No. _____

In the Supreme Court of the United States

JOHN ROGNE,

Petitioner,

v.

CITY OF CATOOSA, OKLAHOMA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court held that a government violates the Takings Clause the moment it takes private property without compensation. *Knick v. Township of Scott*, 588 U.S. 180, 184–85 (2019). Government cannot nullify or moot a property owner's Fifth Amendment right to compensation by rescission of its action. *Id.* Property owners may sue for compensation without first exhausting other remedies. *Id*. at 185.

City served Rogne with a second cease and desist order and then physically took possession of Rogne's property by constructing a barrier fence, denying him from stockpiling dirt on his vacant lots. Rogne sued in state court for a taking without just compensation and lost on a prudential rule of exhaustion and mootness based on City's rescission.

He refiled his Takings Clause claim in federal court under the Oklahoma savings statute because the prior action failed other than on the merits. The district court dismissed. The Tenth Circuit affirmed, holding Rogne's Takings Clause claim was resolved *on the merits*, citing the state appellate court, " . . . as a matter of law there was no taking because Mr. Rogne was granted relief as soon as he sought an administrative remedy and the City rescinded the Cease and Desist Order."

THE QUESTION PRESENTED IS:

Is the application of a prudential rule of exhaustion, where the only relief is voluntary cessation of government's physical possession, a decision on the merits of an uncompensated Takings Clause claim?

PARTIES TO THE PROCEEDINGS

Petitioner and Plaintiff-Appellant below

- John Rogne

Respondent and Defendant-Appellee below

- City of Catoosa, Oklahoma

LIST OF PROCEEDINGS

U.S. Court of Appeals for the Tenth Circuit

No. 25-5039

John Rogne, *Plaintiff-Appellant v.* City of Catoosa, *Defendant-Appellee*

Judgment: February 17, 2026

U.S. District Court, N.D. Oklahoma

No. 24-cv-00307

John Rogne, *Plaintiff v.* City of Catoosa, *Defendant*

Judgment: February 21, 2025

Oklahoma Court of Civil Appeals, Division III

No. 121,026

John Rogne, *Plaintiff-Appellant v.* City of Catoosa, *Defendant-Appellee*

Judgment: June 29, 2023

Rogers County, Oklahoma District Court

No. CJ-2014-0420

John Rogne, *Plaintiff v.* City of Catoosa, *Defendant*

Judgment: July 18, 2022

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OPINIONS BELOW

The Opinion of the U.S. Court of Appeals for the Tenth Circuit was entered on February 17, 2026 and is included at App.1a. The Opinion and Order of the U.S. District Court for the Northern District of Oklahoma, dated February 21, 2025 is included at App.21a.

JURISDICTION

The judgment of the Tenth Circuit court of appeals was entered on February 17, 2026. (App.1a) No petition for rehearing was filed. This petition is timely filed. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

The Fourteenth Amendment provides, in part, "nor shall any state deprive any person of . . . property." U.S. Const. amend. XIV.

The Oklahoma Constitution also provides, in part, "private property shall not be taken or damaged

for public use without just compensation." Article II, Section 24, Okla. Const.

The Oklahoma savings statute, under Title 12 O.S. § 100, grants an additional one year to refile a lawsuit if the party failed other than on the merits.

Title 42 U.S.C. § 1983 provides, in part, that every person who subjects any citizen of the United States to the deprivation of any rights secured by the Constitution shall be liable to the party injured in an action at law.

STATEMENT OF THE CASE

I. Factual Background

In 2009, the City of Catoosa ("City") issued a Cease and Desist Order ("2009 CDO") against Mr. Rogne ("Rogne") prohibiting him from stockpiling dirt on his private property because the City alleged he needed a permit from the City. App.2a.

After conducting an administrative hearing, the hearing officer held a permit was *not* required. The City rescinded this 2009 CDO. *Id*. The City did not pay Rogne any compensation.

Undeterred, in 2011, the City subsequently served him with a second Cease and Desist Order ("2011 CDO") claiming, once again, he needed a permit to stockpile dirt on his property and that he was in violation of City building codes – issues that were previously raised, and ruled on, in the 2009 Administrative Hearing. App.65a. Then, the City physically

came on to Rogne's private property and constructed an orange barrier fence hung by six-foot rebar, and hung a sign, "No Dumping", thereby preventing Rogne from using his property. App.69a.

The 2011 CDO mentioned Rogne could go to an administrative hearing or set up a meeting with City officials; it was optional. App.65a. Rogne and his attorney chose to meet with City officials, including the City attorney, City code officers, and City engineers, where they attempted to resolve this 2011 CDO, but to no avail. The City maintained it was shutting Rogne down and it refused to rescind the 2011 CDO. App.62a-63a.

The City did not initiate any formal condemnation actions to support its physical taking. The City did not pay compensation to Rogne. The City continued to physically occupy Rogne's property with the orange barrier fence for six years and continued its control and dominion over his property even after it was served with a lawsuit. The City did not rescind its physical occupation until after Rogne presented the City, at a second administrative hearing, with the exculpatory depositions of City officers', and its hired civil engineer's testimony during discovery, that the 2011 CDO contained falsified information. App.2a, fn. 2. Rogne was barred from putting on this evidence with the court as the City filed its motion to dismiss and the court granted it on grounds there was no case or controversy, no judiciable claim, and the case was moot on grounds City rescinded its physical occupation and rescinded its 2011 CDO. App.64a.

Rescission was the only remedy provided to Rogne — not compensation.

II. Procedural History

A. State trial court and appeal

On October 29, 2014, Rogne filed his state lawsuit against the City as an unconstitutional taking without just compensation. App.2a-3a, fn. 2. Rogne expressly alleged "City has caused damages by way of inverse condemnation . . . The City of Catoosa has taken away Plaintiff's rights without compensation by prohibiting Plaintiff from entering onto Plaintiffs own property without Plaintiff's consent." (Rogers Cty Case, Petition, Oct. 3, 2014 at ¶ 12).[1] App.2a-3a, fn. 2; App.23a, fn. 4.

The parties engaged in discovery wherein Rogne uncovered exculpatory evidence against the City by way of sworn deposition testimony by the City's civil engineer and code enforcement officer who both testified that the 2011 CDO contained falsified statements. App.2a-3a, fn. 2 and App.65a.

Upon Rogne's request, and over the objection of the City, the state trial court entered a stay order on December 7, 2016. staying all motions to allow Rogne to present to the City at a second administrative hearing his uncovering of the City's falsified 2011 CDO. App.2a-3a, fn. 2.

The City voluntarily rescinded the 2011 CDO. The City did not pay any compensation as a result of

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[1] *See* App.22a, fn. 2; 23a, fn. 4; *John Rogne v. City of Catoosa*, No. CJ-2014-420 (Rogers Cty. Dist. Ct., Okla.) Petition, filed October 3, 2014. The docket for the Rogers County Case is available at https://www.oscn.net/dockets/GetCaseInformation.aspx?db=rogers&number=CJ-2014-420 (last visited Sunday, May 10, 2026).

its rescission. The State trial court did not lift the stay order; it remained in place. App.2a-3a.

After the City had rescinded its 2011 CDO and released its occupation of Rogne's property, it filed a motion to dismiss the entire action, including Rogne's inverse condemnation claim for damages, under Article III of the United States Constitution. App.2a-3a.

City contended that because it had vacated its occupation and rescinded the 2011 CDO, there was no longer a case or controversy, no justiciable claim remained, and the case was therefore moot. *Id.* and fn. 2. *infra.*, Oral Argument. The City's motion to dismiss expressly cited Article III of the Constitution and contended that Rogne's case was not justiciable and was moot. *Id.* and *infra.*, Oral Argument, fn.2.

Rogne objected on grounds that he was still entitled to compensation for the six years City illegally occupied his property under *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 321 (1987). *Id.*

Despite his plea for just compensation, the State trial court dismissed the case because Rogne had received relief and a remedy. The State trial court did not award compensation. App.60a-64a.

The trial court also applied a prudential rule of failure to exhaust an administrative remedy. App.63a. Rogne went to not one, but two administrative hearings — the first was prior to the filing of the lawsuit in 2009 on the same set of facts, and the second was because the trial court stayed the case to allow the parties to proceed to exhaust an administrative remedy. App.2a-3a, fn. 2.

After rehearing, the State trial court granted judgment to city. App.25a, App.61a.

Rogne appealed to the civil appellate court.[2] It affirmed the trial court. "Rogne cannot maintain an inverse condemnation claim under any set of facts because he failed to exhaust his administrative remedies prior to filing the instant action." The court inserted a *footnote* stating:

> The Court notes Mr. Rogne's argument that an administrative remedy is ineffective because there is no administrative remedy for compensating a landowner for money damages for a temporary taking. We find, however, that, as a matter of law, there was no taking because Mr. Rogne was granted relief as soon as he sought an administrative remedy and the City rescinded the Cease and Desist Order. App.58a-59a.

The Oklahoma Supreme Court denied Rogne's request for certiorari. App.27a.

B. Federal case and appeal

Following the conclusion of the state court case, Rogne timely filed the present action in the United States District Court under the Fifth and Fourteenth Amendments, Section 1983, and by way of the Oklahoma savings statute, Title 12 O.S. § 100, which statutorily provides a party the opportunity to refile his

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[2] See App.32a-33a, fn. 28 Federal District Court determined that because the Civil Appeal Court conducted a *de novo* review, it is the state appellate decision that determines what was or was not in the state court case.

claim if it *failed other than on the merits*. App.21a and 27a.

The U.S. District Court for the Northern District of Oklahoma magistrate granted City's motion to dismiss Rogne's case. App.28a. It decided that the state appellate court decision was a decision on the merits, finding the Oklahoma savings statute did not apply. App.41a-42a.

On appeal and after oral arguments, the Tenth Circuit panel affirmed. App.1a. The Tenth Circuit held, "because Mr. Rogne 'was granted relief [of rescission] . . . that as a matter of law, there was no taking.'"[3]

The Tenth Circuit held that the Oklahoma court "resolved Mr. Rogne's claim on the merits." App.20a.

REASONS FOR GRANTING THE PETITION

I. The Question Presented is Important

Was the invocation of a prudential rule of exhaustion (procedural ripeness) and voluntary rescission (Article III mootness), that barred a Constitutional right to just compensation under the Takings Clause, a decision on the merits of the substantive claim? Does a decision solely on these two doctrines preclude Rogne's right to reassert his claim for compensation in federal court under the Oklahoma savings statute

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[3] The United States Court of Appeals for the Tenth Circuit – Oral Argument Recording: Case No. 25-5039, *Rogne v. City of Catoosa*, Argued: Wednesday, January 21, 2026, https://www.ca10.uscourts.gov/sites/ca10/files/oralarguments/25-5039.mp3

that expressly provides that a party may refile his claim if he failed other than on the merits? If neither doctrine can nullify a claim for just compensation, then, can either doctrine, as applied, be a basis for a decision on the merits?

This Court has explained that "if [a party] goes to state court and loses, his claim will be barred in federal court." *Knick*, 588 U.S. at 185. What if the party goes to state court and loses other than on the merits? Will his claim be barred? What if the party goes to state court and he loses solely on grounds of a rule of procedure (ripeness) and lack of jurisdiction (mootness)? Is he barred from refiling under the Oklahoma savings statute in federal court?

Is a judge-made prudential rule of failure to exhaust, a rule of procedure? Is a decision based on a procedural rule a decision on the merits of a substantive Takings Clause claim?

The state appellate court held:

> Rogne cannot maintain an inverse condemnation claim under any set of facts because he failed to exhaust his administrative remedies prior to filing the instant action.

The court inserted a *footnote* stating:

> The Court notes Mr. Rogne's argument that an administrative remedy is ineffective because there is no administrative remedy for compensating a landowner for money damages for a temporary taking. We find, however, that, as a matter of law, there was no taking because Mr. Rogne was granted relief as soon as he

> sought an administrative remedy and the City rescinded the Cease and Desist Order.

The Tenth Circuit held the state court judgment was a decision on the merits.

The state court judgment was decided on two grounds — exhaustion (procedure) and rescission (jurisdiction), not on the substantive claim.

In Oklahoma, the phrase "on the merits" is understood as referring to the substance of the claim different from procedural, or jurisdictional, grounds. *Gottsch v. Ireland*, 1961 OK 4, ¶¶ 16-18, 358 P.2d 1097, 1100-01. The Tenth Circuit defines the word "merits" as the real or substantial grounds of an action as distinguished from matters of procedure. *Providential Dev. Co. v. United States Steel Co.*, 236 F.2d 277, 280 (10th Cir.1956) citing *Clegg v. United States*, 112 F.2d 886 (10th Cir. 1940). The scope and analysis of a decision must in all cases be measured by the ground of demurrer or motion on which the judgment is based. *Swift v. McPherson*, 232 U.S. 51 (1914). The decree, not being on the merits, could not be a bar to such subsequent suit in a state or United States court. *Id.* at 57.

It matters not if the state court decision was right or wrong, or if the federal court agreed or disagreed with the conclusion of the state court decision. The question presented to the Tenth Circuit was whether the state appellate court decision that there was no taking *because* City rescinded the cease and desist order and ended its physical possession of Rogne's property after six years was a decision on the merits of the substantive Takings Clause claim.

This Court has held voluntary cessation by government cannot nullify a Takings Clause claim for compen-

sation. *First English*, 482 U.S. at 321 (no subsequent action whether voluntary repeal or a hearing and rescission can relieve it of a duty to provide compensation).

The merits question as to what constitutes an inverse condemnation Takings Clause claim in this Court and under Oklahoma Supreme Court precedent is: (i) was there a physical occupation resulting in a *per se* taking; (ii) was there substantial interference with a property right of use; and, (iii) was there compensation paid? Rogne maintains that these are the substantive questions on a Takings Clause claim based on the original text of the Takings Clause and this Court's precedent.

The Tenth Circuit did not answer these three merits questions as to the state appellate court decision. It failed to determine whether the state appellate court addressed the underlying substantive claim under the Takings Clause. There was no decision in state court as to whether there was a physical occupation (even though there was a physical occupation); and, no decision as to whether government's act substantially interfered with a private right of use and enjoyment (even though City served Rogne with a cease and desist order prohibiting him from using his property). There was no decision as to payment of just compensation; and no decision as whether the administrative process provided just compensation.

The state appellate court decision was based solely on procedural and jurisdictional grounds. "Mr. Rogne was granted relief as soon as he sought an administrative remedy and the City rescinded the Cease and Desist Order."

Rogne maintains that neither of these two grounds answer the substantive merits question of a taking without just compensation; and, neither can these two grounds support a decision on the merits. Thus, Rogne's prior state court case failed other than on the merits.

Rogne was deprived of just compensation for the six years City occupied his property. The Tenth Circuit undermined and disregarded this Court's Takings Clause precedents by abdicating its authority to allow a justiciable claim to proceed in federal court when the prior state court decision was based solely on the ripeness and mootness doctrines — not the substantive claim for just compensation. Rogne maintains that a judgment on an impermissible bar to a claim for Constitutional compensation is not a judgment on the merits.

This Court has explained, "we have never tolerated that outcome." *United States v. Pewee Coal Co., Inc.*, 341 U.S. 114, 116-117 (1951). Property owners may sue for compensation without first exhausting other remedies. *Knick*, 588 U.S. at 185. No subsequent post-taking action by the government can relieve it of the duty to provide compensation; government cannot nullify or moot a property owner's Fifth Amendment right to compensation by rescission of its action. *Knick*, 588 U.S. at 192; *First English*, 482 U.S. at 321 (no subsequent action of voluntary repeal or rescission can relieve government of a duty to provide compensation).

When government physically takes control, dominion, or possession of private property, the Takings Clause obligates the government to provide the owner with just compensation from the day government physically

took possession or appropriated the property. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 321. The government must pay for what it takes. *Id.*, at 322. The mere fact of a physical invasion, no matter how small, triggers a mandatory duty on government to pay just compensation. *Id.*

This Court has never tolerated a rule under which "the government can appropriate private property without paying just compensation so long as it avoids formal condemnation." *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 156 (2021). In *Jacobs v. United States*, 290 U.S. 13, 16 (1933), this Court "made clear that, no matter what sort of procedures the government puts in place to remedy a taking, a property owner has a Fifth Amendment right to compensation as soon as the government takes his property without paying for it." "The same reasoning applies to takings by the States." *Knick*, 588 U.S. at 191.

