No. _____

**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 Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

## PETITION FOR WRIT OF CERTIORARI


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## QUESTIONS PRESENTED

1. Should the Court overrule *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City* insofar as it requires property owners to seek compensation in state court to ripen a federal takings claim, where four justices of this Court declared in *San Remo Hotel v. City and County of San Francisco* that such a rule is "mistaken" due to its lack of doctrinal underpinning and preclusive effect on federal jurisdiction?

2. Is a property owner barred from bringing a procedural due process claim against a defective land use hearing simply because the owner also raised a regulatory takings claim subject to *Williamson County*, as the Sixth Circuit has held, or does the procedural due process claim supply an independent basis for constitutional relief, as the Ninth and Fifth Circuits have held?

3. Can a property owner raise a procedural due process challenge to a land use permit decision based on a fee simple interest in the affected land, as the Ninth and Seventh Circuits have held, or must the owner have an "entitlement" to the desired permit, as the Sixth Circuit held?

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## PETITION FOR WRIT OF CERTIORARI

Charles and Catherine Braun and Edward and Muriel Pardon respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

## OPINIONS BELOW

The Opinion of the Sixth Circuit Court of Appeals is reported at 519 F.3d 564 (6th Cir. 2008); it appears as Appendix (App.) A to the petition. The decision of the Federal District Court for the Eastern District of Michigan is not reported; it appears as Appendix B. The Sixth Circuit denied rehearing and rehearing en banc in an unpublished order; it appears as Appendix C.

## JURISDICTION

The Sixth Circuit Court of Appeals denied rehearing on June 30, 2008. This Court has jurisdiction under 28 U.S.C. § 1257(a).

## CONSTITUTIONAL PROVISIONS AT ISSUE

The Fifth Amendment to the United States Constitution provides in pertinent part: "[N]or shall private property be taken for public use without just compensation."

The Fourteenth Amendment to the United States Constitution provides in pertinent part: "[N]or shall

any state deprive any person of life, liberty, or property, without due process of law."

## STATEMENT OF THE CASE

This case challenges the doctrine, arising from *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194 (1985), that a private property owner must unsuccessfully pursue just compensation in state court in order to ripen a Fifth Amendment takings claim and, potentially, other constitutional claims. In the decades since *Williamson County,* the justifications for demanding a state court denial of compensation for ripeness have wilted. *San Remo Hotel v. City and County of San Francisco*, 545 U.S. 323, 350-52 (2005) (Rehnquist, C.J., concurring). Moreover, the "go to state court first" rule has proven to be incompatible with traditional rules of justiciability—such as res judicata and the *Rooker-Feldman* doctrine—which generally bar federal review of claims previously rejected by state courts. The state court litigation ripeness predicate also undermines the government's statutory right to remove a federal takings claim. As a whole, *Williamson County* effectively banishes federal takings plaintiffs and defendants from federal courts, without any indication this was intended, and without any coherent doctrinal justification. For all these reasons, lower courts and commentators have expressed deep frustration with *Williamson County*. *See Asociacion De Subscripcion Conjunta Del Seguro De Responsabilidad Obligatorio v. Flores Galarza*, 484 F.3d 1, 17 (1st Cir. 2007); *DLX, Inc. v. Kentucky*, 381 F.3d 511 (6th Cir. 2004); *Fields v. Sarasota Manatee Airport Auth.*, 953 F.2d 1299 (11th

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Recognizing the dysfunction caused by *Williamson County*, the late Chief Justice William Rehnquist and three other Justices of this Court declared in *San Remo Hotel* that "[i]n an appropriate case" this Court should "reconsider" the rule that federal takings claimants "must first seek compensation in state courts." *Id.* at 352 (Rehnquist, C.J., concurring).

This is that "appropriate case." Here, two couples of elderly property owners (Property Owners) sought a zoning change necessary to make economically beneficial use of their land. Although they had historically farmed the land under the current agricultural zoning, this became economically infeasible. The Property Owners therefore sought a medium density residential classification, consistent with the zoning applicable to other adjacent, developed properties. But the Township denied the request. After the Township made clear that there was no available administrative relief, the Property Owners sued in federal court on constitutional grounds, including under takings and procedural due process provisions. The takings claim seeks just compensation for the adverse impact of the decision on their property use; the procedural due

process claim is based on bias and irregularities in the zoning hearings.

In the Sixth Circuit, the Property Owners asked the court not to follow *Williamson County*'s state litigation ripeness rule, based on the *San Remo* concurrence and other evidence of *Williamson County*'s infirmity. App. at A-7, 8. But the lower court refused. Indeed, it not only applied the state litigation ripeness rule to bar the Property Owners' regulatory takings claim, but additionally held, in conflict with other circuits, that the unripe takings claim subsumed and precluded the procedural due process claim challenging a defective hearing. *Id.* at A-13. Alternatively, the lower court held, again in conflict with other circuits, that the Property Owners' landownership was not a property interest that supported a due process challenge to the hearings that resulted in denial of their rezoning application. *Id.* at A-13, 14.

The Property Owners now petition this Court to settle the issue of whether *Williamson County*'s state compensation ripeness predicate remains good law and, if so, whether it can be extended to a basic procedural due process claim through the back door by subsuming such a claim in an unripe takings claim. If *Williamson County* does not go so far, the case presents the independently important issue of whether landownership is an interest sufficient to warrant procedural due process protections. The Court should grant the Petition in its entirety to resolve pervasive conflicts among the lower courts related to whether and when a property owner can challenge a land use permit process and final decision preventing the economically beneficial use of land on takings and due process grounds.

## FACTS AND PROCEDURE BELOW

### A. Facts

#### 1. The Brauns and Pardons

Petitioners Charles and Catherine Braun (Brauns) are elderly fee simple owners of approximately 286 acres of land in Ann Arbor Township, Michigan. Appellants Edward and Muriel Pardon (Pardons) own approximately 77 acres of land adjacent to the Brauns' property. App. at A-3. The Brauns and Pardons will be referred to jointly as the "Property Owners."

