No. ______

IN THE
Supreme Court of the United States

AGRIPOST, LLC, a Florida Limited Liability Company (Successor by Merger to Agripost, Inc.) and AGRI-DADE, LTD., a Florida Limited Partnership, *Petitioners*,

v.

MIAMI-DADE COUNTY, FLORIDA, *Respondent.*

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Question 1. Should the Court overrule *Williamson County Regional Planning Commission v. Hamilton Bank* insofar as it denies property owners the right to litigate their *federal* causes of action in *federal* court, the same as all other constitutionally aggrieved citizens, and forces them to seek compensation in state court ostensibly to ripen their federal constitutional takings claims, where four Justices of this Court declared in *San Remo Hotel v. City and County of San Francisco* that the *Williamson County* rule is "mistaken" due to its lack of doctrinal underpinning and incoherent effect on federal jurisdiction?

Question 2. Where settled 11th Circuit law has for decades provided that a property owner following the *Williamson County* rule of state court ripening litigation may "reserve" federal issues for federal court trial, and in fact the 11th Circuit expressly so ordered in an earlier appeal of this case, can the property owner be punished for obeying such an order by having its eventual federal court suit dismissed on the basis of issue preclusion?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

All parties are listed in the caption:

- Petitioners Agripost, LLC, a Florida Limited Liability Company (successor by Merger to Agripost, Inc.) and Agri-Dade, Ltd., a Florida Limited Partnership were the plaintiffs and appellants below.
- Respondent Miami-Dade County, Florida was the defendant and appellee below.

Pursuant to S.Ct. Rule 29.6, Petitioners state that Petitioner Agripost, LLC has no parent corporation and no publicly held company owns 10% or more of its stock. Petitioner Agri-Dade, Ltd.'s principal owner is Agripost Dade County, LLC, a Florida limited liability company which is itself wholly owned by Agripost, LLC. Agripost, LLC is also a general partner and limited partner of Agri-Dade, Ltd.

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS 2

INTRODUCTION 3

STATEMENT OF THE CASE 5

BASIS FOR GRANTING THIS WRIT OF CERTIORARI 8

I. THERE IS CONFLICT AND CONFUSION REGARDING THE ABILITY OF PROPERTY OWNERS TO SUE MUNICIPALITIES IN FEDERAL COURT FOR 5TH AMENDMENT VIOLATIONS 8

A. *Williamson County* Contained a Fatal Flaw: It Wrongly Assumed That a Fifth Amendment Taking Without Just Compensation is Not Complete Until a State Court Adjudicates That the Local Agency Really Will Not Pay 11

B. *City of Chicago*, Rendered a Dozen Years After *Williamson County*, Added Further Confusion to the "Ripeness" Procedure in Takings Cases 22

TABLE OF CONTENTS
(continued)

Page

C. *San Remo* Added to the Confusion by Applying *Williamson County* Despite Concerns About its Validity 25

II. THE 11TH CIRCUIT'S "SETTLED RULE" OF REMANDING TAKINGS CASES TO STATE COURT FOR *WILLIAMSON COUNTY* "RIPENING" MANDATES ALLOWING THIS CASE TO PROCEED 28

CONCLUSION.. 32

TABLE OF APPENDICES

Appendix A — 11th Circuit Court of Appeals opinion dated April 22, 2008 .... App. 1

Appendix B — Judgment and opinion, U.S. District Court, Southern District of Florida, dated October 21, 2005 .... App. 17

Appendix C — 11th Circuit Court of Appeals opinion dated Nov. 15, 1999 .... App. 28

Appendix D — U.S. District Court, Southern District of Florida, decision dated September 5, 1997 .... App. 47

Appendix E — Florida Court of Appeals decision, March 26, 2003 .... App. 62

Appendix F — Florida Supreme Court Order Denying Review, dated October 15, 2003 .... App. 70

Appendix G — 11th Circuit Court of Appeals Order Denying Rehearing, dated May 30, 2008 .... App. 72

TABLE OF AUTHORITIES

Page

Cases

Bell v. Hood,
327 U.S. 678 (1946).. 17

Chicago B.& Q. R. Co. v. Chicago,
166 U.S. 226 (1897).. 11

City of Chicago v. International College of Surgeons,
522 U.S. 156 (1997)..................................passim

City of Monterey v. Del Monte Dunes at Monterey, Ltd.,
526 U.S. 687 (1999).. 20

Complete Auto Transit, Inc. v. Brady,
430 U.S. 274 (1977).. 24

Cont'l T.V., Inc. v. GTE Sylvania, Inc.,
433 U.S. 36 (1977).. 24

Dodd v. Hood River County,
136 F.3d 1219 (9th Cir. 1998).................... 26, 30

Dodd v. Hood River County,
59 F.3d 852, 861 (9th Cir. 1995) 27

England v. Louisiana Medical Examiners,
375 U.S. 411 (1963).. 4

Felder v. Casey,
487 U.S. 131 (1988).................................. 16, 18

Fields v. Sarasota-Manatee Airport Auth.,
953 F.2d 1299 (11th Cir. 1992)................passim

