No.

In the Supreme Court of the United States

LUCIA F. SANCHEZ, ET AL.,

Petitioners,

v.

RAÚL TORREZ, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF NEW MEXICO, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The beds beneath and banks adjacent to New Mexico's non-navigable rivers and streams are privately owned. Although the state constitution holds the water in those streams to be public water, state law never extended this to the streambeds or banks (collectively, streambeds). For decades, all three branches of state government confirmed the owners' right to exclude trespassers from walking and wading on the streambeds. The state legislature codified it, while state executive agencies certified streambeds as private and issued no-trespassing signage to streambed owners.

Everything changed in 2022. State officials began enforcing a public right to walk and wade on private streambeds, targeting for prosecution landowners who exercised their traditional right to exclude. State officials enforced these public rights pursuant to a state supreme court decision that held the streambed owners never had the right to exclude. Streambed owners brought a federal takings claim, but the Tenth Circuit took a dim view of the history and tradition behind it. The panel majority relied solely on the 2022 state court decision to define the scope of the owners' rights, allowing the state officials to continue prosecuting the owners for exercising their traditional right to exclude.

The question presented is whether state officials violate the Takings Clause when they enforce a public right to walk and wade across privately-owned streambeds and banks contrary to the State's traditional recognition of the streambed owners' right to exclude.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners Lucia F. Sanchez, Michael F. Sanchez Jr., and Richard Jenkins were Plaintiffs in the United States District Court for the District of New Mexico and Appellants in the United States Court of Appeals for the Tenth Circuit. Roland Rivera was a Plaintiff in the District Court and an Appellant in the Tenth Circuit but died during the appellate proceedings. The Tenth Circuit substituted his son Derek Rivera as his personal representative. App. 110a.

Petitioners are all natural persons.

Erik Briones, a Plaintiff and Appellant below, sold his property and is no longer involved in this case.

Respondents are Raúl Torrez in his official capacity as Attorney General of New Mexico; and Richard Stump, Tirzio Lopez, and Fernando Clemente Jr. in their official capacities as officers and members of the New Mexico State Game Commission. They were Defendants and Appellees below.

Sharon Salazar Hickey, Gregg Fulfer, Dr. Sabrina Pack, and Edward Garcia were Defendants and Appellees below in their official capacities as members of the New Mexico State Game Commission. These public officials have since left office. Pursuant to Supreme Court Rule 35.3, the following Respondents who replaced them on the Game Commission are substituted in their place: Dr. Christopher C. Witt, Kyle S. Harwood, and Dr. Richard W. Abercrombie. One seat remains vacant.

Respondent Michael Sloane was Defendant and Appellee below, sued in his official capacity as Director of the New Mexico Department of Game & Fish.

STATEMENT OF RELATED CASES

The proceedings identified below are directly related to the above-captioned case in this Court.

Sanchez v. Torrez, No. 25-2009, 173 F.4th 1202 (10th Cir. Apr. 21, 2026).

Sanchez v. Torrez, No. 24-cv-00646-KWR-LF, 763 F. Supp. 3d 1309 (D.N.M. Jan. 16, 2025).

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PETITION FOR A WRIT OF CERTIORARI

Lucia Sanchez, her brother Michael, and the other Petitioners are proud New Mexicans with generations-long interests in their property. They are dedicated stewards of their land, including the beds and banks of streams that flow through their property. They have tended the land, conserved its resources, and enjoyed its natural beauty and fishing. New Mexico now demands that they allow the public to access their streambeds and banks, with devastating results. Public access has damaged the river, decimated fish populations, exacerbated conflicts between landowners and recreationists, and consequently diminished property values. Yet when the landowners exercise their historically-recognized, fundamental right to exclude the public, they are prosecuted. One landowner faced fines up to $1,000 per day, additional penalties for noncompliance, and possible arrest and incarceration.[1]

New Mexico law traditionally recognized that the private owners of the beds beneath and banks alongside the State's non-navigable streams have the right to exclude trespassers from walking or wading across the stream. But in 2022, the New Mexico Supreme Court issued a novel interpretation of the state constitution declaring that the public always had the right to walk and wade across private streambeds. *Adobe Whitewater Club of N.M. v. N.M. State Game Comm'n*, 519 P.3d 46, 53 (N.M. 2022). Immediately, the same state officials who had recognized and enforced streambed owners' right to exclude reversed

[1] *See* Ryan Laughlin, *4 Investigates: Pecos River Wars*, KOB4 (May 8, 2026), *available at* https://www.kob.com/new-mexico/4-investigates-pecos-river-wars/.

course. They instead began vigorously enforcing the public's purported right to walk and wade across private streambeds, prosecuting owners who continued to exercise their right to exclude.

"The right to exclude is 'one of the most treasured' rights of property ownership." *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 149 (2021) (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982)). The ability to keep trespassers off one's land is a core part of what makes private property private. That is why this Court has long held that "even if the Government physically invades only an easement in property, it must nonetheless pay just compensation." *Kaiser Aetna v. United States*, 444 U.S. 164, 180 (1979).

That is what happened here. As in *Cedar Point*, state officials under color of state law enforce third parties' ability to trespass on private property. When streambed owners sued for a taking, the Tenth Circuit held the owners' allegations were not enough to show that they ever held the right to exclude. Although the landowners pointed to decades of state proclamations, a state statute, and a regulation under which state officials certified streambeds as private and issued no-trespassing signage, the Tenth Circuit found this insufficient. The court below instead deferred to the 2022 state court decision as the one true exposition of state law, characterizing all that had come before as "misinterpretation[s]" of the law. It affirmed the dismissal of the owners' case, allowing the state officials' enforcement and prosecution to continue.