As described by a longtime neighbor, the Brauns' ancestors "cleared the land in 1850. They built the roads," "provided the school system in this area," and constructed the Fire Department building. Petitioner Charles Braun began farming the land at issue here when he was 12 years old, after his father died. He farmed it as a family farm for decades after that. App. at B-2; Joint Appendix on Appeal 139:8-20. Today, Charles Braun requires the use of a wheelchair. Farming is not a physical possibility. Moreover, as shown below, it is no longer an economically viable way of life. The Pardons are also an elderly couple; they historically worked with the Brauns to farm their parcel and the Brauns' as one unit. *Id.* They ceased doing so when farming became unprofitable. App. at B-3.

#### 2. The Property

The Brauns' and Pardons' parcels comprise approximately 363 acres of land. This area (the Property) is sandwiched between a residentially developed parcel on the south and a 2,000-acre mixed

use development on the north. It is predominately zoned as "A-1, General Agricultural District," a classification that allows agricultural uses and low density residential development on lots of 10 acres or more. App. at B-2. The Property has historically operated within the current zoning regime as a farm. *Id.* at B-2-3. Unfortunately, the Property Owners are and have been unable to support themselves from income generated from the farm. *Id.* at B-3 ("The Pardons lost money in 2005, and the Brauns earn[ed] an amount barely sufficient to cover their costs.").

Faced with troubling economic realities, the Property Owners began to pursue a zoning change that would allow an economically feasible residential use. Specifically, they considered rezoning 215 acres of the Property to an "R-6" mobile home classification that would allow affordable manufactured housing, and rezoning the remainder of the acreage in an "R-3" zone, so as to potentially allow higher density single family housing. App. at A-4.

During this period, a qualified agricultural economist surveyed the Property and confirmed "that it is not economically feasible to continue agricultural operation on the . . . property." App. at B-3. A real estate appraiser concluded that the current zoning does not provide an economically viable alternative to farming because it permits only 30 homes on the 363-acre parcel, a regime under which no prudent developer would attempt to build. *Id.*; App. at A-4.

### 3. The Administrative Process, Zoning Denial, and Lack of an Appeal Option

The Property Owners officially filed a Petition for Zoning Amendment (Petition) in February, 2001. App. at A-4. The Petition asked to change the zoning of the Property to the desired R-6 and R-3 classifications. *Id.* The application supplied all the information required for a zoning decision by the Township code. The Township accordingly gave notice that the Petition would be set for a public hearing. *Id.*; App. at B-3-4.

After an initial aborted hearing, the Township Planning Commission (Commission) held a substantive hearing on July 9, 2001. During this meeting, the Township demanded for the first time that the Property Owners submit detailed, and expensive, site specific development plans before a zoning decision would occur. App. at A-5 n.3. This information was not required by the Petition application form, nor compelled by the Township code, nor required of other types of zoning changes. *Id.* at A-4. The Property Owners became aware at this time that the Township had a history of resistance to affordable manufactured housing, having approved only one such project, and by court order. They subsequently informed the Township that, under the Township's own Zoning Ordinance, the requested site plans were not pertinent to, or required for, a general zoning amendment. *Id.* The Property Owners asked the Township to make a decision based on the information previously provided in conformance with the Zoning Ordinance.

The Commission then held a third and final public hearing, at which time it recommended that the Township Board deny the rezoning. *Id.* at A-5. Soon

after, the Board denied the Petition. *Id*. This action was primarily premised on speculation about the impact of a manufactured housing development, if approved, and concerns about the Owners' refusal to supply detailed site and subdivision plans not required for a zoning change. After the denial, the Township told the Property Owners that there was no available appeal because "the [Zoning Board of Appeals] does not have jurisdiction to 'change a [Zoning Classification] for any property, grant a use variance, or hear any other appeal from the Township Board.'" App. at A-5.

### B. The State Court Action and Further Administrative Process

After being informed that the Township Code denied the Zoning Board discretion to hear an appeal, the Property Owners filed a suit in state court. App. at A-6. This suit alleged in part that the Township's zoning denial amounted to a regulatory taking under state law. On appeal, the state appellate court held that the Property Owners lacked a ripe suit until they went back to the Zoning Board and requested a use variance or received an explicit determination from the Board that it lacked jurisdiction. *Id; see Braun v. Ann Arbor Charter Twp.*, 683 N.W.2d 755, 758 (Mich. App. 2004). The Property Owners sought review in the Michigan Supreme Court, but were denied. App. at A-6.

The Owners then went back to the Township Zoning Board, as directed by the state court. After a public hearing, the Board of Appeals decided that the Township code gave it no authority to grant a variance from the zoning classification. *Id.* at A-6.

## C. Federal Proceedings

### 1. The District Court

Soon after the last denial of administrative relief, the Property Owners filed suit against the Township in federal court. *Id*. The complaint raised a regulatory taking claim under the Fifth Amendment based on the severe economic harm caused by the zoning denial. It also asserted a procedural due process claim premised on a denial of a "full and fair hearing," arising from bias against low income manufactured housing and the Township's demand for information not required for a zoning change.

The Township moved for summary judgment on a single ground: that the Property Owners' claims were unripe for federal review. The district court agreed, holding that, under *Williamson County*, 473 U.S. at 194, the Property Owners needed to return to the state courts to receive a state law just compensation ruling on the merits before they could invoke federal review. App. at B-10-16.

### 2. The Sixth Circuit's Decision

On appeal, the Sixth Circuit rejected the Property Owners' arguments that their claims were ripe, and affirmed the district court decision in a published opinion issued March 13, 2008. Initially, the court declared that *Williamson County* remained controlling law: "The Supreme Court has yet to adopt the plaintiffs' position or to overrule *Williamson County* on other grounds; consequently, we reject the plaintiffs' argument that they are not bound by the requirement to pursue a remedy in state court." App. at A-11. The court ultimately held that "[b]ecause the plaintiffs did not fulfill their obligation of seeking [and being denied]

just compensation in state court, we do not have jurisdiction to reach the merits of their takings claim." *Id.* at A-13.

The court then concluded that the Property Owners' procedural due process claim "should be governed by the takings claim theory requiring exhaustion of state remedies" because "it is ancillary to and includes the same facts as the takings claim." *Id.* The procedural due process claim was thus dismissed pursuant to the takings ripeness doctrine. *Id.* at A-16.