TABLE OF AUTHORITIES
(continued)

Page

First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987) 11, 15, 16

Funk v. U.S., 290 U.S. 371 (1933) 25

Jacobs v. United States, 290 U.S. 13 (1933) 15

Kelo v. City of New London, 545 U.S. 469 (2005) 13

Kottschade v. City of Rochester, 319 F.3d 1038 (8th Cir. 2003) 28

MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340 (1986) 14, 15

McDaniel v. Sanchez, 452 U.S. 130 (1981) 25

McNeese v. Board of Education, 373 U.S. 668 (1963) 15

Monell v. Dept. of Social Services, 436 U.S. 658 (1978) 14

Monroe v. Pape, 365 U.S. 167 (1961) 14, 18

Nevada Dept. of Human Resources v. Hibbs, 538 U.S. 721 (2003) 12

Patsy v. Board of Regents, 457 U.S. 496 (1982) 16, 20

San Remo Hotel v. City & County of San Francisco, 545 U.S. 323 (2005) .... passim

TABLE OF AUTHORITIES (continued)

Page

SEC v. United Benefit Life Ins. Co., 387 U.S. 202 (1967) 24

U.S. v. General Motors Corp., 323 U.S. 373 (1945) 14

Wainwright v. Sykes, 433 U.S. 72 (1977) 18

Will v. Michigan Dept. of Police, 491 U.S. 58 (1989) 12

Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172 (1985) .... passim

Wilson v. Garcia, 471 U.S. 261 (1985) 16

Constitution

U.S. Constitution, 5th Amendment .... passim

U.S. Constitution, 11th Amendment 12

U.S. Constitution, 14th Amendment 2, 11, 13

Statutes

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1441(a) 9, 22

28 U.S.C. § 2254(b) 18

42 U.S.C. § 1983 .... passim

42 U.S.C. § 4651(1) 17

42 U.S.C. § 4651(8) 17

Fla. Stat. § 421.55 17

TABLE OF AUTHORITIES (continued)

Page

Other Authorities

Michael M. Berger & Gideon Kanner, *Shell Game! You Can't Get There From Here: Supreme Court Ripeness Jurisprudence in Takings Cases at Long Last Reaches the Self-Parody Stage*, 36 Urban Lawyer 671 (2004) 27

Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century Just Compensation Law*, 52 Vand. L. Rev. 57 (1999) 16

J. David Breemer, *Overcoming* Williamson County's *Troubling State Procedures Rule*, 18 J. Land Use & Envtl. L. 209 (2003) 16

Steven J. Eagle, Regulatory Takings 1070 (2d ed. 2001) 20

Timothy V. Kassouni, *The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights*, 29 Cal. West. L. Rev. 1 (1992) 27

Gregory Overstreet, *Update on the Continuing and Dramatic Effect of the Ripeness Doctrine on Federal Land Use Litigation*, 20 Zoning & Plan. L. Report 17 (1997) 27

PETITION FOR A WRIT OF CERTIORARI

Agripost, LLC, a Florida Limited Liability Company (successor by merger to Agripost, Inc.) and Agri-Dade, Ltd. (collectively "Agripost") petition for a writ of certiorari to review a final judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the Eleventh Circuit Court of Appeals is reproduced as Appendix A, and the denial of rehearing is Appendix G. The Opinion affirms a judgment of the United States District Court, Southern District of Florida, reproduced in Appendix B. Earlier decisions in this matter by the Eleventh Circuit Court of Appeals and the United States District Court, Southern District of Florida are reproduced in Appendices C and D. A decision by the Florida Court of Appeals (required by the Eleventh Circuit decision in Appendix C) and an Order of the Florida Supreme Court denying review are reproduced in Appendices E and F.

JURISDICTION

The Eleventh Circuit entered judgment on April 22, 2008, and denied a timely petition for rehearing on May 30, 2008.

On August 14, 2008, this Court granted an application (No. 08A132) extending the time to file this petition to October 27, 2008.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Constitution, 5th Amendment:

". . . nor shall private property be taken for public use without just compensation."

U.S. Constitution, 14th Amendment:

". . . nor shall any State deprive any person of life, liberty, or property, without due process of law;"

42 U.S.C. § 1983:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action

at law, suit in equity, or other proper proceeding for redress . . . ."

INTRODUCTION

This case demonstrates all that is wrong with *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), and shows clearly why four members of this Court, led by the late Chief Justice, urged that the Court find an opportunity to reconsider *Williamson County* and discard it. (See *San Remo Hotel v. City & County of San Francisco*, 545 U.S. 323, 351 [2005] [concurring opinion by Rehnquist, C.J., joined by O'Connor, Kennedy and Thomas, JJ].)

Briefly, *Williamson County* has created a Catch-22 of monumental proportions for property owners seeking to litigate 5th Amendment takings cases in federal court. *Williamson County* tells property owners that they *must first* litigate parallel state claims in state court in order to "ripen" their federal claims for federal court litigation. Upon doing so, however, their access to federal court is prevented by the doctrines of claim and/or issue preclusion. That is what happened in *San Remo* — triggering four Justices to urge reconsideration of *Williamson County* to end that procedural conundrum.

