No. 08-250

IN THE

# Supreme Court of the United States

CHARLES and CATHERINE BRAUN, husband and wife, and EDWARD and MURIEL PARDON, husband and wife,

*Petitioners*

*v.*

ANN ARBOR CHARTER TOWNSHIP,

*Respondent.*

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

## BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

I. Should the Court reconsider the second requirement for ripeness of federal takings claims under *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City* when the Court of Appeals did not decide whether petitioners satisfied the first requirement?

II. Should the Court reconsider *Williamson County*'s state-litigation requirement when petitioners did not pursue their takings claim to judgment in state court and have not been adversely affected by any jurisdictional or preclusion implications?

III. Should the Court review the Sixth Circuit's holding that petitioners' procedural due process claim arose from the same facts and alleged the same injury as their takings claim and was not ripe, particularly when the other Courts of Appeals follow the same rule?

IV. Should the Court grant certiorari to review *dictum* by the Court of Appeals regarding the property interest necessary to trigger due process protection when the issue was neither raised nor briefed by the parties?

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## INTRODUCTION

Petitioners challenge the state-litigation requirement for ripeness established in *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S 172 (1985). As support, they rely heavily on Chief Justice Rehnquist's suggestion that in "an appropriate case," this Court should reconsider the requirement that plaintiffs asserting a federal takings claim "must first seek compensation in state courts." *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323, 352 (2005) (Rehnquist, C.J., joined by O'Connor, Kennedy and Thomas, JJ., concurring in judgment).

This is not an "appropriate case" for reviewing the first question raised in the petition.

Petitioners do not dispute *Williamson County*'s requirement of "a final decision regarding the application of the regulations to the property at issue." 475 U.S. at 194. For a takings claim to be ripe, a court must "know[] the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it." *MacDonald, Sommer & Frates v. Yolo Co.*, 477 U.S. 340, 351 (1986).

The Court of Appeals did not decide whether petitioners "followed reasonable and necessary steps to allow [the township] to exercise [its] full discretion in considering development plans for the property . . ." *Palazzolo v. Rhode Island*, 533 U.S. 606, 620-21 (2001). In the courts below, Respondent Ann Arbor Charter Township argued that there was no final determination.

Rather, petitioners submitted a rezoning petition which could have increased the township's population from 5,000 to 8,000, overwhelming its public safety services, schools, roads, sewers and other infrastructure. During the review process, petitioners refused to supply information requested by the township's planning commission about the proposed development. Lacking the information needed to responsibly exercise its discretion, the township denied the rezoning petition. Later, petitioners applied for a use variance from a zoning board of appeals with no authority to even consider the request. At the public hearing, petitioners asked the board to deny their own application.

The Court of Appeals said it would "pretermit this question and instead focus on the second prong, which is dispositive on the issue of federal subject-matter jurisdiction." App. at A-9. Because the court did not decide whether petitioners met the finality threshold, the arguments for reconsidering the state-litigation requirement are not squarely presented. See *First English Evangelical Lutheran Church of Glendale v. Los Angeles County, Cal.*, 482 U.S. 304, 311 (1987) (noting cases in which concerns with finality made consideration of the remedial question premature).

Moreover, petitioners do not challenge *Williamson County*'s second requirement in concrete or meaningful terms. Their assertion that the state-litigation requirement "operates as a jurisdictional trap, rather than [a] ripeness prerequisite" is an abstraction. Petition at 19. Because petitioners elected not to ripen their takings claim in state court as required by *Williamson County*, they have not been affected or

aggrieved by *San Remo*'s enforcement of the Full Faith and Credit Act.

As to the second question presented, petitioners erroneously assert that the Court of Appeals "subsumed" their procedural due process claim "in its taking analysis." *Id.* at 23. Instead, the court concluded that the due process claim was "ancillary to and include[d] the same facts as the takings claim." App. at A-13. Based on "the circumstances of the specific case," the court held that the due process claim was not ripe under *Williamson County*'s considerations. *Id.* at A-14-16.[1] The Sixth Circuit's fact- and issue-specific examination of the relationship between the due process and takings claims is consistent with the approach used by the other Courts of Appeals.

As to the third question presented, the Court of Appeals' discussion of the property interest required to trigger due process protection is *dictum*. *Id.* at A-16-17. Neither party raised or briefed the issue on appeal or in the district court. The court's unprompted *dictum* does not provide an appropriate basis for deciding this issue.

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[1] Petitioners also asserted substantive due process and equal protection claims in the district court and Court of Appeals. Those claims are not raised in their petition.

## SUPPLEMENT TO PETITIONERS' STATEMENT OF CASE

As required by Rule 15.2, the township addresses the following misstatements and omissions that bear on the questions presented in the petition.

