

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

ROSE MARY KNICK,)
)
 Petitioner,)
)
 v.) No. 17-647
)
TOWNSHIP OF SCOTT, PENNSYLVANIA,)
)
ET AL.,)
)
 Respondents.)

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ROSE MARY KNICK,)
Petitioner,)
v.) No. 17-647
TOWNSHIP OF SCOTT, PENNSYLVANIA,)
ET AL.,)
Respondents.)
- - - - -

Washington, D.C.

Wednesday, October 3, 2018

The above-entitled matter came on
for oral argument before the Supreme Court of the
United States at 10:05 a.m.

APPEARANCES:

J. DAVID BREEMER, ESQ., Sacramento, California; on
behalf of the Petitioner.
NOEL J. FRANCISCO, Solicitor General, Department of
Justice, Washington, D.C.; for the United States
as amicus curiae, supporting the Petitioner.
TERESA FICKEN SACHS, ESQ., Philadelphia, Pennsylvania;
on behalf of the Respondents.

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1 P R O C E E D I N G S

2 (10:05 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument first this morning in Case 17-647,
5 Knick versus the Township of Scott,
6 Pennsylvania.

7 Mr. Breemer.

8 ORAL ARGUMENT OF J. DAVID BREEMER

9 ON BEHALF OF THE PETITIONER

10 MR. BREEMER: Mr. Chief Justice, and
11 may it please the Court:

12 Requiring Ms. Knick to prosecute her
13 federal takings claim in state court conflicts
14 with Section 1983 and is incompatible with the
15 nature of her claim. Her claim is not based on
16 the government's failure to compensate. It's
17 based on the township's failure to recognize
18 that the imposition of an access easement is a
19 Fifth Amendment taking that triggers a
20 compensation requirement.

21 Because lack of compensation is not an
22 element of her federal takings claim, state
23 compensation remedies do not bear on the
24 presentation of the claim in federal court.

25 CHIEF JUSTICE ROBERTS: How is it not

1 an element of her claim? There's no violation
2 unless she is denied just compensation?

3 MR. BREEMER: Well, Your Honor, in the
4 inverse condemnation context, the problem is
5 not that the government's violating the Just
6 Compensation Clause by failing to pay. The
7 problem is that it's depriving her of her right
8 to just compensation because it does not
9 recognize that it's -- an invasion of her
10 property is a taking that triggers the
11 entitlement to compensation.

12 CHIEF JUSTICE ROBERTS: Well, I
13 thought that was the whole point of an inverse
14 condemnation. They recognize that they owe her
15 money, and the whole point of the process,
16 which can be fairly elaborate, is that they're
17 just trying to figure out how much. If it's
18 not enough, then she can bring a claim.

19 But it seems to me that it's imposing
20 a considerable burden on the state or the local
21 entities to say you've got to pay right away;
22 in other words, go through some sort of process
23 to figure out what you owe before you can even
24 -- you know, it's -- it's simply a process to
25 figure out how much is due. I don't know why

1 it's such a problem to make her go through that
2 in the initial instance.

3 MR. BREEMER: To -- well, Your Honor,
4 it helps to remember that condemnation and
5 inverse condemnation takings are quite
6 different. In a condemnation case, which
7 corresponds to what you were just describing,
8 the government condemns a property and then
9 it's just a process of -- of figuring out where
10 and how she's going to get her money. But,
11 when the question is whether there is even a
12 constitutional entitlement to compensation,
13 that before --

14 JUSTICE SOTOMAYOR: I'm sorry. Isn't
15 that what condemnation, whether it's regular or
16 inverse, does? The first question the court
17 answers is, is there a taking? So it does
18 reach the constitutional question. Even in a
19 -- in a regular condemnation -- condemnation
20 proceeding, they have to decide whether it --
21 the government has a public interest or not.
22 That's what makes it constitutional. So I
23 don't understand.

24 Can I ask another question, however?
25 Assuming that you were right and that you had a

1 federal cause of action or should have one
2 under 1983, when this case goes to a federal
3 court, why would a district court be -- abuse
4 its discretion for abstaining under any of the
5 three doctrines, Pullman, Louisiana Power &
6 Light, or Colorado River? All of them say that
7 district courts can abstain when a legal issue
8 involves state law and that state law could
9 obviate the federal proceeding.

10 So one of two things can happen in the
11 state court below. They say no taking, and
12 then there's no taking; or, second, there's a
13 taking, and the inverse condemnation proceeding
14 will provide the remedy.

15 So, in many ways, this obviates the
16 proceeding altogether.

17 MR. BREEMER: Well, if I could -- Your
18 Honor, if I could answer the abstention
19 question first. Williamson County is different
20 than any known abstention doctrine. For
21 instance, in Quackenbush, this Court held
22 that -- a damages claim, that the federal court
23 couldn't abstain from a constitutional claim
24 for damages under Burford. The other
25 abstention doctrines deal when there's an

1 explicit state claim that might resolve the
2 federal part --

3 JUSTICE SOTOMAYOR: Why isn't --

4 MR. BREEMER: -- but there isn't here.

5 JUSTICE SOTOMAYOR: -- why isn't that
6 the case here? The whole issue is whether this
7 graveyard law is a -- was inherent in the
8 property she took, meaning that's what I
9 understood the legal question was. It's all
10 about the state law rights of landowners
11 vis-a-vis cemeteries.

12 MR. BREEMER: That, Your Honor, is the
13 township's defense. That's a merits defense.
14 The problem here, the question here is whether
15 Ms. Knick must go to the state court with her
16 federal claims. She can't even get in through
17 the courthouse door. That's the fundamental --
18 we think --

19 JUSTICE SOTOMAYOR: I guess my
20 bottom-line question is, if the abstention
21 doctrines apply, which I think they would --
22 you've given me no reason why they shouldn't --
23 aren't you just inviting now a patchwork of
24 federal and state involvement in cases?
25 Williamson has at least the advantage of

1 clarifying where people go and how these claims
2 are adjudicated.

3 MR. BREEMER: Well --

4 JUSTICE SOTOMAYOR: If we have
5 abstention playing in, you're going to have a
6 patchwork of some state inverse condemnation
7 proceedings, some not, some courts taking
8 cases, others rightfully talking about
9 abstention.

10 MR. BREEMER: Well, I think that's
11 actually, the situation you're describing, is
12 what is happening under Williamson County.
13 There is no predictable forum for adjudicating
14 a Fifth Amendment claim that there's a taking
15 that creates the entitlement to a compensation
16 remedy. Property owners like Ms. Knick for 30
17 years have had no reasonable way to litigate
18 that federal question. Is there a taking or
19 not a quest -- or not a taking?

20 JUSTICE SOTOMAYOR: Well, why are you
21 claiming that the state courts in an inverse
22 condemnation proceeding are inadequate?

23 MR. BREEMER: I'm not claiming that at
24 all. State courts can deal with many
25 constitutional questions and they do. The

1 question here, though, is whether Ms. Knick
2 must go to a state court with her federal
3 takings claim to decide to get the town to
4 recognize that there is a taking within the
5 meaning of the Constitution that creates an
6 entitlement to compensation.

7 JUSTICE KAGAN: Mr. Breemer, may I get
8 back to this -- the question that you started
9 off with, which is when exactly the violation
10 occurs and why it occurs before the state
11 denies compensation in the inverse condemnation
12 proceeding, which is, I take it, what you're
13 saying.

14 Is that because -- are you saying that
15 that's because the right to compensation is
16 immediate; in other words, there's a right to
17 compensation contemporaneous with the taking?
18 Is that what your claim is?

19 MR. BREEMER: The -- not exactly.
20 There is -- there is a right to compensation as
21 soon as there's a determined that there's -- a
22 determination that there's a taking in the
23 inverse condemnation context. Remember, what
24 we're talking about is an invasion of property.

