No. _____

In The
Supreme Court of the United States

DENNIS O'CONNOR,

Petitioner,

v.

RACHAEL EUBANKS, in her personal capacity;
TERRY STANTON, in his personal capacity;
STATE OF MICHIGAN,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a state's constitutional obligation to pay just compensation when taking property waives its sovereign immunity from a claim seeking damages for an unconstitutional taking?

2. Whether a property owner may sue a state official in their personal capacity under 42 U.S.C. § 1983 for a violation of the Takings Clause, as the First Circuit holds, or whether such a personal capacity suit is categorically "barred," as the Sixth Circuit holds?

CORPORATE DISCLOSURE STATEMENT

Petitioner has no parent corporation and no stock.

STATEMENT OF RELATED PROCEEDINGS

- *O'Connor v. Eubanks*, 83 F.4th 1018 (6th Cir. Oct. 6, 2023)
- *O'Connor v. Eubanks*, No. 1:21-cv-12837, 2022 WL 4009175 (E.D. Mich. Sept. 2, 2022)
- *O'Connor v. Eubanks*, No. 1:21-cv-12837, 2022 WL 6576955 (E.D. Mich. June 30, 2022)

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PETITION FOR WRIT OF CERTIORARI

Dr. Dennis O'Connor respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 83 F.4th 1018 (6th Cir. 2023) and reprinted at App.1a. The order of the district court granting Respondents' motion to dismiss is reported at 2022 WL 4009175 (E.D. Mich. Sept. 2, 2022), and reprinted at App.21a.

JURISDICTION

The district court had jurisdiction over this case under 28 U.S.C. § 1331 and the Fifth and Fourteenth Amendments to the United States Constitution. The Sixth Circuit issued its decision on October 6, 2023, App.1a, and denied rehearing en banc on December 19, 2023. App.51a. This Court granted an extension of time of 40 days to file a Petition for Certiorari, extending the filing date up to and including April 29, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

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

The Eleventh Amendment states: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

The Fourteenth Amendment to the U.S. Constitution states, in relevant part, "nor shall any State deprive any person of life, liberty, or property, without due process of law."

42 U.S.C. § 1983 states, in relevant part,

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress[.]

Mich. Comp. Laws § 567.223 and §§ 567.242–567.245 and are set out at App.52a–56a.

INTRODUCTION AND SUMMARY OF REASONS FOR GRANTING THE PETITION

This case presents two important and recurring questions pertaining to whether and when a property owner can sue state officials for an unconstitutional taking of private property. The first question asks whether a state's sovereign immunity bars a suit seeking damages from the state or its officials for an unconstitutional taking of property.

States are generally immune from suit because of their sovereign status, *Edelman v. Jordan*, 415 U.S. 651, 663 (1974), unless they consent to be sued or waive their immunity. *Gunter v. Atl. Coast Line R.R. Co.*, 200 U.S. 273, 284 (1906). On the other hand, this Court has held that, under the Just Compensation Clause, the government has a duty to pay just

compensation when it takes property. *Knick v. Township of Scott*, 588 U.S. 180, 191–94 (2019). Further, states are subject to this constitutional duty through the Fourteenth Amendment's Due Process Clause. *Chicago, Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226, 235–41 (1897). The states' immunity from suits for damages accordingly conflicts with its obligation to compensate an owner when it takes property without providing contemporaneous compensation. *Community Housing Improvement Program v. City of New York (CHIP)*, 492 F. Supp. 3d 33, 40 (E.D.N.Y. 2020).

In the decision below, the Sixth Circuit resolved this clash in favor of sovereign immunity. App.9a. Its decision carves out a gaping loophole in the Just Compensation Clause for states, and is inconsistent with this Court's jurisprudence. *See Chicago, B. & Q.R. Co.*, 166 U.S. at 236 (states are subject to the Just Compensation Clause). Since the constitutional founding, it has been understood that the government impliedly promises and agrees to pay compensation when it exercises the power to take property. The act of taking property itself negates the state's sovereign immunity from a claim for compensation, *PennEast Pipeline Co. v. New Jersey,* 141 S. Ct. 2244, 2258 (2021); *Gunter*, 200 U.S. at 284, but the Sixth Circuit held to the contrary.

The second question asks whether a property owner may sue state officials in their personal capacity for an unconstitutional taking of property under 42 U.S.C § 1983. This Court has held that personal capacity suits are permissible against state officials, notwithstanding sovereign immunity. *Hafer v. Melo*, 502 U.S. 21 (1991). Yet, the decision below

holds that personal capacity claims under 42 U.S.C § 1983 are categorically barred in the Sixth Circuit when they assert a violation of the Takings Clause. App.6a n.2; *see also* App.12a (Thapar, J., concurring). Thus, the Sixth Circuit summarily dismissed O'Connor's personal capacity takings claim, without applying the normal "qualified immunity" analysis that governs the viability of such claims.[1] *District of Columbia v. Wesby*, 583 U.S. 48, 62 (2018); *see also* App.11a–12a (Thapar, J., concurring).

In so doing, the decision below exacerbates a deep conflict among the federal courts on whether a personal capacity suit under Section 1983 is viable when it asserts an unconstitutional taking of property. *Merritts v. Richards*, 62 F.4th 764, 776 n.7 (3d Cir. 2023) ("courts have reached different conclusions" on the issue of personal capacity takings suits); *Baker v. City of McKinney*, 93 F.4th 251, 255 (5th Cir. 2024) (Elrod, J., and Oldham, J., dissenting from denial of rehearing en banc) ("[I]t is disputed whether individual officials may be individually liable in damages for violating the Takings Clause at all.") (citing *Vicory v. Walton*, 730 F.2d 466, 467 (6th Cir. 1984), and *O'Connor v. Eubanks*, 83 F.4th 1018, 1026 (6th Cir. 2023) (Thapar, J., concurring)); *Hinkle Family Fun Center, LLC v. Grisham*, No. 22-2028, 2022 WL 17972138, at *4 n.2 (10th Cir. Dec. 28, 2022) ("[s]ome circuits and judges have rejected or expressed

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[1] Under this Court's "qualified immunity" doctrine, a personal capacity claim under Section 1983 is generally subject to dismissal unless the plaintiff shows that (1) the officials violated a federal right, and (2) the unlawfulness of their conduct was "clearly established at the time." *District of Columbia v. Wesby*, 583 U.S. 48, 63 (2018) (quoting *Reichle v. Howards*, 566 U.S. 658, 664 (2012)).

doubt about such claims, while "[o]thers have indicated (at least implicitly) that such claims might proceed").

The Sixth Circuit's rejection of personal capacity takings suits under 42 U.S.C § 1983 is also inconsistent with this Court's jurisprudence, App.11a (Thapar, J., concurring), and with "constitutional history." App.13a–15a (Thapar, J., concurring). Further, the decision below ultimately turns the Takings Clause into a "poor relation" among the rights protected under 42 U.S.C § 1983, *Knick*, 588 U.S. at 189 (quoting *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994)), since courts, including the Sixth Circuit, routinely allow litigants to bring personal capacity suits for the violation of other constitutional rights. *See* App.6a–9a (adjudicating a personal capacity due process claim).

The Court should grant the Petition to hold that a property owner may sue a state and its officers, in their official and personal capacities, for damages for an unconstitutional taking of property, thereby ensuring that a viable federal remedy exists for a taking by a state. *See* App.10a (Thapar, J., concurring) ("[O]ur circuit has closed the federal courthouse doors on takings claims."); *see also* App.18a.

STATEMENT OF THE CASE

A. Legal Background

Michigan's Uniform Unclaimed Property Act ("UUPA") governs the disposition of unclaimed (but not abandoned) property. Such property can include monies from checking and savings accounts, unpaid wages, securities, life insurance payouts, uncashed checks, unredeemed rebates, and the contents of

inactive safe deposit boxes. App.3a. When these assets are held by third parties without activity for a period of time, they become treated under Michigan law as "unclaimed property," and are subject to the state's UUPA. *Id.*

When the state acquires unclaimed property under the Act, it "assumes custody and responsibility for the safekeeping of the property," Mich. Comp. Laws § 567.241(1), holding it "in trust for the benefit of the rightful owner." App.3a (citation omitted).

The state may liquidate assets in its custody after the owner is given notice and fails to file a claim for return of the property. App 3a. If the state liquidates assets, the UUPA allows the owner to file an administrative claim for the "net proceeds" of the liquidation sale. *Id.* The Act also allows property owners to recover interest earned on their assets while in state control, but only if the property was generating interest before the state took custody. *Id.* If the assets were not accruing interest before the state took custody, the owner cannot recover any interest that accrued on their property. App.3a–4a.

B. Facts and Procedure

Two corporations holding monies belonging to O'Connor delivered the funds to the state pursuant to the UUPA. App.4a. When O'Connor discovered that state officials were holding his private property under the UUPA, he filed an administrative claim to recover his funds. *Id.* The state subsequently returned the principal amount to O'Connor, but did not provide him with the interest generated by his funds while in state custody. *Id.*

O'Connor subsequently filed a class action against the State of Michigan and two Michigan officials—Rachael Eubanks, the State Treasurer, and Terry Stanton, the State Administrative Manager of the Unclaimed Property Program (UPP)—in their personal capacity. App.4a. O'Connor's complaint asserted that the state and its officials had unconstitutionally taken his property, namely, the interest earned on his funds, without just compensation or due process. *Id.*; s*ee also Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980) (finding a taking from the confiscation of interest). O'Connor sought damages against the state directly under the Fifth Amendment, and against the two state officials in their personal capacities under 42 U.S.C. § 1983. *Id.*

1. The district court decision

The state defendants moved to dismiss O'Connor's complaint on the ground that sovereign immunity barred his claims against the state, and that qualified immunity shielded the officials in their personal capacities.[2] App.4a–5a. A Magistrate Judge soon issued a report recommending that the district court grant the motion. The Magistrate concluded that sovereign immunity barred O'Connor's takings and due process claims against the state and against Eubanks and Stanton, in their official capacities. App.39a–41a. She further concluded that the state officials were immune from O'Connor's personal

[2] Defendants did not challenge O'Connor's right to sue directly under the Fifth Amendment. *See DeVillier v. Texas*, 601 U.S. ---, --- S. Ct. ---, 2024 WL 1624576 (2024) (observing that the Court has not yet identified the Fifth Amendment as a source of a cause of action for damages).

capacity claims under "qualified immunity" principles because the officials' "actions were mandated by Michigan statute" and "non-discretionary." App.47a.

The district court subsequently issued an order adopting the Magistrate's report. *See* App.21a–33a. The district court judge agreed that "'the States' sovereign immunity protects [state defendants] from takings claims for damages in federal court,'" and that "no exception applies to Plaintiff's claims." App.29a. The court further agreed with the Magistrate Judge's conclusion that the "individual Defendants are entitled to qualified immunity," because their actions were "in accordance with the Act," *id.*, and "Plaintiff has not shown that it is clearly established, either under the Takings Clause or the Due Process Clause, that he has the right to collect interest on funds that were non-interest-bearing when abandoned." App.30a.

2. The decision below

On appeal, the Sixth Circuit affirmed the district court's decision in part and reversed in part. The court upheld the district court's conclusion that sovereign immunity barred O'Connor's takings claim against the state. It stated "circuit precedent holds that 'the Eleventh Amendment bars takings claims against states in federal court, as long as a remedy is available in state court'" and "[a] remedy is available [to O'Connor] in state court." App.9a (quoting *Skatemore, Inc. v. Whitmer*, 40 F.4th 727, 734 (6th Cir. 2022)).

The Sixth Circuit also affirmed the dismissal of O'Connor's unconstitutional takings claim against state officials in their personal capacity, but on different grounds than the district court. Pointing to

Sterling Hotels, LLC v. McKay, 71 F.4th 463, 468 (6th Cir. 2023), which itself relies on *Vicory*, 730 F.2d at 467, the court below ruled that "individual liability for takings claims is not 'clearly established,'" and, thus, the officials are not subject to suit. App.6a (quoting *Sterling Hotels*, 71 F.4th at 468). In the Sixth Circuit's view, the officials were immune simply because they are "being sued in their individual capacities *for takings claims*." App.6a (emphasis added).

Thus, the court emphasized it was applying a "clear" Sixth Circuit rule that "*bars* individual liability for takings claims under 42 U.S.C. § 1983," App.6a n.2 (emphasis added). The court therefore affirmed dismissal of O'Connor's personal capacity takings claims without engaging in the standard qualified immunity analysis applied by the district court. *See* App.42a (determining whether qualified immunity shielded the officials from O'Connor's personal capacity takings claim based on whether they violated his "clearly established" constitutional rights); *see also* App.29a–30a.

However, with respect to O'Connor's *due process claim* against the officials in their personal capacity, the Sixth Circuit reversed the district court's judgment of dismissal. In so doing, the court below applied the traditional qualified immunity analysis, considering whether the defendant state officials violated a "clearly established" due process right. App.7a–9a. The court initially determined that O'Connor had a constitutionally protected property right in interest income, and that the officials had failed to give him notice that the state was taking such interest. App.7a ("When the government takes

custody of private property and earns interest on it, that interest belongs to the owner."). Concluding that the notice is a "clearly established" due process right, and that the officials violated that right, the court held that the officials were not qualifiedly immune from O'Connor's claim that they were liable in their personal capacity for violating the Due Process Clause.[3]

3. Judge Thapar's concurrence

In a concurring opinion, Judge Thapar took issue with the court's treatment of O'Connor's personal capacity takings claim. The concurrence explained that the Sixth Circuit wrongly holds that "there isn't [a cause of action] against individual officials" for a violation of the Takings Clause. App.12a (citing *Vicory*, 730 F.2d at 467). Judge Thapar considered this categorical bar to personal capacity takings suits against state officers "wrong," *id.*, because such claims were common "in the early decades of our republic." App.15a. Thus, he deemed the court's refusal to allow personal capacity takings claims "inconsistent with our constitutional history." *Id.*

Judge Thapar also objected to the majority decision, and the circuit precedent on which it relies, on the ground that it entirely "forecloses" takings claims in federal court against state defendants. App.16a. He explained that, under Sixth Circuit precedent, sovereign immunity bars takings claims against state officials in their official capacity, while

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[3] Defendants plan to file a Petition for Certiorari asking the Court to review the portion of the Sixth Circuit's decision reviving O'Connor's personal capacity due process claim. *See Eubanks v. O'Connor*, Supreme Court Docket No. 23A758, Application to Extend Time to File a Petition (Feb. 9, 2024).

cases like *Vicory*, 730 F.2d at 467, prohibit takings claims against officials in their individual capacity. *Id.* Judge Thapar's concurring opinion noted that this framework forces plaintiffs to "litigate takings claims in state court," and thereby revives a state litigation rule that this Court deemed "wrong" in *Knick*. App.16a.

Given these concerns, Judge Thapar concluded that "[a]t the very least ... our circuit should permit takings claims against officials under section 1983" in their personal capacity. App.19a. The concurrence observed that "section 1983 can provide [such] a remedy" "when a state official 'subjects' a person to an unconstitutional taking." *Id.* (citing 42 U.S.C. § 1983); *see also* Cong. Globe, 42d Cong., 1st Sess. 85 (1871) (Rep. Bingham) (citing states' failure to adequately compensate takings as a basis for enacting section 1983). O'Connor subsequently petitioned the Sixth Circuit for rehearing en banc, but the request was denied.

O'Connor now petitions this Court for a writ of certiorari.

REASONS FOR GRANTING THE PETITION

This Court has held that the Just Compensation Clause "places a condition on the exercise" of the government's power to take private property, *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304, 314 (1987), and confers an automatic right to compensation on affected property owners. *Knick*, 588 U.S. at 193–94. 42 U.S.C. § 1983 similarly provides property owners with a federal cause of action for relief from the deprivation of their right to just compensation. *City of*

Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 710 (1999) (recognizing that takings claimants may sue under 42 U.S.C. § 1983 for "damages for the unconstitutional denial of [] compensation").

In the decision below, the Sixth Circuit held that (1) sovereign immunity bars O'Connor from suing Michigan for unconstitutionally taking interest income earned on his private funds, and that (2) Section 1983 does not allow him to sue state officials in their personal capacity for unconstitutionally taking his property. App.5a, 9a; *see also* App.10a–11a (Thapar, J., concurring).

This decision leaves property owners in the Sixth Circuit without a meaningful federal compensatory remedy for an unconstitutional taking of property by a state. App.10a–11a (Thapar, J., concurring). Moreover, the decision below conflicts with this Court's precedent, with constitutional history, and magnifies a conflict among the courts on whether a property owner can sue state officials in their personal capacity for a violation of the Takings Clause.

I.

THE DECISION BELOW RAISES AN IMPORTANT QUESTION AS TO WHETHER SOVEREIGN IMMUNITY PRECLUDES A SUIT SEEKING JUST COMPENSATION FOR A TAKING BY A STATE

A. The Legal Landscape

The Eleventh Amendment affirms a principle of state sovereignty inherent in the constitutional structure: states are immune from most non-consensual suits, *Hans v. Louisiana*, 134 U.S. 1, 21

(1890). A state's immunity from suit applies whether a suit is filed in state or federal court. *Alden v. Maine*, 527 U.S. 706, 712, 733, 749 (1999). In *Blatchford v. Native Village of Noatak & Circle Village*, 501 U.S. 775 (1991), the Court explained:

> [W]e have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition of our constitutional structure which it confirms: that the States entered the federal system with their sovereignty intact; that the judicial authority in Article III is limited by this sovereignty; and that a State will therefore not be subject to suit in federal court unless it has consented to suit, either expressly or in the "plan of the convention."

Id. at 779 (citations omitted).

It is particularly well-settled that sovereign immunity shields states from non-consensual suits for damages. *Edelman*, 415 U.S. at 666–67 (sovereign immunity does not allow a suit seeking retroactive monetary relief). However, there are exceptions. For instance, sovereign immunity does not apply when it has been "waived" or states "have consented" to suit "pursuant to the plan of the [Constitutional] Convention or to subsequent constitutional Amendments." *Alden*, 527 U.S. at 755; *PennEast*, 141 S. Ct. at 2258.

At the same time, this Court has affirmed that the states' power to take property is conditional upon payment of just compensation. *United States v. Great Falls Mfg. Co.*, 112 U.S. 645, 656 (1884). Indeed, since the beginning of the Republic, it has been understood

that the government's exercise of its right to take property triggers an implicit agreement to pay for what it takes. *See United States v. Klamath & Moadoc Tribes*, 304 U.S. 119, 123 (1938) ("the taking of property by the United States in the exertion of its power of eminent domain implies a promise to pay just compensation"). The Fifth Amendment reflects this understanding by imposing an inexorable duty on the government to pay compensation as the price of exercising the power to take property. *First English*, 482 U.S. at 314. These principles—that states owe compensation when taking property, yet also enjoy sovereign immunity from suits for damages—exist in uneasy tension. Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 Yale L.J. 1, 116 (1988) (The "clarity of this textual provision for a monetary remedy is inconsistent with a premise of sovereign immunity as a constitutional doctrine[.]").