Petitioners own property along the northern boundary of Ann Arbor Township in Washtenaw County, Michigan. The Brauns own 286 acres; the Pardons own 77 acres. App. at B-2. They petitioned the township to rezone the property from A-1 (agricultural) and R-2 (single family suburban), to R-6 (mobile home park residential) and R-3 (single family urban residential). *Id.* at B-2–3.

Petitioners did not seek rezoning to a "medium density residential classification" as suggested. Petition at 3. To the contrary, they sought a rezoning to allow mobile home park development on 215 acres and high density single family urban residential development on 149 acres. App. at B-3.

Petitioners' statement that they sought rezoning "consistent with the zoning applicable to other adjacent developed properties" is contrary to the record. Petition at 3. The documents filed by petitioners with their rezoning petition establish that surrounding properties are zoned A-1 (agricultural), R-2 (single family suburban), and R-1 (single family rural residential). The last classification requires larger lots than the R-2 zone. The reviews by township and county planning

commissions determined that the requested rezoning would be incompatible with surrounding property zoning and uses.[2]

To support their allegation that the township unjustifiably requested information about their proposed uses, petitioners gloss over the extraordinary nature of their rezoning petition. The requested rezoning would have significant adverse consequences for the community as detailed by the township and county planning commissions[3] and the township board.[4] The Sixth Circuit noted the clearest example: if granted, the rezoning could increase the township's population by 3,000, from 5,000 to 8,000. App. at A-4, n.2. As a result, the township requested additional information about the impact on roads, traffic, sewers, water and public safety services. *Id.* at A-5, n. 3; Sixth Circuit Joint Appendix (J.A.) 92-94. Petitioners chose not to provide it. Instead, they demanded that the planning commission and township board make their decision without any further input. Petition at 7.

Petitioners incorrectly state that "subdivision plans" were requested by the township although "not required for a zoning change." Petition at 8. No such request was

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[2] Defendant Ann Arbor Charter Township's Motion for Summary Judgment, Exhibit 1, p. 2 & 6-7 (Township Planning Commission Resolution) & Exhibit 2, p. 3 (County Planning Commission Staff Report).

[3] *Id.* at Exhibit 1 & Exhibit 2.

[4] Sixth Circuit Joint Appendix (J.A.) 99-105 (Township Board Resolution).

made. Instead, as noted, the information related to wetlands, water and sewers, traffic, public safety and other topics relevant to rezoning. J.A. 92-94. The county staff report explained the importance of the requested information. Although a drawing attached to the rezoning petition showed only 1,000 manufactured homes, the potential development was not limited if the 220 acres were rezoned to R-6. "The petitioner is not tied to a site plan with a straight rezoning to R-6 and could therefore build out the site to its maximum allowable density" resulting in many more manufactured homes.[5]

Petitioners erroneously claim that the township's decision was "premised on speculation" about the impact of their proposed development. Petition at 8. The planning commission's resolution recommending denial set forth specific reasons and detailed findings.[6] The county metropolitan planning commission then reviewed the petition, made independent findings, and similarly recommended denial.[7] The township board followed the township and county planning commissions' recommendations and adopted a resolution denying rezoning. The resolution identified the "significant – and – detrimental impact on the community." App. at A-5 (citing J.A. 99-105).

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[5] Defendant Ann Arbor Charter Township's Motion for Summary Judgment, Exhibit 2, p. 3.

[6] *Id.* at Exhibit 1.

[7] *Id.* at Exhibit 2.

## REASONS FOR DENYING THE PETITION

### 1. The Court of Appeals did not decide whether petitioners satisfied the finality prong of *Williamson County.*

Petitioners do not challenge *Williamson County*'s final determination requirement. Instead, their petition simply asserts that "the Township made clear that there was no available administrative relief" and presumes that finality ripeness has been satisfied. Petition at 3.

However, the Court of Appeals did not decide this contested issue. The township argued there was no "final decision regarding the application of the regulations to the property at issue," *Williamson County*, 473 U.S. at 186, and therefore, petitioners' takings claim was not ripe for review. The court said:

> Although the defendant argues that the plaintiffs have not satisfied the finality prong, we pretermit this question and instead focus on the second prong, which is dispositive on the issue of federal subject-matter jurisdiction. App. at A-9.

Because the Court of Appeals did not determine whether petitioners satisfied the final determination requirement, this case does not squarely present the first question raised in the petition. A finding that petitioners did not pass this threshold would eliminate any need to consider the state-litigation requirement. See *First English*, 482 U.S. at 311 (issues relating to remedy for taking are premature when finality is not established).

Petitioners and amici rely on the concurring opinion in *San Remo,* which stated that it was not "clear" that *Williamson County* "was correct in demanding that, *once a government entity has reached a final decision with respect to a claimant's property,* the claimant must seek compensation in state court before bringing a federal takings claim in federal court." *San Remo,* 545 U.S. at 349 (Rehnquist, C.J., concurring) (emphasis added). This passage confirms that the appropriate case for reconsidering the state-litigation requirement should be one where the finality requirement is not disputed.