25 The township, which has the power of

1 eminent domain, doesn't use the power of
2 eminent domain to take that easement. It just
3 used its regulatory powers.

4 So there's no entitlement to
5 compensation until the property owner,
6 Ms. Knick, goes in and gets a determination
7 that's a taking. After that, compensation
8 issues --

9 JUSTICE GINSBURG: And then --

10 JUSTICE KAGAN: Okay --

11 JUSTICE GINSBURG: -- and then what
12 happens? Then suppose you're right and the --
13 the preliminary question, is there a taking,
14 you can bring in federal court.

15 Then -- and if the answer to that is
16 yes, then the whole inverse condemnation
17 proceeding goes forward in -- in federal court
18 with --

19 MR. BREEMER: I understand your --
20 your question, Your Honor. Once a takings
21 determination is made, then a federal court
22 would hold a -- a damages proceeding, just like
23 it does in other Section 1983 contexts,
24 unreasonable seizure, due process deprivations.
25 And it -- it would be easier in a takings

1 context than in those other contexts because
2 damages for a taking is simply just
3 compensation. So a federal court --

4 JUSTICE GINSBURG: But how would this
5 -- and that's what -- that's what inverse
6 condemn -- condemnation is as well. So how --
7 how does step 2 -- step 1, is there a taking?
8 Yes. Something else happens in federal court.

9 How would -- does that something else
10 differ from an inverse condemnation proceeding
11 in state court?

12 MR. BREEMER: It -- it doesn't. It's
13 -- it's dual -- the inverse condemnation
14 rights. The Fifth Amendment under First
15 English incorporates a right of inverse
16 condemnation under the federal Constitution.

17 The states have also inverse
18 condemnation procedures, but, again, the
19 question is when you have a federal claim, when
20 your claim is that the takings provision in the
21 Fifth Amendment is violated -- excuse me, not
22 violated, when it's implicated so that there's
23 a just compensation remedy, do you have to go
24 use a state inverse condemnation instead of the
25 Fifth Amendment's inverse condemnation

1 procedure that's recognized as self-executing.

2 JUSTICE KAGAN: Right. But usually --

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

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

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

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

1 your argument.

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

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

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

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

25 It has the power to condemn easements.

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

10 JUSTICE ALITO: And the township has
11 --

12 JUSTICE SOTOMAYOR: How about the town
13 --

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

1 right on that?

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

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

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

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

1 the Fifth Amendment under the takings
2 provision. So a federal court is capable of
3 deciding that very question, is there liability
4 or not?

5 If there is, there's a compensation
6 remedy ensuring that a de facto taking does not
7 go without compensation if there is, which --

8 JUSTICE KAGAN: Right. But my
9 question is, if the state has not denied
10 liability yet, how do you have a Fifth
11 Amendment claim? If the state has denied
12 liability, if it has said we're refusing to
13 pay, then I take Justice Alito's point exactly.

14 Then you have both your elements of
15 the Fifth Amendment claim. There's been a
16 taking and the state has refused to pay just
17 compensation, allegedly.

18 But if the state has not yet refused
19 to pay, how do you have a Fifth Amendment
20 claim?

21 MR. BREEMER: Because in the inverse
22 condemnation context -- well, let me back up
23 one minute.

24 I think the appropriate actor is the
25 township, but in the inverse condemnation

1 context, again, the problem is not whether or
2 not the government will pay. It's will it
3 recognize an entitlement because there's been a
4 taking.

5 Until you get that entitle -- that
6 takings determination made, compensation issues
7 don't play into the equation. And if
8 compensation issues aren't part of the element
9 of the takings dispute, then state remedies are
10 irrelevant to the presentation of claims.

11 CHIEF JUSTICE ROBERTS: But this isn't
12 -- this isn't sort of a black or white thing.
13 I assume what the state -- well, I thought what
14 the state had done and will do in -- in many
15 cases is say, look, we don't think we owe you
16 anything, but we have a process for determining
17 whether we do or not. And if -- if it turns
18 out under the inverse condemnation action we
19 do, well, that's what we'll pay. Is -- is --
20 is that what is going on here?

21 MR. BREEMER: Well, again, Your Honor,
22 I would say this, that the fact that there are
23 state procedures like inverse condemnation
24 doesn't mean that they must be used for a
25 federal claim. That's the question here: Must

1 Ms. Knick use the state inverse condemnation
2 remedies rather than the federal remedy that's
3 under the Fifth Amendment. And Section 1983
4 would say no, the language and purpose of
5 Section 1983 says no. The history and language
6 and purpose of Section 1331 says no.

7 So what we're asking --

8 JUSTICE GINSBURG: In this case -- in
9 this case, I think the first -- first question
10 was, should the Court overrule Williamson.

11 Are you asking the Court to do that or
12 are you distinguishing the claim that you're
13 making from the claim in Williamson?

14 MR. BREEMER: We're -- we are asking,
15 Your Honor, for the Court to overrule
16 Williamson County to this -- to this extent,
17 the state compensation requirement, because it
18 is inconsistent with Section 1983 and with the
19 nature of a Fifth Amendment inverse
20 condemnation claim.

21 But, again, we're not asking the Court
22 to overrule the entirety of Williamson County.
23 The finality ripeness prong, which is still a
24 difficult hurdle to get by, would remain intact
25 and would keep many claims -- would -- would

1 stop many claims at an early stage. And so
2 we're asking the Court to return --

3 JUSTICE SOTOMAYOR: Would that mean
4 that if the state or the locality says once we
5 have an administrative law, if you disagree
6 with it, you have to go through this
7 administrative process and, if we violated
8 something, we'll pay for it. Would that be
9 okay?

10 MR. BREEMER: No, Your Honor, it would
11 not, for two reasons, and then I'd like to
12 reserve the rest of my time. That would raise
13 the same res judicata and issue preclusion
14 problems that Williamson County already
15 generates because administrative procedures in
16 Pennsylvania and many places elsewhere are res
17 judicata and issue preclusion in court.

18 And, secondly, as this Court --

19 JUSTICE SOTOMAYOR: So -- but wait a
20 minute. What you're saying is a state passes a
21 law, it says at the bottom of the law we don't
22 think this is a condemnation, but, if it is,
23 follow this administrative process.

24 So it's basically saying we'll pay you
25 if you're right. You're saying they don't have

1 to exhaust that administrative process even?

2 MR. BREEMER: If I understand
3 correctly, if you're -- you're saying that if a
4 court, a federal court found a taking that
5 maybe a property owner should go --

6 JUSTICE SOTOMAYOR: No, no.

7 MR. BREEMER: Okay. That's what I --

8 JUSTICE SOTOMAYOR: I'm saying they
9 pass an administrative law that puts -- that
10 recognizes some sort of easement, whether it's
11 historical or not I'm not going to get into.
12 There's a dispute as to whether it -- you took
13 title to that property with that easement or
14 not.

15 Do you say that if the state or the
16 city or whatever says you have to follow this
17 administrative process to determine whether
18 this law is right or not, that you don't have
19 to exhaust that administrative process?

20 MR. BREEMER: No, you wouldn't have
21 to, Your Honor, because that would require you
22 to prove a taking at an administrative level.
23 And as the Court said in Thunder Basin,
24 administrative agencies are --

25 JUSTICE SOTOMAYOR: So there's no hope

1 for states. They're going to be in federal
2 court all of the time on every administrative
3 law that they pass?