Petitioners here have been in litigation for a decade and a half, bouncing between state and federal courts as a result of this Court's decision in *Williamson County* and the 11th Circuit's settled rule applying *Williamson County* that required property owners who wanted to litigate a regulatory taking claim in federal court to first litigate that claim in state court, under state law, with a "reservation" of federal issues. (E.g., *Fields v. Sarasota-Manatee Airport Auth.*, 953 F.2d 1299 [11th Cir. 1992]. See App. p. 10, referring to *Fields* as "the settled law in this circuit.") [1]

After filing suit in U.S. District Court, Petitioners were ordered to proceed in state

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[1] The importance of a fresh federal trial was recognized by the Court in the abstention context: "How the facts are found will often dictate the decision of federal claims. It is the typical, not the rare, case in which constitutional claims turn upon the resolution of contested factual issues. . . . Thus, in cases where, but for the application of the abstention doctrine, the primary fact determination would have been by the District Court, *a litigant may not be unwillingly deprived of that determination . . . [nor of] his right to litigate his federal claims <u>fully</u> in the federal courts.*" (*England v. Louisiana Medical Examiners*, 375 U.S. 411, 416-417 [1963]; emphasis added.)

court under the *Fields* rule and then return. The 11th Circuit affirmed the District Court's Order so holding. The County then petitioned this Court for certiorari, which was denied.

After litigating unsuccessfully in the Florida courts — but reserving their right to litigate federal issues in federal court, as the 11th Circuit had directly ordered them to do — Petitioners returned to U.S. District Court, where they were told that the Florida proceedings had become res judicata. On appeal, the 11th Circuit held that to be error, but concluded that collateral estoppel would preclude the litigation in any event.

Petitioners were the victims of a judicial double whammy. Having filed suit in federal court initially, they were ordered to state court under the authority of *Williamson County* and *Fields*. After spending years in that process, they were told by the court that invented the *Fields* process in order to comply with both *Williamson County* and fundamental fairness that it was all for naught. That cannot stand.

STATEMENT OF THE CASE

Agripost was in the business of transforming waste material into useful fertilizer. Miami-Dade County announced a need for a plant to provide such a service and Agripost responded.

It obtained from the County a 20-year contract and a zoning permit for land it leased from the State, and then built the facilities with private funds — more than $36 million.

Later, the County staff notified Agripost that its plant was creating nuisance-like problems and suggested curative steps. After negotiating a timetable for the cure, Agripost set about dealing with the problem. Before allowing Agripost to complete the negotiated program, however, the County revoked the permit. As a consequence of the County's abrupt permit revocation, Agripost's contract with the County to operate the facility was rendered worthless and it lost its lease (forfeiting all the facilities it had built).

Exhausting its administrative remedies, Agripost unsuccessfully sought review of the County's action in Florida's courts.

Agripost then sued in U.S. District Court for redress of its federal constitutional rights but was, pursuant to settled 11th Circuit policy, told to first ripen its case in state court by seeking recompense under state law. In the process, the District Court rejected the County's defenses that the state administrative proceedings (including court review) were either res judicata or collateral estoppel. (App. D.) The *County* then sought 11th Circuit

review, even though it had prevailed and the case had been dismissed. The basis for its appeal was that the District Court's decision would deny it the ability to invoke either claim or issue preclusion. The 11th Circuit affirmed. (App. C.)

Upon litigating in state court as ordered (and losing), Agripost returned, only to have its second federal suit dismissed on the basis of claim preclusion. (App. B.) The 11th Circuit affirmed, concluding that, although claim preclusion did not apply, the matter was barred by issue preclusion. (App. A.)

The 11th Circuit's treatment of *San Remo* is unfathomable. Acknowledging that *San Remo* "was an *issue* preclusion case" (App. p. 13 [emphasis, the court's]), the 11th Circuit said that "we need not extrapolate from the holding in *San Remo* to decide this appeal" (App. p. 13), and then held that issue preclusion controlled without further mention of this Court's issue preclusion analysis in *San Remo*.

Nor did the 11th Circuit deal at all with the impact of its own *Fields* rule and its direct order to Agripost to litigate in state court in order to ripen its federal claim and then return to federal court to litigate its federal issues.

Moreover, having held in the first appeal that the County could not apply either claim or issue preclusion based on the state court findings (App. C), the 11th Circuit allowed the County to do precisely that (App. A).

Rehearing was denied. (App. G.) Thus, this Petition.

BASIS FOR GRANTING THIS WRIT OF CERTIORARI

I.

THERE IS CONFLICT AND CONFUSION REGARDING THE ABILITY OF PROPERTY OWNERS TO SUE MUNICIPALITIES IN FEDERAL COURT FOR 5TH AMENDMENT VIOLATIONS. THREE DECISIONS OF THIS COURT INTERTWINE TO PERPETUATE THE CONFUSION.

