No. 15-631

In the Supreme Court of the United States

ARRIGONI ENTERPRISES, LLC,
Petitioner,

v.

TOWN OF DURHAM; DURHAM PLANNING AND ZONING COMMISSION; AND DURHAM ZONING BOARD OF APPEALS,

Respondents.

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

AMICUS CURIAE BRIEF OF CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONER

JOHN C. EASTMAN
ANTHONY T. CASO
CENTER FOR CONSTITUTIONAL JURISPRUDENCE
c/o Dale E. Fowler School of Law at Chapman University
One University Drive
Orange, CA 92866

MILTON A. MILLER
Counsel of Record
ANTHONY J. BRUNO
LATHAM & WATKINS LLP
355 South Grand Avenue
Los Angeles, CA 90071
(213) 891-8222
milt.miller@lw.com

Counsel for Amicus Curiae Center for Constitutional Jurisprudence

QUESTIONS PRESENTED

1. Whether the Court should reconsider, and then overrule or modify, the portion of *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City,* 473 U.S. 172, 194 (1985), barring property owners from filing a federal takings claim in federal court until they exhaust state court remedies, when this rule results in numerous jurisdictional "anomalies" and has a "dramatic" negative impact on takings law, *San Remo Hotel, L.P. v. City & County of San Francisco,* 545 U.S. 323, 351-52 (2005) (Rehnquist, C.J., concurring)?

2. Alternatively, whether federal courts can and should waive *Williamson County's* state litigation requirement for prudential reasons when a federal takings claim is factually concrete without state procedures, as some circuit courts hold, or apply the requirement as a rigid jurisdictional barrier, as other circuits hold?

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INTEREST OF AMICUS CURIAE[1]

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute. The Institute is a non-profit organization with the mission to restore the principles of the American Founding to their rightful and preeminent authority in our national life. To safeguard these principles, the Center has represented parties in litigation in state and federal courts. The Center also participates as *amicus curiae* in significant cases before this Court. *See Horne v. Dep't of Agric.*, 135 S. Ct. 2419 (2015); *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013); *Ark. Game & Fish Comm'n v. United States*, 133 S. Ct. 511 (2012); *Sackett v. Envt'l Prot. Agency*, 132 S. Ct. 1367 (2012); *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envt'l Prot.*, 560 U.S. 702 (2010); *Kelo v. City of New London*, 545 U.S. 469 (2005).

Among the principles of the American Founding that the Center champions is the fundamental right, expressed in the Fifth Amendment to the United States Constitution, to be free of governmental takings of private property unless the property is taken solely for public use and just compensation is paid. Indeed, this safeguard against governmental abuse predates the United States Constitution; it is one of the oldest and most firmly established principles in the Anglo-American

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[1] No counsel for any party authored this brief in whole or in part. No person or entity other than *amicus curiae* made a monetary contribution intended to fund the preparation or submission of this brief. Petitioner and respondents consented to the filing of this brief after receiving timely notice.

legal tradition. For thirty years, the decision of the Court in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), has created unnecessary obstacles to claimants seeking to vindicate their rights under the Takings Clause in the federal courts. Because that ruling represents a departure from our founding principles, the Center has a strong interest in this case.

INTRODUCTION

Thirty years ago, this Court in *Williamson County Regional Planning Commission v. Hamilton Bank,* 473 U.S. 172, 186 (1985), held that a regulatory Takings Claim was "not ripe until the government entity charged with implementing the regulations [had] reached a final decision regarding the application of the regulations to the property at issue." Although this holding should have resolved the case, the Court then noted—seemingly in dicta—that ripeness also requires that a litigant who seeks to bring a Takings Claim in federal court to first seek compensation through the procedures provided by the State. *Id.* at 195. Accordingly, pursuant to this state procedures rule (also known as a state litigation requirement), a Takings Claim remains unripe for adjudication in federal court unless and until the claimant first seeks *judicial* redress in the state court to vindicate any state-based right to compensation that may exist apart from the Fifth Amendment claim. *Id.*

