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

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES—Continued

INTRODUCTION

In *San Remo Hotel v. City and County of San Francisco*, 545 U.S. 323, 348-50 (2005) (Rehnquist, C.J., concurring), four justices urged the Court to reconsider whether *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 185, 192-94 (1985), was correct in declaring that a landowner must seek compensation in state court to ripen a federal takings claim. The concurring justices correctly noted that this state litigation requirement has rendered the federal jurisdictional regime governing federal takings claims contradictory, unjust, and virtually unintelligible. Petition for Writ of Certiorari (Pet.) at 17-23; *see also Del-Prairie Stock Farm, Inc. v. County of Walworth*, 572 F. Supp. 2d 1031 (E.D. Wis. 2008) (discussing *San Remo*, *Williamson County*, and cataloging jurisdictional problems caused by *Williamson County*).

Because the Sixth Circuit squarely applied the controversial state litigation requirement to dismiss the Petitioner-Property Owners' (Property Owners) claims that the Township effected a taking of their property and violated procedural due process, the Property Owners now ask the Court to act on the *San Remo* concurrence. The issue of whether *Williamson County*'s state litigation rule should be overruled is properly presented because, unlike in *San Remo*, 545 U.S. at 352, (1) the question was expressly raised and passed on in the court below; (2) a decision vacating the Sixth Circuit's decision to continue applying *Williamson County*'s state litigation requirement would revive the Property Owners' takings claim; and (3) there has been no state court litigation on the merits of the Property Owners' claims, so there are no preclusion barriers.

In its Opposition to the Petition (Opp.), the Township points to nothing that diminishes the appropriateness of this case as a vehicle for reconsidering the state litigation requirement. The Township does not dispute that the lower court's application of the rule disposed of the Property Owners' takings claims. It does not dispute that the state litigation rule causes tremendous jurisdictional confusion for courts and litigants. Its observation that the Sixth Circuit declined to address the Township's "final decision" ripeness arguments simply confirms that the state litigation requirement is isolated for this Court's review.

The Township has similarly failed to identify any reason for declining to grant certiorari to decide whether procedural due process claims targeting an injury other than lack of just compensation are to be treated as a takings claim and whether landownership is a constitutionally protected property interest. These issues were briefed and decided below. They are the subject of conflicts among the federal courts of appeals. Pet. at 26-29; 31-37. The decision below directly raises three important issues of federal jurisdiction in the land use context, on which lower courts are in confusion and conflict, and this justifies granting the Petition.

ARGUMENT

I

THE LOWER COURT'S DECISION NOT TO ADDRESS THE TOWNSHIP'S MERITLESS FINAL DECISION ARGUMENTS ISOLATES THE STATE LITIGATION ISSUE FOR THIS COURT'S REVIEW

In *Williamson County*, this Court held that, in addition to litigating in state court, a property owner with a takings claim must normally secure a "final decision" on a land use application before the claim will ripen. 473 U.S. at 188-90. The Court has subsequently stressed that this final decision requirement is "prudential" and not jurisdictional. In this case, the federal district court found that the Property Owners had satisfied the finality requirement due to the Township's denial of their rezoning request and lack of authority to grant a variance. Appendix to the Petition (Pet. App.) at B-9. But, in the decision below, the Sixth Circuit declined to address the final decision issue because it found the "second prong" of *Williamson County*—the state litigation rule—"dispositive of federal subject matter jurisdiction." Pet. App. at A-9.

A. The State Litigation Issue Is Poised for Resolution, While the Undecided Finality Issue Is Properly Resolved on Remand

In its Opposition, the Township argues that "because the Court of Appeals did not determine whether petitioners satisfied the final determination [ripeness] requirement, this case does not squarely

present the first [state litigation rule] question raised in the Petition." Opp. at 7.

Not so. The Property Owners' takings claim was conclusively dismissed by the Sixth Circuit for one reason only: the state litigation requirement. Pet. App. at A-13. If that requirement is not a legitimate jurisdictional barrier, as the four concurring *San Remo* justices suggested, and as the Property Owners argue, then their takings claim remains live. That the claim might be subject to further ripeness defenses if it is revived does not alter the fact that the state litigation rule poses a threshold jurisdictional issue that must be addressed, particularly because the claim was disposed of under that issue. Indeed, the Sixth Circuit's decision to apply the state litigation rule, without addressing the final decision doctrine, isolates the state litigation issue for this Court's review. *See Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 734 n.8 (1997).

In *Suitum*, this Court reviewed the Ninth Circuit's dismissal of a takings claim on "final decision" ripeness grounds without addressing whether the claim was also subject to the state litigation rule. The reason was that the Ninth Circuit addressed only finality ripeness. *Id.* Here, the situation is reversed—the lower court applied the state litigation rule, but not the final decision doctrine—but the principle of review is the same. That is, since the lower court decided the case on state litigation ripeness alone, that issue is presented, while the unaddressed final decision argument is preserved for remand. *Id.* ("We leave this [other ripeness] matter to the Court of Appeals on remand.").

