to the property's intended uses as a package liquor store and lounge. Unbeknownst to the Estate, the City had passed an ordinance in October of 2006 which prohibited the sale of package liquor within 1,500 feet of any school or existing package liquor store. The property purportedly operated the only package liquor store that fit this description.

In response to Ms. Tarella's inquiry, the City allegedly did not communicate that the property was subject to the ordinance. Instead, the City allegedly submitted a letter detailing the property's transferable building rights without mention of the ordinance.
Page 4
In September of 2009, the Estate received a $1 million offer from interested buyers to purchase the property and its license. The buyers ultimately withdrew their offer after the property was appraised. The same buyers later offered the Estate $500,000 for the property, which the Estate declined.

Thereafter, in June of 2011, the Estate received a $750,000 offer for the property. It

was then that the Estate found out about the zoning limits on the property from the City's Planning Director. The Planning Director drafted a letter in July of 2011 stating that the property's use as a lounge and liquor package store did not conform to the City's land regulations, and asserting that because the property had not been operating as a lounge, it had also lost certain use rights. As a result, the property could not be used as a package store or liquor lounge. Nevertheless, the City stated that the package store could be reestablished through a variance and the liquor license could also be reobtained. The $750,000 offer was ultimately withdrawn.

The Estate objected to the letter's assertions and claimed that it had received no notice of the ordinance. The Estate's efforts to contest the City's prohibitions on the property led it through the City's administrative appeals process and ultimately to a Florida circuit court on a writ of certiorari. The Florida court ultimately granted the Estate relief and reversed the application of the ordinance as to the property in June of 2012.
Page 5

The property was eventually sold in 2013 for $475,000, but not without alleged interference from the City. The City purportedly interfered with the sale of the property by asserting administrative challenges and filing a title objection. As a result, the Estate sought relief in the probate court, where it was successful.

According to the Estate and Mr.

Ardolino's son (the plaintiffs), after Mr. Ardolino's passing, City building officials repeatedly trespassed on the property and harassed the Estate's staff, completed inspections and "red-tagged" the property without warning or justification. They also contacted the Florida Department of Alcoholic Beverage & Tobacco to allegedly interfere with the Estate's license.

B

In August of 2014, the plaintiffs filed suit in state court against the City of Marathon, Mr. Cinque, Mr. Lucignano, the Stuffed Pig, Inc., and CSV, Inc., alleging several causes of action.2 The case was removed to federal court upon the City of Marathon's motion. After two amendments to their complaint, the plaintiffs filed the Third Amended Complaint, which is at issue here.

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The Third Amended Complaint generally alleges that Mr. Cinque and Mr. Lucignano, who were City officials for portions of the relevant period, conspired with the City to negatively impact the value of the property so as to discourage potential buyers from purchasing the property for Mr. Cinque and Mr. Lucignano's private benefit. Mr. Cinque allegedly served on the City's Planning Commission and City Council from 2006 to 2013. At some point, Mr. Cinque also served as mayor. Similarly, Mr. Lucignano allegedly served as a member of the City's Planning Commission from 2009 to 2014. The plaintiffs brought claims against Mr. Cinque and Mr.

Lucignano in their individual capacities and as city officials.

The Third Amended Complaint asserted several claims: an as applied takings claim against the City (Count I); a 42 U.S.C. § 1983 claim against the City (Count II); a § 1983 claim against Mr. Cinque (Count III); a § 1983 claim against Mr. Lucignano (Count IV); a tortious interference with contract rights claim against the City, Mr. Cinque, and Mr. Lucignano (Count V); a tortious interference with advantageous business relationships claim against the City, and against Mr. Cinque and Mr. Lucignano "for conspiring to do so" (Count VI); trespass and unjust enrichment claims against Mr. Cinque, CSV, and the Stuffed Pig (Count VII); a conspiracy claim against the City, Mr. Cinque, and Mr. Lucignano (Count VIII); and a negligence claim against the City under Fla. Stat. § 768.28 (Count IX).

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All of the defendants filed motions to dismiss the Third Amended Complaint. The district court dismissed the complaint with prejudice after conducting a hearing. In its order, the district court stated that "[e]ven a cursory review reveals that the Complaint runs afoul of Rule 8," D.E. 67 at 6, and provided substantive reasons for dismissing each of the claims. The plaintiffs filed a motion for reconsideration, which the district court denied. This appeal followed. 1

II

We review de novo the district court's

grant of a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6). See Leib, 558 F.3d at 1305. We review a district court's denial of a motion for reconsideration for an abuse of discretion. See *Sanderlin v. Seminole Tribe of Fla.*, 243 F.3d 1282, 1285 (11th Cir. 2001).

III

Federal Rule of Civil Procedure 8(a)(2) requires "a short and plain statement of the claim showing that the pleader is entitled to relief" so as to "give the defendant fair notice of what the claim is and the grounds upon which it rests." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal citations omitted). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its
Page 8
face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570).

On appeal, the plaintiffs contest the district court's dismissal of Counts I, II, III, IV, V, and VIII of the complaint. We address their arguments in turn.