This Court has recognized that the government can commit a physical taking either by appropriating property through a condemnation proceeding or by simply "enter[ing] into physical possession of property without authority of a court order." *United States v. Dow*, 357 U.S. 17, 21 (1958).

Temporary physical invasions constitute takings even if they are temporary or intermittent. *Cedar Point Nursery*, 594 U.S. at 2071 (citations omitted); *see also*, *First English*, 482 U.S. at 331. Just compensation is due even for temporary physical invasions — whether that be six days or six years.

The duration of the appropriation bears only on the amount of compensation due. *See United States v. Dow*, 357 U.S. at 26.

Rogne went to not one, but two, administrative hearings, one of which was prior to filing his suit, and the other was after the court stayed the case to proceed to a second administrative hearing. He sued in state trial and appellate courts, and then again in federal trial and appellate courts. From 2009 to the present, Rogne has been asserting his right to just compensation.

He was not paid compensation; there was no decision as to whether there was a physical *per se* taking; there was no decision as to whether there was substantial interference with property rights; and no decision as to whether the administrative process complied with this Court's required mechanism to pay compensation.

The dispositive issue for the state appellate court was the invocation of a prudential and procedural rule of exhaustion and a mootness doctrine of City's rescission of its illegal conduct, that effectively barred Rogne's Takings Clause claim.

The text of the Fifth Amendment Takings Clause expressly states: "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

The text of the Takings Clause does not require exhaustion, this Court has not held exhaustion is required, and there is no express term of voluntary cessation by the government so as to nullify a claim. The text stands by itself and must be construed as written.

A conclusion that a landowner is barred from compensation because he failed to exhaust an administrative remedy, or that government does not have to pay compensation, has no basis in the plain text of the Takings Clause. There is no textual requirement for exhaustion prior to payment of compensation. And there are no textual remedies for rescission — only just compensation.

Rogne is not asking this Court to overrule a state court decision, or a state court's application of a prudential rule of failure to exhaust. Rogne simply contends that the state court decision was a decision other than on the merits of a Takings Clause claim for just compensation.

Rogne appeals and prays to this Court to follow the Constitution and grant him the opportunity to receive just compensation. A reversal would allow Rogne to reassert his claim to be paid for just compensation for the six years City physically occupied his property.

The Tenth Circuit should be reversed.

II. Certiorari Should be Granted to Resolve Whether a Prudential Rule of Exhaustion (Ripeness Doctrine) and Rescission (Mootness Doctrine) Can Bar a Judiciable Claim for Just Compensation

A. Prudential Exhaustion is Not a Bar

Prudential exhaustion is a judge-made doctrine that permits a state court to abdicate their authority to hear a claim for guaranteed constitutional rights. *See generally*, Edmonds, *Prudence or Abdication? Prudential Ripeness and the Federal Forum Guarantee*, 2025 UNIV. OF ILL. LAW REVIEW ONLINE, 132.

When state courts invoke prudential rules to withhold judgment on justiciable constitutional claims, they abdicate and impermissibly deprive rather than adjudicate. *Id.* Prudential ripeness is a discretionary barrier that exceeds constitutional limits. *Id.* at 145. "Judge-made prudential doctrines have authorized courts to refrain from hearing cases even when all Article III requirements are satisfied . . . " *Id.* at 137.

"These concerns are particularly acute when courts apply prudential consideration to dismiss claims under 42 U.S.C. § 1983 . . . . " *Id.* That statute was Congress' deliberate response to the post Civil War reality that state institutions — especially courts — had systematically failed to protect federal [Constitutional] rights." *Id.* "When modern courts defer or dismiss § 1983 claims under the guise of prudential ripeness, they risk reestablishing the very state supremacy that § 1983 was designed to overcome." *Id.*

"During debates over what became the Civil Rights Act of 1871, lawmakers expressed deep alarm over the inability — or refusal — of state institutions [and courts] to provide redress." *Id.* 137-138. *See also*, *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 543 (1972) (Congress "intended to provide a federal judicial forum for the redress of wrongful deprivations of property by persons acting under color of state law."); *Mitchum v. Foster*, 407 U.S. 225, 242 (1972) ("The very purpose of [42 U.S.C.] § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights . . . . ").

Rogne maintains that the application of a prudential rule of failure to exhaust is a procedural ripeness rule and is not a required element to prove or disprove the merits of a Fifth Amendment claim. *Arbuckle*

Abstract Co. v. Scott, 975 P.2d 879, 886 (Okla. 1998). A judgment invoking a prudential rule of procedure is not a judgment on the merits, regardless of what a court calls it — judgment, summary judgment, or dismissal — and at least in Oklahoma, a claim for inverse condemnation is not subject to summary disposition. *Williams v. State ex rel. Dep't of Transp.*, 2000 OK Civ App 19, 998 P.2d 1245, 1252. The petition itself creates a question of fact for the finder of fact, unless the government confesses. *Id.*

The Oklahoma Supreme Court explained, "there is no administrative remedy for compensating a landowner for a governmental taking." *Mattoon v. City of Norman*, 617 P.2d 1347, 1350, 1980 OK 137 (Okla. 1980).

This Court rejected a prudential rule of ripeness in *Knick*, 588 U.S. at 204. Applying *Knick*, there should be no requirement that a private property owner first submit his Takings Clause claim to an administrative hearing, especially when the only remedy is not just compensation but rescission.

The same analysis applies here. There is only one remedy that is dispositive of a Takings Clause claim on the merits and that is monetary compensation conveyed by the government to the private property owner. An administrative remedy of rescission does not meet the merits question. The Tenth Circuit should have determined that if state courts invoke a prudential rule of exhaustion to deny compensation, it is not a bar to refiling a judiciable claim in federal court.

The threat to the Constitutional prohibitions against government overreach continues in this present case, when local government, including the judiciary, ignore and trample the fundamental rights

guaranteed by the United States Constitution. Government does not have the authority or power to take private property without paying just compensation.

There are no prudential or procedural rules that can circumvent this fundamental right.

A prudential rule, as applied here, unconstitutionally grants discretion to courts where no discretion exists. The prudential rule of exhaustion can, at the whim of a court, be applied in one case arbitrarily and not another. The text of the Takings Clause does not support such arbitrary discretion.

Yet, this is exactly what the Tenth Circuit was tasked with — deciding whether the invocation by state courts of a prudential rule of exhaustion (ripeness) to terminate a claim for just compensation by a state court was a decision on the merits.

The Tenth Circuit panel failed in its analysis.

B. Rescission or Mootness Does Not Nullify a Fifth Amendment Takings Claim

Rescission or voluntary cessation does not nullify or moot a Takings Clause claim. Compensation is the remedy, not rescission of the illegal order. *Knick*, 588 U.S. at 206 (J. Thomas concurring). "A violation of this Clause occurs as soon as the government takes property without paying for it." *Id*. A defendant cannot moot a case simply by ending its own unlawful conduct. *Friends of Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 174 (2000).

No subsequent post-taking action by the government can relieve it of the duty to provide compensation; government cannot nullify or moot a property owner's Fifth Amendment right to compensation by

rescission of its action. *Knick*, 588 U.S. at 206; *Friends of Earth*, 528 U.S. at 174; *First English*, 482 U.S. at 321 (no subsequent action whether voluntary repeal or a rescission can relieve it of a duty to provide compensation).

There must be at least a mechanism to pay compensation. Even the dissent in *Knick* conceded the government could only take as long as it provided a reliable mechanism to pay just compensation. *Id. at* 208 (Kagan, dissenting). This case presents a clear question that underscores this point.

Mootness is not a decision on the merits. Mootness is jurisdictional. *North Carolina v. Rice*, 404 U.S. 244, 246 (1971); *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 537 (1978). Lack of jurisdiction is not a case decided on its merits. Once moot, there is no jurisdiction to make any other opinions. *Church of Scientology of Ca. v. United States*, 506 U.S. 9, 12 (1992) (no jurisdiction to give opinions on other questions).

A federal court is not precluded from considering a litigant's Constitutional rights "where the state court willfully refuses to apply the correct and controlling constitutional standards." *Gamble v. State of Oklahoma*, 583 F.2d 1161, 1165 (10th Cir. 1978). In *Gamble*, the Tenth Circuit explained that it was manifestly evident that the Oklahoma state courts did not recognize or apply the controlling Supreme Court constitutional standards. *Id.*

The City's conduct was unconstitutional from the day it first served Rogne with a cease and desist order and then constructed a barrier fence on his private property to the day it rescinded its acts.

The City's rescission does not nullify a judiciable claim for compensation for the six years City took possession. And because City's voluntary cessation cannot nullify Rogne's claim, it is not a decision on the merits. Rescission is not the remedy — compensation is. Article III mootness is not a decision on the merits of a Takings Clause remedy.

III. THIS IS NOT A *SAN REMO* PRECLUSION TRAP

The state courts in the *San Remo Hotel v. City and County of San Francisco*, 364 F.3d 1088, 1093 (9th Cir. 2004) case actually determined and answered the merits question. It analyzed the City of San Francisco's ordinance in relationship to the actual use of, and application to, the private property. It held the regulatory ordinance fee and requirement bore a reasonable relationship in both the intended use and the amount of perceived problems stemming from a change in the hotel's use to a tourist hotel. *San Remo Hotel*, 364 F.3d at 1093. This was after the City of San Francisco denied a permit that was requested by the hotel owners.

Thus, unlike *San Remo* where the state courts actually made a final determination as to the merits question, the Oklahoma courts simply relied on the City's rescission of its cease and desist and failure to exhaust prior to filing the lawsuit — mootness and ripeness doctrines — neither of which are decisions on the merits of the underlying substantive question.

The *San Remo* preclusion trap is not present.

IV. Oklahoma Savings Statute Tolls Statute of Limitations of a Section 1983 Case

Whether a federal Constitutional claim or Section 1983 claim is tolled is a matter of state law. *Board of Regents v. Tomanio*, 446 U.S. 478, 478-79 (1980). Rogne's Constitutional claim was tolled by way of Oklahoma's own savings clause. Title 12 O.S. § 100. This statute tolls a Section 1983 claim. *Williams v. City of Guthrie*, 109 Fed. App'x. 283, 286 (10th Cir. 2004)(applied Oklahoma savings statute to a Section 1983 action).

Neither the Fifth Amendment nor Section 1983 contain a limitations period. Thus, federal courts and the Tenth Circuit look to the state limitations statutes, including the Oklahoma Savings Statute, that grants an additional one year period after a final decision *other than on the merits*. Oklahoma Stat. Title 12 O.S. § 100. *Abbitt v. Franklin*, 731 F.2d 661, 663 (10th Cir. 1984)(en banc)(courts adopt state statute of limitations and the savings provisions)

Okla. Stat. Title 12 § 100 provides:

> . . . if the plaintiff fail in such action otherwise than upon the merits, the plaintiff . . . may commence a new action within one (1) year after the . . . failure although the time limit for commencing the action shall have expired before the new action is filed.

The Oklahoma Savings Statute does not distinguish or even mention the words judgment or dismissal. It matters not if it was a judgment, summary judgment, or dismissal. What matters textually is that the statute states: "if the plaintiff *fail* in such action *otherwise than upon the merits*." *Id.*

Rogne refiled his claim for just compensation under the Oklahoma savings statute, Title 12 O.S. § 100. Even though he failed in the prior action, he is entitled to refile his claim because the state decision was not on the merits of an inverse condemnation claim.

The Oklahoma Supreme Court held where a trial court order is appealed, the one year period under Section 100 commences on the day after the appeal is final. *Cole v. Josey*, 457 P.3d 1007, ¶ 4, 2019 OK 39 (Okla. 2019).

In *Cole*, citing the Tenth Circuit in *Twashakarris, Inc., v. Immigration and Naturalization Serv.*, 890 F.2d 236 (10th Cir. 1989), the Oklahoma Supreme Court explained:

> We found the majority of other decisions with similar savings statutes overwhelmingly agree the time of commencement of the savings provision is the date the "judgment" is decided on appeal, not the date of determination by the trial court. *Cole*, 457 P.3d at ¶ 13.

Rogne complied with the express language of this statute and refiled his takings claim within the tolled period — from the final appeal mandate within the one year period.

When government physically condemns private property by constructing a barrier fence and occupying private property, government must pay compensation — and it accrues the day government constructed the fence.

The accrual of a constitutional takings claim without just compensation accrues at the time of the taking. *Knick*, 588 U.S. at 206-7. In Oklahoma, the accrual commences when the injury occurred. *Calvert v. Swinford*, 2016 OK 100, ¶ 11, 382 P.3d 1028, 1033 (Okla. 2016). The accrual of Rogne's just compensation injury was the day when City served him with a cease and desist order and later when the City physically came on his property and placed an orange barrier fence, hung by six-foot rebar, and placed a sign — "No Dumping Allowed".

Rogne is entitled to refile his claim because the state decision was not on the merits of an inverse condemnation claim.

V. Oklahoma Considers its Takings Clause as Coexistent with the Fifth Amendment's Takings Clause

The Tenth Circuit was tasked with deciding whether Rogne's claim failed other than on the merits. And it matters not that this case was first filed in Oklahoma state court. The Takings Clause claim is the same. Oklahoma's Constitution Art. 2, § 24 and the Fifth Amendment Takings Clause are the same claim and coexistent. App.31a-32a, 41a, fn. 32.

The Oklahoma Constitution provides, in part, "private property shall not be taken or damaged for public use without just compensation." Article II, Section 24, Okla. Const.

There is no difference between the protections under the Fifth Amendment and the Oklahoma Takings Clause, Art. 2, § 24. *Brannon v. City of Tulsa*, 932 P.2d 44, 46 (Okla. Civ. App. 1996)(no difference between

the protections afforded Oklahoma citizens under either provision); *ConocoPhillips Co. v. Henry*, 520 F.Supp 2d 1282, 1317 n.44 (N.D. Okla. 2007), *rev'd on other grounds*, 555 F.3d 1199 (10th Cir. 2009).

The Oklahoma Supreme Court explained:

> The "test" of whether there can be recovery in inverse condemnation is whether there is a sufficient interference with the landowner's use and enjoyment to constitute a taking.

Mattoon, 617 P.2d at 1349 (emphasis added).

As for a *per se* or *de facto* taking, the *Mattoon* court continued: "If there is an overt act by the governmental agency resulting in an assertion of dominion and control over property, there can be an actual or *de facto* 'taking'". *Id.* (emphasis added).

The Tenth Circuit did not answer whether the state courts made a determination of a *per se* or *de facto* taking based on the overt act by the City of constructing a barrier fence on Rogne's property. The Tenth Circuit did not answer whether the state court determined if there was substantial interference with the landowner's use and enjoyment.

The *Mattoon* court also explained "there is no administrative remedy for compensating a landowner for a governmental taking." *Id.* at 1350. A landowner may proceed, as an option, to administratively appeal for a denial of a building permit or may seek a variance.

However, an administrative remedy is not compensation and failure to exhaust such remedies does not address the merits of an inverse condemnation taking. *Id.*

The issue of substantial interference is the critical issue. *Carter v. City of Oklahoma City*, 862 P.2d 77, 81, 1993 OK 134 (Okla. 1993). "Further, in an inverse condemnation case . . . [t]he issue must go before a jury . . . . " *Id.*

> . . . in an action for inverse condemnation the issue of taking is critical and is a fact question which, unless confessed, must be tried to a jury . . .

Id.

In *Henthorn v. Oklahoma City*, 1969 OK 76, 453 P.2d 1013 (Okla. 1969) the Oklahoma Supreme Court required trial courts to determine "whether there was an interference with the use and enjoyment of the property due to the noise the jets made in landing and taking off for Will Rogers Airport and the amount of damages suffered."

> . . . there is a legal right to the use and enjoyment of one's property free from unreasonable interference. The ultimate question is whether there is a sufficient interference with the landowner's use and enjoyment to constitute a taking by a sovereign . . .