Of course, states were not always bound by the Fifth Amendment's "just compensation" requirement. In *Barron v. City of Baltimore*, 32 U.S. (7 Pet.) 243, 247–51 (1833), the Court held that the Takings Clause does not apply to the states. Enactment of the Fourteenth Amendment changed this, however, by "requir[ing] the States to surrender a portion of the sovereignty that had been preserved to them by the original Constitution." *Alden*, 527 U.S. at 756. Most importantly, the Amendment subjected states to the Due Process Clause and its command not to "deprive any person of ... property, without due process of law." U.S. Const. amend. XIV, § 1. A principal drafter of the Fourteenth Amendment, John Bingham, contended that the amendment was necessary to reverse *Barron*'s holding that states are exempt from the

Takings Clause. Cong. Globe, 39th Cong., 1st Sess., 1089–90 (1866); *see also id.* at 1090 ("[T]he people are [now] without remedy. ... [T]he State Legislatures may by direct violations of their duty and oaths avoid the requirements of the Constitution[.]").

Twenty-five years later, in *Chicago, B. & Q.R. Co.*, this Court held that the Due Process Clause incorporates the Fifth Amendment and indeed binds states to that amendment's "self-executing" just compensation requirement for a taking of property. 166 U.S. at 233–34, 239–41; *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 306 n.1 (2002). With this extension of the Takings Clause to the states, "[t]he principles of sovereign immunity and just compensation [were set] on a collision course." Richard H. Seamon, *The Asymmetry of State Sovereign Immunity*, 76 Wash. L. Rev. 1067, 1067–68 (2001); Eric Berger, *The Collision of the Takings and State Sovereign Immunity Doctrines*, 63 Wash. & Lee L. Rev. 493, 494 (2006).

The tension between the states' sovereign immunity and their obligation to provide just compensation for a taking has become increasingly important as states assert a more active role in regulating private property. App.11a (Thapar, J., concurring) ("Sometimes, a plaintiff can find a municipality to sue for a taking. But other times ... there aren't any involved."). Today, states are often the source of rules that intrude on property rights to the point of causing an unconstitutional taking. *See, e.g.*, *Cedar Point Nursery v. Hassid*, 594 U.S. 139 (2021) (takings challenge to state agency's property access regulation); *Brown v. Legal Found. of Wash.*,

538 U.S. 216 (2003) (takings claim against state rule requiring confiscation of interest).

Yet, when property owners attempt to assert that a state owes them compensation, many courts hold that sovereign immunity absolves them of that obligation. *See, e.g.*, *EEE Minerals, LLC v. North Dakota*, 81 F.4th 809 (8th Cir. 2023) (sovereign immunity barred a claim after the state legislatively redefined private mineral interests as public property); *Zito v. N.C. Coastal Res. Comm'n*, 8 F.4th 281, 290 (4th Cir. 2021) (sovereign immunity barred a claim that a state's refusal to allow construction of one home caused a taking); *Ladd v. Marchbanks*, 971 F.3d 574, 576 (6th Cir. 2020) (sovereign immunity barred a takings claim after state construction activities "flooded Plaintiffs' properties three times and caused significant damage"); *Citadel Corp. v. Puerto Rico Highway Auth.*, 695 F.2d 31, 33 n.4 (1st Cir. 1982) (sovereign immunity barred a claim that a property owner was owed compensation for a decades-long state "freeze" on development).

The decision below joins this trend. Although there is little dispute that the state kept interest earned on O'Connor's funds while in state custody, it contends that it is immune from his suit seeking just compensation for this violation of the Takings Clause. *See* App.9a. As the following shows, this decision cannot be reconciled with history and precedent related to the conditional nature of the state's power to take private property.

B. The Decision Below Conflicts with History and Precedent

1. The decision conflicts with founding-era understandings

Since the inception of the Anglo-American legal tradition, it has been understood that a government's power to take property is contingent on a duty to provide just compensation to property owners. *See In The Case of the King's Prerogative in Salt-peter*, 12 Coke R. 13, C2 (1606) (in taking property, the king's ministers "are bound to leave the Inheritance of the Subject in so good Plight as they found it"). In 1625, the scholar Grotius stated that the "State" may take private property, "[b]ut it is to be added that when this is done the State is bound to make good the loss to those who lose their property." Philip Nichols, *The Power of Eminent Domain* 8, § 7 (1909) (quoting Hugo Grotius, *De Jure Belli et Pacis (On the Law of War and Peace)*, lib. ii, e. 20 (1625)). Blackstone similarly observed that the legislature can compel a person to submit to a taking of property only "by giving a full indemnification and equivalent for the injury thereby sustained." 1 William Blackstone, *Commentaries on the Laws of England* 139 (1753).

Thus, by the time of the American founding, the sovereign power to take property was tethered to a commitment to pay compensation to affected property owners. In 1827, Chancellor Kent described "compensation" as a "*necessary attendant* on the due and constitutional exercise of the power of the lawgiver to deprive an individual of his property without his consent." 2 James Kent, *Commentaries on*

American Law 144 (1827) (emphasis added). An early state court decision similarly stated that

> the right to compensation, *is an incident to the exercise of that power* [to take property]: *that the one is so inseparably connected with the other, that they may be said to exist not as separate and distinct principles*, but as parts of one and the same principle.

Sinnickson v. Johnson, 17 N.J.L. 129, 145 (1839) (emphasis added).

Given these views, early courts and commentators considered the act of taking property to include *an implied promise and agreement* on the part of the government to compensate the owner. *Great Falls Mfg. Co.*, 112 U.S. at 656 ("The law will imply a promise to make the required compensation, where property, to which the government asserts no title, is taken[.]"); *Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18, 21 (1940) ("[I]f the authorized action in this instance does constitute a taking of property for which there must be just compensation under the Fifth Amendment, the Government has impliedly promised to pay that compensation[.]"). Indeed, the idea that a taking incorporated a promise to pay was so engrained that some commentators described a taking simply as a compelled *sale* of property to the government. Thomas M. Cooley, *A Treatise on the Constitutional Limitations* 559 (4th ed. 1878) (A taking is "in the nature of a payment for a compulsory purchase."); Henry E. Mills & Augustus L. Abbott, *Mills on the Law of Eminent Domain* 6, § 1 (2d ed. 1888) (a taking is "in the nature of a compulsory purchase of the property of a citizen for the purpose of applying it to public use").

Of course, the Fifth Amendment arose from these pre-existing principles, 2 Joseph Story, *Commentaries on the Constitution of the United States* § 1790, at 596 (3d ed. 1858) (The Fifth Amendment "is an affirmance of a great doctrine, established by the common law for the protection of private property."), and the Due Process Clause of the Fourteenth Amendment applied that Amendment and the understandings from which it arose to the states. *Chicago, B. & Q.R. Co.*, 166 U.S. at 236–37.

The Sixth Circuit's conclusion that Michigan is immune from O'Connor's claim that it owes him compensation for taking his property cannot be reconciled with these founding-era understandings about the conditional nature of the power to take property. Since a state's duty to pay just compensation, and an owner's claim to such compensation, is "baked into" the state's use of its power to take property, sovereign immunity is inapplicable to such a claim. Put another way, since the government "has impliedly promised to pay [] compensation" when it takes property, *Yearsley*, 309 U.S. at 21, a taking itself waives a state's immunity from the resulting claim for just compensation, and/or functions as consent to that claim. *Gunter*, 200 U.S. at 284; *PennEast*, 141 S. Ct. at 2258.

The Sixth Circuit's contrary conclusion leads to the strange result that states are constitutionally bound to pay just compensation, yet can avoid that duty simply by refusing to pay and then invoking sovereign immunity to avoid a lawsuit. *Cf. Howell v. Miller*, 91 F. 129, 136 (6th Cir. 1898) ("A state cannot authorize its agents to violate a citizen's right of property, and then invoke the constitution of the United States to

protect those agents against suit instituted by the owner for the protection of his rights against injury by such agents.").

2. The decision below conflicts with this Court's precedent

The Sixth Circuit's decision also cannot be reconciled with this Court's precedent. In *Chicago, B. & Q.R. Co.*, this Court stressed that the "prohibitions of the [Fourteenth] amendment refer to *all the instrumentalities of the state*,—to its legislative, executive, and judicial authorities,—and therefore whoever, by virtue of public position under a state government, deprives another of any right protected by that amendment against deprivation by the state, 'violates the constitutional inhibition.'" 166 U.S. at 233–34 (citation omitted; emphasis added). Turning to the question of a state's due process-based duty to abide by the Fifth Amendment, the Court stated "it must be that the requirement of due process of law in that [Fourteenth] amendment is applicable to the direct appropriation by the state to public use, and without compensation, of the private property of the citizen." *Id.* at 236. The *Chicago, B. & Q.R. Co.* Court therefore held that

> a judgment of a state court, even if it be authorized by statute, whereby private property is taken for the state or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the fourteenth amendment of the constitution of the United States, and the affirmance of such judgment by the highest

> court of the state is a denial by that state of a right secured to the owner by that instrument.

Id. at 241. *Chicago, B. & Q.R. Co.* thus recognized that, upon adoption of the Due Process Clause, the states' power to take property became subject to the same compensatory condition and duty that animates the Fifth Amendment.

The Sixth Circuit's conclusion that Michigan is immune from O'Connor's takings claim conflicts with this Court's conclusion in *Chicago, B. & Q.R. Co.* that a state's refusal to compensate is actionable. *See Chicago, B. & Q.R. Co.*, 166 U.S. at 236; *Vill. of Norwood v. Baker*, 172 U.S. 269, 277 (1898) ("[T]he due process of law prescribed by that amendment requires compensation to be made or secured to the owner when private property is taken by a *state*, or under its authority, for public use.") (emphasis added); *see also* Nichols, *The Power of Eminent Domain* § 259, at 302 ("[T]he Fourteenth Amendment throws the protection of the United States courts over an individual whose property is taken by authority of a State without compensation.").

In *First English*, this Court appeared to agree that the states' constitutional duty to provide just compensation negates sovereign immunity. There, the United States argued as amicus that "principles of sovereign immunity" prevented the Court from interpreting the Just Compensation Clause as "a remedial provision." Brief for the United States as Amicus Curiae Supporting Appellee, No. 85-1199, 1986 WL 727420, at *26–30 (U.S. Nov. 4, 1986). But the Court rejected this contention. *First English*, 482 U.S. at 316 n.9. Although this portion of the *First*

English opinion does not fully address the sovereign immunity/takings issue, it strongly suggests that the Court did not consider sovereign immunity as a bar to just compensation claims. *Del Monte Dunes*, 526 U.S. at 714 (questioning whether sovereign immunity "retains its vitality" in the context of compensation-seeking takings claims); *Lucien v. Johnson*, 61 F.3d 573, 575 (7th Cir. 1995) (stating that *First English* held that "the Constitution requires a state to waive its sovereign immunity to the extent necessary to allow claims to be filed against it for takings of private property for public use"); *see also* Catherine T. Struve, *Turf Struggles: Land, Sovereignty, and Sovereign Immunity*, 37 New Eng. L. Rev. 571, 574 (2003); 1 Laurence H. Tribe, *American Constitutional Law* § 6-38, at 1272 (3d ed. 2000) (observing, based on *First English*, that the Takings Clause "trumps state (as well as federal) sovereign immunity").

Moreover, since *First English*, the Court has regularly resolved takings claims against states without concern for sovereign immunity barriers. *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); *Tahoe-Sierra*, 535 U.S. 302; *see generally*, *Manning v. N.M. Energy, Minerals, & Natural Res. Dep't*, 144 P.3d 87, 90 (N.M. 2006) (noting the Court "has consistently applied the Takings Clause to the states, and in so doing recognized, at least tacitly, the right of a citizen to sue the state under the Takings Clause"). Indeed, in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), one amicus curiae brief directly raised sovereign immunity as a potential bar to the takings claim, but the Court ignored the argument. *See* Amicus Brief of the Board of County Commissioners of the County of La Plata, Colorado, in

Support of Respondents, No. 99-2047, 2001 WL 15620, at *20–21 (U.S. Jan. 3, 2001).

In short, the Sixth Circuit's conclusion that sovereign immunity prevents O'Connor from suing Michigan for just compensation for a taking is at odds with precedent and history. *Hair v. United States*, 350 F.3d 1253, 1257 (Fed. Cir. 2003) ("sovereign immunity does not protect the government from a Fifth Amendment Takings claim"); *Leistiko v. Sec'y of Army*, 922 F. Supp. 66, 73 (N.D. Ohio 1996) ("The Just Compensation Clause, with its self-executing language, waives sovereign immunity because it can fairly be interpreted as mandating compensation by the government for the damage sustained."); Eric Grant, *A Revolutionary View of the Seventh Amendment and the Just Compensation Clause*, 91 Nw. U. L. Rev. 144, 199 (1996) ("It is a proposition too plain to be contested that the Just Compensation Clause of the Fifth Amendment is 'repugnant' to sovereign immunity and therefore abrogates the doctrine[.]").

One more comment is warranted. In justifying its decision, the Sixth Circuit observed that sovereign immunity "bars a claim against the State in federal court as long as state courts remain open to entertain the action." App. 9a. But this Court has made clear that sovereign immunity is not forum-dependent; it applies equally in federal and state courts. *Franchise Tax Bd. of Cal. v. Hyatt*, 587 U.S. 230, 237–39 (2019). If states can invoke sovereign immunity to close federal courts to Fifth Amendment takings claims, they can do so in state courts as well. *See Austin v. Arkansas State Highway Comm'n*, 895 S.W.2d 941,

944 (Ark. 1995) (sovereign immunity bars a damages-seeking takings claim against a state).

The Court should grant the Petition to hold that a state's constitutional duty to provide just compensation for a taking waives its sovereign immunity from a claim seeking damages for a taking by the state.

II.

THE DECISION BELOW PRESENTS AN IMPORTANT QUESTION, ON WHICH COURTS CONFLICT, AS TO WHETHER A PROPERTY OWNER MAY SUE OFFICIALS IN THEIR PERSONAL CAPACITY FOR AN UNCONSTITUTIONAL TAKING

In the decision below, the Sixth Circuit also held that state officials cannot be sued in their personal capacity under Section 1983 for taking property. This decision magnifies an entrenched conflict among the federal courts, and is inconsistent with this Court's precedent. Moreover, the decision once again relegates the Clause to the status of a second-class constitutional right.

A. The Decision Below Magnifies a Federal Conflict on the Viability of Personal Capacity Takings Claims Under 42 U.S.C. § 1983

Fifty years ago, this Court held that, in an action arising under 42 U.S.C § 1983, "damages against individual defendants are a permissible remedy in some circumstances notwithstanding the fact that they hold public office." *Scheuer v. Rhodes*, 416 U.S. 232, 238 (1974). In *Kentucky v. Graham*, this Court further held that "to establish *personal* liability in a § 1983 action, it is enough to show that the official,

acting under color of state law, caused the deprivation of a federal right." 473 U.S. 159, 166 (1985). In *Hafer*, the Court confirmed these principles, holding that, in their personal capacity, state officials are "persons" within the scope of Section 1983, and are thus subject to suit in their individual capacity for a constitutional violation. 502 U.S. at 31.

Unfortunately, in the decades since *Hafer*, lower federal courts have failed to reach a consensus on whether the right to sue officials in their personal capacity under 42 U.S.C. § 1983 extends to unconstitutional takings claims. Indeed, courts remain in conflict on the issue.

1. The Sixth Circuit is in conflict with the First Circuit

Some courts have explicitly recognized the viability of Section 1983 personal capacity takings suits, or have implicitly approved them. *See Hinkle Family Fun Center*, 2022 WL 17972138, at *4 n.2 (some federal courts "have indicated (at least implicitly) that such claims might proceed but have denied relief").

The First Circuit is among those courts that have expressly sanctioned personal capacity takings claims. *See Asociación de Subscripción Conjunta del Seguro de Responsabilidad Obligatorio v. Flores Galarza*, 484 F.3d 1, 26 (1st Cir. 2007). In *Flores Galarza*, property owners alleged, in part, that state officials were personally liable for taking their property. While a concurring First Circuit judge asserted that he was not "convinced that federal takings claims may ever properly lie against state officials acting in their individual capacities," *id.* at 37

(Howard, J., concurring in judgment), the majority disagreed. *Id.* at 26.

The *Flores Galarza* majority held that if the takings claimant "wishes to seek a personal judgment against Flores Galarza ... for actions that he took as the Commonwealth Treasurer to serve the interests of the Commonwealth, they are entitled to do that." *Id.* Lower courts in the First Circuit thus permit suits against officials in their individual capacity for Fifth Amendment takings violations. *PDCM Associates, SE v. Quiñones*, No. 15-1615, 2016 WL 8711711, at *4 (D.P.R. Apr. 1, 2016) (accepting "a Section 1983 Takings violation claim against the individually named Defendants").

Conversely, other courts, particularly, the Fourth Circuit, "have [] concluded that individual capacity defendants are not liable for federal takings claims." *Bridge Aina Le'a, LLC v. Hawaii Land Use Comm'n*, 125 F. Supp. 3d 1051, 1079 (D. Haw. 2015). In *Langdon v. Swain*, 29 F. App'x 171, 172 (4th Cir. 2002), the Fourth Circuit dismissed a takings claim against state officials in their individual capacity after concluding that "takings actions sound against governmental entities rather than individual state employees in their individual capacities." Federal district courts in the Fourth Circuit have followed suit. *See Donnelly v. Maryland*, No. 20-3654, 2022 WL 4017437, at *2 (D. Md. Sept. 1, 2022) (dismissing an individual capacity claim because the court concluded that the sovereignly immune state was the true party in interest); *Reyes v. Dorchester Cnty. of South Carolina*, No. 2:21-cv-00520, 2022 WL 820029, at *10 (D.S.C. 2022) ("[M]onetary relief is unavailable against persons sued in their individual capacities for

a taking.") (quoting *Marina Point Dev. Assocs. v. Cnty. of San Bernardino*, No. 5:19-CV-00964, 2020 WL 2375221, at *3 (C.D. Cal. Feb. 19, 2020) (citing *Langdon*, 29 F. App'x at 172)).

The Seventh Circuit is in the same camp as the Fourth. In *Gerlach v. Rokita*, 95 F.4th 493 (7th Cir. 2024), the Seventh Circuit considered whether a plaintiff alleging Indiana's Unclaimed Property laws unconstitutionally took her interest income could sue officials in their personal capacity under 42 U.S.C. § 1983. The *Gerlach* court noted that "even though Gerlach names individual current and former state employees, we are 'obliged to consider whether [this claim] may really and substantially be against the state.'" *Id.* at 500 (quoting *Luder v. Endicott*, 253 F.3d 1020, 1023 (7th Cir. 2001) (additional citations omitted)). The *Gerlach* court then held: "A plaintiff cannot circumvent the sovereign immunity enjoyed by states and their employees in their official capacities simply by pleading a cause of action against those same employees as individuals." *Id.* at 500–01. The court reasoned that "[t]he money Gerlach seeks is in the state coffers, not the personal bank accounts of Indiana's current and former attorneys general. Targeting individual state employees for those funds does not change the fact that the amount she claims she is owed should have been paid by the state." *Id.* at 501. The Seventh Circuit further explained that, "[b]ecause the State of Indiana benefited from retaining interest earned on Gerlach's property, we conclude that Gerlach's suit for compensatory relief is actually against the State of Indiana." *Id.* The *Gerlach* court thus held that Gerlach was barred from asserting a personal capacity takings claim under 42 U.S.C. § 1983. *Id.*

The decision below aligns the Sixth Circuit with the Fourth and Seventh Circuits, in conflict with the First, on the issue of whether a property owner may sue state officials in their individual capacity for an unconstitutional taking of property. While the First Circuit allows such suits, *Flores Galarza*, 484 F.3d at 26, the Sixth rejects them under a "clear" rule "bar[ring] individual liability for takings claims under 42 U.S.C. § 1983." App.5a–6a & n.2; *see also* App.11a–13a (Thapar, J., concurring). The decision below thus solidifies the Sixth Circuit as a jurisdiction that forbids personal capacity takings claims under 42 U.S.C. § 1983, in tension with the First Circuit and other lower federal court decisions. *Bridge Aina Le'a*, 125 F. Supp. 3d at 1075.