B. In Discussing Finality, the Township Misstates the Facts and Administrative Procedure

Although it is not relevant to the posture of the state litigation issue, the Property Owners must address some of the Township's (mis)statements about the factual and procedural background of this case.

This dispute does not arise from denial of a development plat. It arises from the denial of manufactured housing and residential zoning classification. If granted, the zoning would have allowed the Property Owners to submit a development plan, but would not vest any particular size of development. *Narrowsview Preservation Ass'n v. City of Tacoma*, 526 P.2d 897, 903 (Wash. 1974) ("rezoning does not involve any physical alteration of the land or irrevocable commitment to allow such a physical alteration."). Under the Township code, issues of development size and impacts are decided in the site planning and subdivision stage that follows zoning. Township Zoning Ordinance § 74-173(c).

Accordingly, it is misleading for the Township to imply that approval of the zoning change would have resulted in a large-scale development. Since the Township *itself* controlled the extent of development in post-zoning planning phases, it could just as plausibly (and probably with more accuracy) say that approval might have resulted in a small development, or a medium-sized one. But, rather than use the subdivision process to control development, the Township chose to deny the requested zoning classification altogether, thereby foreclosing *all* manner of development within the zoning scheme.

In defending the denial, the Township suggests it desired more information, failing to note that this information was not required by its code until the subdivision plat phase. Opp. at A-9. The Township does not deny that the Property Owners supplied all the information required for zoning change. Pet. App. at A-4. Nor does it claim that its zoning denial was by default. The denial was made by formal resolution, with formal findings. Pet. App. at A-4. The Township then informed the Property Owners that there was no administrative appeal mechanism. *Id.* at A-5.

After the state court told the Owners their takings claim would not ripen until they sought a variance and/or got an explicit statement from the Township Zoning Board that it lacked appeal jurisdiction, the Property Owners applied for a variance. Pet. App. at A-6. At a hearing, the Property Owners agreed that the Township code provided the Board no authority to grant a variance, and that a decision to this effect was appropriate. Pet. App. at 128-29. The Board then formally voted to deny the variance. Pet. App. at A-6. This decision categorically prohibited the Property Owners' proposed residential and manufactured housing use. At this point, finality existed, for the Township had exercised its full discretion on the zoning request, resulting in "a conclusive determination . . . whether it would allow [the Property Owners] to develop . . . in the manner [they] proposed."[1]

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[1] The federal courts of appeals, including the Sixth Circuit, are in agreement that denial of a variance, or inability to grant one, establishes finality. *See Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1215 (6th Cir. 1992); *Seguin v. City of Sterling Heights*, 968 F.2d 584, 587 (6th Cir. 1992); *Brandywine, Inc. v. City of*

(continued...)

Williamson County, 473 U.S. at 193-94.[2] To the extent the Township disagrees that this establishes finality, it will have a full opportunity to explain why on remand, should this Court find that the Sixth Circuit improperly dismissed the claims under the state litigation requirement.

II

THIS CASE IS IN THE ONLY POSITION SUITED TO REVIEW OF THE *WILLIAMSON COUNTY* STATE LITIGATION ISSUE

The Township argues that the Court would be in a better position to address the state litigation requirement if the Property Owners first complied with the requirement by securing a state court decision on the merits. Opp. at 18. But the opposite is true. If the

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[1] (...continued)
Richmond, 359 F.3d 830, 834 (6th Cir. 2004); *Herrington v. County of Sonoma*, 857 F.2d 567, 570 n.2 (9th Cir. 1988).

[2] Previously, the Township has relied on *McDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 352 (1986), in arguing a lack of final decision. But *McDonald* is inapposite because it did not involve a denial of a zoning classification; the *McDonald* plaintiffs *already had* the residential zoning they needed. *Id.* at 344 n.2. What the *McDonald* plaintiffs were seeking and what they were denied was approval of a residential subdivision plat, calling for a specific and large number of units in particular places. *Id.* at 342. In this context, *McDonald* demanded submission of a second, smaller subdivision plat for ripeness so as to determine whether the desired residential use was precluded despite the permissive zoning. *Id.* at 347. That approach is inapplicable here, in the context of a denial of a zoning classification, because such a denial necessarily precludes *all* subdivision plans, and thus, there is no need to submit smaller development plats to determine that the proposed use is foreclosed.