4 MR. BREEMER: May I answer the
5 question?

6 CHIEF JUSTICE ROBERTS: You can answer
7 briefly. You'll be able to reserve some time.

8 MR. BREEMER: These cases, takings
9 cases, will get spread out across state and
10 federal courts just like other constitutional
11 claims, and the existing ripeness, the
12 traditional ripeness for rule of finality will
13 ensure that -- that many of these cases don't
14 make it very far in federal court.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.

17 General Francisco.

18 ORAL ARGUMENT OF NOEL J. FRANCISCO
19 ON BEHALF OF THE UNITED STATES,
20 AS AMICUS CURIAE, SUPPORTING THE PETITIONER

21 GENERAL FRANCISCO: Mr. Chief Justice,
22 and may -- may it please the Court:

23 I'd like to address two basic points
24 that I think are relevant to the discussion
25 that we've been having here.

1 First, Williamson County's premise was
2 correct. The government doesn't violate the
3 takings clause if it provides just compensation
4 after the fact. But it erred in assuming that
5 Section 1983 is only available to address
6 constitutional violations. Instead, it's
7 available to enforce the deprivation of all
8 constitutional rights, and there's no basis for
9 concluding that the right to just compensation
10 is the only right that Section 1983 doesn't
11 cover.

12 But, second, I think you can
13 effectively reach the same result under Section
14 1331 because, as this Court held in
15 International College of Surgeons, is -- if a
16 state cause of action asserts a federal takings
17 claim as such, then that state cause of action
18 arises under the Constitution for purposes of
19 Section 1331, and so the property owner falls
20 within the district court's original
21 jurisdiction and you don't have to address
22 whether Williamson County was rightly or
23 wrongly decided at all.

24 JUSTICE KAGAN: Has that ever been
25 considered before? Because it seems a -- a way

1 out of this difficulty. Has anybody ever
2 addressed it?

3 GENERAL FRANCISCO: Your Honor, I
4 think the only thing that I can point you to is
5 International College of Surgeons itself, but,
6 no, no court has addressed it in the context of
7 Williamson County.

8 CHIEF JUSTICE ROBERTS: Well, you --

9 GENERAL FRANCISCO: But --

10 CHIEF JUSTICE ROBERTS: -- you can
11 answer the letters that we're going to get from
12 district court judges around the country who
13 are not going to be very happy learning that
14 they now have to adjudicate state inverse
15 condemnation actions, which can be fairly
16 elaborate.

17 You know, the judge appoints a special
18 master. They go out and evaluate it. It's --
19 you know, it's like arbitration. It's -- it's
20 a very intensive procedure that seems more
21 suited for state court than federal court.

22 GENERAL FRANCISCO: Well, Your Honor,
23 I -- I think the Court crossed that bridge in
24 International College of Surgeons when it --
25 really in a factually analogous case. In that

1 case, Illinois's landmarks law applied to
2 buildings owned by the International College of
3 Surgeons, and they asserted in a state cause of
4 action that the application of that law
5 constituted a federal taking. And this Court
6 held that it was within federal jurisdiction.

7 I agree that there are going to be
8 Erie issues that courts are going to have to
9 confront, but I don't think they'd be
10 particularly problematic. Take, for example,
11 affirmative condemnation proceedings, state
12 eminent domain proceedings that are brought in
13 federal court because of diversity
14 jurisdiction.

15 The federal rules, Federal Rule
16 71.1(k), I think it is, already provide for
17 federal courts to apply the state procedural
18 rules for assessing the amount of compensation
19 in that context.

20 So, yes, they will have to confront
21 those types of state law questions, but I don't
22 think it would be particularly problematic.
23 It's something that courts do in diversity
24 cases all the time, and in cases -- other cases
25 that raise federal questions all the time,

1 like --

2 JUSTICE BREYER: General, my -- my
3 question is I can see his point, that you could
4 say a state that says our regulation doesn't
5 take anything, and they dispute it. And you
6 could say a state that acts that way is a state
7 that isn't going to pay you any money and,
8 therefore, it is complete, the violation.

9 Or you could say we don't know about
10 the second answer yet, so we'll see. Or you
11 could say sometimes the one, sometimes the
12 other.

13 GENERAL FRANCISCO: Right.

14 JUSTICE BREYER: Or we could go into
15 1331. But Williamson was decided 32 years ago.
16 This is a very complicated area of law. Why
17 not let sleeping dogs lie? It's called stare
18 decisis.

19 GENERAL FRANCISCO: And, Your Honor --

20 JUSTICE BREYER: There is one harm,
21 the harm of the person who tries to remove and
22 then gets kicked out of court.

23 GENERAL FRANCISCO: Right.

24 JUSTICE BREYER: We could write a
25 sentence saying that's wrong, you've waived it.

1 All right. But I couldn't find in any of these
2 briefs any serious harm that would, in fact --
3 your 1331 point can be tried out by somebody --
4 but any serious point that right now provides a
5 strong reason for overturning a case that's
6 been on the books in a complex area for 32
7 years.

8 GENERAL FRANCISCO: So a couple of
9 responses, Your Honor. I think our 1331
10 argument doesn't require you to overturn
11 Williamson County.

12 JUSTICE BREYER: It doesn't.

13 GENERAL FRANCISCO: I think it exists
14 very nicely alongside of Williamson County.

15 JUSTICE GINSBURG: It wasn't raised
16 below. Thirteen -- the 1331 theory was not
17 raised below.

18 GENERAL FRANCISCO: No, Your Honor,
19 but we think it is well within the question
20 presented. The Court --

21 JUSTICE SOTOMAYOR: Was it raised by
22 the parties?

23 GENERAL FRANCISCO: That's correct,
24 Your Honor, but I think it's well within the
25 question presented because this Court granted

1 certiorari on whether or not to overrule
2 Williamson County. The principal criticism of
3 Williamson County is that it closes the federal
4 courthouse doors to an entire category of
5 takings litigants. And I think that our
6 alternative argument is directly relevant to
7 whether Williamson County does, in fact, close
8 the federal courthouse doors to an entire
9 category of takings litigants.

10 I'd also note that Williamson County
11 itself -- the parties below didn't raise the
12 issue that we are here talking about before the
13 Court. So I think --

14 JUSTICE BREYER: But this is a theory
15 -- a pretty -- there's no reason in history
16 that federal courts have to be open to every
17 federal claim. I mean, sometimes they are.
18 Sometimes they're not.

19 GENERAL FRANCISCO: That's --

20 JUSTICE BREYER: So, therefore, state
21 courts can litigate too. Okay. So -- so why
22 do it? My question is, why not simply say, law
23 for 32 years, end of this case, stare decisis,
24 solicitor general raises a very interesting
25 point, not litigated here.

1 GENERAL FRANCISCO: Right.

2 JUSTICE BREYER: We'll see what
3 happens. If it's --

4 GENERAL FRANCISCO: Well, look, I'll
5 put my 1331 argument to the side because I
6 think, as -- as I've -- I've explained, that
7 exists alongside Williamson County. But let me
8 take on your question directly, why should the
9 Court consider overturning Williamson County?

10 And we think that the principal
11 reason, if you decide to get there, and we
12 don't think you have to decide to get there,
13 but if you decide to get there, it's because
14 Williamson County's rationale has never
15 actually been explained.

16 And as a result, it has been
17 understood by the lower courts to produce this
18 unintended consequence of essentially closing
19 the courthouse -- federal courthouse doors to a
20 class of takings litigants. We --

21 JUSTICE SOTOMAYOR: I'm sorry, the
22 courthouse doors are closed to people on tax
23 issues, even though there's constitutional
24 claims. So there's a class that we have both
25 for -- for doctrinal reasons and -- and comity

1 issues and a lot of other reasons, we've closed
2 the courthouse doors.

3 We've closed them to people claiming
4 that they had an unreasonable search and
5 seizure. If they litigated in state court
6 under the Fourth Amendment, claim in state
7 court, they can't come to federal court
8 afterwards.