A

The plaintiffs first argue that the district court erred in dismissing their takings claim. The district court dismissed Count I of the complaint on the ground that the claim was not ripe, and that the actions challenged did not deprive the Estate of all or substantially all of the property's beneficial use. We review

the district court's ripeness determination de novo. See *Reahard v. Lee Cty.*, 30 F.3d 1412, 1415 (11th Cir. 1994).3

The plaintiffs assert that the district court erroneously dismissed their claim on ripeness grounds because they availed themselves of administrative and state court remedies, as indicated by the district court's reference to their use of post-deprivation remedies in dismissing their procedural due process claims. And they argue it would have been futile for them to seek a variance in any event. They also argue that they should have the opportunity to demonstrate that the rezoning of the property affected the property's value.

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A federal court has jurisdiction to review a federal takings claim for money damages stemming for a regulatory taking of property when the plaintiff can establish that (1) "the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue," *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985), and (2) there is no adequate state remedy to obtain just compensation, or an adequate remedy exists but the plaintiff has been denied relief, see id. at 194-95. See also *Reahard*, 30 F.3d at 1415-17. As a result, "for [a just compensation] claim to be ripe for adjudication, the landowner must overcome two hurdles: the final decision hurdle and the just compensation hurdle." See *id.* at 1415

(internal citations omitted).

To the extent the plaintiffs assert that they can overcome the final decision hurdle required to bring a takings claim in federal court, we agree that their state court victory, which nullified the application of the ordinance to the property, is a "final decision" for ripeness purposes. Although in most cases a "final decision" has not been reached "until an aggrieved landowner has applied for at least one variance," *Reahard*, 30 F.3d at 1415, we conclude that the Estate effectively sought a variance through the City's appeals processes and its state court action.

The plaintiffs cannot, however, overcome the just compensation hurdle. They did not allege in their complaint that Florida fails to provide an adequate
Page 10
procedure to obtain just compensation—nor could they. Florida does provide an adequate procedure to obtain monetary relief through an inverse condemnation claim. See *Joint Ventures, Inc. v. Dep't of Transp.*, 563 So. 2d 622, 627 (Fla. 1990) ("Inverse condemnation affords the affected property owner an after-the-fact remedy, when there has already been a 'taking' by regulation . . . ."). See also *Reahard*, 30 F.3d at 1417 (explaining that Florida courts have recognized an inverse condemnation remedy since 1990). The plaintiffs also did not allege in their complaint that they availed themselves of this remedy and were denied relief. Instead, the plaintiffs seem to assert on appeal that the takings

claim presented in their complaint is their just compensation claim. Notwithstanding the possibility that they were attempting to assert an inverse condemnation claim in Florida state court before the case was removed to federal court, we cannot review the claim until the plaintiffs have been denied relief by a Florida court. We therefore vacate the district court's order as it relates to Count I with instructions to dismiss the claim without prejudice for lack of subject-matter jurisdiction. See *Ga. Advocacy Office, Inc. v. Camp*, 172 F.3d 1294, 1299 (11th Cir. 1999) (explaining that a dismissal on ripeness grounds is not an adjudication on the merits).

B [intentionally omitted, affirming dismissal of the remaining §1983 Counts and condemning the Complaint's "shotgun pleadings"]

****

C

The plaintiffs also argue that the district court erroneously dismissed their tortious interference with contract rights claim (Count V) on absolute immunity grounds. Specifically, they argue that Mr. Lucignano was not a public official when the property was rezoned and when the conspiracy between Mr. Cinque5 and Mr. Lucignano began, so absolute immunity cannot apply to him.6

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We cannot evaluate whether absolute immunity applies to Mr. Lucignano because

the plaintiffs have effectively failed to argue the doctrine's inapplicability. Count V alleges that the City, Mr. Cinque, and Mr. Lucignano interfered with the $1 million and $750,000 offers the Estate received from potential buyers to purchase the property. The $1 million offer was allegedly received in September of 2009 and withdrawn shortly thereafter, and the $750,000 offer was allegedly received in June of 2011. Therefore, the fact that Mr. Lucignano was not a City official when the property was rezoned or when the alleged conspiracy began is irrelevant to the wrongs alleged in Count V. The acts alleged in Count V relate to events that took place when Mr. Lucignano was a City official, and the plaintiffs do not present any argument about why he should not be protected by absolute immunity for those acts. As a result, we affirm. See Access Now, 385 F.3d at 1330 ("If an argument is not fully briefed . . . evaluating its merits would be improper . . . .").