Petitioners did not satisfy *Williamson County*'s first prong. The process began with their petition to rezone 363 acres that were predominantly zoned "A-1, General Agricultural" for many years. They sought rezoning to allow intensive mobile home park and high-density residential zoning.[8] J.A. 75-90. The effect could have increased the township's population from 5,000 to 8,000, and overwhelmed its schools, roads, municipal services and community resources. App. at A-4, n.2 & A-5 (citing J.A. 99-105).

Presented with a community-changing proposal, the township advised petitioners about its concerns and asked for more information. Petitioners refused to

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[8] Petitioners incorrectly state that they sought "a medium density residential classification." Petition at 3. Their request included rezoning of 215 acres to R-6 (mobile home park residential district) and 149 acres to R-3 (single family home urban residential district). The appraisal submitted by petitioners in support of their application described the proposed uses as "high-density residential housing." App. at A-4.

provide any further details about the planned development or the potential impact on township roads and traffic, sewage and water services, public safety services and related items. *Id.* at A-5, n. 3 (citing J.A. 92-94).[9] Lacking any information about these considerations, the township denied the rezoning petition. *Id.* (citing J.A. 99-105). Rather than supplying the requested information or proposing less drastic alternatives, petitioners informally asked about the process for seeking a variance from the zoning board of appeals. The township attorney responded by letter, stating that the zoning board of appeals lacked authority to change a zoning district classification or grant a use variance. *Id.*

Petitioners did not pursue any further approaches with the township and instead filed suit in state court. The state court of appeals held that petitioners had not obtained a final decision as required by *Williamson County* and dismissed the claim for lack of ripeness. *Braun v. Ann Arbor Charter Township*, 683 N.W.2d 755 (Mich.Ct.App.2004).

Again choosing not to provide the requested information or submit a more modest proposal,

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[9] The requested information was relevant to the township's consideration of the rezoning petition. See *Bell River Associates v. China Charter Township*, 565 N.W.2d 695 (Mich.Ct.App.1997) (affirming township's denial of rezoning from agricultural to mobile home park and multiple-family uses, noting potential 40% increase of township's population, unavailability of water and sewer service, lack of proximity to schools, hospitals, and community services, and need for additional police and fire services).

petitioners applied for a variance from the zoning board of appeals despite knowing it lacked any authority to grant such a request. Indeed, petitioners went to the meeting and *requested denial* of their own application. J.A. 128. Following the invited denial, petitioners went directly to federal court without any resort to Michigan's inverse condemnation procedures.[10]

As in *MacDonald*, petitioners submitted an "exceedingly grandiose" rezoning request that would increase the township's population by 60% and then refused to furnish any information about the potential impact on traffic, public safety services, water and sewage capacities, and similar land use factors. 477 U.S. at 353, n. 9 ("Rejection of exceedingly grandiose development plans does not logically imply that less ambitious plans will receive similarly unfavorable reviews.") By steadfastly rejecting the township's reasonable inquiries, petitioners effectively abandoned their rezoning request.[11] Their next step (after a precipitous and failed detour into state court) was submitting a variance request to a body that could not grant it and asking for its denial.

This sequence presents substantial questions regarding petitioners' satisfaction of the finality

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[10] The Court of Appeals noted, as did the parties, that Michigan has a well-established inverse condemnation remedy. App. at A-9 (citing *Macene v. MJW, Inc.*, 951 F.2d 700, 704 (6th Cir. 1991).

[11] *Kinzli v. City of Santa Cruz*, 818 F.2d 1449, 1454-55 (9th Cir. 1987), amended, 830 F.2d 968 (9th Cir. 1987), cert. denied, 484 U.S. 1043 (1988).

requirement. The first ripeness prong requires a final determination by the appropriate agency regarding the permissible uses of property that allows a court to meaningfully decide whether a regulatory taking has occurred. *DLX, Inc. v. Kentucky*, 381 F.3d 511 (6th Cir. 2004); *Hoehne v. County of San Benito*, 870 F.2d 529, 533 (9th Cir. 1989).

The jurisdictional and prudential reasons for finality – which petitioners do not contest – are not satisfied by a community-changing rezoning petition and a sham variance request.[12] Petitioners had several available options. They could have supplied the requested information and allowed the township to evaluate the proposed rezoning's impact before the public hearings. Petitioners' refusal effectively denied the township "an opportunity to exercise its discretion." *Palazzolo*, 533 U.S. at 620. Second, petitioners could have pursued negotiations with the township regarding "less ambitious plans" that were more consistent with the community's character and resources. *MacDonald*, 477 U.S. at 353, n. 9.