9 So it's not as if our courthouse doors
10 are open uniformly to everybody anytime.
11 There -- there are all sorts of doctrines that
12 preclude people --

13 GENERAL FRANCISCO: Right.

14 JUSTICE SOTOMAYOR: -- from coming to
15 federal court once they've been issue-precluded
16 in state court.

17 GENERAL FRANCISCO: Right. And that's
18 the key, I think, once they've been
19 issue-precluded in state court. None of those
20 doctrines, with the exception of the tax
21 doctrine, which I'll address in a moment,
22 actually close the federal courthouse doors
23 when there's not a pending state court
24 proceeding, because I think the criminal cases
25 you're talking about are the Younger doctrine.

1 When it comes to the tax laws, that's
2 a very tax-specific rule -- rule that doesn't
3 just apply to property claims; it applies
4 across the board and bars any constitutional
5 challenge in federal courts to state or local
6 tax laws. There's no comparable rule that
7 applies across the board to property claims.

8 After all, courts --

9 JUSTICE SOTOMAYOR: Well, except
10 Williamson, which basically says there's no
11 taking. And you don't -- you're not
12 encouraging us to believe that compensation is
13 due the minute there's a taking, is it?

14 GENERAL FRANCISCO: We don't think --

15 JUSTICE SOTOMAYOR: That it has to be
16 -- happen before the taking?

17 GENERAL FRANCISCO: We certainly don't
18 think you violate the clause if you provide
19 compensation after the taking, but to go
20 directly to your question, under the First
21 Amendment and the Fourteenth Amendment, courts
22 regularly entertain challenges to state
23 property laws. Think of cases like City of
24 Cleburne or City of Renton against Playtime
25 Theatres.

1 There's no general rule that bars all
2 federal claims, all claims in federal court to
3 state and local property laws, other than
4 Williamson County, I agree. And I don't think
5 that there's any basis for treating the takings
6 clause any differently than the other parts of
7 the Constitution.

8 JUSTICE KAGAN: General, I assume we
9 wouldn't have a problem here if we didn't have
10 preclusive effect of the state action. Is that
11 correct in your view?

12 GENERAL FRANCISCO: Your Honor, no, I
13 don't think it is correct in my view. I think
14 that highlights one of the unintended
15 consequences of Williamson County, but we
16 believe that, properly construed, Section 1983
17 was meant to provide a remedy for the
18 deprivation of all constitutional rights,
19 including the right to just compensation.

20 And that's a right that vests the
21 moment the property is taken. You don't
22 violate it if you pay after the fact, but the
23 right, in fact, vests the moment the property
24 is taken, which is why you're actually entitled
25 to interest from the moment of the taking until

1 you get paid.

2 So, under Section 1983, we think quite
3 literally that a property owner is being
4 deprived of the right to just compensation at
5 the moment the government engages in the lawful
6 act of taking their property without payment.
7 That's why we think that the error in
8 Williamson County was the --

9 JUSTICE KAGAN: General, I -- you
10 know, I read those pages in your brief a couple
11 of times, and I have -- I have to say that
12 they're -- it's just going over my head a
13 little bit, how it is that you can say that
14 there's a deprivation of a right when you
15 simultaneously say that there's been no
16 violation --

17 GENERAL FRANCISCO: Right.

18 JUSTICE KAGAN: -- even though the
19 government hasn't paid yet.

20 GENERAL FRANCISCO: Right. And for
21 most constitutional provisions, there's no
22 difference. So, under the First Amendment, you
23 don't deprive somebody of their free speech
24 rights unless you violate their free speech
25 rights. But the takings clause is meaningfully

1 different because the right to just
2 compensation vests only when the government
3 acts lawfully.

4 It's at the moment of the government's
5 lawful action in taking your property that your
6 right to just compensation vests, which is why
7 you get interest. And I'll just finish up.

8 And so we think that, quite literally,
9 the property owner is deprived of their right
10 to just compensation from the moment the
11 government acts lawfully to take their property
12 until the property owner is paid.

13 Thank you, Mr. Chief Justice.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 General.

16 Ms. Sachs?

17 ORAL ARGUMENT OF TERESA FICKEN SACHS
18 ON BEHALF OF THE RESPONDENTS

19 MS. SACHS: Mr. Chief Justice, and may
20 it please the Court:

21 The reinterpretations proposed here as
22 to both Section 1983 and also what we've heard
23 about a possible interpretation of Section 1331
24 would create federal jurisdiction over every
25 local land use planning decision made in the

1 39,000 plus jurisdictions across the country.

2 We ask that this Court affirm
3 Williamson County because it was correct then
4 and it is correct now in this case. What this
5 Court held in Williamson County was that a
6 claimant can't come to federal court under
7 Section 1983 claiming that their constitutional
8 right to just compensation has been violated,
9 when the state provides a reasonable, certain,
10 and adequate means to obtain just compensation,
11 and Petitioner --

12 CHIEF JUSTICE ROBERTS: Well, I think
13 it was clear in Williamson County, because they
14 used terms of ripeness and -- and -- and the
15 like that I don't think the court contemplated
16 the later decision in San Remo, that by sending
17 it to state court, they were effectively taking
18 the federal courts out of the whole business of
19 adjudicating these claims because of the
20 preclusive effect of the state -- state remedy.

21 MS. SACHS: Well, first of all, Your
22 Honor, if I may, the -- the court did use terms
23 like ripeness, and at that time, ripeness
24 perhaps was not as closely associated with
25 jurisdictional considerations as it is today.

1 It was not a jurisdictional decision
2 and that the court could certainly clarify that
3 Williamson County was not jurisdictional. In
4 Williamson County, an element of the Section
5 1983 cause of action was missing, for the same
6 reason in this case. The only claim raised was
7 a Section 1983 that the -- the Petitioner's
8 rights to just compensation had been violated.

9 And yet we know from 130 years of this
10 Court's jurisprudence that there is no
11 violation of the just compensation clause if
12 that reasonable, certain, and adequate
13 provision exists at the time of the taking.

14 JUSTICE KAGAN: But I think what the
15 --

16 CHIEF JUSTICE ROBERTS: You -- you
17 agree -- you agree that the compensation that
18 is due runs from the moment of the taking? In
19 other words, if it takes you six months to
20 adjudicate the -- the claim and you say, well,
21 this is how much you owe, you owe interest
22 going all the way back to the point at which
23 the property was taken, correct?

24 MS. SACHS: Well, yes, this Court has
25 certainly -- the -- that -- the -- the fact

1 that in the interest begins to run is another
2 reason why the time is --

3 CHIEF JUSTICE ROBERTS: And it must be
4 --

5 MS. SACHS: -- the time to pursue the
6 inverse condemnation action, means that there
7 has not been any deprivation of a
8 constitutional right in the interim.

9 CHIEF JUSTICE ROBERTS: Well, it turns
10 out there was a violation of the constitutional
11 right at the moment of the taking, right?
12 That's the whole point of interest.

13 MS. SACHS: No.

14 CHIEF JUSTICE ROBERTS: Why, if there
15 hasn't been a violation, why do you owe
16 interest --

17 MS. SACHS: That just --

18 CHIEF JUSTICE ROBERTS: -- from the
19 moment of the taking?

20 MS. SACHS: -- because it's a -- the
21 -- the post-deprivation process has been
22 determined to be appropriate here, as well as
23 in other situations, because there -- there's a
24 circumstance, particularly a regulatory
25 circumstance, where it's impossible to

1 determine in advance, given the, as this Court
2 has said, the myriad ways that regulations can
3 affect property and whether or not any of them
4 will ultimately end up being considered to be a
5 taking.