For good measure, the Sixth Circuit held that, even if the procedural due process claim were considered ripe for federal review independent of the takings claim, it failed because "we are unable to find any cognizable property right that triggers due process protections." *Id.* at A-13-16. In reaching this holding, the court explained that "[i]n order to have a property interest in a benefit, a person must have more than a desire for it or unilateral expectation of it; rather, he must have a 'legitimate claim of entitlement to it.'" *Id.* at A-16. The court held it could find no protected interest of this sort and, therefore, that the Property Owners could not challenge the zoning process and adverse decision on procedural due process grounds. *Id.* at A-17.

The Property Owners asked for rehearing in part on the ground that they were not claiming the rezoning application as a protected property interest but rather relied on their fee simple landownership. Rehearing was denied. App. at C-2.

## REASONS FOR GRANTING THE WRIT

### I

### THE CASE RAISES AN IMPORTANT ISSUE AS TO WHETHER *WILLIAMSON COUNTY*'S STATE LITIGATION REQUIREMENT SHOULD BE REPUDIATED DUE TO ITS OBVIOUS DOCTRINAL FLAWS AND CHAOTIC JURISDICTIONAL EFFECTS

In *Williamson County*, this Court considered whether a takings claim based on the economic effect of a land use regulation was ripe. 473 U.S. at 174. The Court initially ruled that the claimant lacked a ripe claim because there was no "final agency decision" on application of the suspect land use regulations. *Id.* at 188-90. Although this effectively decided the case, the *Williamson County* Court went on to articulate a second, more novel ripeness barrier. In particular, the Court ruled, for the first time, that a federal takings claim seeking compensation would not ripen until the claimant unsuccessfully sought and was denied just compensation through a state's compensation procedures. 473 U.S. at 194, 197. It is this requirement that is at issue here.

### A. There Is No Doctrinal Basis for *Williamson County*'s State Court Ripeness Requirement

#### 1. *Williamson County* Rests on a Flawed Understanding of the "Without Just Compensation" Portion of the Takings Clause

The *Williamson County* Court purported to derive the state litigation rule from the nature of the Takings Clause and, particularly, from the "without just compensation" portion. *Id.* at 194-95. *Williamson County* interpreted this language to mean that there is no actionable "violation" of the Takings Clause until the claimant is "without just compensation." From this premise, the Court then concluded that a claimant must be denied compensation in state court before seeking compensation for a Fifth Amendment taking in federal court. *Id.*

This reasoning is flawed from start to finish because it fails to account for the fact that the primary function of the Takings Clause, unlike other constitutional provisions, is to prescribe a posttaking damages remedy, rather than to place a limitation on government power. Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52 Vand. L. Rev. 57, 61 (1999). Under modern understandings of the Just Compensation Clause, a landowner subject to an invasion does not acquire a right to claim a constitutional "violation" based on a lack of compensation (as *Williamson County* assumed); instead, what he acquires is a cause of action for

damages.[1] *Hurley v. Kincaid*, 285 U.S. 95, 104 (1932) ("[E]ven if the defendants are acting illegally [by taking property without compensation proceedings] . . . the illegality, on complainant's own contention, is confined to the failure to compensate him for the taking, and affords no basis for an injunction if such compensation may be procured in an action at law.").

As this Court has repeatedly explained in cases predating *Williamson County,* the Just Compensation Clause functions as a "self-executing" damages remedy. *See Jacobs v. United States*, 290 U.S. 13, 16 (1933) (a property owner's right to sue for money damages "rested upon the Fifth Amendment. Statutory recognition was not necessary. A promise to pay was not necessary. Such a promise was implied because of the duty to pay imposed by the Amendment. The suits were thus founded upon the Constitution of the United States."); *United States v. Clarke*, 445 U.S. 253, 257 (1980) (citing 6 P. Nichols, *Eminent Domain* § 25.41 (3d rev. ed. 1972) (noting "'the self-executing character of the constitutional provision with respect to compensation.").

### 2. The "Self-Executing" Nature of the Federal Just Compensation Remedy Prohibits a "Go to State Court First" Rule

While the remedial aspect of the Just Compensation Clause means a property owner subject to an uncompensated taking has an action for damages, not for a constitutional "violation," the "self-executing" aspect means that remedy *is available as*

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[1] Equitable relief may be available in limited circumstances. *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 71 n.15 (1978).

*soon as an alleged taking occurs*. *United States v. Dickinson*, 331 U.S. 745, 751 (1947) ("[T]he land was taken when it was taken and an obligation to pay for it then arose"); *Clarke*, 445 U.S. at 258 ("[T]he usual rule is that the time of the invasion constitutes the act of taking and '[i]t is that event which gives rise to the claim for compensation.' ") (quoting *United States v. Dow*, 357 U.S. 17, 22 (1958)); *Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1, 5 (1984) (a property "owner has a right to bring an 'inverse condemnation' suit to recover the value of the land on the date of the intrusion by the Government."); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 315 (1987) ("[G]overnment action that works a taking of property rights necessarily implicates the 'constitutional obligation to pay just compensation.'") (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

And since the self-executing just compensation remedy is a *federal* right, the federal courts have historically been a proper forum for its vindication. *Ballard Fish & Oyster Co. v. Glaser Constr. Co.*, 424 F.2d 473, 475 (4th Cir. 1970) (holding that a federal takings claim for compensation raised a "federal question" appropriate for federal judicial review without respect to state law remedies); *see generally Heritage Farms, Inc. v. Solebury Twp.*, 671 F.2d 743 (3d Cir. 1982); *Kollsman v. City of Los Angeles*, 737 F.2d 830 (9th Cir. 1984); *Hill v. City of El Paso*, 437 F.2d 352 (5th Cir. 1971) (all federal takings cases heard on merits). As a whole, the historical understanding is that a property owner who claims an invasion of property is a taking, has a right, under the "self-executing" federal Just Compensation Clause, to immediately go to federal court for monetary relief.

*Ballard* 424 F.2d at 475; *First English*, 482 U.S. at 315 ("A landowner is entitled to bring an action [for damages] in inverse condemnation as a result of "'the self-executing character of the constitutional provision with respect to compensation.'"") (citing *Clarke*, 445 U.S. at 253, 257 (quoting P. Nichols, *Eminent Domain* § 25.4)).