There was no evidence that the township would not allow less intensive development. The township sought

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[12] Although numerous cases refer to a property owner's need to request a variance if available, the correct procedures depend on the particular state's law. "The term 'variance' is not definitive or talismanic; if other types of permits or actions are available and could provide similar relief, they must be sought." *Southern Pacific Transportation Co. v. City of Los Angeles*, 922 F.2d 498, 503 (9th Cir. 1990). See also, *Executive 100, Inc. v. Martin County*, 922 F.2d 1536, 1540 (11th Cir.) (landowner must have "pursued alternative, less ambitious development plans"), *cert. denied*, 502 U.S. 810 (1991).

detailed information during its initial review. The zoning board of appeals suggested several options, referring to a comparable development proposal for a nearby agriculturally zoned parcel. J.A. 133, 145. Against this background, petitioners have not received "a final and authoritative determination of the *type and intensity* of development legally permitted on the subject property." *MacDonald*, 477 U.S. at 348 (emphasis added). The township's denial of the rezoning petition to convert farmland into high density residential housing – after petitioners refused to provide the information needed to fairly evaluate the request – represents only an initial "[r]ejection of exceedingly grandiose development plans." *Id.* at 353, n. 9.

The lack of any "meaningful application" was decisive in *Southern Pacific Transportation Co. v. City of Los Angeles*, 922 F.2d 498 (9th Cir. 1990). An unused railroad right-of-way was zoned for residential, commercial and industrial uses. The city rezoned the property to allow only surface parking. The owners opposed the rezoning but did not submit any development proposals or suggest alternatives other than continuing the preexisting zoning. The Ninth Circuit held that "federal courts would be required to guess what possible proposals appellants might have filed with the City, and how the City might have responded to these imaginary applications. It is precisely this type of speculation that the ripeness doctrine is intended to avoid." *Id.* at 504.

Petitioners' persistent refusals resulted in the same speculation. The township was never given the chance to consider the many alternatives between agricultural

uses at one end and high density mobile home and residential developments at the other. *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 738-739 (1997) (recognizing "high degree of discretion characteristically possessed by land-use boards in softening the strictures of the general regulations they administer"); *Del Monte Dunes v. City of Monterey*, 920 F.2d 1496, 1501 (9th Cir. 1990) (landowner "may need to resubmit modified development proposals that satisfy the local government's objections to the development as initially proposed").

This dispositive issue was not decided by the Court of Appeals. As a result, the soundness of the state-litigation requirement is not properly presented for review.

**2. *Williamson County*'s state-litigation requirement is well-founded in the text of the Takings Clause.**

There is no need to extensively reiterate the arguments regarding *Williamson County*'s state-litigation requirement. Petitioners raise the same objections asserted in prior cases and debated in law review articles. Petition at 2-3. As foundation, the arguments presume that regulatory taking claims are somehow different than other constitutional claims and should be exempt from the standards governing other federal actions. This Court has twice rejected these arguments – when made by the property owner and when made by a municipality.

The state-litigation requirement is based on the plain language of the Takings Clause. ("[N]or shall

property be taken for public use, without just compensation."). Accordingly, "[t]he Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation." 473 U.S. at 194.

> If the government has provided an adequate process for obtaining compensation, and if resort to that process "yield[s] just compensation," then the property owner "has no claim against the Government" for a taking. *Id.* at 194-95 (quoting *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1013, 1018 n.2) [13]

The right guaranteed by the Takings Clause is "the right to recover just compensation." *First English*, 482 U.S. at 314 (quoting *Jacobs v. United States*, 290 U.S. 13, 16 (1933)).

That textual understanding of the protection afforded by the Takings Clause was followed in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526

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[13] This reading was accepted before *Williamson County. Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 297, n. 40 (1981) ("an alleged taking is not unconstitutional unless just compensation is unavailable"). This Court has consistently followed it since. *First English*, 482 U.S. at 315 (The Takings Clause "is designed not to limit the governmental interference with property rights *per se*, but rather to secure compensation in the event of otherwise proper interference amounting to a taking."); *Suitum*, 520 U.S. at 734 (state-litigation requirement "stems from the Fifth Amendment's proviso that only takings without 'just compensation' infringe that Amendment"); *Brown v. Legal Foundation of Washington*, 538 U.S. 216, 231-32, 235 (2003).

U.S. 687, 718 (1999) ("Simply put, there is no constitutional or tortious injury until the landowner is denied just compensation.").[14] Because state law did not allow compensation for temporary takings, the property owner had a ripe takings claim under § 1983. This Court held that the right to jury trial applied to § 1983 actions. The city sought "an exception . . . for claims alleging violations of the Takings Clause of the Fifth Amendment." *Id.* at 711. After a lengthy examination of the nature of the just compensation remedy, this Court concluded that there was no justification for treating takings claims differently from other constitutional claims raised in § 1983 actions. *Id.* at 718.

