No. 15-631

In The
Supreme Court of the United States

ARRIGONI ENTERPRISES, LLC,

Petitioner,

v.

TOWN OF DURHAM, CONNECTICUT, *ET AL.*,

Respondents.

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

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER AND ILYA SOMIN IN SUPPORT OF PETITIONERS

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MOTION OF THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER AND ILYA SOMIN FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

Pursuant to Supreme Court Rule 37.2(b), the National Federation of Independent Business Small Business Legal Center and Ilya Somin respectfully request leave of this Court to file the following brief *amici curiae* in support of the petitioners in the above captioned matter. In support of the motion, the proposed *amici* states:

1. The Petitioner has filed a blanket consent to all amicus filings in this matter.

2. NFIB SBLC requested Respondent's consent to the proposed *amici* brief on November 25, 2015. Respondent has withheld consent.

3. The proposed *amici* seeks leave to file in this matter because this case raises an important issue of national concern.

4. The proposed *amici* brief offers valuable perspective and expertise and will therein aid the Court in reviewing this petition.

The proposed *amici* respectfully request leave to file the attached brief.

Respectfully submitted,

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QUESTIONS PRESENTED

Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172 (1985), held that to state a ripe claim for a regulatory taking, property owners must both (1) demonstrate the government reached a "final decision" about what uses may be made of the subject property, and (2) seek and be denied just compensation in state court. The rationale supporting the second prong—the "state remedies" requirement—was that there can be no "taking without just compensation" under the Fifth and Fourteenth Amendments until a state court denies compensation. This requires takings plaintiffs to exhaust state remedies before coming to federal court—a requirement inapplicable to any other constitutional right.

The question presented here is whether this Court should repudiate *Williamson County*'s state remedies requirement in order to re-open the federal court house doors to property owners seeking vindication of their federal rights under the Fifth and Fourteenth Amendments?

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INTEREST OF THE *AMICI CURIAE*

The National Federation of Independent Business Small Business Legal Center (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses.[1] The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitols. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses.

NFIB represents 325,000 member businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business. To fulfill its role as the voice for small business, the NFIB Legal Center frequently files amicus briefs in cases that will impact small businesses.

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[1] Pursuant to Rule 37.6, *Amici* affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici*, its members, or its counsel made a monetary contribution to its preparation or submission.

Ilya Somin is Professor of Law at George Mason University School of Law. He has written extensively in scholarly journals on constitutional issues and property rights. He is the author of The Grasping Hand: Kelo v. City of New London and the Limits of Eminent Domain (University of Chicago Press, 2015), and Democracy and Political Ignorance: Why Smaller Government is Smarter (Stanford University Press, 2013, revised and expanded second edition, forthcoming 2016). He is also a contributor to Volokh Conspiracy law and politics blog.

SUMMARY OF ARGUMENT

Thirty years ago, in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), this Court pronounced a new and unfounded rule that a property owner must sue in state court in order to ripen a federal takings claim. This marked a radical departure from the historic practice. There was never, previously, any requirement that property owners had to resort to litigation in order to ripen their takings claims. For that matter, courts played no role in the ripening of takings claims prior to the ratification of the Fourteenth Amendment, and there is no basis for assuming that, through ratification, the Reconstruction Congress imposed any sort of litigation requirement on property owners seeking to ripen claims against state actors.

To be sure, *Williamson County's* requirement to litigate in state court is anathematic to the very reforms that Congress sought to effect with the

Reconstruction Amendments, and enactment of U.S.C. § 1983. The Fourteenth Amendment was intended to secure federal rights—especially the guarantee against uncompensated takings—for citizens of the United States, against the various states. The Amendment was necessary to curb pervasive abuse by state governments at the time. And, to further that noble goal, the Reconstruction Congress enacted Section 1983 in order to ensure that citizens would have a federal forum to vindicate their federal rights—precisely because, there was great skepticism as to whether state courts could be trusted to adequately enforce the federal constitution against the coordinate branches of state government.

Not only does *Williamson County's* requirement to litigate in state court defeat the Reconstruction Congress' goal of opening the federal court house doors to citizens alleging violation of federal rights, but it denies the right to litigate in federal court without any truly principled basis. Property owners are simply shut out from federal court without any firm doctrinal justification. Worse—in a total miscarriage of justice—some courts apply *Williamson County* to deny access to *both* federal and state courts. For all of these reasons, the time has come to reconsider *Williamson County*.