*Williamson County* radically departed from this Court's Just Compensation Clause precedent in holding that a property owner subject to an alleged taking cannot seek the federal compensation remedy in federal court until state courts have their say. And it did so without any analysis of the damages remedy framework established in the prior century of case law. Moreover, as commentators have pointed out, there is no overriding textual justification that might justify abandoning, *sub silentio*, the understanding that the just compensation remedy is actionable at the moment of invasion. *See* Roberts, *supra*, at 72 ("The language of the Fifth Amendment does not dictate this [state procedures] rule."); Michael M. Berger and 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 Urb. Law. 671, 694 (2004) ("There is nothing in . . . the language of the Fifth Amendment that requires municipal nonpayment [of compensation] to be certified by a state court before it is complete.").

Accordingly, there is no plausible doctrinal support for requiring takings claimants, like the Property Owners here, to litigate in state court before they claim the lost value of regulated land under the

Just Compensation Clause.[2] Instead, this Court's traditional jurisprudence indicates that the Property Owners acquired a federal cause of action for such monetary relief—founded on the Just Compensation Clause—at the time the property restrictions were finalized. The court below was asked to follow this understanding, rather than the *Williamson County* "state court first" anomaly, but it declined. Accordingly, this case presents a perfect vehicle for reconsidering *Williamson County*'s state litigation ripeness rule and, particularly, whether it was ever legitimate due to this Court's preexisting takings jurisprudence.

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[2] The *Williamson County* Court attempted to buttress its novel understanding of the timing for a claim under the Just Compensation Clause by analogizing to *Ruckelshaus v. Monsanto*, 467 U.S. 986 (1984), and *Parratt v. Taylor*, 451 U.S. 527 (1981). But neither decision actually provides support. *San Remo*, 545 U.S. at 349 n.1 (Rehnquist, C.J., concurring). Unlike *Williamson County*, *Monsanto* did not involve a federal claim for just compensation; it involved a claim for equitable relief alone. *Monsanto*, 467 U.S. at 998. The *Monsanto* Court's holding that equitable relief was unavailable had nothing to do with the ripeness of a just compensation claim. *Parratt* held that a claimant challenging a random property deprivation for which predeprivation process was impossible must exhaust adequate postdeprivation state remedies. Post-*Williamson County* decisions have strictly limited *Parratt* to its random deprivation context. *Zinermon v. Burch*, 494 U.S. 113, 129-30 (1990). *Parratt* thus has no relevance to a taking, such as the one in *Williamson County*, occurring by formal decision after predeprivation process.

### B. The State Compensation Requirement Wreaks Havoc on the Federal Jurisdictional Framework

*Williamson County*'s state procedures ripeness requirement is unworkable in practice, as well as doctrinally unsound.

#### 1. The State Compensation Ripeness Rule Conflicts with Preclusive Res Judicata Principles, So That a "Ripe" Claim Is a Precluded One

Although *Williamson County* indicates that failed state court litigation will "ripen" a federal takings claim for federal review, 473 U.S. at 194-96, this is not what happens in practice because of conflicting res judicata principles. *See generally Allen v. McCurry*, 449 U.S. 90, 94 (1980).

As one court explained:

> *Williamson* and its progeny place Plaintiffs in a precarious situation. Plaintiffs must seek redress from the State court before their federal taking claims ripen, and failure to do so will result in dismissal by the federal court. However, once having gone through the State court system, plaintiffs who then try to have their federal claims adjudicated in a federal forum face, in many cases, potential preclusion defenses. This appears to preclude completely litigants such as those in the case at bar from bringing federal taking claims in a federal forum . . . .

*W.J.F. Realty Corp. v. Town of Southampton*, 220 F. Supp. 2d 140,146 (E.D.N.Y. 2002).

As described by the Seventh Circuit:

> Although the *Williamson* line of cases that requires the property owner to seek compensation in the state courts speaks in terms of "exhaustion" of remedies, that is a misnomer. For if . . . the property owner goes through the entire state proceeding, and he loses, he cannot maintain a federal suit. The failure to complain of the taking under federal as well as state law is a case of "splitting" a claim, thus barring by virtue of the doctrine of res judicata a subsequent suit under federal law.

*Rockstead v. City of Crystal Lake*, 486 F.3d 963, 968 (7th Cir. 2007).

This res judicata problem is particularly vexing to courts and litigants because *Williamson County* did not anticipate it, or account for its effect in banishing federal takings claims to state court. *DLX*, 381 F.3d at 521 ("The barring of the federal courthouse door to takings litigants seems an unanticipated effect of *Williamson County*, and one which is unique to the takings context, as other § 1983 plaintiffs do not have the requirement of filing prior state-court actions."). Faced with the disconnect between *Williamson County*'s ripeness intent, and its actual effect in triggering preclusion, some courts have tried to craft res judicata exceptions that would allow "ripened" takings claims in federal court. *See DLX*, 381 F.3d at 519-21 (describing method to reserve federal claims); *Fields v. Sarasota Manatee Airport Auth.*, 953 F.2d at 1303-06 (same).

In 2005, this Court rejected court-created exceptions to res judicata in the takings context in the *San Remo* case. 545 U.S. at 338, 344-45. Yet, *San Remo* did *not* alter *Williamson County* or its instruction that unsuccessful state court compensation procedures will "ripen" federal review of takings claims. As a result, this Court's jurisprudence continues to offer takings litigants and federal courts two conflicting sets of rules. On the one hand, *Williamson County* says that unsuccessful pursuit of a just compensation claim in state court will render a federal takings claim "complete" and ready for federal review. 473 U.S. at 194-96. On the other hand, *San Remo* and other cases strictly construing the Full Faith and Credit Act declare that prosecution of claims in state court will entirely preclude subsequent federal review. 545 U.S. at 344-45. Not surprisingly, federal courts also continue to issue inherently contradictory precedent on the availability of jurisdiction over a federal takings claim. *Compare Braun v. Ann Arbor Charter Twp.*, 519 F.3d 564, 569 (6th Cir. 2008) ("in order for a plaintiff to bring a takings claim in federal court, he or she must first pursue available remedies in state court"), *with Trafalgar Corp. v. Miami County Bd. of Comm'rs*, 519 F.3d 285, 287 (6th Cir. 2008) (because "the issue of just compensation under the Takings clause . . . was directly decided in a previous state court action, it cannot be re-litigated in federal district court").