2. The case law in most circuits is in disagreement on the issue of personal capacity takings claims

The jurisprudence on the issue in the remainder of the circuits is confused and contradictory. The Second Circuit has not directly "addressed whether a Takings claim may be brought against state officials in their individual capacities." *Herman v. Town of Cortlandt, Inc.*, No. 18-CV-2440, 2023 WL 6795373, at *4 (S.D.N.Y. Oct. 13, 2023). District courts in the Second Circuit have addressed the issue, but with conflicting results. Some have allowed personal capacity takings claims. *See Everest Foods Inc. v. Cuomo*, 585 F. Supp. 3d 425, 434 (S.D.N.Y. 2022) (adjudicating personal capacity takings claims). Others reject such claims "as a matter of law." *Herman*, 2023 WL 6795373, at *4; *Katsaros v. Serafino*, No. Civ. 300CV288, 2001 WL 789322, at *5 (D. Conn. Feb. 28, 2001) ("Only governmental entities, and not individuals, can be

liable for takings violations.") (citing *Vicory*, 730 F.2d at 467).

For its part, the Third Circuit appears skeptical of personal capacity suits asserting a Takings Clause violation under 42 U.S.C. § 1983. *See Merritts v. Richards*, 62 F.4th 764, 769 (3d Cir. 2023). In *Merritts*, the Third Circuit stated that its rejection of a personal capacity takings claim on jurisdictional grounds "does not validate the legal viability of just compensation claims under § 1983 against individual-capacity defendants who did not personally acquire any interests in the property taken." *Id.* at 776 n.7. At least one district court has taken the hint in *Merritts* and rejected a personal capacity takings claim as "a matter of law." *Simonds v. Boyer*, No. 2:21-cv-841, 2022 WL 11964613, at *4 (W.D. Pa. Oct. 20, 2022) (because the plaintiff "only brings claims against Judge Hanley and Ms. Boyer as 'individuals' ... her Takings claim under the Fifth Amendment fails as a matter of law").

The Eighth Circuit's jurisprudence on the issue is similar to the Third Circuit's. In *Glow In One Mini Golf, LLC v. Walz*, 37 F.4th 1365, 1373–74 (8th Cir. 2022), the Eighth Circuit frowned on a personal capacity takings claim, stressing that "it is traditionally the government itself that is responsible for compensating an individual who has suffered a governmental taking." *Id.* at 1375. Yet, after acknowledging that none of this Court's decisions "expressly *reject* appellants' theory that a government official can be held personally liable for a government taking," *id.*, the Eighth Circuit adjudicated a personal capacity takings claim on standard qualified immunity grounds. *Id.*

The case law in the Eleventh Circuit is a bit more developed, and yet more disjointed. The Eleventh Circuit itself has left "open the question of whether the plaintiffs would be able to make out Fifth Amendment Takings Clause or Due Process Clause claims against the individual governmental defendants who allegedly engaged in the illegal behavior." *Garvie v. City of Ft. Walton Beach*, 366 F.3d 1186, 1189 n.2 (11th Cir. 2004). District courts have accordingly arrived at contrary conclusions on whether such claims may lie. *Compare Spencer v. Benison*, No. 7:16-cv-01334, 2018 WL 4896389, at *7 (N.D. Ala. Oct. 9, 2018) (concluding that "within the Eleventh Circuit a takings claim may be brought against a government official in his individual capacity"), *with Reed v. Long*, 506 F. Supp. 3d 1322, 1337 n.14 (M.D. Ga. 2020) ("It is doubtful whether a takings claim, which seeks just compensation for land taken by the government for a public purpose, can be brought against an individual defendant in his individual capacity.") (citing *Langdon*, 29 F. App'x at 172).

In the Ninth Circuit, federal district courts consistently hold that litigants *cannot* sue officials in their personal capacity for a violation of the Takings Clause. In *Bridge Aina Le'a*, 125 F. Supp. 3d at 1078, a district court ruled:

> The very nature of a taking is that a public entity is taking private property for a public purpose, and must provide just compensation in return. This concept is inconsistent with the notion that someone acting in an individual capacity has taken property or could be personally liable for a taking.

Holding "that monetary relief is not available against persons sued in their individual capacities for takings," the *Bridge Aina* court therefore dismissed a personal capacity takings claim. *Id.* at 1080; *see also Marina Point Dev. Assocs.*, 2020 WL 2375221, at *3 ("The Court agrees that monetary relief is unavailable against persons sued in their individual capacities for a taking.") (citing *Langdon*, 29 F. App'x at 172; *Vicory*, 730 F.2d at 467).

The decision below sides with federal court decisions that reject personal capacity takings claims as "a matter of law," in tension with other federal decisions that allow such claims to proceed. The decision below therefore exacerbates a deep, decades-long federal court conflict on the issue, one that warrants this Court's intervention.

B. The Sixth Circuit's Decision Is Inconsistent with This Court's Precedent

The Sixth Circuit's decision to bar personal capacity Section 1983 claims in the takings context also cannot be reconciled with this Court's precedent. Of particular relevance is *Hafer*. There, this Court "address[ed] the question whether state officers may be held personally liable for damages under § 1983 based upon actions taken in their official capacities." *Hafer*, 502 U.S. at 24.

The defendant in *Hafer*, an official of the commonwealth of Pennsylvania, asserted "that she may not be held personally liable under § 1983 for discharging respondents because she 'act[ed]' in her official capacity as auditor general of Pennsylvania." *Id.* at 26. This Court rejected the claim. It first reaffirmed that "officers sued in their personal

capacity come to court as individuals. A government official in the role of personal-capacity defendant thus fits comfortably within the statutory term 'person'" in 42 U.S.C. § 1983. *Id.* at 27 (citing *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 n.10 (1989)). The *Hafer* Court then refuted the argument that sovereign immunity barred the personal capacity claims. The Court observed that "damages awards against individual defendants in federal courts 'are a permissible remedy in some circumstances notwithstanding the fact that they hold public office.'" *Id.* at 30 (quoting *Scheuer*, 416 U.S. at 238).

Thus, *Hafer* concluded that "the Eleventh Amendment does not erect a barrier against suits to impose 'individual and personal liability' on state officials under § 1983." *Id.* at 30–31. It then held "that state officials, sued in their individual capacities, are "persons" within the meaning of Section 1983. The Eleventh Amendment does not bar such suits, nor are state officers absolutely immune from personal liability under Section 1983 solely by virtue of the "official" nature of their acts. *Id.* at 31; *see also Lewis v. Clarke*, 581 U.S. 155, 166 (2017) ("Nor have we ever held that a civil rights suit under 42 U.S.C. § 1983 against a state officer in his individual capacity implicates the Eleventh Amendment.").

Nothing in *Hafer* or related precedent involving 42 U.S.C. § 1983 holds that the availability of a personal capacity suit against state officials depends on the nature of the underlying constitutional claim. *Del Monte Dunes*, 526 U.S. at 711 ("we have declined ... to classify § 1983 actions based on the nature of the underlying right"); *see also Tindal v. Wesley*, 167 U.S 204, 221 (1897) (approving a takings claim against

state officials in their personal capacity). Yet, in the decision below, the Sixth Circuit held that the recognized right to sue officials in their personal capacity does not exist at all when the suit asserts an unconstitutional taking. App.6a n.2 (noting that Circuit precedent bars "individual liability for takings claims under 42 U.S.C. § 1983"). The Sixth Circuit's rationale is also contrary to this Court's precedent. The circuit rests its rejection of personal capacity takings suits on the belief that an unconstitutional taking is a "wrong committed by a government body." *Vicory*, 730 F.2d at 467. It reasons that a "[p]laintiff may not maintain a constitutional [takings] cause of action against these defendants who neither have nor claim the eminent domain power, nor any power similar to it." *Id.*

Yet, this Court has made clear that unconstitutional takings can arise from routine exercises of the *police power*, as well as from the power of eminent domain. A regulatory decision that purports to advance environmental, economic, safety, or other public goals, and which has nothing to do with eminent domain, can cause a taking. *Cedar Point*, 594 U.S. at 148–49 (listing a multitude of regulatory actions that can result in a taking). Since state officials can take property even when not clothed with eminent domain authority, the lack of such authority does not justify barring personal capacity takings claims.

In short, this Court has "not before treated a lawsuit against an individual employee as one against a state instrumentality," *Lewis*, 581 U.S. at 166, and nothing in this Court's precedent justifies an exception for personal capacity claims arising under

the Takings Clause. That governments typically pay "just compensation" when a court finds a taking is irrelevant. "The critical inquiry is who may be legally bound by the court's adverse judgment, not who will ultimately pick up the tab." *Id.* at 165. This Court has made clear that state officials may be legally bound by a judgment against them in their personal capacity under 42 U.S.C. § 1983. *Hafer*, 502 U.S. at 30–31; *see Alden*, 527 U.S. at 757. The decision below flouts this precedent in concluding that state officials cannot be sued in their personal capacity when the plaintiff asserts a violation of the Takings Clause.

C. The Decision Below Is Inconsistent with Constitutional History

As Judge Thapar's concurring opinion in the decision below emphasizes, the Sixth Circuit's rejection of personal capacity takings claims against state officials is also "inconsistent with our constitutional history." App.15a (Thapar, J., concurring). This is because "[u]ntil the 1870s, the typical recourse of a property owner who had suffered an uncompensated taking was to bring a common law trespass action against the responsible corporation or *government official*." *Knick*, 588 U.S. at 199 (emphasis added). The defendant officials in early takings cases "couldn't raise statutory authorization as a defense" to an unconstitutional taking. "If a state took property without compensation, *the relevant officials* were on the hook for damages." App.14a–15a (Thapar, J., concurring) (emphasis added).

In short, "in the early decades of our republic, lawsuits against officials were a viable remedy for takings." App 15a (Thapar, J., concurring.) Thus, in concluding that people like Dennis O'Connor cannot

personally sue state officials for unconstitutionally taking their property under color of state law, the decision below is contrary to the American legal tradition.

Ultimately, in refusing to allow personal capacity suits under 42 U.S.C. § 1983 when a property owner raises a Takings Clause claim, the Sixth Circuit's decision makes the Fifth Amendment into an inferior constitutional right relative to other constitutional guarantees. After all, courts routinely allow property owners to raise personal capacity claims under 42 U.S.C. § 1983 which rest on the Fourteenth Amendment's Due Process Clause. *See, e.g.*, *Romano v. Bible*, 169 F.3d 1182, 1185 (9th Cir. 1999) (holding that one suing state officials in their personal capacity for a deprivation of property "need to allege nothing more" than that "defendants deprived [plaintiff] of a protected property interest in violation of due process" under "color of state law"); *Wilson v. Civil Town of Clayton*, 839 F.2d 375, 382 (7th Cir. 1988) (reversing the dismissal of due process claims against Town officials). Indeed, in the instant matter, the court below allowed a due process claim to proceed against the defendant officials in their personal capacity, but not a takings claim. App.6a–9a. Closing the courthouse door to 42 U.S.C. § 1983 claims when they are based on the Takings Clause "relegates the Takings Clause 'to the status of a poor relation' among the provisions of the Bill of Rights." *Knick*, 588 U.S. at 189 (quoting *Dolan*, 512 U.S. at 392).

Congress enacted 42 U.S.C. § 1983 "to enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity." *Scheuer*, 416 U.S. at

243 (quoting *Monroe v. Pape*, 365 U.S. 167, 171–72 (1961)). People asserting a violation of the Takings Clause should not be left out of this enterprise. The Court should grant the Petition in part to hold that 42 U.S.C. § 1983 suits seeking to hold state officials personally accountable for an unconstitutional taking "should be handled the same as other claims under the Bill of Rights." *Knick*, 588 U.S. at 202.

CONCLUSION

The Court should grant the Petition.

DATED: April 2024.

Respectfully submitted,

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Appendix

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RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 23a0225p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

DENNIS O'CONNOR, and all those similarly situated, *Plaintiff-Appellant*, *v.* RACHAEL EUBANKS, in her personal capacity; TERRY STANTON, in his personal capacity; STATE OF MICHIGAN, *Defendants-Appellees*.	No. 22-1780

Appeal from the United States District Court for the Eastern District of Michigan at Bay City.
No. 1:21-cv-12837—Nancy G. Edmunds, District Judge.

Decided and Filed: October 6, 2023

Before: MOORE, THAPAR, and NALBANDIAN, Circuit Judges.

COUNSEL

ON BRIEF: Philip L. Ellison, OUTSIDE LEGAL COUNSEL PLC, Hemlock, Michigan, for Appellant. James A. Ziehmer, Brian McLaughlin, B. Thomas

Golden, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for Appellees.

The court issued a PER CURIAM opinion. THAPAR, J. (pp. 8–14), delivered a separate concurring opinion.

OPINION

PER CURIAM. When Michigan took custody of Dennis O'Connor's property under its unclaimed property laws, it did not acquire title outright. As a result, O'Connor retained certain rights, including those to just compensation and pre-deprivation process. But once O'Connor filed for compensation, a dispute over these rights arose. Michigan reimbursed O'Connor for the original value of his property, but not for any net interest earned after its liquidation. And according to O'Connor, Michigan failed to provide him with pre-deprivation process. So, he sued the State and two officials in their personal capacities, alleging violations of the Fifth and Fourteenth Amendments. The district court dismissed O'Connor's case with prejudice, holding that the employees were entitled to qualified immunity and the State was entitled to sovereign immunity.

As to O'Connor's claims against the officials, we affirm in part and vacate in part. The officials are entitled to qualified immunity on O'Connor's taking claims but not his due process claims. And while the district court correctly dismissed O'Connor's claims against the State, it should not have dismissed them with prejudice.

I.

In Michigan, the Uniform Unclaimed Property Act ("UUPA") governs unclaimed property. Under UUPA, the State may take custody—not ownership—of unclaimed property after complying with the statute's procedural requirements. *See* Mich. Comp. Laws §§ 567.223(1); 567.238; 567.240(1). The State then holds the property "in trust for the benefit of the rightful owner." *Flint Cold Storage v. Dep't of Treasury*, 776 N.W.2d 387, 393 (Mich. Ct. App. 2009).

The State does not hold the property in its original form for long. After publishing required notices, the State sells or liquidates the unclaimed property within three years of receiving it, unless the owner brings a valid claim to recover the property beforehand. Mich. Comp. Laws § 567.243(1). Then Michigan deposits the proceeds into its general fund, subtracting reasonable administration costs. *Id.* § 567.244(1)–(2). At this point, the owner can no longer reclaim his property, but he can still recover the "net proceeds" from its sale. *Id.* § 567.245(3). To that end, the State maintains a fund to satisfy UUPA claims. *Id.* § 567.244(1).

UUPA also permits owners to recover the interest earned on their property, but only if their property accrued interest before the State took custody of it. So for property like stocks and interest-bearing accounts, the state administrator must pay owners "any dividends, interest, or other increments realized or accruing on the property at or before liquidation." *Id.* § 567.242. Owners are also entitled to post-liquidation interest on the property's proceeds—but again, only if the property was interest-bearing in the first place. *Id.* § 567.245(3). If the property did not accrue interest

before the State took custody, UUPA does not require the State to pay the owner any interest.[1]

Under these provisions, FMC Corporation and Michigan Millers Mutual Insurance Company delivered O'Connor's properties—two checks collectively worth no more than $350—to the State after he failed to claim them. Shortly after, the State liquidated them.

Eventually, O'Connor discovered the taking and filed a claim for compensation. All agree that after receiving this claim, the State reimbursed O'Connor for the value of his property, but not any post-liquidation interest. O'Connor also alleges that neither the State nor the third-party holders provided him with the statutorily required notices.

So O'Connor sued the State in federal court. He also sued two Michigan officials in their personal capacities: Rachael Eubanks, the State Treasurer; and Terry Stanton, the State Administrative Manager of the Unclaimed Property Program. In his complaint, O'Connor claimed the Defendants violated the Fifth and Fourteenth Amendments by denying him—and a potential class of Michigan property owners—just compensation and due process. He sued Eubanks and Stanton under 42 U.S.C. § 1983 and the State directly under the Fifth Amendment.

The Defendants moved to dismiss, claiming the officials were entitled to qualified immunity and the State was entitled to sovereign immunity. The district

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[1] All agree that UUPA does not provide for interest payments on O'Connor's property, as it bore no interest when the State took it. Nevertheless, O'Connor has a constitutional right to any net interest earned post-liquidation, as discussed *infra*, Section II.B.

court granted the Defendants' motion and dismissed all claims with prejudice. *O'Connor v. Eubanks*, No. 21-12837 (NGE), 2022 WL 4009175, at *1, 5 (E.D. Mich. Sept. 2, 2022); R. 29, Pg. ID 387 (judgment). O'Connor timely appealed.

II.

We first consider O'Connor's claims against the officials. Qualified immunity protects Eubanks and Stanton unless "(1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was clearly established at the time." *Dist. of Columbia v. Wesby*, 583 U.S. 48, 62–63 (2018) (cleaned up). Since this case reaches us after a motion to dismiss, we review the facts in the light most favorable to the plaintiff and decide whether "it is plausible that an official's acts violated the plaintiff's clearly established constitutional right." *Heyne v. Metro. Nashville Pub. Schs.*, 655 F.3d 556, 563 (6th Cir. 2011).

Addressing O'Connor's takings and due process claims in turn, we conclude that the officials are entitled to qualified immunity on the former claims but not the latter.

A.

The Fifth Amendment's Takings Clause provides that "private property" shall not "be taken for public use, without just compensation." U.S. Const. amend. V. In his complaint, O'Connor alleges that the officials violated the Takings Clause. But under circuit precedent, Eubanks and Stanton are entitled to qualified immunity on these claims. *See Sterling Hotels, LLC v. McKay*, 71 F.4th 463, 468 (6th Cir. 2023). Earlier this year in *Sterling Hotels*, we held

that individual liability for takings claims is not "clearly established." *Id.* ("[N]o court in this circuit had yet decided whether an officer could be liable for a taking in his individual capacity . . . and at least one case suggested the contrary.") (citing *Vicory v. Walton*, 730 F.2d 466, 467 (6th Cir. 1984)). Thus, we granted qualified immunity to an official sued in his individual capacity. *Id.* Because Eubanks and Stanton are also being sued in their individual capacities for takings claims, they are entitled to qualified immunity under *Sterling Hotels*.[2]

B.

