No. _____

In the Supreme Court of the United States

JOHN ROGNE,

Petitioner,

v.

CITY OF CATOOSA, OKLAHOMA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court held that a government violates the Takings Clause the moment it takes private property without compensation. *Knick v. Township of Scott*, 588 U.S. 180, 184–85 (2019). Government cannot nullify or moot a property owner's Fifth Amendment right to compensation by rescission of its action. *Id.* Property owners may sue for compensation without first exhausting other remedies. *Id*. at 185.

City served Rogne with a second cease and desist order and then physically took possession of Rogne's property by constructing a barrier fence, denying him from stockpiling dirt on his vacant lots. Rogne sued in state court for a taking without just compensation and lost on a prudential rule of exhaustion and mootness based on City's rescission.

He refiled his Takings Clause claim in federal court under the Oklahoma savings statute because the prior action failed other than on the merits. The district court dismissed. The Tenth Circuit affirmed, holding Rogne's Takings Clause claim was resolved *on the merits*, citing the state appellate court, " . . . as a matter of law there was no taking because Mr. Rogne was granted relief as soon as he sought an administrative remedy and the City rescinded the Cease and Desist Order."

THE QUESTION PRESENTED IS:

Is the application of a prudential rule of exhaustion, where the only relief is voluntary cessation of government's physical possession, a decision on the merits of an uncompensated Takings Clause claim?

PARTIES TO THE PROCEEDINGS

Petitioner and Plaintiff-Appellant below

- John Rogne

Respondent and Defendant-Appellee below

- City of Catoosa, Oklahoma

LIST OF PROCEEDINGS

U.S. Court of Appeals for the Tenth Circuit

No. 25-5039

John Rogne, *Plaintiff-Appellant v.* City of Catoosa, *Defendant-Appellee*

Judgment: February 17, 2026

U.S. District Court, N.D. Oklahoma

No. 24-cv-00307

John Rogne, *Plaintiff v.* City of Catoosa, *Defendant*

Judgment: February 21, 2025

Oklahoma Court of Civil Appeals, Division III

No. 121,026

John Rogne, *Plaintiff-Appellant v.* City of Catoosa, *Defendant-Appellee*

Judgment: June 29, 2023

Rogers County, Oklahoma District Court

No. CJ-2014-0420

John Rogne, *Plaintiff v.* City of Catoosa, *Defendant*

Judgment: July 18, 2022

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The Opinion of the U.S. Court of Appeals for the Tenth Circuit was entered on February 17, 2026 and is included at App.1a. The Opinion and Order of the U.S. District Court for the Northern District of Oklahoma, dated February 21, 2025 is included at App.21a.

JURISDICTION

The judgment of the Tenth Circuit court of appeals was entered on February 17, 2026. (App.1a) No petition for rehearing was filed. This petition is timely filed. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

The Fourteenth Amendment provides, in part, "nor shall any state deprive any person of . . . property." U.S. Const. amend. XIV.

The Oklahoma Constitution also provides, in part, "private property shall not be taken or damaged

for public use without just compensation." Article II, Section 24, Okla. Const.

The Oklahoma savings statute, under Title 12 O.S. § 100, grants an additional one year to refile a lawsuit if the party failed other than on the merits.

Title 42 U.S.C. § 1983 provides, in part, that every person who subjects any citizen of the United States to the deprivation of any rights secured by the Constitution shall be liable to the party injured in an action at law.

STATEMENT OF THE CASE

I. Factual Background

In 2009, the City of Catoosa ("City") issued a Cease and Desist Order ("2009 CDO") against Mr. Rogne ("Rogne") prohibiting him from stockpiling dirt on his private property because the City alleged he needed a permit from the City. App.2a.

After conducting an administrative hearing, the hearing officer held a permit was *not* required. The City rescinded this 2009 CDO. *Id*. The City did not pay Rogne any compensation.

Undeterred, in 2011, the City subsequently served him with a second Cease and Desist Order ("2011 CDO") claiming, once again, he needed a permit to stockpile dirt on his property and that he was in violation of City building codes – issues that were previously raised, and ruled on, in the 2009 Administrative Hearing. App.65a. Then, the City physically

came on to Rogne's private property and constructed an orange barrier fence hung by six-foot rebar, and hung a sign, "No Dumping", thereby preventing Rogne from using his property. App.69a.