*Williamson County* accordingly operates as a jurisdictional trap, rather than ripeness prerequisite, as it commands would-be federal takings plaintiffs to take state litigation steps that permanently bar federal

review.[3] This cannot have been by design. *Dodd v. Hood River County*, 59 F.3d 852, 861 (9th Cir. 1995) ("We disagree . . . with the suggestion that *Williamson County* is a thinly-veiled attempt by the Court to eliminate the federal forum for Fifth Amendment taking plaintiffs . . . ."); Daniel Mandelker et al., *Federal Land Use Law* 4A-23 (1998) ("The Supreme Court could hardly have intended the ripeness rules to become a trap for federal litigants.").

### 2. The State Procedures Requirement Eviscerates the Government's Ability To Remove a Federal Takings Claim

*Williamson County*'s state litigation ripeness requirement is equally harmful to a government defendant's ability to invoke federal jurisdiction under the federal removal statute. A takings defendant must demonstrate federal jurisdiction in order to remove a claim, *see* 28 U.S.C. § 1441(b) (removal depends on "original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the

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[3] A similar problem can occur through a conflict between *Williamson County* and the *Rooker-Feldman* doctrine. The *Rooker-Feldman* doctrine prevents federal courts from entertaining suits "complaining of injuries caused by state-court judgments . . . and inviting district court review and rejection of those judgments." *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280, 281 (2005). Some courts have held that compliance with *Williamson County* triggers *Rooker-Feldman* and prevents, rather than matures, federal review. *See*, *e.g.*, *Johnson v. City of Shorewood*, 360 F.3d 810, 818-19 (8th Cir. 2004). Thus, "[t]he catch-22 of the '*Williamson* trap' discussed . . . with respect to res judicata is also evident with respect to the *Rooker-Feldman* doctrine." *DLX*, 381 F.3d at 518 n.3.

United States"), but *Williamson County* is typically understood to bar federal jurisdiction over takings claims until state court litigation ends. *Bigelow v. Michigan Dep't of Natural Res.*, 970 F.2d 154, 157 (6th Cir. 1992) ("If a claim is unripe, federal courts lack subject matter jurisdiction."). Consequently, due to the state litigation ripeness predicate, defendants logically cannot remove a federal takings claim from state court, though it has the appearance of a federal issue.

Many courts have indeed concluded that a plaintiff's lack of compliance with *Williamson County* bars a defendant's removal of a Fifth Amendment takings claim. *Moore v. Covington County Comm'n*, 2007 WL 1771384, at *3 (M.D. Ala. 2007) ("Because the defendants removed this case to federal court before the plaintiffs could pursue their claims in state court, this court lacks jurisdiction."); *Doney v. Pacific County*, 2007 WL 1381515, at *4 (W.D. Wash. 2007) ("[B]ecause Plaintiffs have not adjudicated an inverse condemnation claim in state court, the federal takings claim is not yet ripe and should accordingly be remanded to state court."); *Carrollton Properties, Ltd. v. City of Carrollton*, 2006 WL 2559535, at *2 (E.D. Tex. 2006) (denying removal because "[p]laintiffs have not unsuccessfully pursued just compensation in state court, thus the claim is not ripe, and it is not a federal question").

It is true that some federal courts have opted for permissive removal when confronted with the conflict between the federal question removal statute and *Williamson County*'s barrier. But this just creates yet another Kafkaesque jurisdictional nightmare, one where a takings plaintiff is dragged by a defendant into a federal forum closed to the plaintiff, forced to

litigate there (perhaps for years), only to be kicked back on appeal to the state court where it all started due to lack of *Williamson County* ripeness. *See Sandy Creek Investors, Ltd. v. City of Jonestown*, 325 F.3d 623, 625-26 (5th Cir. 2003) (removal allowed, landowner wins on merits in trial court, but on appeal, Fifth Circuit remands case to state court where initially filed due to lack of compliance with *Williamson County*); *Reahard v. Lee County*, 30 F.3d 1412, 1418 (11th Cir. 1994) (remanding removed takings claim back to state court after five years of federal litigation, including on the merits and two circuit court appellate opinions, based on lack of state court compensation proceedings).

While *Williamson County* may have been conceived as a simple ripeness hurdle, it has metamorphosed into a monster that confuses courts and swallows the claims of takings litigants who comply with its predicates to secure federal review, but who then discover that the law is the opposite of what it seems. *San Remo*, 545 U.S. at 350-51 (Rehnquist, C.J., concurring). In the same way, government defendants are deprived of their statutory ability to remove constitutional takings claims to a federal forum. Furthermore, because the federal removal statute allows imposition of financial penalties against defendants who remove in the absence of jurisdiction, 28 U.S.C. § 1447(c), a defendant may not only be barred from removing due to *Williamson County*'s state litigation ripeness predicate, they may be subject to attorneys' fees for the attempt. *See, e.g., Quivira Village, LLC v. City of Lake Quivira*, 2004 WL 1701070, at *2 (D. Kan. 2004) (awarding fees for wrongful removal of takings claim because the

defendant "was on notice that the federal claims were not ripe").

All this jurisdictional chaos and inequity can be straightened out by a simple return to the doctrinally sound pre-*Williamson County* regime. Although precedent is not to be lightly overturned, when a rule–such as the state litigation predicate—is both mistaken and unworkable, this Court has not hesitated to abandon it. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 63 (1996) (" '[W]hen governing decisions are unworkable or are badly reasoned, "this Court has never felt constrained to follow precedent."'") (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (quoting *Smith v. Allwright*, 321 U.S. 649, 665 (1944)).

This Court should grant certiorari in this case to overrule *Williamson County*'s state litigation requirement.

## II

## THIS CASE PRESENTS AN IMPORTANT QUESTION, ON WHICH LOWER COURTS CONFLICT, AS TO WHETHER TRADITIONAL PROCEDURAL DUE PROCESS CLAIMS ARE SUBSUMED IN AND BARRED BY A TAKINGS CLAIM SUBJECT TO *WILLIAMSON COUNTY*

The Property Owners challenged the Township's actions under federal procedural due process protections, as well as the Takings Clause, alleging a biased and otherwise defective process. Yet, the Sixth Circuit held that this due process claim was subsumed in its takings analysis, in conflict with other federal

courts. App. at A-13-16. This decision has untenable consequences for federal jurisdiction over procedural due process claims.