A property owner's request for special dispensation was also declined in *San Remo*. This Court found no reason to "create an exception to the full faith and credit statute, and the ancient rule on which it is based, in order to provide a federal forum for litigants who seek to advance federal takings claims that are not ripe until the entry of a final state judgment denying just compensation." 545 U.S. at 337. More broadly, this Court recognized that "this is not the only area of law in which we have recognized limits to plaintiffs' ability to press their federal claims in federal courts." *Id.* at 347. Requiring a takings plaintiff to pursue state compensation remedies was justified because "[s]tate courts are fully competent to adjudicate constitutional challenges to local land-use decisions" and "undoubtedly have more experience than federal courts do in resolving

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[14] See also, *First English*, 482 U.S. at 320, n. 10 ("illegitimate taking" occurs when "the government refuses to pay")

the complex factual, technical and legal questions relating to zoning and land-use regulations." *Id.*[15]

At the core of petitioners' argument is a belief that their constitutional right to just compensation can be protected *only* in federal court. However, the state-litigation requirement does not weaken a property owner's entitlement to just compensation. Rather, it enforces the language of the Takings Clause by holding that a constitutional violation occurs only when a property owner has been denied just compensation. It respects the role of state courts and legislatures in ensuring the availability of adequate remedies. And, it allows a federal remedy when a state fails to meet its constitutional obligation to provide an adequate just compensation remedy. *First English*, 482 U.S. at 314-316.

Petitioners suggest that abandoning the state-litigation requirement would lead to "a simple return to the doctrinally sound pre-*Williamson County* regime." Petition at 23. However, this Court noted that there is "scant precedent" for litigating takings claims in federal court. *San Remo*, 545 U.S. at 347. The state-litigation requirement is entirely consistent with the central role of state law in determining whether regulatory action

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[15] State property law provides the guiding principles in taking cases. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029 (1992) (need for reference to "the restrictions that background principles of the State's law of property and nuisance already place upon land ownership" to determine if regulatory act results in taking).

results in a taking[16] and the confidence in state courts to enforce constitutional rights.[17]

### 3. Because petitioners did not ripen their takings claim in state court as required by *Williamson County*, none of their issues or claims have been precluded. As a result, they have not been affected by the "jurisdictional trap."

Petitioners argue that *San Remo*'s enforcement of the Full Faith and Credit Act turns *Williamson County* into "a jurisdictional trap, rather than [a] ripeness prerequisite." Petition at 19. However, since petitioners did not ripen their claims through state court litigation, there is no judgment with preclusive effect. And in turn, there is no way to determine what particular facts, issues or claims might have been precluded. Thus, petitioners have not been placed in or suffered from the "jurisdictional trap" about which they complain.[18]

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[16] *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978); *Lucas*, 505 U.S. at 1027-29, 1031. *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 164 (1998). See, Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 Yale L.J. 114, 211-14 (2004) (discussing primacy of state law in takings law).

[17] *Allen v. McCurry*, 449 U.S. 90, 105 (1980).

[18] Petitioners advance a related argument that a property owner's compliance with *Williamson County*'s state-litigation requirement prevents federal courts from exercising jurisdiction over takings claims due to the *Rooker-Feldman* doctrine. Petition at 19 n. 3. This issue is also not presented because there has not been a state court judgment. *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280, 284 (2005).

If this Court wants to revisit the state-litigation requirement, the issue would be best presented by a property owner directly and adversely affected by the rule. Petitioners cannot frame the issue in any meaningful or concrete sense. They have not lost a valid federal claim due to a state court's erroneous conclusion that the township's application of its zoning ordinances did not result in a taking. Nor can they show that a state court failed to justly compensate them for the alleged taking of their property.

Instead, petitioners must speculate that a Michigan court might improperly apply the state's "long recognized and constitutionally established" inverse condemnation doctrine and procedures. *Macene v. MJW, Inc.*, 951 F.2d 700, 704 (6th Cir. 1991). And, petitioners must assume that a Michigan court would fail to properly enforce federal constitutional provisions. Their hypothetical assertions run directly contrary to this Court's "emphatic reaffirmation . . . of the constitutional obligation of the state courts to uphold federal law, and its . . . confidence in their ability to do so." *Allen v. McCurry*, 449 U.S. 90, 105 (1980) (citing *Stone v. Powell*, 428 U.S. 465, 494 n.35 (1976)).

In dramatic but generic terms, petitioners object to the state-litigation requirement as "wreak[ing] havoc on the federal jurisdictional framework." Petition at 17. However, by choosing to bypass state court – a ripeness requirement in place since 1985 – petitioners have defeated their ability to act as an aggrieved representative for that position.