The 2011 CDO mentioned Rogne could go to an administrative hearing or set up a meeting with City officials; it was optional. App.65a. Rogne and his attorney chose to meet with City officials, including the City attorney, City code officers, and City engineers, where they attempted to resolve this 2011 CDO, but to no avail. The City maintained it was shutting Rogne down and it refused to rescind the 2011 CDO. App.62a-63a.

The City did not initiate any formal condemnation actions to support its physical taking. The City did not pay compensation to Rogne. The City continued to physically occupy Rogne's property with the orange barrier fence for six years and continued its control and dominion over his property even after it was served with a lawsuit. The City did not rescind its physical occupation until after Rogne presented the City, at a second administrative hearing, with the exculpatory depositions of City officers', and its hired civil engineer's testimony during discovery, that the 2011 CDO contained falsified information. App.2a, fn. 2. Rogne was barred from putting on this evidence with the court as the City filed its motion to dismiss and the court granted it on grounds there was no case or controversy, no judiciable claim, and the case was moot on grounds City rescinded its physical occupation and rescinded its 2011 CDO. App.64a.

Rescission was the only remedy provided to Rogne — not compensation.

II. Procedural History

A. State trial court and appeal

On October 29, 2014, Rogne filed his state lawsuit against the City as an unconstitutional taking without just compensation. App.2a-3a, fn. 2. Rogne expressly alleged "City has caused damages by way of inverse condemnation . . . The City of Catoosa has taken away Plaintiff's rights without compensation by prohibiting Plaintiff from entering onto Plaintiffs own property without Plaintiff's consent." (Rogers Cty Case, Petition, Oct. 3, 2014 at ¶ 12).[1] App.2a-3a, fn. 2; App.23a, fn. 4.

The parties engaged in discovery wherein Rogne uncovered exculpatory evidence against the City by way of sworn deposition testimony by the City's civil engineer and code enforcement officer who both testified that the 2011 CDO contained falsified statements. App.2a-3a, fn. 2 and App.65a.

Upon Rogne's request, and over the objection of the City, the state trial court entered a stay order on December 7, 2016. staying all motions to allow Rogne to present to the City at a second administrative hearing his uncovering of the City's falsified 2011 CDO. App.2a-3a, fn. 2.

The City voluntarily rescinded the 2011 CDO. The City did not pay any compensation as a result of

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[1] *See* App.22a, fn. 2; 23a, fn. 4; *John Rogne v. City of Catoosa*, No. CJ-2014-420 (Rogers Cty. Dist. Ct., Okla.) Petition, filed October 3, 2014. The docket for the Rogers County Case is available at https://www.oscn.net/dockets/GetCaseInformation.aspx?db=rogers&number=CJ-2014-420 (last visited Sunday, May 10, 2026).

its rescission. The State trial court did not lift the stay order; it remained in place. App.2a-3a.

After the City had rescinded its 2011 CDO and released its occupation of Rogne's property, it filed a motion to dismiss the entire action, including Rogne's inverse condemnation claim for damages, under Article III of the United States Constitution. App.2a-3a.

City contended that because it had vacated its occupation and rescinded the 2011 CDO, there was no longer a case or controversy, no justiciable claim remained, and the case was therefore moot. *Id.* and fn. 2. *infra.*, Oral Argument. The City's motion to dismiss expressly cited Article III of the Constitution and contended that Rogne's case was not justiciable and was moot. *Id.* and *infra.*, Oral Argument, fn.2.

Rogne objected on grounds that he was still entitled to compensation for the six years City illegally occupied his property under *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 321 (1987). *Id.*

Despite his plea for just compensation, the State trial court dismissed the case because Rogne had received relief and a remedy. The State trial court did not award compensation. App.60a-64a.

The trial court also applied a prudential rule of failure to exhaust an administrative remedy. App.63a. Rogne went to not one, but two administrative hearings — the first was prior to the filing of the lawsuit in 2009 on the same set of facts, and the second was because the trial court stayed the case to allow the parties to proceed to exhaust an administrative remedy. App.2a-3a, fn. 2.

After rehearing, the State trial court granted judgment to city. App.25a, App.61a.

