CA NO. [redacted]

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IN THE

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Client INC.
Plaintiff – Appellant

v.

COMMONWEALTH OF KENTUCKY, ET AL.
Defendants - Appellees

On Appeal from the United States District Court
for the Eastern District of Kentucky
Case No. [redacted]

BRIEF OF APPELLANT

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ORAL ARGUMENT REQUESTED

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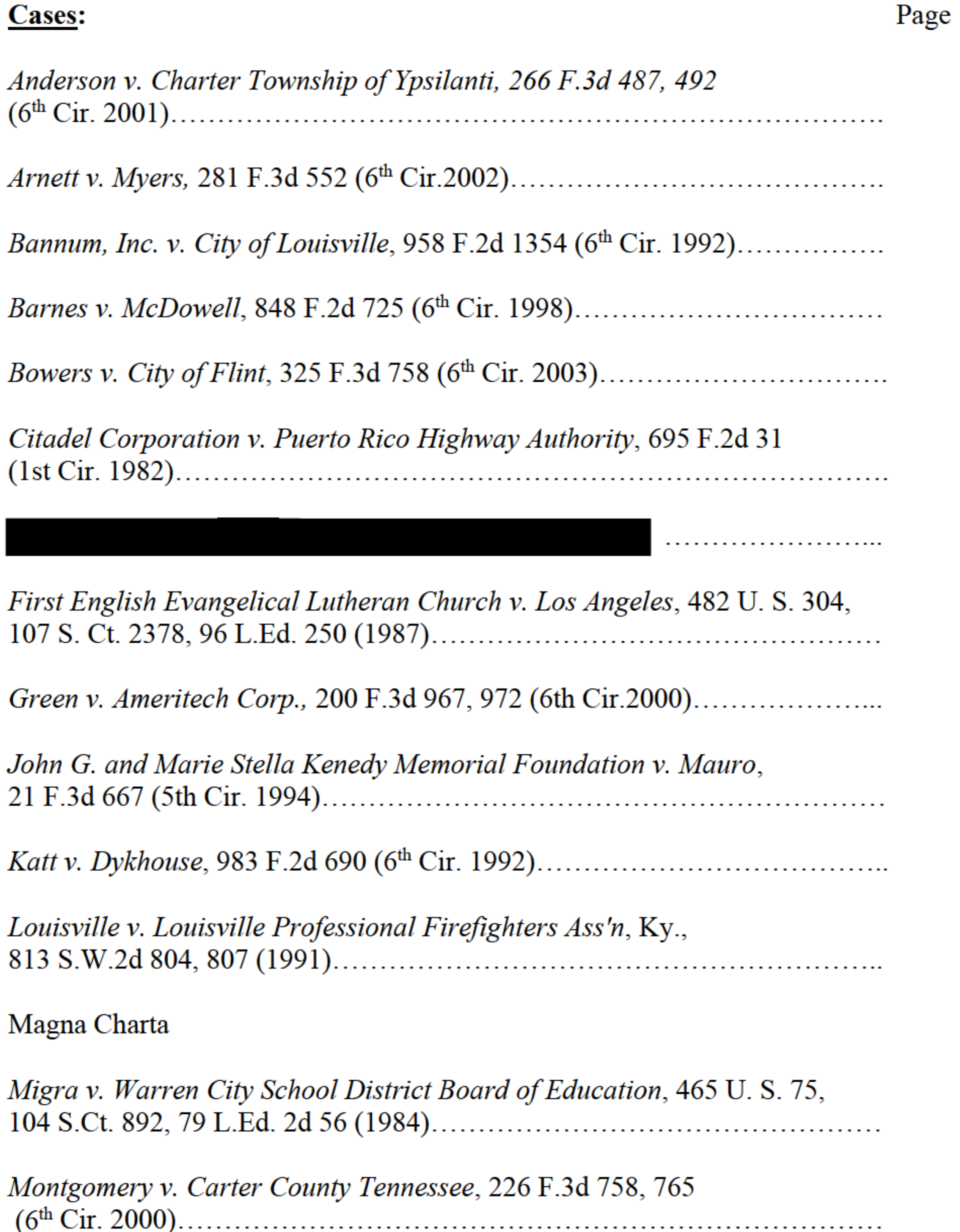

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Oral argument is appropriate because this case involves subtle and important issues of federal constitutional law. Oral argument will assist the Court in clarifying issues and answering questions that may not be fully addressed in the briefs.

JURISDICTIONAL STATEMENT

A. District Court Jurisdiction

The District Court had jurisdiction of this action pursuant to 28 U.S.C. §§ 1331 and 1343. This action involves the claim of Appellant, Client Inc. (“Client against the Appellees, the Commonwealth of Kentucky, the Kentucky Natural Resources and Environmental Protection Cabinet (the “Cabinet”), and the Secretary of the Cabinet, in his official capacity (all of whom are referred to hereinafter together as the “Commonwealth”). Client seeks compensation from the Commonwealth for a taking of property without just compensation. The action arises under the Constitution and laws of the United States, including the Takings Clause of the United States Constitution (amend. V), the Due Process Clause of the United States Constitution (amend. XIV), and 42 U.S.C. § 1983.

B. Court of Appeals Jurisdiction

This Court has jurisdiction over the appeal pursuant to 28 USC §1291. This is an appeal from the final decision of the United States District Court for the Eastern District of Kentucky granting the Commonwealth’s motion to dismiss.

C. Filing Dates

The District Court's Memorandum Opinion & Order dismissing the claims of Client for lack of jurisdiction, was entered March 24, 2003. (R. 12 Memorandum Opinion & Order, Apx. pg. ____.) Client filed its Notice of Appeal on April 21, 2003. (R. 13 Notice of Appeal, Apx. pg. ___.)

D. Final Order

The District Court's Memorandum Opinion & Order is a final order that disposes of all parties' claims.

STATEMENT OF THE ISSUES

I. Is the *Rooker/Feldman* doctrine a jurisdictional bar to the Client claims?

II. Did the District Court correctly apply the second *Williamson* ripeness requirement?

III. Do any other grounds exist which can form a basis for affirming the District Court's decision? In particular:

A. Was the Commonwealth's permit decision sufficiently "final" to satisfy the first *Williamson* ripeness requirement?

B. Are the Client claims barred by res judicata?

C. Are the Client claims barred by the Eleventh Amendment?

STATEMENT OF THE CASE

Client claim arises out of the denial by the Cabinet of the Client application for a permit to mine coal, by underground mining methods, beneath the Woods (the "Woods") in County, Kentucky.

Client petitioned for review of the permit denial and a lengthy administrative hearing on the Client petition for review was held. After the hearing, the hearing officer recommended that the denial of the Client permit application be affirmed. The Secretary of the Cabinet adopted the hearing officer's report and recommendations and affirmed the denial of the permit application.[1] Client did not appeal the final Order of the Secretary, but instead filed a claim, in the Franklin County Kentucky Circuit Court, for compensation under the takings clause of the Kentucky Constitution. The circuit court dismissed the Client claims because it found that appeal of the final agency order (pursuant to KRS 350.0305) was a prerequisite to the bringing of a claim for compensation pursuant to §242 of the Kentucky Constitution.