Henthorn, 453 P.2d at 1015-16.

To determine whether or not the state case was terminated on its merits under Oklahoma inverse condemnation precedent, the test is whether there was an overt act by the government resulting in dominion or control over property or whether there was a determination of substantial interference with the use and enjoyment of private property. Oklahoma Takings

Clause law is consistent with this Court's Takings Clause precedent.

The prior state appellate court held that Rogne failed to timely exhaust his administrative remedy, and when he did the remedy was government rescission of its cease and desist order and cessation of its physical possession of his property. There was no compensation paid.

Rogne maintains the application of a prudential rule of exhaustion where the only relief is rescission of government conduct, is not a decision on the merits of a Takings Clause claim. Government's physical possession, control and dominion of his private property demands just compensation from the day government first entered his property until it vacated.

The Tenth Circuit committed reversible error.

CONCLUSION

This Court should grant the Petition for Certiorari.

Respectfully submitted,

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May 18, 2026

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ORDER AND JUDGMENT, U.S. COURT OF APPEALS FOR THE TENTH CIRCUIT (FEBRUARY 17, 2026)

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JOHN ROGNE,

Plaintiff-Appellant,

v.

CITY OF CATOOSA,

Defendant-Appellee.

No. 25-5039

(D.C. No. 4:24-CV-00307-SH)
(N.D. Okla.)

Before: MATHESON, PHILLIPS, and ROSSMAN, Circuit Judges.

ORDER AND JUDGMENT*

John Rogne appeals the dismissal of his § 1983 Fifth Amendment Takings Clause claim against the City of Catoosa, Oklahoma ("the City"). Exercising

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

jurisdiction under 28 U.S.C. § 1291, we agree with the district court that Mr. Rogne's claim was time-barred and affirm.

I. Background[1]

A. Cease-and-Desist Orders

In 2009, the City issued a Cease-and-Desist Order that prevented Mr. Rogne from "stockpil[ing] dirt on [his] vacant lots" without a permit (the "2009 CDO"). App. at 8. Mr. Rogne administratively challenged the 2009 CDO. After a hearing, the City vacated it because Mr. Rogne "was not required to have a permit to stockpile dirt on his property." *Id.*

In 2011, the City issued another Cease-and-Desist Order "on the same vacant [l]ots" (the "2011 CDO"). *Id.* Mr. Rogne alleged that he "was not able to use his property" because the City "erected a temporary fence around [his] property." *Id.* at 11. He did not immediately bring an administrative challenge to the 2011 CDO.

B. State Court and Administrative Proceedings[2]

In 2014, Mr. Rogne sued the City for inverse condemnation in Oklahoma district court, seeking

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1 Because Mr. Rogne appeals from the district court's grant of the City's motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), we draw the facts from the well-pled allegations in Mr. Rogne's complaint. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Ashaheed v. Currington*, 7 F.4th 1236, 1249 (10th Cir. 2021).

2 We take judicial notice of records in Mr. Rogne's related state court proceedings that were not included in his Appendix. *See Rogne v. City of Catoosa*, No. CJ-2014-0420 (Okla. Dist. Ct. Rogers

injunctive relief and damages. He requested (1) "an order enjoining the City . . . from committing any acts that prohibits or precludes [sic] [Mr. Rogne] from engaging in or transporting fill dirt to his property . . . and storing fill dirt on his property" and (2) damages "in excess of $10,000." *See* Amended Petition at 2, *Rogne v. City of Catoosa*, No. CJ-2014-0420 (Okla. Dist. Ct. Rogers Cnty. Oct. 29, 2014).

In 2016, the City moved for summary judgment, arguing that Mr. Rogne had "not been denied economical viable use of his land" and had "not exhausted his administrative remedies with respect to the 2011 [CDO.]" Def.'s Mot. for Summ. J. at 2, *Rogne*, No. CJ-2014-0420 (Okla. Dist. Ct. Rogers Cnty. Oct. 6, 2016). Instead of responding to the City's motion, Mr. Rogne requested a stay pending administrative proceedings, which the court granted. After a hearing before the City Council, the City vacated the 2011 CDO in February 2017.[3]

The state district court proceedings remained pending. In May 2020, the City moved to dismiss, arguing that Mr. Rogne's claim "is not justiciable and is now moot" because "the City rescinded the 2011 CDO in 2017." App. at 81. Following briefing and a hearing, the court granted the motion. Order at 1,

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Cnty.). We consider the court records to determine what occurred in a prior case—"i.e., as evidence of prior 'judicial acts'"—not for the truth of the matter. *Johnson v. Spencer*, 950 F.3d 680, 705 (10th Cir. 2020) (quoting 21B Wright & Miller's Federal Practice & Procedure § 5106.4).

[3] The parties entered into a settlement agreement in August 2017, but a dispute promptly arose. Mr. Rogne moved to enforce the settlement in the state district court, which enforced it in part, but the Oklahoma Civil Court of Appeals reversed.

Rogne, No. CJ-2014-0420 (Okla. Dist. Ct. Rogers Cnty. July 27, 2020). It concluded there was "no justiciable controversy going forward" because "there is no ongoing cease and desist order in effect." *Id*. As to Mr. Rogne's damages claim from the time the 2011 CDO went into effect "until it was rescinded in February of 2017," the court concluded Mr. Rogne failed to exhaust his administrative remedies and therefore "cannot sustain an inverse condemnation claim upon these facts." *Id*.

Mr. Rogne moved for rehearing and to supplement the record. The court granted the motion. It converted the City's motion to dismiss to a summary judgment motion and also considered the City's still-pending 2016 summary judgment motion. Viewing the evidence in Mr. Rogne's favor, the court concluded that Mr. Rogne's "prospective claim" challenging the "ongoing cease and desist order" was "moot" because the 2011 CDO was dissolved through administrative proceedings. App. at 88. It then reiterated that Mr. Rogne failed to exhaust administrative remedies before 2017 and rejected that Mr. Rogne could excuse failure to exhaust based on his belief that a request for administrative relief would not succeed. The court granted the City summary judgment and entered "final judgment in favor of [the City] and against [Mr. Rogne]." *Id.* at 90.

Mr. Rogne appealed to the Oklahoma Court of Civil Appeals ("OCCA"). He argued that "he had a viable claim for damages for inverse condemnation from the time that the 2011 [CDO] had been issued by the City until 2017, when the City rescinded the Order." *Id.* at 30. The OCCA disagreed and affirmed the district court. It concluded "that there are no material disputed facts" and Mr. Rogne "cannot maintain an inverse condemnation claim under any

set of facts because he failed to exhaust his administrative remedies prior to filing the instant action." *Id.* at 32. It also stated in a footnote "that, as a matter of law, there was no taking because Mr. Rogne was granted relief as soon as he sought an administrative remedy and the City rescinded the Cease and Desist Order." *Id.* at 32 n.1.

The Oklahoma Supreme Court denied Mr. Rogne's petition for certiorari in February 2024.

C. Federal District Court Proceedings

In June 2024, Mr. Rogne sued the City in federal court. He asserted "a temporary taking without just compensation by way of 42 U.S.C. § 1983, the 14th Amendment to the United States Constitution and under the Fifth Amendment to the United States Constitution" based on "the time period of the City's 2011 [CDO] until the City vacated the Order." *Id.* at 10-11.[4] He requested "monetary damages and attorneys' fees and costs in excess of $100,000." *Id.* at 11.

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[4] Mr. Rogne also sought a declaratory judgment that the City and Oklahoma state courts lacked subject matter jurisdiction to regulate Mr. Rogne because he "is a card holding Cherokee and his ownership of land was within the territorial jurisdiction of the Cherokee Nation." App. at 12. The City moved to dismiss the declaratory judgment count, arguing the district court lacked jurisdiction under the *Rooker-Feldman* doctrine. The district court determined it had jurisdiction because Mr. Rogne's request for a declaratory judgment did not ask it to "overturn or invalidate" a state court order, but the court dismissed the claim because it sought only retrospective relief. *Rogne v. City of Catoosa*, No. 24-cv-00307-SH, 2025 WL 582563, at *11 (N.D. Okla. Feb. 21, 2025). Mr. Rogne does not challenge this ruling on appeal, *see* Aplee. Br. at 5 n.2, so we do not address it further.

The City moved to dismiss under Federal Rule of Civil Procedure 12(b)(6), arguing (1) Mr. Rogne's § 1983 claim was untimely based on Oklahoma's two-year statute of limitations for personal-injury actions as applicable to § 1983 actions, and (2) issue preclusion prevented Mr. Rogne from relitigating whether a taking occurred.

The district court granted the motion. *Rogne v. City of Catoosa*, No. 24-cv-00307-SH, 2025 WL 582563, at *1 (N.D. Okla. Feb. 21, 2025). First, it determined that issue preclusion applied because Mr. Rogne "had a full and fair opportunity to litigate the issue of whether a taking occurred from 2011 to 2017" and that issue "was actually litigated and determined" by the OCCA. *Id.* at *6. Second, even if issue preclusion did not bar the claim, his § 1983 claim "would still be barred by the statute of limitations." *Id.* at *7. The court said Oklahoma's two-year statute of limitations for personal-injury claims applied and that his claim accrued in 2019 when the Supreme Court decided *Knick v. Township of Scott*, 588 U.S. 180 (2019), which held that litigants may bring takings clause claims in federal court without first seeking relief in state courts. *Rogne*, 2025 WL 582563, at *7. Because Mr. Rogne failed to assert his § 1983 claim until 2024, the court concluded it was untimely. *Id.* It also rejected Mr. Rogne's argument that Oklahoma's savings statute, Okla. Stat. tit. 12, § 100, tolled the statute of limitations. *Id.* at *8-10.

D. Legal Background

1. Takings

The Takings Clause of the Fifth Amendment states that "private property [shall not] be taken for public use, without just compensation."

U.S. Const. amend. V.[5] "While States have substantial authority to regulate land use, the right to compensation is triggered if they 'physically appropriat[e]' property or otherwise interfere with the owner's right to exclude others from it." *Sheetz v. Cnty. of El Dorado*, 601 U.S. 267, 274 (2024) (quoting *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 149-52 (2021)).

Temporary takings "are not different in kind from permanent takings, for which the Constitution clearly requires compensation." *First English Evangelical Lutheran Church v. Los Angeles Cnty.*, 482 U.S. 304, 318 (1987). The government's "post-taking actions," such as repeal of a challenged taking, "cannot nullify the property owner's existing Fifth Amendment right: '[W]here the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation.'" *Knick*, 588 U.S. at 192 (quoting *First English*, 482 U.S. at 321).

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[5] The Takings Clause applies to the states through the Fourteenth Amendment. *See Dolan v. City of Tigard*, 512 U.S. 374, 383 (1994).

2. The State-Litigation Requirement and *Knick*

Before *Knick*, the Supreme Court said that a property owner asserting a taking by a local government must exhaust available state procedures for compensation before seeking relief in federal court. *Id.* at 191 (discussing *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1984)). In *Williamson County*, the Court held that "if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the [Takings] Clause until it has used the procedure and been denied just compensation." 473 U.S. at 195. Thus, a federal takings claim against a local government was not "ripe" until the property owner sought "compensation through the procedures the State has provided for doing so." *Id.* at 195.

As the Supreme Court explained in *Knick*, a "state court's resolution of a claim for just compensation under state law generally has preclusive effect in any subsequent federal suit." *Knick*, 588 U.S. at 184. As a result, the *Williamson County* "state-litigation requirement" created "a Catch-22" for the takings plaintiff: "He cannot go to federal court without going to state court first; but if he goes to state court and loses, his claim will be barred in federal court." *Id.* at 184-85.

In *Knick*, the Supreme Court eliminated the preclusion trap by overruling *Williamson County*'s state-litigation requirement. Under *Knick*, the "Fifth Amendment right to full compensation arises at the time of the taking, regardless of post-taking remedies that may be available to the property owner." 588 U.S. at 190. "If a local government takes private property

without paying for it, that government has violated the Fifth Amendment—just as the Takings Clause says—without regard to subsequent state court proceedings." *Id.* at 189. The property owner "may bring his claim in federal court under § 1983 at that time." *Id.* at 185.[6]

3. Oklahoma Inverse Condemnation

The Oklahoma Constitution provides: "Private property shall not be taken or damaged for public use without just compensation. Just compensation shall mean the value of the property taken, and in addition, any injury to any part of the property not taken." Okla. Const., Art. 2, § 24; *see Snow v. Town of Calumet*, 512 P.3d 369, 372 (Okla. 2022). "When a governmental entity takes or damages private property without just compensation, a person may bring an inverse condemnation claim." *Snow*, 512 P.3d at 372.[7] "The essential

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[6] Although *Knick* held that property owners need not exhaust state procedures to bring a federal court takings claim, they still must satisfy a "finality requirement." *Pakdel v. City of San Francisco*, 594 U.S. 474, 478 (2021). Generally, the property owner must "at least resort to the procedure for obtaining variances and obtain a conclusive determination by the agency whether it would allow the proposed development, in order to ripen its takings claims." *North Mill Street, LLC v. City of Aspen*, 6 F.4th 1216, 1225 (10th Cir. 2021) (quoting *Suitum v. Tahoe Reg'l Plan. Agency*, 520 U.S. 725, 738 (1997)). "[A] plaintiff's failure to properly pursue administrative procedures may render a claim unripe *if* avenues still remain for the government to clarify or change its decision." *Id.* (quoting *Pakdel*, 594 U.S. at 480).

[7] Inverse condemnation is the traditional state law "cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant." *Knick*, 588 U.S. at 186 (quoting *United States v.*

elements of an inverse condemnation claim are (1) a taking of property for public use by a governmental entity that has the power of eminent domain, and (2) a failure to tender just compensation." *Id.* "A property owner is entitled to just compensation if the government's actions constitute such a 'substantial interference' with the use of the property that a de facto taking occurs." *Rocket Props., LLC v. City of Tulsa*, 567 P.3d 390, 395 (Okla. Civ. App. 2024) (quoting *Mattoon v. City of Norman*, 617 P.2d 1347, 1347 (Okla. 1980)).

In general, Oklahoma requires that property owners exhaust administrative remedies before resorting to the courts for inverse condemnation. *Id.* at 394. "[U]ntil a final administrative decision has been formalized," an inverse condemnation action is not ripe for judicial review in Oklahoma. *See April v. City of Broken Arrow*, 775 P.2d 1347, 1355 (Okla. 1989). "The requirement to exhaust administrative remedies may be excused where there is a showing the administrative remedies would be futile or inadequate to give the relief required; however, a strong showing is required." *Rocket Props.*, 567 P.3d at 396.

II. Discussion

On appeal, Mr. Rogne does not contest that he failed to file his § 1983 takings action before the applicable statute of limitations expired.[8] He argues that

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Clarke, 445 U.S. 253, 257 (1980)); *id.* at 205 (equating "federal court takings claims" to "inverse condemnation suits in state court"). "Inverse condemnation stands in contrast to direct condemnation, in which the government initiates proceedings to acquire title under its eminent domain authority." *Id.*

[8] In his reply brief, Mr. Rogne argues for the first time that his "Fifth Amendment claim for just compensation does not arise

he timely filed his action under the Oklahoma savings statute. We disagree. As we discuss below, the statute of limitations period for his claim was two years, his claim accrued long before he filed this action in 2024, and the savings statute does not apply because the Oklahoma state courts resolved his inverse condemnation claim for damages on the merits.[9]

A. Standard of Review

We review de novo a district court's decision to grant a Rule 12(b)(6) motion to dismiss for failure to state a claim. *Cuervo v. Sorenson*, 112 F.4th 1307,

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under § 1983" and that § 1983 is not required to assert a Fifth Amendment claim. Aplt. Reply Br. at 1-2. The City moved to file a sur-reply to respond to Mr. Rogne's new argument. Aplee. Mot. to file Sur-Reply at 2-3, Doc. No. 11150917.