Next, O'Connor claims that Eubanks and Stanton violated his right to due process. The Fourteenth Amendment provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV. To plausibly allege a due process violation, O'Connor must first establish that he had a right in the deprived property. *See, e.g.*, *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). Then, he must show that the State failed to provide sufficient process. *See id.*

First, we must determine whether O'Connor had protected property rights. Neither party disputes that O'Connor has a right in his principal. But the parties disagree over whether O'Connor has a right to interest.[3] Precedent clearly establishes that he does.

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[2] O'Connor attempts to distinguish this case from *Sterling Hotels*, but the latter sets a clear rule: qualified immunity bars individual liability for takings claims under 42 U.S.C. § 1983.

[3] This question has implications for available damages. If O'Connor has rights only to his principal, he would be limited to nominal and punitive damages, since the State has already reimbursed him for the principal.

When the government takes custody of private property and earns interest on it, that interest belongs to the owner. *City of New Orleans v. Fisher*, 180 U.S. 185, 197 (1901). The Supreme Court has reaffirmed this rule time and again. *See Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161–62 (1980); *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 172 (1988). This is true even when the principal was not interest-bearing at the time the state took custody. *See Webb's*, 449 U.S. at 156–57 (noting the principal was cash proceeds from an asset sale). Specifically, the Court has held that owners have a right to the net interest on their principal—that is, the interest accrued less reasonable administrative costs. *Cf. Brown v. Legal Found. of Wash.*, 538 U.S. 216, 238–39 n.10 (2003) (finding no takings violation when the earned interest could not have exceeded the administrative costs and fees).

As these cases clearly establish, O'Connor has a property right in his net interest. To be sure, we do not yet know if O'Connor's property accrued interest or if Michigan incurred costs. But, at this stage of the proceedings, we rely on O'Connor's complaint. And his complaint plausibly alleges his right to net interest. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Because O'Connor has a property right, the State must comply with the Due Process Clause before depriving him of it. Here, O'Connor alleges the State provided him "*no* process whatsoever." Appellant's Br. 31. The officials do not contest this allegation, nor is the allegation implausible. Nothing in the complaint indicates that FMC Corporation, Michigan Millers Mutual Insurance Company, or Michigan issued any

notice before the State took custody of his property or liquidated it.[4]

This presents a problem for the officials. Precedent clearly establishes that the government must give at least *some* notice before taking property. *See Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 313 (1950). But here, O'Connor alleges the government provided none. Thus, assuming O'Connor's allegations are true, he plausibly alleges a violation of his clearly established right to notice and process.[5]

Eubanks and Stanton dispute this. They argue O'Connor has no rights in any interest because UUPA deems his principal abandoned. *See* Mich. Comp. Laws § 567.223(1). But this argument misses the

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[4] To be sure, UUPA required FMC Corporation and Michigan Millers Mutual Insurance Company to send O'Connor written notice before delivering his property to the State. Mich. Comp. Laws § 567.238(5). And every six months in a statewide newspaper, Michigan had to publish a notice identifying O'Connor by name and instructing him on how to claim his property. *Id.* § 567.239. To top it off, the State had to publish another notice "at least 3 weeks in advance of [its] sale, in a newspaper of general circulation in the county in which the property is to be sold." *Id.* § 567.243(1). But the complaint does not indicate whether any of this happened. For this reason, *Freed v. Thomas* is also inapplicable here. In *Freed*, we noted that courts grant qualified immunity to officials who enforce a properly enacted statute "as written," so long as a court has not previously invalidated the statute. *Freed v. Thomas*, 21-1248, 2023 WL 5733164, at *3 (6th Cir. Sept. 6, 2023). But as noted above, the complaint asserts that O'Connor did not receive notice as required by UUPA.

[5] We do not decide the kind of notice and process that the Due Process Clause requires here. We save that issue for the district court on remand. Similarly, we do not decide here whether UUPA's notice and process requirements would satisfy the Due Process Clause.

point. Before the State can extinguish O'Connor's title in "abandoned" property, it must give him "the full procedural protections of the Due Process Clause." *Texaco, Inc. v. Short*, 454 U.S. 516, 534 (1982). And since O'Connor alleges the State provided no process, abandonment is no defense at this stage of the case.

Thus, Eubank and Stanton are not entitled to qualified immunity on O'Connor's due process claims. We vacate the dismissal of those claims and remand for further proceedings.

III.

Lastly, O'Connor raises takings claims against the State. But circuit precedent holds that "the Eleventh Amendment bars takings claims against states in federal court, as long as a remedy is available in state court." *Skatemore, Inc. v. Whitmer*, 40 F.4th 727, 734 (6th Cir. 2022) (citing *DLX, Inc. v. Kentucky*, 381 F.3d 511, 526–28 (6th Cir. 2004)).

Here, a remedy is available in state court. UUPA expressly provides that "[a] person who is aggrieved by a decision of the administrator . . . may bring an action to establish the claim in the circuit court." Mich. Comp. Laws § 567.247. And the Michigan Supreme Court has adjudicated takings claims against the State under the Fifth and Fourteenth Amendments. *See, e.g.*, *K & K Constr., Inc. v. Dep't of Nat'l Res.*, 575 N.W.2d 531, 534, 538–40 (Mich. 1998); *see also Electro-Tech, Inc. v. H.F. Campbell Co.*, 445 N.W.2d 61, 77 n.38 (Mich. 1989) ("Since the obligation to pay just compensation arises under the [C]onstitution and not in tort, the immunity doctrine does not insulate the government from liability."). Our caselaw thus bars O'Connor's claims. And we are

required to follow our binding decisions. *See Ladd v. Marchbanks*, 971 F.3d 574, 578–80 (6th Cir. 2020) (holding that our sovereign-immunity precedent survives *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019)).

But it is not all bad news for O'Connor. The district court should have dismissed his claims against the State without prejudice. When courts dismiss for lack of jurisdiction, the general rule is to do so without prejudice. *Ernst v. Rising*, 427 F.3d 351, 367 (6th Cir. 2005) (en banc) (collecting cases). Although this rule has exceptions, the district court did not apply any. Thus, we affirm the district court's dismissal but vacate it to the extent that it was with prejudice. S*ee Carmichael v. City of Cleveland*, 571 F. App'x 426, 435, 437 (6th Cir. 2014) (granting identical relief).

IV.

Precedent forecloses O'Connor's takings claims, but his due process claims may proceed. We affirm in part, vacate in part, and remand for further proceedings consistent with this opinion.

CONCURRENCE

THAPAR, Circuit Judge, concurring. The Takings Clause sets "a simple, *per se* rule: The government must pay for what it takes." *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2071 (2021). But what happens when the government doesn't? Usually, you'd go to court. Yet our circuit has closed the federal courthouse doors on takings claims. First, in *Vicory*, we arguably foreclosed claims against officials. *Vicory v. Walton*, 730 F.2d 466 (6th Cir. 1984). Then, in *DLX*,

we shielded states from suits in federal courts. *DLX, Inc. v. Kentucky*, 381 F.3d 511 (6th Cir. 2004). Sometimes, a plaintiff can find a municipality to sue for a taking. But other times, as here, there aren't any involved. In these cases, the only remedy is in state court. Neither federal law nor the Constitution dictates this odd result—and recent Supreme Court precedent rejects it. *See Knick v. Township of Scott*, 139 S. Ct. 2162, 2171 (2019).

I write separately to make four points about *Vicory*. First, *Vicory*'s focus on individual liability supplies the wrong inquiry for qualified immunity. Under the "clearly established" prong, we should ask "what happened," not "whom can you sue." Second, despite what *Vicory* suggests, our constitutional history establishes a strong tradition of takings suits against individual officials. Third, when we combine *Vicory* with our sovereign immunity precedent in *DLX*, we effectively require parties to litigate takings claims in state court. And that requirement directly conflicts with the Supreme Court's decision in *Knick*. Finally, it's unclear that *Vicory* is actually controlling.

Eubanks and Stanton are off the hook for O'Connor's takings claim. But in the future, our circuit can and should permit takings claims against officials.

I.

Today's decision correctly applies *Vicory* and *Sterling Hotels* to O'Connor's takings claims. In *Vicory*, this court couldn't find any cases "suggest[ing] that an individual may . . . be liable in damages" for takings violations. 730 F.2d at 467. And in *Sterling Hotels*, the defendant cited *Vicory* in arguing that

personal liability for takings claims is not "clearly established." *Sterling Hotels, LLC v. McKay*, 71 F.4th 463, 468 (6th Cir. 2023). Deferring to the parties' framing of the issue, the *Sterling Hotels* court agreed and granted immunity. *Id.* Thus, because O'Connor brought takings claims against Eubanks and Stanton in their personal capacities, they're immune under *Vicory* and *Sterling Hotels*.

There's just one problem: this approach asks the wrong question. We should first ask whether a cause of action exists against the official. Then, we should ask if that official's conduct violated clearly established law. *See District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018). The facts of this case make that distinction clear. Under our typical approach, we'd first ask if there's a cause of action against Eubanks and Stanton. Then we'd ask if Eubanks and Stanton's failure to compensate O'Connor violated his clearly established rights. But the parties in *Sterling Hotel* framed the question differently: they asked whether a suit against individual officials is a clearly established remedy for takings violations. That's the wrong inquiry.

II.

Of course, the question of "whom can you sue" still matters. After all, qualified immunity is irrelevant if there's no cause of action. And *Vicory* suggests there isn't one against individual officials. 730 F.2d at 467.

Vicory got it wrong. Start with the text of the Fifth Amendment. Under it, not all takings for public use are unconstitutional. It's only those without just compensation. U.S. Const. amend. V. But what did "just compensation" look like at the founding? And

what remedies were available when the government failed to provide compensation?

At the federal level, early Congresses usually provided for "just compensation" in the statutes authorizing takings. A statute reorganizing the municipal government in Georgetown, D.C. (now a part of Washington) is an illustrative example. Under that statute, the government could build and extend streets within the city. Act of March 3, 1805, ch. 32, § 12, 2 Stat. 332, 335. But the municipality had to give "just and adequate" compensation to those who suffered property loss as a result. *Id.* How would this amount be determined? A justice of the peace would empanel a jury of twenty-three men who would vote on the amount to be repaid. *Id.*; *see also* Act of Feb. 25, 1804, Ch. 15, § 5, 2 Stat. 255, 257 (analogous provisions for Alexandria, D.C.). Congress authorized similar compensation mechanisms for other public projects. *E.g.*, Act of March 3, 1809, Ch. 31, § 7, 2 Stat. 539, 541 (providing for appraisal, voluntary agreement, or jury valuation to compensate property owners aggrieved by the construction of a turnpike through Alexandria).

But what happened when the government failed to provide compensation? Early practice under analogous state protections offers insight. *Cf. District of Columbia v. Heller*, 554 U.S. 570, 600–01 (2008) (relying on state analogs to interpret the Second Amendment). Long before the federal Takings Clause applied to states, many states added takings clauses to their own constitutions. *See, e.g.*, Vt. Const. of 1777, ch. I, art. II; Mass. Const. of 1780, art. X. And in other states, courts imposed a just compensation requirement as a matter of "natural equity." Akhil R.

Amar, *The Bill of Rights: Creation and Reconstruction* 150 n.* (1998) (collecting cases); *see, e.g.*, *Young v. McKenzie*, 3 Ga. 31, 44 (1847) (holding that the Takings Clause simply recognized a preexisting principle that applied to all republican governments). These analogs shed light on early takings remedies.

State takings clauses functioned like other constitutional limits on the government: statutes and official actions that violated a constitutional provision were unenforceable. *See VanHorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 316 (C.C.D. Pa. 1795) (Patterson, J.) (finding that a state statute was of no "virtue or avail" in the case because it failed to provide compensation for a taking). This meant that an uncompensated taking was unlawful, since any statutes authorizing the taking wouldn't have been enforceable. *See Thacher v. Dartmouth Bridge Co.*, 35 Mass. (18 Pick.) 501, 502 (1836) (noting that a statute granting the power to take property without compensation couldn't justify what is otherwise a trespass).

And if an official took property unlawfully, the aggrieved party had remedies against him at common law. This often took the form of a trespass action against the official.[1] In some cases, the aggrieved

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[1] *See, e.g.*, *Stevens v. Proprietors of Middlesex Canal*, 12 Mass. (11 Tyng) 466, 468 (1815) (noting that if a state passed a law diminishing the value of private property without indemnifying owner, the owner would "undoubtedly have his action at common law, against those who should cause the injury"); *Jerome v. Ross*, 7 Johns. Ch. 315 (N.Y. Ch. 1823) (noting that a legislature's failure to include a compensation mechanism did not preclude owner from bringing a claim against the commissioners for damages); *Bates v. Cooper*, 5 Ohio 115, 115 (1831) (suing canal

party could even enjoin the official from further takings.[2] Importantly, the defendants in these cases couldn't raise statutory authorization as a defense. Statutes authorizing uncompensated takings were unconstitutional, and an unconstitutional statute was no defense. *Thacher*, 35 Mass. at 502; *Knick*, 139 S. Ct. at 2175–76 (citing Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52 Vand. L. Rev. 57, 69–70, 69 n.33 (1999)). So if a state took property without compensation, the relevant officials were on the hook for damages.

Thus, in the early decades of our republic, lawsuits against officials were a viable remedy for takings. Indeed, because states enjoyed sovereign immunity, suits against officials were among the *only* takings remedies for most of the nineteenth century. Brauneis, *supra*, at 72–78; *see also Knick*, 139 S. Ct. at 2176 (noting there weren't statutory or implied-constitutional-tort remedies for takings until the 1870s). Because the *Vicory* line of cases says otherwise, it's inconsistent with our constitutional history.

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superintendent for trespass when the authorizing statute allegedly violated the state's takings clause).

[2] *See, e.g.*, *Gardner v. Village of Newburgh*, 2 Johns. Ch. 162 (N.Y. Ch. 1816) (enjoining the individual trustees of Newburgh from diverting plaintiff's water supply when owner was not sufficiently compensated); *Cooper v. Williams*, 4 Ohio 253 (1831) (seeking injunction against an individual commissioner for taking water rights for an allegedly non-public use); *Parham v. Justs. of Inferior Ct. of Decatur Cnty.*, 9 Ga. 341 (1851) (enjoining individual road commissioners from constructing roads when no compensation had been provided).

III

If that doesn't give us enough reason to reconsider *Vicory*, its combined impact with *DLX* should. When a state official takes someone's property without compensation, two obvious defendants come to mind: the official who committed the taking, and the state. Yet our precedent forecloses suits against either defendant in federal court. *Vicory* prevents claims against officials. And *DLX* bars claims against the state in federal court. *Skatemore, Inc. v. Whitmer*, 40 F.4th 727, 734 (6th Cir. 2022) (citing *DLX*, 381 F.3d at 526–28). Thus, unless there's a municipality to sue, plaintiffs must litigate takings claims in state court.

If this rule sounds familiar, that's because it's not new. It's a version of the "state-litigation" rule. More importantly, it's a rule the Supreme Court deemed "wrong" and "exceptionally ill" just four years ago. *See Knick*, 139 S. Ct. at 2178. In *Knick*, the Court rejected the idea that a plaintiff had no remedy in federal court until a state court denied him compensation. *Id.* at 2179. To hold otherwise, the Court noted, would "relegate[] the Takings Clause to the status of a poor relation among the provisions of the Bill of Rights." *Id.* at 2169. Indeed, the Justices have repeatedly recognized that the state-litigation rule is "at odds with the plain text and original meaning of the Takings Clause." *Arrigoni Enterp. v. Town of Durham*, 136 S. Ct. 1409, 1409 (2016) (Thomas, J., dissenting from denial of certiorari). So we should stop enforcing it.

To be sure, our precedent doesn't impose a state-litigation rule in so many words. But together, *DLX* and *Vicory* get us pretty close. Unless a municipality is available as a defendant—and as this case shows,

that's not always the case—plaintiffs are stuck litigating in state court. At best, plaintiffs can sue the state in federal court if remedies aren't available in state court. *See Skatemore*, 40 F.4th at 734. But *Knick* expressly rejected that kind of arrangement: "The availability of any particular compensation remedy . . . under state law, cannot infringe or restrict" an owner's right to pursue a remedy in federal court. 139 S. Ct. at 2171. The Supreme Court shattered the state-litigation rule in *Knick*. Our circuit shouldn't piece it back together with *Vicory* and *DLX*.

IV.

If all that's not enough, I'll offer one more reason why we shouldn't follow *Vicory*: I don't believe it's binding. First, as *Sterling Hotels* recognized, *Vicory* merely "suggested" that there's no individual liability for takings violations. 71 F.4th at 468. And suggestions aren't law.

Second, *Vicory* was an order denying rehearing en banc. In other words, it was a refusal to reconsider a case's merits—not a ruling on the merits themselves.[3] Admittedly, the panel that originally heard the case added a statement to the order. And in that statement, the panel claimed that officials can't be individually liable for takings violations. But when circuit judges write these statements, they aren't binding on the court. *Shepherd v. Unknown Party*, 5 F.4th 1075, 1077 (9th Cir. 2021). A six-judge concurral

[3] The question of individual liability for takings violations wasn't before the *Vicory* panel when it originally decided the case. The *Vicory* plaintiff raised that issue for the first time in his rehearing petition. *Vicory*, 730 F.2d at 467. Thus, the *Vicory* court never ruled on the merits of that question.

couldn't bind this court, so the statement in *Vicory*—joined by just two judges—doesn't bind us, either.

V.

Because this court isn't bound by *Vicory*, we should allow plaintiffs to raise takings claims against officials in future cases. But what form would these claims take?

As our constitutional history shows, common law torts against officials are one option. After all, those were the go-to remedies against officials for takings violations at the founding. There's just one issue: unlike at the founding, common law is state law these days. *See Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). That means states have broad power to abrogate and modify common law remedies, and federal courts are bound to follow their lead. *Id.* But the *Knick* Court made clear that the remedies available under the Takings Clause aren't contingent on the remedies available under state law. 139 S. Ct. at 2171. Thus, common law torts can't be the only remedy against officials for takings violations.[4]

Fortunately, section 1983 offers another option. That statute creates a cause of action against state actors who violate constitutional rights. 42 U.S.C. § 1983. And under the Takings Clause, there's a violation "as soon as" the government takes property without paying for it. *Knick*, 139 S. Ct. at 2170. Thus,

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[4] This wasn't always a problem. Before *Erie*, a federal court could entertain "general" common law torts against officials who committed unconstitutional takings. And federal courts applying general common law weren't bound by state common law. *Swift v. Tyson*, 41 U.S. 1, 18 (1842), *overruled by Erie*, 304 U.S. at 79. Thus, pre-*Erie*, common law torts didn't violate the *Knick* principle.

when a state official "subjects" a person to an unconstitutional taking, section 1983 can provide a remedy against the official. 42 U.S.C. § 1983; *see also* Cong. Globe. App. 42d Cong., 1st Sess. 85 (1871) (Rep. Bingham) (citing states' failure to adequately compensate takings as a basis for enacting section 1983). At the very least, then, our circuit should permit takings claims against officials under section 1983.