ARGUMENT

I. *WILLIAMSON COUNTY*'S STATE REMEDIES REQUIREMENT IS RIPE FOR ABANDONMENT

Williamson County held that there are two steps to ripening a federal takings claim. 473 U.S. at 186-97. First, there must be a final decision making clear the extent of permissible uses of the property. *Palazzolo v. Rhode Island*, 533 U.S. 606, 620 (2001). Second, a property owner must pursue whatever procedures the state has established for landowners to obtain just compensation. *See Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 734 (1997) (characterizing this as a "prudential ripeness principle[].").[2] This "State Remedies" requirement would make sense if the Court had meant that the landowner must first pursue *administrative procedures* for compensation before a takings claim would be considered ripe. But, instead *Williamson County* proclaimed that, in order to ripen a federal takings claim against a state actor, the owner must first be denied just compensation in state court. 473 U.S. at 194-97.

The Court declared—*ipse dixit*—that a takings claim is unripe if the property owner has

[2] The lower courts are divided as to the question of whether *Williamson County's* requirements are prudential. *See* J. David Breemer, *The Rebirth of Federal Takings Review? The Courts' "Prudential" Answer to Williamson County's Flawed State Litigation Ripeness Requirement*, 30 Touro L. Rev. 319, 340-42 (2014). This in itself raises an issue worthy of resolution.

failed to utilize a state's inverse condemnation procedures (*i.e.*, a statute authorizing suit to compel payment of just compensation in state court). *Id.* at 194-95. This requirement is supposedly grounded in the text of the Fifth Amendment's Takings Clause. *Id.* at 195, n.13. As the Court observed, "[t]he Fifth Amendment does not proscribe the taking of property; it proscribes taking without [just] compensation." *Id.* at 194. True enough. But, there was no real explanation as to why the constitutional text should be construed as requiring denial of just compensation *in state court* in order to ripen a takings claim, when it could just as well be construed so as to recognize a ripened takings claim at the time property is taken if the owner is not afforded some contemporaneous *administrative procedure* for obtaining just compensation. As discussed *infra*, in Section II, the latter interpretation would be more protective of the constitutional right in question, would better comport with historical practice, and would be more logical.

But the most peculiar aspect of the *Williamson County* decision is that the opinion seemed to assume that property owners could proceed to federal court after litigating their claims in state court—an assumption that has proven wildly inaccurate over the past three decades. 473 U.S. at 194 (emphasizing that the takings claim was "not yet ripe[.]"). The reality is that *Williamson County's* state remedies requirement results in a constitutional absurdity: The doors to the federal courts will remain closed until the property owner receives an adverse decision in state court, denying

just compensation; but, the decision that—in theory—ripens the owners takings claim simultaneously bars the owner from (re)litigating the issue in federal court.

A. The State Remedies Rule Effectively Bars Property Owners From Vindicating Federal Rights in Federal Court

The federal courts were initially divided on the question of whether *Williamson County* imposed an ironclad bar—closing federal courthouse doors for all takings claimants, except those lucky enough to have a petition for *certiorari* granted for review by this Court. The problem is that the Full Claim and Credit Act, 28 U.S.C. § 1738, requires preclusive effect to be given to a state court judgment according to the state's issue and claim preclusion rules—which in general prohibits individuals from re-litigating issues or claims already decided in another court, or claims that could have been raised in prior litigation.[3]

Some courts assumed a special exception that would allow an avenue for property owners to ultimately have their takings claim heard in federal court. These courts relied on *England v. Louisiana State Bd. of Medical Examiners*, wherein "the Supreme Court recognized a procedure [allowing] parties who are involuntarily litigating state-law

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[3] *See*, *e.g.*, *Wilkinson v. Pitkin Bd. of County Comm'rs*, 142 F.3d 1319, 1324 (10th Cir. 1998); *Palomar Mobilehome Park Ass'n v. City of San Marcos*, 989 F.2d 362, 364-65 (9th Cir. 1993).