In the same way, petitioners maintain that *Williamson County* "eviscerates the government's ability to remove a federal takings claim." *Id.* at 20. They are even less suitable advocates for this argument. Obviously, petitioners are not a municipality unable to remove a federal takings claim. They are also not property owners who have endured a "Kafkaesque jurisdictional nightmare" as a case is removed and later remanded. *Id.* at 21-22.

Only three years ago, this Court said that "[i]t is hardly a radical notion to recognize that, as a practical matter, a significant number of plaintiffs will necessarily litigate their federal takings claims in state courts." *San Remo*, 545 U.S. at 346. If this Court wants to accept Chief Justice Rehnquist's suggestion for reconsideration of that result, the township believes the better course would be to wait for a property owner who suffered actual and specific harm from proceeding in state court.

**4. There is no conflict among the Courts of Appeals as to the ripeness analysis for procedural due process claims asserted in the land use context.**

The Court of Appeals did not hold that petitioners' procedural due process claim "was subsumed in its taking analysis." Petition at 23. Nor has any circuit held that "takings claims preempt land use procedural due process claims." *Id.* at 26. Instead, the Courts of Appeals consistently employ a pragmatic approach to determine whether the ripeness considerations underlying *Williamson County* should be applied to procedural due process and other constitutional claims raised in the land

use context. When particular constitutional claims depend on the same facts and are closely related to takings claims, courts hold that ripeness principles call for one or both of the requirements established in *Williamson County*. When the other claims are factually separate and result in distinct injuries, courts find the claims are ripe without requiring finality or state court litigation.

Based on their erroneous characterizations of the Sixth Circuit opinion and the decisions in other circuits, petitioners assert that "subsuming procedural due process claims in takings law effectively ends federal jurisdiction over those claims." Petition at 24. They also maintain that the Sixth Circuit's treatment of due process claims conflicts with decisions in the Fifth and Ninth Circuits. *Id.* at 26-29. Neither argument is correct. Neither warrants a grant of certiorari.

In this case, the Court of Appeals noted that "the thrust of the plaintiffs' due process claim is that the Township's refusal to rezone their property was a taking, one resulting from a policy bias (evidenced by the request for more information) against low-income housing proposals." App. at A-15. The court "focused on the circumstances of the specific case – and particularly the issue of when the alleged injuries occurred." The township's alleged policy bias did not result in an "instantaneous infliction of a concrete injury." *Id.* at A-14 (quoting *Bigelow v. Michigan Dep't of Natural Resources*, 970 F.2d 154, 159 (6th Cir. 1992)) Until a state court determined whether there was a taking, the Court of Appeals "was unable to say that the Township's decision resulted from bias potentially

constituting a procedural due process violation." *Id.* at A-16. Finding that the procedural due process claim "is ancillary to and includes the same facts as the takings claim," the court concluded that applying *Williamson County*'s ripeness requirements was appropriate. *Id.* at A-13.[19]

The ripeness inquiry involves a careful analysis of the nature and context of due process claims. *Murphy v. New Milford Zoning Comm.*, 402 F.3d 342 (2d Cir. 2005) ("The *Williamson County* ripeness test in a fact-sensitive inquiry that may, when circumstances warrant, be applicable to various types of land use challenges."). This approach "stands merely for the sensible proposition that . . . different circumstances may produce different results." *Bigelow*, 970 F.2d at 160.

Moreover, the analysis is entirely consistent with traditional ripeness principles. Ripeness "is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43, 57, n. 18 (1993). The doctrine protects against "judicial interference until a[ ] . . . decision has been formalized and its effects felt in a concrete way by the challenging parties." *National Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 807-08 (2003) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967)). Under these standards, waiting to see if a taking occurred

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[19] Petitioners also asserted substantive due process and equal protection claims in the Court of Appeals. Those claims are not raised in their petition.

before deciding whether the taking resulted from deficient procedures is prudent, if not constitutionally mandated.

This case-by-case evaluation also serves an important purpose. Justiciability would be reduced to a pleading standard if ripeness could be established by simply restating a land use claim in due process terms,. If ripeness was determined without acknowledging the land use context, a property owner could easily evade the prudential considerations protected by *Williamson County*.

Petitioners incorrectly divide the circuits into two categories – one applying *Williamson County* to procedural due process claims and the other refusing to do so. A review of the cases demonstrates that the Courts of Appeals are much more discriminating. Depending on the circumstances, a court may determine that the nature and context of a procedural due process claim calls for application of *Williamson County*'s ripeness principles. In others, a court may conclude that a particular due process claim stands separately and ripens independently from a takings claim. No Court of Appeals mechanically applies or declines to apply *Williamson County* to other constitutional claims raised in a land use dispute.