Perhaps our circuit should also allow suits against officials directly under the Takings Clause. There's some historical support for this approach. By the late nineteenth century, state courts began entertaining takings claims that were wholly disconnected from common law trespass. *See, e.g.*, *Reardon v. City & County of San Francisco*, 6 P. 317, 325 (Cal. 1885); *Harman v. City of Omaha*, 23 N.W. 503, 503 (Neb. 1885). In other words, plaintiffs could sue directly under a state takings clause, independent of any statute or common law action. And as Judge Oldham recently noted in a thoughtful opinion, Supreme Court precedent has repeatedly suggested the same for the federal Takings Clause. *See Devillier v. State*, 63 F.4th 416, 436 (5th Cir. 2023) (Oldham, J., dissenting from the denial of rehearing en banc) (collecting over a century of Supreme Court cases suggesting plaintiffs have a cause of action directly under the Takings Clause), *cert. granted sub nom. Devillier v. Texas*, No. 22-913, 2023 WL 6319651 (U.S. Sept. 29, 2023). Indeed, this circuit previously allowed direct takings claims against municipalities in the days before *Monell*. *See Foster v. City of Detroit*, 405 F.2d 138, 140, 144 (6th Cir. 1968). *But see Thomas v. Shipka*, 818 F.2d 496, 501–03 (6th Cir. 1987) (suggesting section 1983 is the exclusive remedy for constitutional claims

after *Monell*), *vacated*, 872 F.2d 772 (6th Cir. 1989). And for good reason. The right to just compensation shouldn't depend on any statute—the Constitution requires it. *See Jacobs v. United States*, 290 U.S. 13, 16 (1933) ("Statutory recognition was not necessary . . . . The suits were thus founded upon the Constitution . . . ."). Perhaps, then, plaintiffs could sue an official directly under the Takings Clause.

There's certainly more to say on this topic, and we need not resolve that question today. For now, it suffices to say this: our circuit ought to abandon *Vicory*. It's inconsistent with our constitutional history, and, when combined with *DLX*, it violates *Knick*. Instead, we should hold that section 1983 provides a cause of action against officials who inflict unconstitutional takings.

Filed September 2, 2022

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DENNIS O'CONNOR,

Plaintiff,

v.

RACHAEL EUBANKS, TERRY STANTON, and the STATE OF MICHIGAN,

Defendants.
_____/

Case No. 21-12837

Honorable Nancy G. Edmunds

Magistrate Judge Patricia T. Morris

ORDER OVERRULING OBJECTIONS, ACCEPTING AND ADOPTING THE MAGISTRATE JUDGE'S JUNE 30, 2022 REPORT AND RECOMMENDATION, AND GRANTING DEFENDANTS' MOTION TO DISMISS [3, 9, 21, 22, 23]

This putative class action concerns the Uniform Unclaimed Property Program ("UUPP") arising under the State of Michigan's Uniform Unclaimed Property Act (the "Act"), Mich. Comp. Laws §§ 567.221, *et seq*. The Act "provides a mechanism by which the state may hold certain unclaimed property in trust for the benefit of the rightful owner." *Flint Cold Storage v. Dep't. of Treasury*, 776 N.W.2d 387, 393 (Mich. Ct. App. 2009). Plaintiff Dennis O'Connor, on behalf of himself and the class he seeks to represent, filed an Amended Complaint for money damages against the

State of Michigan and Defendants Rachael Eubanks (administrator of UUPP) and Terry Stanton (state administrative manager of UUPP) in their personal capacities. (ECF No. 5.) The Amended Complaint asserts that Defendants violated the Fifth and Fourteenth Amendments to the United States Constitution by not paying Plaintiff and putative class members interest accumulated on the value of the assets held in the UPPP, or alternatively, by operating the UUPP as a "Ponzi scheme." (*Id.* at PageID.57–58.)

On February 17, 2022, Defendants filed a motion to dismiss Plaintiff's Amended Complaint.[1] (ECF No. 9.) The Court referred that motion, along with Plaintiff's Motion for Order to Exclude Exhibits (ECF No. 14), to the Magistrate Judge. Before the Court is the Magistrate Judge's June 30, 2022 Report and Recommendation on Defendants' Motion to Dismiss (ECF No. 21), and Plaintiff's objections thereto (ECF No. 22). Defendants responded to Plaintiff's objections (ECF No. 25) and Plaintiff filed a reply to their response (ECF No. 27). Also before the Court is the Magistrate Judge's Order Denying Plaintiff's Motion to Exclude Defendants' Exhibits as Moot. (ECF No. 20.) Plaintiff objected to this Order pursuant to Fed. R. Civ. P. 72(a) (ECF No. 23), Defendant filed a response to the objection (ECF No. 24), and Plaintiff replied (ECF No. 26). For the reasons that follow, the Court ACCEPTS and ADOPTS the Magistrate

[1] Defendants had previously filed a motion to dismiss Plaintiff's original complaint. (ECF No. 3.) The Magistrate Judge recommends denying this first motion as moot. (ECF No. 21, PageID.281.) Plaintiff does not object to this portion of the Report and Recommendation. (ECF No. 22, PageID.300.) Accordingly, Defendants' first motion (ECF No. 3) is DENIED as MOOT.

Judge's June 30, 2022 Report and Recommendation and overrules each of Plaintiff's objections.

I. Factual Background

The following facts are taken from the Amended Complaint, or the attachments thereto, and accepted as true for purposes of this motion:

Michigan's UUPP's main objective is to reunite owners or heirs with their lost or forgotten property. (ECF No. 5-2, PageID.83.) Examples of unclaimed property include uncashed payroll checks, inactive stocks, dividends, checking and savings accounts, and certain physical property (such as safety deposit boxes and tangible property). (*Id.*) Businesses and governmental agencies that have property that belongs to someone else, has been dormant for a specified period, and remains unclaimed, are required to turn the property over to the state program. (*Id.* at PageID.76, 83.) The State of Michigan never takes ownership of the property but serves as custodian for the owner or heir. (*Id.* PageID.83.)

Once the funds are reported and remitted as unclaimed property from holders, the money is transferred to the State's General Fund, but a separate trust fund is maintained from which the State pays claimants. (ECF No. 5-1, PageID.71.) *See also* Mich. Comp. Laws § 567.244(1). The trust fund account is non-interest bearing, (ECF No. 5-1, PageID.71), and per state law, claimants are only entitled to interest on assets that were interest bearing at the time they were turned over to the state. *See* Mich. Comp. Laws § 567.245(3) ("If the property claimed was interest bearing to the owner on the date of surrender by the holder, and if the date of surrender

is on or after March 28, 1996, the administrator . . . shall pay interest at a rate of 6% a year . . .").

Plaintiff owns two assets that are currently being held in the UUPP[2] after they were turned over from FMC Corporation and Michigan Millers Mutual Insurance Company. (ECF No. 5, PageID.57.) These assets are valued at between $100 and $250, and less than $100, respectively. (*Id.*) The Amended Complaint is silent as to whether or not these funds were collecting interest before they were turned over to the UUPP, but Plaintiff states that interest generated by this property while it was in the custody of the UUPP was "seized and taken for public use without notice." (*Id.*) In the alternative, he alleges that the principal on his property was taken for "public use without notice" and that under the State's "Ponzi scheme," more recently received unclaimed property is being used to reimburse individuals seeking to claim the property. (*Id.* at PageID.57–58.) He asks that "his money—both principal and interest [be] returned to him." (*Id.* at PageID.58) (underscore in the Amended Complaint).

Plaintiff proposes two possible classes: (1) the individuals or entities entitled to interest on the unclaimed funds; and (2) individuals or entities "who have had their property assets seized and spent" while the funds were in the custody of the UUPP. (*Id.*) He claims Defendants violated the Takings Clause of the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment. (*Id.* at PageID.59–67.)

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[2] According to Defendants, Plaintiff has collected the money belonging to him from the UUPP since the filing of the Amended Complaint. (ECF No. 18, PageID.261.)

Plaintiff requests money damages on behalf of himself and the prospective classes. (*Id.* at PageID.68.)

II. Standard of Review

Upon receipt of a report and recommendation from the magistrate judge, a district court judge "shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. §636(b)(1). Thereafter, the district court judge "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." *Id.* *See also* Fed. R. Civ. P. 72(b)(3).

The Court is not "required to articulate all of the reasons it rejects a party's objections," if it does not sustain those objections. *Thomas v. Halter*, 131 F. Supp. 2d 942, 944 (E.D. Mich. 2001) (citations omitted). The purpose of filing objections is to focus the district judge's "attention on those issues—factual and legal—that are at the heart of the parties' dispute." *Thomas v. Arn*, 474 U.S. 140, 147 (1985). Thus, a party's objections must be "specific." *Cole v. Yukins*, 7 F. App'x 354, 356 (6th Cir. 2001) (citations omitted). "The filing of vague, general, or conclusory objections does not meet the requirement of specific objections and is tantamount to a complete failure to object." *Id.* (citing *Miller v. Currie*, 50 F.3d 373, 380 (6th Cir. 1995)).

In addition, objections that merely restate arguments previously presented, do not sufficiently identify alleged errors on the part of the magistrate judge. *Senneff v. Colvin*, No. 15-cv-13667, 2017 WL 710651, at *2 (E.D. Mich. Feb. 23, 2017) (citing cases). An objection that does nothing more than disagree

with a magistrate judge's conclusion, or simply summarizes what has been argued before, is not considered a valid objection. *Howard v. Sec'y of Health and Human Servs.*, 932 F.2d 505, 508 (6th Cir. 1991); *Watson v. Jamsen*, No. 16-cv-13770, 2017 WL 4250477, at *1 (E.D. Mich. Sept. 26, 2017).

III. Defendants' Motion to Dismiss

Plaintiff first challenges the Magistrate Judge's Report and Recommendation on Defendants' motion to dismiss. (ECF No. 22.) Defendants moved to dismiss Plaintiff's Amended Complaint under Rule 12(b)(1) for lack of subject matter jurisdiction and under Rule 12(b)(6) for failure to state a claim. (ECF No. 9.)

A Rule 12(b)(1) motion to dismiss based upon subject matter jurisdiction can be brought either as a facial or a factual attack. *Ohio Nat. Life Ins. Co. v. United States*, 922 F.2d 320, 325 (6th Cir. 1990). An assertion of Eleventh Amendment sovereign immunity, as has been made by Defendants here, constitutes a facial attack. *See Sims v. University of Cincinnati,* 46 F.Supp.2d 736, 737 (S.D. Ohio 1999). Thus, the Court must accept the allegations in the complaint as true. *Ohio Nat. Life Ins. Co.*, 922 F.2d at 325. The State of Michigan, as the entity asserting sovereign immunity, has the burden of establishing the applicability of the doctrine in this case. *Gragg v. Ky. Cabinet for Workforce Dev.*, 289 F.3d 958, 963 (6th Cir. 2002).

Federal Rule of Civil Procedure 12(b)(6) provides for the dismissal of a case where the complaint fails to state a claim upon which relief can be granted. As with a facial attack on subject matter jurisdiction,

when presented with a Rule 12(b)(6) motion, the Court must "construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff." *Directv, Inc. v. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007). But the Court "need not accept as true legal conclusions or unwarranted factual inferences." *Id.* (quoting *Gregory v. Shelby County*, 220 F.3d 433, 446 (6th Cir. 2000)). A plaintiff's complaint will be dismissed under this Rule if it lacks sufficient "factual matter (taken as true) to" provide "plausible grounds to infer" that the elements of a claim for relief could be met. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007).

A. Magistrate Judge's Recommendation

The Magistrate Judge recommends that the Court grant Defendants' motion to dismiss the Amended Complaint. (ECF No. 21, PageID.281.)

In her report, the Magistrate Judge concludes that this Court does not have jurisdiction over Plaintiff's claims against the State of Michigan. (*Id.* at PageID.287.) She further notes that Plaintiff does not dispute that binding precedent requires this outcome. (*Id.* at PageID.286) (citing ECF 13, PageID.212; U.S. Const. amend. XI.; *Edelman v. Jordan*, 415 U.S. 651, 662–63 (1974); *Ladd v. Marchbanks*, 971 F.3d 574, 578 (6th Cir. 2020)). In addition, the Magistrate Judge concludes that Defendants Eubanks and Stanton are entitled to qualified immunity because their (1) actions were mandated by Michigan statute and were therefore non-discretionary; and (2) because it is not clearly established that claimants are entitled to interest on unclaimed property under either the Due

Process Clause or the Takings Clause of the Constitution (*Id.* at PageID.292.)

B. Plaintiff's Objections

Plaintiff filed two timely objections to the Magistrate Judge's Report and Recommendation. (ECF No. 22.) First, Plaintiff objects to the Magistrate Judge's recommendation to dismiss the claims against the State of Michigan for lack of subject matter jurisdiction, though he notes he only makes this objection to preserve his appellate rights. (*Id.* at PageID.309–10.) Second, Plaintiff objects to the Magistrate Judge's conclusion that Defendants Eubanks and Stanton are entitled to qualified immunity. (*Id.* at PageID.311.)

C. Analysis

Plaintiff's objections are overruled. At the outset, the Court notes that Plaintiff's objections are duplicative of the arguments made in his response and the Court is not obligated to reassess these identical arguments. *See, e.g.*, *Owens v. Comm'r of Soc. Sec.*, No 1:12-47, 2013 U.S. Dist. LEXIS 44411, 2013 WL 1304470 (W.D. Mich. Mar. 28, 2013) ("Plaintiff's objections are merely recitations of the identical arguments that were before the magistrate judge. This Court is not obligated to address objections made in this form because the objections fail to identify the *specific* errors in the magistrate judge's proposed recommendations."); *Davis v. Caruso*, No. 07-10115, 2008 U.S. Dist. LEXIS 13713, at *5, 2008 WL 540818 (E.D. Mich. Feb. 25, 2008) (denying an objection to a report and recommendation where Plaintiff "merely rehash[ed] his arguments" made before the Magistrate Judge).

Despite this lack of obligation, the Court has reviewed the record and relevant law *de novo* and it finds that none of Plaintiff's objections have merit. The Court agrees with the Magistrate Judge's analysis on the issues of both sovereign and qualified immunity.

Regarding sovereign immunity, the Court agrees with the Magistrate Judge's conclusion that "[i]t is well settled that 'the States' sovereign immunity protects them from takings claims for damages in federal court'" and that no exception applies to Plaintiff's claims. (ECF No. 21, PageID.286) (citing *Ladd*, 971 F.3d at 578). In addition, the Sixth Circuit instructs that sovereign immunity precludes consideration of due process claims against the state. *S & M Brands, Inc. v. Cooper*, 527 F.3d 500 (6th Cir. 2008).

This Court also agrees with the Magistrate Judge's conclusion that the individual Defendants are entitled to qualified immunity from suit. (ECF No. 21, PageID.292.) "As a general rule, a law enforcement official is entitled to qualified immunity for non-discretionary acts performed in conformity with state law or policy." *Kutschbach v. Davies*, 885 F. Supp. 1079, 1094 (S.D. Ohio 1995) (citing *Kentucky v. Graham*, 473 U.S. 159, 166–67 (1985)). Here, there is no dispute that the individual Defendants' actions related to the UUPP and Plaintiff's claims were in accordance with the Act.

Plaintiff cites *Villarreal v. City of Laredo, Texas*, 44 F.4th —, 2022 WL 3334699, at *5 (5th Cir. 2022),[3] for the proposition that the Act is "so obviously unconstitutional" that state officials should be "require[d] . . . the second-guess the legislature and refuse to enforce" it, but the Act is not one of those "obviously unconstitutional" statutes. *See Lawrence v. Reed*, 406 F.3d 1224, 1233 (10th Cir. 2005) (describing a vehicle ordinance as "obviously unconstitutional" because it authorized city employees to impound personal vehicles without any "form of pre- or post-deprivation hearing even a constitutionally inadequate one"). The Act provides interest earned by property which was interest bearing when it was turned over to the state, but does not obligate the UUPP to pay interest to claimants on assets that were non-interest-bearing when the state took custody. *See* Mich. Comp. Laws § 567.245(3).

Furthermore, even if Plaintiff could show that his constitutional rights were violated, the individual Defendants are entitled to qualified immunity because Plaintiff has not shown that it is clearly established, either under the Taking Clause or the Due Process Clause, that he has the right to collect interest on funds that were non-interest-bearing when abandoned.

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[3] Plaintiff's citation is actually to the 2021 opinion in *Villarreal v. City of Laredo, Texas*, 17 F.4th 532, 541 (5th Cir. 2021), but that opinion was withdrawn and superseded by a subsequent opinion in 2022. Nevertheless, the portion of the opinion cited by Plaintiff is the same in both the 2021 opinion and 2022 opinion.

IV. Plaintiff's Motion to Exclude Defendants' Exhibits

Plaintiff also objects to the Magistrate Judge's order denying as moot Plaintiff's Motion to Exclude Exhibits from Rule 12(b)(6) motion. (ECF No. 23.) Federal Rule of Civil Procedure 72(a) allows a party to serve and file objections to a magistrate judge's order on a non-dispositive motion.

Defendants attached four exhibits to their motion to dismiss the Amended Complaint: an affidavit by Defendant Stanton; a list of previously unclaimed properties by Plaintiff and notification that his claim for recovery of same had been processed; a state court opinion and order denying Plaintiff's request for interest on a non-interest-bearing, unclaimed account; and a state court notice of appeal of the same judgment. (ECF No. 9 at PageID.148–66.) Plaintiff argues these are not properly considered on a motion to dismiss and that consideration of exhibits by the Court would necessarily convert Defendants' motion into one for summary judgment requiring the Court to give him "a reasonable opportunity to present all the material that is pertinent to the motion." (ECF No. 23, PageID.332) (citing Fed. R. Civ. P. 12(d)). As with his objections to the Magistrate Judge's Report and Recommendation, Plaintiff's objection to this order is almost a verbatim recitation of the original arguments made in his motion so the objection is invalid and the Court is not obligated to consider it. *See Howard*, 932 F.2d at 508.

The Sixth Circuit allows district courts deciding motions under Rule 12(b)(6) to review and consider materials outside the pleadings under limited circumstances. In addition to the pleadings identified

by Fed. R. Civ. P. 7(a), the Court may consider documents attached to the pleadings, *Commercial Money Ctr., Inc. v. Illinois Union Ins. Co.*, 508 F.3d 327, 335 (6th Cir. 2007) (citing Fed. R. Civ. P. 10(c)), documents referenced in the pleadings that are "integral to the claims," *id.* at 335–36, documents that are not mentioned specifically but which govern the plaintiff's rights and are necessarily incorporated by reference, *Weiner v. Klais & Co., Inc.*, 108 F.3d 86, 89 (6th Cir. 1997), *abrogated on other grounds by Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506 (2002), and matters of public record, *Northville Downs v. Granholm*, 622 F.3d 579, 586 (6th Cir. 2010).

An in-depth analysis of Defendants' exhibits is not necessary here. Neither the Magistrate Judge nor this Court relied on Defendants' exhibits in ruling on Defendants' motion to dismiss. Accordingly, this Court agrees with the Magistrate Judge's disposition of the motion.