claims in state court to 'reserve' their federal claims for later determination by a federal court." *Santini v. Connecticut Hazardous Waste Management Service*, 342 F.3d 118, 128 (2003). These courts held that a takings claim could be litigated in federal court if the claimant made a formal reservation, on the record, that—in the event of an adverse decision—the plaintiff would bring his or her federal takings claim in federal court.[4]

Yet several federal courts refused to allow *England* reservations on the theory that *England* only applied when a case originated in federal court, and that *Williamson County* requires takings claims to originate in state court.[5] Other courts flatly rejected the notion that *England's* "reservation doctrine [could be invoked] [] to avoid preclusion of issues actually litigated in the state forum." *See e.g.*, *Dodd v. Hood River Cnty.*, 136 F.3d 1219, 1227 (9th Cir. 1998). Ultimately this Court granted *certiorari* in *San Remo Hotel v. City and County of San Francisco*, to resolve this conflict. 545 U.S. 323 (2005).

The *San Remo* Court unanimously held that parties could not use an *England* reservation to

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[4] *See e.g.*, *DLX, Inc. v. Kentucky*, 381 F.3d 511 (6th Cir. 2004); *Fields v. Sarasota Manatee Airport Auth.*, 953 F.2d 1299, 1305-06 (11th Cir. 1992); *Saboff v. St. John's River Mgmt. Dist.*, 200 F.3d 1356, 1359-60 (11th Cir. 2000); *Front Royal & Warren Cnty. Indus. Park Corp. v. Town of Front Royal*, 135 F.3d 275, 283 (4th Cir. 1998).

[5] *See e.g.*, *Peduto v. City of N. Wildwood*, 878 F.2d 725, 729 n.5 (3d Cir. 1989); *Fuller Co. v. Ramon I. Gil, Inc.*, 782 F.2d 306, 312 (1st. Cir. 1986).

"negate the preclusive effect of [a] state-court judgment with respect to any and all federal issues that might arise in … future federal litigation." *Id.* at 338. Yet even if *San Remo* had said that a takings claimant could make an *England* reservation to preserve a potential path to federal court, the *Rooker-Feldman* doctrine prevents any meaningful federal review of federal takings claims that are brought in state court. *See Barefoot v. City of Wilmington*, 306 F.3d 113, 120-21 (4th Cir. 2002) ("The *Rooker-Feldman* doctrine generally bars district courts from 'sit[ting] in review of state court decisions.'") (quoting *District of Columbia Ct. of Appeals v. Feldman*, 460 U.S. 462, 476 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-16 (1923)). Simply put, the federal courthouse doors are closed to takings claimants.

B. Manipulative Defendants Have Exploited the State Remedies Rule to Deny Property Owners Both State and Federal Judicial Forums

At the very least *Williamson County* assumed that a property owner would have the opportunity to attain a decision in state court. This assumption has proven wrong. The Court did not anticipate that governmental defendants would invoke *Williamson County* as a weapon to short-circuit takings claims that are brought in state court.

In *City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156 (1997), this Court held that a takings claim, filed in state court, could be removed to federal court. *Id.* at 161. Employing that decision,

governmental defendants have since removed takings cases to federal court based on federal question jurisdiction. Then—with all the *chutzpah* that can be mustered—they have sought dismissal on the ground that the federal takings claim is unripe because there has been no state court decision, as required by *Williamson County*. *See* J. David Breemer, *The Rebirth of Federal Takings Review? The Courts' "Prudential" Answer to* Williamson County's *Flawed State Litigation Ripeness Requirement*, 30 Touro L. Rev. 319, 334 n.78 (2014).

Some courts don't buy this tactic.[6] But many do.[7] Consequently, many takings plaintiffs are

[6] *See*, e.g., *Yamagowa v. City of Half Moon Bay*, 523 F. Supp. 2d 1036, 1110 (N.D. Cal. 2007) (city removed case to federal court, and on the eve of trial sought remand under *Williamson County*; court rejected the argument, concluding "the City having invoked federal jurisdiction, its effort to multiply these proceedings by a remand to state court smacks of bad faith."); *see also Sherman v. Town of Chester*, 752 F.3d 554, 564 (2d Cir. 2014); *Sansotta v. Town of Nags Heard*, 724 F.3d 533, 544-47 (4th Cir. 2013); *Key Outdoor Inc. v. City of Galesburg*, 327 F.3d 549, 550 (7th Cir. 2003).