D

The plaintiffs lastly argue that the district court erred in dismissing Count VIII, which alleged that the City, Mr. Lucignano, and Mr. Cinque conspired to commit the wrongs described in Counts II-VI. The district court dismissed Count

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VIII on two bases: (1) the claim was barred by the intracorporate conspiracy doctrine and (2) the underlying claims had been rejected so no conspiracy claim could stand.7

On appeal, the plaintiffs argue that the intracorporate conspiracy doctrine is inapplicable because Mr. Lucignano and Mr. Cinque were not City officials from 2006 to 2008. We do not need to decide whether the intracorporate conspiracy doctrine applies because none of the claims underlying the conspiracy claim are viable. "Under Florida law, the gist of a civil conspiracy is not the conspiracy itself but the civil wrong which is done through the conspiracy which results in injury to the Plaintiff." *Am. United Life Ins. Co. v. Martinez*, 480 F.3d 1043, 1067 (11th Cir. 2007) (internal citations and quotation marks omitted). Here, Counts II through IV do not survive, so none can "serve as the basis for a conspiracy claim." Id. As a result, we affirm the district court's dismissal of Count VIII.

IV

We affirm the district court's dismissal of Counts I, II, III, IV, V, and VIII of the Third Amended Complaint. We nonetheless vacate the district court's order as to Count I because it is not yet ripe for review and remand for the district court to issue an order of dismissal as to Count I in accordance with our ruling.
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AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

Footnotes:

1. The complaint also alleges that a sewer line was improperly built across the property. Because the facts related to the sewer line are not central to this appeal or our

determination, we do not discuss them here.

2. The Stuffed Pig is a business adjacent to the property. Mr. Cinque allegedly has an interest in The Stuffed Pig. Similarly, CSV is a company that owns a trailer park near the property, which Mr. Cinque also has an interest in. Mr. Cinque is purportedly the "owner or manager" of The Stuffed Pig and the trailer park property.

3. Count I also appears to assert a takings claim under Article X § 6 of the Florida Constitution and a procedural due process claim. Although we dismiss Count I on ripeness grounds, we note that we disapprove of this type of drafting. See *Weiland v. Palm Beach Cty. Sheriff's Office*, 792 F.3d 1313, 1322-23 (11th Cir. 2015) ("The third type of shotgun pleading is one that commits the sin of not separating into a different count each cause of action or claim for relief.").

4. The plaintiffs also cite to the Federal Rules of Criminal Procedure to argue that they should be able to allege claims against multiple defendants in a single count. Aside from the fact that this is a civil case, Counts II-IV did not present claims against multiple defendants within each count, nor did the district court dismiss the claims on that basis, so we do not address this argument.

5. The plaintiffs do not challenge the district court's rulings that Mr. Cinque and the City are immune from suit under absolute immunity principles, so we consider any issue

related to the district court's immunity holdings as to these two defendants abandoned. See *Access Now, Inc. v. Sw. Airlines Co.*, 385 F.3d 1324, 1330 (11th Cir. 2004) ("Any issue that an appellant wants the Court to address should be specifically and clearly identified in the brief."). Similarly, we note that the district court also dismissed Count VI on absolute immunity grounds, but the plaintiffs did not present argument as to Count VI. See id.

6. The plaintiffs also present arguments about qualified immunity, but the district court did not rely on qualified immunity to dismiss any claim. Similarly, the plaintiffs present arguments about sovereign immunity without connecting their contentions to any of the dismissed claims. We will not guess what the plaintiffs are attempting to take issue with on appeal.

7. The complaint seems to state that Mr. Ardolino's son only alleges a claim against the City, Mr. Lucignano, and Mr. Cinque for conspiring to commit the acts alleged in Counts V and VI. Our ruling is unaffected by this possibility.

APPENDIX 5

Filed 03/25/2022

IN THE CIRCUIT COURT OF THE 16TH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR MONROE COUNTY

CASE NUMBER: 2018-CA-222-M

RICHARD E. WARNER & JOHN W. PARENTE, as Co-Personal Representatives of the Estate of Joseph Ardolino II, & JOSEPH E. ARDOLINO, Individually,

Plaintiffs

v.

CITY OF MARATHON, a political Subdivision of the State of Florida,

Defendant.

ORDER GRANTING DEFENDANT, CITY OF MARATHON'S, MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON TAKING & PARTIAL DAMAGES

THIS CAUSE, having come before the Court on January 20, 2022 upon Plaintiffs' Motion for Partial Summary Judgment on Taking & Damages and Defendant, City of Marathon's, Motion for Summary Judgment, and the Court, having considered said motions, the Defendant's

response, the Plaintiffs' reply, the summary judgment evidence, pertinent legal authority, argument of counsel, the Court file, and being otherwise fully advised in the premises, hereby finds as follows:

1. Plaintiffs are suing Defendant, City, for as applied inverse, temporary regulatory taking of existing liquor businesses at the Overseas Lounge and Liquor Store based on the Defendants enacting a zoning amendment in 2006-7 which made the established liquor businesses at the Overseas non-conforming and ruling in 2011 that the Overseas' "non-conforming" liquor uses had been"abandoned."
2. The Court finds that there is no genuine dispute as to any material fact and that the Defendant is entitled to entry of judgment in its favor as a matter of law.
3. The Plaintiffs, RICHARD E. WARNER & JOHN W. PARENTE, are the co-personal representatives of the Estate of Joseph Ardolino II ("the Decedent"). Joseph Ardolino II was the former owner of the Overseas Lounge and Liquor Store located at 3568-3574 Overseas Highway in Marathon, Florida ("the Property"). 2d Am. Compl. at¶3.
4. The Plaintiff, JOSEPH E. ARDOLINO, is the Decedent's son ("the Son"). 2d Am. Compl. at ¶3.
5. Prior to the Decedent's death on November 11, 2005, he had operated the Property for many years "as a package liquor store and cocktail lounge with live music," and "rented

apartments and trailers." 2d Am. Compl. at ¶9.