Whether the State's enforcement and prosecution take the streambed owners' right to exclude depends entirely on whether the landowners had that right in

the first place. If they did, then "a State, by *ipse dixit*, may not transform private property into public property without compensation." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980). And if it never existed, then there was nothing for the state officials to take. Whether state action implicates the Takings Clause thus turns on how courts determine the existence of the claimed property right.

Unfortunately, this Court's guidance on that question is muddled. Generally, property rights are creatures of state law. *See Cedar Point*, 594 U.S. at 155. Nonetheless, a State cannot "'sidestep the Takings Clause by disavowing traditional property interests' in assets it wishes to appropriate." *Tyler v. Hennepin Cnty.*, 598 U.S. 631, 638 (2023) (quoting *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 167 (1998)). *Tyler* cautioned that while "[s]tate law is one important source" of property rights, it "cannot be the only source." *Ibid.* Important sources also include "'traditional property law principles,' plus historical practice and this Court's precedents." *Ibid.*

This tension in the framework for determining whether a property right exists has led to a circuit split. While the Tenth Circuit below disregarded the history and tradition the streambed owners pleaded in favor of the single most recent pronouncement, the Sixth Circuit has consistently rejected a State's effort to cast a single declaration of state law "as a get-out-of-Takings-Clause-free card to 'appropriat[e]' any traditional property 'right' owners may have." *Hendershot v. Stanton*, 162 F.4th 625, 631 (6th Cir. 2025) (quoting *Cedar Point*, 594 U.S. at 155); *see also Hall v. Meisner*, 51 F.4th 185, 190 (6th Cir. 2022). For property owners, the differing frameworks mean the

difference between federal constitutional protection for their traditional property rights and leaving them vulnerable to a State's U-turn on whether to acknowledge their existence at all.

The Court should grant the petition for a writ of certiorari.

OPINIONS BELOW

The decision of the Tenth Circuit is reported at 173 F.4th 1202 and reprinted at App. 1a-63a. The decision of the district court is reported at 763 F. Supp. 3d 1309 and reprinted at App. 64a-84a.

JURISDICTION

The Tenth Circuit issued its decision on April 21, 2026. Petitioners sought en banc review, which the Tenth Circuit denied on July 14, 2026. App. 85a. Justice Gorsuch granted Petitioners' application for an extension to November 11, 2026, to file their petition for a writ of certiorari. This Court has jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides, in relevant part, "nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

A. Historical Background

The territory that became New Mexico was annexed to the United States under the terms of the Treaty of Guadalupe Hidalgo, 9 Stat. 922 (1848), which ended the Mexican-American War. The acquired lands were "subject to all obligations

imposed upon the United States with respect to them under the principles of international law by reason of the annexation, and by its treaty obligations." *United States v. O'Donnell*, 303 U.S. 501, 510 (1938). This includes "not only formal grants 'but also any concession, warrant, order or permission to survey, possess or settle, whether evidenced by writing or parol, or presumed from possession.'" *Id.* at 510 n.2. *See also Los Angeles Farming & Milling Co. v. City of Los Angeles*, 217 U.S. 217, 231 (1910) ("the treaty of Guadalupe Hidalgo protected all existing property rights, but neither created nor defined the rights"). Two years later, Congress established the New Mexico Territory, which also included parts of present-day Arizona and Colorado. Act of Sept. 9, 1850, ch. XLIX, 9 Stat. 446. Subsequently, the United States acquired the southwestern portion of New Mexico in the Gadsden Purchase. *See* Treaty of La Mesilla, 10 Stat. 1031 (1853). After considerable controversy and political compromise, Congress passed a joint resolution providing that "the Territories of New Mexico and Arizona are hereby admitted into the Union upon an equal footing with the original States[.]" J. Res. 8, 62d Cong., 37 Stat. 39 (1911).

Before statehood, the territorial legislature passed a statute declaring that all "natural waters flowing in streams and watercourses . . . belong to the public and are subject to appropriation for beneficial use." N.M.S.A. 1978, § 72-1-1 (1907). When New Mexico became a State, this provision was incorporated into the state constitution as the Public Water Clause. N.M. Const. art. XVI, § 2. These provisions explicitly define rights in *water*, not the land under or adjacent to it. *Cf. Rapanos v. United States*, 547 U.S. 715, 736 n.7 (2006) (plurality opinion) (noting cases and

examples that differentiate between water and the conveyance that carries it—ditches, streambeds, tunnels, and the like).

New Mexico was admitted to the Union as a State in 1912. App. 96a. Through the Equal Footing Doctrine, the State obtained title to the lands beneath streams that were navigable-in-fact at the time of statehood, while the United States retained title to non-navigable streambeds. *See PPL Montana, LLC v. Montana*, 565 U.S. 576, 591 (2012). Many of those non-navigable streambeds, like Petitioners', subsequently passed into private ownership. App. 96a. In 1945, the state supreme court considered whether the owner of non-navigable streambeds had the right to exclude the public from fishing from a boat in the water above the beds. Applying the Public Water Clause, the court held that non-navigable waters above the privately-owned streambeds were open to the public for fishing. *State ex rel. State Game Comm'n v. Red River Valley Co.*, 51 N.M. 207 (1945). The court viewed its holding as "only declaratory of prior existing law, always the rule and practice under Spanish and Mexican dominion." *Id.* at 217 (internal quotation marks omitted). It also cautioned that "[t]he question of the right of use, or trespass upon, the lands of [the private party] bordering upon the [waters] in question is not involved." *Id.* at 216 (the appellant disclaimed any intent to trespass and proposed only to access the water at public access points elsewhere on the lakeshore).

