No. 23-1167

IN THE

Supreme Court of the United States

DENNIS O'CONNOR,

Petitioner,

v.

RACHEL EUBANKS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE OHIO FARM BUREAU FEDERATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER DENNIS O'CONNOR

CHAD ENDSLEY
LEAH CURTIS
OHIO FARM BUREAU FEDERATION
80 North High Street, 6th Floor
Columbus, OH 43218
(614) 246-8912

THOMAS FUSONIE
Counsel of Record
VORYS SATER SEYMOUR AND PEASE, LLP
52 East Gay Street
Columbus, OH 43215
(614) 464-8261
thfunsonie@vorys.com

Counsel for Amicus Curiae

116814

COUNSEL PRESS

(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

This brief addresses both questions raised by the petition:

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?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS. ii

TABLE OF CITED AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT. 4

A. Sixth Circuit Precedent Undermines the Supreme Court's Holding in *Knick*; Plaintiffs Should be Permitted to Bring Constitutional Claims under § 1983 in Federal Courts 4

B. The Harm to Citizens in Ohio is Particularly Evident as in Ohio There is No Claim for Inverse Condemnation 6

C. The Sixth Circuit's Decision Has a Particularly Devastating Impact on Ohio Farmers 10

CONCLUSION 14

TABLE OF CITED AUTHORITIES

Page

CASES

Broaddus v. United States Army Corps of Eng'rs, 380 F.3d 162 (4th Cir. 2004) 10

Cincinnati v. Smith, 29 Ohio App. 2d 172, 279 N.E.2d 638 (Ohio Ct. App. 1971) 8, 12

City of Monterey v. Del Monte Dunes, 526 U.S. 687 (1999) 5

Dep't of Nat. Res. v. Ebbing, 39 N.E.3d 1270 (Ohio 2015) 13

Dep't of Nat. Res. v. Knapke Tr., 37 N.E.3d 1249 (Ohio 2015) 13

Dep't of Nat. Res. v. Thomas, 72 N.E.3d 658 (Ohio 2017) 13

DLX, Inc. v. Kentucky, 381 F.3d 511 (6th Cir. 2004) 2, 3, 4, 5, 6

Knick v. Twp. of Scott, 139 S. Ct. 2162, 204 L. Ed. 2d 558 (2019) . . . 2, 3, 4, 6

Kuhn v. Zehringer, Case No. 2:17-cv-00315-MHW-EPD, ECF No. 1 (August 13, 2017 S.D. Ohio) 13

Page

Ladd v. Marchbanks,
971 F.3d 574 (6th Cir. 2020). 6

Mitchum v. Foster,
407 U.S. 225 (1972). 4

O'Connor v. Eubanks,
83 F.4th 1018 (6th Cir. 2023) .2, 6

Ohio Dep't of Nat. Res. v. Knapke,
41 N.E.3d 447 (Ohio 2015). 13

Ohio ex rel. Karr Revocable Tr. v. Zehringer,
No. 10-13-2018, 2014-Ohio-2241,
2014 Ohio App. LEXIS 2186
(Ohio Ct. App. May 27, 2014). .12

State ex rel. Doner v. Logan,
131 Ohio St. 3d 1455, 961 N.E.2d 1134
(Ohio 2012). 11, 12

State ex rel. Doner v. Zehringer,
982 N.E.2d 664 (Ohio 2012). 7

State ex rel. Doner v. Zody,
958 N.E.2d 1235 (Ohio 2011) 3, 6, 7, 10, 11, 12

State ex rel. Levin v. City of Sheffield Lake,
637 N.E.2d 319 (Ohio 1994) 7

Page

State ex rel. New Wen, Inc. v. Marchbanks,
167 N.E.3d 934 (Ohio 2020) 8, 9

State v. Ebbing,
28 N.E.3d 682 (Ohio Ct. App. 2015) 12

State v. Knapke,
33 N.E.3d 528 (Ohio Ct. App. 2015) 12

State, Dep't of Nat. Res. v. Mark L. Knapke Revocable Living Tr.,
28 N.E.3d 667 (Ohio Ct. App. 2015) 12

State, Dep't of Nat. Res. v. Thomas,
79 N.E.3d 28 (Ohio Ct. App. 2016) 12

United States v. Clarke,
445 U.S. 253 (1980) 4

Vicory v. Walton,
730 F.2d 466 (6th Cir. 1984) 2, 3, 4, 5, 6

Williamson County Regional Planning Comm'n v. Hamilton Bank,
473 U.S. 172 (1985) 2