The Kentucky Court of Appeals reversed the trial court, but the Kentucky Supreme Court reversed the decision of the Court of Appeals and held "Client

[1] A copy of the Secretary's Order and the Hearing Officer's Report and Recommendations are attached as Appendix C to the Commonwealth's Memorandum of Law in Support of Motion to Dismiss. (R.5 Memorandum in Support of Motion to Dismiss, Apx. pg. ___).

failure to exhaust its administrative remedies by failing to appeal the Secretary's Order, deprived the Franklin Circuit Court of subject-matter jurisdiction to hear Client takings claim."

Client then filed this action in the Eastern District of Kentucky on April 25, 2002, claiming that the action of the Commonwealth: (a) constituted a taking of property for which Client is entitled to just compensation under the Fifth and Fourteenth Amendments of the United States Constitution, (b) violated Client right to due process as secured by the Fifth and Fourteenth Amendments of the United States Constitution, and (c) constituted a violation of 42 U.S.C. § 1983. (R. 1 Complaint, pp. 4-5, Apx. pg. ___),

Prior to filing an answer and before the taking of any discovery, the Commonwealth moved to dismiss the complaint and raised four issues which it claimed deprived the District Court of subject-matter jurisdiction: (1) sovereign immunity under the Eleventh Amendment to the United States Constitution; (2) ripeness; (3) exhaustion of administrative remedies; and (4) res judicata and the *Rooker/Feldman* doctrine. (R. 5 Motion to Dismiss, pp. 1-2, Apx. pg. ____.) On March 24, 2003, the District Court entered its Memorandum Opinion & Order dismissing the Client claims. (R. 12 Memorandum Opinion & Order, Apx. pg. ___.) The District Court ruled that it lacked jurisdiction under the *Rooker/Feldman* doctrine and that the Client takings claims were not ripe. (R. 12 Memorandum

Opinion & Order, pp. 9-10, Apx. pg. ___). The District Court did not address the Commonwealth's other arguments. This appeal followed.

STATEMENT OF THE FACTS

The basic disagreement between Client and the Commonwealth over the issuance of the mining permit concerned the required distance under the surface of the Woods the Client mining could occur (referred to as the vertical cover requirement). (R. 5. Memorandum in Support, pp. 4-5, Apx. pg. ___; R. 8 Response to Motion to Dismiss, pp. 3-4, Apx. pg. ___.) In this mountainous region, a greater vertical cover requirement translates into a smaller amount of coal which can be mined. At the two extremes, if no vertical cover is required (as with mountaintop removal mining), theoretically all of the coal can be mined; if the required vertical cover is equal to the height of the mountain, no coal can be mined.

Client submitted a number of permit applications with greater and greater proposed vertical cover for its mining. Client proposed, and then withdrew, a revision to its permit application which would have left a 250-foot vertical cover because (among other reasons) it determined that the 250-foot vertical cover requirement would render the remaining coal economically unmineable. (R. 8 Response to Motion to Dismiss, Appendix 2 HT Vol 1 pp. 45-46, Apx. pg. ___.[2]) The last Client permit application called for a vertical cover of 110 feet. This

[2] Appendix 2 to the Client Response to Motion to Dismiss is a collection of excerpts from the transcript (hereinafter referred to as "HT") of the testimony during the administrative hearing on the permit denial.

application was denied. (R. 5. Memorandum in Support, pp. 4-5, Apx. pg. ___; R. 8 Response to Motion to Dismiss, pp. 3-4, Apx. pg. ___.) The Hearing Officer's Report and Recommendations characterized the final Client application as its fifth submittal. (R.5 Memorandum in Support of Motion to Dismiss, Appendix C at p. 4, Apx. pg. ___.)

The Client Complaint in the District Court (R. 1) included the claims that: (1) the Client mining would be conducted through existing mine openings without new mine entries in the Woods (R. Complaint, pp. 2-3, Apx. pg. ___), (2) the protections of the hydrological consequences of the mining built into the permit application were at least as extensive as those provided for mining under adjacent properties (R. Complaint, pg. 3, Apx. pg. ___), (3) the Commonwealth had no legal authority to treat mining under the Woods differently than mining under other properties (R. Complaint, pg. 3, Apx. pg. ___), (4) the Commonwealth produced no evidence that mining would harm the Woods (R. Complaint, pg. 3, Apx. pg. ___), and (5) Client produced considerable evidence that mining would not harm the Woods (R. Complaint, pg. 3, Apx. pg. ___). The Complaint alleged that the Commonwealth's actions were a complete taking of Client property, leaving Client without any rights with respect to its coal (R. Complaint, pg. 4, Apx. pg. ___). The Complaint also alleged that Client sought compensation in the state courts but was denied relief (R. Complaint, pg. 4, Apx. pg. ___).

SUMMARY OF ARGUMENT

I. INTRODUCTION

The District Court determined that it had no subject-matter jurisdiction with respect to the [Client] taking claims because it determined that: (1) the *Rooker/Feldman* doctrine applied to this case, and (2) [Client] had not satisfied the second ripeness requirement established in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 105 S. Ct. 3108, 87 L.Ed. 2d 126 (1985) (because [Client] did not exhaust its state law compensation remedies). These issues are addressed below, but because this Court may affirm the District Court on any grounds supported by the record, this brief also addresses the other arguments made by the Commonwealth.

II. THE *ROOKER/FELDMAN* DOCTRINE IS NO BAR TO THE [Client] CLAIMS

The District Court incorrectly concluded that the federal claims asserted by [Client] are identical to the claims asserted in the state courts and then incorrectly concluded that its adjudication of the [Client] federal takings claims would amount to the District Court hearing an appeal of the decision of the state courts to dismiss the state claims. The state courts dismissed the [Client] state law claims on state law grounds; they did not rule on the merits of any fact necessary to establish the [Client]

federal claims and did not make any rulings on federal law. The District Court will not be called upon to second-guess any state court/state law findings of fact or conclusions of law and, consequently, the *Rooker/Feldman* doctrine is not applicable.

III. THE DISTRICT COURT DID NOT CORRECTLY APPLY THE SECOND *WILLIAMSON* RIPENESS REQUIREMENT

In order for the Client regulatory takings claim to be "ripe" in federal court: (1) the relevant agency must have reached a final decision, and (2) Client must have sought and been denied compensation through appropriate state procedures. The District Court did not address the first requirement because it found that Client had not satisfied the second requirement. This determination was incorrect. Client has no other avenue available through the Kentucky courts or agencies in which to seek compensation for its property. The Kentucky Supreme Court has determined that the failure of Client to exhaust its administrative appeals of the permit denial means that the Kentucky state courts have no jurisdiction to hear Client claims. On the other hand, this Court has held on a number of occasions that there is no requirement under federal law that a plaintiff exhaust its administrative appeal remedies before bringing a federal regulatory takings claim. *See*, *Bowers v. City of Flint*, 325 F.3d 758 (6th Cir. 2003); *Montgomery v. Carter County Tennessee*, 226 F.3d 758 (6th Cir. 2000); *Arnett v. Myers,* 281 F.3d 552 (6th Cir.2002).