First. In *Williamson County Reg. Plan. Commn. v. Hamilton Bank*, 473 U.S. 172 (1985), this Court held that a property owner's 5th Amendment claim to just compensation for a regulatory taking was not "ripe" for federal court litigation until litigation under parallel state constitutional provisions had been tried and lost.

Second. In *City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997), this Court held that a municipal defendant could remove such a 5th Amendment claim from state court for federal litigation. The opinion does not cite *Williamson County* nor the fact that *Williamson County*'s holding renders compliance with 28 U.S.C. § 1441(a) (i.e., that a case can be removed only if it could have been brought in federal court in the first instance) impossible.

The upshot of *Williamson* and *City of Chicago* is that property owners are barred from filing takings claims in federal court, but municipalities have the absolute right to try such claims in federal court by removing them.

Third. In *San Remo Hotel v. City & County of San Francisco*, 545 U.S. 323 (2005), this Court held that, once a case is brought and tried in state court, issue preclusion would prevent prosecuting such a case in federal court, even though the state court litigation had completed the required *Williamson County* ripening — rendering the matter theoretically ready for federal court litigation.

By the time *San Remo* was decided, members of this Court openly questioned the continuing validity of *Williamson County*. The *San Remo* plaintiff did not challenge

Williamson County, instead assuming that it could follow the direction of that case to return to federal court with its then-ripened 5th Amendment claim. As *Williamson County* was not challenged in this Court, the Court simply assumed it was still valid precedent. The late Chief Justice, however, joined by Justices O'Connor, Kennedy, and Thomas, filed a concurring opinion directly asking for such a reconsideration of a ruling they had come to believe "may have been mistaken" (*San Remo*, 545 U.S. at 348):

> "I joined the opinion of the Court in *Williamson County*. But further reflection and experience lead me to think that the justifications for its state-litigation requirement are suspect, while its impact on takings plaintiffs is dramatic. . . . In an appropriate case, I believe the Court should reconsider whether plaintiffs asserting a Fifth Amendment takings claim based on the final decision of a state or local government entity must first seek compensation in state courts." (*San Remo*, 545 U.S. at 352 [concurring opinion].)

A.

Williamson County Contained a Fatal Flaw: It Wrongly Assumed That a Fifth Amendment Taking Without Just Compensation is Not Complete Until a State Court Adjudicates That the Local Agency Really Will Not Pay.

The 5th Amendment's Just Compensation Clause (the first element of the Bill of Rights incorporated into the 14th Amendment's Due Process Clause)[2] prohibits government from taking private property for public use unless it pays just compensation. A violation of that provision occurs as soon as government action takes private property and the municipality fails or refuses to pay. (See *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 316-317 [1987].) There is nothing in either logic or the language of the 5th Amendment to require state court certification of non-payment before the taking is complete.

That is *Williamson County*'s flaw: it held that the taking was not complete until

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[2] *Chicago B.& Q. R. Co. v. Chicago*, 166 U.S. 226, 241 (1897).

compensation was denied not just by the taking entity, but also by the state courts.

Williamson County quite properly began its analysis with the words of the 5th Amendment, noting that the constitutional provision "does not proscribe the taking of property; it proscribes taking without just compensation." (473 U.S. at 194.) The problem arises because the Court then blurred the distinction between acts of the *agency* that actually committed the taking and the *State* that may or may not have provided compensation through litigation. (473 U.S. at 195-196.)

But the *state* is not involved in 42 U.S.C. § 1983 cases like this one. States and their officials cannot be sued under Section 1983 (*Will v. Michigan Dept. of Police*, 491 U.S. 58 [1989]), nor (with very narrow exceptions [*Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721 (2003)]) can they be brought into federal court at all against their will (U.S. Const., 11th Amendment). The real issue in cases like this is whether the local entity — like Miami-Dade County at bench — is alleged to have taken private property for public use (i.e.,

in pursuit of a public purpose[3]) and failed to pay for it. If so, the question whether the municipality can be *compelled* to pay lies at the heart of litigation in either state or federal court.

The crux of the problem with *Williamson County* is that it *merged the state legal system with the local agency defendant* and disregarded the plain words of the Constitution. Nothing in the 5th Amendment requires multiple litigation or state court deference. It does not say ". . . nor shall private property be taken for public use without just compensation *as finally determined by suing the municipal defendant in state court.*"[4]

The issue is not whether a state has countenanced the constitutional violation, but whether the municipal defendant has

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[3] *Kelo v. City of New London*, 545 U.S. 469, 480 (2005).

[4] Indeed, when adopted, the 5th Amendment applied only to the federal government The 14th Amendment applied its precepts to the states, but there have been no developments in constitutional law suggesting that this provision has been *de facto* amended to exclude the federal courts from enforcing it.

committed it. 42 U.S.C. § 1983 forbids any person, including municipalities (*Monell v. Dept. of Social Services*, 436 U.S. 658, 690 [1978]), acting under color of state law from violating rights secured by federal law. The gravamen of a 5th Amendment claim is a taking of property[5] and nonpayment by the taker. When a municipal council — like Miami-Dade's — takes private property without providing any compensation, it violates the 5th Amendment then and there. The presence or absence of a state remedy has no bearing on whether the malefactor did the deed. (*Monroe v. Pape*, 365 U.S. 167, 183 [1961] ["It is no answer that the state has a law which if enforced would give relief."])