### A. Subsuming Procedural Due Process Claims in Takings Law Effectively Ends Federal Jurisdiction over Those Claims

At first glance, a decision to treat a land use procedural due process claim as a takings challenge might seem to do nothing more than change the focus of federal review. But when *Williamson County* is brought into the picture, it has a much more regressive impact. For if a due process claim is subsumed in a takings claim (which is itself subject to *Williamson County*), the due process claim also is subject to the "state court first" ripeness barrier as a practical matter. Despite *Williamson County*'s limitation of the state court predicate to takings, 473 U.S. at 196 (applying only the "final decision" prong to a due process claim), it reaches due process claims when they are ancillary to unripe takings claims. *See* App. at A-15-16.

But a doctrine subsuming due process claims in takings claims does not merely end with application of *Williamson County* to procedural due process claims. Due to the *Williamson County*/res judicata conflict, the ultimate effect is to totally prevent land use applicants from *ever* invoking due process in federal court. This is because the state court litigation needed to ripen a takings claim (and an ancillary due process claim) will trigger res judicata over both claims at the federal level. *See Wilkinson v. Pitkin County Bd. of County Comm'rs*, 142 F.3d 1319, 1322-23 (10th Cir. 1998); *Rainey Bros. Constr. Co., Inc. v. Memphis and Shelby*

*County Bd. of Adjustment*, 967 F. Supp. 998, 1004 (W.D. Tenn. 1997). It makes no difference if the would-be procedural due process claimant declines to actually litigate that claim in a predicate state court takings action, because claim preclusion bars federal review of claims that *could have been* raised in earlier litigation, as well as those that actually were. *Wilkinson*, 142 F.3d at 1322-23.

Thus, holding a procedural due process claim contingent on a takings claim starts a chain reaction that results in the unprecedented abdication of federal jurisdiction over an explicit federal constitutional provision: the procedural component of the Due Process Clause. There is no basis for this in the Court's jurisprudence. *See Soldal v. Cook County*, 506 U.S. 56, 70 (1992) ("Certain wrongs affect more than a single right and, accordingly, can implicate more than one of the Constitution's commands. Where such multiple violations are alleged, we are not in the habit of identifying as a preliminary matter the claim's 'dominant' character. Rather, we examine each constitutional provision in turn."); *United States v. James Daniel Good Real Property*, 510 U.S. 43, 50 (1993) (the "question is not which Amendment controls but whether either Amendment is violated"); *Carey v. Piphus*, 435 U.S. 247, 266-67 (1978) (right to procedural due process does not require collateral injury); *Zinermon*, 494 U.S. at 136-37 (no resort to adequate state remedies required for due process claims challenging a nonrandom decision in which pre-deprivation process was possible).

Because of its radical and unprecedented effect in banishing land use procedural due process claims from federal court, the lower court's decision to subsume a

procedural due process claim in takings analysis raises an important issue worthy of this Court's review.

### B. Federal Courts of Appeals Are In Conflict on Whether Takings Claims Preempt Land Use Procedural Due Process Claims

There is a substantial disagreement among the lower courts on whether to subsume in takings analysis a procedural due process claim challenging an injury other than lack of just compensation.

#### 1. The Ninth and Fifth Circuits View Procedural Due Process Claims as an Independent Basis for Federal Relief, In Conflict with the Decision Below

The Ninth Circuit has consistently rejected the idea, adopted below, that procedural due process claims targeting a traditional procedural injury are subsumed in takings claims, and thereby subject to *Williamson County*. *See Carpinteria Valley Farms, Ltd. v. County of Santa Barbara*, 344 F.3d 822, 831 (9th Cir. 2003) (a procedural due process claim alleging a biased decision-making process is distinct from a takings claim and thus exempted from *Williamson County*); *Harris v. County of Riverside*, 904 F.2d 497, 501 (9th Cir. 1990) (holding that a "procedural due process claim [based on lack of notice] does not directly arise from, or rely on, his taking claim . . . [and] is not subject to the ripeness constraints applicable to regulatory takings"); *Weinberg v. Whatcom County*, 241 F.3d 746, 752 (9th Cir. 2001) ("A procedural due process claim, unlike . . . takings claims, is not rooted in the notions of adequate compensation and economic

restitution but is based on something more—an expectation that the system is fair and has provided an adequate forum for the aggrieved to air his grievance" and so redresses a distinct injury.); *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 882 F.2d 1398 (9th Cir. 1989).[4]

As *Sinaloa* explained:

> [T]he rationale for requiring exhaustion of state compensation remedies in taking cases does not extend to a claim that plaintiffs were denied due process. . . . It is of no moment that this due process claim is based on factors that also form the basis of an alleged taking. Two or more legal theories may cover the same conduct and a plaintiff is entitled to prove each claim according to its terms. Accordingly, we reject the contention that *Williamson County* requires plaintiffs to seek relief in state court for the alleged violation of their right to due process.

*Id.* at 1404.

The Fifth Circuit also treats land use procedural due process claims as independent claims that are distinct from takings law. *See Hidden Oaks Ltd. v. City of Austin*, 138 F.3d 1036, 1045 n.6 (5th Cir. 1998) (refusing to treat a procedural due process claim based

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[4] *Sinaloa* was overruled on other grounds—particularly, on its conclusion that a *substantive* due process claim was viable—by *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996). But in 2007, *Armendariz itself was abrogated* on the very point under which it purported to overrule *Sinaloa*. *Crown Point Dev., Inc. v. City of Sun Valley*, 506 F.3d 851, 855 (9th Cir. 2007). *Sinaloa*'s understanding of substantive due process was thereby reaffirmed, and the case is logically good law in full.

on a contractual breach as within the reach of takings ripeness); *Bryan v. City of Madison*, 213 F.3d 267, 272, 275 n.16 (5th Cir. 2000) (dismissing takings claim for lack of state procedures ripeness, while reviewing a due process claim, based on hearing irregularities, on the merits).