This rule has proven unworkable and is inconsistent with the text and authorities under the Fifth Amendment. Indeed, the state procedures rule has erected nearly-insurmountable barriers to

landowners seeking to have their Takings Claims adjudicated in the lower federal courts.[2] As explained in Petitioner's brief, the rule often creates a procedural labyrinth whereby a litigant aiming to ripen his claim for federal review by prosecuting his action first in state court will unintentionally trigger the application of preclusion doctrines that will bar such federal review.[3] *See, e.g.*, *San Remo Hotel, L.P. v. City & Cty. of San Francisco*, 545 U.S. 323, 349 (2005) (Rehnquist, C.J., concurring in the judgment) (The rule "all but guarantees that claimants will be unable to utilize the federal courts to enforce the Fifth Amendment's just compensation guarantee.").

In the intervening years since the inception of the state procedures rule, litigants, scholars and judges have attempted to reconcile the doctrinal anomalies created by *Williamson County* to no avail.[4] At least four members of this Court—both current and former—have all but acknowledged the

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[2] J. David Breemer, *Overcoming Williamson County's Troubling State Procedures Rule*, 18 J. Land Use & Envtl. L. 209, 210 (2003).

[3] The doctrines of issue and claim preclusion effectively require that all related claims be brought together in the same judicial proceeding. As explained in Petitioner's brief, "[t]he ultimate result of the interaction between Williamson's state litigation rule and preclusion rules is that a property owner must raise a federal takings claim in state court or not at all." Pet. 16. But if the federal claim is later raised in federal court, it is precluded under doctrines of preclusion. And, even if preclusion law would not block a litigant's claim, it may be barred by *Rooker-Feldman*. *San Remo Hotel, L.P. v. City & Cty. of San Francisco*, 545 U.S. 323, 351 (2005) (Rehnquist, C.J., concurring in the judgment).

[4] Breemer, *supra*, at 210-11.

infirmity of this rule. *San Remo Hotel*, 545 U.S. at 349 (Rehnquist, C.J., concurring, joined by O'Connor, Kennedy, and Thomas, JJ.) ("It is not clear to me 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."); *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 742 (2010) (Kennedy, J., concurring in part and concurring in the judgment) ("Until *Williamson County* is reconsidered, litigants will have to press most of their judicial takings claims before state courts . . . ."). It is respectfully submitted that the Court should grant certiorari for the express purpose of reconsidering the state procedures requirement of *Williamson County*. Reexamination of previously decided questions of constitutional law is most warranted where precedent has proven "outdated, ill-founded, unworkable, or otherwise legitimately vulnerable to serious reconsideration." *Vasquez v. Hillery*, 474 U.S. 254, 266 (1986); *accord Payne v. Tennessee*, 501 U.S. 808, 827 (1991). For the reasons explained in Petitioner's Petition for Writ of Certiorari and below, it is clear that each such factor applies here.

SUMMARY OF ARGUMENT

Apart from the procedural trap that *Williamson County* creates, Amicus Curiae urges this Court to reexamine the state litigation rule because the requirement is not firmly established in the text of the Takings Clause and it represents a significant

departure from the original understanding of the right at issue. Stated succinctly, the Fifth Amendment requires that compensation be paid when the government takes property for public use. Compensation is not simply a remedy for a taking, but a condition upon which the exercise of the takings power depends. Accordingly, the moment a governmental body issues a final ruling to effect a taking without providing for adequate compensation, the constitutional violation is suffered—and the matter is therefore ripe for federal adjudication.

The principle that compensation must be paid at the time of the taking is deeply rooted in our legal history and can be traced back to Magna Carta. Among the grievances of the barons who compelled King John to sign Magna Carta was a concern that his deputies would delay payment for property seized under royal decree. While at the time of Magna Carta there was no dispute that the king's agents were obligated to pay for seized provisions, payment was often delayed, sometimes indefinitely. Because the promise of future payment could prove illusory, Magna Carta prohibited certain takings "unless [the agent] pays cash for them immediately." Magna Carta cl. 28 (1215), http://magnacarta.cmp.uea.ac.uk/read/magna_carta_1215/Clause_28.