Mr. Rogne has waived this argument on three separate grounds. First, he failed to raise it in his opening brief. *See Sawyers v. Norton*, 962 F.3d 1270, 1286 (10th Cir. 2020). Second, he also failed to raise it in district court and does not argue plain error on appeal. *See Paycom Payroll, LLC v. Richison*, 758 F.3d 1198, 1203 (10th Cir. 2014). Third, the argument is inadequately briefed in his Reply brief. *See Sawyers*, 962 F.3d at 1286. Also, the district court did not pass upon this issue. *See Tesone v. Empire Mktg. Strategies*, 942 F.3d 979, 991-92 (10th Cir. 2019). We decline to consider it. We deny as moot the City's motion to file a sur-reply on this argument.

[9] Because we conclude Mr. Rogne's claim is time-barred, we do not address issue preclusion, the district court's alternative basis for dismissal. But we note that "a state court's resolution of a claim for just compensation under state law generally has preclusive effect in any subsequent federal suit." *Knick*, 588 U.S. at 184; *see also San Remo Hotel, L.P. v. City & Cnty. of San Francisco*, 545 U.S. 323, 338 (2005) ("Federal courts, moreover, are not free to disregard [the full faith and credit statute] simply to guarantee that all takings plaintiffs can have their day in federal court.").

1312 (10th Cir. 2024). "To survive a motion to dismiss [for failure to state a claim], a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft*, 556 U.S. at 678 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "On a motion to dismiss, 'all well-pleaded allegations of the complaint are accepted as true and viewed in a light most favorable to the nonmoving party.'" *Johnson v. City of Cheyenne*, 99 F.4th 1206, 1217 (10th Cir. 2024) (quoting *Schwartz v. Booker*, 702 F.3d 573, 579 (10th Cir. 2012)).

"We review whether a district court properly applied a statute of limitations de novo." *Allen v. Env't Restoration, LLC*, 32 F.4th 1239, 1243 (10th Cir. 2022).

B. Timeliness

Whether Mr. Rogne timely asserted his § 1983 claim depends on (1) the statute of limitations applicable to his claim, (2) when his claim accrued, and (3) whether the limitations period was tolled.

1. Statute of Limitations

"The statute of limitations period for a § 1983 claim is dictated by the personal injury statute of limitations in the state in which the claim arose." *Schell v. Chief Just. and Justs. of Okla. Sup. Ct.*, 11 F.4th 1178, 1191 (10th Cir. 2021) (quotations omitted); *see also Nance v. Ward*, 597 U.S. 159, 174 (2022) ("[A]ll § 1983 suits must be brought within a State's statute of limitations for personal-injury actions."). Oklahoma's

two-year statute of limitations for personal injury claims applies to Mr. Rogne's § 1983 claim. *See Schell*, 11 F4th at 1191.[10] Mr. Rogne does not argue otherwise. *See* Aplt. Br. at 23.

2. Accrual

Federal law determines the accrual of section 1983 claims. *Herrera v. City of Espanola*, 32 F.4th 980, 990 (10th Cir. 2022). "[I]t is the standard rule that accrual occurs when the plaintiff has a complete and present cause of action, that is, when the plaintiff can file suit and obtain relief." *Id.* (quotations omitted).

Previously, under *Williamson County*, "until the property owner ha[d] tried and failed to obtain compensation through the available state procedure," a property owner had not suffered a constitutional takings injury and "thus [had] no Fifth Amendment claim actionable under § 1983." *Knick*, 588 U.S. at 194-95. *Knick*'s overruling of *Williamson County* and its holding that "a property owner has a claim for a violation of the Takings Clause as soon as a government takes his property for public use without paying for it," 588 U.S. at 189, changed the accrual analysis. Under *Knick*, a property owner's Fifth Amendment claim under § 1983 accrues "at the time of the taking." *Id.*

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[10] *See also 2701 Mountain Glen CT, LLC v. City of Woodland Park,* 856 F. App'x 141, 143-44 (10th Cir. 2021) (unpublished) (holding "Colorado's two-year statute of limitations for personal injury claims" applies to plaintiff's § 1983 takings claim); *Bruce v. Ogden City Corp.*, No. 22-4114, 2023 WL 8300363, at *10 (10th Cir. Dec. 1, 2023) (unpublished) (holding "Utah's four-year residual statute of limitations governs Bruce's § 1983 claims" asserting takings clause violations).

Mr. Rogne argues that his federal takings claim accrued in 2011 when the City issued the cease-and-desist order and placed a fence on his property. Aplt. Br. at 30. The district court concluded, and the City urges on appeal, that Mr. Rogne's federal takings claim accrued when the Supreme Court decided *Knick* in 2019. Aplee. Br. at 10; *Rogne*, 2025 WL 582563, at *8. Mr. Rogne filed his federal takings claim under § 1983 in 2024. Therefore, under either accrual date, the two-year statute of limitations had lapsed.

3. Oklahoma Savings Statute

Mr. Rogne argues that Oklahoma's savings statute, Okla. Stat. tit. 12, § 100, should have allowed his claim by his bringing a new action within one year of when his state lawsuit ended. We disagree.[11]

a. Savings statute

Oklahoma's savings statute, Okla. Stat. tit. 12, § 100, "permits the filing of an action after the statute of limitations has run." *Grider v. USX Corp.*, 847 P.2d 779, 783 (Okla. 1993). It provides,

> If any action is commenced within due time, and . . . the plaintiff fail[s] in such action otherwise than upon the merits, the plaintiff . . . may commence a new action within

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[11] Mr. Rogne argued below that his reliance on *Williamson County* and the intervening change in law in *Knick* equitably tolled his claim. The district court rejected this argument. *Rogne*, 2025 WL 582563, at *8. Mr. Rogne does argue equitable tolling on appeal. We therefore do not address the issue. *Tran v. Trs. of State Colls. in Colo.*, 355 F.3d 1263, 1266 (10th Cir. 2004) (holding that issues not raised in appellant's opening brief "are deemed abandoned or waived" (quotations omitted)).

> one (1) year after the reversal or failure although the time limit for commencing the action shall have expired before the new action is filed.

Okla. Stat. tit. 12, § 100.

Under the statute, if a plaintiff timely initiates an action that "fails . . . otherwise than on the merits," the plaintiff has "an additional year from the time the appeal or motion was adjudicated in which to refile a complaint." *Twashakarris, Inc. v. I.N.S. of U.S.*, 890 F.2d 236, 237 (10th Cir. 1989). In general, "the Oklahoma savings statute applies to § 1983 claims." *Eastom v. City of Tulsa*, 783 F.3d 1181, 1184 (10th Cir. 2015). And the "new action" need not be identical to the failed prior action. *Ciszkowski v. Rector*, 70 F.3d 1282 (Table), 1995 WL 681504, at *2 (10th Cir. 1995) (unpublished). "The Oklahoma Supreme Court . . . has construed section 100 in light of that state's transactional approach to the definition of a cause of action." *Id.* (citing *Chandler v. Denton*, 741 P.2d 855, 862-64 (Okla. 1987)). So long as the plaintiff "allege[d] the operative events in his first timely suit, his failure to assert his section 1983 theory of recovery within two years would not bar him from pursuing that theory" in a new action filed under Oklahoma's savings statute. *Id.*

The plaintiff bears the burden of establishing "the original action fail[ed] otherwise than upon the merits." *Id.* "The word 'merits' and the phrase 'on the merits' have been understood . . . as referring to the substance of a claim or defense, different from purely procedural or technical grounds." *Pettyjohn v. Plaster*, 956 P.2d 948, 950 (Okla. Civ. App. 1998) (citing *Duncan v. Deming Inv. Co.*, 154 P. 651 (1916)). "A judgment is

rendered on the merits 'when it amounts to a declaration of the law as to the respective rights and duties of the parties, based on the ultimate facts or state of facts disclosed by the pleadings, and evidence upon which the right of recovery depends, irrespective of formal, technical, or dilatory objections or contentions.'" *Id.* (quoting *Crow v. Abraham*, 167 P. 590, 591 (Okla. 1917)) (holding that dismissal for failure to state a claim upon which relief could be granted is a dismissal on the merits and the savings statute does not apply to the subsequent action).

b. Analysis

i. OCCA decision on the merits

To salvage his § 1983 claim based on the Oklahoma's savings statute, Mr. Rogne must establish that (1) he timely filed his state inverse condemnation claim; (2) his state inverse condemnation claim alleged the same operative events as his federal § 1983 claim; (3) he filed his § 1983 claim within one year of the resolution of his state inverse condemnation appeal; and (4) his state inverse condemnation claim failed "otherwise than upon the merits." Okla. Stat. tit. 12, § 100; *Twashakarris*, 890 F.2d at 237.

The parties dispute only the fourth element—whether Mr. Rogne's state inverse condemnation claim failed "otherwise than upon the merits." We conclude it did not because the OCCA resolved Mr. Rogne's claim upon the merits when it affirmed summary judgment for the City.[12]

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[12] Mr. Rogne's focus on the Oklahoma district court's decision is misplaced. *See, e.g.*, Aplt. Br. at 8. The failed action under Oklahoma's savings statute "includes the initial judgment and any

We read the OCCA's decision as declaring "the respective rights and duties of the parties, based on the ultimate facts." *Pettyjohn*, 956 P.2d at 950. It determined "there are no material disputed facts" and summary judgment was appropriate. App. at 32. In Oklahoma, "[s]ummary judgment is an adjudication on the merits of the controversy." *Ind. Sch. Dist. #52 of Okla. Cnty. v. Hofmeister*, 473 P.3d 475, 489 (Okla. 2020); *Okla. Pub. Emps. Ass'n v. Okla. Dep't of Central Servs.*, 55 P.3d 1072, 1076 (Okla. 2002). The OCCA affirmed summary judgment for the City.

Further, the OCCA said that "[Mr.] Rogne cannot maintain an inverse condemnation claim under any set of facts because he failed to exhaust his administrative remedies prior to filing the instant action" and, "as soon as he sought an administrative remedy . . . the City rescinded the Cease and Desist Order." App. at 32 & n.1. Because Mr. Rogne "was granted relief" through administrative proceedings, the OCCA concluded "that, as a matter of law, there was no taking." *Id.* at 32 n.1. By concluding that "there was no taking" and that Mr. Rogne's inverse condemnation claim failed "under any set of facts," the OCCA resolved Mr. Rogne's claim on the merits.

ii. Mr. Rogne's Arguments

Mr. Rogne's arguments that the Oklahoma courts did not render a merits decision lack merit.

First, he presents various legal arguments based on Oklahoma law—that (1) summary judgment is not

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validly filed appeals." *Twashakarris*, 890 F.2d at 237. We must therefore consider whether the ultimate disposition of Mr. Rogne's case, after his "validly filed appeals," was "upon the merits." *Id.*

available for inverse condemnation claims and such claims "can only be resolved by the jury," Aplt. Br. at 19; (2) the Oklahoma courts failed to address the merits "issues of (i) substantial interference and (ii) just compensation," *id.*; and (3) the City's "[s]ubsequent rescission" of the 2011 CDO does not "relieve [the City] of the duty to provide compensation," *id.* at 8.

In raising these arguments, Mr. Rogne effectively asks us to review the OCCA's decision for legal error under state law. But even if he has one or more colorable arguments, we lack authority to address them. "It is axiomatic that state courts are the final arbiters of state law." *Brown v. Buhman*, 822 F.3d 1151, 1160 n.6 (10th Cir. 2016) (quoting *Schrock v. Wyeth, Inc.*, 727 F.3d 1273, 1280 (10th Cir. 2013)); *see also Johnson v. Fankell*, 520 U.S. 911, 916 (1997) ("Neither this Court nor any other federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the State," whether state rule is "procedural" or "substantive"); *TMJ Implants, Inc. v. Aetna, Inc.*, 498 F.3d 1175, 1181 (10th Cir. 2007) ("A federal court must follow the state's highest court in pronouncing or construing the state's common law, statutory law, or constitutional law . . . if state law imposes [a] limitation, we must recognize that limitation even if the federal constitution is not so restrictive"). The appropriate court for these arguments was the Oklahoma Supreme Court, which denied Mr. Rogne's petition for certiorari. Our inquiry is limited to whether the OCCA resolved Mr. Rogne's inverse condemnation claim upon the merits. We conclude it did.

Second, Mr. Rogne's argument that the Oklahoma courts resolved his claim on mootness grounds overlooks

the state court procedural history and the relief he requested—both prospective injunctive relief and damages. *See* Amended Petition at 2-3, *Rogne*, No. CJ-2014-0420 (Okla. Dist. Ct. Rogers Cnty. Oct. 29, 2014). The Oklahoma district court held Mr. Rogne's "prospective claim," which sought to vacate the "ongoing cease and desist order," was "moot, and the issue is no longer justiciable," because the City vacated the 2011 CDO in 2017. App. at 88. Mr. Rogne did not appeal this portion of the district court's ruling, so the OCCA did not address it. Other than summarizing the City's motion to dismiss and the district court's ruling, the OCCA did not address mootness.

As for Mr. Rogne's damages claim for a temporary taking between 2011 and 2017, neither the Oklahoma district court nor the OCCA determined that claim was moot. In the Oklahoma district court's order granting the City's motion to dismiss, it concluded Mr. Rogne "cannot sustain an inverse condemnation claim" for "the time period from the 2011 cease and desist order until it was rescinded in February of 2017" because he "had not exhausted his administrative remedies at that point." Order at 1, *Rogne*, No. CJ-2014-0420 (Okla. Dist. Ct. Rogers Cnty. July 27, 2020). On rehearing, the district court granted summary judgment to the City and rejected Mr. Rogne's argument that "exhaustion of Plaintiff's remedies would not have been successful in 2011 [so] there is no requirement that this Plaintiff exhausts such remedies." App. at 89.

The OCCA's decision solely addressed Mr. Rogne's "claim for damages for inverse condemnation from the time that the 2011 Cease and Desist Order had been issued by the City until 2017, when the City rescinded the Order." *Id.* at 30. It did not review the district

court's conclusion that his prospective claim was moot. Nor did it conclude his damages claim was moot. Rather, as discussed, it held no taking occurred, affirming summary judgment on the merits for the City.

* * * *

In sum, Oklahoma's two-year statute of limitations applies to Mr. Rogne's § 1983 Fifth Amendment claim. Mr. Rogne failed to file his claim within two years. The Oklahoma savings statute does not apply because the OCCA resolved Mr. Rogne's inverse condemnation claim on the merits. Because Mr. Rogne first asserted his Fifth Amendment claim under § 1983 in 2024, years after the limitations period ended, it was time-barred.

III. Conclusion

We affirm the district court's judgment.

Entered for the Court

Scott M. Matheson, Jr.
Circuit Judge

**OPINION AND ORDER,
U.S. DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA
(FEBRUARY 21, 2025)**

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOHN ROGNE,

Plaintiff,

v.

CITY OF CATOOSA,

Defendant.

Case No. 24-cv-00307-SH

Before: Susan E. HUNTSMAN,
Magistrate Judge, United States District Court.

OPINION AND ORDER

Plaintiff brought this lawsuit on June 28, 2024, asserting a Fifth Amendment takings claim and seeking a declaration that Defendant improperly exercised jurisdiction over his land.[1] Defendant now moves to dismiss the takings claim, arguing it is barred by issue

[1] The parties have consented to the jurisdiction of a U.S. Magistrate Judge for all purposes under 28 U.S.C. § 636(c)(1) and Fed. R. Civ. P. 73(a). (ECF No. 15.)

preclusion and the applicable statute of limitations. Defendant also moves to dismiss the declaratory judgment action for lack of subject-matter jurisdiction and standing.

The Court agrees Plaintiff is precluded from asserting a taking occurred and, in any event, brought his claim too late. As for the declaratory judgment action, the Court finds that it has jurisdiction, but Plaintiff cannot seek a retrospective declaratory judgment. Plaintiff's claims will be dismissed.