[7] *See Sandy Creek Investors, Ltd. v. City of Jonestown*, 325 F.3d 623, 625 (5th Cir. 2003) (dismissing a case on appeal because district court did not have jurisdiction to resolve takings claims that were removed from state court); *Koscielski v.City of Minneapolis*, 435 F.3d 898, 903-04 (8th Cir. 2006); *Ohad Assocs., LLC v. Twp. Of Marlboro*, Civil No. 10-2183 (AET), 2011 U.S. Dist. LEXIS 8414, at *3, 6-8 (D.N.J. Jan. 28, 2011); 8679 *Trout, LLC v. N. Tahoe Pub. Utils. Dist.*, No. 2:10-cv-01569-MCE-EFB, 2010 U.S. Dist. LEXIS 93303, at *4, 13-14 (E.D. Cal., Sept. 8, 2010); *Rau v. City of Garden Plain*, 76 F. Supp. 2d 1173, 1174-75 (D. Kan. 1999); *see also Del-Prarier Stock Farm, Inc. v. Cnty. of Walworth*, 572 F. Supp. 2d 1031, 1034 (E.D. Wis. 2008) (recognizing the incoherent application of

unable to complete the *Williamson County* state remedies requirement and may be barred from filing a second suit by the statute of limitations—or otherwise forced to exhaust their legal budget on these procedural games. *Cf. Martin v. Franklin Capital Corp.*, 546 U.S. 132 (2005) ("The process of removing a case to federal court and then having it remanded back to state court delays resolution of the case, imposes additional costs on both parties, and wastes judicial resources.").

II. THERE IS NO DOCTRINAL BASIS FOR THE STATE REMEDIES RULE

Ironically, "the very procedure that [W*illiamson County*] require[s] [plaintiffs] to follow before bringing a Fifth Amendment takings claim … also preclude[s] [them] from ever bringing a Fifth Amendment takings claim." *Santini*, 342 F.3d at 130. This is absurd. If a takings claim only ripens with a state court decision denying just compensation, then this rule renders the protections of the Fourteenth Amendment illusionary and unenforceable in practice because there is no available remedy at that point. *See Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat) 304, 330-31 (1816) (ruling that the lower federal courts must be authorized to hear cases concerning federal rights). Such a rule contravenes the very purpose of the Fourteenth Amendment in affording protections for federal rights against the states, and the fundamental premise of our constitutional system—

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the *Williamson County* state litigation requirement and remanding a removed case back to state court).

entailed in the maxim that "For every right, there must be a remedy." Sir William Blackstone, 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, 137 (Oxford, Clarendon Press 1765-1769) (commenting on Chapter 29 of Magna Carta: "A third subordinate right of every Englishman is that of applying to the courts of justice for redress of injuries.") (alteration of original).

A. *Williamson County* Pronounced a New and Unfounded Ripeness Rule for Takings Claims

This Court holds that the requirements for Article III standing are satisfied once a litigant shows that there is a *live case or controversy* concerning a question of federal law.[8] But, *Williamson County* assumes that special ripeness rules apply in the context of a takings claim.[9] Specifically, the opinion construed the words of the Takings Clause as imposing a requirement to pursue "just compensation" in state court in order to ripen a takings claim against a state actor.

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[8] *See Warth v. Seldin*, 422 U.S. 490, 500 (1975) (emphasizing that standing "in no way depends on the merits of the [] contention that particular conduct is illegal.").

[9] And worse, some courts extend *Williamson County's* state litigation requirement to due process claims. *See*, *e.g.*, *Kurtz v. Verizon New York, Inc.*, 758 F.3d 506, 515 (2d Cir. 2014) *cert. denied* (2015); *B. Willis, C.P.A., Inc. v. BNSF Ry. Corp.*, 531 F.3d 1282, 1299 n. 19 (10th Cir. 2008); *Greenfield Mills, Inc. v. Macklin*, 361 F.3d 934, 961 (7th Cir. 2004).

Yet if the text of the Fifth Amendment was understood as requiring individuals to seek compensation in court, in order to ripen a takings claim, that requirement would seemingly apply equally to claims against state and federal actors. Indeed, there is no basis for assuming a different standard for ripening takings claims against state and local entities than against the United States. The text of the Fifth Amendment certainly imposes no requirement to pursue judicial remedies *against the states*. For that matter, its prohibition was originally directed only *against the federal government*. *See Barron v. City of Baltimore*, 32 U.S. 243, 250-51 (1833).