During the colonial period of our country, early legislatures codified the requirement that prompt and immediate payment accompany a taking. Later, the Framers enshrined this principle via the Fifth Amendment's guarantee that property shall not be taken "for public use, without just compensation." U.S. Const. amend. V. This Court has, for nearly two hundred years since the Bill of Rights, stayed

true to an interpretation of the Takings Clause that required that payment accompany—and thereby serve as a condition to—any taking. *Williamson County* broke from this historical understanding of the Takings Clause and this Court should grant certiorari to correct it.

Specifically, the *Williamson County* Court, in finding that a claim under the Takings Clause is not ripe until the claimant first utilizes state procedures to obtain the compensation due, has rekindled the grievances of the barons long thought extinguished by Magna Carta: "just compensation" is again delayed until the completion of a long remedial process. As a result, for many victims of regulatory takings, the obligation of the government to make prompt payment proves elusive.

The *Williamson County* state litigation rule is the product of a mischaracterization of the nature of the rights protected by the Fifth Amendment, as well as a misinterpretation of the principles established by this Court in prior holdings. The state litigation rule also represents an anomaly that is hard to reconcile with the traditional understanding of ripeness. The rule appears to be incongruously borrowed from the doctrine of administrative exhaustion and is therefore inconsistent with this Court's ordinary treatment of constitutional claims brought under 42 U.S.C. § 1983, in which a plaintiff need not satisfy any exhaustion rule to seek redress in federal court. Amicus respectfully asks this Court to grant certiorari to reconsider the state litigation requirement of *Williamson County*.

REASONS TO GRANT REVIEW

I. At Its Core, The *Williamson County* State Litigation Requirement Stems From A Misconception Of The Government's Obligation To Provide "Just Compensation"

The Fifth Amendment provides "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. For most of our history, the natural understanding of this clause, as reflected in the Court's precedents, is there shall be no taking of property without the simultaneous payment of "just compensation." Breemer, *supra*, at 220-221. In other words, "just compensation" serves as a condition that must be satisfied for the government to exercise its power to effectuate a taking; it is not simply a remedy to be afforded to the landowner. *See First English Evangelical Lutheran Church v. Cty. of Los Angeles*, 482 U.S. 304, 314 (1987) ("[A]s the Court has frequently noted, [the Fifth Amendment] does not prohibit the taking of private property, but instead places a condition on the exercise of that power."); *see also* Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52 Vand. L. Rev. 57, 60 (1999) (noting that just compensation clauses were historically understood to impose legislative disabilities). Indeed, early courts recognized the conditionality of the compensation requirement, adopting an understanding whereby a failure to pay compensation would not simply give rise to a claim for compensation, but render the taking itself void. *Id.* at 60-61.

The historical evidence confirms the view that once the government issues a final decision to take property without simultaneous provision[5] for just compensation, there is an immediate constitutional violation. *See generally United States v. Dow*, 357 U.S. 17, 21-22 (1958) (explaining the operation of the Takings Clause). Hence, because the Takings Clause conditions the government's power on the payment of compensation, a litigant need not first avail themselves of state-based remedies to secure the compensation due.

In other contexts, a claimant alleging an injury to a federal right caused by the government sidestepping a limitation placed upon its own power would have immediate access to the federal courts; he would not need to "ripen" his claim by first pursuing state-based remedies in state court. *See* 42 U.S.C. § 1983; *Felder v. Casey*, 487 U.S. 131, 148 (1988) (Other than where Congress has specified otherwise, "[Section 1983] 'causes of action' . . . 'exist independent of any other legal or administrative relief that may be available . . . [t]hey are judicially enforceable *in the first instance*.'" (citation omitted, emphasis in original)). Yet, the *Williamson County* Court required otherwise, mandating that takings claimants first seek in state court state-based