Property Owners litigated on the merits in state court before raising their federal takings claim, the claim would be barred by res judicata principles, not *Williamson County*, and the state litigation issue would not be presented. Such is the lesson of *San Remo*, in which the takings claimant did litigate in state court, only to be barred from federal court by issue preclusion. When the plaintiffs raised questions about *Williamson County* to this Court, the Court concluded that it could not reach the issue because the claim was precluded. *San Remo Hotel*, 545 U.S. at 348, 352.

The only way the state litigation issue can be properly presented is for a plaintiff to file a takings claim in federal court, without completing any state litigation, and then to suffer dismissal under that rule. This is exactly what happened here. Requiring the takings claimant to fall into the res judicata trap arising from compliance with the state litigation rule, Pet. at 17-20, might trigger renewed questions about that pitfall, but it would not set up the state litigation issue.

III

THERE IS A REAL CONFLICT AMONG THE COURTS ON WHETHER PURPORTEDLY UNRIPE TAKINGS CLAIMS DEFEAT LAND USE PROCEDURAL DUE PROCESS CLAIMS

The Township argues that there is no conflict among the courts on the treatment of land use procedural due process claims. Opp. at 19-20. Its mistake is in misunderstanding the nature of the posited conflict. The conflict is not on whether *all*

procedural due process claims must *always* be treated as takings claims. Rather, the courts are split between those (1) that treat land use due process claims complaining of a procedural injury other than failure to provide compensation; *i.e.*, lack of notice or fair hearing or bias, as a basis for federal relief independent from takings claims, and (2) those that treat such procedural claims as a takings claim subject to *Williamson County*, and therefore refuse to assert jurisdiction. Pet. at 26-29.

It is irrelevant whether the latter class of courts act by directly applying *Williamson County*, out of fear of creating "exceptions" to *Williamson County*, or by deeming the due process claims "ancillary" to an unripe takings claim. Either way, the result is to strip the procedural claim of its own identity so as to subject it to the state litigation ripeness requirement, which in turn bars the claim from federal court under res judicata rules. Pet. at 24-25. It is with respect to this approach, and its preclusive outcome, that the lower courts are in conflict.

Here, the Property Owners' procedural due process claim is not based on failure to provide just compensation, but on procedural irregularities (demand for information not required for a zoning application by the Township code), and biases against lower income housing development,[3] that prevented them from having a meaningful opportunity to be heard. The merits of this claim have never been addressed or passed on, and are not before this Court. This is

[3] The bias claim is based in part on the allegation that the Township has never approved a manufactured or mobile home zoning application in its history except in one case decades ago where it was forced by a court to do so.

because the Sixth Circuit dismissed the procedural claim for lack of jurisdiction pursuant to *Williamson County*. Pet. App. at A-13-16. In so doing, the lower court (1) sided with circuit courts that, in conflict with others, remove land use procedural due process claims as an independent basis for challenging a property deprivation in federal court, Pet. at 26-29, and (2) ignored this Court's contrary precedent. *Soldal v. Cook County*, 506 U.S. 56, 70 (1992); *United States v. James Daniel Good Real Property*, 510 U.S. 43, 50 (1993). The Court should grant the Petition to resolve the conflicts.

IV

THE ISSUE OF WHETHER LAND-OWNERSHIP IS A PROTECTED PROPERTY INTEREST ISSUE WAS RAISED AND PASSED ON, AND SHOULD BE REVIEWED

To avoid review of the Sixth Circuit's decision that the Property Owners lack a protected property interest in their land, the Township argues that the issue was never raised below.[4] Opp. at 26-27. This is both irrelevant and wrong. In the first place, this Court can review an issue passed on by a lower court, regardless of whether it was raised by the parties. *First English*

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[4] The Township also argues that the Sixth Circuit's "no property interest" ruling should not be reviewed because it is "dicta." It fails to recognize that, if this Court grants the Petition and overrules *Williamson County*, as requested, the "no property interest" ruling would be the controlling basis for dismissal of the procedural due process claim. Accordingly, the Property Owners must raise the issue to revive their claim. Since the issue is important and subject to conflicts, it is appropriate for this Court to decide it.

Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 313 n.8 (1987). Second, the Township is not being candid in asserting that the property interest issue was not raised. The issue *was raised* in a petition for rehearing, after the Sixth Circuit addressed it, *sua sponte*, in its opinion. After the Sixth Circuit ordered a response to the rehearing petition, the Township *itself* briefed the property interest issue. Response to Petition for Rehearing at 3-7.

The issue of whether the Property Owners' fee simple landownership is sufficient to implicate procedural due process protections is properly postured for review. Because the lower court's negative answer (1) defeats the Property Owners' procedural due process claim, should the Court overrule *Williamson County*, (2) dramatically affects the ability of landowners to invoke basic due process rights, and (3) is in conflict with other courts, this Court should grant the Petition.

CONCLUSION

The Court should grant the Petition for Writ of Certiorari.

DATED: November, 2008.

Respectfully submitted,

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