And there is no reason to think that the Fourteenth Amendment imposed any special ripening requirement. The incorporation doctrine does not alter the nature of the constitutional protections secured in the Bill of Rights; it simply makes those constitutional guarantees applicable against the states on equal terms as they are applicable against the federal government. *McDonald v. City of Chicago*, 561 U.S. 742, 765 (2010). Thus any special ripening requirement would have to be derived from the text of the Fifth Amendment; however, that would necessarily make that requirement equally applicable to claims against the United States.[10]

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[10] *C.f.*, John D. Echeverria, *Stop the Beach Renoourishment: Why the Judiciary is Different*, 35 Vt. L. Rev. 475, 489 (2010) ("If the judicial branch of state government is subject to the Takings Clause, which applies to the states via incorporation through the Fourteenth Amendment, then the judicial branch of the federal government must also be subject to the Takings Clause.").

Yet it would be nonsensical to say that a property owner must litigate a claim for just compensation in order to ripen a takings claim against the federal government. Such a rule would be circular. It would make it impossible to ever ripen a claim against the United States, which would utterly defeat the purpose of including the guarantee against uncompensated takings in the Bill of Rights. Thus it cannot be that the Takings Clause entails any sort of requirement to ripen a takings claim in court. *See Monongahela Navigation Co. v. United States*, 13 S. Ct. 37 (1893) (emphasizing that the question of whether just compensation has been denied by an Act of Congress is a "judicial… question."); *see also Hunter's Lessee*, 14 U.S. at 330-31.

To be sure, the courts played no role in the ripening of takings claims in the Nineteenth Century.[11] *See e.g.*, *Kennedy v. Indianapolis*, 103 U.S. 599, 601 (1880) (recognizing a "controversy"—on appeal from a lower federal court—as to whether just compensation had been paid under Indiana's Takings Clause, which was essentially identical to the Fifth Amendment). The fact is that, prior to *Williamson County*, the courts understood takings claims to be properly raised if (a) the owner's property had been taken by a legislative or executive action, (b) without affording a contemporaneous

[11] *See e.g.*, *Pumpelly v. Green Bay & Mississippi Canal Co.*, 80 U.S. 166, 176-77 (1871) (assuming a ripened controversy, and interpreting Wisconsin's Takings Clause, which was nearly identical to the Fifth Amendment; holding that just compensation was owed to a landowner who had suffered an uncompensated taking as a result of a legislative act authorizing the construction of a dam).

administrative avenue for obtaining the compensation guaranteed by the Constitution.[12] *See e.g.*, *Cherokee Nation*, 135 U.S. at 667-68 (case proceeded to federal court after the Cherokee Nation refused to accept an offer of compensation deemed adequate by presidentially appointed referees). This was unequivocally true both with regard to claims asserting a violation of the Fifth Amendment, and equivalent claims raised under the takings clauses of the states. *See* Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52 Vand. L. Rev. 57, 60-61 (1999) (explaining that, prior to the Civil War, courts recognized actionable

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[12] *Williamson County* said that there is "no require[ment] that just compensation be paid in advance of, or contemporaneously with, the taking; all that is required is that a 'reasonable, certain and adequate provision for obtaining compensation' exist at the time of the taking." *Id.* at 194 (quoting *Cherokee Nation v. S. Kan. Ry. Co.*, 135 U.S. 641, 659 (1890)). But, the cases cited in support of this proposition do not support *Williamson County's* ultimate conclusion. On the contrary, they stand for the proposition that a property owner *may proceed to court* (presumably with a ripe claim) to attain just compensation where a legislative enactment has already taken property without providing compensation. *See Cherokee Nation*, 135 U.S. at 659-60 (concerning an Act of Congress that compelled transfer of title upon payment of just compensation) (citing *Kennedy*, 103 U.S. at 604 (title did not pass because the authorities never paid just compensation)); *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 124-25, 134 (1974) (rejecting an interpretation of the Rail Act that would deny takings claimants a judicial remedy, in part because of the "grave" constitutional problems that would arise); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016 (1984) (recognizing a property owner may advance a claim for just compensation in court if an enactment results in an uncompensated taking); *Yearsley v. W.A. Ross Const. Co.*, 309 U.S. 18, 21 (1940) (same); *Hurley v. Kincaide*, 285 U.S. 95, 104 (1932) (same).

claims in challenge to legislative enactments purportedly authorizing takings in the absence of any statutorily defined administrative procedure for obtaining compensation).