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[5] Under the Fifth Amendment, a property owner is "entitled to reasonable, certain and adequate provision for obtaining compensation before his occupancy is disturbed." *Cherokee Nation v. S. Kan. Ry. Co.*, 135 U.S. 641, 659 (1890). This entitlement is stripped of nearly all meaning—and the Constitution offers a claimant scant protection—if background state law procedures for filing suit and obtaining redress are deemed "adequate provision."

compensatory remedies, such as rights afforded under state constitutions or remedies available through inverse condemnation proceedings. *See Williamson Cty.,* 473 U.S. at 186; *Snaza v. City of Saint Paul*, 548 F.3d 1178, 1182 (8th Cir. 2008) (describing state litigation rule). In addition, due to the operation of well-established preclusion doctrines requiring plaintiffs to bring all related claims in the same action, this Court has essentially conferred upon state tribunals the exclusive jurisdiction to adjudicate violations of federal rights.[6]

The misstep here—in which the compensation clause is viewed as a remedial scheme—largely results from the *Williamson County* Court's analogy to cases examining timing rules governing the availability of judicial remedies for procedural rights, such as a violation of procedural due process. For example, *Williamson County* relied on *Parratt v. Taylor*, 451 U.S. 527 (1981), a case holding that there could be no constitutional due process violation until a plaintiff had availed himself of the adequate post-deprivation remedy provided by the state's tort claims statute. 451 U.S. at 544. Analogizing the

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[6] It is important to note that *Williamson County* does not require that the litigant prosecute his federal claim in state court. *Williamson Cty.*, 473 U.S. at 195*;* Breemer, *supra,* at 209, 210, 277. However, if the federal causes of action are not brought in state court concurrent with the state claims, preclusive doctrines may operate to bar the claim. Pet. 16. For example, in litigating whether a regulation results in a taking under state constitutional law (and thus whether compensation will be provided), the property owner litigates the same issues that would be present in the federal claim, resulting in claim preclusion. *See San Remo Hotel,* 545 U.S. at 323.

situation before it to *Parratt*, the *Williamson County* Court determined that in a takings case, "a property owner has not suffered a violation of the Just Compensation Clause until the owner has unsuccessfully attempted to obtain just compensation through the procedures provided by the State," such as an inverse condemnation proceeding. 473 U.S. at 195.

This analogy does not work. A procedural due process claim arises only when the state fails to afford process. *See, e.g.*, *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428-37 (1982) (finding that Illinois violated plaintiff's Due Process rights by failing to provide adequate procedure). It is thus natural for a court to require that a litigant utilize state procedural remedies, thus ensuring that the state has conclusively failed to provide adequate process, before examining a federal due process claim. *See, e.g.*, *Wax 'n Works v. City of St. Paul*, 213 F.3d 1016, 1020 (8th Cir. 2000) (noting that while exhaustion of state remedies is not generally required for a § 1983 claim, it is required in the due process context). A Takings Claim, by contrast, is not a claim seeking to vindicate a procedural entitlement, but rather a claim to enforce a limitation upon the power of government to effectuate a taking. *See Monongahela Navigation Co. v. United States,* 148 U.S. 312, 336 (1892) (If "Congress . . .deems it necessary to take private property, then it must proceed subject to the limitations imposed by this Fifth Amendment, and can take only on payment of just compensation.").

In short, the *Williamson County* treatment of just compensation as a mere remedy—and the state litigation rule borne from such treatment—is

contrary to this Court's precedent, the plain reading of the text, the history of "just compensation," and common sense. This Court should grant certiorari to undo the anomaly in its takings jurisprudence.