A year after *Williamson County*, the Court seemed to understand this, explaining *Williamson County* as being based on the premise that "a court cannot determine whether a municipality has failed to provide 'just compensation' until it knows what, if any, compensation *the responsible administrative body* *<u>intends</u>* *to provide*." (*MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 350

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[5] Per *U.S. v. General Motors Corp.*, 323 U.S. 373, 378 (1945), it is the deprivation of the owner, not the accretion of any interest to the taker, that constitutes the compensable taking.

[1986]; citation omitted; emphasis added.) At another point, the same opinion speaks of determining "if *proffered* compensation is 'just.'" (477 U.S. at 350; emphasis added.) Neither formulation requires state court litigation. If needed, a simple inquiry can answer questions of "intent" and "proffer."[6]

After saying that in *MacDonald*, the Court again explained *Williamson County* as holding that "an illegitimate taking might not occur *until the government refuses to pay*" (*First English*, 482 U.S. at 320, fn. 10; emphasis added), without any reference to whether a state court had refused to *order* payment. In any event, if a city refuses to provide compensation as required by the U.S. Constitution and recourse to the courts must be had, there is no reason why such recourse should — let alone must — be had only in *state* courts when the *federal* constitution is being violated. (*McNeese v. Board of Education*, 373 U.S. 668, 674, n. 6 [1963] ["we have not the right to decline the exercise of . . . jurisdiction simply because the rights asserted may be adjudicated in some other forum."])

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[6] Cf. *Jacobs v. United States*, 290 U.S. 13, 16 (1933): "A promise to pay was not necessary. Such a promise was implied because of the duty to pay imposed by the [5th] Amendment."

Deferring to state courts is tantamount to granting states a veto power over access to federal court, making them *de facto* federal court gatekeepers. The Court has repeatedly concluded that "Congress surely did not intend to assign to state courts and legislatures a conclusive role in the formative function of defining and characterizing the essential elements of a federal cause of action." (*Felder v. Casey*, 487 U.S. 131, 144 [1988], quoting *Wilson v. Garcia*, 471 U.S. 261, 269 [1985].)

Mandating suit in state court imports into the 5th Amendment an unwarranted remedial requirement when the just compensation language is a self-executing limitation on government's inherent power. (*First English*, 482 U.S. at 315.)[7]

If nothing else, any required state court suit for payment is not only inconsistent with 42 U.S.C. § 1983 (*Patsy v. Board of Regents*,

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[7] See also Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century Just Compensation Law*, 52 Vand. L. Rev. 57, 60-61 (1999); J. David Breemer, *Overcoming* Williamson County's *Troubling State Procedures Rule*, 18 J. Land Use & Envtl. L. 209, 219-225 (2003).

457 U.S. 496, 503 [1982]), but also with Congressional policy established in the Uniform Relocation Assistance and Real Property Acquisition Policies Act, which provides that it is illegal for government agencies to make it necessary for property owners to sue for just compensation. (42 U.S.C. § 4651[8].) Rather, the duty is the government's to acquire whatever property interests are needed for the public good, either by negotiation (42 U.S.C. § 4651[1]) or condemnation (42 U.S.C. § 4651[8]). State laws track these provisions. (See Fla. Stat. § 421.55)

In any event, if suit is required to demonstrate the actuality of a 5th Amendment violation, there is nothing in the 5th Amendment directing that the *only* place to seek that determination is in *state* court. As state and federal courts have concurrent jurisdiction to decide constitutional claims, the choice of forum, as in other cases, should belong in the first instance to the plaintiff.[8]

No other constitutional rights are treated that way. Just as the Constitution forbids

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[8] *Bell v. Hood*, 327 U.S. 678, 681 (1946): "a party who brings a suit is master to decide what law he will rely upon."

taking property, but only without just compensation, so the Constitution forbids the deprivation of life and liberty — but only if done without due process of law: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ." And yet, plaintiffs complaining about deprivations of life or liberty without due process of law are not told they must first sue in state courts to determine whether relief can be had there, as a precondition to seeking redress in federal court. Quite the contrary. Their suits take place in federal court; the validity of the defendant's actions under state law, and the availability of state remedies is irrelevant. (See *Monroe v. Pape,* 365 U.S. 167 [1961] [police brutality case not required to be preceded by state tort suit for assault and battery]; *Felder v. Casey,* 487 U.S. 131, 148 [1988] [Section 1983 suits are enforceable in federal court "in the first instance"].)[9]

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[9] The lone exception is habeas corpus, where by statute all issues (state and federal) must be raised in state court first. (28 U.S.C. § 2254[b].) However, once done, a habeas petitioner is not subjected to res judicata, collateral estoppel, or full faith and credit barriers upon arriving in federal court. The issues may be argued afresh. (See, e.g, *Wainwright v. Sykes,* 433 U.S. 72, 80 [1977].)