IV. NO OTHER GROUNDS EXIST FOR AFFIRMING THE DISTRICT COURT

A. The Permit Denial Decision Was Sufficiently "Final" To Satisfy The First *Williamson* Ripeness Requirement

The Commonwealth argued below that Client did not satisfy the first *Williamson* ripeness requirement because it did not submit enough applications. According to the Commonwealth, the agency decision was not "final," in other words, because Client might have submitted a permit application which was acceptable to both the Commonwealth and to Client This argument is incorrect factually and incorrectly interprets the finality requirement. The Commonwealth made the same argument which was made by the state of Rhode Island and rejected by the Supreme Court in *Palazzolo v. Rhode Island*, 533 U.S. 606, 121 S. Ct. 2448, 150 L.Ed.2d 592 (2001)("Ripeness doctrine does not require a landowner to submit applications for their own sake." 533 U.S. at 622.).

B. The Client Claims Are Not Barred By Res Judicata.

Federal courts must generally give state court judgments the same preclusive effect as those judgments would have in the state's own courts. *Migra v. Warren City School District Board of Education*, 465 U. S. 75, 104 S.Ct. 892, 79 L.Ed. 2d 56 (1984). The Commonwealth argued below that the state court dismissal of the Client state claims for lack of subject-matter jurisdiction precluded Client from

bringing its federal takings claims in federal court. However, in Kentucky, a claim is precluded by prior litigation only if the claim was: (1) actually litigated, (2) on the merits. Client federal takings claim was not actually litigated in the Kentucky courts. In fact, Client had no federal takings claim until the state courts denied compensation. Moreover, no Client claim or issue, state or federal, was litigated "on the merits." Kentucky law makes clear that a dismissal for lack of jurisdiction is not a decision "on the merits" for claim preclusion purposes.

C. The Eleventh Amendment Does Not Bar The Client Claims.

The Commonwealth argued below that the Client Fifth Amendment takings claims are barred by the Eleventh Amendment. While there does not appear to be any Supreme Court decision directly on point, many academic commentators think that the decision in *First English Evangelical Lutheran Church v. Los Angeles*, 482 U. S. 304, 107 S. Ct. 2378, 96 L.Ed. 250 (1987) clearly indicates the Supreme Court's view that the Eleventh Amendment does not apply to bar Fifth Amendment takings claims against a state. That is the only conclusion to be drawn from the decision in *Palazzolo v. Rhode Island*, 533 U.S. 606, 121 S. Ct. 2448, 150 L.Ed.2d 592 (2001), a case in which the "judicial power of the United States" was applied (favorably to the takings claimant) to a takings case prosecuted by a citizen against his own state (Rhode Island). This Court has also held that the Eleventh

Amendment does not bar Fifth Amendment takings claims. *Arnett v. Myers,* 281 F.3d 552 (6th Cir.2002).

The Supreme Court's recent Eleventh Amendment decisions have been severely criticized in the academic literature as unfaithful to the text, unfair, arbitrary, and irrational. On the other hand, the protection of private property has a long and respectable pedigree. Moreover, modern scholars think those protections have been essential to the freedom and prosperity of the West. This Court should not expand the scope of the Eleventh Amendment or limit the scope of the Fifth and Fourteenth Amendments.

APPLICABLE STANDARD OF REVIEW

The District Court's conclusion that it lacked subject-matter jurisdiction is to be analyzed under a de novo standard of review. *See Anderson v. Charter Township of Ypsilanti, 266 F.3d 487, 492 (6th Cir. 2001); Green v. Ameritech Corp.,* 200 F.3d 967, 972 (6th Cir.2000).

ARGUMENT

I. INTRODUCTION.

The Memorandum Opinion & Order addressed at some length the question of whether the Client due process claims are subject to the same ripeness requirements as its taking claims. (R. 12 Memorandum Opinion & Order, pp. 4-8, Apx. pg. ___.) The District Court answered that question affirmatively and then addressed the critical issues in only two paragraphs. (R. 12 Memorandum Opinion & Order pp. 9-10, Apx. pg. ___.)

In the first dispositive paragraph of the Memorandum Opinion & Order the court cited only *Anderson v. Charter Township of Ypsilanti*, 266 F.3d 487 (6th Cir. 2001) for the proposition that "[b]ecause the federal claims asserted by Client are identical to the claims adjudicated in state court, this Court lacks jurisdiction under the *Rooker/Feldman* doctrine." (R. 12 Memorandum Opinion & Order, pg. 10, Apx. pg. ___.)

In the second dispositive paragraph of its opinion, the District Court found that "Client has not yet been denied just compensation because its state complaint was dismissed for lack of subject-matter jurisdiction." (R. 12 Memorandum Opinion & Order, pg. 10, Apx. pg. ___.) The District Court then cited only *Williamson* for the proposition that "[u]ntil Client has been denied just

compensation through the procedures Kentucky has provided, its federal claims are not ripe." (R. 12 Memorandum Opinion & Order, pg. 10, Apx. pg. ___.)

These two issues are addressed below in Parts II and III of the Argument.

This Court may affirm the District Court on any grounds supported by the record. *See Peterson Novelties, Inc. v. City of Berkley*, 305 F.3d 386, 394 (6th Cir. 2002); *Russ' Kwik Car Wash, Inc. v. Marathon Petroleum Co.*, 772 F.2d 214, 216 (6th Cir. 1985). Consequently, Part IV of the Argument below demonstrates that the additional arguments made by the Commonwealth in support of its Motion to Dismiss are not sound and cannot, therefore, provide a basis for affirming the District Court.

II. THE *ROOKER/FELDMAN* DOCTRINE IS NO BAR TO THE Client CLAIMS.

The District Court correctly noted that the doctrine " stands for the proposition that a federal district court may not hear an appeal of a case already litigated in state court." (R. 12 Memorandum Opinion & Order p. 9, Apx. pg. ___.) However, the Client case is not an appeal from the state court decision. It does not ask the federal courts to reverse any state court ruling of law or finding of fact. The Kentucky Supreme Court determined that, in Kentucky, in order to bring a takings claim under Section 242 of the Kentucky Constitution based on administrative action, plaintiffs must first appeal the administrative decision. That

is now the law in Kentucky.[3] This Court cannot change Kentucky law and is not being asked to review Kentucky law. No such review is necessary to resolve this case.

Anderson, supra, provides no help to the Commonwealth's cause. At bottom, *Anderson* is no more than an issue preclusion case. The *Anderson* Court's description of the doctrine included the following:

> Where federal relief can only be predicated upon a conviction that the state court was wrong, it is difficult to conceive the federal proceeding as, in substance, anything other than a prohibited appeal of the state-court judgment.