II. The Text Of The Fifth Amendment And Historical Understanding Of "Just Compensation" Demonstrate That The Government's Obligation To Pay Accrues Concurrently With The Taking

The plain text of the Fifth Amendment reads as a codification of an individual right or a limitation on government power, not as a remedial grant. Brauneis, *supra*, at 113 (comparing "private property shall not be taken for public use without just compensation" with language of a remedial grant, such as "whenever the state takes property, it will have an obligation to pay just compensation"). In declaring that private property shall not be taken "for public use, without just compensation," the Framers were codifying an ancient principle requiring the prompt payment of compensation for property seized by the crown. William Sharp McKechnie, *Magna Carta: A Commentary on the Great Charter of King John, with an Historical Introduction* 330 (1914). The principle reflected in the Takings Clause "goes back at least 800 years to Magna Carta" and has been carried forward throughout our history. *See Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2426 (2015). For example, Magna Carta's right to just compensation was incorporated by the colonists into the Massachusetts Bodies of Liberties, the laws of Virginia, and the laws of South Carolina, among others. *Id.*; *see also* Constitution of

Vermont ch. I, § I (July 8, 1777), *available at* https://vermonthistory.org/images/stories/docs/con77.pdf; Northwest Ordinance: An Ordinance for the Government of the Territory of the United States Northwest of the River Ohio § 14, art. 2 (July 13, 1787), *available at* http://www.ourdocuments.gov/doc.php?doc=8&page=transcript.

Medieval barons forced King John to endorse Magna Carta with a provision for immediate compensation. 1 William Blackstone, *Commentaries* *277-78. The king's officials abused the royal prerogative of "purveyance"—the ancient analogue to eminent domain—by taking property with the promise of future payments that often proved illusory. *Id.* Though ostensibly required, payment was often deferred indefinitely, became impossible for lack of coin, or was lost to corrupt purveyors enriching themselves. *Id.* To address these grievances, Magna Carta included a provision for contemporaneous payment as a condition for the taking of property.

Accordingly, under Magna Carta, prompt payment for a taking was required or else the taking would be prohibited entirely. For instance, Clause 28 stated: "No constable or other bailiff of ours is to take anyone's corn or other chattels, unless he pays cash for them immediately . . . ."[7] Contemporaneous payment for seized provisions was a crucial protection against potentially empty assurances of future compensation. McKechnie, *supra,* at 330. In

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[7] Magna Carta cl. 28, http://magnacarta.cmp.uea.ac.uk/read/magna_carta_1215/Clause_28.

all, the protections codified by Magna Carta demonstrate that the right to prompt payment for a seizure of property were central concerns of early English jurisprudence.

Consistent with this historical practice, the colonists commonly required the immediate vindication of an individual's substantive right to Just Compensation. James W. Ely, Jr., "*That due satisfaction may be made": the Fifth Amendment and the Origins of the Compensation Principle*, 36 Am. J. of Legal History 1, 4-5 (1992) (When a legislature authorized a taking, it "invariably" and concurrently required compensation.). Legislatures across the colonies authorized payment provisions simultaneously with authorizations to take property. For example, Rhode Island passed a legislative act authorizing a taking of land but mandated payment of the property's "True Worth." An Act impowering [sic] the Freeman of the Town of Providence to take up a convenient Piece of Land for the Building a Pest House, R.I. Laws (1752). Ely, *supra*, at 5 & n.27. Similarly, when the New York legislature authorized the taking of property to build fortifications, it required owners be compensated for the value of their lots. An Act to enable the Inhabitants of Schenectady to fortify the said Town, N.Y. Laws, ch. DCCCCLXXIV (1755). Ely, *supra*, at 6 & n.28. This historical backdrop demonstrates that at the time of the enactment of the Bill of Rights, compensation was to be paid as a condition for the government to seize an individual's property.

In the century following the Bill of Rights, this understanding persisted; compensation was required at the time of the taking. *See, e.g., Baring v.*

Erdman, 2 F. Cas. 784, 791 (C.C.E.D. Pa. 1834) ("[T]he obligation upon the state to make compensation is undoubtedly co-extensive with their power to take or apply private property to public use[,] [a]s this obligation is a constitutional one . . . ."). In stark contrast to the idea that compensation is merely remedial, some early courts even required payment *in advance* of a taking. *See, e.g., Postal Tel. Cable Co. v. S. Ry. Co.*, 89 F. 190, 191 (C.C.W.D.N.C. 1898) ("No act of congress can give the right of taking private property for public purposes without first paying just compensation."); *see also Md. & Wash. Ry. Co. v. Hiller*, 8 App. D.C. 289, 294 (D.C. Cir. 1896) ("[I]t seems clear that the proper interpretation of the Constitution requires that the owner should receive his just compensation before entry upon his property." (citation omitted)). Just compensation was never understood as a remedy that the aggrieved individual was required to seek through some procedural mechanism.