Red River Valley adopted a different rule than neighboring Colorado: *Hartman v. Tresise*, 84 P. 685 (Colo. 1905), held that the public had no right to fish above private streambeds. The *Red River Valley* majority relied on the dissent in *Hartman*, *see* 51 N.M.

at 222-23, while the dissenting justices criticized the majority for not following *Hartman*'s rule, *id.* at 248-49 (Bickley, J., dissenting). Yet even as it rejected *Hartman*, the *Red River Valley* majority emphasized in a decision denying rehearing that "no person has the right to approach public water through private property, or fish in public water while on private property without the consent of the owner." *Red River Valley*, 51 N.M. at 276 (opinion denying rehearing, appended to the original opinion). As the court explained, a member of the public "may fish in public water if he does not trespass upon the lands of another; and fishing from a boat is not a trespass upon the property of the owner of the underlying land." *Ibid.*

New Mexico's political branches consistently applied *Red River Valley*'s distinction between the public water and the private land beneath and adjacent to non-navigable streams. The Game Commission and the Department of Game & Fish issued annual proclamations warning the public to obtain permission from the landowner before entering private streambeds.[2] App. 97a-98a. In 2015, the state legislature codified that tradition:

> No person engaged in hunting, fishing, trapping, camping, hiking, sightseeing, the operation of watercraft or any other recreational use shall

[2] "Fishing Proclamation" is shorthand vernacular for the annually issued New Mexico Department of Game and Fish Rules & Regulations. These rules and regulations are legally binding. *See, e.g.*, Karen Walsh, *New Mexico Fishing Violations and Penalties* (Oct. 1, 2026) (potential penalties include fines, license revocation, jail time, and asset forfeiture), https://newmexicofishinghub.com/new-mexico-fishing-violations-and-penalties/.

> walk or wade onto private property through non-navigable public water or access public water via private property unless the private property owner or lessee or person in control of private lands has expressly consented in writing.

N.M.S.A. 1978, § 17-4-6(C) (2015).

The Commission promulgated regulations to implement this legislation that was consistent with the agency's longstanding position that the public had no right to walk or wade across private streambeds. N.M. Admin. Code § 19.31.22 (2018). *See* App. 98a-99a. Under it, the agency permitted streambed owners "to be issued a certificate and signage by the director [of the Department] and the commission that recognizes that within the landowner's private property is a segment of a non-navigable public water, whose riverbed or streambed or lakebed is closed to access without written permission from the landowner." *Ibid.* The Department-issued signs were meant to serve as "prima facie evidence that the property subject to the sign is private property, subject to the laws, rules, and regulations of trespass." App. 99a.

B. Streambed Owners Relied on Their Property Rights to Improve the Land and Conserve Natural Resources

Petitioners relied on these longstanding rights in maintaining and improving their land. Siblings Lucia and Michael Sanchez have an 80-acre cattle ranch along the Rio Tusas that has been in their family since 1942. App. 90a. The Sanchez family has been a dedicated steward of the land and relied on the right to exclude to make stream improvements that foster a better habitat for fish. *Ibid.* The other Petitioners

along the Pecos River can trace their title back to before New Mexican statehood.[3] *Ibid.* The streambed owners share a passion for the land and its natural beauty. App. 90a-92a.

C. State Officials Switch Their Position and Prevent Streambed Owners from Exercising the Right to Exclude

Despite the State's longstanding recognition of the streambed owners' right to exclude, public recreation advocacy groups challenged the Commission's regulation through a mandamus proceeding in the state supreme court. The court sustained their challenge, holding the regulation unconstitutional on the theory that the Public Water Clause guarantees the public the right to walk and wade on privately owned streambeds. *Adobe Whitewater*, 519 P.3d at 53.[4] The court found the question of navigability irrelevant because public rights extend even to the beds of non-navigable rivers that have always been privately held. *Id.* at 54. *Adobe Whitewater* eviscerated nearly 80

[3] Initial Plaintiff and Appellant Roland Rivera, one of the Pecos River landowners, died while the case was pending in the Tenth Circuit. That court granted a motion to substitute Rivera's personal representative—his son, Derek—who is a Petitioner here. App. 110a.

[4] The New Mexico Supreme Court issued an unpublished order on March 2, 2022, declaring that the Commission's Trespass Rule violated the Public Water Clause of the New Mexico Constitution and that "certificates that the New Mexico State Game Commission has issued to private landowners pursuant to [the Trespass Rule] are hereby declared VOID." *Adobe Whitewater Club of N.M. v. N.M. State Game Comm'n*, No. S-1-SC-38195, Order (N.M. Mar. 2, 2022). The court issued its opinion explaining its reasoning six months later on September 1, 2022.

years of New Mexico law recognizing the streambed owners' right to exclude.[5]

The Commission and Department consequently reversed their longstanding recognition of the streambed owners' right to exclude. The Commission repealed the 2018 regulation and directed the Department to send a letter to each landowner who had obtained a certification that his streambed is closed to the public. App. 101a. The letter notified each landowner that "the certificate you were issued is now void" and that "in accordance with" *Adobe Whitewater*, streambed owners must "remove any signage referencing the certification and restricting access to the water" and "remove any barriers limiting access to legally accessed water on your property, unless otherwise authorized by law." *Ibid.*

The Attorney General also began targeting streambed owners for exercising their right to exclude. *Ibid.* He filed multiple lawsuits against streambed owners—including Briones and Jenkins[6]—for maintaining signage and barriers along a portion of the Pecos River recognized as closed to the public under the 2018 regulation. App. 101a-102a. And he issued multiple press releases touting his office's continued

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[5] The state supreme court purported not to invalidate the 2015 statute on the ground it could be interpreted not to apply to streambeds at all. It held instead that the agencies lacked power under the narrow reading of the statute to promulgate the regulation. 519 P.3d at 56-57. But the statute specifically mentions "wad[ing]," something one can only do on a streambed rather than on dry land next to the stream. This implausible reading of the statute further demonstrates how *Adobe Whitewater* rejected the longstanding consensus.