Rogne appealed to the civil appellate court.[2] It affirmed the trial court. "Rogne cannot maintain an inverse condemnation claim under any set of facts because he failed to exhaust his administrative remedies prior to filing the instant action." The court inserted a *footnote* stating:

> The Court notes Mr. Rogne's argument that an administrative remedy is ineffective because there is no administrative remedy for compensating a landowner for money damages for a temporary taking. We find, however, that, as a matter of law, there was no taking because Mr. Rogne was granted relief as soon as he sought an administrative remedy and the City rescinded the Cease and Desist Order. App.58a-59a.

The Oklahoma Supreme Court denied Rogne's request for certiorari. App.27a.

B. Federal case and appeal

Following the conclusion of the state court case, Rogne timely filed the present action in the United States District Court under the Fifth and Fourteenth Amendments, Section 1983, and by way of the Oklahoma savings statute, Title 12 O.S. § 100, which statutorily provides a party the opportunity to refile his

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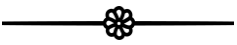
[2] See App.32a-33a, fn. 28 Federal District Court determined that because the Civil Appeal Court conducted a *de novo* review, it is the state appellate decision that determines what was or was not in the state court case.

claim if it *failed other than on the merits*. App.21a and 27a.

The U.S. District Court for the Northern District of Oklahoma magistrate granted City's motion to dismiss Rogne's case. App.28a. It decided that the state appellate court decision was a decision on the merits, finding the Oklahoma savings statute did not apply. App.41a-42a.

On appeal and after oral arguments, the Tenth Circuit panel affirmed. App.1a. The Tenth Circuit held, "because Mr. Rogne 'was granted relief [of rescission] . . . that as a matter of law, there was no taking.'"[3]

The Tenth Circuit held that the Oklahoma court "resolved Mr. Rogne's claim on the merits." App.20a.



REASONS FOR GRANTING THE PETITION

I. The Question Presented is Important

Was the invocation of a prudential rule of exhaustion (procedural ripeness) and voluntary rescission (Article III mootness), that barred a Constitutional right to just compensation under the Takings Clause, a decision on the merits of the substantive claim? Does a decision solely on these two doctrines preclude Rogne's right to reassert his claim for compensation in federal court under the Oklahoma savings statute

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[3] The United States Court of Appeals for the Tenth Circuit – Oral Argument Recording: Case No. 25-5039, *Rogne v. City of Catoosa*, Argued: Wednesday, January 21, 2026, https://www.ca10.uscourts.gov/sites/ca10/files/oralarguments/25-5039.mp3

that expressly provides that a party may refile his claim if he failed other than on the merits? If neither doctrine can nullify a claim for just compensation, then, can either doctrine, as applied, be a basis for a decision on the merits?

This Court has explained that "if [a party] goes to state court and loses, his claim will be barred in federal court." *Knick*, 588 U.S. at 185. What if the party goes to state court and loses other than on the merits? Will his claim be barred? What if the party goes to state court and he loses solely on grounds of a rule of procedure (ripeness) and lack of jurisdiction (mootness)? Is he barred from refiling under the Oklahoma savings statute in federal court?

Is a judge-made prudential rule of failure to exhaust, a rule of procedure? Is a decision based on a procedural rule a decision on the merits of a substantive Takings Clause claim?

The state appellate court held:

> Rogne cannot maintain an inverse condemnation claim under any set of facts because he failed to exhaust his administrative remedies prior to filing the instant action.

The court inserted a *footnote* stating:

> The Court notes Mr. Rogne's argument that an administrative remedy is ineffective because there is no administrative remedy for compensating a landowner for money damages for a temporary taking. We find, however, that, as a matter of law, there was no taking because Mr. Rogne was granted relief as soon as he

> sought an administrative remedy and the City rescinded the Cease and Desist Order.

The Tenth Circuit held the state court judgment was a decision on the merits.

The state court judgment was decided on two grounds — exhaustion (procedure) and rescission (jurisdiction), not on the substantive claim.