Petitioners' categories ignore the differing application of the finality and state-litigation requirements. In some cases, courts only require a final determination before a due process claim is ripe. *Dougherty v. Town of North Hempstead Bd. of Zoning Appeals*, 282 F.3d 83, 88-89 (2d Cir. 2002) (applying finality but not state-litigation requirement). In others,

when the alleged injury caused by deficient procedures is the deprivation of the right to use property, courts require the claim to be ripened through state compensation procedures. *River Park, Inc. v. City of Highland Park*, 23 F.3d 164, 167 (7th Cir. 1994) (procedural due process claim not ripe unless available state procedures were used).[20]

Moreover, petitioners fail to distinguish the rationale from the holding of the cases used to demonstrate the purported circuit conflict. For example, petitioners put the Fifth Circuit into their "independent claim" category, citing *Hidden Oaks Ltd. v. City of Austin*, 138 F.3d 1036 (5th Cir. 1998). However, in that case, the claim was ripe because the property owners "asserted a violation of their procedural due process rights that inflicted an injury separate from the takings claims that was dismissed before trial." *John Corp. v. City of Houston*, 214 F.3d 573, 585 (5th Cir. 2000). The bright-line categorization suggested by petitioners was explicitly rejected by the Fifth Circuit in *Urban Developers LLC v. City of Jackson*, 468 F.3d 281 (5th Cir. 2006). A developer claimed that a city's statements about condemning flood-damaged apartments and its refusal to approve rebuilding plans violated procedural due process. The court analyzed ripeness "not by direct reference to *Williamson County* . . . but rather by reference to principles of ripeness generally." *Id.* at 296. Because the developer had "yet to suffer a deprivation

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[20] See also, *Taylor Investment,. Ltd. v. Upper Darby Twp.*, 983 F.2d 1285, 1292-95 (3d Cir. 1993) (finality only); *Rocky Mountain Materials & Asphalt, Inc. v. Board of County Commissioners of El Paso County*, 972 F.2d 309, 311 (10th Cir. 1991) (both).

of property," the procedural due process claim was not ripe. *Id.* at 295-96. See also, *Monk v. Huston*, 340 F.3d 279, 282 (5th Cir. 2003) (applying general ripeness principles consistently with *Williamson County*).

Nor does the Ninth Circuit fall into petitioners' rigid categories. "Procedural due process claims arising from an alleged taking *may be subject* to the same ripeness requirements as the taking claim itself *depending on the circumstances of the case*." *Harris v. County of Riverside*, 904 F.2d 497, 500-01 (9th Cir. 1990) (emphasis added). In another case cited by petitioners, *Carpinteria Valley Farms, Ltd. v. County of Santa Barbara*, 344 F.3d 822 (9th Cir. 2003), the plaintiff could not use its property without paying an unauthorized fee. The denial of procedural due process resulted in "actual, concrete injuries which [were] separate from any taking, . . . [had] already occurred and [did] not depend on the finality of the County's determination of the permissible uses of his property." In terms entirely consistent with the flexible approach used in other circuits, *Carpinteria Valley* concluded that "*in certain limited and appropriate circumstances*," other constitutional claims "concerning land use may proceed even when related Fifth Amendment 'as applied' taking claims are not yet ripe for adjudication." *Id.* at 831 (emphasis added).[21]

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[21] The D.C. Circuit cases cited by petitioners also do not support their contention. The ripeness of the procedural due process claim in *Tri County Industries, Inc. v. District of Columbia*, 104 F.3d 455, 460 (D.C. Cir. 1997) was not contested and *Williamson County* was not mentioned. No procedural due process claim or ripeness issues were presented in *Silverman v. Barry*, 845 F.2d 1072 (D.C. Cir. 1988).

The remaining Courts of Appeals do not fit into petitioners' other category. None require all procedural due process claims to satisfy *Williamson County* ripeness. Instead, the courts use the same fact-specific analysis to determine if the finality and state-litigation requirements are appropriate to ripen particular due process claims. *Gilbert v. City of Cambridge*, 932 F.2d 51, 66, n. 20 (1st Cir. 1991) ("same basic claim under two different labels"); *Murphy*, 402 F.3d 342, 350 (2d Cir. 2005) (may apply "when circumstances warrant" based on "fact-sensitive inquiry); *Taylor Investment, Ltd. v. Upper Darby Township*, 983 F.2d 1285, 1293-94 (3d Cir. 1993); *Greenfield Mills, Inc. v Macklin*, 361 F.3d 934, 961-62 (7th Cir. 2004) ("based on the same facts as a takings claim"); *Bateman v. City of West Bountiful*, 89 F.3d 704, 709 (10th Cir. 1996) ("claims that rest upon the same facts as a concomitant takings claim"). In the Sixth Circuit, some procedural due process claims are ripe without a final determination or prior state court litigation. *Nasierowski Brothers Investment Co. v. Sterling Heights*, 949 F.2d 890, 893 (6th Cir. 1991) (claim based on "immediately sustained and concretely felt" injury was ripe). Others are not. *Bigelow*, 970 F.2d at 159-60 (ancillary claim was not ripe).