[6] The lawsuit against Jenkins is available at ECF No. 22-1 in Case No. 1:24-cv-00646-KWR-LF (D.N.M.).

aggressive enforcement of the public's purported right to walk and wade across privately-owned streambeds.[7] *See* App. 101a n.5, 106a. To this day, state officials whose offices recognized the streambed owners' right to exclude for decades invite members of the public to submit complaints about owners who exercise the right—punishing, or threatening to punish, those who still do. *See* App. 105a-107a.

D. Streambed Owners Sue State Officials

The Sanchez siblings, Briones, Jenkins, and Rivera sued the Attorney General, the members of the Commission, and the Director of the Department in district court, alleging that the State's actions prosecuting (or threatening to prosecute) them for excluding the public from their historically recognized, privately-owned streambeds and banks violate the Takings Clause. App. 86a-109a. The owners alleged that since state officials began enforcing public access to private streambeds, members of the public increasingly invaded their property, destroying the owners' privacy and counteracting their efforts to preserve the land. App. 102a-104a. Trespassers left trash that sickened cattle on the Sanchez ranch. App. 104a. They overfished the rivers. App. 103a-104a. Petitioners lost their privacy and much of their ability to take care of the land that means so much to them.

The district court dismissed the landowners' case without reaching the merits, holding that they lacked standing and that sovereign immunity barred their claims against the state officials. App. 84a.

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[7] *See, e.g.*, N.M. Dep't of Justice, *Protecting Public Access to Rivers and Streams*, https://nmdoj.gov/initiative/protecting-public-access-to-rivers-and-streams/ (visited Nov. 4, 2026).

The Tenth Circuit panel unanimously rejected the district court's jurisdictional holdings. App. 14a-23a (standing); App. 23a-35a (sovereign immunity).[8] It then ruled 2-1 to affirm the dismissal for failure to state a claim under Rule 12(b)(6). On the merits, the majority disregarded the role of the Commission in regulating the streambeds and the Attorney General's prosecution of landowners, viewing the case solely through the lens of a "judicial taking." App. 38a-54a. That analytical choice led the majority to focus only on whether the streambed owners' right to exclude was established before *Adobe Whitewater*. It relied on the original *Red River Valley* decision, discounting the appended order denying rehearing that clarified the scope of that decision. App. 48a-51a. The Tenth Circuit majority concluded that the New Mexico Supreme Court "characterized the public right to access private streambeds narrowly, emphasizing 'that the scope of the public's easement includes only such use as is reasonably necessary to the utilization of the water itself and any use of the beds and banks must be of minimal impact.'" App. 50a-51a (quoting *Adobe Whitewater*, 519 P.3d at 56). It dismissed the Commission's and Department's implementation of the 2015 statute because *Adobe Whitewater* had invalidated the regulation (App. 52a-53a), and down-played earlier agency proclamations as "insufficient to plausibly suggest an established property right as opposed to an agency misinterpretation of New Mexico law," App. 53a, even though the proclamations were consistent with the State's longstanding recognition of the right.

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[8] The Tenth Circuit also unanimously rejected Respondents' other jurisdictional arguments. App. 35a-38a.

Judge Federico concurred in the jurisdictional rulings but dissented on the merits. Following *Cedar Point* and *Tyler*, Judge Federico "look[ed] beyond state law to consider 'traditional property law principles, plus historical practice and [the Supreme] Court's precedents.'" App. 58a. Thus, he considered more than *Adobe Whitewater*'s assessment of what counts as property under state law, explaining that "determining whether the Landowners have sufficiently alleged an established property right requires us to weigh state law against the Landowners' non-state law sources." App. 58a-59a.

Judge Federico also rejected the "judicial takings" framing of the case, explaining that *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, 560 U.S. 702 (2010), "identifies a presumption in favor of state courts' interpretation of state law, but it says nothing about the amount of non-state law support needed to overcome this presumption." App. 59a. Judge Federico noted that the landowners "marshalled factual allegations about historical practice, alleging that prior to *Adobe Whitewater*, both New Mexico's executive and legislative branches had recognized the claimed property right via proclamation, legislation, and regulation." App. 58a. Given these allegations, which the lower courts should have accepted as true at this stage of proceedings, Judge Federico would have remanded the case to the district court to decide whether the landowners adequately pleaded a takings claim. App. 55a.

The landowners petitioned for rehearing en banc. The court called for a response, then denied the petition with no noted dissents. App. 85a. This petition followed.