Wilson v. United States,
350 F.2d 901 (10th Cir. 1965) 5

Page

STATUTES

42 U.S.C. § 1983 . . . . .4, 5, 13

42 U.S.C. § 1988(b) 5

49 C.F.R. § 24.107(c) 9

Ohio Adm. Code § 5501:2-5-06(G)(3) 8

Ohio Rev. Code § 163.05 7

OTHER AUTHORITIES

Cong. Globe, 42d Cong., 1st Sess., 376 (1871) 4

RULES

Supreme Court Rule 37.6 1

INTEREST OF *AMICUS CURIAE*[1]

The Ohio Farm Bureau Federation ("OFBF") is Ohio's largest general farm organization, with a core purpose of working together for Ohio's farmers and a mission of creating a partnership between farmers and consumers. OFBF has around 65,000 member families. OFBF constitutes the twenty-first largest state farm bureau federation.

OFBF members own and rent substantial amounts of land throughout the state of Ohio and use it to produce virtually every kind of agricultural commodity found in that area of the country. Ohio's number one industry remains food and agriculture, and OFBF supports farmers of all types and sizes of farms in an industry that contributes billions of dollars each year to Ohio's economy. OFBF is strongly committed to protecting the private property rights preserved by the U.S. Constitution, as it has done for over 100 years. OFBF regularly monitors and participates in pending cases, like this one, that significantly impact its members.

Farmers and their land are all too often the target of eminent domain activity and, unfortunately, subject to unconstitutional takings made without payment of just

---

1. The counsel of record for all parties received notice of OFBF intention to file this brief at least 10 days prior to its due date. Pursuant to Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus, its members, or its counsel made a monetary contribution intended to fund this brief's preparation or submission.

compensation. As farmers, OFBF's members generally have a strong interest in upholding their property rights as guaranteed under the Fifth Amendment of the U.S. Constitution. This interest required OFBF to (for the first time in its history for an action before the United State Supreme Court) participate as an amicus curiae in *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 204 L. Ed. 2d 558 (2019) to protect those rights and successfully overturn *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985). Yet, despite that success, Ohio farmers find themselves in the same position due to the Sixth Circuit's decision below in *O'Connor v. Eubanks*, 83 F.4th 1018 (6th Cir. 2023). Moreover, as Ohio farmers, OFBF's members' interest in protecting access to federal courts developed in *Knick* is especially strong, because Ohio law does not recognize a claim of inverse condemnation and forces landowners to engage in an even more tortured, costly, and delay-prone state process to attempt to obtain just compensation for an unconstitutional taking of their property. It is for this reason that OFBF now requests this Court accept petitioner's petition and reverse the Sixth Circuit decision.

SUMMARY OF ARGUMENT

The Sixth Circuit closed the door to the federal courthouse that this Court just re-opened in *Knick*. Similar to the *Williamson County* unintended impacts on property owners asserting Fifth Amendment just compensation claims, the Sixth Circuit's continued reliance on the combined decisions in *Vicory v. Walton*, 730 F.2d 466 (6th Cir. 1984) and *DLX, Inc. v. Kentucky*, 381 F.3d 511 (6th Cir. 2004) limit property owner's access to federal courts. Accordingly, in the Sixth Circuit (and,

importantly, in Ohio), unless there is a municipality, county or otherwise local entity to sue, property owners must still litigate takings claims in state court. This is a version of the state-litigation rule that this Court deemed "wrong" and "exceptionally ill" five years ago in *Knick*. 139 S. Ct. at 2178. Simply, the Sixth Circuit has failed to enforce the *Knick* decision.

The Sixth Circuit's continued reliance on its decisions in *Vicory* and *DLX* has severely injured farmers, especially in physical takings cases where a farmer must engage in years and years of litigation to obtain just compensation while the state physically occupies their most valuable asset—their land. Without a guarantee of attorney's fees, as there would be in federal court, a single farming family may find it difficult to afford representation to vindicate their rights in state court. This affects Ohio farmers particularly severely due to the multi-step, grueling mandamus process in place in Ohio. This multi-step process, and the cost that a farmer would incur as a result, means many farmers will never bring their claims through the courthouse door, and their rights will be trampled upon indefinitely. This brief also highlights a case previously identified even by this Court in *Knick* that exemplifies the hardships of eminent domain litigation involving Ohio farmers—such as the decades of litigation related to *State ex rel. Doner v. Zody*, 958 N.E.2d 1235 (Ohio 2011). *See Infra* § C for a discussion of the *Doner* case.