Id. at 492-493. (Quoting from *Pennzoil Co. v. Texaco, Inc*. 481 U.S. 1, 25, 107 S.Ct. 1519, 95 L.Ed.2d 1 (1987)). The Court went on to note that issue was "whether the district court's conclusions regarding Anderson's federal-takings claim place it in the position of evaluating the merits of the state trial court's decision." *Id*. at 493.

To make a long story short, in *Anderson* the plaintiff (Anderson) filed state and federal takings claims in state court. The Township removed the case to federal court. Anderson moved the federal court to remand the state claims (and only the state claims) and the court did so using a *Pullman* abstention rationale.

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[3] Exhaustion of administrative appeal remedies prior to bringing constitutional challenges to agency action was not required in Kentucky prior to [redacted] [redacted] (dissenting opinion of Justice [redacted], in which Chief Justice [redacted] joined).

The federal court retained jurisdiction over the federal claims and stayed further proceedings pending the outcome of the state claims. Anderson lost at trial on the state claims and then sought to revive his federal claims in federal court. The district court dismissed the claims, finding that the *Rooker/Feldman* doctrine deprived it of jurisdiction. This Court affirmed the district court, but only after a very careful analysis of Michigan takings law. The Court determined that the required factual elements of a taking claim were the same under Michigan law as under federal law. Since the Michigan courts must necessarily have found against Anderson on some or all of those factual elements, the Court quite reasonably found that a federal takings claim would necessarily involve review of state court findings. The *Anderson* case is, in essence, a straight-forward issue preclusion case.

This Court's more recent decision in *Peterson Novelties, Inc. v. City of Berkley*, 305 F.3d 386, 394 (6th Cir. 2002) is more instructive. The case involved a fireworks retailer (Peterson) who obtained a state court temporary restraining order requiring the City to issue a permit for the sale of fireworks. Some time after the order was issued, a city detective seized allegedly illegal fireworks and arrested several Peterson employees. The state court held a show cause hearing during which it heard evidence. As a result of the hearing, the state court held that Peterson could continue its business, but did not find the City in contempt.

Peterson then filed a complaint in federal court alleging, among other things, violations of the First, Fourth, Fifth and Fourteenth Amendments. The district court dismissed the complaint, finding that the federal claims were precluded by *Rooker/Feldman,* because the federal issues were "inextricably intertwined" with issues presented to the state court. The district court ruled that "Rooker-Feldman applies when an issue was raised and adjudicated in a prior state court proceeding and when claims made in federal court 'arise out of the very same incidents' that gave rise to an earlier state court adjudication." *Id*. at 391. This Court rejected that reasoning and found that the district court's application of *Rooker/Feldman* was in error.[4] The *Peterson* Court determined that the state court's ruling after the show cause hearing did not address the illegality of the City's actions. The state court opinion "merely reaffirms the validity of the court's earlier order while silently refusing to hold the City in contempt of that order." *Id*. at 392. This Court then ruled that:

> [T]he district court in the present case could give Peterson relief on its federal claims without effectively finding that the state court wrongly decided any issues before it. For this reason, the Rooker-Feldman doctrine does not apply to bar the court's consideration of Peterson's claims based on the state court's 1996 order.

Id.

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[4] This Court did, however, affirm the dismissal of Peterson's claims on other grounds.

In the course of its opinion, the *Peterson* panel discussed an unpublished decision that is directly on point:

> There is an unpublished case of this circuit that is similarly instructive. In that case, this court vacated a district court's application of the *Rooker-Feldman* doctrine in a situation where a plaintiff had filed in state court a suit alleging improper conduct by a city, and the state court relied on a procedural matter to refuse to consider the propriety of the city's conduct. *See Wojcik v. City of Romulus,* No. 97-2236, 1999 WL 238662, at *2 (6th Cir. April 13, 1999). In that circumstance, **this court held that the plaintiffs were not effectively seeking review of the state court decision, because the state court did not consider the relevant issue**.

Peterson, supra, at 393. (Emphasis supplied.) Here, as in *Wojcik*, the state court relied on a procedural matter to refuse to consider the propriety of the government's conduct.

The case presented by Client is entirely different than *Anderson, supra*, and much more like *Peterson, supra*, and *Wojcik, supra*. The District Court will not be called upon to second-guess any state court findings of fact or conclusions of law. This case cannot be characterized as an appeal of the state court decisions on Client state law claims and, consequently, the *Rooker/Feldman* doctrine is not applicable. The District Court was incorrect in its determination that the *Rooker/Feldman* doctrine bars the Client claims.

III. THE DISTRICT COURT DID NOT CORRECTLY APPLY THE *SECOND WILLIAMSON* RIPENESS REQUIREMENT.

This Court has explained that:

> [A] plaintiff must demonstrate two things for a regulatory taking claim to be ripe: (1) that "the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue;" and (2) that if the state had a "reasonable, certain and adequate provision for obtaining [just] compensation ... at the time of the taking," just compensation was sought and denied through that procedure.

Arnett v. Myers, 281 F.3d 552, 562 (6th Cir.2002), citing *Williamson,* 473 U.S. at 186, 194, 105 S.Ct. at 3116, 3120. The Commonwealth argued below that Client satisfied neither of these two ripeness requirements.[5] (R. 5 Memorandum in Support of Motion to Dismiss, pp. 10-18, Apx. pg. ___.) However, the District Court's ripeness determination was based on a finding only that Client had failed to satisfy the second requirement:

> [T]here has been no showing by Client that Kentucky does not provide an adequate procedure for seeking just compensation. Moreover, Client has no yet been denied just compensation because its state complaint was dismissed for lack of subject-matter jurisdiction. . . . Until Client has been denied just compensation through the procedures Kentucky has provided, its federal claims are not ripe."

R. 12 Memorandum Opinion & Order pg. 10, Apx. pg. ____.

The District Court provided no further explanation for its ripeness decision, but its decision can rest on only two possible foundations. Either (1) the District

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[5] The Commonwealth's arguments respecting the "finality" prong of the ripeness requirement are addressed in Part IV below.

Court determined that there is still some state court or administrative agency in which Client may seek compensation, or (2) the District Court determined that federal takings law has the same exhaustion of administrative remedies requirement as was imposed for the first time in Kentucky by the Kentucky Supreme Court decision in [redacted] Neither of these possible foundations can support the District Court decision.

The Kentucky Supreme Court determined that the Franklin Circuit Court did not have jurisdiction to hear the Client takings claim. [redacted]. This was not a dismissal without prejudice and it did not leave open the possibility that Client could properly bring its takings claims in any other Kentucky state court. At the time of the Kentucky Supreme Court's decision, Client had already been denied the opportunity to raise its constitutional takings claims in the administrative proceedings. [redacted] ([redacted] dissent). Moreover, Client cannot now appeal the permit denial because the applicable statute, KRS 350.0305, requires that such appeals be taken within thirty days of the entry of the final agency order – November 3, 1995. (R. 5 Memorandum in Support of Motion to Dismiss, Appendix C, Apx. pg. ___.) Client now has no place to go, other than federal court, to prosecute its takings claims. Consequently, it has satisfied the second ripeness element; it has exhausted its state court efforts to receive compensation.