V. Conclusion

For the above-stated reasons, Plaintiff's objections to the June 30, 2022 report and recommendation (ECF No. 22) and his objection to the Magistrate Judge's Order Denying Plaintiff's Motion to Exclude Defendants' Exhibits as Moot (ECF No. 23) are **OVERRULED**. The Court declines to modify or set aside the Magistrate Judge's Order Denying Plaintiff's Motion to Exclude. (ECF No. 20.) In addition, the Court **ACCEPTS AND ADOPTS** the Magistrate Judge's June 30, 2022 Report and Recommendation on Defendants' Motion to Dismiss (ECF No. 9). Defendants' Motion to Dismiss the Amended Complaint (ECF No. 9) is **GRANTED** and

their first motion to dismiss (ECF No. 3) is **DENIED AS MOOT**.

SO ORDERED.

s/Nancy G. Edmunds
Nancy G. Edmunds
United States District Judge

Dated: September 2, 2022

I hereby certify that a copy of the foregoing document was served upon counsel of record on September 2, 2022, by electronic and/or ordinary mail.

s/Lisa Bartlett
Case Manager

Filed June 30, 2022

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

DENNIS O'CONNOR *and all those similarly situated,*

Plaintiff,

v.

RACHEL EUBANKS, TERRY STANTON, and STATE OF MICHIGAN,

Defendants.

_____/

CASE NO. 1:21-cv-12837

DISTRICT JUDGE NANCY G. EDMUNDS

MAGISTRATE JUDGE PATRICIA T. MORRIS

REPORT AND RECOMMENDATION ON DEFENDANTS' MOTION TO DISMISS (ECF No. 9)

I. Recommendation

For the reasons below, **I RECOMMEND** that Defendants' Second Motion to Dismiss (ECF No. 9) be **GRANTED** and that Defendants' original Motion to Dismiss (ECF No. 3) be **DENIED as MOOT**.[1]

[1] Plaintiff filed his first Amended Complaint as a matter of right two days after Defendants filed their motion to dismiss. Fed. R. Civ. P. 15(a)(1)(B). "'Once an amended pleading is interposed, the original pleading no longer performs any function in the case and any subsequent motion made by an opposing party should be

II. Report

A. Introduction

This case involves Plaintiff's claim under Michigan's Uniform Unclaimed Property Act ("UUPA"), M.C.L. § 567.221 *et seq.,* which "provides a mechanism by which the state may hold certain unclaimed property in trust for the benefit of the rightful owner." *Flint Cold Storage v. Dep't. of Treasury*, 285 Mich. App. 483, 492, 776 N.W.2d 387, 393, 2009 WL 2878015 (2009). "The UUPA applies to both tangible and intangible property that is in the possession of a holder." *Id.* (internal quotes omitted). Under the Act, the "property" includes "tangible" personal property. § 567.222(p). (October 6, 2016). "'Owner' means a depositor, in the case of a deposit; a beneficiary, in case of a trust other than a deposit in trust; [and] a creditor, claimant, or payee." § 567.222(n). An individual "claiming an interest in any property paid or delivered to the administrator under this act, may file with the administrator a claim on a form prescribed by the administrator and verified by the claimant." § 567.245(1). The state treasurer "shall consider each claim within 90 days after it is filed and give written notice to the claimant if the claim is denied in whole or in part." § 567.245(2).

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directed at the amended pleading.'" *Hayward v. Cleveland Clinic Found.*, 759 F.3d 601, 617 (6th Cir. 2014) (quoting 6 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1476 (3d ed. 2010)). The "original complaint . . . is a nullity, because an amended complaint supercedes all prior complaints." *Id.* (internal citations omitted).

B. Background

Plaintiff Dennis O'Connor filed a "Class Action Complaint" on December 3, 2021 under 42 U.S.C. § 1983 against the State of Michigan "as a state sovereign" and Rachael Eubanks administrator of Michigan's Unclaimed Property Program ("UPP") and Terry Stanton, UPP's administrative manager, in their personal capacities. (ECF No. 1, PageID.1).

The Amended Complaint, filed February 3, 2022, states as follows. Plaintiff had two monetary assets turned over to the UPP by FMC Corporation ("FMC") and Michigan Millers Mutual Insurance Company ("Millers") valued between $100 and $250 and less than $100 respectively.[2] (ECF No. 5, PageID.57, ¶ 42). Plaintiff alleges that the interest generated on the principal while the property was in the custody of the UPP was improperly "seized and taken for a public use without notice." (*Id.*, ¶ 43(a)). He alleges alternatively that the principal on the property was taken for "public use without notice" and that under the State's "Ponzi scheme," more recently received unclaimed property is being used to reimburse individuals seeking to claim the property. (*Id.* at PageID.57–58, ¶ 43(b)). He asks that "his money — both principal and interest — [be] returned to him." (*Id.* at PageID.5, ¶ 44) (underscore in original).

Plaintiff proposes two possible classes: (1) the individuals or entities entitled to interest on the unclaimed funds, and (2) individuals or entities "who

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[2] Plaintiff states that unclaimed property, as a rule could include interest-bearing accounts, (ECF No. 5, PageID.53, ¶8) but does not allege that any of his own funds were held in interest-bearing accounts prior to being held by the UPP.

have had their property assets seized and spent" while the funds were in the custody of the UPP. (*Id*. at PageID.58, ¶ 46(a)(b)). He claims violations of the Takings Clause of the Fifth Amendment as to both interest and principal on the funds by the State of Michigan, Eubanks, and Stanton as well as violations of the Fourteenth Amendment Due Process Clause against all three Defendants. (*Id*. at PageID.59–67). Plaintiff requests monetary damages against all three Defendants on behalf of himself and the prospective classes. (*Id*. at PageID.68).

C. Standard of Review

Defendants move to dismiss Plaintiff's Amended Complaint under Federal Rule of Civil Procedure 12(b)(1) on the basis of lack of subject matter jurisdiction and under 12(b)(6) for failure to state a claim.

Sovereign immunity is a jurisdictional issue and is therefore properly considered under Rule 12(b)(1). *See Russell v. Lundergan-Grimes*, 784 F.3d 1037, 1046 (6th Cir. 2015). Further, the sovereign immunity issue, under Rule 12(b)(1), must be addressed first because "the Rule 12(b)(6) challenge becomes moot if this court lacks subject matter jurisdiction." *Moir v. Greater Cleveland Reg'l Transit Auth.*, 895 F.2d 266, 269 (6th Cir. 1990).

Under Rule 12(b)(1) a defendant may move to dismiss a complaint on the grounds that the district court lacks subject matter jurisdiction. Where subject matter jurisdiction is challenged under Rule 12(b)(1), it is the plaintiff's burden to prove that the district court has jurisdiction. *See id.* The court will accept the complaint's factual allegations as true insofar as the

defendant facially challenges the "sufficiency of the pleading" itself. *Ohio Nat. Life Ins. Co. v. United States*, 922 F.2d 320, 325 (6th Cir. 1990). However, the complaint's factual allegations are not presumptively true where there is a factual controversy. Instead, the court must "weigh the conflicting evidence to arrive at the factual predicate that subject matter jurisdiction exists or does not exist." In this case, Defendants facially challenge this Court's jurisdiction with respect to Plaintiff's official capacity claims for monetary damages because there are no material factual disputes which would affect subject matter jurisdiction.

Under Rule 12(b)(6), a complaint must provide "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Accordingly, a plaintiff's complaint shall be dismissed for failure to state a claim if it lacks sufficient "factual matter (taken as true) to" provide "plausible grounds to infer" that the elements of a claim for relief could be met. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007); *see* Fed. R. Civ. P. 12(b)(6). A complaint must "raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. Mere labels, conclusory statements, or "formulaic recitations" of the elements of a cause of action are not sufficient to meet this burden if they are unsupported by adequate factual allegations. *Id.* (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). The requirement to provide a plausible claim does not require that a claim be "probable"; however, a claim must be more than merely "conceivable." *Ashcroft v. Iqbal*, 556 U.S. 662, 678–80 (2009).

D. Analysis[3]

1. Sovereign Immunity

Defendants argue that the claims for monetary damages against the State and damages against Eubanks and Stanton that would be paid from the State treasury are barred by the Eleventh Amendment. (ECF No. 9, PageID.134) (citing *Edelman v. Jordan*, 415 U.S. 651, 662–63, 673 (1974)).

In response, Plaintiff concedes that his theory that he is entitled to damages against the State "has been unwelcomed by the Sixth Circuit." (ECF No. 13. PageID.211–12). He argues that the issue of whether he is entitled to such damages should be preserved "for review by an en banc panel" of the Sixth Circuit. (*Id*.). As to Defendants' argument that the claims against Eubanks and Stanton should be barred insofar as they seek funds from the State treasury, Plaintiff states that the individual Defendants were sued only in their personal capacities; thus, the claims against them are not barred by Eleventh Amendment immunity. (*Id*. at PageID.213, n.12). In reply, Defendants note that Plaintiff's response "concedes that the State is entitled to sovereign immunity." (ECF No. 18, PageID.261)

The Eleventh Amendment to the United States Constitution provides that no citizen of the United States shall commence a suit against any state. U.S.

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[3] On February 22, 2022, Plaintiff filed a motion to exclude the exhibits attached to Defendants' Motion to Dismiss. (ECF No. 14). The Court does not rely on, much less cite any of the disputed exhibits in concluding that the Amended Complaint should be dismissed. The motion to exclude the exhibits is addressed in a separate motion filed concurrently with the Report and Recommendation.

Const. amend. XI.; *Edelman v. Jordan*, 415 U.S. 651, 662–63 (1974). It is well settled that "the States' sovereign immunity protects them from takings claims for damages in federal court." *Ladd v. Marchbanks*, 971 F.3d 574, 578, 2020 WL 4882885 (6th Cir. 2020) (citing *DLX, Inc. v. Kentucky*, 381 F.3d 511, 526 (6th Cir. 2004) *overruled on other grounds by San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323, (2005). Because Plaintiff requests only monetary damages, the exception to Eleventh Amendment immunity set forth in *Ex parte Young*, 209 U.S. 123, 148 (1908), permitting suits against states for prospective injunctive relief, does not apply.

Plaintiff concedes that this Court "cannot overrule" the binding precedent set forth in *DLX, Inc.*. but has duly preserved the issue for review by the Sixth Circuit. (ECF No. 13, PageID.212). Likewise, Plaintiff concedes that under *Ladd,* claims seeking monetary damages against agents of the state in their official capacities are also barred. *Id.* at 581 (Where "'the state is the real, substantial party in interest, as when the judgment sought would expend itself on the public treasury or domain, or interfere with public administration, the state's sovereign immunity extends to protect its officers from suit.'") (quoting *Virginia Off. for Prot. & Advoc. v. Stewart*, 563 U.S. 247, 255 (2011)) (internal citations omitted). Accordingly, under the Eleventh Amendment, this Court lacks subject matter jurisdiction over both the claims for monetary damages against the State of Michigan and insofar as the Amended Complaint

could be construed to state official capacity claims against Eubanks and Stanton.[4]

2. Qualified Immunity

Defendants also argue that Eubanks and Stanton are entitled to qualified immunity on the Fifth Amendment Takings Clause and Fourteenth Amendment Due Process Clause claims. (ECF No. 9, PageID.137). They contend that Plaintiff does not have a property right to interest because the accounts in question were non-interest-bearing at the time they were turned over to the UPP, noting the constitutional right to interest on non-interest-bearing accounts is not clearly established by either Supreme Court or Sixth Circuit caselaw. (*Id*. at PageID.138–39). In response, Plaintiff argues that the deprivation of interest on the accounts held by the State constitutes a violation of the Due Process Clause of the Fourteenth Amendment and that the unlawfulness of the individual Defendants' actions is "apparent" under pre-existing law. (*Id*. at PageID.214) (citing *Hope v. Pelzer*, 536 U.S. 730, 739 (2002)). In reply, Defendants note that M.C.L. § 567.245(3) (December 30, 1997) makes a distinction between interest-bearing and non-interest-bearing property and that no court has found the statute's provisions unconstitutional. (ECF No. 18, PageID.263). They reiterate that even assuming that a constitutional violation occurred, the right is not clearly established. (*Id*. at PageID.264).

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[4] Again, Plaintiff has stated that he seeks damages against Eubanks and Stanton in their personal capacities only. (ECF No. 13, PageID.213, n.12).

A state official is protected by qualified immunity unless the plaintiff shows (1) that the defendant violated a constitutional right, and (2) the right was clearly established to the extent that a reasonable person in the defendant's position would know that the conduct complained of was unlawful. *Saucier v. Katz,* 533 U.S. 194 (2001). Under *Saucier,* the inquiry was sequential, requiring the district court to first consider whether there was a constitutional violation. However, in *Pearson v. Callahan,* 555 U.S. 223 (2009), the Supreme Court held that the two-step sequential analysis set forth in *Saucier* is no longer mandatory. Rather, *Pearson* commends the order of inquiry to the judge's discretion, to be exercised on a case-by-case basis:

> "On reconsidering the procedure required in *Saucier,* we conclude that, while the sequence set forth there is often appropriate, it should no longer be regarded as mandatory. The judges of the district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand."

Id. at 236. In this case, the question of whether the constitutional right that the Defendants are accused of violating was clearly established will be considered first. The right in question, however, cannot be a generalized right. "It must be clearly established in a 'particularized' sense, so that 'the contours of the right' are clear enough for any reasonable official in the defendants' position to know that what the official is doing violates that right." *Danese v. Asman*, 875

F.2d 1239, 1242 (6th Cir.1989) (citations omitted). *See also Myers v. Potter*, 422 F.3d 347, 356 (6th Cir.2005) ("[W]e do not assess the right violated at a high level of generality, but instead, we must determine whether the right [is] 'clearly established' in a more particularized ... sense"); *Martin v. Heideman*, 106 F.3d 1308, 1312 (6th Cir.1997) ("Because most legal rights are 'clearly established' at some level of generality, immunity would be impossible to obtain if a plaintiff were required only to cite an abstract legal principle that an official had 'clearly' violated.").

"A right is 'clearly established' if '[t]he contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" *Baynes v. Cleland*, 799 F.3d 600, 610 (6th Cir. 2015) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). In other words, the official must have "fair warning" that the act in question violates the constitution. *Baynes*, at 612–13.

In determining whether a particular constitutional right is clearly established, this Court must "look first to decisions of the Supreme Court, then to decisions of [the Sixth Circuit], and finally to decisions of other courts." *Sallier v. Brooks,* 343 F.3d 868, 878 (6th Cir. 2003). "We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." *Ashcroft v. al-Kidd,* 563 U.S. 731, 741 (2011).

Here, the right that Plaintiff claims under both the Fifth Amendment Takings Clause and the Fourteenth Amendment Due Process Clause is the right of an individual to receive payment of interest on unclaimed funds that have transferred to the State, notwithstanding a statute that limits payment of

interest. Taking the Amended Complaint's allegations as true, Eubanks and Stanton were discharging their statutory duties.

M.C.L. § 567.245(3) provides that interest is payable on previously unclaimed funds only if they were interest-bearing to the owner on the date the funds were turned over to the State:

> (3) If a claim is allowed, the administrator shall pay over or deliver to the claimant the property or the amount the administrator actually received or the net proceeds if it has been sold by the administrator, plus any additional amount required by section 22. *If the property claimed was interest bearing to the owner on the date of surrender by the holder … the administrator also shall pay interest* at a rate of 6% a year or any lesser rate the property earned while in the possession of the holder. Interest begins to accrue when the interest bearing property is delivered to the administrator and ceases on the earlier of the expiration of 10 years after delivery or the date on which payment is made to the owner.

(Emphasis added).

Under M.C.L § 567.244(1) (December 23, 2013), unclaimed funds that are surrendered to the state are deposited in the state's general fund. The administrator is then statutorily directed to maintain a separate trust account of not less than $100,000, from which claims under the Act are paid:

> Sec. 24. (1) Except as otherwise provided by this section, *the administrator shall* promptly deposit in the general fund of this state all

> funds received under this act, including the proceeds from the sale of abandoned property under section 23. *The administrator shall* retain in a separate trust fund an amount not less than $100,000.00 from which prompt payment of claims allowed under this act shall be made. When making the deposit, *the administrator shall* record the name and last known address of each person appearing from the holders' reports to be entitled to the property and the name and last known address of each insured person or annuitant and beneficiary and with respect to each policy or contract listed in the report of an insurance company, the number of the policy or contract, the name of the insurance company, and the amount due.

(Emphasis added). In this case, Plaintiff has attached to the Amended Complaint an affidavit from Bruce Hanses, an administrator with the Michigan Department of Treasury, affirmatively stating that the trust fund account established under M.C.L. § 567.244 is a non-interest-bearing account. (ECF No. 5-1, PageID.71, ¶¶ 3–4). In addition, it is important to note that money is fungible, and because an amount of money equal to the funds claimed (in this case well under $100,000) is in the trust fund account, identified by the name and last known address of the person entitled to the funds, it does not matter that funds initially received by the state are deposited in the general fund. In ¶ 44 of Amended Complaint, Plaintiff states that he "does not want someone else's money to be paid to him by a Ponzi scheme that will only inflict harm on others; Plaintiff wants <u>his</u> money—both principal and interest—returned to

him." (ECF No. 5, PageID.58) (underscore in original). But again, when "his" money was deposited into the general fund, an equal number of fungible dollars was maintained in the trust fund account, and designated as "his" money by amount, name, and last known address. This bears no relationship to a "Ponzi scheme," where investors are paid "dividends" from principal payments of subsequent investors. Such schemes eventually bottom out when there are an insufficient number of new investors to cover payments to earlier investors. Michigan's Unclaimed Property Program is not an investment plan, and the unclaimed funds are protected by the $100,000 minimum balance required for the trust fund account under M.C.L § 567.244(1).[5] It should also be noted that the statute requires only that the trust fund account have a minimum balance of $100,000; it does not provide that the trust fund account be funded by subsequently received unclaimed monies, as Plaintiff suggests. Rather, M.C.L § 567.244(1) states that the administrator "shall promptly deposit in the general fund of this state all funds received under this act."

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[5] Defendants do not dispute that the principal amount of the funds (the amount the administrator actually received) must be paid to the Plaintiff, and state that to that extent, Plaintiff's claim has been approved and paid. (ECF No. 18, PageID.261). In arguing the unlawfulness of Defendants' actions, Plaintiff admits that he has received the principal on the previously unclaimed properties. "When O'Connor wanted his money back, Defendants did not have it and could not return his funds (because they had already spent it). So what did they do? Defendants converted someone's more recently incoming monies to repay O'Connor — similar to a Ponzi scheme." (ECF No. 13, PageID.208). *See also* (*Id.* at PageID.201, n.2). As discussed above, Plaintiff's Ponzi scheme argument is without merit.

Because the Defendants' actions were mandated by Michigan statute, they were non-discretionary, and thus protected by qualified immunity on that basis. "As a general rule, a law enforcement official is entitled to qualified immunity for non-discretionary acts performed in conformity with state law or policy." *Kutschbach v. Davies*, 885 F. Supp. 1079, 1094 (S.D. Ohio 1995) (citing *Kentucky v. Graham,* 473 U.S. 159, 166–67 (1985)) ("When it comes to defenses to liability, an official in a personal-capacity action may, depending on his position, be able to assert personal immunity defenses, such as objectively reasonable reliance on existing law.").