Farmer's most important asset is their land. The U.S. Constitution protects these landowners' basic human right to just compensation for government seizures of private property. This Court sought to restore that basic right to

its rightful place in *Knick*, but remnants of state-litigation requirements remain. Left uncorrected, the good done in *Knick* will be circumvented.[2] Citizens like Ohio farmers deserve the same benefit of this Court's decision in *Knick* as other landowners throughout the United States. Accordingly, this Court should grant review and reverse.

ARGUMENT

A. Sixth Circuit Precedent Undermines the Supreme Court's Holding in *Knick*; Plaintiffs Should be Permitted to Bring Constitutional Claims under § 1983 in Federal Courts

The *Knick* decision sought to re-open federal courts to a landowner who had suffered a violation of his Fifth Amendment rights when a government took his property without just compensation. The very purpose of § 1983 was "to 'throw open the doors of the United States courts' to individuals who were threatened with, or who had suffered the deprivation of constitutional rights." *Id.* (quoting Cong. Globe, 42d Cong., 1st Sess., 376 (1871)). By enacting § 1983, Congress chose to "interpose the federal courts between the States and the people, as guardians of the people's federal rights." *Id.* (quoting *Mitchum v. Foster*, 407 U.S. 225, 242 (1972)). However, the Sixth Circuit slammed that door shut.

---

2. The *Vicory* and *DLX* decisions also ignore this Court's decision in *United States v. Clarke*, 445 U.S. 253 (1980). The Court in *Clarke* recognized that the just compensation requirement is "self executing." 445 U.S. at 257.

If a state actor takes property without providing just compensation in violation of the U.S. Constitution, a landowner, or group of landowners, should be able to assert an inverse condemnation claim in federal court under § 1983. A single federal court would be tasked to first decide, under a preponderance of the evidence standard, whether there had been a taking. *Wilson v. United States*, 350 F.2d 901, 908 (10th Cir. 1965). Then, the same court would determine the extent of the taking. Finally, the court would oversee jury trials to determine just compensation. *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 711 (1999) (finding that a plaintiff is entitled to a jury trial for a § 1983 action seeking redress for an uncompensated taking). In other words, a single judge, under a single continuous case number, would preside over the entirety of the landowners' case, ensuring consistency, a fair application of the law of the case, and normal case management procedures to prevent delay. *See id.* This system leaves the injured party, the landowner, in control of the proceedings as the plaintiff. Finally, a prevailing landowner would be entitled to attorney's fees. 42 U.S.C. § 1988(b).

The Sixth Circuit precedent holds that (unless a claim also exists against a municipality or other local entity vs. a state entity or officer) federal courts and this process are not an option. In *Vicory*, in 1984, the Sixth Circuit in an order denying petition for rehearing *en banc* arguably foreclosed claims against state officials. 730 F.2d at 467 ("Plaintiff cites no case, and we can find none, that suggests that an individual may commit, and be liable in damages for, a 'taking' under the fifth amendment."). Twenty years later, in *DLX*, the Sixth Circuit then shielded states from federal takings claims

in federal court under the doctrine of sovereign immunity. 381 F.3d at 528. Following these cases then, where there is no municipality or local actor involved in the taking, state court would be the only recourse in the states within the Sixth Circuit. *See Eubanks*, 83 F.4th at 1024 ("Our caselaw thus bars O'Connor's claims. And we are required to follow our binding decisions.") (citing *Ladd v. Marchbanks*, 971 F.3d 574, 578-80 (6th Cir. 2020)). And, as recognized in Circuit Judge Thapar's concurrence "that requirement **directly conflicts** with the Supreme Court's decision in *Knick*." *Eubanks*, 83 F.4th at 1025 (Thapar, J., concurring) (emphasis added). Therefore, under *Vicory* and *DLX*, the concerns raised and addressed as "wrong" and "ill founded" by this Court in *Knick* remain in the Sixth Circuit. 139 S. Ct. at 2178; *see also Eubanks*, 83 F.4th at 1024. Acceptance of this petition will allow this Court to rectify this error.