The second possible foundation for the District Court's decision is almost as easily disposed of. This Court has repeatedly held, consistently with the holding in *Williamson*, that while agency finality and exhaustion of state **compensation** remedies are required for ripeness, exhaustion of state administrative appeal remedies is not. The decision of this Court in *Arnett, supra*, is directly on point. In that case, the plaintiffs brought due process, equal protection, and takings claims because of the destruction of plaintiffs' duck blinds and use restrictions placed on the plaintiffs' property in Reelfoot Lake. In response to the defendants' argument that the plaintiffs were required to exhaust their administrative remedies under the Tennessee Uniform Administrative Procedures Act before bringing their federal constitutional claims, this Court found simply that:

> The Arnetts were not required to exhaust these administrative remedies for their claims to be ripe in federal court.

Arnett, supra, at 563 fn2.

This point was addressed at length very recently in *Bowers v. City of Flint*, 325 F.3d 758 (6th Cir. 2003). That case was brought by citizens claiming that the City of Flint violated their rights by failing to implement a city ordinance which required certain discounts on city water and sewer bills. The citizens filed their claims (including a due process claim under 42 U.S.C.§1983) in state court. The lawsuit was removed to federal court and the district court remanded the state law claims and granted summary judgment on the federal claim. This Court affirmed

the district court, but its discussion of the ripeness requirements included the following explanation of the difference between “finality” (which is required) and “exhaustion” (which is not required):

> We begin by noting the distinction between exhaustion and finality. **Exhaustion**, the Supreme Court has held, "generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate," and **is not required before a plaintiff may bring a suit predicated upon 42 U.S.C. § 1983.** *Williamson County Reg'l Planning Com'n v. Hamilton Bank,* 473 U.S. 172, 193, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985). Finality, on the other hand, "is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury...." *Id.*
>
> Whether finality is required in any given case depends upon the type of harm alleged: "If the injury the [plaintiffs] seek to redress is harm to their property amounting to a 'deprivation' in constitutional terms, a final judgment is required; however, if the injury is the infirmity of the process, neither a final judgment nor exhaustion is required." *Hammond v. Baldwin,* 866 F.2d 172, 176 (6th Cir.1989). In other words, a due process challenge brought under § 1983 to an allegedly unconstitutional procedure is not subject to a finality requirement, while **a claim alleging harm or deprivation of property "is substantive and, so, a final judgment (but not exhaustion) is required**." *Id.; see also Macene v. MJW, Inc.,* 951 F.2d 700, 704 (6th Cir.1991) ("In order to make a § 1983 claim for a taking without just compensation, a plaintiff must have attempted to obtain compensation through established state procedures. This is not technically an exhaustion requirement but is a product of the ripeness doctrine.").

Bowers, supra, at 762 (emphasis supplied). See, also, *Montgomery v. Carter County Tennessee*, 226 F.3d 758, 765 (6th Cir. 2000)(“The requirement that takings claims be ripe, however, is not the same as an exhaustion requirement.”)

These decisions are consistent with *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 105 S. Ct. 3108, 87 L.Ed. 2d 126 (1985), which held clearly that "[e]xhaustion of review procedures is not required." *Williamson, supra*, at fn.13. (Emphasis supplied.)

Client has exhausted all its available state court compensation remedies and exhaustion by Client of administrative review of the Commonwealth's permit denial was not required. The District Court wrongly determined that the Client claims are not ripe.

IV. NO OTHER GROUNDS EXIST FOR AFFIRMING THE DISTRICT COURT

A. **The Permit Denial Decision Was Sufficiently "Final" <u>To Satisfy The First Ripeness Element</u>.**

The Commonwealth argued below that the permit denial decision was not sufficiently final to satisfy the first ripeness requirement because, although Client submitted a number of applications which were denied, Client might have submitted an application which the Cabinet would have granted. However, submittal of an additional (sixth) application would have been futile. The Cabinet reviewer, Mr. testified that he would not have recommended approval of a permit with a vertical barrier of less than 250 feet. During the administrative hearing, Mr. was asked the following question and gave the following answer:

Q: **. . . . [B]ased on the data that you did have, it is fair to say that you would not have approved a permit that left only a 240-foot vertical cover isn't it?**

A: **Yes.**

(R. 8 Response to Motion to Dismiss, Appendix 2, HT Vol. VII, p. 139. Apx. pg. ___.)

Where, as here, an additional application for a variance would have been futile, the filing of the futile application will not be a jurisdictional prerequisite to the filing of a takings claim. *See Bannum, Inc. v. Louisville*, 958 F.2d 1354 (6th Cir. 1992)(applying the *Williamson* ripeness requirements to an equal protection claim).

The Supreme Court ruling on ripeness in *Palazzolo v. Rhode Island*, 533 U.S. 606, 121 S. Ct. 2448, 150 L.Ed.2d 592 (2001), is instructive. The ripeness arguments made by the state and rejected by the Supreme Court in *Palazzolo* are strikingly similar to the arguments made by the Commonwealth. Mr. Palazzolo wanted to develop coastal property by filling certain wetlands. He filed two proposals with the Rhode Island Coastal Resources Management Council (the state agency created to protect the state's coastal properties), one to fill the entire parcel and the second to fill 11 of the property's 18 acres. When these proposals were rejected, Mr. Palazzolo filed his takings claim in state court. The state trial court,

and state appellate courts, rejected Mr. Pallozolo's claim as unripe. In the United States Supreme Court the state argued that:

> [W]hile the Council rejected petitioner's effort to fill all of the wetlands, and then rejected his proposal to fill 11 of the wetland acres, perhaps an application to fill (for instance) 5 acres would have been approved. Thus the reasoning goes, we cannot know for sure the extent of permitted development on petitioner's wetlands.

533 U.S. at 619. The court rejected this argument and held:

> Ripeness doctrine does not require a landowner to submit applications for their own sake. Petitioner is required to explore development opportunities on his upland parcel only if there is uncertainty as to the land's permitted use.

Id. at 622. Here, Client was not required to submit permit applications for their own sake. Once it was clear that the minimum vertical cover required by the Cabinet would be 250 feet, Client had satisfied the first element of the *Williamson* ripeness requirement.

B. The Client Claims Are Not Barred By Res Judicata.

The Commonwealth below cited *Migra v. Warren City School District Board of Education*, 465 U. S. 75, 104 S.Ct. 892, 79 L.Ed. 2d 56 (1984), for the proposition that "[t]he Kentucky Supreme Court opinion provides preclusive effect for every claim made in this federal action." R. Memorandum in Support of Motion to Dismiss pg. 26, Apx. pg. ___. *Migra* requires, in most cases, that federal courts give the same preclusive effect to state court judgments as those

judgments would have in other state courts. *Migra* does not bar the Client federal takings claims.