B. The Fourteenth Amendment and Section 1983 Conferred Federal Protections for Property Rights—Including the Right to a Federal Judicial Forum—on the Same Terms as Other Fundamental Rights, in Order to Protect Political Minorities

The Fourteenth Amendment prohibits state actions that deprive individuals of "life, liberty, or property, without due process of law." U.S. CONST. Amend. XIV, § 1. It would be truly strange if one of the three rights explicitly listed in the text was not ensured any means of protection in federal court. Indeed, it would be inconceivable that either life or liberty would be left unprotected, without opportunity for aggrieved individuals to vindicate their rights in federal court. And the same must be true for property—which the Fourteenth Amendment protects on equal terms.

To be sure, the need to protect property rights against abusive state and local governments was one of the main purposes behind the enactment of the Fourteenth Amendment. Advocates of the Amendment feared that southern state governments would threaten the property rights of African-Americans and other political minorities, including whites who had supported the Union against the

Confederacy during the Civil War. AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 268-69 (1998); *see also* Ilya Somin, The Civil Rights Implications of Eminent Domain Abuse, Testimony before the United State Commission on Civil Rights, 5-11 (Aug. 12, 2011) (explaining that minorities suffer disproportionately in the absence of strong property right protections).[13] The right to private property was thus a central component of the "civil rights" that the framers of the Fourteenth Amendment sought to protect.[14] "Equality in the enjoyment of property rights was regarded by the framers of that Amendment as an essential precondition to the realization of other basic civil liberties which the Amendment was intended to guarantee." *Shelly v. Kraemer*, 334 U.S. 1, 10 (1948).

And the need to seek redress in a federal judicial forum was viewed as especially important for vindication of these rights. Indeed, the Reconstruction Congress was not concerned only with the possibility of abuse at the hands of the

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[13] *Available* online at http://www.law.gmu.edu/assets/files/faculty/Somin_USCCR-aug2011.pdf (last visited Dec. 10, 2015).

[14] On the centrality of property rights in nineteenth century conceptions of civil rights, *see*, *e.g.*, HAROLD HYMAN & WILLIAM WIECEK, EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT, 1835-75, 395-97 (1982) (describing the right to property as one of the main elements of civil rights as concieved in the 1860s); MARK A. GRABER, TRANSFORMING FREE SPEECH: THE AMBIGUOUS LEGACY OF CIVIL LIBERTARIANISM (1991) (describing how most nineteenth century jurists viewed property as a fundamental right).

legislature and executive branches of state government. *See Patsy v. Bd. of Regents*, 457 U.S. 496, 503 (1982). The concern was that abuses may be pervasive and systemic—throughout all coordinate branches of state government. *Mitchum v. Foster*, 407 U.S. 225, 242 (1972); *Stop the Beach Renourishment v. Florida Dep't of Envtl. Prot.*, 560 U.S. 702, 713-14 (2010) (affirming that the Takings Clause applies on equal terms to all branches of state government). Indeed, there was special skepticism as to whether state courts could be trusted to vindicate federal rights against abuse—especially for African-Americans recently freed from slavery.[15] *See Mitchum v. Foster*, 407 U.S. 225, 242 (1972); Ilya Somin, *Stop the Beach Renourishment and the Problem of Judicial Takings*, 6 Duke J. Const. L. & Pub. Pol'y 92, 101-03 (2011) (observing that state court judges are sometimes influenced by political pressure—especially those who are elected, or appointed by a politically motivated coalition). Thus, in the face of continued abuses, in which state courts were complicit, the Reconstruction Congress enacted U.S.C. § 1983 in order to ensure that the federal court house doors would be open for any individual seeking vindication of federal rights. *See*

[15] Justice Story emphasized that the original Constitution likewise presumed the possibility of institutional bias in state courts. S*ee Hunter's Lessee*, 14 U.S. at 346-47 ("[A]dmitting that the judges of the state courts are, and always will be, of as much learning, integrity, and wisdom, as those of the courts of the United States, … [i]t is manifest that the constitution has proceeded upon a theory of its own… The Constitution has presumed (whether rightly or wrongly we do not inquire) that state attachments, state prejudices, state jealousies, and state interests, might sometimes obstruct, or control, or be supposed to obstruct or control, the regular administration of justice.").