B. The Harm to Citizens in Ohio is Particularly Evident as in Ohio There is No Claim for Inverse Condemnation

The impact to citizens in Ohio is even more evident. As recognized in Chief Justice Roberts majority opinion, in Ohio, there is no state inverse condemnation action. *Knick*, 139 S. Ct. at 2168. To seek just compensation for an unconstitutional taking of private property, Ohio law requires a landowner to file an action for an "extraordinary" writ of mandamus to force a condemnor to initiate a separate appropriation action to determine the value of the taken property. *Id.* at 2168, n.1 (citing *State ex rel. Doner v. Zody*, 130 Ohio St. 3d 446, 2011-Ohio-6117, 958 N.E.2d 1235, 1247). Under the extraordinary writ standard, the landowner must prove that a taking

has occurred by "clear and convincing evidence," which is a much higher standard than the "preponderance of the evidence" standard that would have otherwise been applied in federal court. *State ex rel. Doner*, 958 N.E.2d at 1247 ("Parties seeking extraordinary relief bear a more substantial burden in establishing their entitlement to this relief.").

Ohio's eminent domain procedures necessarily require multiple actions and result in piecemeal litigation. If the extraordinary writ is granted, the condemnor starts a second action (often in front of a different judge) to determine the value of the appropriation. *State ex rel. Levin v. City of Sheffield Lake*, 637 N.E.2d 319, 322 (Ohio 1994) ("mandamus lies to determine if property has been appropriated and to compel initiation of statutory proceedings"). Therefore, at a minimum, to vindicate one's Fifth Amendment rights, a landowner is forced to litigate two separate actions—the mandamus action and the appropriation proceeding. *See id.*

Once the landowner is granted the writ, the mandamus case is closed and the landowner no longer has control over the eminent domain action. Instead, Ohio law allows the condemnor to prepare and initiate appropriation proceedings under a complaint and description of the taking as drafted by the condemnor. Ohio Revised Code § 163.05. After the writ has been granted, there is no active case or judicial oversight of the condemnor in its preparation and initiation of appropriation proceedings, and, as a result, condemnors do not move quickly. *See, e.g.*, *State ex rel. Doner v. Zehringer*, 982 N.E.2d 664, 664 (Ohio 2012). Further, although landowners often achieve a writ of mandamus in a group, condemnors file separate

appropriation proceedings for each landowner, forcing landowners to litigate their claims (and any evidentiary or property law issues shared by the group) separately. *See id.*

Ohio law also limits what defenses and issues a landowner may raise in response to an appropriation petition; if issues arise in the appropriation proceeding beyond the issue of just compensation, the landowner must initiate yet another action to resolve those matters. *Cincinnati v. Smith*, 29 Ohio App. 2d 172, 173, 279 N.E.2d 638, 639 (Ohio Ct. App. 1971) ("if the landowner wanted to raise questions other than a determination of the amount of compensation and damages to which he is entitled, such questions would have to be determined in a separate action to enjoin the proceeding").

Additionally, there is no guarantee that a landowner will be able to recover attorney's fees for either the mandamus action or the appropriation action, even if the landowner prevails. *State ex rel. New Wen, Inc. v. Marchbanks*, 167 N.E.3d 934, 938 (Ohio 2020).

In *New Wen*, over three years after the Ohio Department of Transportation (ODOT) permanently closed New Wen's access point on its property that was the basis for the taking, New Wen successfully obtained the extraordinary writ from the Ohio Supreme Court by clear and convincing evidence that it did not receive just compensation. *State ex rel. New Wen, Inc. v. Marchbanks*, 146 N.E.3d 545, 548, 554 (Ohio 2020). Given the ODOT road project was a federally funded project, New Wen sought attorney's fees and costs under Ohio Adm. Code § 5501:2-5-06(G)(3). That administrative code provision

sets forth Ohio's adoption of the federally funded project's regulatory requirement in 49 C.F.R. § 24.107(c). That federal regulation mandates attorney fees and costs to prevailing property owners in inverse-condemnation proceedings against federal highway funds recipients.

Yet, despite its own administrative code provision, ODOT argued that the Supreme Court of Ohio could not award fees and costs to New Wen because the Ohio General Assembly did not adopt the federal requirement in statute despite it being a condition to receive federal funding. The Supreme Court of Ohio had to agree and denied New Wen its fees and costs. *New Wen*, 167 N.E.3d 937-938; *see also New Wen*, 167 N.E.3d 938-939 (Fischer, J., concurring) (noting that the Ohio General Assembly should consider attorney's fees when a property owner is forced to file a protracted lawsuit to compel compensation for a taking).