6 JUSTICE ALITO: Does the township owe
7 --

8 MS. SACHS: It's appropriate --

9 JUSTICE ALITO: -- does the township
10 owe Ms. Knick any money, any compensation?

11 MS. SACHS: That has yet to be
12 determined, Your Honor.

13 JUSTICE ALITO: You can't -- well,
14 have you made any -- you don't know whether you
15 owe her any money?

16 MS. SACHS: The reason that --

17 JUSTICE ALITO: Are you going to go
18 back to your office and -- and think about
19 that, and then send her a letter saying whether
20 you owe her any money? If she does absolutely
21 nothing, what will you do?

22 MS. SACHS: Your Honor, what she is
23 supposed to do in -- in this situation to find
24 out the answer to Your Honor's question is
25 pursue the Pennsylvania procedure that has been

1 in effect for some 300 years.

2 JUSTICE ALITO: You can't tell me
3 whether you owe her any money?

4 MS. SACHS: The state has to tell her
5 whether we owe her any money, Your Honor.

6 JUSTICE ALITO: You are the state.
7 You represent the township. The township is
8 part of the state. So what is before us here
9 is the Commonwealth of Pennsylvania.

10 Does the township owe her any money?
11 Yes or no. I don't see how you cannot have an
12 answer to that question.

13 MS. SACHS: Your Honor, I cannot -- I
14 can't have an answer to that question because
15 that is why inverse condemnation exists.
16 That's why the proceeding, as you recall --

17 JUSTICE ALITO: All right. If she
18 files an inverse condemnation proceeding, are
19 you going to -- are you going to confess that
20 you owe her money, at the outset?

21 MS. SACHS: The first step in a
22 Pennsylvania inverse condemnation proceeding
23 would not involve that. The first question is
24 for the court. The court determines in an
25 inverse condemnation proceeding whether there

1 has been a taking.

2 We as the township --

3 JUSTICE ALITO: What will your
4 position be?

5 JUSTICE BREYER: His point is that --

6 JUSTICE ALITO: What will your
7 position be?

8 JUSTICE BREYER: That's right.

9 MS. SACHS: What would the position
10 be?

11 JUSTICE ALITO: Yes, what will the
12 position of the township be?

13 MS. SACHS: In this particular case, I
14 think the township would say there has been no
15 taking.

16 JUSTICE ALITO: Therefore, if you have
17 taken her property, you have taken her property
18 and you have denied her compensation. Why is
19 that not a violation of the takings clause? It
20 is a taking without compensation.

21 MS. SACHS: Because we do not agree
22 that we have taken anything, Your Honor.

23 JUSTICE ALITO: Well, that's fine.
24 That's a merits issue. That can be decided in
25 a 1983 action.

1 MS. SACHS: But, under 1983, there is
2 no violation. Her right to just compensation
3 is what Section 1983 protects. And, of course,
4 because the Fifth Amendment provides the right
5 to compensation, and the Fourteenth Amendment
6 prohibits a state from denying that right, we
7 have not denied that right.

8 JUSTICE GORSUCH: Counsel, I -- I --

9 JUSTICE KAGAN: Can I go back --

10 JUSTICE GORSUCH: -- I think this gets
11 back to Justice Breyer's question a little bit,
12 which is you could say that the violation is
13 complete upon the taking of the property with
14 the denial of compensation, as Justice Alito
15 just alluded to, and you've just denied that
16 any compensation is due.

17 Or you could say it should wait until
18 a state litigation process has exhausted
19 itself. And maybe it makes sense to wait when
20 the state has acknowledged a duty to pay, and
21 we can say the state's probably good for it.
22 And that's where those cases originally came
23 from, Cherokee and some of the early ones.

24 But maybe -- maybe it doesn't make
25 sense when the state has denied any obligation

1 to pay. Maybe -- maybe it makes -- maybe it is
2 different when it's an inverse condemnation,
3 because when we look at other -- other
4 constitutional rights, we don't say that a
5 First Amendment violation isn't complete until
6 someone has litigated that claim in state court
7 under state processes or a Fourth Amendment
8 claim.

9 And when you look at the history of
10 inverse condemnation suits, they originated in
11 common law under trespass. It's a simple claim
12 against the state for trespass. That's what an
13 inverse condemnation suit is. Nothing more,
14 nothing less.

15 So why should we single out the --
16 this particular right, the takings clause, for
17 such disfavored treatment to wait to exhaust
18 state remedies that wind up in this ripeness
19 world to yield a moot federal claim?

20 MS. SACHS: A -- a couple of answers
21 to that question, Your Honor.

22 Number one, we are not giving
23 disfavored treatment to property rights. The
24 Constitution does not protect the right to hold
25 onto your property when the government has a

1 just reason to take it.

2 And the -- what the Constitution
3 protects is the right to get just compensation
4 for that. And this Court since, I think, 1895,
5 has specifically said inverse condemnation is
6 an appropriate form of -- of providing that
7 reasonable, certain, and adequate compensation.

8 JUSTICE GORSUCH: But we could say the
9 exact same thing with a Fourth Amendment claim
10 or a First Amendment claim. There are a lot of
11 great state judges out there, every bit as good
12 as any federal judge. And there are a lot of
13 state tort claims that are available equivalent
14 to the trespass claim of an inverse
15 condemnation suit.

16 Why don't we wait to see how they
17 adjudicate a Fourth Amendment violation by a
18 police officer who's engaged in excessive
19 force? Why don't we wait for -- when the
20 prosecutor's engaged in malicious prosecution?
21 We don't because 1983 says you don't have to
22 wait. Why not here?

23 MS. SACHS: Actually, with malicious
24 prosecution, Your Honor, we do. And that's one
25 example of times when we do require litigants

1 to have -- have completed their state process.
2 And here, that -- we are not suggesting that
3 there isn't a right to seek compensation.

4 The question is, has Congress created
5 a basis in federal court to seek compensation?
6 The suggestion that this is a federal takings
7 claim is not where this claim -- case --

8 JUSTICE KAGAN: Well, Ms. --

9 MS. SACHS: -- started or where
10 Williamson County started.

11 JUSTICE KAGAN: -- Ms. Sachs, I -- I
12 think you have a pretty good argument that
13 there's no Fifth Amendment violation until both
14 the taking has been accomplished and there's
15 been a denial of just compensation.

16 And until both of those things happen,
17 there's no claim. But I think the problem is,
18 and the Chief Justice referred to this, the way
19 that rule combines with the preclusion
20 principles in such a way that it prevents
21 somebody from getting into federal court at
22 all. In other words, does -- and I don't think
23 Williams really understood that this would
24 happen, that saying, well, look, you have to go
25 through the state process for determining just

1 compensation before you can bring a federal
2 claim, I don't think Williams understood that
3 the result of going through the state process
4 for determining just compensation was that you
5 were never going to be able to bring a Fifth
6 Amendment claim.

7 And -- and that seems to me an issue,
8 and one that I'm trying to find my way around.
9 And I'm wondering whether there is one.

10 MS. SACHS: Well, I think, when you go
11 back and look at Williamson County, Williamson
12 County was, again, in terms of a 1983 cause of
13 action, whether there had been a violation. So
14 we're talking about establishing whether there
15 has been a violation.

16 And with respect to the -- the full
17 faith and credit aspect, in Williamson County,
18 the -- the Court specifically cites the Migra
19 case, which the Court had decided one year
20 earlier and which specifically turned on
21 exactly that point, that adjudication --

22 JUSTICE BREYER: You don't have to --
23 the problem -- the problem -- I mean, you could
24 say what Justice Gorsuch said, couldn't you?
25 The state says: No, we're not going to pay

1 you. Ha, because there's no compensation --
2 there's no taking. Ha.