Briscoe v. Lahue, 460 U.S. 325, 363-64 (1983) (noting that "[t]he debates over the 1871 Act are replete with hostile comments directed as state judicial systems."). With this historical backdrop, there is simply no reason to assume that Congress would have wanted to exclude takings claimants from vindicating their federal rights in federal courts. *Cf. San Remo Hotel*, 545 U.S. at 349 (Rehnquist, C.J., concurring) (suggesting that owners should be allowed to initiate takings suits in federal court against state actors under Section 1983).

C. There is No Principled Basis for Excluding Property Rights from the General Rule that Federal Rights may be Vindicated in Federal Court

In *San Remo*, Chief Justice Rehnquist wrote a separate concurrence—joined by Justices O'Connor, Kennedy, and Thomas—suggesting that *Williamson County* was a mistake, and questioning whether there was any doctrinal justification for requiring property owners to litigate in state court. *Id.* at 351-52 (Rehnquist, C.J., concurring). The concurrence emphasized that there was no apparent basis for "hand[ing] authority over federal takings claims to state courts… while allowing plaintiffs to proceed in cases involving, for example, challenges to municipal land-use regulations based on the First Amendment." *Id.* at 351 (Rehnquist, C.J., concurring). The point cannot be overstated.

The general rule is that there must be an available federal forum for individuals seeking

vindication of federal rights. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (affirming the English rule that "where there is a legal right, there is also a legal remedy…"); *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 84 (1936) (Brandis J., concurring). And as Justice Joseph Story explained, another important reason why federal courts have ultimate jurisdiction over federal constitutional issues is "the importance, and even necessity of *uniformity* of decisions throughout the whole United States, upon all subjects within the purview of the constitution." *Hunter's Lessee*, 14 U.S. at 3347-48 (emphasis in original). Any posited exception—closing the federal courthouse doors—is thus a grave matter, which can only be justified by some compelling rationale of the highest order. *See* Douglas E. Edlin, *A Constitutional Right to Judicial Review: Access to Courts and Ouster Clauses in England and the United States*, 57 Am. J. Comp. L. 67, 92 (2002). But there is no principled basis for singling out takings claims for relegation to state courts—let alone a compelling justification.

No other provision of the Bill of Rights is treated as *Williamson County* treats the Takings Clause. *See* Gideon Kanner, *"[Un]equal Justice Under Law": The Invidously Disparate Treatment of American Property Owners in Takings Cases*, 40 Loy. L.A. L.Rev. 1065, 1077-78 (2007). If we were to extend *Williamson County's* logic to other rights—protected on equal terms in the Bill of Rights—the result would be that litigants would face the same insurmountable barriers to getting to federal court. One could not state a ripened claim for a violation of the First Amendment until after a state court had

ruled that censorship was legal—at which point the claim would be barred for the reasons outlined in Section I. Likewise, one could not ask a federal judge to enforce the exclusionary rule of the Fourth Amendment unless and until a state court has consummated the constitutional violation by ruling that the evidence in question was properly admitted—at which point the only potential for federal review would be if the Supreme Court should grant *certiorari*.

The right to vindicate federally secured rights is held sacrosanct in all other contexts.[16] Yet without any real explanation, *Williamson County* has relegated the right to receive "just compensation" for the taking of one's property to the status of an unprotected right—despite its explicit protection in the actual text of the Constitution. To be sure, if there is no judicial forum available to provide a

[16] It would be inconceivable to require individuals, seeking vindication of political rights secured under the Fourteenth Amendment, to sue in state court if the state of Texas should decide to reinstitute a poll tax, or if the state of Louisiana should decide to deny equal apportionment of legislative districts. By that same measure, this Court would never tolerate a requirement to seek redress in state court for an alleged violation of the Equal Protection Clause if, for example, South Carolina should enact law requiring that one must be Protestant to hold public office, or if Mississippi should enact a law imposing heightened sentencing requirements on African-Americans, or if officials in Tennessee should refuse to issue marriage licenses to same sex couples.