As the *San Remo* group of concurring Justices concluded, *Williamson County* contains no principled explanation of "why federal takings claims in particular should be singled out to be confined to state court . . ." (545 U.S. at 351.) Viewing litigation to protect federal rights as a whole, the *San Remo* concurrence put its finger on the right issue:

> "The Court has not explained why we should hand authority over federal takings claims to state courts, based simply on their relative familiarity with local land-use decisions and proceedings, while allowing plaintiffs to proceed directly to federal court in cases involving, for example, challenges to municipal land-use regulations based on the *First Amendment* [citations]." (545 U.S. at 350; emphasis, the Court's.)

If, as *Williamson County* said, the federal violation is not ripe until a *state court* verifies that state law provides no remedy, then *all* Section 1983 litigation would have to begin in state courts. In the words of the leading treatise, "If there is a reason why free speech cases are heard by federal judges with alacrity and property rights cases receive the treatment indicated above [i.e., diversion to state courts], it is not readily discernible from the

Constitution." (Steven J. Eagle, Regulatory Takings 1070 [2d ed. 2001].)

There is no need to sue in State court merely to confirm the self-evident fact of non-payment of just compensation. The non-payment is obvious; it is the reason for the suit. Had there been payment, there would be no litigation. The Agripost litigation has been on-going for some 15 years. The County has made no offer of payment, flouting federal law in the all too evident belief that state courts will not enforce the Takings Clause and the preclusion rule will bar the owners from federal court.[10]

This can be seen in any regulatory taking case. In *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999), for example, the taking occurred in 1986, the case was furiously litigated, through two appeals to the 9th Circuit and one trip to this Court. That

[10] Such a result is plainly contrary to the intent of the Congress that adopted 42 U.S.C. § 1983 and this Court's consistent application of it. As *Patsy* concluded after exhaustive study of the statute's adoption, Congress had a general "mistrust" of the "local prejudice" in state courts and therefore intended "to interpose the federal courts between the States and the people, as guardians of the people's federal rights . . . ." (457 U.S. at 503.)

process consumed 13 years. At no time — even after a jury trial resulted in a compensatory judgment — did the city volunteer to pay anything. Suit was not necessary to determine the lack of compensation, or the city's lack of interest in paying.

Nor is a state suit needed to inform the defendant of the problem. Given the complexity of today's land use procedures — usually requiring years of effort and endless public hearings before action is taken — any agency that is not comatose is well aware by the end of the process that the property owner claims the city action violates the 5th Amendment. Miami-Dade was not in doubt about that claim. It simply chose not to honor it. Imposing on Agripost (not to mention the time of the state courts) merely to confirm that obvious fact serves no legitimate purpose.

With respect, *Williamson County* erroneously construed the 5th Amendment to require a wasteful detour through state courts as a precursor to federal court litigation of a core federal constitutional issue. As shown in *San Remo*, lower court efforts to grapple with this rule, attempting to apply it while also giving deference to general rules of preclusion, have created only chaos. It is time for this Court to acknowledge the original error,

overrule the state court ripening requirement, and allow Agripost the day in federal court that it initially sought and to which it was entitled *ab initio*.

B.

City of Chicago, Rendered a Dozen Years After *Williamson County*, Added Further Confusion to the "Ripeness" Procedure in Takings Cases.

In *City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997), the property owner did as instructed by *Williamson County*: it filed a state court action challenging the validity of land use regulations. In addition to state court claims, the complaint raised federal due process, equal protection and takings claims. (See 522 U.S. at 160.)

The Court held that it was proper for the municipal defendant to remove the case to federal court under 28 U.S.C. § 1441(a). Section 1441(a) permits removal *if, but only if*, the plaintiff could have brought suit in federal court in the first place, but chose not to.

It somehow got overlooked that, as a land use plaintiff, the International College of

Surgeons could *not* have sued the City of Chicago in federal court; *Williamson County* forbade it. Nonetheless, the Court held removal was proper because "a case containing claims that local administrative action violates federal law . . . is within the jurisdiction of federal district courts." (522 U.S. at 528-529.) The Court added that "the facial and as-applied federal constitutional claims raised by ICS 'arise under' federal law for purposes of federal question jurisdiction." (522 U.S. at 167-168.)

Justice Ginsberg's dissent emphasized *City of Chicago*'s momentous nature, characterizing the decision as both a "watershed" (522 U.S. at 175) and a "landmark" (522 U.S. at 180), because:

> "After today, litigants asserting federal-question or diversity jurisdiction may routinely lodge in federal courts direct appeals from the actions of all manner of local (county and municipal) agencies, boards, and commissions." (522 U.S. at 175; Ginsberg, J., dissenting.)

City of Chicago demonstrates the error in *Williamson County*. Unburdened by being

reminded of *Williamson County*,[11] the Court accurately and sensibly concluded that 5th Amendment cases are properly brought in federal court in the first instance.