Shunting landowners to Ohio state court means that many landowners lacking the wherewithal to vindicate their Fifth Amendment constitutional rights give up. Unless the value of the appropriated property is exceedingly high or unless there are multiple landowners subject to the same taking who can combine resources for the initial mandamus proceedings, Ohio's multi-step process—coupled with the lack of any guarantee of attorney's fees—makes litigation in Ohio courts too costly and precludes many landowners from seeking just compensation at all. In these instances, the state continues to trample on the constitutional right to just compensation.

C. The Sixth Circuit's Decision Has a Particularly Devastating Impact on Ohio Farmers

The Sixth Circuit's rehabilitation of the federal court litigation prohibition disproportionally impacts farmers. Many farmers are "land rich and cash poor." *Broaddus v. United States Army Corps of Eng'rs*, 380 F.3d 162, 172 n.9 (4th Cir. 2004) (describing family farmers as "land rich but cash poor" and noting that their "land is committed to an ongoing use as part of the farming enterprise"). In an uncompensated physical takings case, the government occupies the farmer's most valuable asset—without having paid compensation—for the duration of the eminent domain litigation. Without access to the federal courts, the farmer must fund costly piecemeal litigation in state court. And without any guarantee of attorney's fees, a single farmer may not be able to find representation to vindicate their rights. While piecemeal litigation is undesirable for any litigant, the cost and delay of multiple lawsuits can be devastating for farmers deprived of the source of their livelihood.

Ohio's eminent domain laws compound these issues for Ohio farmers. Ohio farmers forced to assert their federal takings claims in state court are subjected to Ohio's heightened burden of proof, two-step mandamus process, and condemnor-friendly presumptions. The *Doner* case best illustrates the negative impacts on Ohio farmers.

The *Doner* case is but one example of the devastating impact the Sixth Circuit's decision has on Ohio farmers' ability to assert their Fifth Amendment rights. In *Doner*, over 80 farmers in Mercer County, Ohio brought suit in 2009 against the Ohio Department of Natural Resources

("ODNR"), asserting that ODNR took their land by its frequent, severe and inevitably recurring flooding of thousands of acres of farmland as the result of a redesigned spillway. *Doner*, 958 N.E.2d at 1239. ODNR had been warned repeatedly by landowners and local government officials that the proposed redesign of the spillway would cause severe flooding to land downstream, but ODNR "made a conscious choice to disregard that foreseeable risk in favor of recreational users of the lake and landowners on the southern end of the lake." *Id.* at 1250. Due to ODNR's actions, the farmers' properties "flooded more frequently, over a larger area, for longer periods of time and with greater resulting damage, including crop loss, the deposit of silt, sand, stone, and other debris, drainage-tile failure, soil compaction, and the destruction of trees, bushes, and shrubs." *Id.* at 1241. Such flooding substantially destroyed the value of the farms. *Id.* at 1248, 1252.

After nearly two years of extensive discovery (requested by the state), substantial briefing, and the presentation of evidence, the Supreme Court of Ohio unanimously granted the writ of mandamus, compelling ODNR to immediately commence appropriation proceedings. *Id.* at 1252. The Supreme Court of Ohio denied the landowners' request for attorneys' fees. *State ex rel. Doner v. Logan*, 131 Ohio St. 3d 1455, 961 N.E.2d 1134 (Ohio 2012).

ODNR intentionally delayed filing the appropriation actions. Nine months after that order was issued, ODNR had filed only two of the over fifty compensation cases that needed to be filed. *State ex rel. Doner*, 982 N.E.2d at 664. Because Ohio law does not afford for ongoing

judicial oversight of the relief granted by the writ, i.e. the condemnor's filing of the appropriation proceedings, ODNR's delay tactics forced the farmers to reopen the mandamus case and file a motion to show cause as to why ODNR should not be held in contempt of the Supreme Court of Ohio's writ of mandamus. *Id.* The Supreme Court of Ohio held ODNR in contempt and ordered ODNR to file all appropriation cases within 120 days. *Id.*