Until *Williamson County*, this Court adhered to the traditional understanding that the Takings Clause immediately obligates the government to compensate a landowner to complete a taking. *See 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."); *Dow*, 357 U.S. at 20 ("For it is undisputed that '[since] compensation is due at the time of taking, the owner at that time . . . receives the payment.'" (first alteration in original) (citation omitted)); *Seabord Air Line Ry. Co. v. United States*, 261 U.S. 299, 306 (1923) ("[I]t was the duty of the Government to make just compensation as of the time when the owners were deprived of their property." (citation omitted));

Danforth v. United States, 308 U.S. 271, 283-84 (1939) ("There is no disagreement in principle . . . compensation is due at the time of taking . . . .").

Now, however, the dark days that had preceded Magna Carta in which compensation was an expectant potential remedy have returned; federal court doors that were once open for claimants seeking to compel the government to fulfil its obligation to make immediate payment have been all but closed. *See Devines v. Maier*, 665 F.2d 138, 148 (7th Cir. 1981) (holding that the municipality's actions constituted an unconstitutional taking under the Fifth Amendment, without requiring plaintiffs to litigate in state court); *Foster v. City of Detroit*, 405 F.2d 138 (6th Cir. 1968) (holding the same); *Richmond Elks Hall Ass'n v. Richmond Redevelopment Agency*, 561 F.2d 1327, 1333-34 (9th Cir. 1977) (holding the same).

III. The *Williamson County* Court Departed From Precedent In Concluding That Just Compensation Is A Remedial Provision That Ripens Only After Other Compensatory Remedies Are Sought In State Court

The *Williamson County* Court's finding that a claim under the Takings Clause is not ripe until the claimant seeks "compensation through the procedures the State has provided for doing so" flows initially from the Court's reading of a line from the holding in *Cherokee Nation v. Southern Kansas Railway Co.*, 135 U.S. 641 (1890). In that case, the Court concluded that an "owner is entitled to reasonable, certain and adequate provision for

obtaining compensation before his occupancy [in land] is disturbed." 135 U.S. at 659. From this, the *Williamson County* Court reasoned that so long as there exists under state law any "reasonable, certain and adequate" procedure to seek compensation for a completed taking, there can be no actionable claim in federal court. 473 U.S. at 194-95. However, *Cherokee Nation* cannot bear the weight on which the *Williamson County* Court's conclusion depends.

Cherokee Nation simply recognized that the compensation clause is satisfied where the legislative act that effects the taking also provides a mechanism for the payment of compensation. That case involved a physical taking authorized by Congress for the purpose of constructing a railway. The Cherokee Nation sought to enjoin the property seizure, claiming that the act of Congress was unconstitutional by failing to provide for compensation to the landowner before the government entered[8] upon these lands to construct its road. *Cherokee Nation*, 135 U.S. at 646-51. The Court held that because the Act contained a "reasonable, certain and adequate provision for obtaining compensation before his occupancy is disturbed," the Act complied with the Constitutional requirements. *Id.* at 659.

Cherokee Nation thus does not weaken the traditional understanding that compensation under the Fifth Amendment is owed at the time of the

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[8] The Court made a distinction between the defendant's entering upon the land for the "purpose of constructing its road over them" and the plaintiff's "occupancy being disturbed" by the defendant. *Cherokee Nation*, 135 U.S. at 658-59.

taking, nor does it lend support to the state litigation requirement. Rather, it simply reinforces the idea, as originally manifested in the acts of the colonial legislatures discussed *supra* Part II that where a right to just compensation accompanies, or is contained within, the legislative act authorizing the taking, there is no actionable claim (assuming fair compensation is indeed paid). Interestingly, in *Cherokee Nation*, according to the relevant provision of the Act, full compensation was to be paid before the property owner's occupancy was disturbed. 135 U.S. at 659. Therefore, not only does it not provide support for the state procedure requirement, but undermines it.