REASONS FOR GRANTING THE PETITION

I. The Panel Opinion Conflicts With This Court's Precedent Protecting Against Government Manipulation of Property Rights

"There are varied ways of taking a person's property, namely: trespass, theft, banditry, robbery, plunder, bald government seizure, or by decree to simply deny he ever owned it in the first place." *Ryals v. Pigott*, 580 So. 2d 1140, 1158 (Miss. 1990) (Hawkins, P.J., dissenting). The last of these is a particularly clean way to avoid takings liability. By disregarding New Mexico's longstanding recognition of a traditional property right, the Tenth Circuit panel made it easier for States to do just that. Yet under this Court's precedent, "property rights 'cannot be so easily manipulated.'" *Horne v. Dep't of Agric.*, 576 U.S. 351, 365 (2015) (quoting *Loretto*, 458 U.S. at 439 n.17).

This Court has shown appropriate skepticism of government maneuvers to avoid paying for the taking of private property. In *Horne* and *Loretto*, for example, the government unsuccessfully tried to sidestep the Takings Clause by arguing that the property owner could have avoided the taking by leaving the regulated industry. *Horne*, 576 U.S. at 365; *Loretto*, 458 U.S. at 439 n.17. More frequently, the Court has parried attempts to redefine the scope of property rights by generally hewing to the maxim that "a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all." *Hughes v. Washington*, 389 U.S. 290, 296-97 (1967) (Stewart, J., concurring).

Webb's and *Phillips* both applied this principle. In *Webb's*, a bankruptcy receiver sought payment of accrued interest from an interpleader fund to which the receiver was otherwise entitled. 449 U.S. at 156-58. The county clerk argued that a state statute, as interpreted by the state supreme court, declared even private funds deposited in an interpleader fund "public money," making the accrued interest property of the county. *Id.* at 158-60. But Florida law otherwise recognized that the money deposited into an interpleader fund is private, *id.* at 160-61, and general property principles counseled that the interest follows the principal, *id.* at 162-63. This Court unanimously rejected the county's attempt to manipulate its way out of takings liability, holding that "[n]either the Florida legislature by statute, nor the Florida courts by judicial decree, may accomplish the result the county seeks simply by recharacterizing the principal as 'public money' because it is temporarily held by the court." *Id.* at 164.

Phillips followed, holding that "the interest income generated by funds held in IOLTA accounts is the 'private property' of the owner of the principal." 524 U.S. at 172. Once again, the Court explained that state law recognized the money deposited as private, and that the traditional common-law rule holds that the interest follows the principal. *See id.* at 164-65. That made the funds private, and Texas could not "sidestep the Takings Clause by disavowing traditional property interests long recognized under state law." *Id.* at 167.

This protection against manipulation is in some tension with the general rule that "property rights protected by the Takings Clause are creatures of state law." *Cedar Point*, 594 U.S. at 155. If state law

defines property rights, property rights might be at the mercy of the State. This is why earlier cases like *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972), and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1030 (1992), referred to "existing rules or understandings that stem from an independent source such as state law" to define protected property rights. This formulation reflects the possibility that a particular expression of state law might diverge from those existing understandings.

More recent cases elaborated on this, emphasizing the importance of history, tradition, and precedent in defining property rights. *Cedar Point* rejected California's argument that a regulation requiring agricultural employers to permit union organizers onto their property was not a taking because the access did not amount to a traditional easement under California law. The Court said California could not "absolve itself of takings liability by appropriating the growers' right to exclude in a form that is a slight mismatch from state easement law." 594 U.S. at 155. And *Tyler* unanimously rejected a county's attempt to avoid liability for taking a homeowner's surplus equity by relying on a 1935 state statute that "purported to extinguish that property interest." 598 U.S. at 639. As the Court explained, if state law definitively establishes what does and does not count as "property," a State could easily "'sidestep the Takings Clause by disavowing traditional property interests' in assets it wishes to appropriate." *Id.* at 638 (quoting *Phillips*, 524 U.S. at 167).

Tyler developed a framework to help determine when history and tradition have established a property right. State law, of course, is "one important source" of property rights. *Ibid.* But to guard against

government manipulation, state law must be considered alongside "'traditional property law principles,' plus historical practice and this Court's precedents." *Ibid.* In *Tyler* itself, the Court traced the claimed right from the Magna Carta, through precedent, and in other sources of state law. *See id.* at 639-45. That is why the Court unanimously held that, despite the 1935 statute, Ms. Tyler had a property right in her surplus equity and had plausibly alleged that the county had taken that property without just compensation. *See id.* at 647-48.

Consistent with this approach, especially where the right to exclude is concerned, this Court has "refused to allow the government to decree" a physical occupation "anew (without compensation), no matter how weighty the asserted 'public interests' involved." *Lucas*, 505 U.S. at 1028 (quoting *Loretto*, 458 U.S. at 426).[9] A new restriction on a fundamental right "so severe cannot be newly legislated or decreed . . . but must inhere in the title itself." *Id.* at 1029. That is why *Kaiser Aetna* did not permit the government to impose a navigational servitude across a privately-

[9] This Court so clearly understood a property owner's right to exclude from stream banks that, in *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994), it held, "Without question, had the city simply required petitioner to dedicate a strip of land along Fanno Creek for public use, rather than conditioning the grant of her permit to redevelop her property on such a dedication, a taking would have occurred. . . . Such public access would deprive petitioner of the right to exclude others . . . ." (citing *Kaiser Aetna*, 444 U.S. at 176). Similarly, *United States v. Causby* discusses the "edges" of property—like the bank of a streambed—in holding that the government had taken the property because it deprived the owners of "full enjoyment of the land" by eliminating their "exclusive control of the immediate reaches of the enveloping atmosphere." 328 U.S. 256, 264 (1946).

owned marina on the theory that "the pond had become a navigable water." *Cedar Point*, 594 U.S. at 151 (citing *Kaiser Aetna*, 444 U.S. at 168); *see also Kaiser Aetna*, 444 U.S. at 178 (when the expectation of private ownership is based on a right which "has the law back of it[,] . . . courts may 'compel others to forbear from interfering with [it] or to compensate for [its] invasion.'" (quoting *United States v. Willow River Co.*, 324 U.S. 499, 502 (1945)). Despite the primacy of state law in creating property rights, "the right to exclude is not a creature of statute and is instead fundamental and inherent in the ownership of real property." *Heights Apartments, LLC v. Walz*, 30 F.4th 720, 728 (8th Cir. 2022).