Once Ohio law granted ODNR control of the litigation, ODNR split apart the group of farmers that had been granted the writ, and forced them to litigate their appropriations proceedings separately. This splintering drove up the cost of litigation, required each landowner to fight anew the legal battles their neighbors had won in separate trials, and resulted in delay.[3] *See, e.g.*, *State v. Ebbing*, 28 N.E.3d 682 (Ohio Ct. App. 2015); *State v. Knapke*, 33 N.E.3d 528, 541 (Ohio Ct. App. 2015); *State, Dep't of Nat. Res. v. Mark L. Knapke Revocable Living Tr.*, 28 N.E.3d 667 (Ohio Ct. App. 2015); *State, Dep't of Nat. Res. v. Thomas*, 79 N.E.3d 28 (Ohio Ct. App. 2016). Litigating against each farmer in a separate action permitted ODNR to relitigate the same issues in each jury trial and delay subsequent trials by appealing each

---

3. As noted above, Ohio's eminent domain statues provide no process for addressing eminent domain abuses within an appropriation proceeding. *See Cincinnati v. Smith*, 29 Ohio App. 2d 172, 173, 279 N.E.2d 638, 639 (Ohio Ct. App. 1971). Thus, when ODNR refused to make required deposits to secure their possession of the farmers' property, the *Doner* farmers were forced to obtain two more additional writs compelling the state to do so. *See, e.g., Ohio ex rel. Karr Revocable Tr. v. Zehringer*, No. 10-13-2018, 2014-Ohio-2241, ¶ 36, 2014 Ohio App. LEXIS 2186 (Ohio Ct. App. May 27, 2014).

verdict, often to the Supreme Court of Ohio. *Dep't of Nat. Res. v. Ebbing*, 39 N.E.3d 1270 (Ohio 2015); *Ohio Dep't of Nat. Res. v. Knapke*, 41 N.E.3d 447 (Ohio 2015); *Dep't of Nat. Res. v. Knapke Tr.*, 37 N.E.3d 1249 (Ohio 2015); *Dep't of Nat. Res. v. Thomas*, 72 N.E.3d 658 (Ohio 2017). Litigating each case one-by-one also allowed ODNR to "shift[] strategies" by raising new issues in each subsequent jury trial, and then appealing those new issues as well. *Thomas*, 79 N.E.3d at 46. The years of machinations, delays with each successive appeal of the jury verdicts, and deprivation of just compensation ended for eight of the farmers who died before ever receiving a penny for state's flooding of their farms. Complaint, *Kuhn v. Zehringer*, Case No. 2:17-cv-00315-MHW-EPD, ECF No. 1, ¶ 16 (August 13, 2017 S.D. Ohio).

All of these issues could have been avoided if the federal courthouse doors had been open to the *Doner* farmers to vindicate their Fifth Amendment rights from the start. The *Doner* farmers should have been permitted to utilize § 1983 to bring a single federal action for a Fifth Amendment violation under § 1983, where they would remain plaintiffs throughout, their claims would remain under the constant supervision of a single federal judge, and the law of the case would require fair and consistent treatment to them all. These problems exemplify the need for a federal court option.

The end of the *Doner* litigation only highlights the importance of federal courts in resolving unconstitutional takings by a state actor. After only five cases were tried and only five families received just compensation after roughly eight years of state court litigation, the farmers sued ODNR in federal court, alleging <u>not</u> their takings

claims, but were forced to file First and Fifth Amendment retaliation based claims. The dispute between ODNR and the farmers resolved shortly after the landowners were finally let in the federal courthouse doors; only further proving the important role that federal courts must play in vindicating property rights. It is unfortunate, and improper, that the farmers were not let in those courthouse doors years earlier.

CONCLUSION

This appeal is important to Ohio farmers. The continued prohibition of use of the federal courts against the state and state actors places Ohio farmers in an unfair position and, critically, seeks to close the door that *Knick* opened. For the foregoing reasons, certiorari should be granted in order to reaffirm access to federal courts in takings actions.

Respectfully submitted,

Chad Endsley
Leah Curtis
Ohio Farm Bureau Federation
80 North High Street, 6th Floor
Columbus, OH 43218
(614) 246-8912

Thomas Fusonie
Counsel of Record
Vorys Sater Seymour and Pease, LLP
52 East Gay Street
Columbus, OH 43215
(614) 464-8261
thfunsonie@vorys.com

Counsel for Amicus Curiae