6. In March 2008, the tenant operating the package liquor store and bar at the Property left at the end of its lease. 2d Am. Compl. at 12; Plf.'s. 2d Supp. Ans. to 1st Set of Interr. at pg. 3, ¶12; Plf.'s Ans. to 2d Set of Interr. at ¶¶ 19, 20.

7. After March 31, 2008, the Property did not operate as a bar, restaurant, or liquor store. Pitt's. 2d Supp. Ans. to 1st Set of Interr. at 3; Plf.'s Ans. to 2d Set of Interr. at ¶¶ 19, 20.

8. In October 2006, the City amended its Land Development Regulations ("LDRs") by adopting Ordinance 2006-25, which prohibited package liquor sales within 1,500 feet of any school and within 1,500 feet of any existing package liquor store. The Property was the only existing business impacted by this amendment. 2d Am. Compl. at ¶¶ 14, 23, Ex. B; Ordinance 2006-25.

9. The City's adoption of Ordinance 2006-25 proceeded without the Estate having received the notice required by Section 108.09 of the City's Code of Ordinance to all affected landowners. 2d Am. Compl. at ¶¶ 14, 16, 28.

10. In 2009, the Estate listed the Property for sale. Although the realtor met with City Planning Director George Garrett and his staff, neither the realtor, the Estate, nor potential buyers were told by the City until 2011 that the 1,500 foot limit existed or applied to the Property thereby making its use non-conforming and that the City could rule

those uses abandoned after two years. Plff's. 2d Supp. Ans. to 1st Set of Interr. at 2.

11. In September 2009, the Estate executed a contract to sell the Property for $1,000,000. Revised Ans. to Interr. at ¶3.

12. The potential buyer ultimately withdrew from the September 2009 contract. Revised Ans. to Interr. at ¶3.

13. On June 10, 2011, the Estate entered into a contract to sell the Property to John J. Foster for $750,000.00. 2d Am. Compl. at ¶¶ 41, 42, Ex. C.

14. The June 10, 2011 contract was subject to the Estate obtaining a written confirmation from the City that the Property could be used as "a bar and package store." id.

15. In response to a request for such confirmation from the Estate, the City's Planning Director explained, in a July 27, 2011 correspondence, (1) that "when in operation, the Property's use as a bar/tavern and package store was a nonconforming use pursuant to section 104.05 of the City's" LDRs, (2) that the extended closure of the bar/tavern and package store resulted in an abandonment of the non-conforming use, and (3) that if the Estate wished to use the Property as a package liquor store, the Estate would need to obtain a variance pursuant to §104.05 of the City's LDRs. See Dec. 10, 2020, Depo. of George Garrett, Ex. C (July 27, 2011, Letter).

16. The City Planning Director also noted that the Estate could continue to operate the

premises as a "bar/tavern use" merely by obtaining an alcoholic beverage license and a conditional use permit. Id.

17. Ultimately, in 2012, the $750,000.00 offer was withdrawn because the written confirmation from the City could not be obtained and the offer expired. 2d Am. Compl. at ¶48; Revised Ans. to Interr. at ¶ 2.

18. Even after the City's determination that the Property had lost its right to operate as a package liquor store, the Property retained significant value. Wilson Affidavit.

19. This value was based on the Property's status as an improved commercial vacant restaurant/bar use facility and permissible uses associated with the Property's designation as "MU, Mixed Use" for purposes of its zoning under the City's land development regulations. Wilson Affidavit.

20. According to the City's expert appraiser, the Property's value after Garrett's July 27, 2011 correspondence was $510,000. Wilson Affidavit.

21. The Estate appealed the City Planning Director's letter to the City Planning Commission, City Council, and Monroe County Circuit Court ("Appellate Division"). 2d Am. Compl. at ¶20.

22. The Appellate Division found on June 29, 2012, that, because the City had failed to provide the Estate with the required notice when it adopted Ordinance 2006-25, the Ordinance could not be applied to the Estate until such time as notice had been provided.

Am. Order Granting Cert.

23. The Estate would then be permitted to register the Property as a lawful non-conforming use for package liquor sales under the previous version of the Code. Am. Order Granting Cert.

24. The Estate eventually sold the Property in September 2013 for $475,000. Plf.'s. 2d Supp. Ans. to 1st Set of Interr. at 2.

25. Inverse condemnation is a cause of action by a property owner to recover the value of property that has been de facto taken by an agency having the power of eminent domain where no formal exercise of the power has been undertaken." Osceola County v. Best Diversified. Inc., 936 So. 2d 55, 59-60 (Fla. 5th DCA 2006). Whether a plaintiff has established a taking "is a question for the court in an inverse condemnation case." Fla. Dep't of Agric. & Consumer Servs. v. Mendez, 126 So. 3d 367, 375 (Fla. 4th DCA 2013).