Background

The Court treats the factual allegations in the Complaint as true for purposes of this order. The Court has also considered documents attached to the parties' briefing and has taken judicial notice of filings in the related state-court action. (*See* section I(A), *infra*.) The following background is based on these allegations and documents:[2]

Plaintiff John Rogne ("Rogne") owns property in Catoosa, Oklahoma. (ECF No. 2 ¶¶ 1–3.) This property is located within the exterior boundaries of the Cherokee Nation, and Rogne is a Cherokee Nation citizen. (*Id.* ¶ 30.) In 2009, the City of Catoosa (the "City") issued a cease-and-desist order to Rogne on the grounds that he did not have a permit to stockpile dirt on his

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[2] The Court references state-court filings for purposes of elucidating the claims and rulings made in the state-court action and its procedural posture. The Court does not treat the factual statements in those filings as true for purposes of this order. *See Tal u. Hogan*, 453 F.3d 1244, 1264 n.24 (10th Cir. 2006) ("[t]he documents may only be considered to show their contents, not to prove the truth of matters asserted therein" (quoting *Oxford Asset Mgmt., Ltd. u. Jaharis*, 297 F.3d 1182, 1188 (11th Cir. 2002))).

property. (*Id*. ¶ 6.) After conducting a hearing, the City rescinded the order. (*Id.* ¶ 7.)

Two years later, in 2011, the City issued another cease-and-desist order regarding the same lots. (*Id.* ¶ 8.) On October 3, 2014, Rogne filed a state-court lawsuit against the City, asserting—among other things—an action for inverse condemnation and seeking damages.[3] (*Id*. ¶ 10.[4])

In October 2016, the City filed a motion for summary judgment, arguing, *inter alia*, that Rogne had failed to exhaust his administrative remedies with respect to the 2011 cease-and-desist order.[5] Plaintiff then moved to stay the state-court action pending the City's administrative hearing on the order.[6] The City vacated the 2011 cease-and-desist order (ECF No. 2 ¶ 12), apparently in 2017.[7]

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[3] "Inverse condemnation is 'a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant.'" *Knick u. Twp. of Scott*, 588 U.S. 180, 186 (2019) (quoting *United States u. Clarke*, 445 U.S. 253, 257 (1980)).

[4] *See also Rogne u. City of Catoosa*, No. CJ-2014-420 (Rogers Cty. Dist. Ct., Okla.) (the "Rogers Cty. Case"), Pet. ¶ 12 (Oct. 3, 2014); *id*. Am. Pet. ¶ 11 (Oct. 29, 2014). The docket for the Rogers County Case is available at https://www.oscn.net/dockets/GetCaseInformation.aspx?db=rogers&number=CJ-2014-420 (last visited Feb. 21, 2025).

[5] *See id*., Def.'s Mot. Summ. J., at 2 (Oct. 6, 2016).

[6] *See id*., Pl.'s Mot. Stay (Oct. 28, 2016).

[7] Plaintiff's complaint does not state the date of this vacatur. However, Rogne agrees in his briefing that it occurred in 2017. (*See, e.g.*, ECF No 17 at 7 ("the City cannot deny that it vacated

The parties then had a dispute regarding the terms of a settlement,[8] and the district court entered judgment partially granting each parties' motion.[9] The City appealed that judgment;[10] the Court of Civil Appeals reversed;[11] and the district court received the mandate on November 5, 2019.[12]

While that appeal was pending, on June 21, 2019, the United States Supreme Court decided the case of *Knick v. Township of Scott*, 588 U.S. 180 (2019). Prior to *Knick*, a person like Rogne had to wait until a state court denied his claim for just compensation under state law before he could file a federal takings claim under 42 U.S.C. § 1983. *See id.* at 184 (citing *Williamson Cnty. Reg'l Plan. Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), *overruled by Knick*). However, if a plaintiff followed the requirements of *Williamson County* and filed a state suit first, the "state court's resolution of a claim for just compensation under state law generally has preclusive effect in any subsequent federal suit." *Id.* (citing *San Remo Hotel, L.P. v. City & Cnty. of San Francisco*, 545 U.S. 323 (2005)). "The takings plaintiff thus finds himself in a Catch-22: He cannot go to

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the 2011 Cease and Desist Order after giving Mr. Rogne his administrative hearing in 2017").)

8 *See, e.g.*, *Rogers Cty. Case*, Pl.'s Mot. Enforce Sett. Agmt. (Sept. 21, 2017); *id.*, Comb. Resp. Mot. Enforce Sett. Agmt. (Oct. 10, 2017).

9 *See id.* Journal Entry of J. (Jan. 19, 2018).

10 *See id.* Pet. in Error (Feb. 16, 2018).

11 *See Rogne v. City of Catoosa*, No. 116,769, slip. op. (Okla. Ct. Civ. App. Feb. 14, 2019).

12 *See Rogers Cty. Case*, Mandate (Nov. 5, 2019).

federal court without going to state court first; but if he goes to state court and loses, his claim will be barred in federal court." *Id.* at 184-85. *Knick* eliminated this Catch-22. It overruled *Williamson County* and found that a property owner could bring his takings claim under § 1983 immediately upon the taking of his property without just compensation. *Id.* at 206. After *Knick* was handed down, Rogne did not file a § 1983 case in this court.

Back in the state district court, Rogne's litigation continued. In May 2020, the City filed a motion to dismiss, asserting there was no justiciable controversy and that Rogne's claims were moot following the City's rescission of the 2011 cease-and-desist order.[13] In response, Rogne argued he still was entitled to compensation for the temporary taking that occurred during the period when the cease-and-desist order was in effect.[14] The state district court granted the City's motion to dismiss.[15] Plaintiff moved to reconsider and to supplement the record with additional evidence.[16]

The state court held a hearing on October 13, 2021, and issued a "minute" granting Rogne's motion for "new trial,"[17] converting the City's motion to dismiss

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[13] *See Rogers Cty. Case*, Def. Mot. Dismiss (May 18, 2020).

[14] *See id.*, Pl.'s Resp. Mot. Dismiss (Jun. 5, 2020).

[15] *See id.*, Order Granting City's Mot. Dismiss (July 27, 2020).

[16] *See id.*, Pl's Mot. Rehearing (Aug. 10, 2020); Pl.'s Am. Mot. Rehearing (Aug. 13, 2020); App. Supp. Record & File Reply (Apr. 15, 2021).

[17] The "Court considers the Plaintiff's Motion for Rehearing filed on August 10, 2020, to be a motion for a new trial." *Id.*, Order and Judgment (July 18, 2022).

into one for summary judgment, and granting both that motion and the earlier 2016 motion for summary judgment.[18] On July 18, 2022, the state court entered an Order and Judgment formalizing this ruling.[19] Rogne filed a motion for new trial, which the state court denied.[20] Rogne then appealed.[21]

On appeal, the Oklahoma Court of Civil Appeals reviewed the grant of summary judgment *de nouo*. *Rogne u. City of Catoosa*, No. 121,026, slip. op. ¶ 6 (Okla. Civ. App. June 29, 2023). Reviewing Plaintiff's arguments, the appellate court summarized:

> Rogne contends, in essence, that it was error for the trial court to grant summary judgment to the City because, according to him, he had a viable claim for damages for inverse condemnation from the time that the 2011 Cease and Desist Order had been issued by the City until 2017, when the City rescinded the Order. We disagree with Rogne's contentions and affirm the Orders of the trial court.

Id. ¶ 7. In affirming summary judgment, the court concluded, "Rogne cannot maintain an inverse condemnation claim under any set of facts because he

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[18] *See id*., Minute (Oct. 13, 2021).

[19] *See id.*, Order and Judgment (July 18, 2022).

[20] *See id*., Mot. New Trial (Aug. 8, 2022); *id*., Order (Dec. 28, 2022).

[21] *Rogne u. City of Catoosa*, No. 121,026 (Okla. Civ. App.) (the "State Appeal"), Pet. in Error (Jan. 30, 2023). The docket for the State Appeal is available at https://www.oscn.net/dockets/GetCaseInformation.aspx?db=appellate&number=1210 26 (last visited Feb. 21, 2025).

failed to exhaust his administrative remedies prior to filing the instant action." *Id.* ¶ 9. The court further acknowledged "Rogne's argument that an administrative remedy is ineffective because there is no administrative remedy for compensating a landowner for money damages for a temporary taking." *Id.* n.1. The appellate court found, "however, that, as a matter of law, there was no taking because Mr. Rogne was granted relief as soon as he sought an administrative remedy and the City rescinded the Cease and Desist Order." *Id.*

Rogne then filed a petition for writ of certiorari from the Oklahoma Supreme Court, which the court denied on February 12, 2024.[22] Mandate issued on March 7, 2024.[23] The United States Supreme Court's docket indicates that no petition for writ of certiorari was filed there, so this mandate marks the end of Rogne's state-court litigation.

On June 28, 2024, Rogne filed the current federal lawsuit. (ECF No. 2.) Rogne brings suit under 42 U.S.C. § 1983 for a taking without just compensation in violation of the Fifth and Fourteenth Amendments. (*Id.* ¶¶ 23-28.) As in state court, Rogne continues to assert that he suffered a temporary taking of his property from the time the 2011 cease-and-desist order was entered until it was later vacated. (*Id.* ¶¶ 24, 26.)

Separately, Rogne seeks a declaratory judgment that "the City and the Oklahoma State Courts including Rogers County District Court and the Court of Appeals

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[22] *See State Appeal*, Pet. Writ Cert. (July 19, 2023); *id.*, Docket (Feb. 12, 2024).

[23] *See id.*, Mandate (Mar. 7, 2024).

lacked jurisdiction to regulate and penalize Plaintiff" because he is an Indian living within a reservation. (*Id.* ¶¶ 29-35.)

The City now moves to dismiss. (ECF No. 9.) The City argues Rogne fails to state a claim under § 1983, as it is barred by issue preclusion and the statute of limitations. (*Id.* at 4-6.) The City further argues this Court lacks jurisdiction over Rogne's declaratory judgment action under the *Rooker-Feldman* doctrine and because the relief sought is entirely retrospective. (*Id.* at 6-9.)

Analysis

I. Rogne's § 1983 Claims

Having reviewed the parties' briefing, the Court finds Rogne has fallen into the type of "preclusion trap" the Supreme Court sought to eliminate in *Knick*. Because he pursued his inverse condemnation claim to its conclusion in state court, he is precluded from rearguing issues decided there, including whether a taking occurred. Even were Rogne's claims not precluded, he has brought his § 1983 action years too late.

A. Standard of Review—Rule 12(b)(6)

The City moves to dismiss Rogne's § 1983 action for failure to state a claim upon which relief can be granted. *See* Fed. R. Civ. P. 12(b)(6). "[A] plaintiff must plead sufficient factual allegations 'to state a claim to relief that is plausible on its face.'" *Brokers' Choice of Am., Inc. v. NBC Universal, Inc.*, 861 F.3d 1081, 1104 (10th Cir. 2017) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim is

facially plausible 'when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). All such reasonable inferences are resolved in the plaintiff's favor. *Diversey v. Schmidly*, 738 F.3d 1196, 1199 (10th Cir. 2013). "Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Twombly*, 550 U.S. at 555-56 (citations and footnote omitted).

A statute of limitations argument, however, is an affirmative defense that must be raised by the defendant and which is often dependent on a resolution of factual disputes that cannot occur at the Rule 12 stage. *Herrera v. City of Espanola*, 32 F.4th 980, 991 (10th Cir. 2022). Even so, "[i]f from the complaint, 'the dates on which the pertinent acts occurred are not in dispute, [then] the date a statute of limitations accrues is . . . a question of law' suitable for resolution at the motion to dismiss stage." *Id.* (quoting *Edwards v. Int'l Union, United Plant Guard Workers of Am.*, 46 F.3d 1047, 1050 (10th Cir. 1995)); *see also Sierra Club v. Okla. Gas & Elec. Co.*, 816 F.3d 666, 671 (10th Cir. 2016) ("A statute of limitations defense may be appropriately resolved on a Rule 12(b) motion when the dates given in the complaint make clear that the right sued upon has been extinguished." (cleaned up)).

When assessing the allegations in a complaint, the Court looks not only to the complaint itself, but to "documents attached to or referenced in the complaint if they 'are central to the plaintiff's claim and the parties do not dispute the documents' authenticity.'"

Brokers' Choice, 861 F.3d at 1103 (quoting *Jacobsen v. Deseret Book Co.*, 287 F.3d 936, 941 (10th Cir. 2002)). Here, the Court considers the state-court documents referenced in and/or attached to the parties' briefing, as they are referred to in Rogne's complaint (ECF No. 2 ¶¶ 10, 14-15); are central to his claims (*id.* ¶¶ 22-35); and no party disputes their authenticity. The Court also considers other filings from the parties' state-court action, which are a matter of public record. *See Tal*, 453 F.3d at 1264 n.24 ("facts subject to judicial notice may be considered in a Rule 12(b)(6) motion," including matters of public record); *Rose v. Utah State Bar*, 471 F. App'x 818, 820 (10th Cir. 2012) (unpublished) (noting this includes state-court filings).[24]

B. Rogne Is Precluded from Asserting a Taking Occurred

As Rogne correctly notes, in 1985, the Supreme Court held that takings claims were not ripe until a state "fails to provide adequate compensation for the taking." *Williamson Cty.*, 473 U.S. at 195. In 2005, the Supreme Court recognized that this could lead to what would later be called the "*San Remo* preclusion trap." *Knick*, 588 U.S. at 185.

In *San Remo*, the plaintiffs filed their original federal takings action in 1993, but it was determined, on summary judgment, to be unripe under *Williamson County* because the plaintiffs had not pursued an inverse condemnation action in state court. *San Remo*, 545 U.S. at 330-31. After complying with the federal court's holding and concluding their state-

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[24] Unpublished decisions are not precedential, but they may be cited for their persuasive value. 10th Cir. R. 32.1(A).

court litigation, the plaintiffs returned to federal court. *Id*. at 334 & n.12. This time, the federal-court action was dismissed due to issue preclusion.[25] *Id*. at 334-35.

On certiorari, the Supreme Court recognized that the plaintiffs would have preferred not to pursue their as-applied takings claim in state court and were forced to do so by the *Williamson County* ripeness rule. *Id*. at 343-44. The Supreme Court noted, "[i]t is hardly a radical notion to recognize that, as a practical matter, a significant number of plaintiffs will necessarily litigate their federal takings claims in state courts." *Id*. at 346. Indeed, the Supreme Court observed that most of its takings jurisprudence originated in state-court cases brought by petition for writ of certiorari. *Id*. at 347 & n.26 (collecting cases). The Supreme Court, therefore, agreed that the federal court had properly applied issue preclusion in the takings case. *Id*. at 347-48.

As in *San Remo*, Rogne here argued in state court that a taking—as that term is defined under federal Fifth Amendment jurisprudence—had occurred. *See e.g.*, *Rogers Cty. Case*, Pl.'s Resp. Mot Dismiss, at 10-11 (June 5, 2020); *State Appeal*, Pet. in Error, at 14 ¶ 4 (Jan. 30, 2023).[26] Further, it appears there is "no

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[25] Although the state-court case had been decided entirely in reference to state takings law, the court had "interpreted the relevant substantive state takings law coextensively with federal law." *Id*. at 335. The Supreme Court assumed, for purposes of its decision, that "the California Supreme Court was correct in its determination that California takings law is coextensive with federal law. . . . " *Id*. at 337 n.18.

[26] Raising issue "[w]hether the District Court erred where the administrative remedy was not effective because under United

difference between the protections afforded Oklahoma citizens under either" the Fifth Amendment or Oklahoma's takings clause, at least as it relates to Okla. Const. art. 2, § 24. *Brannon v. City of Tulsa*, 1996 OK CIV APP 145, ¶ 5, 932 P.2d 44, 46; *ConocoPhillips Co. v. Henry*, 520 F. Supp. 2d 1282, 1317 n.44 (N.D. Okla. 2007) (citing Okla. Const. art. 2, § 24, and noting that "the federal framework and the Oklahoma [takings] framework are coextensive"), *rev'd on other grounds*, 555 F.3d 1199 (10th Cir. 2009).[27] In making its decision in Rogne's case—which, the court acknowledged included arguments about "federal and state court precedent"—the Oklahoma Court of Civil Appeals relied on state case law that, in turn, relied on federal law in determining whether a taking occurred.[28] *See, e.g.*, *Rogne v. City of*

States Supreme Court and Oklahoma Supreme Court precedent there is no administrative remedy for compensating a landowner for money damages for a governmental taking even if it is a temporary taking." *Id.*

[27] *Cf. April v. City of Broken Arrow*, 1989 OK 70, ¶ 1 n.1, 775 P.2d 1347, 1348, n.1 (noting Article 2, Section 24 is in "harmony" with the Fifth Amendment and "goes further in the protection of private property" by providing additional compensation for damaged property); *but cf. Bd. of Cnty. Commis v. Lowery*, 2006 OK 31, ¶¶ 19–20, 136 P.3d 639, 651–52 (in consideration of the Oklahoma Constitution's "general rule against the taking of private property for private use," the constitutional provisions "provide private property protection to Oklahoma citizens beyond that which is afforded them by the Fifth Amendment" and place "more stringent limitation on governmental eminent domain power" (citing Okla. Const. art 2, § 23) (emphasis added)).