Precedents are not cast away lightly. However, when scholars have been critical of its decisions,[12] when application of a precedent has produced a rule that "stands only as a trap for the unwary,"[13] when necessary to clarify the implications of earlier decisions,[14] when decisions of the Court are "if not directly . . .

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[11] In fairness to the Court, the adversary system seems to have failed. Neither of the parties to *City of Chicago* cited *Williamson County*, and only one amicus brief even mentioned it (and that one only tangentially), so the Court was uninformed about the full consequences of its actions.

[12] *Cont'l T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 48 (1977).

[13] *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977).

[14] *SEC v. United Benefit Life Ins. Co.*, 387 U.S. 202, 207 (1967).

[conflicting,] are so in principle,"[15] or when "the answer suggested by [the Court's] prior opinions is not free of ambiguity,"[16] the Court has reviewed its earlier decisions and corrected its own errors. Each of those factors applies to *Williamson County.*

C.

San Remo Added to the Confusion by Applying *Williamson County* Despite Concerns About its Validity.

By the time *San Remo* reached this Court, the plaintiff had several strikes against it. First, plaintiff filed suits in both state and federal court and then stayed the state court action. The District Court held that the federal case was both untimely (facial claim) and unripe (as applied claim). On appeal, plaintiff asked the court to abstain from considering its own case, pending resolution of the state court litigation, a request that the 9th Circuit granted as to the facial claim, but agreed with the District Court that the as applied claim was

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[15] *Funk v. U.S.*, 290 U.S. 371, 374 (1933).

[16] *McDaniel v. Sanchez*, 452 U.S. 130, 136 (1981).

unripe. Second, the plaintiff purported to file a "reservation of federal issues," notwithstanding that the 9th Circuit (unlike the 11th Circuit) had no established policy regarding such reservations. (See *Dodd v. Hood River County*, 136 F.3d 1219 [9th Cir. 1998], applying issue preclusion notwithstanding that the state court honored the property owner's reservation of federal issues.) Third, when the state suit was decided, the California Supreme Court acknowledged that a reservation had been filed, but nonetheless analyzed decisions of this Court in ruling on the merits. Fourth, when it sought certiorari here, the plaintiff did not challenge *Williamson County*. Finally, when this Court decided *San Remo*, it was on the assumption that *Williamson County* was still good law because it had not been challenged.

This Court was thus able to review the result in *San Remo* as though *Williamson County* was etched in stone. In that light, *San Remo* simply examined the question whether application of *unchallenged* law by a state court was entitled to full faith and credit. The Court found the answer to that question obvious.

In the context of *Williamson County*, however, that obvious result only added to the confusion. While *San Remo* held that the result of a regulatory taking case tried in state

court would be entitled to full faith and credit in federal court, it left unanswered the question whether the litigation *had* to be filed in state court to begin with. *Williamson County* said that it did, but four Justices voiced grave concern about that conclusion in *San Remo*, and the Court held that it did not in *City of Chicago*.

The upshot is that the law is in hopeless disarray, heavily criticized by the scholarly community and lower courts as well. (E.g., *Dodd v. Hood River County*, 59 F.3d 852, 861 [9th Cir. 1995] ["**draconian**"]; *Fields*, 953 F.2d at 1307, n.8 ["**odd**"]; Gregory Overstreet, *Update on the Continuing and Dramatic Effect of the Ripeness Doctrine on Federal Land Use Litigation*, 20 Zoning & Plan. L. Report 17 at 27 [1997] ["**shocking**"]; Timothy V. Kassouni, *The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights*, 29 Cal. West. L. Rev. 1, 51 [1992] ["**Kafkaesque**"]. A collection of dozens of other such critical descriptions of *Williamson County* may be found in Michael M. Berger & Gideon Kanner, *Shell Game! You Can't Get There From Here: Supreme Court Ripeness Jurisprudence in Takings Cases at Long Last Reaches the Self-Parody Stage*, 36 Urban Lawyer 671, 702-703 [2004].)

As the confusion is the result of the adoption and interaction of this Court's own decisions, any resolution must come from this Court. (E.g., *Kottschade v. City of Rochester*, 319 F.3d 1038, 1041 [8th Cir. 2003] [calling the dissonance between *Williamson County* and *City of Chicago* an "anomalous gap in Supreme Court jurisprudence" whose resolution "is for the Supreme Court to say, not us."].)

The decision in *San Remo* only added to the confusion containing, as it did, the strong analysis of four Justices that *Williamson County* was erroneously decided and ripe for overruling, but failing to reach the issue because the parties did not raise it.

It is time to end the confusion.

II.

THE 11TH CIRCUIT'S "SETTLED RULE" OF REMANDING TAKINGS CASES TO STATE COURT FOR *WILLIAMSON COUNTY* "RIPENING" MANDATES ALLOWING THIS CASE TO PROCEED.

Agripost was directly ordered by the District Court and the 11th Circuit — following the "settled rule" of the 11th Circuit — to depart from the federal courts and litigate ***first*** in the

state courts. Pursuant to that settled 11th Circuit rule, Agripost was told that it could "reserve" its federal issues for federal court litigation.