remedy when a constitutional violation occurs, then there is no meaningful constitutional protection.[17]

III. THIS COURT SHOULD REPUDIATE *WILLIAMSON COUNTY'S* STATE REMEDIES RULE, AND RETURN TO THE HISTORIC RULE

This case presents an ideal vehicle for this Court to reconsider and repudiate *Williamson County's* state litigation requirement. The facts are concrete and succinct. Arrigoni Enterprises LLC, a small family-owned business, initially sued in Connecticut state court, contesting the validity of restrictions prohibiting the crushing of rocks on its property. In addition the company alleged a violation of the Takings Clause. But those claims were rejected.

Thereafter, the company sought a variance, which was denied, and then initiated this suit in federal court. From these facts it's clear that the Connecticut courts were not disposed to take the company's claims for just compensation seriously, and that, if the company is to vindicate its federal rights, it must proceed in federal court—except that *Williamson County's* bars the suit because the company did not engage in the futile task of litigating in state court (again). Accordingly, this Court should grant *certiorari* in order to "reconsider

[17] This is not hyperbole. *Williamson County* holds that a federal takings claim only ripens with a state court decision denying just compensation—meaning that the constitutional injury occurs with the issuance of that decision. But, the owner is precluded from seeking a remedy in federal court at that point.

whether plaintiffs asserting a Fifth Amendment takings claim based on the final decision of a state or local government must first seek compensation in state courts[,]" as urged by four members of this Court in *San Remo*.

In the wake of this Court's still recent decision in *Horne v. U.S. Department of Agriculture* (*Horne I*), there is all the more reason to reconsider *Williamson County* at this juncture. 133 S. Ct. 2053 (2013). In *Horne I*, this Court said that "[a] 'Case' or 'Controversy' exists once the government has taken private property without paying for it[,] [and] … whether an alternative [judicial] remedy exists does not affect the jurisdiction of the federal court." *Id*. at 2062, n.6. This statement of law conflicts sharply—perhaps irreconcilably—with *Williamson County's* rule that a justiciable federal takings claim can only be raised once the owner has pursued just compensation in court. But it is entirely consistent with the historical rule. *See United States v. Dickinson*, 331 U.S. 745, 751 (1947) (recognizing that a takings claim arises at the time of the taking); *United States v. Dow*, 357 U.S. 17, 22 (1958) (recognizing that an act taking private property "gives rise to [a] claim for compensation..."); *United States v. Clark*, 445 U.S. 253, 258 (1980).

Moreover, since *Williamson County*, this Court has repeatedly sent conflicting signals as to

when a takings claim accrues.[18] For example, in *Lingle v. Chevron, U.S.A.*, there was no question as to whether Chevron had advanced a ripened takings claim—notwithstanding the fact that the company had failed to pursue compensation in the Hawaiian courts. 544 U.S. 528 (2005). And, in the very term following *Williamson County*, this Court ruled in *First English Evangelical Lutheran Church v. Los Angeles County*, that the County of Los Angeles was required to pay compensation for a temporary taking from the time the County began enforcing the offending restriction until it was eventually struck-down by the California courts. 482 U.S. 304, 318-321 (1987).

But if a takings claim accrues—triggering the requirement to pay just compensation—at the time a restriction is imposed, then it cannot be that one must be denied just compensation in a subsequent judicial proceeding in order to have a ripe claim. *See* Michael W. McConnell, Horne *and the Normalization of Takings Litigation: A Response to Professor Echeverria*, 43 Envtl. L. Rep. News & Analysis 10749 (2013). Nonetheless, the lower courts continue to apply *Williamson County* in contravention of the historical rule that takings claims accrue at the time a taking occurs. As such, this Court should take this case in order to repudiate the state litigation requirement. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 63 (1996) (the Court

[18] *See e.g.*, *Koontz v. St. Johns River Management District*, 133 S. Ct. 2586, 2595-96 (2013) (holding that a constitutional claim accrues under the Takings Clause at the point at which a public authority makes clear that a development permit will not be issued without an agreement to dedicate private property).

should reconsider decisions that are poorly reasoned or unworkable). Until overturned, *Williamson County* will continue to stand as an unprincipled lock to the federal court house doors.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari to review the Second Circuit's judgment.

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