In Oklahoma, the phrase "on the merits" is understood as referring to the substance of the claim different from procedural, or jurisdictional, grounds. *Gottsch v. Ireland*, 1961 OK 4, ¶¶ 16-18, 358 P.2d 1097, 1100-01. The Tenth Circuit defines the word "merits" as the real or substantial grounds of an action as distinguished from matters of procedure. *Providential Dev. Co. v. United States Steel Co.*, 236 F.2d 277, 280 (10th Cir.1956) citing *Clegg v. United States*, 112 F.2d 886 (10th Cir. 1940). The scope and analysis of a decision must in all cases be measured by the ground of demurrer or motion on which the judgment is based. *Swift v. McPherson*, 232 U.S. 51 (1914). The decree, not being on the merits, could not be a bar to such subsequent suit in a state or United States court. *Id.* at 57.

It matters not if the state court decision was right or wrong, or if the federal court agreed or disagreed with the conclusion of the state court decision. The question presented to the Tenth Circuit was whether the state appellate court decision that there was no taking *because* City rescinded the cease and desist order and ended its physical possession of Rogne's property after six years was a decision on the merits of the substantive Takings Clause claim.

This Court has held voluntary cessation by government cannot nullify a Takings Clause claim for compen-

sation. *First English*, 482 U.S. at 321 (no subsequent action whether voluntary repeal or a hearing and rescission can relieve it of a duty to provide compensation).

The merits question as to what constitutes an inverse condemnation Takings Clause claim in this Court and under Oklahoma Supreme Court precedent is: (i) was there a physical occupation resulting in a *per se* taking; (ii) was there substantial interference with a property right of use; and, (iii) was there compensation paid? Rogne maintains that these are the substantive questions on a Takings Clause claim based on the original text of the Takings Clause and this Court's precedent.

The Tenth Circuit did not answer these three merits questions as to the state appellate court decision. It failed to determine whether the state appellate court addressed the underlying substantive claim under the Takings Clause. There was no decision in state court as to whether there was a physical occupation (even though there was a physical occupation); and, no decision as to whether government's act substantially interfered with a private right of use and enjoyment (even though City served Rogne with a cease and desist order prohibiting him from using his property). There was no decision as to payment of just compensation; and no decision as whether the administrative process provided just compensation.

The state appellate court decision was based solely on procedural and jurisdictional grounds. "Mr. Rogne was granted relief as soon as he sought an administrative remedy and the City rescinded the Cease and Desist Order."

Rogne maintains that neither of these two grounds answer the substantive merits question of a taking without just compensation; and, neither can these two grounds support a decision on the merits. Thus, Rogne's prior state court case failed other than on the merits.

Rogne was deprived of just compensation for the six years City occupied his property. The Tenth Circuit undermined and disregarded this Court's Takings Clause precedents by abdicating its authority to allow a justiciable claim to proceed in federal court when the prior state court decision was based solely on the ripeness and mootness doctrines — not the substantive claim for just compensation. Rogne maintains that a judgment on an impermissible bar to a claim for Constitutional compensation is not a judgment on the merits.

This Court has explained, "we have never tolerated that outcome." *United States v. Pewee Coal Co., Inc.*, 341 U.S. 114, 116-117 (1951). Property owners may sue for compensation without first exhausting other remedies. *Knick*, 588 U.S. at 185. No subsequent post-taking action by the government can relieve it of the duty to provide compensation; government cannot nullify or moot a property owner's Fifth Amendment right to compensation by rescission of its action. *Knick*, 588 U.S. at 192; *First English*, 482 U.S. at 321 (no subsequent action of voluntary repeal or rescission can relieve government of a duty to provide compensation).

When government physically takes control, dominion, or possession of private property, the Takings Clause obligates the government to provide the owner with just compensation from the day government physically

took possession or appropriated the property. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 321. The government must pay for what it takes. *Id.*, at 322. The mere fact of a physical invasion, no matter how small, triggers a mandatory duty on government to pay just compensation. *Id.*

This Court has never tolerated a rule under which "the government can appropriate private property without paying just compensation so long as it avoids formal condemnation." *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 156 (2021). In *Jacobs v. United States*, 290 U.S. 13, 16 (1933), this Court "made clear that, no matter what sort of procedures the government puts in place to remedy a taking, a property owner has a Fifth Amendment right to compensation as soon as the government takes his property without paying for it." "The same reasoning applies to takings by the States." *Knick*, 588 U.S. at 191.

This Court has recognized that the government can commit a physical taking either by appropriating property through a condemnation proceeding or by simply "enter[ing] into physical possession of property without authority of a court order." *United States v. Dow*, 357 U.S. 17, 21 (1958).