The Tenth Circuit's decision below failed to recognize this. It deferred exclusively to the state supreme court's 2022 declaration that New Mexican streambed owners never had the right to exclude. Confronted with plausible allegations of the contrary history, tradition, and precedent in the streambed owners' complaint, the panel labeled these mere mistakes of law.[10] The Tenth Circuit missed the lesson of *Cedar Point* and *Tyler* that one isolated pronouncement cannot determine the nonexistence of a property interest, particularly when that pronouncement is inconsistent with other expressions of state law and historical practice. So it allowed the New Mexico officials to continue enforcing a public right of access that nobody believed existed until 2022.

The Tenth Circuit's opinion opens the door to the very manipulation of property rights this Court has

[10] Judge Federico pointed out that whether these allegations were factual or legal was another unresolved matter that should have been remanded to the district court. App. 60a-61a.

warned against. If a single declaration of state law, contrary to history, tradition, and the facts on the ground, were enough to destroy a long-recognized property right, this Court's historic protection of treasured rights like the right to exclude would amount to little. The same danger lurks in any area where this Court has considered history and tradition in defining the scope of a right. *See, e.g.*, *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 33-38 (2022). Certiorari is warranted to ensure that the government cannot avoid takings liability by declaring that the claimed right never existed.

II. The Panel Opinion Conflicts With the Sixth Circuit's Application of *Tyler*

The Tenth Circuit's unwillingness to look beyond the state supreme court's 2022 declaration stands in stark contrast to the Sixth Circuit's approach. In two recent cases, district courts dismissed takings claims based on a state-court opinion holding that the claimed property right did not exist. The Sixth Circuit reversed both, demanding a deeper look into the State's traditional recognition of the right. Had the Tenth Circuit panel done the same, it would have vacated the district court's dismissal and remanded for full consideration of the history and tradition the streambed owners alleged. App. 55a-61a (Federico, J., dissenting).

The first of these cases became a model for *Tyler*. Like *Tyler*, the case involved the seizure of property to satisfy a tax debt. But in *Hall v. Meisner*, rather than reaping the windfall itself, the Michigan county that took the property sold it to another jurisdiction for the amount of the tax debt—and the buying jurisdiction later sold it for much more. 51 F.4th at 188-89. The

district court relied on a Michigan Supreme Court opinion holding that the property owner had no right to her excess equity because the county didn't collect the surplus. *See id.* at 189. The Sixth Circuit rejected the district court's "assumption that the question whether the County took the plaintiffs' property is answered solely by reference to Michigan law." *Ibid.* Instead, in language the *Tyler* Court quoted favorably, Judge Kethledge explained that "the Takings Clause would be a dead letter if a state could simply exclude from its definition of property any interest that the state wished to take." *Id.* at 190.

Looking beyond the Michigan Supreme Court's pronouncement, the Sixth Circuit panel sought to answer whether the State had "disavowed traditional property interests merely by defining them away." *Ibid.* To do so, the court surveyed this Court's decisions, *ibid.*, Anglo-American common law, *id.* at 190-94, and other sources of Michigan law, *id.* at 194-95. It concluded that Michigan recognized the claimed property right "in every context but this one," and thus that "on the facts alleged here, the County took the plaintiffs' property without just compensation, in violation of the Takings Clause." *Id.* at 194, 196. The decision ensured that Michigan could not "decline to recognize long-established interests in property as a device to take them." *Id.* at 188.

After *Tyler* favorably quoted *Hall* and performed a similar analysis, the Sixth Circuit applied it again. In *Hendershot v. Stanton*, too, the district court held the claimed property right—interest in unclaimed

property held by the State—did not exist.[11] The Sixth Circuit rejected the district court's sole reliance on state court expositions of a state statute. Citing *Webb's*, the panel recognized that "[i]f longstanding property principles establish a 'private property' right, Michigan cannot extinguish that right by statute, 'even for the limited duration' unclaimed property remains in Michigan's custody." *Id.* at 630 (quoting *Webb's*, 449 U.S. at 164).

The panel then followed *Tyler*'s analytical framework. Faced with a Michigan appellate court holding "that owners of unclaimed property have an inferior right to title," the Sixth Circuit rejected the county's attempt to characterize the state court decision as conclusive. *Ibid.*; *see also O'Connor v. Eubanks*, 83 F.4th 1018, 1023 (6th Cir. 2026) (following the same analysis in the context of a due process claim). It said that doing so "disregards" constitutional limits on a State's power to recharacterize property rights. *Hendershot*, 162 F.4th at 630. Like *Tyler*, the panel delved into other sources of law. It found that a state statute recognized that owners of unclaimed property still hold traditional title to the property even while it is in state custody. *Ibid.* The county could not avoid takings liability by pointing to a sole declaration of state law holding that the interest never existed. *See id.* at 631 (rejecting the county's attempt to use the state court opinion "as a get-out-of-Takings-Clause-free card").