[28] In his briefing, Rogne makes various arguments relating to the decision of the Rogers County District Court. (*See, e.g.*, ECF No. 17 at 18.) As the Court of Civil Appeals conducted a *de novo*

Catoosa, No. 121,026, slip op. ¶¶ 7-8 (Okla. Ct. Civ. App. June 29, 2023) (citing *April*, ¶ 14). Against this backdrop, the Court of Civil Appeals rejected Rogne's argument that he had a viable claim for damages during the period in 2011-2017 when he was under the cease-and-desist order, and further explicitly found that "as a matter of law, there was no taking. . . ." *Id.* ¶ 7 & n.1. Whatever this Court's thoughts on the correctness of the state appellate court's reasoning, that court explicitly ruled on the very issue Rogne raises in this case—whether there was a taking without just compensation.

The Court then must turn to whether Oklahoma courts would give preclusive effect to the state appellate court's ruling. *See Ryan v. City of Shawnee*, 13 F.3d 345, 347 (10th Cir. 1993) ("Under the full faith and credit statute, federal courts must give the judicial proceedings of any state court the same preclusive effect that those judgments would be given by the courts of that state." (citing 28 U.S.C. § 1738)). Under Oklahoma's "doctrine of issue preclusion, once a court has decided an issue of fact or of law necessary to its judgment, the same parties or their privies may not relitigate that issue in a suit brought upon a different claim." *Salazar v. City of Okla. City*, 1999 OK 20, ¶ 10, 976 P.2d 1056, 1060 (footnotes omitted). The precluded party must have "had a 'full and fair opportunity' to litigate the issue that was adversely resolved," and the party asserting the defense has the burden of establishing that (1) the issue to be precluded was actually litigated and determined (2) in a prior action

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review, the undersigned finds it is the appellate decision that determines what was or was not ultimately decided in the state-court case.

between the same parties or their privies, and (3) its resolution was essential to a decision in that prior action. *Id.* at 1060-61. A party may not have had a "full and fair opportunity" to litigate if (1) it was not sufficiently foreseeable in the first action that the issue would arise in a later action or (2) the precluded party did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action. *Id.* at 1060 n.7.

Here, Rogne had a full and fair opportunity to litigate the issue of whether a taking occurred from 2011 to 2017. It was entirely foreseeable that the issue would arise in a later action; Rogne has explicitly stated that he was pursuing the inverse condemnation action in order to ripen a subsequent Fifth Amendment takings claim. Further, Rogne had an adequate opportunity and incentive to obtain a full and fair adjudication of the state-court action. The dispute Rogne has with what happened at the state-court level is not that there was no opportunity to raise his arguments; it is that the state court rejected those arguments.

The Court further finds that the issue of whether there was a taking was actually litigated and determined; that it is undisputed the parties are the same in this action and the prior state-court litigation; and that the existence of a taking was essential to a decision in the prior case. On this final issue, the Court of Civil Appeals found "Rogne cannot maintain an inverse condemnation claim under any set of facts because he failed to exhaust his administrative remedies" before filing the state-court action. *Rogne v. City of Catoosa*, No. 121,026, slip op., ¶ 9 (Okla. Ct. Civ. App. June 29, 2023). Perhaps the court could have stopped there and ended the case. But the court

apparently felt it could not, noting Rogne had made the argument that the administrative remedy was ineffective due to the lack of any remedy for temporary takings. As such, the court expressly found there "was no taking." *Id.* n.1. In these circumstances, the state appellate court's finding that no taking occurred was an essential part of its decision.[29]

Finally, Rogne argues an exception to preclusion based on an intervening change in the applicable legal context, namely the Supreme Court's decision in *Knick*. (ECF No.17 at 19-20 (citing *Herrera v. Wyoming*, 587 U.S. 329, 343 (2019).) It is not at all clear, however, that *Knick*'s change in when a plaintiff may bring their takings claim has any effect on the legal context of whether a taking has occurred. The Court need not decide the issue. For "the issue preclusion change-in-law exception to apply, the relevant change in law must occur between the preclusive judgment and any subsequent action." *Boulter v. Noble Energy Inc.*, 74 F.4th 1285, 1290 (10th Cir. 2023). Here, the Supreme Court issued *Knick* in 2019, while Rogne was still litigating his claims in state

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[29] Rogne argues there can be no issue preclusion without a final judgment on the merits. (ECF No. 17 at 15 (citing *Bronson Trailers & Trucks v. Newman*, 2006 OK 46, ¶ 4 n.9, 139 P.3d 885, 888 n.9).) Rogne asserts the state-court judgment was not on the merits, because he received no compensation, because the state-court's ruling that there was no taking would in essence allow the government's actions to "nullify" his right to compensation, because the state district court ruled his claims were moot, and because there was no jury trial. (*Id.* at 15–19.) As discussed in relation to Oklahoma's savings statute, *infra* at section I(C)(4), these arguments fail.

court—not after his state court case was resolved. The exception does not apply.[30]

C. Any § 1983 Claims Would Be Barred by the Statute of Limitations

Even if Rogne were not precluded from bringing his § 1983 claim, it would still be barred by the statute of limitations. Rogne could first bring a § 1983 claim in 2019, when *Knick* was decided. His claim, therefore, accrued in 2019. Because Rogne did not bring his claim until 2024—roughly five years after accrual—it is barred by the applicable statute of limitations. The Court rejects Rogne's arguments that the limitations period was "tolled" or that Oklahoma's savings statute applies.

1. Limitations for § 1983 Actions—Generally

"Because Congress has not enacted a statute of limitations expressly applicable to section 1983 claims, the courts must adopt the most analogous limitations period provided by state law." *Abbitt v. Franklin*, 731 F.2d 661, 663 (10th Cir. 1984) (en banc). The Tenth Circuit has concluded "that all section 1983 claims should be characterized as actions for injury to personal

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[30] In relation to his declaratory judgment action, Rogne argues that the City's preclusion defense fails because there is no former "valid" judgment, because the cease-and-desist order was "an invalid exercise of regulatory authority against a Cherokee person and their property." (ECF No. 17 at 21.) As discussed *infra* at note 33, Rogne neither explains nor supports any legal theory as to why this also means Oklahoma's district courts would lack jurisdiction to hear the claims he himself brought against the City.

rights," making "the most analogous Oklahoma statute . . . the two-year limitations period" in Okla. Stat. tit. 12, § 95(A)(3). *Id.* As with all statutes of limitations, the running of the limitations period "in a § 1983 action begins when the cause of action accrues. . . . " *Bedford v. Rivers*, 176 F.3d 488 (table), 1999 WL 288373, at *1 (10th Cir. May 10, 1999) (unpublished). "While state law governs limitations and tolling issues, federal law determines the accrual of section 1983 claims." *Fratus v. DeLand*, 49 F.3d 673, 675 (10th Cir. 1995).

"A right of action 'accrues' when the plaintiff has a 'complete and present cause of action'—*i.e.*, when she has the right to 'file suit and obtain relief.'" *Corner Post, Inc. v. Bd. of Governors*, 603 U.S. 799, 809–11 (2024) (quoting *Green v. Brennan*, 578 U.S. 547, 554 (2016)). Put another way, "a civil rights action accrues when the plaintiff knows or has reason to know of the injury which is the basis of the action, or when the plaintiff's right to resort to federal court was perfected." *Herrera v. City of Espanola*, 32 F.4th 980, 990 (10th Cir. 2022) (citations and internal quotation marks omitted).

2. Accrual of Rogne's Federal Constitutional Claims

As the Supreme Court notes, "a statute of limitations begins to run at the time the plaintiff has the right to apply to the court for relief." *Corner Post*, 603 U.S. at 811 (internal quotations omitted). "Conversely, [the Supreme Court has] rejected the possibility that a limitations period commences at a time when the plaintiff could not yet file suit as inconsistent with basic limitations principles." *Id.*

(cleaned up). Applying these two concepts, the Court finds that Rogne's § 1983 claim accrued, as a matter of law, in 2019.

Before 2019, Rogne was bound by *Williamson County*'s holding that his cause of action was not ripe until the state court had denied his claim for compensation. 473 U.S. at 195. Rogne could not file his § 1983 suit before then, and it would be inconsistent with basic limitations principles to find that his claim had accrued.

However, after *Knick* overruled *Williamson County*, Rogne was no longer constrained. He believed his property had been taken without just compensation by a local government—this was all *Knick* required for a property owner to bring a § 1983 takings claim. *See* 588 U.S. at 206. And Rogne knew of his injury—indeed he was already seeking damages for it. At that point in 2019, Rogne had the right to apply to the court for relief on his federal claim.

The posture and pendency of Rogne's state-court action did not limit this right. In the state-court case, the mandate from the earlier settlement appeal had issued by 2019 and Rogne was back in the district court litigating the merits. He could have sought to amend his claims to include the § 1983 claim. *See Harper v. Va. Dep't of Tax'n*, 509 U.S. 86, 97 (1993) (generally, Supreme Court decisions are given "full retroactive effect" in open cases);[31] *see also Middlesex*

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[31] "When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule." *Id.*

Cnty. Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 431 (1982) ("Minimal respect for the state processes . . . precludes any *presumption* that the state courts will not safeguard federal constitutional rights."). Rogne also was free to bring his § 1983 claim in federal court, despite the pendency of the state-court litigation. *See Wyles v. Sussman*, 661 F. App'x 548, 551 (10th Cir. 2016) ("the general rule is that a pending state-court action 'is no bar to proceedings concerning the same matter in the Federal court having jurisdiction'" (quoting *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 73 (2013)). As such, Rogne could have brought his federal claim after *Knick* was decided.

The Court, therefore, finds Rogne's federal constitutional claim accrued when *Knick* was issued on June 21, 2019. *Cf. 4th Leaf, LLC v. City of Grayson*, 425 F. Supp. 3d 810, 821 (E.D. Ky. 2019) (deciding, on the basis of tolling, that the limitations period for takings claim did not begin to run "until June 21, 2019 when the Supreme Court overruled *Williamson County*").

3. The Limitations Period Was Not Equitably Tolled

Rogne argues he properly filed his state-court action in reliance on *Williamson County*, and, because the law changed mid-case, the statute of limitations for his federal § 1983 claim was tolled until completion of that action. (ECF No. 17 at 14.) He offers no law in support of this argument.

The Court looks to state law to determine tolling. *See Fratus*, 49 F.3d at 675. Generally, Oklahoma permits tolling of a statute of limitations in two circum-

stances. *Alexander v. Oklahoma*, 382 F.3d 1206, 1217 (10th Cir. 2004). First, tolling may be proper when "the existence of a 'legal disability' provides proper grounds for equitable tolling." *Id.* (citing Okla. Stat. tit. 12, § 96). "Oklahoma courts have applied this provision only for plaintiffs whose competency is impaired or who have not reached the age of majority." *Id.* Second, Oklahoma may toll the limitations period "until an injured party knows of, or in the exercise of reasonable diligence, should have known of or discovered the injury, and resulting cause of action." *Id.* (internal quotations omitted). Thus, the cause of action is tolled when the defendant engages in fraudulent conduct that lulls the plaintiff into sitting on his rights. *Id.* Neither circumstance applies in this case. Rogne provides no other impediment to him bringing a § 1983 claim after 2019.

4. Rogne's Claims Are Not Saved by Okla. Stat. tit. 12, § 100

Rogne separately argues that his § 1983 claim is tolled by Oklahoma's savings statute, Okla. Stat. tit. 12, § 100. (ECF No. 17 at 8-14.) Pursuant to section 100,

> If any action is commenced within due time, and a judgment thereon for the plaintiff is reversed, or if the plaintiff fail in such action otherwise than upon the merits, the plaintiff . . . may commence a new action within one (1) year after the reversal or failure although the time limit for commencing the action shall have expired before the new action is filed.

Okla. Stat. tit. 12, § 100. For the savings statute to apply, a plaintiff must demonstrate "(1) that the original action was timely, (2) that the action terminated for some reason other than its merits, (3) that [the plaintiff] qualifies as one of the parties entitled to revive the action, and (4) that the new action is substantially the same as the original." *State Farm Mut. Auto. Ins. Co. v. Payne*, 2017 OK 95, ¶ 5, 408 P.3d 204, 206. The "one year period commences on the day after the appeal is final." *Cole v. Josey*, 2019 OK 39, ¶ 4, 457 P.3d 1007, 1009.

For any subsequently filed case, "Oklahoma courts apply the 'transactional approach' to determine whether various theories of recovery fall within the Oklahoma Savings Statute." *Thompson v. Clymer*, No. 21-CV-156-GKF-SH, 2021 WL 6138077, at *3 (N.D. Okla. Nov. 23, 2021) (citing *Chandler v. Denton*, 1987 OK 38, ¶ 12, 741 P.2d 855, 862-63)). Under this test, "[t]he operative event that underlies a party's claim delineates the parameters of his cause of action." *Chandler*, ¶ 12, at 863. Meanwhile, in deciding whether a claim failed otherwise than upon the merits, "[t]he term 'merits' means 'the real or substantial grounds of action or defense as distinguished from matters of practice, procedure or form.'" *Hug v. James*, 2008 OK CIV APP 93, ¶ 12, 197 P.3d 22, 24-25 (quoting *Flick v. Crouch*, 1967 OK 131, ¶ 15, 434 P.2d 256, 261).

Both parties' arguments focus on whether the state matter was resolved upon the merits.[32] The

[32] The Court, therefore, assumes without deciding that this new § 1983 action is substantially the same as the original inverse condemnation action under the savings statute.

Court rejects Rogne's various arguments that it was not.

a. No Compensation

Citing Justice Thomas's concurrence in *Knick*, Rogne argues that "a taking without just compensation has not been decided on its merits until there has been the actual payment of 'compensation' – compensation is the remedy." (ECF No. 17 at 9; *see also id*. at 12-14.) Because the state court awarded no compensation, he argues, its decision could not be on the merits. (*Id*. at 9.)

As a preliminary matter, Rogne misreads Thomas's concurrence. The quoted section reads in full,

> This "sue me" approach to the Takings Clause is untenable. The Fifth Amendment does not merely provide a damages remedy to a property owner willing to "shoulder the burden of securing compensation" after the government takes property without paying for it. Instead, it makes just compensation a "prerequisite" to the government's authority to "tak[e] property for public use." A "purported exercise of the eminent-domain power" is therefore "invalid" unless the government "pays just compensation before or at the time of its taking." If this requirement makes some regulatory programs "unworkable in practice," so be it—our role is to enforce the Takings Clause as written.

Knick, 588 U.S. at 206-07 (Thomas, J., concurring) (citations omitted). Nothing in Thomas's concurrence even hints that a takings-related lawsuit can never be

decided on the merits unless and until the plaintiff wins.

b. No Jury

Rogne next argues that Oklahoma law requires inverse condemnation actions—including the issue of whether there was a taking—be tried to a jury. (ECF No. 17 at 9-10.) Because no jury was empaneled, he argues, there was no decision on the merits. (*Id.* at 10.)