The D.C. Circuit is in line with the Ninth and Fifth Circuits on the issue. *Tri County Industries, Inc. v. District of Columbia*, 104 F.3d 455, 460 (D.C. Cir. 1997) (declining to treat a due process claim as an adjunct of an unripe takings claim); *Silverman v. Barry*, 845 F.2d 1072, 1080 (D.C. Cir. 1988).

**2. The Seventh and Tenth Circuits Agree with the Sixth That Procedural Due Process Claims Are Subject to Takings Analysis**

Other courts, such as the Seventh Circuit, hold that takings law controls land use procedural due process claims. In *Greenfield Mills, Inc. v. Macklin,* 361 F.3d 934, 961-62 (7th Cir. 2004), for instance, the Seventh Circuit broadly held that procedural due process claims arising from zoning disputes are governed by takings ripeness rules. *See also Forseth v. Village of Sussex*, 199 F.3d 363, 368 (7th Cir. 2000).

Similarly, "[t]he Tenth Circuit repeatedly has held that the [second] ripeness requirement of *Williamson* applies to due process and equal protection claims that rest upon the same facts as a concomitant takings claim" because it considers takings law as controlling. *Bateman v. City of West Bountiful*, 89 F.3d 704, 709 (10th Cir. 1996); *Miller v. Campbell County*, 945 F.2d 348, 352-53 (10th Cir. 1991); *Rocky Mountain Materials & Asphalt, Inc. v. Board of County Comm'rs*,

972 F.2d 309, 311 (10th Cir. 1992); *J. B. Ranch, Inc. v. Grand County*, 958 F.2d 306, 309-10 (10th Cir. 1992).

The Sixth Circuit sided with the Seventh and Tenth Circuits on the issue of subsuming a procedural due process claim in a takings claim subject to *Williamson County*, and thereby solidified a persistent split between the circuits on the question. Because of this split, the scope of federal protection for due process in land use disputes is contingent on the particular jurisdiction. If a complaining land use applicant is unlucky enough to reside in the Sixth, Seventh, or Tenth Circuit, she cannot raise a traditional due process claim because it is subsumed in precluded takings claims. Conversely, if the plaintiff resides in the Ninth, Fifth, or D.C. Circuits, the same procedural due process claim will be held ripe and reviewed on the merits in the federal court.

The Court should grant the Petition to resolve the conflict.

## III

## THE DECISION BELOW RAISES AN IMPORTANT ISSUE, ON WHICH COURTS CONFLICT, OF WHETHER LANDOWNERSHIP INTERESTS ARE ADEQUATE TO TRIGGER PROCEDURAL DUE PROCESS RIGHTS IN THE LAND USE PERMITTING CONTEXT

The decision below held that even if the Property Owners' procedural due process claim was ripe, it failed because the Owners could not show an "entitlement" to the desired zoning, and therefore they had no protected property interest. App. at A-16-17.

The court rejected the argument that a fee simple title was a sufficient interest. This decision drastically limits the reach of procedural due process protection, and conflicts with the decisions of other courts.

### A. The Denial of Protected Property Interests in Land Deprives Zoning Applicants of All Procedural Due Process Protection

The Sixth Circuit's conclusion that landownership is not enough to trigger the Due Process Clause has devastating consequences for the procedural rights of landowners. Going a step beyond denying federal judicial review (as the decision to subsume due process in takings law does), to rule that a zoning applicant has no protected interest is to totally eliminate resort to the Due Process Clause—in federal *or* state court. After all, if there is no property, there is simply no due process requirement. *James v. City of St. Petersburg*, 33 F.3d 1304, 1307 (11th Cir. 1994) (property owner's "failure to demonstrate that she had a constitutionally protected property interest in continued water service makes it unnecessary to determine whether the City afforded her procedural due process").

The government's duty to provide notice and a fair hearing is a fundamental aspect of constitutional governance. *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972). But, if a zoning applicant has no constitutionally protected property interest, as the Sixth Circuit held, the government can deny a requested use of land in closed session without notice or hearing, and the applicant has no resort to the Due Process Clause. Banishing land use applicants from the umbrella of procedural due process is a radical step, particularly

where, as here, the applicants typically hold a fee simple title replete with common law rights of free use.

The Sixth Circuit's decision that landownership does not warrant due process in land use permitting accordingly raises an important issue worthy of this Court's attention.

### B. Courts Are In Conflict on Whether a Land Use Applicant Must Identify a Positive Government Entitlement, Rather Than Fee Simple Ownership, to Claim Procedural Protections

Federal courts disagree on whether landownership triggers due process protection.

#### 1. The Origin of the Conflict

The conflict among the courts on whether a land use applicant must show an entitlement to a permit, rather than simply claiming a property interest in land, derives from this Court's expansion of procedural due process as a means of securing access to governmental benefits or "entitlements," and its retrenchment of the definition of those entitlements. *Compare Goldberg v. Kelly*, 397 U.S. 254, 263 n.8 (1970), *with Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577-78 (1972).

In *Goldberg*, this Court relied on two law review articles by Charles A. Reich, *see* Reich, *The New Property*, 73 Yale L.J. 733 (1964), and Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 Yale L.J. 1245 (1965), in holding that a welfare recipient had a property interest entitling him to a hearing before the termination of benefits. *Goldberg*, 397 U.S. at 263 n.8.

Two years later, this Court limited *Goldberg's* expansion of new due process property interests:

> Certain attributes of "property" interests protected by procedural due process emerge from these decisions. To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.

*Roth*, 408 U.S. at 577 (emphasis added).

The *Roth* Court concluded that the claimant had no entitlement to continued employment: "In these circumstances, the respondent . . . did not have a property interest sufficient to require the University authorities to give him a hearing when they declined to renew his contract of employment." *Id.* at 578. Thus, for "new property" rights, *i.e.*, those "rights that do not fall within traditional common-law concepts of property," this Court limited procedural due process to those interests that rise to a "legitimate claim of entitlement." *Goldberg*, 254 U.S. at 263 n.8. *Roth* did not, however, repudiate due process protection for "old" property rights, such as the right to use land inherent in fee simple title.

Unfortunately, some courts, including the Sixth Circuit, have extended *Roth*'s "entitlement" standard to the real property context. Others have declined.