The 11th Circuit's *Fields* rule was the effort of a lower court to find a way to reconcile this Court's *Williamson County* rule with the settled jurisdiction of federal courts to decide federal questions presented to them.

Williamson County was clear that after state court ripening, federal litigation could proceed. (E.g., 473 U.S. at 185 [federal claim is "premature"]; 473 U.S. at 186 [federal claim "is not ripe"]; 473 U.S. at 194 ["not yet ripe"]; 473 U.S. at 197 ["until [plaintiff] has used that [state] procedure, its taking claim is premature"].) The 11th Circuit thus created a procedure in its *Fields* decision to implement both the perceived intent and the plain language of *Williamson County*, and it adhered to that procedure consistently.

This case thus differs from *San Remo* in significant ways.

First. Unlike the 11th Circuit, the 9th Circuit had no established rule dealing with *Williamson County.*

Thus, Agripost was trapped by the settled law of the 11th Circuit into litigating in the state courts, with the promise of eventual federal court litigation thereafter. The San Remo Hotel, by contrast, was litigating in the 9th Circuit, where the Court of Appeals had already said that it would apply issue preclusion to takings cases that had obtained a state court decision. (See *Dodd v. Hood River County*, 136 F.3d 1219 [9th Cir. 1998].) When this Court applied issue preclusion in *San Remo*, it was only doing what the 9th Circuit would have done in any event. That differs sharply from Agripost's treatment in the 11th Circuit. Recall that, as noted in the opinion below, the *Fields* rule had "become the settled law in this circuit." (App. p. 10.)

Second. There was no order there from a U.S. Circuit Court of Appeals — as there is here — refusing to allow a federal suit to proceed *until after* the property owner sued first in state court *and* reserved the right to litigate any federal issues in federal court.

Third. Agripost has filed this Petition directly challenging the continuing validity of *Williamson County*.

Because of the 11th Circuit's settled application of the *Fields* rule, this case should

not be bound by *San Remo*. This case was initially brought in federal court, and there it should have stayed. Applying *Fields*, however, the 11th Circuit directly ordered Agripost to take its case to state court. Although Agripost told the state courts it was reserving its federal issues, and those courts acknowledged as much, the 11th Circuit later held that issue preclusion attached. Thus, unlike all other plaintiffs claiming sundry violations of their *federal* constitutional rights, Agripost finds itself unable to seek relief for the violation of its federal rights in *any* court.

This much is clear: But for the 11th Circuit's order, *there would have been no state court decision* that could have functioned in an issue preclusive manner. If the 11th Circuit, in the absence of *Fields*, had determined that the matter was not ripe, Agripost could have sought review here. As it was, the law of the Circuit was settled, and it promised access to federal court. Delayed, but not denied. There was no need to question that process, so Agripost did as it was ordered to do.

Agripost is a litigational victim of a system deliberately constructed by the 11th Circuit to deal with applications of this Court's *Williamson County* decision. These things seem clear: (1) *Williamson County* needs to be

reviewed and (as to its state court litigation prong) disapproved; (2) because Agripost was following the direct orders of the 11th Circuit in submitting to state court jurisdiction — but without submitting its federal claims there — it should not suffer the loss of the federal forum it legitimately chose to litigate its federal claim.

CONCLUSION

Williamson County's requirement of ripening 5th Amendment takings claims in state court, as it has been applied during more than two decades, has been a nightmare. It has caused needless anguish to property owners like Agripost. It has caused wastefully repetitive litigation for state and federal court systems. And it has created a field day for criticism by lower courts and commentators.

Citizens, lawyers, and — particularly — busy trial judges are concerned with the law's application, i.e., its nuts and bolts. They lack the luxury of being able casuistically to parse words and theories and attempting to fit unfamiliar concepts like *Williamson County*'s state court ripeness rule into a matrix that already includes rules of claim and issue preclusion with which industrious trial judges work on a daily basis.

It is time to call a halt to the pointless, and plainly unintended, game playing to which property owners have been subjected. They have become the shuttlecocks of constitutional litigation, subject to dismissal under *Williamson County* if they dare to file in federal court, but subject to removal under *City of Chicago* if they file in state court and their municipal opponents would prefer a federal forum. Finally, they are subject to loss of access to federal courts altogether under *San Remo* if they follow the letter of *Williamson County* and seek (or, as in this case, are ordered to seek) to ripen their federal claims in state court before coming to federal court. Rights created and protected by the Constitution deserve better.

Williamson County's state court litigation requirement needs to be overruled. It has become a jurisprudential poison pill, precluding determination of federal constitutional issues, rather than enabling meaningful decision.

Because of the established 11th Circuit procedure with which Agripost complied, any overruling of *Williamson County* in this case ought to apply to Agripost. Agripost was trapped by a pair of interlocking cases created by this Court and the 11th Circuit — *Williamson County* and *Fields* — which combined to force its litigation into the Florida

courts. None of that ever should have taken place. If the *Williamson County* rule requiring state court litigation is undone here, Agripost ought to be one of its beneficiaries.

Petitioner prays that certiorari be granted.

Respectfully submitted,

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