3 And we could say that's a final
4 decision not to take it. We could. I mean, I
5 don't see any logic. But Williamson didn't.
6 So I thought: Well, why let the sleeping
7 dog -- let it lie? And -- and then one thing,
8 however, they have a good point and what do you
9 think of that? Their point is there's surely
10 no reason for the defendant in the state case,
11 where you can do so, remove it to federal
12 court, and then, once he's in federal court,
13 they won't decide it because it wasn't in state
14 court.

15 You agree that we should -- no matter
16 what we do, we should write a sentence which
17 says that's wrong?

18 MS. SACHS: Yes, Your Honor. And --
19 and to -- to put that in context, I think of
20 all of the cases that have been raised as
21 supposedly illustrating this dramatic problem
22 created by Williamson County, there were only
23 three situations that we could identify where
24 an actual takings -- an actual inverse
25 condemnation claim had been pursued properly in

1 state court and then was dismissed when it was
2 removed.

3 And we agree, no one advocates for --
4 for not having property owners have their
5 appropriate day in court.

6 JUSTICE BREYER: How does it work?
7 How does it work? I just -- I should know
8 this, but I don't. A group of people would
9 like to demonstrate in the park next Thursday.
10 To do that in the city, you have to have a
11 permit. They go to the city authorities. And
12 they say we do not want you to demonstrate in
13 park, and we won't give you a permit.

14 Can the person who wants to
15 demonstrate then and there bring a suit in
16 federal court and -- saying that violates my
17 First Amendment right?

18 MS. SACHS: Well, if -- if that is a
19 complete -- yeah, I --

20 JUSTICE BREYER: I should know. I
21 don't know.

22 MS. SACHS: Your Honor, I would say
23 that that might be an example of one of the
24 many situations where the -- the -- the state
25 doesn't have the right to violate anyone's

1 First Amendment right. The state doesn't have
2 the right to deny anyone of due process.

3 The state does have the right to take
4 property. That is a normal, legitimate,
5 appropriate function of government. And that's
6 why the -- the Fourteenth Amendment and the
7 Section 1983 cause of action very appropriately
8 allow violations of the right to get
9 compensation in exchange for the taking --

10 CHIEF JUSTICE ROBERTS: You -- you
11 answered --

12 MS. SACHS: -- to be litigated just
13 like any other violation.

14 CHIEF JUSTICE ROBERTS: You answered a
15 question from Justice Breyer about removal, is
16 that correct?

17 MS. SACHS: About --

18 CHIEF JUSTICE ROBERTS: Removal to
19 federal court? Or did I misunderstand?

20 MS. SACHS: About whether a federal --
21 whether a federal -- if a federal cause of
22 action existed, could there be removal, yes.

23 CHIEF JUSTICE ROBERTS: So under our
24 cases in Gunn and -- I forget whether it's
25 Gamble or Gramble -- we said there -- that

1 logic suggests there would be a federal cause
2 of action in this case, right? Any type of
3 condemnation case?

4 MS. SACHS: We would disagree with
5 that, Your Honor, because federal question
6 jurisdiction, arising under jurisdiction, under
7 Section 1331, is a very different analysis --

8 CHIEF JUSTICE ROBERTS: Okay.

9 MS. SACHS: -- as this Court has
10 pointed out.

11 CHIEF JUSTICE ROBERTS: I'll take your
12 point on that. But then -- so in what
13 situation would somebody be able to remove an
14 inverse condemnation case to federal court?

15 MS. SACHS: If it were coupled with a
16 claim that properly stated a federal cause of
17 action. If there were a facial challenge to
18 the statute that caused --

19 CHIEF JUSTICE ROBERTS: Oh, so it's
20 really not -- you're not talking about anything
21 like the case we're talking about today?

22 MS. SACHS: No, but it -- and this
23 case was --

24 CHIEF JUSTICE ROBERTS: Okay. So
25 removal is not a responsive argument to the

1 objections that are being raised?

2 MS. SACHS: Well, we -- this case
3 didn't start off in state court. This
4 plaintiff filed this particular case in federal
5 court. So there was no removal issue. But --

6 JUSTICE SOTOMAYOR: I'm sorry. You --
7 you can remove a state -- a state reverse
8 condemnation case if there's diversity.

9 JUSTICE BREYER: Yeah, that's --

10 MS. SACHS: Yes, if there's diversity,
11 yes. And there are other circumstances too.
12 There could be -- there could be a
13 legitimate --

14 JUSTICE BREYER: That's what I was
15 thinking.

16 MS. SACHS: Right.

17 JUSTICE BREYER: I was thinking
18 only --

19 MS. SACHS: A legitimate --

20 JUSTICE BREYER: -- I was thinking
21 only of their complaint, that there are two or
22 three cases where removal is proper, probably
23 because of diversity. And then the poor
24 plaintiff gets into federal court and it's
25 dismissed.

1 MS. SACHS: Right. Diversity is one
2 example.

3 JUSTICE BREYER: You have no objection
4 to changing that?

5 MS. SACHS: Correct. The -- the --
6 yes, that -- that would not be what the
7 argument is here. But the distinction is --

8 CHIEF JUSTICE ROBERTS: Well, just
9 to --

10 MS. SACHS: -- that there has to be a
11 right to be in federal court in the first
12 place. If they are stating other valid claims
13 that belong in federal court, the case should
14 be in federal court. But Congress has not
15 created a cause of action for general federal
16 takings.

17 And the -- the City of Chicago case
18 that was mentioned earlier --

19 JUSTICE SOTOMAYOR: To have a due
20 process right claim under 1983 --

21 MS. SACHS: A --

22 JUSTICE SOTOMAYOR: -- you have to
23 have a valid claim that the process that you're
24 being offered by the state is inadequate,
25 unfair. There's a bunch of different words.

1 MS. SACHS: Yes.

2 JUSTICE SOTOMAYOR: So that if
3 compensation is unfair, inadequate, et cetera,
4 you could still have a federal claim under
5 1983?

6 MS. SACHS: Absolutely, Your Honor.
7 The --

8 JUSTICE SOTOMAYOR: And if you have a
9 -- if you're claiming that you haven't had a
10 fair process, you can still go -- even after
11 you finish the process, you can still go to
12 federal court and you won't be claim-precluded
13 if you prove that the process you received
14 wasn't fair, correct?

15 MS. SACHS: Correct. Absolutely.

16 JUSTICE GINSBURG: And when you were
17 discussing --

18 JUSTICE SOTOMAYOR: So to say that you
19 have a right --

20 CHIEF JUSTICE ROBERTS: Justice
21 Ginsburg.

22 JUSTICE GINSBURG: -- City of Chicago,
23 when you -- you were in the middle of saying
24 something about City of Chicago, which the --
25 the solicitor general relies on for the 1331

1 argument. Could you complete your answer to
2 that, the relevance of City of Chicago?

3 MS. SACHS: Absolutely, Justice
4 Ginsburg. The reason that we -- we wanted to
5 point out City of Chicago is that City of
6 Chicago is another example, I think, of what
7 Justice Sotomayor was just talking about: a
8 case that belonged in federal court from the
9 start or could have been filed in federal court
10 from the start, because, when you look at the
11 actual complaint, a notice of removal, which we
12 actually got from the federal court archives
13 for that purpose, they were all federal facial
14 claims that could have been brought in federal
15 court in the first place.

16 There was no claim for compensation
17 that was removed. The issue in that case and
18 the reason the Court referenced, I think,
19 Section 1331 jurisdiction was because the Court
20 made a point of saying every issue raised by
21 the plaintiff in that case was a substantial
22 federal issue.

23 And so that was a case that was
24 properly in federal court. And those cases --

25 JUSTICE GINSBURG: Was that -- was

1 that 100 percent clear?