Moreover, there are no cases from the Supreme Court, the Sixth Circuit, or the district courts within the Sixth Circuit holding that under either the Due Process Clause or the Takings Clause of the constitutions, claimants are entitled to interest on unclaimed funds held by a state. The Plaintiff relies heavily on *Star-Batt, Inc. v. City of Rochester Hills*, 251 Mich. App. 502, 504–05, (2002), but that case is easily distinguishable. In *Star-Batt*, the City of Rochester Hills by ordinance required the contractor (Starr-Batt) to post a bond to ensure that any damage caused by its construction activities would be compensated. The City invested the funds from the bond, earning interest, but the ordinance was silent as to who was entitled to the interest. The City returned the amount of the bond to Starr-Batt, but kept the interest. The Court found that because the ordinance did not address the disposition of the earned interest, it would follow the common law rule on the issue:

> Further, *if an ordinance is silent regarding an issue*, "the Legislature is deemed to act with an understanding of common law in existence before the legislation was enacted." *Nation v. W.D.E Electric Co.,* 454 Mich. 489, 494, 563 N.W.2d 233 (1997). Moreover, "*[w]here there is doubt regarding the meaning of such a statute*, it is to be 'given the effect which makes the least rather than the most change in the common law.'"

Id. (quoting *Energetics, Ltd. v. Whitmill*, 442 Mich. 38, 51, 497 N.W.2d 497 (1993)). (Emphasis added). Noting that "had the drafters of the ordinance desired to retain the right to keep whatever interest accrued on cash bonds, they could have easily inserted such language in the ordinance," *id.,* 251 Mich. App. at 511, the Court held that Starr-Batt was entitled to the interest under the common law rule:

> The trial court erred in granting summary disposition to the city because *the city chose not to state in the ordinance that it would retain interest earned on the funds and, in the absence of such language,* we apply the common-law rule that "interest follows the principal" on the basis of the contractor's superior rights to the interest earned as the owner of the funds.

Id. at 512. (Emphasis added).

By contrast in the present case, M.C.L. § 567.245(3) explicitly provides that the claimant will be paid only "the amount the administrator actually received" by the administrator," and that interest will be paid only if the money or property was interest-bearing at the time it was surrendered to the state.

Again, Plaintiff has not alleged that the funds at issue were ever interest-bearing. Because the statute clearly addresses when interest is paid and when it is not, common law is inapplicable. *Starr-Batt* does not give these Defendants "fair warning" that they were violating Plaintiff's rights by not paying him interest.

"When properly applied, [qualified immunity] protects all but the plainly incompetent or those who knowingly violate the law." *Ashcroft v. al-Kidd,* 563 U.S. at 743 (internal quotation marks omitted). When clearly worded statutes mandate that these Defendants *not* pay interest to Plaintiff and mandate that a trust account be established for Plaintiff's unclaimed funds (an account that Plaintiff himself concedes is a non-interest bearing account), and in the absence of any relevant authority that compliance with the statute violates the constitution, it cannot be said that the Defendants "knowingly violated the law" or were plainly incompetent.

Taking the Amended Complaint's allegations as true, Eubanks and Stanton reasonably relied on existing statutory law in remitting the unclaimed funds. Accordingly, they are entitled to qualified immunity, and should be dismissed.

III. Conclusion

For the reasons above, **I RECOMMEND** that Defendants' Second Motion to Dismiss (ECF No. 9) be **GRANTED** and that Defendants' original Motion to Dismiss (ECF No. 3) be **DENIED as MOOT**.

IV. Review

Pursuant to Rule 72(b)(2) of the Federal Rules of Civil Procedure, "[w]ithin 14 days after being served with a copy of the recommended disposition, a party

may serve and file specific written objections to the proposed findings and recommendations. A party may respond to another party's objections within 14 days after being served with a copy." Fed. R. Civ. P. 72(b)(2); *see also* 28 U.S.C. § 636(b)(1). Failure to file specific objections constitutes a waiver of any further right of appeal. *Thomas v. Arn*, 474 U.S. 140 (1985); *Howard v. Sec'y of Health & Human Servs.*, 932 F.2d 505 (6th Cir. 1991); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981). The parties are advised that making some objections, but failing to raise others, will not preserve all the objections a party may have to this Report and Recommendation. *Willis v. Sec'y of Health & Human Servs.*, 931 F.2d 390, 401 (6th Cir. 1991); *Dakroub v. Detroit Fed'n of Teachers Local 231*, 829 F.2d 1370, 1373 (6th Cir. 1987). Pursuant to E.D. Mich. LR 72.1(d)(2), a copy of any objections is to be served upon this magistrate judge.

Any objections must be labeled as "Objection No. 1," "Objection No. 2," etc. Any objection must recite precisely the provision of this Report and Recommendation to which it pertains. Not later than 14 days after service of an objection, the opposing party may file a concise response proportionate to the objections in length and complexity. Fed. R. Civ. P. 72(b)(2); E.D. Mich. LR 72.1(d). The response must specifically address each issue raised in the objections, in the same order, and labeled as "Response to Objection No. 1," "Response to Objection No. 2," etc. If the Court determines that any objections are without merit, it may rule without awaiting the response.

Date: June 30, 2022 **S/ PATRICIA T. MORRIS**
Patricia T. Morris
United States Magistrate Judge

Filed December 19, 2023

No. 22-1780

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DENNIS O'CONNOR, AND ALL THOSE SIMILARLY SITUATED, Plaintiff-Appellant, v. RACHAEL EUBANKS, IN HER PERSONAL CAPACITY; TERRY STANTON, IN HIS PERSONAL CAPACITY; STATE OF MICHIGAN, Defendants-Appellees.	)	ORDER

BEFORE: MOORE, THAPAR, and NALBANDIAN, Circuit Judges.

The court received two petitions for rehearing en banc. The original panel has reviewed the petitions for rehearing and concludes that the issues raised in the petitions were fully considered upon the original submission and decision of the case. The petitions then were circulated to the full court.* No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petitions are denied.

ENTERED BY ORDER OF THE COURT

/s/ Kelly L. Stephens
Kelly L. Stephens, Clerk

* Judge Davis recused herself from participation in this ruling.

Relevant Statutes

Mich. Comp. Laws § 567.223. Unclaimed property held in ordinary course of business

Sec. 3. (1) Except as otherwise provided by this act, all property, including any income or increment derived from the property, less any lawful charges, that is held, issued, or owing in the ordinary course of a holder's business and remains unclaimed by the owner for more than 3 years after it becomes payable or distributable is presumed abandoned.

(2) Property is payable or distributable for the purpose of this act, notwithstanding the owner's failure to make demand or to present any instrument or document required to receive payment.

Mich. Comp. Laws § 567.242. Right of owner to dividends, interest, or other increments on property liquidated or converted to money

Sec. 22. If property other than money is paid or delivered to the administrator under this act, the owner is entitled to receive from the administrator any dividends, interest, or other increments realized or accruing on the property at or before liquidation or conversion of the property into money.

Mich. Comp. Laws § 567.243. Sale of abandoned property; securities; rights of purchaser at sale; transfer of ownership

Sec. 23. (1) Except as provided in subsections (2) and (3), the administrator, not later than 3 years after the receipt of abandoned property, shall sell it to the highest bidder at public sale in whatever city in the state affords, in the judgment of the administrator, the most favorable market for the property involved.

The administrator may decline the highest bid and reoffer the property for sale if, in the judgment of the administrator, the bid is insufficient. If, in the judgment of the administrator, the probable cost of sale exceeds the value of the property, the property need not be offered for sale. Any sale held under this section shall be preceded by a single publication of notice, at least 3 weeks in advance of sale, in a newspaper of general circulation in the county in which the property is to be sold.

(2) Securities listed on an established stock exchange shall be sold at prices prevailing at the time of sale on the exchange. Securities not listed on an established stock exchange may be sold over the counter at prices prevailing at the time of sale or by any other method the administrator considers advisable.

(3) Unless the administrator considers it to be in the best interest of the state to do otherwise, all securities presumed abandoned under this act and delivered to the administrator shall be sold within 1 year of the receipt of the securities. A person making a claim under this act against the state, the holder, any transfer agent, registrar, or other person acting for or on behalf of a holder is not entitled to any appreciation in the value of the property occurring after delivery by the holder to the administrator.

(4) The purchaser of property at any sale conducted by the administrator under this act takes the property free of all claims of the owner or previous holder of the property and of all persons claiming through or under the owner or previous holder. The administrator shall execute all documents necessary to complete the transfer of ownership.

Mich. Comp. Laws § 567.244. Disposition of funds

Sec. 24. (1) Except as otherwise provided by this section, the administrator shall promptly deposit in the general fund of this state all funds received under this act, including the proceeds from the sale of abandoned property under section 23.1 The administrator shall retain in a separate trust fund an amount not less than $100,000.00 from which prompt payment of claims allowed under this act shall be made. When making the deposit, the administrator shall record the name and last known address of each person appearing from the holders' reports to be entitled to the property and the name and last known address of each insured person or annuitant and beneficiary and with respect to each policy or contract listed in the report of an insurance company, the number of the policy or contract, the name of the insurance company, and the amount due. The name of the owner or apparent owner and a gross description of the property only shall be available for public inspection at all reasonable business hours.

(2) Before making any deposit to the credit of the general fund, the administrator may deduct any of the following:

(a) Costs in connection with the sale of abandoned property.

(b) Costs of mailing and publication in connection with any abandoned property.

(c) Reasonable service charges.

(d) Costs incurred in examining records of holders of property and in collecting the property from those holders.

(3) The administrator shall transfer to the senior care respite fund created in the older Michiganians act, 1981 PA 180, MCL 400.581 to 400.594, funds that escheat to this state pursuant to 1 or more of the following:

(a) Section 403a of the nonprofit health care corporation reform act, 1980 PA 350, MCL 550.1403a.

(b) Section 5805 of the insurance code of 1956, 1956 PA 218, MCL 500.5805.

Mich. Comp. Laws § 567.245. Filing, processing, and determination of claims of interest in property paid or delivered to administrator

Sec. 25. (1) A person, excluding another state, claiming an interest in any property paid or delivered to the administrator under this act, may file with the administrator a claim on a form prescribed by the administrator and verified by the claimant.

(2) The administrator shall consider each claim within 90 days after it is filed and give written notice to the claimant if the claim is denied in whole or in part. The notice may be given by mailing it to the last address, if any, stated in the claim as the address to which notices are to be sent. If no address for notices is stated in the claim, the notice may be mailed to the last address, if any, of the claimant as stated in the claim. No notice of denial need be given if the claim fails to state either the last address to which notices are to be sent or the address of the claimant.

(3) If a claim is allowed, the administrator shall pay over or deliver to the claimant the property or the amount the administrator actually received or the net proceeds if it has been sold by the administrator, plus any additional amount required by section 22. If the

property claimed was interest bearing to the owner on the date of surrender by the holder, and if the date of surrender is on or after March 28, 1996, the administrator also shall pay interest at a rate of 6% a year or any lesser rate the property earned while in the possession of the holder. Interest begins to accrue when the interest bearing property is delivered to the administrator and ceases on the earlier of the expiration of 10 years after delivery or the date on which payment is made to the owner. No interest on interest bearing property is payable for any period before March 28, 1996.

(4) Any holder who pays the owner for property that has been delivered to the state and which, if claimed from the administrator, would be subject to subsection (3) shall add interest as provided in that subsection. The added interest must be repaid to the holder by the administrator in the same manner as the principal.

Filed February 3, 2022

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISRICT OF MICHIGAN

DENNIS O'CONNOR, and all those similarly situated,
Plaintiffs,

v.

STATE OF MICHIGAN, RACHAEL EUBANKS, in her personal capacity, and TERRY STANTON, in his personal capacity
Defendants
_____/

Case No.: 21-cv-12837

Honorable Nancy G. Edmunds

AMENDED COMPLAINT
JURY DEMANDED

**** CLASS ACTION****

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FIRST AMENDED
CLASS ACTION COMPLAINT

NOW COMES Plaintiff DENNIS C. O'CONNOR, both individually and as class representative, by and through counsel, and pleads unto this Court as follows:

PARTIES

1. Plaintiff Dr. DENNIS C. O'CONNOR is named directly and as proposed class representative.

2. Defendant STATE OF MICHIGAN is a named party as a state sovereign.

3. Defendant RACHAEL EUBANKS is administrator of the Unclaimed Property Program (UPP); she is sued in her personal capacity only.

4. Defendant TERRY STANTON is state administrative manager of the Unclaimed Property Program (UPP); he is sued in his personal capacity only.

JURISDICTION

5. This is a civil action brought pursuant to 42 U.S.C. § 1983 seeking relief against Defendants for past and ongoing violations the United States Constitution.

6. This Court has jurisdiction pursuant to 28 U.S.C. § 1331, which authorizes federal courts to

decide cases concerning federal questions and 28 U.S.C. § 1343, which authorizes federal courts to hear civil rights cases.

GENERAL ALLEGATIONS

7. Any non-real property asset, tangible or intangible, belonging to a person that remains inactive for an arbitrary-selected period of time is considered under Michigan law to be "unclaimed property."

8. Unclaimed property consists of non-real estate assets such as checking and savings accounts, unpaid wages, securities, life insurance payouts, uncashed checks, unredeemed rebates, and the contents of safe deposit boxes that are without activity for a certain specified period of time.

9. After that period of time, a "holder" (usually a business or other type of organization in possession of property belonging to another) having "unclaimed property" is required to turn over such property assets to Defendant STATE OF MICHIGAN's Unclaimed Property Program (UPP) within the Department of Treasury.

10. Defendant RACHAEL EUBANKS is the administrator of the UPP.

11. Defendant TERRY STANTON is state administrative manager of the UPP.

12. Once property is turned over to the UPP, "the state assumes custody and responsibility for the safekeeping of the property." MCL 567.241(1).

13. Government reports confirm that Defendant STATE OF MICHIGAN "*never* takes ownership" of the unclaimed property but merely "serves as a

custodian for the owner or heir." **Exhibit B**. Such is consistent with the controlling operative law. MCL 567.241(1).

14. The unclaimed property is never owned by the State but instead owned, at all times, by private citizens and entities throughout Michigan.

15. Because Defendants "*never* takes ownership" of the unclaimed property, nothing actually escheats.

16. Unclaimed property has been collected by Defendant STATE OF MICHIGAN and handled by its administrator, Defendant RACHAEL EUBANKS, and its state administrative manager, Defendant TERRY STANTON.

17. When unclaimed property arrives into the custody and responsibility of Defendants, the monetized versions of these assets are deposited into bank accounts, which are, on information and belief, generating substantial additional earnings in the form of interest.

18. Defendants are legally required to store these funds within one of two governmental budget accounts (which is different than what bank account the funds are deposited into).

a. The first is a "trust fund" which must keep a balance of at least $100,000 to allow for the "prompt payment of claims allowed." This is commonly known in the Michigan budgeting process as the "Escheats Fund."

b. The remaining (and extremely larger) balance is to be stored and held within the "General Fund" of the State of Michigan. See MCL 567.244(1).

19. No matter how these monies are booked for accounting purposes in the Escheats Fund or the General Fund, these monies are deposited into one or more bank account(s) at a financial institution which, on information and belief, is (or supposed to be) generating substantial additional earnings in the form of interest.

20. The UPP has largely operated unnoticed and unregulated for years.

21. However, state officials have confirmed that the UPP is supposed to be holding approximately $1.9 billion in unclaimed property consisting of approximately 23 million properties. See **Exhibit A**.

22. As part of the pre-suit and ongoing post-suit investigation into the UPP for this case, Defendant STATE OF MICHIGAN has (or alternatively is supposed to have) ≈$1.9 billion in unclaimed property its current "custody" and under the "responsibility" of the State of Michigan on behalf of approximately 23 million citizen-owners. See **Exhibit A**.

23. As such, between these two funds, Defendants should today be physically holding ≈$1.9 billion of privately-owned monies consisting of approximately twenty-three million unclaimed monetized pieces of property.

24. In the recent 2020 Budget, there is a section called "STATEMENT OF AVAILABLE OPERATING FUNDS" which listed a line item under the "NON-TAX REVENUE" section called "*Unclaimed Property Transfer*" in an amount of $74 million for 2020. **Exhibit C at C-8**.

25. There are also estimates for transfers of $77,200,000 for 2021; $82,500,000 for 2022, and $83,000,000 for 2023. **Exhibit C at C-8**.

26. These transfers are/were thought to be the amount of generated interest on the monies as part of the UPP.

27. However Defendants have not been forthright about what this money is or where it comes fromm.

28. Defendants have not confirmed whether annual "transfers" are, in fact, interest being generated on the ≈$1.9 billion of privately-owned monies or something else.

29. If it is interest, then those sums of generated interest are the property of the private citizens, not the government, under Michigan law. See e.g. *Star-Batt, Inc v City of Rochester*, 251 Mich App 502; 650 NW2d 422 (2002).

30. Moreover, with sums of generated interest being a property right belonging to the members of the class, there is an obligation to provide procedural due process before depriving any class member of his/her/its property.

31. However, since this case has started, there is now a serious question of whether these "*Unclaimed Property Transfer*" line items in the annual state budget is generated interest or whether the state government is simply seizing and using privately-owned monies (i.e. the principal) as a means to gap-fill budget holes.

32. "Good lawyering as well as ethical compliance often requires lawyers to plead in the alternative."

Jordan v. City of Cleveland, 464 F.3d 584, 604 (6th Cir. 2006).

33. Since this case stated, a government auditor's report for the year ending December 31, 2018 was located on an obscure, largely-overlooked government website. **Exhibit E**.

34. Michigan law (MCL 12.10) requires the Michigan Auditor General to perform an audit of cash and investments in the possession or under the control of the State Treasurer upon a vacancy in the Office of State Treasurer.

35. One such report was generated when current treasurer, Defendant RACHAEL EUBANKS, was appointed as of January 1, 2019.

36. Confusingly, there is not an amount equal or approximate to the $1.9 billion in unclaimed property anywhere list as a currently-held asset within the General Fund.

37. Yet, there absolutely should be. MCL 567.244(1).

38. More surprisingly, the Escheats Fund only had $2.5 million as of January 1, 2019. **Exhibit E at 10**.

39. So, while the State Treasurer had $8.7 billion in "total cash and investments" in her official possession, there was nothing documenting the location of the ≈$1.9 billion (as confirmed by the affidavit in Exhibit A) belonging to the millions of Michigan citizens under the "custody and responsibility" of Defendants "for safekeeping" per MCL 567.241(1).

40. So, the pre-discovery limited publicly available facts now reasonably suggests that it is possible that no interest is being generated on the ≈$1.9 billion in unclaimed property because the private monies were already seized and spent by illegally appropriating millions of privately-owned dollars each year a budget gap-filler under the label of a "Unclaimed Property Transfer for various public uses.

41. So, under the principle of good lawyering, this lawsuit has alternatively pled theories as outlined below.

ABOUT PLAINTIFF

42. Plaintiff DENNIS O'CONNOR has two assets held (but not owned) by Defendants that were turned over from FMC Corporation and Michigan Millers Mutual Insurance Company valued as being between $100 and $250 and less than $100 respectively.