Migra was primarily an employment and First Amendment case. Mrs. Migra was employed by the Warren (Ohio) board of education. Her contract was orally renewed for the 1979-1980 school year and then promptly terminated by the board. Ms. Migra brought suit in state court against the board and its members, alleging breach of contract and wrongful interference with contract by the individual board members. After a bench trial, the state court reserved judgment on the wrongful interference, but found for Ms. Migra and awarded her reinstatement and compensatory damages. Subsequent to the state court judgment, Ms. Migra filed a federal action claiming that she had been fired for exercising her First Amendment rights (as director of a commission appointed to craft a desegregation plan for the schools). She also claimed that she was deprived of property and denied equal protection, but these claims were not addressed separately by the Supreme Court. The defendants moved for summary judgment on the grounds that the state court judgment was a bar to the federal claims and the district court granted summary judgment and dismissed the complaint. The court of appeals affirmed the dismissal. The Supreme Court found the critical question to be whether " the preclusive effect of a state-court judgment might be different as to a federal issue that a § 1983 litigant **could have raised** but did not raise in the

earlier state court proceeding." 465 U. S. at 83 (emphasis supplied). The Court answered the question in the following language:

> We hold, therefore, that petitioner's state-court judgment in this litigation has the same preclusive effect in federal court that the judgment would have in the Ohio state court.

465 U.S. at 85. The Supreme Court vacated the court of appeals decision and remanded the case to the district court with directions that the court interpret Ohio preclusion law and apply it to Ms. Migra's case.

The Commonwealth's res judicata argument was fatally flawed – whether federal or state law is applied. The Client federal takings claim was not ripe until it had sought compensation in the state courts and been denied. Client had no federal claim, in other words, which it "could have raised" until the Kentucky Supreme Court decided that Client had no right to seek compensation in the state courts. The Commonwealth argued below that Client has no claim, and never had a claim, because its claim was never ripe and, at the same time, argued that Client had a federal claim that it could have raised in the state court. Both arguments may be (and are) wrong, but both arguments cannot be right. The decision of this Court on this point in *Katt v. Dykhouse*, 983 F.2d 690 (6th Cir. 1992) is controlling. The Court there found that the plaintiff's first amendment claims, which were not ripe at the time of a related state court action, were not barred by res judicata.

The most recent Kentucky Supreme Court case cited by the Commonwealth on res judicata was *Yeoman v. Commonwealth*, Ky., 983 S.W.2d 459 (1998). The court there listed the elements necessary for the application of claim preclusion:

> For claim preclusion to bar further litigation, certain elements must be present. First, there must be identity of the parties. [Citation omitted.] Second, there must be identity of the causes of action. [Citation omitted.] Third, the action must have been resolved on the merits.

Id. at 465. The Commonwealth cannot establish either the second or the third elements required under Kentucky law for the preclusion of Client federal takings claims.

The state court and federal court claims are not identical. Client filed its Kentucky constitutional claims in state court and its federal constitutional claims in this Court. The test in Kentucky is not whether the claims "could have been raised," but whether the claims sought to be barred **actually were raised** in the previous action. The two causes of action must be identical.

An interesting application of these principles in the federal constitutional context is found in *Barnes v. McDowell*, 848 F.2d 725 (6th Cir. 1998), an employment case similar to *Migra*. Mr. Barnes was fired for sexual harassment. His firing was upheld by the Kentucky Personnel Board, the state trial court and the Kentucky Court of Appeals. While review of his decision was still pending in state court, Mr. Barnes filed a §1983 action in federal court claiming the sexual

harassment charge was a pretext for firing him for his expressions of opinion about corruption in the state bureau where he worked. The district court granted the defendant's summary judgment motion, finding that the prior state court action barred the federal action. The court of appeals reversed, holding that the state court judgment did not bar Mr. Barnes' federal constitution claims. The court examined Kentucky law on claim preclusion and concluded:

> Kentucky courts do not apply the doctrine of claim preclusion in a subsequent suit involving facts already at issue in another action when the causes of action in the two proceedings are not the same.

848 F.2d at 730. The court then ruled:

> Thus, because Barnes's section 1983 action involves a constitutional issue which was not involved in the state proceedings, the district court erred in concluding that the doctrine of issue preclusion bars further litigation of Barnes's federal claim.

848 F.2d at 731.

Moreover, [Client] state court claims were not resolved on the merits. The holding in *Louisville v. Louisville Professional Firefighters Association*, Ky. 813 S.W.2d 804 (1991), lays the Commonwealth's res judicata argument completely to rest. The court there ruled:

> **The general rule is that a former adjudication is regarded as not being on the merits, within the scope of the doctrine of *res judicata,* where it was based upon the fact that the court lacked jurisdiction.**

813 S.W.2d at 807 (emphasis supplied). It could not be clearer. The state courts dismissed the Client claims for lack of jurisdiction; there has been no decision on any claim on the merits and, consequently, no basis under Kentucky law to preclude any of Client claims.

C. The Eleventh Amendment Does Not Bar The Client Claims.

The Commonwealth argued below that the Eleventh Amendment bars Client claims in this case. This argument ignores a fundamental difference between a garden-variety damage claim and Client claim – compensation to Client in this case is required by the very same Constitution that contains the Eleventh Amendment. This case will require this Court to reconcile the interests protected by the Fifth and Fourteenth Amendments with the interests protected by the Eleventh Amendment. On the left below are the relevant portions of the Fifth and Fourteenth Amendments; on the right, the Eleventh Amendment.

PROPERTY RIGHTS:

U.S. Const. amend. V:

> No person shall . . . be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation.

SOVEREIGN IMMUNITY:

U. S. Const. amend. XI:

> 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.

U.S. Const. amend. XIV, § 1:

> [N]or shall any state deprive any person of life, liberty or property, without due process of law . . .

(Emphasis supplied.)

The provisions on the left say unequivocally that private property will not be taken without just compensation and due process. The provision on the right says only that federal judicial power shall not extend to cases brought against a state by citizens of **another** state or foreign state. Clearly protection of property rights was in the mind of the drafters; protection of a state from claims by its own citizens was not.

The Commonwealth argued below that even federal takings claims under the Fifth and Fourteenth Amendment are barred by the Eleventh Amendment, but the Supreme Court has never expressed that view. Richard H. Seamon, *The Asymmetry of State Sovereign Immunity*, 76 Wash. L. Rev. 1067, 1068 (2001). In fact, the Supreme Court has given us some clear indications that it takes the view that takings claims are not barred by the Eleventh Amendment. For example, many commentators think the issue was resolved, favorably to takings claimants, by *First English Evangelical Lutheran Church v. Los Angeles*, 482 U. S. 304, 107 S. Ct. 2378, 96 L.Ed. 250 (1987). Professor Seamon collected citations to many of these commentators in his footnote 19:

See, e.g., Richard H. Fallon, Jr. et al., *Hart and Wechsler's The Federal Courts and the Federal Court System* 379 & n.32 (4th ed. 1996) (**citing First English and Reich as holding that Constitution "requires courts to provide" remedies for takings, "the sovereign immunity States traditionally enjoy in their own courts notwithstanding");** Scott P. Glauberman, *Citizen Suits Against States: The Exclusive Jurisdiction Dilemma*, 45 J. Copyright Soc'y U.S.A. 63, 96 n.194 (1997) (citing First English for proposition that "the state cannot assert sovereign immunity in state court against a takings claim"); Eric Grant, *A Revolutionary View of the Seventh Amendment and the Just Compensation Clause*, 91 Nw. U. L. Rev. 144, 205 (1996) **(asserting that First English makes clear that federal courts can award just compensation "without regard to the 'consent' of Congress"**); Paul J. Heald & Michael L. Wells, *Remedies for the Misappropriation of Intellectual Property by State and Municipal Governments Before and After Seminole Tribe: The Eleventh Amendment and Other Immunity Doctrines*, 55 Wash. & Lee L. Rev. 849, 871-72 (1998) **(citing First English for proposition that Just Compensation Clause "carves out an exception to otherwise applicable rules of sovereign immunity");** Katz, supra note 18, at 1485 & n.89 [Ellen D. Katz, *State Judges, State Officers, and Federal Commands After Seminole Tribe and Printz*, 1998 Wis. L. Rev. 1465] (citing First English as holding that state courts must adjudicate just-compensation claims against the State and that "state courts may not permit claims of state sovereign immunity to block" awards of just compensation); Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 Va. L. Rev. 885, 981 & n.351 (2000) (**citing First English for proposition that "the Takings Clause has been held to incorporate a self-executing waiver of state and federal sovereign immunity against claims for monetary compensation");** Thomas E. Roberts, *Ripeness and Forum Selection in Fifth Amendment Takings Litigation*, 11 J. Land Use & Envtl. L. 37, 57 (1995) (stating that "after First English, no state court is free to reject a compensation award where a taking is found"); Vazquez, What Is, supra note 18, at 1709-10 & n.121 [Carlos Manuel Vazquez, *What Is Eleventh Amendment Immunity?,* 106 Yale L.J. 1683, 1766-1804 (1997)] **(citing First English for proposition that "the state courts [may not] interpose their own law of sovereign immunity to bar [just-compensation] claims");** see also Vicki C. Jackson, *Seductions of Coherence, State Sovereign Immunity and the*

> *Denationalization of Federal Law*, 31 Rutgers L.J. 691, 724 n.126 (2000) **(citing First English for proposition that "notwithstanding sovereign immunity, the Constitution 'dictates' a remedy for takings of property");** Jackson, The Supreme Court, supra note 18, at 115 & n.454 [Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 Yale L.J. 1, 72-104 (1998)] **(stating that First English "strongly suggests" that States lack sovereign immunity from just-compensation claims in federal court).**

Seamon, supra, at fn. 19 (emphasis supplied).

The Court in *First English* held that the just compensation clause is "self executing" and that, when the government takes possession of private property without paying for it, the property owner's right to compensation "derives from the self-executing character of the constitutional provision . . . ." 482 U.S. at 315. In footnote nine of the opinion, the court addressed the issue in the following way:

> The Solicitor General urges that the prohibitory nature of the Fifth Amendment, combined with principles of sovereign immunity, establishes that the Amendment itself is only a limitation on the power of the Government to act, not a remedial provision. **The cases cited in the text, we think, refute the argument of the United States that "the Constitution does not, of its own force, furnish a basis for a court to award money damages against the government**." Brief for United States as Amicus Curiae 14. Though arising in various factual and jurisdictional settings, these cases make clear that **it is the Constitution that dictates the remedy for interference with property rights amounting to a taking.**

Id. at 316. n. 9 (emphasis supplied).

Another clear indication of the Supreme Court's position on this issue is its recent decision in *Palazzolo v. Rhode Island*, 533 U.S. 606, 121 S. Ct. 2448, 150

L.Ed.2d 592 (2001). There the United States Supreme Court (a federal court) ruled on a takings claim (favorably to the takings claimant) brought by a citizen of Rhode Island against his own state. There is no hint in the case that the Supreme Court thought the state enjoyed sovereign immunity. Moreover, there is no hint in the text of the Eleventh Amendment that its strictures apply only to United States district courts and United States courts of appeal and not to the United States Supreme Court. Its limits apply broadly to "**[t]he judicial power of the United States**" The Supreme Court in *Palazzolo* took as a given that the Eleventh Amendment does not operate as a bar to takings claims under the Fifth Amendment.

In *Arnett v. Myers*, 281 F3d 552 (6th Cir. 2002), this Court added its weight to the scales on the side of the Fifth Amendment. That case involved claims against the Executive Director of the Tennessee Wildlife Resources Agency ("TWRA") and members of the Tennessee Wildlife Resources Commission ("TWRC"), in their official capacities, and certain employees of the TWRA in their individual capacities. The Arnetts claimed that the removal of their duck blinds from Reelfoot Lake in Tennessee and certain other official decisions regarding the Arnetts' right to use the lake: (1) denied the Arnetts due process, equal protection, and just compensation for a taking under the Fifth and Fourteenth Amendments; (2) denied them their property rights under the Fifth and Fourteenth

Amendments, and (3) constituted retaliation for the exercise by Gary Arnett of his First Amendment rights to criticize the TWRA management. The district court granted summary judgment to the defendants on all the claims, finding (with respect to the Arnetts' Fifth and Fourteenth Amendment claims) that the claims were not ripe (because the Arnetts had not pursued their claims first in state court) and that the Arnetts had not established a constitutionally protected property interest in the duck blinds. This Court reversed the district court on all the claims and, in the process, addressed the question of sovereign immunity (which was not a basis for the district court's summary judgment). The Court stated flatly: "Eleventh Amendment sovereign immunity does not bar the Arnetts' claims in this case." 281 F.3d at 568.

Courts in three other circuits have ruled that takings claims against states may not proceed in federal court. *Citadel Corporation v. Puerto Rico Highway Authority*, 695 F.2d 31(1st Cir. 1982); *Robinson v. Georgia Department of Transportation*, 966 F.2d 637 (11th Cir. 1992); *John G. and Marie Stella Kenedy Memorial Foundation v. Mauro*, 21 F.3d 667 (5th Cir. 1994). However, none of these decisions address the issues in depth sufficient to call into question the decisions in *First English*, *Palazzolo*, and *Arnett*.

This Court should not be anxious to expand the reach of the Eleventh Amendment. The recent Supreme Court decisions in the area have been roundly

criticized. For example, noted constitutional scholar John C. Jeffries, Jr. describes Eleventh Amendment jurisprudence this way:

> As everyone knows, the Eleventh Amendment is a mess. It is the home of self-contradiction, transparent fiction, and arbitrary stops in reasoning. Any hope of doctrinal stability is undermined by shifting paradigms, as the Eleventh Amendment is inconsistently conceptualized as a form of sovereign immunity, as an exception to federal jurisdiction, and as a structural constraint on the powers of the national government. While commentators dispute the merits of these conceptions, the courts forge logic-chopping combinations. Finally, there is the astonishing (if widely welcomed) proposition that whatever the Eleventh Amendment may mean, Congress can override it. Even Marbury v. Madison takes a hit in the intellectual disaster of the Eleventh Amendment.
>
> Despite – or perhaps because of – the incoherence in the cases, the Eleventh Amendment has drawn the attention of leading scholars. **The dominant academic position asserts that the Eleventh Amendment limits only diversity jurisdiction, that it has no application in federal question cases**, and that in constitutionalizing some form of state sovereign immunity, the Supreme Court has been on the wrong track these past 100 years.