26. Under Florida law, a property owner is permitted to pursue either (I) declaratory relief seeking to have the allegedly confiscatory decision overturned so that development can proceed or (ii) to accept the appropriateness of the government decision and seek compensation through inverse condemnation. A property owner is not, however, entitled to both. Golf Club of Plantation, Inc. v. City of Plantation, 717 So. 2d 166, 171 (Fla. 4th DCA 1998) ("Dismissal on that basis was correct and, in addition, was warranted based on the fact that, Golf Club

may not seek both damages as a result of inverse condemnation and a declaratory judgment."); see Key Haven Associated Enters., Inc. v. Board of Trustees of Internal Imp. Trust Fund, 427 So.2d 153 (Fla.1982), superseded on other grounds as noted in Bowen v. Florida Dep't of Envtl. Regulation, 448 So.2d 566, 568-69 (Fla. 2d DCA 1984), approved and adopted, 472 So.2d 460 (Fla. 1985); Janson v. City of St. Augustine, 468 So.2d 329 (Fla. 5th DCA 1985).

27. In Key Haven, the Florida Supreme Court explained the nature of the election between the remedies of declaratory relief and compensation and found that they are mutually exclusive:

> [O]nce an applicant has appealed the denial of a permit through all review procedures available in the executive branch, the applicant may choose either to contest the validity of the agency action by petitioning for review in a district court, or, by accepting the agency action as completely correct, to seek a circuit court determination of whether that correct agency action constituted a total taking of a person's property without just compensation.

427 So.2d at 156 (emphasis added).

28. The undisputed facts establish that the Plaintiffs elected to contest the City's action. They filed a petition for a writ of certiorari seeking to have allegedly confiscatory decision overturned (so that the Property could

continue to operate as a non-conforming package liquor store) and prevailed in that action. See Am. Order Granting Cert. Having obtained that specific relief, the Court finds that no taking claim may be pursued for the alternative and inconsistent remedy of compensation. See Golf Club of Plantation, 717 So. 2d at 171 (affirming dismissal of "alternative" claim for declaratory relief). For this reason, the City is entitled to judgment as a matter of law.

29. The City is also entitled to judgment as a matter of law because Florida courts have consistently held that property owners cannot recover for the harm allegedly caused by the delay associated with the municipal decision-making process even when harm occurred and the decision was wrong. Mandelstam, 685 So. 2d at 869; Jacobi, 678 So. 2d at 1367 .

30. In Mandelstam, the landowners sued the city for inverse condemnation and violations of due process arising out of a delay in the approval of their application for special use permit to build a gymnastics school. 685 So. 2d at 869. After the city commission denied the permit, the landowners appealed to the appellate division of the circuit court, which affirmed. Id. The Third District then granted the landowners' petition for certiorari review, quashed the circuit court's decision, and directed the court to enter an order instructing the city to grant the special use permit. Id. It was not until 1992 -approximately 6 years after the original application 1 -- that the city

finally issued the special use permit. Id.

31. The landowners then filed suit against the city, "seeking damages resulting from what the [the landowners] claimed was the temporary taking of their property from the time of their original application for the permit until the time when the permit was issued in 1992." Id. at 869. Noting that that property owners could not typically recover for the harm caused by the decision-making process, the Third District "conclude[d] that the instant litigation delay did not constitute a temporary taking under either the federal or state constitution, and thus did not give rise to an inverse condemnation claim." Id.

32. In Jacobi, the property owners sued for inverse condemnation based on the city's refusal to approve an application to reconfigure two lots and to build a house on one of the lots. 678 So. 2d at 1366. Following a successful appeal to the appellate division of the circuit court, the property owners obtained approval from the city. Id. The property owners then filed a complaint asserting a claim for inverse condemnation and seeking compensation for the losses incurred as a result of the erroneous decision. Id.

1 See Mandelstam v. City Comm'n of City of S. Miami, 539 So. 2d 1139, 1139 (Fla. 3d DCA 1988).

33. The Third District affirmed the trial court's grant of summary judgment in favor of the city. ld. It held that no taking occurred because, during the time between the city's disapproval and the appellate division's

reversal, "the owners made improvements to the property including remodelling and expanding the existing house" and were, therefore, "not denied substantially all use of the property." ld.

34. The Third District concluded that delay associated with faulty governmental land use decisions do not give rise to taking claims:

> [T]he property owners may not recover for the harm caused by the decision-making process pursuant to the asserted claims. We are cognizant that the property owners were unable to proceed unhindered in the development of their property. They experienced delays and incurred expenses awaiting resolution of the neighbors' appeal to the Board and their successful appeal to the circuit court. However, there is no guarantee that regulatory bodies will not become embroiled in disputes with property owners in which the owners ultimately will prevail. In addition, there is no concomitant guarantee that property owners may recover for harm caused by these disputes.

Id at 1367.