The statement "that the taking issue must be determined by a jury" is "merely shorthand for the requirement that the taking issue is to be submitted to the trier of fact." *Williams v. State ex rel. Dep't of Transp.*, 2000 OK CIV APP 19, ¶ 35, 998 P.2d 1245, 1252. "Stated otherwise, whether a jury is empaneled to determine damages or not, a determination must be made on a taking." *Id.* ¶ 36, at 1252. While various cases state that "the determination of a taking . . . is not susceptible to summary disposition," *id.*, the authorities cited merely refer to the need for a jury to resolve disputes that require a factual determination, *see Oxley v. City of Tulsa ex rel. Tulsa Airport Auth.*, 1989 OK 166, ¶ 15, 794 P.2d 742, 745. Oklahoma law, however, allows for the entry of summary judgment when the submissions "show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Okla. Stat. tit. 12, § 2056(C). Here, the state appellate court, in its *de novo* review, found that summary judgment was appropriate—*i.e.*, that there were no disputed material facts. The lack of a jury trial has no effect on whether Rogne's state-court action failed "otherwise than upon the merits."

c. Mootness

Rogne further argues that the state-court case was not resolved on the merits because the state district court adopted the City's arguments that the case was not justiciable and was moot. (ECF No. 17 at 10-11.) But it is not the district court's decision that ultimately caused Rogne's case to fail; it was the *de novo* ruling of the appellate court. In that ruling, the court explicitly found "there was no taking," which goes to the heart of the merits of Rogne's state-court claims. *See Rogne v. City of Catoosa*, No. 121,026, slip. op. n.1 (Okla. Civ. App. June 29, 2023). In any event, whether the state appellate court relied on failure to exhaust administrative remedies or the lack of a taking, its decision was on "the real or substantial grounds of action or defense as distinguished from matters of practice, procedure or form." *Hug*, 2008 OK CIV APP 93, ¶ 12, 197 P.3d 22 at 24. The Oklahoma savings statute does not apply here.

5. Rogne's § 1983 Claims Expired in 2021

With no tolling of the statute of limitations or savings statute, the Court returns to the date Rogne's claims accrued: June 21, 2019. Applying Oklahoma's two-year limitations period, Rogne's time to file suit expired in 2021. As Rogne did not raise his § 1983 claim before that time—either in state or federal court—it is barred.

II. Rogne's Declaratory Judgment Action

As an alternative to his takings claim, Rogne asks this Court to enter a declaratory judgment that "the City and the Oklahoma State Courts including Rogers

County District Court and the Court of Appeals lacked jurisdiction to regulate and penalize Plaintiff with a Cease and Desist Order and a Citation for $250 fine and threat of a warrant for his arrest." (ECF No. 2 ¶ 30.) Rogne argues that, under *Hooper v. City of Tulsa*, 71 F.4th 1270 (10th Cir. 2023), cities like Catoosa lack jurisdiction to issue citations to Indians for municipal violations committed within Indian country. (ECF No. 17 at 20.) Without any legal authority, Rogne then argues that this means state civil courts lacked subject-matter jurisdiction to hear the claims he brought when seeking compensation for the effects of that cease-and-desist order.[33] (*Id.* at 21.)

The City, conversely, argues that this Court lacks jurisdiction to hear Rogne's claim for declaratory judgment under the *Rooker-Feldman* doctrine and that declaratory judgment is not proper where a

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[33] With certain exceptions, the Oklahoma Constitution vests the state district courts with "unlimited original jurisdiction of all justiciable matters. . . . " Okla. Const. art. 7, § 7(a). When Rogne filed suit in state court, he asserted the court had jurisdiction and sought an injunction stopping the City from committing acts affecting his use of the property. *See Rogers Cty. Case*, Am. Pet. ¶¶ 3, 8-9 (Oct. 29, 2014). He also sought an award for the damages he claimed the City caused to his property and for damages by way of inverse condemnation. *Id.* ¶¶ 10-11. Rogne asserted claims for interference with contract, economic relations, and prospective economic relations; trespass; negligence; and negligence per se. *Id.* ¶ 12. Rogne does not explain how a state court of general jurisdiction would lack the ability to hear such claims voluntarily brought before it by Rogne. The only case he cites, *Hooper*, involved the jurisdiction of a city (and its municipal courts) to enforce municipal criminal violations. *E.g.*, 71 F.4th at 1272. It did not address the general jurisdiction of state courts to hear civil claims brought by an Indian.

plaintiff seeks only retrospective relief. (ECF No. 9 at 6-9.)

The Court finds it has jurisdiction but dismisses the declaratory judgment action because no prospective relief is sought.

A. Subject-Matter Jurisdiction

1. Standard of Review—Rule 12(b)(1)

The City moves to dismiss Rogne's declaratory judgment action for lack of subject-matter jurisdiction. *See* Fed. R. Civ. P. 12(b)(1). A Rule 12(b)(1) motion typically takes one of two forms. "The moving party may (1) facially attack the complaint's allegations as to the existence of subject matter jurisdiction, or (2) go beyond allegations contained in the complaint by presenting evidence to challenge the factual basis upon which subject matter jurisdiction rests." *Maestas v. Lujan*, 351 F.3d 1001, 1013 (10th Cir. 2003). In a facial attack, the Court accepts the allegations in the complaint as true, *United States v. Rodriguez-Aguirre*, 264 F.3d 1195, 1203 (10th Cir. 2001), and applies the same standards as are applicable to a 12(b)(6) motion, *Muscogee (Creek) Nation v. Okla. Tax Comm'n*, 611 F.3d 1222, 1227 n.1 (10th Cir. 2010).

2. *Rooker-Feldman* Doctrine—Generally

The *Rooker-Feldman*[34] doctrine precludes "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the

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34 *See Rooker v. Fid. Tr. Co.*, 263 U.S. 413 (1923); *D.C. Ct. of Appeals v. Feldman*, 460 U.S. 462 (1983).

[federal] district court proceedings commenced and inviting district court review and rejection of those judgments." *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005). This type of review is prohibited, because Congress has empowered only the Supreme Court "to exercise authority to reverse or modify a state-court judgment." *Id.* (internal quotation omitted).

The principle reaches a federal district court's ability to "review state court judgments or claims inextricably intertwined with them." *Bear v. Patton*, 451 F.3d 639, 641 (10th Cir. 2006). The Tenth Circuit has recognized, however, that *Rooker-Feldman* has a narrow scope. *See D.A. Osguthorpe Fam. P'ship v. ASC Utah, Inc.*, 705 F.3d 1223, 1232 (10th Cir. 2013). It is reserved for "claims where (1) the plaintiff lost in state court, (2) the state court judgment caused the plaintiff's injuries, (3) the state court rendered judgment before the plaintiff filed the federal claim, and (4) the plaintiff is asking the district court to review and reject the state court judgment." *Bruce v. City & Cnty. of Denver*, 57 F.4th 738, 746 (10th Cir. 2023).

Notably, the doctrine does not "bar a claim that does not seek to modify or set aside a state court judgment." *Id.* "Seeking relief that is *inconsistent* with the state-court judgment is a different matter, which is the province of preclusion doctrine." *Mayotte u. U.S. Bank Nat'l Ass'n*, 880 F.3d 1169, 1174-75 (10th Cir. 2018).

3. Application to Rogne's Complaint

Looking at the request for declaratory judgment in Rogne's complaint, the Court finds *Rooker-Feldman* does not deprive it of jurisdiction.

Rogne appears to seek two different declarations. First, that the City lacked regulatory authority over his property and could not issue the cease-and-desist order or fine him $250. Second, that the state courts lacked subject-matter jurisdiction over his prior lawsuit. (ECF No. 2 ¶¶ 30-31.)

For the first declaration, there is no allegation or other indication that any court anywhere entered an order enforcing the cease-and-desist order or the $250 fine. The only state-court action alleged in the complaint involves Rogne's own civil suit for inverse condemnation and other damages. (*Id.* ¶ 10.) And the only state-court judgment alleged is the grant of summary judgment in favor of the City. (*Id.* ¶ 15.) This is not a situation where Rogne was assessed a $250 fine in a municipal court for code violations and is asking this federal court to overturn or invalidate that order. *Cf. Hooper*, 71 F.4th at 1288.

For the second declaration, Rogne is not asserting an injury arising from the state-court judgment. Instead, Rogne asserts that he was injured by the original unconstitutional taking. (ECF No. 2 ¶ 32.) It is true that the relief Rogne seeks includes a finding that a taking occurred and compensation for that taking—something that would be inconsistent with the state-court judgment. *Cf. Mayotte*, 880 F.3d at 1176 ("To be sure, the relief she seeks includes obtaining title to her home, a result that would be inconsistent with the Rule 120 order approving sale."). But this is a matter of preclusion, which Rogne's briefing makes clear. (ECF No. 17 at 21 ("City's contention of issue or claim preclusion cannot stand as the underlying decisions were invalid."). The Court

has jurisdiction to hear Rogne's claim for declaratory judgment.

B. Retrospective Declaratory Relief

Even so, the Court finds dismissal is appropriate, because Rogne seeks retrospective declaratory relief.[35]

1. Declaratory Judgment—Generally

With certain exceptions, in "a case of actual controversy within its jurisdiction," a court "may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201(a). This "gives a means by which rights and obligations may be adjudicated in cases . . . that [have] not reached the stage at which either party may seek a coercive remedy" and in matters where "a party who could sue for coercive relief has not yet done so." Mary Kay Kane, 10B Federal Practice & Procedure (Wright & Miller) § 2751 (4th ed.). "Because of the Act's use of the word 'may,' the Supreme Court has held it confers upon courts the power, but not the duty, to hear claims for declaratory judgment." *Mid-Continent Cas. Co. v. Vill. at Deer Creek Homeowners Ass'n*, 685 F.3d 977, 980 (10th Cir. 2012) (citing *Wilton v. Seven Falls Co.*, 515 U.S. 277, 286-87 (1995); *Pub. Affs. Assocs., Inc. v. Rickover*, 369 U.S. 111, 112 (1962) (per curiam)); *see also Wilton*, 512 U.S. at 287 ("We have

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[35] In its motion to dismiss, the City argues Rogne's requests in Count II "are all retroactive and are inappropriate for declaratory judgment." (ECF No. 9 at 8-9 ("Plaintiff's complaint contains no allegations regarding the likelihood of future injury or any future conduct on the part of the City").) Rogne does not respond to this argument. (ECF No. 17.)

repeatedly characterized the Declaratory Judgment Act as an enabling Act, which confers a discretion on the courts rather than an absolute right upon the litigant." (internal quotation omitted)).

A district court cannot, however, grant retrospective declaratory judgment unmoored from a claim for damages. *PeTA v. Rasmussen*, 298 F.3d 1198, 1202 & n.2 (10th Cir. 2002). Declaratory judgment is generally a claim for prospective relief, which requires a continuing injury. *Id.* "[W]hile a plaintiff who has been constitutionally injured can bring a § 1983 action to recover damages, that same plaintiff cannot maintain a declaratory or injunctive action unless he or she can demonstrate a good chance of being likewise injured in the future." *Facio v. Jones*, 929 F.2d 541, 544 (10th Cir. 1991). Plaintiff's claims are moot where "the entry of a declaratory judgment in [his] favor would amount to nothing more than a declaration that he was wronged, and would have no effect on the defendants' behavior towards him." *Green v. Branson*, 108 F.3d 1296, 1299-1300 (10th Cir. 1997).

2. Application to Rogne's Request

Here, Rogne has alleged nothing indicating a good chance of being injured by the City or state courts in the future. *Cf. Hooper*, 71 F.4th at 1277 (finding standing where plaintiff alleged declaratory judgment was necessary to prevent city from continuing to wrongfully exercise jurisdiction over him). He asks for a declaration that the City improperly issued a cease-and-desist order that he agrees was later vacated. (ECF No. 2 ¶¶ 12, 30.) He then asks for a declaration that the state courts lacked jurisdiction to hear his civil claims against the City, while agreeing that litigation

was dismissed without awarding future relief or having any other prospective effect.[36] (*Id.* ¶¶ 15, 31.) At this stage of the dispute, a declaratory judgment would amount to nothing more than a declaration that Rogne was wronged, and it would have no effect on the City's behavior toward him. The Court finds such declaratory relief would be inappropriate and would not redress Rogne's claimed injuries.

Conclusion

IT IS THEREFORE ORDERED that Defendant City of Catoosa's *Motion to Dismiss* (ECF No. 9) is GRANTED. Plaintiff John Rogne's claims under 42 U.S.C. § 1983 are DISMISSED WITH PREJUDICE. Plaintiff's claim for declaratory judgment is DISMISSED WITHOUT PREJUDICE.

ORDERED this 21st day of February, 2025.

/s/ Susan E. Huntsman
Magistrate Judge
United States District Court

[36] To the extent Rogne is concerned with the prospective preclusive effect of issues decided in that civil judgment, this is something Rogne can—and has—argued in pursuing the actual claims that may be affected by such preclusion. *See* section I(B), *supra*.

OPINION, COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA (JUNE 29, 2023)

NOT FOR OFFICIAL PUBLICATION

IN THE COURT OF CIVIL APPEALS
OF THE STATE OF OKLAHOMA
DIVISION III

JOHN ROGNE,

Plaintiff-Appellant,

v.

CITY OF CATOOSA,

Defendant-Appellee.

Case No. 121,026

Appeal from the District Court of Rogers County, Oklahoma
Honorable Sheila A. Condren, Trial Judge

Before: Thomas E. PRINCE, Presiding Judge, MITCHELL, C.J., and BELL, J.

AFFIRMED

OPINION BY THOMAS E. PRINCE, PRESIDING JUDGE:

¶ 1 This appeal stems from two orders entered by the trial court in favor of Defendant/Appellee, City

of Catoosa ("City"). The first Order and Judgment granted the City summary judgment against the Plaintiff/Appellant, John Rogne, and the second Order denied his Motion for New Trial. Rogne claimed that he incurred damages as a result of a Cease and Desist Order issued by the City that allegedly constituted inverse condemnation. The Cease and Desist Order required Rogne to stop allowing fill dirt to be dumped on his land, but the City rescinded that Order following an administrative hearing. The trial court granted summary judgment after it determined that Rogne's case was no longer justiciable upon the basis of the City's rescission of the Order and the failure of Rogne to exhaust his administrative remedies. We find that there are no material facts in dispute and that Rogne did not exhaust his administrative remedies prior to filing the instant lawsuit. Therefore, the Order and Judgment granting summary judgment to the City and the Order denying the Motion for New Trial are affirmed.

BACKGROUND

¶ 2 The dispute between Rogne and the City commenced during 2009 when the City issued its first Cease and Desist Order. The City received complaints about fill dirt being dumped on Rogne's property which had not been compacted. During an administrative hearing it became clear that, while fill dirt that is larger than twelve inches in diameter had to be compacted at some point in time, there was no specific time limit included in the Code. The City, therefore, vacated the 2009 Cease and Desist Order. On December 30, 2011, the City issued a second Cease and Desist Order citing Rogne for an alleged violation of various provisions of the 2009 International Building Code.

Rogne did not request an administrative hearing. Instead, Rogne instituted this lawsuit against the City on October 3, 2014. He filed an Amended Petition on October 29, 2014. In his Amended Petition, Rogne alleged, *inter alia,* that the City caused damages by way of inverse condemnation. The City filed a response on November 17, 2014, and alleged, in part, that Rogne had failed to exhaust his administrative remedies prior to filing his lawsuit.

¶ 3 On October 16, 2016, the City filed its Motion for Summary Judgment and Supporting Brief. Regarding the claim for inverse condemnation, the City argued that Rogne was not the proper party to assert the claim because his father owned the property during 2011, that neither Rogne nor his father were denied an economical viable use of the land because there was no final determination of the type of development legally permitted on the land, that there was nothing in the construction ordinances that categorically prevented Rogne from placing fill material on his property, and that Rogne failed to appeal the 2011 Cease and Desist Order. Rogne ultimately appealed the 2011 Cease and Desist Order and, during 2017, the City rescinded that Order.

¶ 4 During August, 2017, the Parties settled the case, but a dispute soon arose over the terms of the settlement agreement, which resulted in Appellate Case Number 116,769. Another division of this Court determined that it was error for the trial court to enforce a Mediation Agreement because it was incomplete and unenforceable.

