

1 procedure that's recognized as self-executing.

2 JUSTICE KAGAN: Right. But usually --

3 JUSTICE ALITO: Let me see if I
4 understand your claim, because a little -- some
5 of the questions and the discussion up to this
6 point is a bit confusing to me.

7 I thought your claim was that there is
8 a violation of the takings clause and you can,
9 therefore, bring a suit under 1983 when the
10 state does something that constitutes a taking
11 but at the same time says we're not paying you
12 anything for this.

13 Now it's not a question of when they
14 would have to pay once they've admitted that
15 there's a taking, but when they do something
16 that constitutes a taking, and they say, no,
17 this isn't a taking at all, and, therefore,
18 you're getting zero, which I understand to be
19 your claim here, then you can go directly to
20 federal court and bring an action under 1983.

21 And to require you to go to state
22 court before you do that is essentially to
23 require you to exhaust state remedies before
24 you can bring a 1983 claim, which is never
25 required under 1983. I thought that that was

1 your argument.

2 MR. BREEMER: Right. And that is one
3 of our arguments, is that when the government,
4 the township here in this case, invades
5 property without -- without condemning it, it's
6 clear that it's not compensating and that your
7 claim accrues at that --

8 JUSTICE KAGAN: Well, how is it clear
9 that it's not compensating? In other words,
10 what Justice Alito says clarifies matters
11 considerably, that if the state has already
12 said we're not compensating, then it seems you
13 can claim both that you've had a taking and
14 that the state has refused to compensate.

15 But I thought that the question here
16 arose from the fact that the state has not said
17 yet that it's not compensating, that, instead,
18 it uses the inverse condemnation proceeding to
19 make that determination. Is that wrong?

20 MR. BREEMER: Well, yes, in -- in this
21 way: The township is taking her property. The
22 township has imposed an easement on Ms. Knick's
23 property that allows the public in every day of
24 the week, every day of the year.

25 It has the power to condemn easements.

1 It did not use it. So we know that the
2 township is not compensating her. It denies
3 that there's even a taking. So it's not a
4 matter of what the state does. It's a matter
5 of what the township, as the -- as the
6 defendant that's taking your property, and
7 could have used condemnation and declared a
8 taking, gone into state court, kept it there,
9 but instead used its regulatory power.

10 JUSTICE ALITO: And the township has
11 --

12 JUSTICE SOTOMAYOR: How about the town
13 --

14 JUSTICE ALITO: -- the township has
15 imposed these restrictions on the property and
16 it hasn't said that it will pay anything for
17 it. Of course, it hasn't said that if you sue
18 us in state court and you win in an inverse
19 conver -- inverse condemnation proceeding which
20 we will resist, we will refuse to pay the
21 judgment of the state court. It hasn't said
22 that. But it has -- it certainly has not said
23 we admit that this is a taking and we owe you
24 money, and there -- and you have to go to state
25 court to determine how much money we owe. Am I

1 right on that?

2 MR. BREEMER: That's right. And --
3 and the entitle -- that's -- the issue is the
4 entitlement. The township denies that there's
5 an entitlement to compensation. Ms. --

6 JUSTICE KAGAN: But does it? I mean,
7 I -- I'm following Justice Alito's point
8 exactly, except what I'm not understanding is I
9 -- I had thought that in a case like this there
10 had been no determination by the state that
11 there was liability one way or the other. In
12 other words, the state had not denied
13 liability, nor had the state conceded
14 liability.

15 So this isn't a -- a question where
16 the state has said: Look, we deny any
17 liability. It's -- it's -- the state hasn't
18 said one way or the other. And we're going to
19 find out in the inverse condemnation action
20 whether the state is, in fact, denying all
21 liability or whether the state is going to come
22 in and say: You're right, there is liability
23 here, and now let's talk about how much.

24 MR. BREEMER: Well, we -- we could,
25 but, again, that liability issue arises under