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[11] Like the district court in this case, the *Hendershot* district court dismissed for lack of standing. But much like the Tenth Circuit here, the Sixth Circuit treated the existence of the property right as a merits question. 162 F.4th at 629.

That is exactly what the Tenth Circuit permitted New Mexico to do here. Had it followed the Sixth Circuit, it would have remanded the case to allow the district court to consider the streambed owners' historical allegations. *See ibid.*; *see also* App. 55a-61a (Federico, J., dissenting). Had the court below performed the analysis itself, the panel majority would have credited the many official pronouncements recognizing the streambed owners' right to exclude, including a state statute and implementing regulation. It would have understood the problem with viewing the New Mexico Supreme Court's decree in isolation, permitting the State simply to define away property that previously existed. Instead, the Tenth Circuit panel viewed *Adobe Whitewater* as conclusive and characterized the inconsistent proclamations and legislative and administrative decrees as mistakes of law.

These modes of analysis are irreconcilable. The difference is outcome determinative. Certiorari is warranted to resolve the split.

III. The Panel Opinion Adds to Longstanding Takings Confusion in the Lower Courts

The opinion below is strong evidence that this Court's recent opinions in *Tyler* and *Sheetz v. County of El Dorado*, 601 U.S. 267 (2024), have not calmed this particular strain of confusion in takings law. Specifically, the panel majority's worry about "judicial takings" proved too much to overcome and unnecessarily constrained its analysis. This case presents an opportunity for the Court to cut through the labels and clarify that there are no judicial takings, legislative takings, or administrative takings—there are just takings.

Defining property interests has long been a thorny subject in the lower courts. Long before *Tyler*, courts wrestled with the limits of the States' ability to define property rights. Many understood that "[e]ven though fundamental principles of State property law may define property rights, the Takings Clause nevertheless limits a State's authority to redefine pre-existing property rights." *Washlefske v. Winston*, 234 F.3d 179, 183 (4th Cir. 2000); *see also Schneider v. Cal. Dep't of Corr.*, 151 F.3d 1194, 1200 (9th Cir. 1998) ("Rather, there is, we think, a 'core' notion of constitutionally protected property into which state regulation simply may not intrude without prompting Takings Clause scrutiny."). Yet application has proven difficult.

This is especially true when state common law is involved. Like the Tenth Circuit here, some courts are hesitant to find that a property right exists after a state court says it does not. Federal courts worry that they "lack authority to overrule a state supreme court." *Pavlock v. Holcomb*, 35 F.4th 581, 588-89 (7th Cir. 2022); *see also Stop the Beach*, 560 U.S. at 744 (Breyer, J., concurring in part and concurring in the judgment) (expressing worry about "the distinct possibility that federal judges would play a major role in the shaping of a matter of significant state interest—state property law"). On this theory, when a state court says that the law has never recognized a particular property right, a federal court must agree even when presented with convincing history and tradition to the contrary.[12] The Sixth Circuit has

[12] It is hard to imagine a state court opinion openly admitting to redefining longstanding property rights. "Courts seldom confess to changing the law, claiming instead to clarify,

rejected that view. *See Hendershot*, 162 F.4th at 630-31; *O'Connor*, 83 F.4th at 1023. And this Court's precedents support the position that different sources of state law should be treated the same. In *Sheetz*, the Court unanimously recognized that the incorporated Takings Clause "constrains the power of each 'State' as an undivided whole." 601 U.S. at 276. Whether a State seeks to redefine traditional property rights by statute, agency action, or judicial decree, the constitutional takings question is the same. As the Fourth Circuit put it, "we look outside the Takings Clause to traditional rules of property law to determine whether a constitutionally protected property interest exists, and only when a State, through legislation, rule, decision, or other action deprives an owner of such an interest, must it provide just compensation." *Washlefske*, 234 F.3d at 184.

It is true that a federal court cannot overrule a state court on a matter of state law. *See United States v. Taylor*, 596 U.S. 845, 859 (2022) (recognizing that state courts are "the final arbiters of state law in our federal system"). But the dispositive question here is not one of state law. If a property right does exist, the federal Takings Clause protects it. The claim is not

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integrate, or correct prior precedents." Barton H. Thompson, Jr., *Judicial Takings*, 76 Va. L. Rev. 1449, 1478 (1990); *cf. Lucas*, 505 U.S. at 1025 n.12 (rejecting the argument that "the test for required compensation is whether the legislature has recited a harm-preventing justification for its action" because "such a justification can be formulated in practically every case, this amounts to a test of whether the legislature has a stupid staff" and "the Takings Clause requires courts to do more than insist upon artful harm-preventing characterizations"). That is one reason *Tyler*'s history-and-tradition approach is far superior to permitting a State to cherry pick a favorable declaration of state law for the proposition that the property right never existed.

that a particular action is wrong as a matter of state law (something a federal court cannot decide), but that performing the action results in an uncompensated taking of private property. *See Preseault v. United States*, 100 F.3d 1525, 1551 (Fed. Cir. 1996) (en banc) (plurality opinion) ("One can hardly fault the State government for complying with its law. However, the statute does not say that such actions are without consequences to the property owners, nor does it say that the property owners will not, or must not, be compensated for such actions. . . . Obviously the State could not simply by enactment of a statute immunize itself from the salutary provisions of the Fifth Amendment."); Josh Patashnik, *Bringing a Judicial Takings Claim*, 64 Stan. L. Rev. 255, 277 (2012) (a federal takings suit "assumes that the state court judgment is now an accurate statement of the state's property law" and claims that a taking results from "changing the state's property law"). Like any other case seeking relief through *Ex parte Young*, 209 U.S. 123 (1908), the question is whether the state officials have violated the owners' federal constitutional rights.