Ultimately, what these cases hold is that "[l]abels do not matter." *River Park, Inc.*, 23 F.3d at 167. A property owner cannot ripen a claim based on the unconstitutional deprivation of property by couching it as a procedural due process violation. The consistent approach used by the Courts of Appeals means that only those claims which are closely related to and raise the same justiciability concerns as takings claims are subject to *Williamson County*'s ripeness requirements.

Nothing in these cases represents an "unprecedented abdication of federal jurisdiction" over procedural due process claims.

**5. The Sixth Circuit did not hold that petitioners lacked a sufficient property interest for procedural due process protection. Instead, the court's discussion is *dictum* regarding an issue neither raised nor briefed by the parties.**

The third question presented in the petition, *i.e.*, whether petitioners had a cognizable property interest that triggered due process protection, is not properly before the Court for two reasons: (1) the Sixth Circuit's discussion was *dictum*; and (2) the issue was not raised, briefed, or argued by the parties.

The Sixth Circuit appropriately declined to consider the merits of petitioners' takings claim. Having determined that the claim was not ripe because petitioners failed to satisfy *Williamson County*'s state-litigation requirement, the court correctly stated that "[b]ecause the plaintiffs did not fulfill their obligation of seeking just compensation in state court, we do not have jurisdiction to reach the merits of their takings claim." App. at A-13.

The Court of Appeals next affirmed the district court's dismissal of the procedural due process claim, finding it was ancillary to the takings claim and lacked ripeness. *Id.* at A-13–16. Despite this holding, the court commented that "even assuming *arguendo* that the claim . . . is ripe for review; we are unable to find any cognizable property right that triggers due process

protections." *Id.* at A-16. Because the court held that the due process claim was not ripe, the subsequent discussion is *dictum*. Indeed, the court lacked jurisdiction to review the substantive validity of petitioners' claim. *National Park Hospitality Ass'n v. Department of Interior*, 538 U.S. 803, 912 (2003) (vacating lower court decision on merits because claim was not ripe).

Certiorari is granted to "review[] judgments, not statements in opinions." *Black v. Cutter Laboratories*, 351 U.S. 292, 297-88 (1956). With rare exceptions, this Court does not consider an issue that the parties have not had an opportunity to fully develop below. See, e.g., *Singleton v. Wulff*, 428 U.S. 106, 121 (1976).

Petitioners erroneously assert that "the decision below *held* that even if the Property Owners' procedural due process claim was ripe, it failed . . ." for lack of a protected property interest. Petition at 29 (emphasis added). The court made no such holding. The petition continues the mischaracterization, stating that "the court rejected the argument that a fee simple title was a sufficient [property] interest." Petition at 30. The court did not "reject the argument" since no argument was made by either party. To the contrary, the court discussed the issue even though it was not raised or decided in the district court and was not raised, briefed, or argued on appeal.[22]

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[22] Even if this Court believes that this issue deserves consideration, this is not an appropriate case. The "thrust" of petitioners' procedural due process claim is that the township's (Cont'd)

The third question raised in the petition is not properly before this Court.

## CONCLUSION

This is not the "appropriate case" for reconsidering *Williamson County*'s state-litigation requirement. The Court of Appeals did not decide whether petitioners passed the finality threshold. Petitioners have not been affected by the asserted "jurisdictional trap."

The Sixth Circuit and the other Courts of Appeals have responsibly applied *Williamson County*'s ripeness considerations to procedural due process and other constitutional claims related to land use decisions. There is no conflict to resolve.

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(Cont'd)
rezoning decision resulted from a "policy bias . . . against low-income housing proposals." App. at A-15. This is a frivolous claim. In Michigan, zoning and rezoning property are legislative functions. *Schwartz v. City of Flint*, 395 N.W.2d 678, 682-83 (Mich.1986). By their legislative nature, rezoning decisions reflect municipal policy choices regarding acceptable and desirable land uses. *Kropf v. City of Sterling Heights*, 215 N.W.2d 179, 188 (Mich.1974) ("Our laws have wisely committed to the people of a community themselves the determination of their municipal destiny, the degree to which the industrial may have precedence over the residential, and the areas carved out of each to be devoted to commercial pursuits."). The constitutional protection against arbitrary and irrational zoning decisions derives from substantive due process. Procedural due process does not protect against legislative choices. *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 676-77 (1976). If the differing circuit views as to the requisite property interest warrant review, then the issue should be framed by a property owner with a more substantial procedural due process claim.

The nature of the property interest necessary to trigger due process protections is not properly presented. The Sixth Circuit's discussion is *dictum* about an issue neither raised nor briefed by either party.

Respondent Ann Arbor Charter Township asks this Court to deny the petition.

Respectfully submitted,

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