2 MS. SACHS: I'm sorry, Your Honor?

3 JUSTICE GINSBURG: Because I dissented
4 in City of Chicago.

5 (Laughter.)

6 MS. SACHS: And -- and I -- I -- I
7 remember that, Your Honor, because of the cross
8 -- the cross sort of jurisdictional appeal
9 issue, which was really, I think, what was a
10 big issue in that case, not whether there
11 weren't claims that couldn't have been brought
12 in federal court to start with. And I think
13 that's --

14 CHIEF JUSTICE ROBERTS: One of the
15 problems --

16 MS. SACHS: -- what it's been cited
17 for here.

18 CHIEF JUSTICE ROBERTS: -- one of the
19 problems with requiring takings plaintiffs to
20 go to state court is that the inverse
21 condemnation procedures can be very elaborate,
22 can be very expensive, requiring the hiring of
23 experts and economic analyses and all that.

24 And somebody with a legitimate takings
25 claim, forced to go through the state

1 procedures, as a practical matter may not be
2 able to defend their -- their rights.

3 MS. SACHS: Well, that is certainly
4 not the case in Pennsylvania, Your Honor, which
5 is what I can speak to. Pennsylvania's process
6 not only is very comprehensive, it provides for
7 expert review, it provides for more relief --

8 CHIEF JUSTICE ROBERTS: Well, okay --
9 well, I -- I assume it's not necessarily the
10 case in every other state. So what would you
11 do in a situation where -- where that's the
12 case, that the -- the procedure is very
13 expensive and requiring someone to go through
14 it will discourage people with legitimate
15 federal claims from going forward with them?

16 MS. SACHS: Again, nobody advocates
17 for a position that would not allow owners to
18 go to court. But what Your Honor is positing
19 sounds like it could be a Section 1983 claim
20 because there's been a denial of a means to
21 provide just compensation.

22 If the process is so byzantine or long
23 or complicated that it -- it doesn't represent
24 that reasonable, certain, adequate component,
25 that constitutionality demands.

1 JUSTICE KAGAN: Ms. Sachs --

2 JUSTICE ALITO: Are there -- are there
3 any reliance interests at issue here? That's
4 an important consideration under stare decisis.

5 MS. SACHS: Yes, I think there are,
6 Your Honor. And I --

7 JUSTICE ALITO: In what way are states
8 and their subdivisions in a different position
9 today than they were on the eve of the decision
10 in Williamson County?

11 MS. SACHS: Well, I think the
12 Williamson County, and just if I may put a bit
13 of context to that question, because there's
14 been so much focus on Williamson County,
15 Williamson County was actually not so much the
16 sea change in this area as Monell because
17 Monell was where this Court first said you can
18 make a Section 1983 claim against a
19 municipality.

20 That was just seven years before
21 Williamson County. And the Court said we're
22 not establishing the contours of -- of what
23 liability against township -- municipalities
24 will look like.

25 So the amount of Section 1983

1 litigation really arose after Monell and -- and
2 -- and came to this Court in Williamson County.
3 But to answer then the question of -- of the
4 difference between then and now, before and
5 after Williamson County, states have used
6 eminent domain and inverse condemnation
7 proceedings to be sure that they're providing
8 the appropriate compensation for any regulatory
9 taking that might be deemed to occur.

10 And, of course, they've continued to
11 -- to do that and to enact statutes in
12 reliance, and regulations, in reliance upon the
13 fact that --

14 JUSTICE ALITO: So what have they done
15 -- what have they done in reliance on their
16 understanding that they can't be required to go
17 directly to federal court in a case like this?

18 MS. SACHS: Well, I -- I -- I think
19 that they've relied on the existence of their
20 processes as providing the compensation that is
21 required for any taking so that they don't have
22 to determine that in some fashion.

23 JUSTICE ALITO: What -- so what would
24 they have done differently if that rule had
25 never been adopted?

1 MS. SACHS: If -- if Williamson County
2 had come out differently?

3 JUSTICE ALITO: Yeah. What would they
4 have done differently?

5 MS. SACHS: I --

6 JUSTICE ALITO: What would they have
7 done differently as a result of Williamson
8 County that cannot be easily undone?

9 MS. SACHS: It's -- it's -- well, I
10 think depending upon the basis for -- for
11 undoing Williamson County, if this Court were
12 to say that you have to make payment in
13 advance, I think that would affect counties and
14 municipalities all over the country
15 tremendously because it would require the
16 rewriting of every eminent domain code out
17 there and it would require every statute,
18 presumably, or regulation or ordinance to
19 somehow be --

20 JUSTICE GORSUCH: Well, but, counsel,
21 that's not -- that's not quite what's at issue,
22 of course. We're just talking about a remedial
23 regime in either case, a suit in federal court
24 or a suit in state court.

25 And I would have thought presumably

1 the answer would be that the state's conduct
2 would be the same in either circumstance.
3 You'd be prepared to pay just compensation for
4 takings, and prepared not to pay just
5 compensation where there is no taking, and it
6 wouldn't matter whether the claim's in federal
7 court or state court. Isn't that right?

8 MS. SACHS: If -- if -- if -- if
9 that's the question and then I misunderstood
10 Justice Alito's question, and I apologize, but
11 I thought when you were talking about
12 overruling Williamson County, you were thinking
13 of one of the arguments that we've heard here
14 today, which is that perhaps it's always
15 unconstitutional if taking isn't made at the
16 time of inverse --

17 JUSTICE ALITO: No, I'm talking about
18 reliance. Usually, in a stare -- when -- when
19 stare decisis is at issue, the party invoking
20 stare decisis will say: Well, you know, this
21 has been on the books for a long time, and --
22 and we've done all sorts of things or the
23 society has done all sorts of things, and it
24 would be a great burden to undo, very upsetting
25 to undo all of that. That's what I was getting

1 at.

2 But you've addressed the reliance
3 part. What -- what other factors under stare
4 decisis weigh strongly in favor of retaining
5 Williamson County in your judgment?

6 MS. SACHS: The fact that it was
7 correct from the outset, Your Honor, and the
8 fact that this is an area where one of the
9 factors for stare decisis is whether the
10 Court's recent decisions are consistent or
11 inconsistent with any steps Congress may have
12 taken recently. Now some --

13 JUSTICE ALITO: Well, if we overruled
14 it, would that undermine other decisions of
15 ours?

16 MS. SACHS: Well, Your Honor, there
17 isn't a whole web of -- of precedents from this
18 Court, both on the full faith and credit issue,
19 but, obviously, that would be minimized, but
20 things like Del Monte Dunes, where the Court
21 specifically said, again, and I think in the
22 1983 context, that there is no -- that you need
23 that element of denial.

24 JUSTICE BREYER: I don't know if
25 you've come across this anywhere, but --

1 MS. SACHS: I'm sorry, Your Honor?

2 JUSTICE BREYER: I don't know if
3 you've come across this in stare decisis cases,
4 but I think a factor that moves me -- maybe it
5 shouldn't -- is the technical area of law, two
6 generations at least of lawyers have grown up
7 knowing this is how you proceed, that if you
8 change it, suddenly there will be new lines
9 that have to be drawn, which are the complete
10 refusals, which are the not refusals, but we --
11 which are the partial refusals, and maybe it
12 will be a boon to law schools that have courses
13 to catch property lawyers up on what's going
14 on.