43. Based on the limited public facts known but will be confirmed by discovery, one of two things has happened to Plaintiff's property (in the form of money) after it was turned over by FMC Corporation and Michigan Millers Mutual Insurance Company.

a. First, pursuant to the UPP statute, while his property was and is in the custody of UPP, Plaintiff generated interest on his asset while in state custody and said interest was seized and taken for a public use without any notice or the opportunity to be heard. See **Exhibit C at C-8**.

b. Alternatively, Plaintiff's property (principal) was taken for a public use without any notice or the opportunity to be heard but now

> Defendants are trying to use some other class members' more recently turned over unclaimed property monies (more recently received) to cover the prior seizure and use of Plaintiff's money—similar to a Ponzi scheme.[1]

44. Plaintiff does not someone else's money to be paid to him by a Ponzi scheme that will only inflict harm on others; Plaintiff wants his money—both principal and interest—returned to him.

CLASS ALLEGATIONS

45. This action is brought by Plaintiff DENNIS O'CONNOR individually and on behalf of all those similarly situated.

46. Plaintiff DENNIS O'CONNOR proposes two possible classes following initial discovery to reveal the operational status of the UPP—

a. Proposed Class No. 1 consists of all persons or entities who have not been provided just compensation equal to the amount of the interest income earned (less any proper proportional custodial expenses) that been generated or should have been generated on their assets while in the custody of the Unclaimed Property Program.

b. Proposed Class No. 2 consists of all persons or entities who have had their

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[1] A Ponzi scheme is a form of operation that lures in contributors and pays monies to earlier contributors with funds from more recent contributors. The Ponzi scheme always collapses because eventually the amount to pay out by the Ponzi operator will exceed the amount provided by more recent contributors.

property assets seized and spent while in the custody of the Unclaimed Property Program.

47. The number of injured individuals who have been injured is sufficiently numerous to make class action status the most practical method to secure redress for injuries sustained and class wide equitable relief.

48. There are clear questions fact raised by the named Plaintiff's claim common to, and typical of, those raised by the Class each seeks to represent.

49. There are clear questions of law raised by the named Plaintiff's claims common to, and typical of, those raised by the Class each seeks to represent.

50. The violations of law and resulting harms alleged by the named Plaintiff are typical of the legal violations and harms suffered by all class members.

51. Plaintiff, as Class representative, will fairly and adequately protect the interests of the class members and will vigorously prosecute the suit on behalf of the Class; and is represented by sufficiently experienced counsel.

52. The maintenance of the action as a class action will be superior to other available methods of adjudication and will promote the convenient administration of justice, preventing possible inconsistent or varying adjudications with respect to individual members of the Class and/or one or more of the Defendants.

53. Defendants have acted, failed to act, and/or are continuing to act on grounds generally applicable to all members of the Class.

COUNT I
FIFTH AMENDMENT TAKING — DIRECT ACTION (*FIRST ENGLISH*) AGAINST DEFENDANT STATE OF MICHIGAN (INTEREST)

54. The previous allegations are re-alleged word for word herein.

55. Yearly earned income (i.e. interest), as described above, is a property right belonging to Plaintiff and members of the Class. *Star-Batt, Inc v City of Rochester*, 251 Mich App 502; 650 NW2d 422 (2002).

56. Defendant STATE OF MICHIGAN has taken Plaintiff's and the class members' constitutionally-protected property in the form of monies equal to earned income (i.e. interest) on the held property assets, less proportional custodial expenses (if applicable), and have appropriated and/or will appropriate property without the payment of just compensation in violation of Fifth Amendment to the United States Constitution.

57. Defendants do not intend to pay or otherwise will immediately pay just compensation by or via any known procedures.

58. Unconstitutional takings occur pursuant to Fifth Amendment occurs when Defendants take, seize and use the interest generated to Plaintiff's and class members' assets while in the custody of the UPP.

59. Plaintiff and class members have suffered damages as a result.

60. Plaintiff expressly asserts that state sovereign immunity does not exist in favor of

Defendant State of Michigan for claims for annual interest as sought directly under the Fifth Amendment to the United States Constitution. See *First English Evangelical Lutheran Church v. Los Angeles*, 482 U.S. 304, 315 (1987).

61. To the extent that this Court believes it is bound to hold otherwise by *DLX, Inc v Kentucky*[2] or any other circuit precedent, this claim is made to expressly preserve the issue for review by an en banc panel of the United States Court of Appeals for the Sixth Circuit and/or by the United States Supreme Court.

COUNT II
FIFTH AMENDMENT TAKING — DIRECT ACTION (*FIRST ENGLISH*) AGAINST DEFENDANT STATE OF MICHIGAN (PRINCIPAL)

62. The previous allegations are re-alleged word for word herein.

63. Count II is pled in the alternative to Count I.

64. The privately-owned property/assets held by Defendant STATE OF MICHIGAN as part of the UPP do not belong to or is otherwise owned by the government or its officials, but is property that belongs to Plaintiff and the class members (as private citizens).

65. Without knowledge or notice, Defendant STATE OF MICHIGAN has taken Plaintiff's and the class members' constitutionally-protected property in the form of privately-owned monies that were

[2] 381 F.3d 511 (6th Cir. 2004)

supposed to be kept in the custody of and under the responsibility of the government as part of the UPP.

66. Defendant STATE OF MICHIGAN no longer has or possesses the monies belonging to Plaintiff and class members but is instead using the monies from newly arriving unclaimed property funds to pay out older turn-overs when the latter makes a demand for its return.

67. Defendant STATE OF MICHIGAN cannot fix its prior taking of Plaintiff and the class members' property by converting other class members' property that Defendant STATE OF MICHIGAN is supposed to keep "custody" over and "responsibility for the safekeeping." MCL 567.241(1).

68. The UPP is being operated like a classically-formed Ponzi scheme.

69. Plaintiff and class members have suffered damages as a result of the taking by Defendant STATE OF MICHIGAN.

70. Plaintiff expressly asserts that state sovereign immunity does not exist in favor of Defendant STATE OF MICHIGAN for claims for the taking of their private property as sought directly under the Fifth Amendment to the United States Constitution. See *First English Evangelical Lutheran Church v. Los Angeles*, 482 U.S. 304, 315 (1987).

71. To the extent that this Court believes it is bound to hold otherwise by *DLX, Inc v Kentucky*[3] or any other circuit precedent, this claim is made to expressly preserve the issue for review by an en banc panel of the United States Court of Appeals for the

[3] 381 F.3d 511 (6th Cir. 2004)

Sixth Circuit and/or by the United States Supreme Court.

COUNT III
42 U.S.C. § 1983 — FIFTH AMENDMENT AGAINST DEFENDANTS EUBANKS AND STANTON (INTEREST)

72. The previous allegations are re-alleged word for word herein.

73. Defendant RACHAEL EUBANKS is a state actor when serving in her role as administrator of the UPP.

74. Defendant TERRY STANTON is a state actor when serving in his role as state administrative manager of the UPP.

75. Under the Fifth Amendment, government officials can take property (like money) for public use but conditions that action on first immediately paying "just compensation."

76. It is clearly established law that when a taking occurs, Defendants RACHAEL EUBANKS and TERRY STANTON have a constitutional duty to ensure that "just compensation" is provided for as the Constitution protects from "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."

77. Since at least 1933, "the Fifth Amendment right to full compensation arises at the time of the taking, regardless of post-taking [state] remedies that may be available to the property owner." See *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2170 (2019) (citing *Jacobs v. United States*, 290 U.S. 13 (1933)).

78. Since at least 2002, any reasonable official in the positions held by Defendants RACHAEL EUBANKS and TERRY STANTON would or should know that interest generated on principal sums held in the custody of the government is a form of property belong to the owner and not the government. *Star-Batt, Inc v City of Rochester*, 251 Mich App 502; 650 NW2d 422 (2002).

79. So, when property (i.e. the interest generated on privately-owned sums held in the custody of the government) was taken, it was clearly established that there must, constitutionally, be the payment of just compensation.

80. Defendants RACHAEL EUBANKS and TERRY STANTON have caused Plaintiff and members of the Class to be deprived of their rights under Fifth Amendment to the United States Constitution when, while administering the UPP, each refused and still refuses to require the government for which each serves to cause the payment of (and has otherwise improper administered an unconstitutional statute which refuses to provide) just compensation equal to the annual income generated on the time value of money, less proportional custodial expenses (if applicable) while assets belonging to Plaintiff and members of the class are in the custody and control of the UPP.

81. By failing to effectuate just compensation under the Fifth Amendment as officials in charge of the UPP, Defendants RACHAEL EUBANKS and TERRY STANTON caused Plaintiff and members of the Class to be deprived of the right of just compensation as secured by the Fifth Amendment to

the United States Constitution and is liable as to Plaintiffs and class members so injured.

82. Plaintiff and members of the Class have suffered damages as a result.

83. The actions and/or inactions of Defendants RACHAEL EUBANKS and TERRY STANTON was expressly designed to intentionally or wantonly cause harm to Plaintiffs and the members of the Class due to the utter disregard of the constitutionally protected rights of all members of the Class.

COUNT IV
42 U.S.C. § 1983 — FIFTH AMENDMENT AGAINST DEFENDANTS EUBANKS AND STANTON (PRINCIPAL)

84. The previous allegations are re-alleged word for word herein.

85. Count IV is pled in the alternative to Count III.

86. Defendant RACHAEL EUBANKS is a state actor when serving in her role as administrator of the UPP.

87. Defendant TERRY STANTON is a state actor when serving in his role as state administrative manager of the UPP.

88. Under the Fifth Amendment, government officials can take property (like money) for public use but conditions that action on first immediately paying "just compensation."

89. It is clearly established law that when a taking occurs, Defendants RACHAEL EUBANKS and

TERRY STANTON have a constitutional duty to ensure that "just compensation" is provided for as the Constitution protects from "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."

90. It is also clearly established that the property/assets held as part of the UPP belonged to and are solely owned by Plaintiff and the class members.

91. It is also clearly established that when the government took said property for public uses (and a taking occurs), Defendants RACHAEL EUBANKS and TERRY STANTON had and have a constitutional duty to ensure that "just compensation" is provided.

92. Since at least 1933, "the Fifth Amendment right to full compensation arises at the time of the taking, regardless of post-taking remedies that may be available to the property owner." See *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2170 (2019) (citing *Jacobs v. United States*, 290 U.S. 13 (1933)).

93. Any reasonable official in the positions held by Defendants RACHAEL EUBANKS and TERRY STANTON would or should know that the property held in the UPP belonged to the members of the class and never the government. MCL 567.241(1); **Exhibit B**.

94. So, when the class members' money was taken, it was clearly established that there must, constitutionally, be the payment of just compensation.

95. Defendants RACHAEL EUBANKS and TERRY STANTON have caused Plaintiff and members of the Class to be deprived of their rights under Fifth Amendment to the United States

Constitution when, while administering the UPP, each refused and still refuses to cause the payment of (and has otherwise improper administered an unconstitutional statute which refuses to provide) just compensation equal to principal sums of money that were taken from the General Fund for use by the government as part of its budget when the seized property solely and unquestionably belonged to Plaintiff and members of the class.

96. Defendants RACHAEL EUBANKS and TERRY STANTON have caused Plaintiff and members of the Class to be deprived of their rights under Fifth Amendment to the United States Constitution when, while administering the UPP, each refused and still refuses to cause the payment of (and has otherwise improper administered an unconstitutional statute which refuses to provide) just compensation equal to principal sums of money that were taken from the Escrow Fund for use by the government to pay claims made by owners when the government had already seized, used, and spent the funds to pay claims made by those who had money turned over even earlier.

97. By failing to effectuate just compensation under the Fifth Amendment as officials in charge of the UPP, Defendants RACHAEL EUBANKS and TERRY STANTON caused Plaintiff and members of the Class to be deprived of the right of just compensation as secured by the Fifth Amendment to the United States Constitution and is liable as to Plaintiffs and class members so injured.

98. Plaintiff and members of the Class have suffered damages as a result.

99. The actions and/or inactions of Defendants RACHAEL EUBANKS and TERRY STANTON was expressly designed to intentionally or wantonly cause harm to Plaintiffs and the members of the Class due to the utter disregard of the constitutionally protected rights of all members of the Class.

COUNT V
42 U.S.C. § 1983 —
FOURTEENTH AMENDMENT
(PROCEDURAL DUE PROCESS)
AGAINST DEFENDANTS EUBANKS
AND STANTON
(INTEREST)

100. The previous allegations are re-alleged word for word herein.

101. Under Michigan's common law, there is a well-known and established state law property right—the doctrine of interest follows principal. When a government has custody over (but not ownership of) the money of another, the interest generated belongs to the principal's owner, not the government. See *Star-Batt, Inc v City of Rochester*, 251 Mich App 502; 650 NW2d 422 (2002).

102. Plaintiff and the class members have a private property right in the interest that is generated on their monies while held as part of the UPP. See *Star-Batt, Inc v City of Rochester*, 251 Mich App 502; 650 NW2d 422 (2002).

103. Plaintiff and the class members suffered deprivations of their property in the form of generated interest on private assets held in state custody. See e.g. **Exhibit C at C-8**.

104. As such, Plaintiff and the class members have established property interests that trigger procedural due process requirements.

105. Plaintiff and the class members received no (and thus insufficient) due process.

106. When Defendants RACHAEL EUBANKS and TERRY STANTON caused, allowed, authorized, and/or acquiesced the seizure and spending of generated interest which belongs, by law, to Plaintiff and the class members, Plaintiff and the class members were deprived of their property rights without notice or the opportunity to be heard.

107. Plaintiff and the class members were not afforded either timely and adequate process under law, namely that no notice was afforded and no opportunity for hearing was provided before the deprivation of the class members' property.

108. Defendants failed to provide required and/or sufficient due process as mandated by the Fourteenth Amendment in the form of a pre-deprivation hearing before the property rights of Plaintiff and the class members were taken from them.

109. There is extreme risk of erroneous deprivation of private property as well as actual deprivation of private property due to the non-existence of any constitutionally sufficient due process procedures.

110. There is insufficient level of any governmental burden to not provide a sufficient due process procedure.

111. As for Defendants RACHAEL EUBANKS and TERRY STANTON sued in his/her personal capacity, each purposely, recklessly, and with wanton disregard

for the federal rights of Plaintiff and the class members, inflicted harmed in violation of the Fourteenth Amendment.

112. Plaintiff and the class members have been damaged as a result of Defendants' violation of their rights under the United States Constitution.

COUNT VI
42 U.S.C. § 1983 —
FOURTEENTH AMENDMENT
(PROCEDURAL DUE PROCESS)
AGAINST DEFENDANTS EUBANKS
AND STANTON
(INTEREST)

113. The previous allegations are re-alleged word for word herein.

114. Count IV is pled in the alternative to Count III.

115. Under Michigan's law, there is an established property right regarding the monies (as property) held as part of the UPP as belonging to Plaintiff and members of the Class.

116. Plaintiff and the class members have a private property right in their monies (as property) even while held as part of the UPP.

117. As such, Plaintiff and the class members have property interest that triggers a procedural due process requirement.

118. Plaintiff and the class members received no (and thus insufficient) process when said monies were seized and used by the government.

119. When Defendants RACHAEL EUBANKS and TERRY STANTON caused, allowed, authorized, and/or acquiesced the seizure and spending of Plaintiff's and the class members' property, Plaintiff and the class members were deprived of their property rights without notice or the opportunity to be heard.

120. Plaintiff and the class members were not afforded timely and adequate process under law, namely that no notice was afforded and no opportunity for hearing was provided before the deprivation of the class members' property.

121. Defendants failed to provide required and/or sufficient due process as mandated by the Fourteenth Amendment in the form of a pre-deprivation hearing before the property rights of Plaintiff and the class members were taken from them.

122. There is extreme risk of erroneous deprivation of private property as well as actual deprivation of private property due to the non-existence of any constitutionally sufficient due process procedures.

123. There is insufficient level of any governmental burden to not provide a sufficient due process procedure.

124. As for Defendants RACHAEL EUBANKS and TERRY STANTON sued in his/her personal capacity, each purposely, recklessly, and with wanton disregard for the federal rights of Plaintiff and the class members, inflicted harmed in violation of the Fourteenth Amendment.

125. Plaintiff and the class members have been damaged as a result of Defendants' violation of their rights under the United States Constitution.

JURY DEMAND

126. A jury is demanded for all triable issues.

RELIEF REQUESTED

127. WHEREFORE, Plaintiff and/or the Class Members respectfully request this Court to—

a. Enter an order certifying this case as a class action;

b. Award all forms of damages, directing under the Fifth Amendment, related to the failure of Defendant STATE OF MICHIGAN to provide just compensation for its violations of the Fifth Amendment to the United States Constitution;

c. Award all forms of damages, including (but not limited to) punitive damages, pursuant to 42 U.S.C. § 1983, when Defendants RACHAEL EUBANKS and TERRY STANTON deprived Plaintiff and class members of their rights to just compensation under Fifth Amendment to the United States Constitution;

d. Award all forms of damages, including (but not limited to) punitive damages, pursuant to 42 U.S.C. § 1983, related to the failures of Defendants RACHAEL EUBANKS and TERRY STANTON to provide sufficient due process and having acted in direct violation of the Fourteenth Amendment to the United States Constitution;

e. Award interest on said damages;

f. Award and/or determine reasonable attorney fees and litigation expenses pursuant to all applicable laws, rules, or statutes, including under Rule 23 and 42 U.S.C. § 1988; and

g. Enter an order for all such other relief the court deems proper, equitable and required, see e.g. FRCP 54(c).

Date: February 3, 2022

RESPECTFULLY SUBMITTED:

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Attorneys for Plaintiff

No. _____

In the
Supreme Court of the United States

DENNIS O'CONNOR,
Petitioner,

v.

RACHEL EUBANKS, in her personal capacity;
TERRY STANTON, in his personal capacity;
STATE OF MICHIGAN,
Respondents.

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

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the PETITION FOR WRIT OF CERTIORARI contains 8,984 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 26, 2024.

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AFFIDAVIT OF SERVICE

SUPREME COURT OF THE UNITED STATES

No. _____

----------X

DENNIS O'CONNOR

PETITIONER,

V.

RACHAEL EUBANKS, in her personal capacity;
TERRY STANTON, in his personal capacity;
STATE OF MICHIGAN,

RESPONDENTS.

----------X

STATE OF NEW YORK)

COUNTY OF NEW YORK)

I, Darian J. Girard, being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

I am retained by Counsel of Record for *Petitioner.*

That on the 26th day of April, 2024, I served the within PETITION FOR WRIT OF CERTIORARI in the above-captioned matter upon:

Attorneys for Respondents
Ann M. Sherman, Solicitor General
B. Thomas Golden, Assistant Attorney General
Brian Kenneth McLaughlin, Assistant Attorney General
James Alan Ziehmer, Assistant Attorney General
Office of the Attorney General of Michigan
P.O. Box 30754
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ziehmerj@michigan.gov
Party name: Rachael Eubanks, Terry Stanton, and State of Michigan

by sending three copies of same through USPS Priority Mail.

That on the same date as above, I sent to this Court forty copies of the within PETITION FOR WRIT OF CERTIORARI through FedEx Priority Overnight Mail, postage prepaid.

All parties required to be served have been served.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 26th day of April, 2024.

Darian J. Girard

Sworn to and subscribed before me this 26th day of April, 2024.

MARIANA BRAYLOVSKIY
Notary Public State of New York
No. 01BR6004935
Qualified in Richmond County
Commission Expires March 30, 2026

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