The confusion over "judicial takings" shows that the lower courts have not received this message from *Sheetz* and *Tyler*. The label "judicial taking" is meaningless. Like most constitutional cases, many takings cases involve actions of more than one branch of state government. In a typical *Ex parte Young* case, the state legislature passes a statute, and a plaintiff sues a state executive official to restrain its enforcement against him. *See Whole Woman's Health v. Jackson*, 595 U.S. 30, 39 (2021) (*Young* "allows certain private parties to seek judicial orders in federal court preventing state executive officials from enforcing

state laws that are contrary to federal law"). The same is true here, but for the source of the official's authority. The New Mexico Attorney General (an executive official) sued Briones and Jenkins for excluding the general public from land they claim is privately owned. Whether the Attorney General based that prosecution on a statute or a judicial decree is of no consequence under the Takings Clause, which applies to the State as a whole. *Sheetz*, 601 U.S. at 276. *Hendershot* similarly involved a county government claiming that a state court decision said the claimed property right did not exist. Labels like "judicial taking" cause unnecessary confusion.

There is no need for anxiety over "judicial takings," which "are ultimately no different from takings carried out by other government actors." Ilya Somin, Stop the Beach Renourishment *and the Problem of Judicial Takings*, 6 Duke J. Const. L. & Pub. Pol'y 91, 93 (2011). Only this Court can cut through the morass in this area and ensure uniformity nationwide.

IV. This Case Is of National Importance

As Justice Stewart warned almost sixty years ago, state redefinition of property rights is a gaping loophole in the Takings Clause. *See Hughes*, 389 U.S. at 296-97. If one proclamation of state law can erase a formerly established right, *see Armstrong v. United States*, 364 U.S. 40, 48 (1960) (government action, "however accomplished," causes a taking when it causes a property right to "vanish[] into thin air"), States will tend to expand public access to private property without paying for it. Whether through litigation or legislation, this is happening now and has happened in several States over the past few decades.

In Maine, public recreation advocates have made several attempts to persuade the State's highest court to overrule the longstanding common-law rule that beachfront owners hold title to the intertidal zone subject only to a narrow public easement for fishing, fowling, and navigation. They have nearly succeeded before. *See Bell v. Town of Wells*, 557 A.2d 168, 170-73 (Me. 1989) (4-3 opinion recognizing the historic limited public access); *Ross v. Acadian Seaplants, Ltd.*, 206 A.3d 283, 294 (Me. 2019) (Saufley, C.J., concurring in part) (three justices calling for the overruling of *Bell*). *See also* Brief for Masucci, et al., in *Masucci v. Judy's Moody, LLC*, No. Cum-24-82, at 8-40 (Maine Sup. Judicial Ct. June 14, 2024) (asking court to declare a broad recreational easement or even that the entire intertidal zone is public property).[13]

The Rhode Island legislature passed a statute purporting to set the boundary between public and private land on the beach at ten feet landward of the recognizable high tide line—a point indisputably landward of the traditional mean high tide line. A state trial court held this effected a taking, but the case is still pending in the state supreme court. *Stilts, LLC v. State of Rhode Island*, No. WC-2023-0481, 2024 WL 3488823, at *6 (R.I. Super. July 12, 2024), petitions docketed Nos. 2024-244-M.P. & 2024-245-M.P. (R.I.).

In *Matthews v. Bay Head Improvement Ass'n*, 95 N.J. 306, 326 (1984), the New Jersey Supreme Court dramatically expanded prior precedents, citing the "dynamic nature of the public trust doctrine" to deprive beachfront owners of the right to exclude. *See*

[13] *Available at* https://www.courts.maine.gov/news/masucci/24-82_appellants_masucci_et_al_brief.pdf.

W. David Sarratt, *Judicial Takings and the Course Pursued*, 90 Va. L. Rev. 1487, 1511 (2004). Property owners were left with no remedy.

In Oregon, the state supreme court declared a recreational easement across the entire shoreline under the doctrine of customary use, which the court itself called "unprecedented." *State ex rel. Thornton v. Hay*, 254 Or. 584, 597 (1969). This Court turned away a similar case from Oregon in 1994, even as Justice Scalia called it a "landgrab." *Stevens v. City of Cannon Beach*, 114 S. Ct. 1332, 1335 (1994) (mem.) (Scalia, J., dissenting from denial of certiorari).

In Indiana, the state supreme court held for the first time in 2018 that the State holds exclusive title to the shore of Lake Michigan up to the ordinary high water mark. *Gunderson v. State*, 90 N.E.3d 1171, 1173 (Ind. 2018). The lower courts had adhered to the rule applied to other navigable waters in the State: that owners held title down to the low water mark. *See Gunderson v. State*, 67 N.E.3d 1050, 1060 (Ind. Ct. App. 2016). Affected property owners sued, but the district court thought "the area of property law was murky in the State of Indiana," *Pavlock v. Holcomb*, 532 F. Supp. 3d 685, 701 (N.D. Ind. 2021), and the Seventh Circuit ultimately held that the landowners lacked standing, *Pavlock*, 35 F.4th at 592.

Obtaining coastal property via eminent domain is expensive. A loophole around paying just compensation to secure public access to private coastal lands would be popular, so it is no wonder that many states have gone this route. But the Takings Clause exists precisely to guard against this sort of exploitation. It "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as

a whole." *Armstrong*, 364 U.S. at 49. The Court should grant this petition to resolve the circuit split and clarify an important area of constitutional law.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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