Temporary physical invasions constitute takings even if they are temporary or intermittent. *Cedar Point Nursery*, 594 U.S. at 2071 (citations omitted); *see also*, *First English*, 482 U.S. at 331. Just compensation is due even for temporary physical invasions — whether that be six days or six years.

The duration of the appropriation bears only on the amount of compensation due. *See United States v. Dow*, 357 U.S. at 26.

Rogne went to not one, but two, administrative hearings, one of which was prior to filing his suit, and the other was after the court stayed the case to proceed to a second administrative hearing. He sued in state trial and appellate courts, and then again in federal trial and appellate courts. From 2009 to the present, Rogne has been asserting his right to just compensation.

He was not paid compensation; there was no decision as to whether there was a physical *per se* taking; there was no decision as to whether there was substantial interference with property rights; and no decision as to whether the administrative process complied with this Court's required mechanism to pay compensation.

The dispositive issue for the state appellate court was the invocation of a prudential and procedural rule of exhaustion and a mootness doctrine of City's rescission of its illegal conduct, that effectively barred Rogne's Takings Clause claim.

The text of the Fifth Amendment Takings Clause expressly states: "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

The text of the Takings Clause does not require exhaustion, this Court has not held exhaustion is required, and there is no express term of voluntary cessation by the government so as to nullify a claim. The text stands by itself and must be construed as written.

A conclusion that a landowner is barred from compensation because he failed to exhaust an administrative remedy, or that government does not have to pay compensation, has no basis in the plain text of the Takings Clause. There is no textual requirement for exhaustion prior to payment of compensation. And there are no textual remedies for rescission — only just compensation.

Rogne is not asking this Court to overrule a state court decision, or a state court's application of a prudential rule of failure to exhaust. Rogne simply contends that the state court decision was a decision other than on the merits of a Takings Clause claim for just compensation.

Rogne appeals and prays to this Court to follow the Constitution and grant him the opportunity to receive just compensation. A reversal would allow Rogne to reassert his claim to be paid for just compensation for the six years City physically occupied his property.

The Tenth Circuit should be reversed.

II. Certiorari Should be Granted to Resolve Whether a Prudential Rule of Exhaustion (Ripeness Doctrine) and Rescission (Mootness Doctrine) Can Bar a Judiciable Claim for Just Compensation

A. Prudential Exhaustion is Not a Bar

Prudential exhaustion is a judge-made doctrine that permits a state court to abdicate their authority to hear a claim for guaranteed constitutional rights. *See generally*, Edmonds, *Prudence or Abdication? Prudential Ripeness and the Federal Forum Guarantee*, 2025 UNIV. OF ILL. LAW REVIEW ONLINE, 132.

When state courts invoke prudential rules to withhold judgment on justiciable constitutional claims, they abdicate and impermissibly deprive rather than adjudicate. *Id.* Prudential ripeness is a discretionary barrier that exceeds constitutional limits. *Id.* at 145. "Judge-made prudential doctrines have authorized courts to refrain from hearing cases even when all Article III requirements are satisfied . . . " *Id.* at 137.

"These concerns are particularly acute when courts apply prudential consideration to dismiss claims under 42 U.S.C. § 1983 . . . . " *Id.* That statute was Congress' deliberate response to the post Civil War reality that state institutions — especially courts — had systematically failed to protect federal [Constitutional] rights." *Id.* "When modern courts defer or dismiss § 1983 claims under the guise of prudential ripeness, they risk reestablishing the very state supremacy that § 1983 was designed to overcome." *Id.*

"During debates over what became the Civil Rights Act of 1871, lawmakers expressed deep alarm over the inability — or refusal — of state institutions [and courts] to provide redress." *Id.* 137-138. *See also*, *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 543 (1972) (Congress "intended to provide a federal judicial forum for the redress of wrongful deprivations of property by persons acting under color of state law."); *Mitchum v. Foster*, 407 U.S. 225, 242 (1972) ("The very purpose of [42 U.S.C.] § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights . . . . ").