IV. The State Litigation Rule Is Not Necessary To Ensure Ripeness And Is Based Upon A Mistaken Understanding Of When The Right To Compensation Accrues

The jurisprudential doctrine of "ripeness" permits a court to dismiss claims that are inappropriate for review upon their initial presentation. Ripeness traditionally operates to dismiss disputes involving "uncertain and contingent future events that may not occur as anticipated, or indeed may not occur at all." Breemer, *supra*, at 233 (citation omitted). Primarily, ripeness is a question of timing: courts seek to ensure sufficient time has passed to crystalize the case or controversy before rendering judgment. 33 Charles Alan Wright & Charles H. Koch Jr., *Federal Practice and Procedure: Judicial Review* § 8418 (1st ed.), Westlaw (database updated Apr. 2015).

The ripeness doctrine originates from the "case" or "controversy" requirement of Article III of the Constitution and prudential concerns about federal jurisdiction. *Id.* Purely legal issues, final agency actions, and cases that will not benefit from further delay typically satisfy the Article III requirements. *See Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 581 (1985); *Action Alliance of Senior Citizens v. Heckler*, 789 F.2d 931, 940 (D.C. Cir. 1986). However, even where a matter is constitutionally ripe, prudential values may trigger dismissal where the court determines that an issue is presently unfit for judicial decision and this concern outweighs the hardship to the parties that would result from the court withholding its consideration. Breemer, *supra,* at 236-39.

If the right to compensation under the Fifth Amendment is properly viewed as a condition to the exercise of the takings power, it is difficult to see how, once a final decision is rendered with respect to a taking, a Takings Claim can be unripe for review under either the constitutional or prudential ripeness inquiries. *San Remo Hotel*, 545 U.S. at 349 (Rehnquist, C.J., concurring) (observing that "[i]t is not obvious that either constitutional or prudential principles require claimants to utilize all state compensation procedures before they can bring a federal takings claim"). Compensation is due at that moment an administrative body issues a final decision authorizing a physical or regulatory taking. Consequently, no further factual development is required and the controversy is fit for judicial adjudication. Max Kidalov & Richard H. Seamon, *The Missing Pieces of the Debate Over Federal*

Property Rights Legislation, 27 Hastings Const. L.Q. 1, 5-7, 27-28 (1999).

Although the Court has not resolved whether the state litigation requirement is a constitutional or prudential rule, *San Remo Hotel*, 545 U.S. at 349 (Rehnquist, C.J., concurring), neither doctrine appears to have force in the takings context; this is emphatically the case if the right to compensation is properly conceptualized as a limitation upon the government's power to act. Article III ripeness concerns—as expressed in the first prong of the *Williamson County* test—are satisfied once a final decision is rendered. Breemer, *supra*, at 235-36. Prudential concerns similarly are satisfied; in fact, the state litigation requirement undermines the values that prudential ripeness seeks to further.

These prudential values include the desire to preserve judicial economy[9], to ensure the development of a factual record adequate to decide the case[10], and to ensure that only those individuals who cannot resolve their disputes without judicial intervention end up in court.[11] With respect to judicial economy, the state litigation requirement demands a "ripening" round of litigation in state court that is unnecessary since any state claims may be prosecuted in federal courts along with the Takings Claim under supplemental jurisdiction. *See*

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[9] *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967).

[10] *Navegar, Inc. v. United States*, 103 F.3d 994, 998 (D.C. Cir. 1997).

[11] *Madsen v. Boise State Univ.*, 976 F.2d 1219, 1221 (9th Cir. 1992).