35. The Court finds that Mandlestam and Jacobi are directly analogous to the current situation. In those cases, the Third District rejected taking claims identical to the one at issue. As a pure matter of law, the delays in obtaining approval for the land development decisions at issue in Mandlestam (a special

use permit to build a gymnastics school) and Jacobi (a lot reconfiguration) that were only obtained after the plaintiffs appealed the denials to an appellate court did not give rise to a valid claim for compensation. Here, the Plaintiffs' inverse condemnation claim is based upon an 11-month delay between the City's July 27, 2011, determination that the lawful nonconforming package liquor store use had been abandoned and the circuit court's June 21, 2012, Amended Order Granting Certiorari, that quashed the City's determination regarding the abandonment of the lawful nonconforming use. The facts of Mandlestam and Jacobi cannot be distinguished from the facts here. Based on these authorities, the Court finds that the Plaintiffs' inverse condemnation claim, predicated upon a delay in the issuance of a correct decision by the City, is invalid and that the City is entitled to summary judgment.

36. The City is also entitled to judgment as a matter of law because a taking has not occurred. "'[A] plaintiff seeking to challenge a government regulation as an uncompensated taking of private property may proceed under one of the' four theories identified in Lingle v. Chevron U.S.A.. Inc., 544 U.S. 528, 548, 538, 546, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005)." Highlands-In-The-Woods.L.L.C. v. Polk Cty., 217 So. 3d 1175, 1178 (Fla. 2d DCA 2017).2

37. The Second District summarized the categories as follows:

The first two are narrow categories that

involve a physical invasion of property, see Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982), or a regulation that completely deprives an owner of all economically beneficial use of his or her property, see Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992). Lingle, 544 U.S. at 538, 548, 125 S.Ct. 2074. The third category of takings is governed by the standard set forth in Penn Central Transportation Co. v.

2 The Florida Supreme Court "has interpreted the takings clauses of the United States and Florida Constitutions **coextensively.**" St. Johns River Mgmt. Dist. v. Koontz, 77 So.3d 1220, 1226 (Fla. 2011) (emphasis added) quashed on other grounds by Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595 (2013).

New York City, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978), and the fourth category is governed by the standard set forth in Nollan and Dolan. Lingle, 544 U.S. at 538-39, 548, 125 S.Ct. 2074.

Highlands-In-The-Woods, LLC., 217 So. 3d at 1178.

38. The Plaintiffs proceed under the Penn Central theory of takings. See 2nd Am. Compl. at ¶84.

39. While a use restriction applied to real property may constitute a taking "if it has an unduly harsh impact on the owner's use of the

property," the regulation's impact on the property as a whole must be considered when evaluating whether a taking has occurred. Penn Cent. Transp. Co, 438 U.S. at 127; Gwynn, 76 So. 3d 401, 404 (Fla. 2d DCA 2011).

40. When engaging in a review under Penn Central, a court must consider: (1) the economic impact of the regulation on the property owner; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the government invasion. Penn Central, 438 U.S. at 124.

41. The Court finds that an analysis of the undisputed facts of this case under the Penn Central factors establishes that the City is entitled to summary judgment on the single taking claim framed in the Second Amended Complaint.

With respect to the Penn Central economic impact criterion, a plaintiff must establish "'a serious financial loss from the regulatory imposition.'" Leon County v. Gluesenkamp. 873 So. 2d 460, 467 (Fla. 1st DCA 2004) (quoting Bass Enters. Prod. Co. v. United States, 54 Fed. Cl. 400, 403 (Fed. Cl. 2002)). The focus of this factor is on the change in fair market value of the subject property caused by the regulatory imposition. Gluesenkamp, 873 So. 2d 460, 467. In other words, the court must compare the value that has been taken from the property with the value that remains in the property. Id. (citing Keystone

Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 497,107 S.Ct. 1232, 94 L.Ed.2d 4 72 (1987)); see also Cane Tenn. Inc. v. United States, 57 Fed. Cl. 115, 123 (Fed. Cl. 2003) (holding that the proper measure of economic impact is a comparison of the market value of the property immediately before the governmental action with the market value of that same property immediately after the action).

42. The Court finds that undisputed record evidence establishes that the Property retained significant value even during the temporary loss of its status as a lawfulnon-conforming package liquor store. According to the City's appraiser, the Property's value with the package liquor license and the right to sell package liquors in July 2011 was $880,000. Wilson Affidavit. The City's appraiser also opined that, after the City took the position that the Property had lost its right to operate as a non-conforming package liquor store, the Property retained a value of $510,000. Wilson Aff. Such a significant retained value confirms the absence of a viable taking under Penn Central. See Gardens Country Club, Inc. v. Palm Beach Cty., 712 So. 2d 398, 402 (Fla. 4th DCA 1998) (affirming a finding of no taking where the evidence established that "the value of the land before the County refused the application for rezoning under the 1980 Comprehensive Plan was $8,000 per acre and after the County refused to consider the rezoning application was $3,000 per acre," and

characterizing "the remaining value []as more than a negligible amount and constituted a significant benefit.").