Rogne maintains that the application of a prudential rule of failure to exhaust is a procedural ripeness rule and is not a required element to prove or disprove the merits of a Fifth Amendment claim. *Arbuckle*

Abstract Co. v. Scott, 975 P.2d 879, 886 (Okla. 1998). A judgment invoking a prudential rule of procedure is not a judgment on the merits, regardless of what a court calls it — judgment, summary judgment, or dismissal — and at least in Oklahoma, a claim for inverse condemnation is not subject to summary disposition. *Williams v. State ex rel. Dep't of Transp.*, 2000 OK Civ App 19, 998 P.2d 1245, 1252. The petition itself creates a question of fact for the finder of fact, unless the government confesses. *Id.*

The Oklahoma Supreme Court explained, "there is no administrative remedy for compensating a landowner for a governmental taking." *Mattoon v. City of Norman*, 617 P.2d 1347, 1350, 1980 OK 137 (Okla. 1980).

This Court rejected a prudential rule of ripeness in *Knick*, 588 U.S. at 204. Applying *Knick*, there should be no requirement that a private property owner first submit his Takings Clause claim to an administrative hearing, especially when the only remedy is not just compensation but rescission.

The same analysis applies here. There is only one remedy that is dispositive of a Takings Clause claim on the merits and that is monetary compensation conveyed by the government to the private property owner. An administrative remedy of rescission does not meet the merits question. The Tenth Circuit should have determined that if state courts invoke a prudential rule of exhaustion to deny compensation, it is not a bar to refiling a judiciable claim in federal court.

The threat to the Constitutional prohibitions against government overreach continues in this present case, when local government, including the judiciary, ignore and trample the fundamental rights

guaranteed by the United States Constitution. Government does not have the authority or power to take private property without paying just compensation.

There are no prudential or procedural rules that can circumvent this fundamental right.

A prudential rule, as applied here, unconstitutionally grants discretion to courts where no discretion exists. The prudential rule of exhaustion can, at the whim of a court, be applied in one case arbitrarily and not another. The text of the Takings Clause does not support such arbitrary discretion.

Yet, this is exactly what the Tenth Circuit was tasked with — deciding whether the invocation by state courts of a prudential rule of exhaustion (ripeness) to terminate a claim for just compensation by a state court was a decision on the merits.

The Tenth Circuit panel failed in its analysis.

B. Rescission or Mootness Does Not Nullify a Fifth Amendment Takings Claim

Rescission or voluntary cessation does not nullify or moot a Takings Clause claim. Compensation is the remedy, not rescission of the illegal order. *Knick*, 588 U.S. at 206 (J. Thomas concurring). "A violation of this Clause occurs as soon as the government takes property without paying for it." *Id*. A defendant cannot moot a case simply by ending its own unlawful conduct. *Friends of Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 174 (2000).

No subsequent post-taking action by the government can relieve it of the duty to provide compensation; government cannot nullify or moot a property owner's Fifth Amendment right to compensation by

rescission of its action. *Knick*, 588 U.S. at 206; *Friends of Earth*, 528 U.S. at 174; *First English*, 482 U.S. at 321 (no subsequent action whether voluntary repeal or a rescission can relieve it of a duty to provide compensation).

There must be at least a mechanism to pay compensation. Even the dissent in *Knick* conceded the government could only take as long as it provided a reliable mechanism to pay just compensation. *Id. at* 208 (Kagan, dissenting). This case presents a clear question that underscores this point.

Mootness is not a decision on the merits. Mootness is jurisdictional. *North Carolina v. Rice*, 404 U.S. 244, 246 (1971); *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 537 (1978). Lack of jurisdiction is not a case decided on its merits. Once moot, there is no jurisdiction to make any other opinions. *Church of Scientology of Ca. v. United States*, 506 U.S. 9, 12 (1992) (no jurisdiction to give opinions on other questions).

A federal court is not precluded from considering a litigant's Constitutional rights "where the state court willfully refuses to apply the correct and controlling constitutional standards." *Gamble v. State of Oklahoma*, 583 F.2d 1161, 1165 (10th Cir. 1978). In *Gamble*, the Tenth Circuit explained that it was manifestly evident that the Oklahoma state courts did not recognize or apply the controlling Supreme Court constitutional standards. *Id.*

The City's conduct was unconstitutional from the day it first served Rogne with a cease and desist order and then constructed a barrier fence on his private property to the day it rescinded its acts.