### 2. Like the Court Below, the Second, Fourth, Eleventh, and Eighth Circuits Have Extended *Roth* to Land Use Claims

The Second Circuit is a leading proponent of a *Roth* "entitlement" prerequisite for due process protection. In *RRI Realty Corp. v. Incorporated Village of Southampton*, 870 F.2d 911, 917-18 (2d Cir. 1989), that Circuit explained that a litigant must show no discretion in issuance of a permit, or that issuance is "virtually assured," to have a property interest triggering due process protections. In so doing, the *RRI* court recognized that courts historically assumed "that the pertinent property interest is the property the plaintiff owns." 870 F.2d at 916 (citations omitted). The *RRI* court itself was unsure why this wasn't still the test:

> It is not readily apparent why land regulation cases that involve applications to local regulators have applied the *Roth* entitlement test to inquire whether an entitlement exists in what has been applied for—whether a zoning variance, a business license, or a building permit—instead of simply recognizing the owner's indisputable property interest in the land he owns . . . ."

870 F.2d at 917. Nevertheless, based on a prior Second Circuit case, the *RRI* court adopted the requirement that a landowner have a vested right to a permit before a permit application can be subjected to due process review. *Id.*

The Fourth Circuit also has extended the "entitlement" test to land use claims. In *Gardner v.*

*City of Baltimore Mayor and City Council*, 969 F.2d 63 (4th Cir. 1992), that court held:

> Under this [*Roth* analysis] approach, whether a property-holder possesses a legitimate claim of entitlement to a permit or approval turns on whether, under state and municipal law, the local agency lacks all discretion to deny issuance of the permit or to withhold its approval. Any significant discretion conferred upon the local agency defeats the claim of a property interest.

969 F.2d at 68.

So, too, the Eleventh Circuit. *James*, 33 F.3d at 1306 ("In order for an individual to have a protected property interest, he or she . . . must, instead, have a legitimate claim of entitlement to it.'") (quoting *Roth*, 408 U.S. at 577); *see also Spence v. Zimmerman*, 873 F.2d 256, 261 n.6 (11th Cir. 1989) ("Because we conclude that the Spences had no protectible [*sic*] property interest in the TCO [temporary certificate of occupancy] and were never deprived of the building permit, we do not address the Spences' claim that they have been deprived of a property interest without procedural due process."); *Villas of Lake Jackson, Ltd. v. Leon County*, 121 F.3d 610, 614 (11th Cir. 1997) (a landowner must show "a state-created property right in the development project" before a due process analysis applies).

The Eighth Circuit likewise follows the *Roth* entitlement approach. In *Bituminous Materials, Inc. v. Rice County*, 126 F.3d 1068, 1070 (8th Cir. 1997), the Court described a protected property interest as

> [a] claim to entitlement [which] arises, for these purposes, when a statute or regulation places substantial limits on the government's exercise of its licensing discretion. Thus, the holder of a land use permit has a property interest if a state law or regulation limits the issuing authority's discretion to restrict or revoke the permit by requiring that the permit issue upon compliance with terms and conditions prescribed by statute or ordinance.

126 F.3d at 1070.

### 3. The Seventh, Ninth, and Third Circuits Consider Landownership a Sufficient Property Interest, in Conflict with the "Entitlement" Circuits

The Seventh, Ninth, and Third Circuits have rejected the "entitlement" approach in favor of one considering a land use applicant's fee simple rights sufficient to trigger procedural protections.

Writing for the Seventh Circuit, in *River Park, Inc. v. City of Highland Park*, 23 F.3d 164 (7th Cir. 1994), Judge Easterbrook explained:

> River Park . . . surely had a property interest in the land, which it owned in fee simple, and it is therefore entitled to contend that the City's regulation of that land deprived it of property without due process . . . . An owner may build on its land; that is an ordinary element of a property interest. Zoning classifications are not the measure of the

> property interest but are legal restrictions on the use of property.

23 F.3d at 165-66 (citations omitted); *see also Polenz v. Parrott*, 883 F.2d 551, 556-57 (7th Cir. 1989) ("The attribute of ownership at issue in the zoning cases is the right of use—one of the bundle of rights attendant to ownership under the laws of property in all states . . . . [Thus a due process claim will lie] based on the right to exclusive use and enjoyment.").

Like the Seventh Circuit, the Ninth Circuit recognizes that landownership warrants due process for land use decisions, in conflict with the entitlement circuits. *Harris*, 904 F.2d at 503 (" 'The right of [an owner] to devote [his] land to any legitimate use is properly within the protection of the Constitution.' ") (quoting *Washington ex rel. Seattle Title and Trust v. Roberge*, 278 U.S. 116, 121 (1928)); S*quaw Valley Dev. Co. v. Goldberg*, 375 F.3d 936, 949 (9th Cir. 2004) (Landowners have "a constitutionally 'protected property interest'" in their "right 'to devote [their] land to any legitimate use' ") (quoting *Harris*, 904 F. 2d at 497). Last year, the Ninth Circuit reaffirmed its precedent in this area, emphasizing that "[w]e see no difficulty in recognizing the alleged deprivation of rights in real property as a proper subject" of due process review. *Action Apartment Ass'n, Inc. v. Santa Monica Rent Control Bd.*, 509 F.3d 1020, 1026 (9th Cir. 2007).

The Third Circuit takes the same approach as the Ninth and Seventh Circuits. In *DeBlasio v. Zoning Bd. of Adjustment for Twp. of West Amwell*, 53 F.3d 592 (3d Cir.), *cert. denied*, 516 U.S. 937 (1995), *overruled on other grounds by United Artists Theatre Circuit, Inc. v. Twp. of Warrington*, 316 F.3d 392, 400 (3d Cir. 2003),

the town argued that a landowner had no property interest in a favorable zoning decision and, therefore, due process rights were not implicated. The Third Circuit disagreed, holding: "[O]wnership is a property interest worthy of substantive due process protection. Indeed, one would be hard-pressed to find a property interest more worthy of substantive due process protection than ownership." *DeBlasio*, 53 F.3d at 600-01 (citations and footnotes omitted).

The decision below is in abject conflict with the decisions of the Seventh, Ninth, and Third Circuits on whether *Roth's* "new property" entitlement requirement precludes due process protection for land use permit applicants.

The Court should grant the Petition to resolve the conflicts.

## CONCLUSION

The Petition for Writ of Certiorari should be granted.

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