¶ 5 Subsequently, on May 18, 2020, following the remand of the case, the City filed a Motion to Dismiss and Brief in Support. The City claimed that since the

2011 Cease and Desist Order had been rescinded, Rogne's inverse condemnation claim was moot and there was no remaining justiciable claim. Rogne argued in response that he had a legally cognizable claim and that the trier of fact had to determine the outcome. Rogne contended in addition that his claim for damages was not available under the City's administrative scheme. On June 19, 2020, a hearing was held on the City's Motion to Dismiss. The trial court granted the Motion and included the following in the Order Granting City of Catoosa's Motion to Dismiss:

> In November of 2016, after the instant case was filed, [Rogne] requested a hearing before the city council to appeal the 2011 order. The City rescinded the cease and desist order as a result of that appeal. Because there is no ongoing cease and desist order in effect, there is no justiciable controversy going forward. The issue is moot.
>
> [Rogne] asserts there still exists a controversy regarding the time period from the 2011 cease and desist order until it was rescinded in February of 2017. [Rogne], however, could have immediately requested a hearing but chose not to. [Rogne] had not exhausted his administrative remedies at that point. [Rogne] cannot sustain an inverse condemnation claim upon these facts.

Rogne filed Plaintiff's Motion for Rehearing. The trial court denied that Motion and indicated in the Order and Judgment that it had converted the City's Motion to Dismiss to a Motion for Summary Judgment because the trial court had considered evidentiary material in

addition to the pleadings. The trial court also granted the City's October 6, 2016, Motion for Summary Judgment. Rogne filed a Motion for New Trial, which the trial court denied. This timely appeal followed.

STANDARD OF REVIEW

¶ 6 We review orders granting summary judgment *de novo. Prudential Insurance Co. v. Glass,* 1998 OK 52, ¶ 2, 959 P.2d 586, 588. Summary judgment is proper if one party is entitled to judgment as a matter of law because there are no material disputed factual questions. *Id.* In summary judgment proceedings, all evidence and inferences to be drawn therefrom are viewed in the light most favorable to the nonmovant. *Cook v. McGraw Davisson Stewart,* 2021 OK CIV APP 32, ¶ 11, 496 P.3d 1006, 1010. A denial of a Motion for New Trial is reviewed for abuse of discretion and it is an abuse of discretion to deny a Motion for New Trial if the granting of summary judgment was incorrect. *State ex rel. Pruitt v. Native Wholesale Supply,* 2014 OK 49, ¶ 11, 338 P.3d 613, 617-618.

ANALYSIS

¶ 7 Rogne raised four issues on appeal at Exhibit "C" of his Petition in Error. They were: (1) whether the trial court erred by finding that Rogne failed to exhaust his administrative remedies regarding the 2011 Cease and Desist Order when it was uncontroverted that he previously engaged in an Administrative Hearing in 2009 which included the same alleged code violations; (2) whether the trial court erred under a summary judgment standard by rejecting Rogne's claim of futility that a second administrative hearing was necessary on the same facts as the 2009 hearing because the City was going to continue to violate the

original order and "insisted on enforcing the fraudulent 2011 letter"; (3) whether the trial court erred in finding that Rogne's claim for money damages for inverse condemnation was no longer justiciable and moot for the period of time from the "illegal 2011 City condemnation" of his property up to the time that the City dissolved the Cease and Desist Order in 2017; and (4) whether the trial court erred where the administrative remedy was not effective because under federal and state court precedent there is no administrative remedy for compensating a landowner for money damages for a governmental taking even if it is a temporary taking. Rogne contends, in essence, that it was error for the trial court to grant summary judgment to the City because, according to him, he had a viable claim for damages for inverse condemnation from the time that the 2011 Cease and Desist Order had been issued by the City until 2017, when the City rescinded the Order. We disagree with Rogne's contentions and affirm the Orders of the trial court.

¶ 8 A claim for inverse condemnation is a special statutory proceeding for ascertaining the amount of compensation to be paid for appropriated property. *Material Service Corp. v. Rogers County Commissioners,* 2006 OK CIV APP 52, ¶ 7, 136 P.3d 1063, 1065. Courts have recognized claims for inverse condemnation when regulations are enacted that substantially impair the usefulness of property. *Id.,* at ¶ 8. "[I]f regulation goes too far it will be recognized as a taking." *Id.* (citations omitted). On the other hand, governmental acts done in the proper exercise of police power that impair the use of property do not constitute a taking. *April v. City of Broken Arrow,* 1989 OK 70, ¶ 14, 775 P.2d 1347,

1351. The test is whether there is sufficient interference with the landowner's use to constitute a taking. *Id.* When administrative remedies are available, individuals are generally required to exhaust those remedies prior to resorting to the courts. *Matter of Request of Hamm Production Co.,* 1983 OK 92, ¶ 9, 671 P.2d 50, 52. The doctrine of exhaustion of administrative remedies aids in the administration of justice and prevents transfers to the courts of duties imposed on administrative agencies. *Atkinson v. Halliburton Co.,* 1995 OK 104, ¶ 11, 905 P.2d 772, 774. The doctrine protects agency autonomy and promotes judicial economy. *Id.,* at ¶ 12. When required by statute, exhaustion of administrative remedies is mandatory. *Beachner Construction Co., Inc. v. State ex rel. Office of State Finance,* 2014 OK CIV APP 3, ¶ 11, 316 P.3d 229, 231. Otherwise, it is a prudential rule within the discretion of the trial court to apply and "may be excused if the administrative remedy is unavailable, ineffective or would have been futile to pursue." *Id.*

¶ 9 In this matter, the City issued a Cease and Desist Order during 2011 and Rogne could have appealed the Order at that time. He did not appeal, even though an administrative remedy was readily available. He claims that an appeal of the 2011 Cease and Desist Order would have been futile, arguably based on deposition excerpts and an affidavit from his attorney (to support his futility argument). The clear and irrefutable facts demonstrate, however, that, on the two occasions on which Rogne had sought an administrative hearing, he had been granted relief. We, therefore, find that there are no material disputed facts and the trial court was correct when it granted summary judgment in favor of the City. Rogne cannot

maintain an inverse condemnation claim under any set of facts because he failed to exhaust his administrative remedies prior to filing the instant action.[1] Consequently, the Orders granting summary judgment and denying Rogne's Motion for New Trial are affirmed.

CONCLUSION

¶ 10 For the reasons stated, the Order and Judgment granting summary judgment to the City and the Order denying the Motion for New Trial are affirmed.

MITCHELL, C.J., and BELL, J., concur.

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[1] The Court notes Mr. Rogne's argument that an administrative remedy is ineffective because there is no administrative remedy for compensating a landowner for money damages for a temporary taking. We find, however, that, as a matter of law, there was no taking because Mr. Rogne was granted relief as soon as he sought an administrative remedy and the City rescinded the Cease and Desist Order.

ORDER AND JUDGMENT,
ROGERS COUNTY DISTRICT COURT
(JULY 18, 2022)

IN THE DISTRICT COURT IN AND FOR
ROGERS COUNTY STATE OF OKLAHOMA

JOHN ROGNE,

Plaintiff,

v.

CITY OF CATOOSA,

Defendant.

Case No. CJ-2014-0420

Before: Sheila CONDREN, Judge.

ORDER AND JUDGMENT

This matter came on for hearing on October 13, 2021. The Plaintiff, John Rogue ("Plaintiffs"), was present by his attorneys of record, Will Wright and William Higgins. The City of Catoosa ("Defendant") was present by its counsel of record, Matthew P. Cyran of Rosenstein, Fist & Ringold. After considering the court file, the Court rules as follows:

First, the Court considers the Plaintiff's Motion for Rehearing filed on August 10, 2020, to be a motion for a new trial. On August 13, 2020, the Plaintiff filed an amended motion for rehearing, despite not seeking

nor being granted leave to file an amendment to the original, timely-filed motion. Defendant urges that the amendment should be treated as a motion to correct, open, modify, or vacate pursuant to Title 12, Section 1031.1. The Court will allow the Plaintiff's amendment to stand and relate back to the original motion for new trial, rather than treat it as a 1031.1 motion.

The Plaintiff asserts in his motion for new trial that, when looking at the Defendant's motion to dismiss filed May 18, 2020, and the decision rendered on June 19, 2020, that was memorialized in an order filed July 27, 2020, the Court necessarily has to look outside the Plaintiff's petition for facts that have occurred since the filing of the petition and the amended petition—such as the fact that the Catoosa City Council granted the Plaintiff's request for relief from the 2011 cease and desist order. Further, the Defendant asserts that the Defendant did not raise the issue of exhaustion of remedies in their motion to dismiss. As a result, this Court will grant the Plaintiff's motion for new trial and will once again consider the Defendant's motion to dismiss.

In that regard, the Court allows the Plaintiff's evidentiary material attached to his response to the motion to dismiss and, further, allows the evidentiary material attached to the Plaintiff's reply and amended reply to the motion for rehearing to be considered. In that regard, the Court will convert the Defendant's motion to dismiss to a motion for summary judgment, since the Plaintiff has attached and seeks to have the Court consider matters outside the petition.

Likewise, the Court will take up the Defendant's motion for summary judgment filed October 6, 2016,

that remains pending. Plaintiff has had ample opportunity to respond to this pending motion, and the Court has reviewed the entire court file, including all of the evidentiary material provided by the Plaintiff before determining the issues presented here.

In that regard, in taking the evidence in the light most favorable to the nonmoving party, the Court finds there is no substantial controversy as to any material fact; that is, in November of 2016 the Plaintiff requested a hearing with the City of Catoosa pursuant to the 2011 cease and desist order, and in 2017, the City Council granted the Plaintiff's requested relief. After the Plaintiff dismissed several of his claims, the one remaining claim was for inverse condemnation.

First, regarding the issue of justiciability and mootness, the Plaintiff alleged in his amended petition that the city interfered with Plaintiff's placement of fill dirt on his own property by prohibiting the conduct and entitling a cease and desist order against the Plaintiff to prohibit such conduct. The Plaintiff requested a hearing in November of 2016, and in 2017 the city dissolved the cease and desist order. Plaintiff was able to administratively take care of the impediment to him placing fill dirt on his own property. The ongoing cease and desist order was the gravamen of point of prospective claim. Because the cease and desist order was prospectively dissolved and no evidence was presented that Plaintiff continued to enforce the complaint of interference, despite the dissolution of the cease and desist order, the Court finds this issue to be moot, and the issue is no longer justiciable.

The next issue is regarding exhaustion of remedies. Plaintiff asserts that the burden lies with the city to

show that if he would have requested a hearing in 2011, it would have been granted; otherwise, he is not required to exhaust his administrative remedies. Plaintiff indicates because Plaintiff's counsel believes exhaustion of Plaintiff's remedies would not have been successful in 2011 there is no requirement that this Plaintiff exhausts such administrative remedies.

The Oklahoma Supreme Court addressed exhaustion of remedies in *Waste Connections v. ODEQ,* 2002 OK 94, wherein the court stated, "Where relief is available from an administrative agency, a plaintiff is ordinarily required to pursue that avenue of redress before proceeding to the courts." The court further stated, "In cases in which exhaustion of remedies is not required by statute, the requirement to exhaust administrative remedies is a prudential rule, rather than a jurisdictional bar." In order for Plaintiff to be excused from the requirement to exhaust their administrative remedies, it must be demonstrated that this remedy is unavailable, ineffective, or futile to pursue.

The Court finds the burden is not upon the city to demonstrate that the plaintiff would have been successful in 2011. Plaintiff submits an affidavit from his attorney that they believe their request for an appeal or hearing would have been unsuccessful, therefore they should not have been required to exhaust their administrative remedies. The Court, however, does not find that a belief by a litigant and/or their counsel that they would have been unsuccessful in a request for administrative relief is sufficient to excuse one from an exhaustion of administrative remedy. In fact, the Plaintiff was successful in 2017 with his administrative remedy and had earlier been

successful pursuant to an administrative remedy in 2009.

Finally, it's noted that Plaintiff argues if the Court does not cite to Legal authority, this failure somehow invalidates any ruling of the Court. Contrary to Plaintiff's contentions, this issue has no bearing on the effectiveness of the Court's ruling.

Here, the Court sustains both pending motions for summary judgment of the Defendant.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Defendant's motion for summary judgment filed on October 6, 2016, and the Defendant's motion to dismiss filed May 18, 2020, which the court has converted to a motion for summary judgment, shall be and are hereby GRANTED; accordingly, final judgment is entered in favor of Defendant City of Catoosa and against Plaintiff John Rogne.

IT IS SO ORDERED this 18th day of July, 2022.

/s/ Sheila Condren
Judge of the District Court

**CEASE AND DESIST ORDER,
ISSUED BY THE CATOOSA CITY MANAGER
(DECEMBER 30, 2011)**

Leroy D. Alsup
Catoosa City Manager
214 South Cherokee / P.O. Box 190
Catoosa, OK 74015
Office 918-266-0806
Fax 918-266-1687
Email: lalsup@cityofcatoosa.org

**Cease and Desist Order
December 30, 2011**

John L. Rogne & Normagene Rogne
734 Winter Lane
Claremore, OK 74017

John M. Rogne
19191 Valley View Lane
Catoosa, OK 74015

Project Location: Lots 13, 14, 21 and 22, Block 9, Woodcrest Estates, Rogers County, Oklahoma.

Due to violations of the "Appendix J-Grading" provisions (attached) of the 2009 International Building Code (IBC) you are hereby ordered to cease & desist any and all grading, excavation, earthwork construction, inclusive of all fill activity on Lots 13, 14, 21 and 22, Block 9, Woodcrest Estates, Rogers County, Oklahoma.

Based on a site visit by the City Engineer, Doug Alexander and other city staff your project did not meet the following provisions of the 2009 IBC.

Section J107 Fills:

- **J107.2 Surface preparation.** The ground surface shall be prepared to receive fill by removing vegetation, topsoil, and other unsuitable materials, and scarifying the ground to provide a bond with the fill material.

  Adequate surface preparation has not been performed.

- **J107.3 Benching.** Where existing grade is at a slope steeper than five units horizontal to one unit vertical (20 percent slope) and the depth of the fill exceeds 5 feet (1524 mm) benching shall be provided in accordance with Figure J107.3. A key shall be provided which is at least 10 feet (3048 mm) in width and 2 feet (610 mm) in depth.

  The existing grade is greater than 2:1 and the depth of the fill exceeds 5 feet. No benching has been constructed.

- **J107.4 Fill material.** Fill material shall not include organic, frozen or other deleterious materials. No rock or similar irreducible material greater than 12 inches (305 mm) in any dimension shall be included in fills.

  Concrete and asphalt material larger than 12 inches has been included in the fill. Organic or other deleterious materials (tree limbs, re bar, etc.) has been included in the fill.

- **J107.5 Compaction.** All fill material shall be compacted to 90 percent of maximum density as determined by ASTM D 1557, Modified Proctor, in lifts not exceeding 12 inches (305 mm) in depth.

  Compaction to 90% of maximum has not been performed.

- **J107.6 Maximum slope.** The slope of fill surfaces shall be no steeper than is safe for the intended use. Fill slopes steeper than two units horizontal to one unit vertical (50 percent slope) shall be justified by a geotechnical report or engineering data.

  The fill slope is greater than 2:1. No supporting geotechnical report or engineering data has been submitted to the City of Catoosa for review.

Section J103 Permits Required:

- **J103.1 Permits required.** Except as exempted in Section J103.2, no grading shall be performed without first having obtained a permit therefor from the building official. A grading permit does not include the construction of retaining walls or other structures.

- **J103.2 Exemptions.** A grading permit shall not be required for the following:

  1. Grading in an isolated, self-contained area, provided there is no danger to the public, and that such grading will not adversely affect adjoining properties.

  There appears to be a reasonable chance that the fill material could slide and adversely affect the public and adjoining properties.

City staff would be glad to discuss this matter with you further, please contact my office if you have any questions or would like to meet to discuss this Order. If you chose to appeal this "Cease and Desist" Order the Catoosa Code of Ordinances provides that all appeals from the rules set forth by the adopted codes shall be brought to the City Council of the City of Catoosa, Oklahoma.

City of Catoosa:

/s/ Fanny Campbell
Fanny Campbell, Code Enforcement Officer

/s/ Leroy D. Alsup
Leroy D. Alsup, City Manager

IMAGE OF ROGNE PROPERTY
(PHOTO CIRCA 2012)