The City's rescission does not nullify a judiciable claim for compensation for the six years City took possession. And because City's voluntary cessation cannot nullify Rogne's claim, it is not a decision on the merits. Rescission is not the remedy — compensation is. Article III mootness is not a decision on the merits of a Takings Clause remedy.

III. THIS IS NOT A *SAN REMO* PRECLUSION TRAP

The state courts in the *San Remo Hotel v. City and County of San Francisco*, 364 F.3d 1088, 1093 (9th Cir. 2004) case actually determined and answered the merits question. It analyzed the City of San Francisco's ordinance in relationship to the actual use of, and application to, the private property. It held the regulatory ordinance fee and requirement bore a reasonable relationship in both the intended use and the amount of perceived problems stemming from a change in the hotel's use to a tourist hotel. *San Remo Hotel*, 364 F.3d at 1093. This was after the City of San Francisco denied a permit that was requested by the hotel owners.

Thus, unlike *San Remo* where the state courts actually made a final determination as to the merits question, the Oklahoma courts simply relied on the City's rescission of its cease and desist and failure to exhaust prior to filing the lawsuit — mootness and ripeness doctrines — neither of which are decisions on the merits of the underlying substantive question.

The *San Remo* preclusion trap is not present.

IV. Oklahoma Savings Statute Tolls Statute of Limitations of a Section 1983 Case

Whether a federal Constitutional claim or Section 1983 claim is tolled is a matter of state law. *Board of Regents v. Tomanio*, 446 U.S. 478, 478-79 (1980). Rogne's Constitutional claim was tolled by way of Oklahoma's own savings clause. Title 12 O.S. § 100. This statute tolls a Section 1983 claim. *Williams v. City of Guthrie*, 109 Fed. App'x. 283, 286 (10th Cir. 2004)(applied Oklahoma savings statute to a Section 1983 action).

Neither the Fifth Amendment nor Section 1983 contain a limitations period. Thus, federal courts and the Tenth Circuit look to the state limitations statutes, including the Oklahoma Savings Statute, that grants an additional one year period after a final decision *other than on the merits*. Oklahoma Stat. Title 12 O.S. § 100. *Abbitt v. Franklin*, 731 F.2d 661, 663 (10th Cir. 1984)(en banc)(courts adopt state statute of limitations and the savings provisions)

Okla. Stat. Title 12 § 100 provides:

> . . . if the plaintiff fail in such action otherwise than upon the merits, the plaintiff . . . may commence a new action within one (1) year after the . . . failure although the time limit for commencing the action shall have expired before the new action is filed.

The Oklahoma Savings Statute does not distinguish or even mention the words judgment or dismissal. It matters not if it was a judgment, summary judgment, or dismissal. What matters textually is that the statute states: "if the plaintiff *fail* in such action *otherwise than upon the merits*." *Id.*

Rogne refiled his claim for just compensation under the Oklahoma savings statute, Title 12 O.S. § 100. Even though he failed in the prior action, he is entitled to refile his claim because the state decision was not on the merits of an inverse condemnation claim.

The Oklahoma Supreme Court held where a trial court order is appealed, the one year period under Section 100 commences on the day after the appeal is final. *Cole v. Josey*, 457 P.3d 1007, ¶ 4, 2019 OK 39 (Okla. 2019).

In *Cole*, citing the Tenth Circuit in *Twashakarris, Inc., v. Immigration and Naturalization Serv.*, 890 F.2d 236 (10th Cir. 1989), the Oklahoma Supreme Court explained:

> We found the majority of other decisions with similar savings statutes overwhelmingly agree the time of commencement of the savings provision is the date the "judgment" is decided on appeal, not the date of determination by the trial court. *Cole*, 457 P.3d at ¶ 13.

Rogne complied with the express language of this statute and refiled his takings claim within the tolled period — from the final appeal mandate within the one year period.

When government physically condemns private property by constructing a barrier fence and occupying private property, government must pay compensation — and it accrues the day government constructed the fence.

The accrual of a constitutional takings claim without just compensation accrues at the time of the taking. *Knick*, 588 U.S. at 206-7. In Oklahoma, the accrual commences when the injury occurred. *Calvert v. Swinford*, 2016 OK 100, ¶ 11, 382 P.3d 1028, 1033 (Okla. 2016). The accrual of Rogne's just compensation injury was the day when City served him with a cease and desist order and later when the City physically came on his property and placed an orange barrier fence, hung by six-foot rebar, and placed a sign — "No Dumping Allowed".