43. Any contention that the mere loss of the right to operate as a non-conforming package liquor store alone constitutes a taking is not supported by Florida law or the facts of this case. Legally, the loss of a single use can only rise to the level of the taking when its impact on the property as a whole satisfies the Penn Central analysis. See City of Venice v. Gwynn, 76 So. 3d 401, 405 (Fla. 2d DCA 2011) (on a claim challenging a prohibition against short-term rentals, the Second District held that, in performing the Penn Central analysis, the trial court "failed to recognize record evidence that [the] property had continued value as a monthly rental, as a short-term rental for three periods, or as investment property which could be sold.").

44. The undisputed evidence establishes that Garrett's July 27, 2011, correspondence did not impact any existing business or any ongoing use of the Property. After March 31, 2008, the Property did not operate as a bar, restaurant, or package liquor store. Plf.'s. 2d Supp. Ans. to 1st Set of Interr. at 3; Plf. 's Ans. to 2d Set of Interr. at ¶¶19, 20. Thus, no existing business or ongoing use was impacted by the City's July 2011 determination. Without the destruction of an existing business or the denial of an existing use, the mere loss of a potential business opportunity is not a sufficient deprivation to constitute a

taking under Penn Central. Compare State v. Basford, 119 So. 3d 478, 483 (Fla. 1st 2013) (affirming finding of a taking under Penn Central analysis of certain improvements for a pig farming operation where facts established that improvements "could not be used for any purpose other than raising pigs and that the wells and feed mill had no other practical purpose or use.").

45. The other factors also support a finding, as a matter of law, that no taking occurred. With respect to the Penn Central factor relating to the character of the government action, "[a] 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government ... than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." Penn Cent., 438 U.S. at 124, 98 S.Ct. 2646. In determining the character of the government action, courts must weigh the "'purpose and importance of the public interest reflected in the regulatory imposition'" and balance the plaintiff's interests against the government's need to protect the public. Gluesenkamp. 873 So. 2d at 467-68 (quoting Bass Enters. Prod. Co., 54 Fed. Cl. at 403).

46. The complained of 1500 Foot Prohibition was reflected in Ordinance 2006-25, which was adopted to address a concern "with the effect that a proliferation of package liquor stores would have on the health, safety and

welfare of the communication and on the character of the neighborhood in which such stores would be located." See Ordinance 2006-25 at 1. In addition to prohibiting new package liquor stores from locating within 1500 feet of an existing package liquor store, the ordinance also prohibited them from locating within 1500 of a school. Id. at 3-4. Such an ordinance is certainly akin to a "public program adjusting the. benefits and burdens of economic life to promote the common good." Penn Cent., 438 U.S. at 124, 98 S.Ct. 2646.

4 7. The absence of a taking under the undisputed facts of this case is also consistent with all of the Florida cases addressing taking claims involving a single use. See City of Miami Springs v. J.J.T., Inc., 437 So. 2d 200, 201 (Fla. 3d DCA 1983) (finding that a prohibition against the service of liquor at the same time that sexual performances or like activities are occurring on the premises did not constitute a taking of an existing nightclub offering both "exotic dancing" and liquor sales); Gwynn, 76 So.3d at 404 (reversing a circuit court decision holding that restrictions limiting short-term rentals of a house to three times per year were unconstitutional as applied to a homeowner; the court held that the lower court had failed to apply correct Penn Central standard by not comparing the value of property before and after the restrictions had been enacted.).

48. None of the cases relied upon by the

Plaintiffs provide a basis to deny summary judgment to the City. First, in City of Tampa v. Redner, the issue of liability had already been determined, and the Second District was directing its attention not to whether a taking occurred but to the issue of compensation. 852 So. 2d 270, 271 (Fla. 2d DCA 2003). Given the procedural posture of Redner, it is not relevant to the determination of whether a taking occurred. Instead, such an analysis is still governed by the factors identified in Penn Central as outlined above.

49. Second, the Plaintiff cited State v. Basford, 119 So. 3d 478, 483 (Fla. 1st DCA 2013), for the proposition that a business or building can be taken. However, in Basford, the plaintiff sought compensation for "for a taking of certain improvements on his real property." Id. at 480. Moreover, in that case, the plaintiff's existing and operating business -- a pig farm -- was "shut down" after a constitutional amendment made it unlawful to operate a pig farm in the manner that had been utilized by the plaintiff. Id. Here, the Plaintiffs are not seeking compensation for a taking of improvements on the Property. Rather, they are asserting the taking of a single use (package liquor sales) where no package liquor business was operating at the time of the alleged taking, nor had one been operating at the Property for over three years.

50. Finally, the Plaintiffs cite AA Profiles v. City of Fort Lauderdale, 850 F.2d 1483, 1485-7 (11th Cir. 1988), for the proposition that an

existing zoning designation is a property interest that may be taken. First, AA Profiles is distinguishable because it involved a situation where the plaintiff planned to operate a wood-chipping business on its land. The Plaintiff received the necessary approvals from the city commission, completed the purchase of the land, obtained building permits, and commenced construction. Id. at 1485. Subsequently, the city withdrew its approval, issued a stop work order, and re-zoned the land. Id. Here, no such comprehensive changes imposed by the government are at issue.