John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 Va. L. Rev. 47, 48 (1998) (emphasis supplied).[6] Professor Jeffries' title, "In Praise of . . .," is obviously tongue-in-cheek.

Similar criticisms of Eleventh Amendment jurisprudence can be found in John Randolph Prince, *Forgetting the Lyrics and Changing the Tune: The Eleventh Amendment and Textual Infidelity*, 104 Dick. L. Rev. 1 (1999). In this article, the author (a member of the faculty at Villanova University School of Law) concludes:

[6] Professor Jeffries is Dean of the University of Virginia School of Law.

> The larger question for constitutional jurisprudence is whether, having made a commitment to a text as a commonly accepted basis for structuring a polity, abandoning that text altogether to search for principles of "intent" is ever a good idea. If we choose that road, perhaps it would be better to abandon any pretext of a written Constitution altogether, and follow the relatively successful British model of a common law constitution. If we are not prepared to do so, however, it would be best for us to return to a faithful and sensitive reading of the words of the written Constitution. The more respect we show the lyrics the more likely it is we will sing the right song.

Prince, supra, at 94.

A particularly scathing criticism of Eleventh Amendment doctrine can be found in the book published last year by Judge John T. Noonan, Jr.,[7] *Narrowing the Nation's Power: The Supreme Court Sides with the States* (2002). After a lengthy examination of the doctrine and its problems, Judge Noonan concludes:

> A doctrine that has swelled beyond bounds, a doctrine that cannot be consistently applied or reconciled with the federal system, state immunity from suit suffers from one further, final difficulty for a doctrine of the law. It is unjust. Why should a state not pay its just debts, why should it be saved from compensating for the harm it tortiously causes? Why should it be subject to federal patent law, federal copyright law, and federal prohibitions of discrimination in employment and not be accountable for the patent or copyright it invades, not accountable for its discriminatory acts as an employer? No reason in the constitution or in the nature of things or in the acts of Congress supplies an answer. The states are permitted to act unjustly only because the highest court in the land has, by its own will, moved the middle ground and narrowed the nation's power.

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[7] Judge Noonan is Robbins Professor of Law Emeritus at the University of California, Berkeley, holder of the Maguire Chair in Ethics at the Kluge Center of the Library of Congress, and a senior judge on the United States Court of Appeals for the Ninth Circuit.

Noonan, supra, at 156.

All this being said, however, [Client] is not asking this Court to ignore the Supreme Court's recent Eleventh Amendment jurisprudence, because, as noted above, that jurisprudence does not apply in Fifth Amendment takings cases. The point is simply that this Court should not be eager to expand the scope of the Eleventh Amendment. Unless the Supreme Court is completely immune to scholarly criticism, the Eleventh Amendment's scope is likely to contract.

The protection of private property, on the other hand, has a much longer and more respectable pedigree. Private property has been at the heart of the thinking of writers on ethics, law and human rights for centuries, at least in the countries most influenced by the Judeo-Christian tradition. For example, the eighth and tenth of the Ten Commandments deal with property:

> You shall not steal.
>
> You shall not covet your neighbor's house. You shall not covet your neighbor's wife, or his manservant or maidservant, his ox or donkey, or anything that belongs to your neighbor.

Exodus 20:17. Exodus 22:1-14 contains detailed rules for the protection of property from theft and negligence.

In the West, property has been the Siamese twin to liberty. The Magna Charta, signed by King John in 1215, provided:

> No Freeman shall be taken, or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or

> any otherwise destroyed; nor will we not pass upon him, nor condemn him, but by lawful Judgment of his Peers, or by the Law of the Land.

Quoted in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 at 28, 111 S.Ct. 1032 at 1049-1049, 113 L.Ed.2d 1 (1991). The Fifth and Fourteenth Amendments to our Constitution protect (among other things) "life, liberty, and property." More recently, economists and historians have confirmed that the prophets, philosophers, and statesmen were correct in so highly regarding property rights -- property rights are the foundation of our freedom and prosperity. Nobel Prize winning economist F. A. Hayek[8] described the importance of property this way:

> What our generation has forgotten is that the system of private property is the most important guaranty of freedom, not only for those who own property, but scarcely less for those who do not. It is only because the control of the means of production is divided among many people acting independently that nobody has complete power over us, that we as individuals can decide what to do with ourselves. If all the means of production were vested in a single hand, whether it be nominally that of 'society' as a whole or that of a dictator, whoever exercises this control has complete power over us.

F. A. Hayek, *The Road to Serfdom* (50th Ann. Ed. 1994) at 115.

The historical relationship between property and freedom has been studied by Richard Pipes[9], and his conclusions echo those of Hayek. Professor Pipes reports:

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[8] F. A. Hayek (1899-1992), recipient of the Medal of Freedom in 1991 and co-winner of the Nobel Memorial Prize in Economics in 1974, taught at the University of London, the University of Chicago, and the University of Freiburg.

[9] Richard Pipes is Baird Research Professor of History at Harvard University.

> The right to property in and of itself does not guaranty civil rights and liberties. But historically speaking, it has been the single most effective device for ensuring both, because it creates an autonomous sphere in which, by mutual consent, neither the state nor society can encroach: by drawing a line between the public and the private, it makes the owner co-sovereign, as it were. Hence, it is arguably more important than the right to vote.

Richard Pipes, *Property and Freedom: The Story of How Through the Centuries Private Ownership has Promoted Liberty and the Rule of Law* (1999) at 281.

Property rights have not only been essential to our freedom, they have created our prosperity. Professor Pipes puts the case this way:

> The close relationship between property and prosperity is demonstrated by the course of history, which shows that one of the main reasons for the rise of the West to the position of global economic preeminence lies in the institution of property, which originated there and found there its fullest development. This fact has been convincingly presented in a number of scholarly works by such authors as North and Thomas, Landes, and Bethell.[10] It can be further demonstrated statistically for the contemporary world . . . . countries that provide the firmest guarantees of economic independence, including private property rights, are virtually without exception the richest.

Pipes, supra, at 286.

The Eleventh Amendment does not bar Fifth Amendment takings claims against the states. This Court should be very hesitant to expand the reach of the

[10] Douglass C. North and Robert Paul Thomas, *The Rise of the Western World* (1973); David Landes, *The Wealth and Poverty of Nations* (1998); Tom Bethell, *The Noblest Triumph* (1998).

Eleventh Amendment or to narrow the protections of the Fifth and Fourteenth Amendments.

CONCLUSION

The decision of the District Court should be reversed and this case should be remanded with instructions that Client claims should be adjudicated as ripe and not barred by res judicata or the Eleventh Amendment.

Respectfully submitted,

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