Rogne is entitled to refile his claim because the state decision was not on the merits of an inverse condemnation claim.

V. Oklahoma Considers its Takings Clause as Coexistent with the Fifth Amendment's Takings Clause

The Tenth Circuit was tasked with deciding whether Rogne's claim failed other than on the merits. And it matters not that this case was first filed in Oklahoma state court. The Takings Clause claim is the same. Oklahoma's Constitution Art. 2, § 24 and the Fifth Amendment Takings Clause are the same claim and coexistent. App.31a-32a, 41a, fn. 32.

The Oklahoma Constitution provides, in part, "private property shall not be taken or damaged for public use without just compensation." Article II, Section 24, Okla. Const.

There is no difference between the protections under the Fifth Amendment and the Oklahoma Takings Clause, Art. 2, § 24. *Brannon v. City of Tulsa*, 932 P.2d 44, 46 (Okla. Civ. App. 1996)(no difference between

the protections afforded Oklahoma citizens under either provision); *ConocoPhillips Co. v. Henry*, 520 F.Supp 2d 1282, 1317 n.44 (N.D. Okla. 2007), *rev'd on other grounds*, 555 F.3d 1199 (10th Cir. 2009).

The Oklahoma Supreme Court explained:

> The "test" of whether there can be recovery in inverse condemnation is whether there is a sufficient interference with the landowner's use and enjoyment to constitute a taking.

Mattoon, 617 P.2d at 1349 (emphasis added).

As for a *per se* or *de facto* taking, the *Mattoon* court continued: "If there is an overt act by the governmental agency resulting in an assertion of dominion and control over property, there can be an actual or *de facto* 'taking'". *Id.* (emphasis added).

The Tenth Circuit did not answer whether the state courts made a determination of a *per se* or *de facto* taking based on the overt act by the City of constructing a barrier fence on Rogne's property. The Tenth Circuit did not answer whether the state court determined if there was substantial interference with the landowner's use and enjoyment.

The *Mattoon* court also explained "there is no administrative remedy for compensating a landowner for a governmental taking." *Id.* at 1350. A landowner may proceed, as an option, to administratively appeal for a denial of a building permit or may seek a variance.

However, an administrative remedy is not compensation and failure to exhaust such remedies does not address the merits of an inverse condemnation taking. *Id.*

The issue of substantial interference is the critical issue. *Carter v. City of Oklahoma City*, 862 P.2d 77, 81, 1993 OK 134 (Okla. 1993). "Further, in an inverse condemnation case . . . [t]he issue must go before a jury . . . . " *Id.*

> . . . in an action for inverse condemnation the issue of taking is critical and is a fact question which, unless confessed, must be tried to a jury . . .

Id.

In *Henthorn v. Oklahoma City*, 1969 OK 76, 453 P.2d 1013 (Okla. 1969) the Oklahoma Supreme Court required trial courts to determine "whether there was an interference with the use and enjoyment of the property due to the noise the jets made in landing and taking off for Will Rogers Airport and the amount of damages suffered."

> . . . there is a legal right to the use and enjoyment of one's property free from unreasonable interference. The ultimate question is whether there is a sufficient interference with the landowner's use and enjoyment to constitute a taking by a sovereign . . .

Henthorn, 453 P.2d at 1015-16.

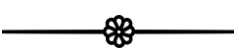
To determine whether or not the state case was terminated on its merits under Oklahoma inverse condemnation precedent, the test is whether there was an overt act by the government resulting in dominion or control over property or whether there was a determination of substantial interference with the use and enjoyment of private property. Oklahoma Takings

Clause law is consistent with this Court's Takings Clause precedent.

The prior state appellate court held that Rogne failed to timely exhaust his administrative remedy, and when he did the remedy was government rescission of its cease and desist order and cessation of its physical possession of his property. There was no compensation paid.

Rogne maintains the application of a prudential rule of exhaustion where the only relief is rescission of government conduct, is not a decision on the merits of a Takings Clause claim. Government's physical possession, control and dominion of his private property demands just compensation from the day government first entered his property until it vacated.

The Tenth Circuit committed reversible error.



CONCLUSION

This Court should grant the Petition for Certiorari.

Respectfully submitted,

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