51. Second, the Eleventh Circuit expressly rejected the interpretation of AA Profiles being advanced by the Plaintiffs. In Corn v. City of Lauderdale Lakes, the Eleventh Circuit held that AA Profiles did not hold that "a **developer** establishes a just compensation claim simply by showing denial of a vested right in a particular development project." Corn v. City of Lauderdale Lakes, 95 F.3d 1066, 1076 (11th Cir. 1996).

52. Ultimately, the Court finds that entry of summary judgment for the Defendant is warranted on the basis of any of the following three independent grounds:

a. Plaintiffs elected the remedy of seeking to overturn the Defendant's decision;

b. Plaintiffs are not entitled to be compensated for losses incurred during delays in the decision making process;

c. Under a Penn Central analysis, no taking

occurred because irrespective of the Defendant's actions, the Property retained significant value.

Wherefore, it is hereby, Ordered and Adjudged:

1. That Defendant City of Marathon's, Motion for Summary Judgment is GRANTED.

2. That Plaintiff's Motion for Partial Summary Judgment on Taking & Partial Damages is DENIED.

DONE and ORDERED at Key West, Monroe County, Florida, this Friday, March 25, 2022.

/s/ Mark N. Jones
Judge Mark Jones,
Circuit Judge
44-2018-CA-222AO
01 MR 03/25/2022

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APPE NDIX 5A

IN THE CIRCUIT COURT OF THE 16th
JUDICIAL CIRCUIT
OF FLORIDA, IN AND FOR MONROE
COUNTY
CASE NO. 2018-CA-222-M

RICHARD E. WARNER & JOHN W. PARENTE, Co-Personal Representatives of the Estate of Joseph Ardolino II, and JOSEPH E. ARDOLINO, individually,
Plaintiffs,

v.

CITY OF MARATHON, a political subdivision of the State of Florida,
Defendant.

ORDER DENYING DEFENDANT CITY OF MARATHON'S MOTION TO DETERMINE ENTITLEMENT TO AN AWARD OF ATTORNEYS' FEES

THIS CAUSE, having come before the Court on July 27, 2022, upon the Defendant, City of Marathon's Motion to Determine Entitlement to an Award of Attorneys Fees, and the Court, having considered the Court file, said Motion, the Plaintiffs' response, the Defendant's reply, and having heard arguments of counsel, and being otherwise fully advised in the premises, hereby finds and determines as follows:

1. On January 25, 2019, Defendant made offers of judgement of $100 to Plaintiff Joseph Ardolino and $10,000 to Plaintiff Ardolino Estate (the "Offers"). Plaintiffs did not accept the offers.

2. Plaintiffs argue that the Offers were "not made in good faith" under Rule 1.442(h)(2). (Said term does not imply any dishonesty or misconduct by Defendant or its counsel.)

3. Rule 1.442 (h)(2)(A) provides, on good faith "the Court shall consider....The then-apparent merit or lack of merit in the claim." This Court had denied Defendant's Motion to Dismiss on December 31, 2018.

4. *Matrisciani v. Garrison Prop. & Cas. Ins. Co.*, 298 So.3d 53, 61 (Fla. 4th DCA 2020) sets out the rule requiring a "good faith" offer of judgement--"nominal or otherwise"--to be based on "a realistic assessment of liability" at the time it is made.

5. The Court finds that, at that time, it was not realistic for the Defendant to believe that the Plaintiffs had no case or that the Plaintiffs would accept the amounts of the Offers.

6. Rule 1.442 (h)(2)(C) also provides "the Court shall consider....The closeness of questions of law and fact at issue."

7. The Court also finds that this case involved "close questions of law and fact".

8. Accordingly, this Court finds that on January 25, 2019 the Defendant's Offers were not made in good faith, under Rule 1.442.

Wherefore, it is hereby Ordered and Adjudged:

1. That the Defendant, City of Marathon's, Motion to Determine Entitlement to an Award of Attorneys Fees is DENIED.

DONE and ORDERED at Key West, Monroe County, Florida, this Tuesday, August 9, 2022.

/s/ Mark H. Jones
Mark Jones, Circuit Judge

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City of Marathon, Appellant,
v.
Richard E. Warner, etc., et al., Appellees.

No. 3D22-1509

Florida Court of Appeals, Third District

September 27, 2023

Not final until disposition of timely filed motion for rehearing.

An Appeal from the Circuit Court for Monroe County, Mark H. Jones, Judge Lower Tribunal No. 18-222-M.

Johnson, Anselmo, Murdoch, Burke, Piper & Hochman, P.A., and Jeffrey L. Hochman and Hudson C. Gill (Fort Lauderdale), for appellant.

John P. Fenner (Weston), for appellees Richard E. Warner and John W. Parente; Margaret A. Broz (West Palm Beach), for appellee Joseph E. Ardolino.

Before LOGUE, C.J., and HENDON, and LOBREE, JJ.

PER CURIAM.

Affirmed.