28 U.S.C. § 1367.[12] In addition, for any claimant aiming to avail himself of the federal forum, the state litigation rule creates procedural traps requiring the parties to litigate esoteric procedural questions.[13] As for the value of ensuring an adequate factual record, that requirement is satisfied through the issuance of a final agency decision; *Williamson County* itself recognizes this by demanding the claimant prosecute once such decision is issued state *litigation.*

In short, the state litigation rule cannot be explained by reference to Article III or to the traditional values underlying prudential ripeness, especially if compensation is properly viewed as being owed at the time of the taking. But this aside, even if the right to compensation were a mere remedial provision as the *Williamson County* Court appears to suggest, it is still difficult to see how the state litigation rule can be justified by a ripeness bar. At best, the rule seems to be borrowed from the doctrine of administrative exhaustion, under which a claimant must exhaust administrative remedies before a claim becomes ripe.[14] However, state courts

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[12] *See also Cortez v. Skol*, 776 F.3d 1046, 1054 n.8 (9th Cir. 2015) (noting that "[t]he district court had federal question jurisdiction over the § 1983 claim and supplemental jurisdiction over the state-law . . . claim").

[13] *See* Defender of Property Rights Amicus Br. for Pet'r 12-13, *San Remo Hotel, L.P. v. City & Cty. of San Francisco*, 545 U.S. 323 (2005) (No. 04-340), 2005 WL 176433 (summarizing costs and expenses of state litigation requirement); Breemer, *supra*, at 238-39; Pet. 16.

[14] Factors found to favor requiring exhaustion include "giving agencies the opportunity to correct their own errors,

are not administrative bodies; they are judicial tribunals like the federal courts. *Younger v. Harris*, 401 U.S. 37, 44 (1971). The state litigation rule, however, improperly treats state tribunals as stepping stones to the federal courthouse. *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280 (2005); *Rooker v. Fid. Trust Co.*, 263 U.S. 413 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983) (observing that unless Congress commands otherwise, federal courts are ordinarily barred from sitting in judgment of a state court decision).

Finally, this Court has not usually required a plaintiff to satisfy *any* exhaustion rule before bringing a constitutional claim under 42 U.S.C. § 1983 for a violation of a substantive constitutional right. *Steffel v. Thompson*, 415 U.S. 452, 472-73 (1974). The state procedures requirement, of course, lies in tension with this ordinary rule, but the *Williamson County* Court sidestepped this concern concluding that Section 1983 takings claimants could not allege a claim "until just compensation has been denied." *Williamson Cty.*, 473 U.S. at 194 n.14 (1985). This premise is seems true on its face, but may beg the question of when and where a court is to look in determining whether just compensation "has been denied." It is only because the Court recasts the Just Compensation Clause as a post-deprivation

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affording parties and courts the benefits of agencies' expertise, compiling a record adequate for judicial review, promoting judicial efficiency." *Marine Mammal Conservancy, Inc. v. Dep't of Agric.*, 134 F.3d 409, 414 (D.C. Cir. 1988). Again, it is unclear how the state litigation rule furthers *any* of these values.

remedy, rather than as a condition of governmental action, that it can conclude that the exhaustion of state procedures is required by the Fifth Amendment's terms. As explained, this is a questionable foundational premise.

CONCLUSION

For these reasons, it is respectfully submitted that the Court should grant the petition for certiorari for the express purpose of re-examining the state procedures requirement of *Williamson County*.

Respectfully submitted,

JOHN C. EASTMAN
ANTHONY T. CASO
CENTER FOR CONSTITUTIONAL JURISPRUDENCE
c/o Dale E. Fowler School of Law at Chapman University
One University Drive
Orange, CA 92866

MILTON A. MILLER
Counsel of Record
ANTHONY J. BRUNO
LATHAM & WATKINS LLP
355 South Grand Avenue
Los Angeles, CA 90071
(213) 891-8222
milt.miller@lw.com

Counsel for Amicus Curiae Center for Constitutional Jurisprudence

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