15 Now is that sort of thing relevant to
16 stare decisis?

17 MS. SACHS: I -- I think that they --
18 the ability to rely upon existing
19 jurisprudence, to trust the courts to say that
20 we trust the state courts to resolve these
21 issues and to know that, especially in property
22 rights cases, where stare decisis has
23 particular force because people do rely upon
24 what they know about property rights, and --
25 and this Court has called that particular area

1 sort of a super-specialized type of stare
2 decisis that requires a super-specialized
3 justification --

4 JUSTICE KAGAN: Ms. Sachs?

5 MS. SACHS: -- for overruling it. And
6 that doesn't exist. I'm sorry?

7 JUSTICE KAGAN: I probably should know
8 the answer to this question, but if -- if
9 Pennsylvania, instead of using an inverse
10 condemnation procedure, used strictly an
11 administrative process so it didn't go to the
12 courts, it was just some kind of administrative
13 body, would that have the same kind of
14 preclusive effect as a state court judgment
15 does?

16 MS. SACHS: I think it would not have
17 the same type of preclusive effect in an
18 administrative proceeding. So that --

19 JUSTICE GINSBURG: Can you go over, I
20 think, what -- you said that there's an element
21 missing, this is not a 1983 claim because
22 there's an element of such a claim that's
23 missing. What is the element that's missing?

24 MS. SACHS: I think the element that
25 is missing, Justice Ginsburg, is the denial or

1 the -- the deprivation of a constitutional
2 right. There has been no deprivation of a
3 constitutional right because the right that
4 this Court has said is protected is the right
5 to get just compensation, that that can happen
6 afterwards as long as that reasonable, certain,
7 adequate provision exists.

8 And the Petitioner has not been
9 deprived of that. So, to state this as a 1983
10 cause of action, it -- it misses the fact that
11 it is missing an element.

12 This is an inverse condemnation case
13 which Petitioner could still bring. The
14 statute of limitations has not run on this
15 case. She has always had the right to file
16 what she should have filed in the first place,
17 which is an inverse condemnation proceeding
18 where, in Pennsylvania, there's all sorts of
19 emphasis on promptness, to Your Honor's point
20 about the length of -- of what could happen.
21 That's not the situation in Pennsylvania.

22 There's a tremendous emphasis on how
23 these proceed, and also a tremendous benefit to
24 a takings claimant who is successful, because
25 our inverse condemnation proceeding if

1 successful pays, and shall pay -- this is
2 mandatory -- attorneys' fees, costs, expert
3 fees, appraisal fees, interest obviously.

4 It is a very beneficial process for
5 property owners. This is not a bad situation
6 for them to be in.

7 CHIEF JUSTICE ROBERTS: How much --

8 MS. SACHS: And they haven't claimed
9 that it is.

10 CHIEF JUSTICE ROBERTS: If you do owe
11 Ms. Knick compensation for requiring her to
12 grant access to people to come see the grave,
13 how -- how much do you think that would be
14 worth?

15 MS. SACHS: Oh, Your Honor --

16 CHIEF JUSTICE ROBERTS: Well, I know.
17 But my point is that it's very hard to litigate
18 that question. It's a fairly abstract
19 question. She's entitled to some compensation.
20 It's a taking of an easement. It's going to
21 require extraordinary amounts of valuation
22 procedures.

23 And you say, well, you get attorneys'
24 fees and expert fees, but only if you win at
25 the end, and that's requiring the property --

1 property owner to undertake a very big gamble
2 to vindicate a right granted under the
3 Constitution.

4 MS. SACHS: Your Honor, there's
5 nothing to suggest, and Petitioners have not
6 suggested, that the Pennsylvania process is any
7 more long or burdensome or expensive than any
8 litigation process would be.

9 And -- and -- and we submit that
10 actually it's the opposite. Pennsylvania would
11 be a much faster process. Here we are four
12 years later and -- and we're still litigating a
13 preliminary issue. If an inverse condemnation
14 proceeding had been filed, with all of the
15 emphasis on promptness and on the ability to
16 take interlocutory appeals, which is unusual,
17 but -- in Pennsylvania, but is provided for
18 this cause of action, this case would have been
19 over long ago.

20 So there -- there's been no suggestion
21 that Pennsylvania's process is burdensome. I
22 can't say there's no process out there, but
23 certainly there's nothing before this Court
24 that would give that as a basis to say that the
25 -- the -- the -- the Pennsylvania process

1 doesn't provide the reasonable, certain, and
2 adequate component.

3 And this Court has said it so many
4 times, for 130 years, that that is adequate.
5 And the -- that is what we have provided and
6 continue to provide.

7 And, you know, to suggest that every
8 one of these claims would now be appropriately
9 in the federal forum really deprives the -- the
10 states of the ability to help shape --

11 JUSTICE SOTOMAYOR: Now, I have --

12 MS. SACHS: -- state property laws.

13 JUSTICE SOTOMAYOR: I have -- may I?

14 CHIEF JUSTICE ROBERTS: Yes.

15 JUSTICE SOTOMAYOR: And I know there's
16 some dispute below, but have you taken a look
17 at sovereign immunity? Can states be sued for
18 reverse condemnation in federal court unless
19 they've agreed to be sued in federal court?

20 MS. SACHS: States cannot. But the
21 townships are -- do not have --

22 JUSTICE SOTOMAYOR: The township
23 could, but --

24 MS. SACHS: The township could. That
25 -- that -- the immunity was not an issue, Your

1 Honor. So that was not raised.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 MS. SACHS: Thank you.

5 CHIEF JUSTICE ROBERTS: Mr. Breemer,
6 you have two minutes remaining.

7 REBUTTAL ARGUMENT OF J. DAVID BREEMER
8 ON BEHALF OF THE PETITIONER

9 MR. BREEMER: Thank you, and may it
10 please the Court:

11 Williamson County is not a sleeping
12 dog. It has run wild through the state and
13 federal courts for 30 years swallowing just
14 compensation rights of ordinary people like
15 Ms. Knick.

16 There are so many problems with Ms. --
17 excuse me, with Williamson County, res
18 judicata, removal, Rooker-Feldman, its
19 infection of other Constitutional claims, there
20 is no way to set things right except overruling
21 that portion of Williamson County and returning
22 --

23 JUSTICE SOTOMAYOR: Sorry. The only
24 right at issue here that you're claiming is the
25 right to have this adjudicated in federal

1 court.

2 You haven't suggested that the
3 Pennsylvania inverse condemnation system is
4 unfair, unjust, not reasonable, not fast, not
5 anything else, right? So your only absolute
6 claim is I should have had this done in federal
7 court, not state court, correct?

8 MR. BREEMER: Your Honor --

9 JUSTICE SOTOMAYOR: Because I wanted
10 it in federal court?

11 MR. BREEMER: The state process is
12 more complicated. Just like the government
13 sometimes wants a constitutional claim in
14 federal court, sometimes a person like
15 Ms. Knick believes that her federal rights will
16 be better protected in a federal forum.

17 Since it's a federal question whether
18 or not there is a taking --

19 JUSTICE SOTOMAYOR: Well, she's not --

20 MR. BREEMER: -- that is
21 appropriate --

22 JUSTICE SOTOMAYOR: -- guaranteed
23 that, unfortunately, because even under the
24 abstention doctrines, the issue of whether or
25 not there was a permanent easement on her

1 property the day she bought it, because this
2 has been historically true for 300 years, I
3 don't know. I don't know how the district
4 court's going to do that without referring to
5 state law. And so that's what she wishes for.

6 CHIEF JUSTICE ROBERTS: You -- you may
7 answer, briefly.

8 MR. BREEMER: Williamson County is not
9 an abstention doctrine. It's an incorrect
10 doctrine. The violation of a person's right to
11 just compensation occurs at the time of a
12 taking when the government has no intent or
13 means to compensate or denies compensation.

14 And that's what happened here when the
15 township took Ms. Knick's property without
16 condemning it and without any ability or means
17 to compensate.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel. The case is submitted.

20 (Whereupon, at 11:08 a.m., the case
21 was submitted.)

22

23

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