No. 11-189

IN THE

Supreme Court of the United States

COLONY COVE PROPERTIES, LLC, a Delaware limited liability company,

Petitioner,

v.

CITY OF CARSON, a municipal corporation; and CITY OF CARSON MOBILEHOME PARK RENTAL REVIEW BOARD, a public administrative body,

Respondents.

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

MOTION FOR LEAVE TO FILE AND BRIEF AMICUS CURIAE OF WESTERN MANUFACTURED HOUSING COMMUNITIES ASSOCIATION IN SUPPORT OF PETITION FOR CERTIORARI

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Before filing this motion and brief, Amicus Western Manufactured Housing Communities Association (WMA) sought the consent of the parties and provided counsel for each party with ten days' notice of WMA's intent to file this amicus curiae brief. Petitioner consented, but the Respondents would not. Petitioner's consent is submitted with this brief. Therefore, pursuant to Rule 37, WMA moves the Court for leave to file the attached amicus curiae brief in support of the Petition.

WMA is the largest association of mobile home park owners in the United States, whose members constantly face the same issues raised in the Petition for Certiorari. WMA has a broad interest in the issues in this case and regularly appears to advocate its members' interests in this and other courts.

In the instant case, the Court of Appeals applied a rule that essentially precludes the owners of mobile home parks from invoking the protection of 42 U.S.C. §1983 to seek compensation for confiscatory rent regulations. That rule also precludes mobile home park owners from ever seeking compensation from U.S. District Courts, through an application of

Williamson County Reg. Plan. Commn. v. Hamilton Bank, 473 U.S. 172 (1985). WMA and its members have faced these issues repeatedly and believe they can assist this Court in its deliberations.

Respectfully submitted

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BRIEF OF AMICUS CURIAE

Western Manufactured Community Housing Association (WMA) submits this brief in support of the Petition for Certiorari.[1]

INTEREST OF AMICUS CURIAE

WMA represents 1800 mobile home park operators. It is the largest such organization in California and, indeed, in the United States. the Association has a vital interest in the issues raised by this case because its members face those same issues continuously — particularly in California, where mobile home rent control ordinances are ubiquitous and the courts are inhospitable to the claims of park owners to a fair return on investments. As shown in the Petition for Certiorari, the California courts provide no real remedy for park owners, making their ability to litigate their claims in federal court a necessity. Because of the depth of its membership, WMA is able to present an industry-wide perspective to the Court.

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[1] Counsel for WMA authored this brief in whole and no other person or entity other than WMA, its members or counsel have made a monetary contribution to the preparation or submission of this brief. WMA notified counsel for the parties ten days before this filing that we intended to file this brief.

SUMMARY OF ARGUMENT

The rule laid down in *Williamson County Reg. Plan. Commn. v. Hamilton Bank*, 473 U.S. 172 (1985), i.e., that a property owner does not have a "ripe" regulatory taking claim under the 5th and 14th Amendments to the United States Constitution until first seeking — and failing to obtain — redress under state law in state court, has caused jurisprudential havoc in the quarter-century of its existence. Even its most ardent supporters have conceded the lack of intellectual and legal soundness in its holding.

In its most recent opportunity to examine the rule, four Justices of this Court agreed that the rule is in sharp need of re-evaluation and perhaps should be discarded. (*San Remo Hotel v. City & County of San Francisco*, 545 U.S. 323, 340 [2005]; Rehnquist, C.J., concurring, joined by O'Connor, Kennedy and Thomas, JJ.) It is time for the full Court to join those four and end the anarchy set loose by *Williamson County*. The confusion it has created below is exemplified by the 9th Circuit's opinion herein, where that court acknowledged that California provides no compensatory remedy for Petitioner yet nonetheless dispatched Petitioner to the California courts for "relief." Certiorari should be granted so this issue may be put to rest, allowing the courts and parties to expend their efforts dealing with the merits

of the substantial constitutional issues presented by these cases.

REASONS FOR GRANTING THE PETITION

I.

WILLIAMSON COUNTY CONTAINED A FATAL FLAW: IT WRONGLY ASSUMED THAT A 5TH AMENDMENT TAKING WITHOUT JUST COMPENSATION IS NOT COMPLETE UNTIL A STATE COURT ADJUDICATES THAT THE LOCAL AGENCY REALLY WILL NOT PAY

The 5th Amendment's Just Compensation Clause (the first element of the Bill of Rights incorporated into the 14th Amendment's Due Process Clause)[2] prohibits government from taking private property for public use unless it pays just compensation. A violation of that provision occurs as soon as government action takes private property and the municipality fails or refuses to pay. There is nothing in either logic or the language of the 5th Amendment to require state court certification of non-payment before the taking is complete.

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

A.

The *San Remo* Concurrence Disclosed The *Williamson County* Flaw

The four concurring Justices in *San Remo* questioned whether *Williamson County* "was correct in demanding that once a government entity has reached a final decision with respect to a claimant's property, the claimant must seek compensation in state court before bringing a federal takings claim in federal court." (*San Remo*, 545 U.S. at 340; concurring opinion.)

The *San Remo* concurrence put its finger on *Williamson County*'s flaw: *Williamson County* held that a taking is not complete until compensation is denied not just by the taking entity, but also by the state courts. No law mandates that result, and even *Williamson County*'s analysis does not support it.

B.

The *Williamson County* Analysis Injected Confusion Into The Relationship Between State And Federal Courts

Williamson County quite properly began with the words of the 5th Amendment, noting

that the constitutional provision "does not proscribe the taking of property; it proscribes taking without just compensation." (473 U.S. at 194.) The problem arises because the Court then blurred the distinction between acts of the agency that actually committed the taking and the State that may or may not have provided a method to obtain compensation through litigation. (473 U.S. at 195-196.)

But the *state* is not involved in 42 U.S.C. § 1983 cases like this one. States and their officials cannot be sued under Section 1983 (*Will v. Michigan Dept. of Police*, 491 U.S. 58 [1989]), nor (with very narrow exceptions [*Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721 (2003)]) can they be brought into federal court at all against their will (U.S. Const., 11th Amendment). The real issue in cases like this is whether the local entity — like the City of Carson here — is alleged to have taken private property for public use and failed to pay for it. If so, the question whether the city can be *compelled* to pay lies at the heart of litigation in either state or federal court.

The crux of the problem with *Williamson County* is that it *merged the state legal system with the local agency defendant* and disregarded the plain words of the Constitution. Nothing in the 5th Amendment requires multiple litigation or state court

deference. It does not say ". . . nor shall private property be taken for public use without just compensation *as finally determined by suing the municipal defendant in state court*."[3]

The issue is not whether a state has countenanced the constitutional violation, but whether the municipal defendant has committed it. 42 U.S.C. § 1983 forbids any person, including municipalities (*Monell v. Dept. of Social Services*, 436 U.S. 658, 690 [1978]), acting under color of state law from violating rights secured by federal law. The gravamen of a 5th Amendment claim is a taking of property[4] and nonpayment by the taker. When a municipal government — like Carson — conscripts private property into public service without any pretext of compensation, it violates the 5th Amendment. The presence or absence of a state remedy has

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

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

no bearing on whether the malefactor did the deed.

C.

Williamson County Was Undermined By Later Decisions

A year after *Williamson County*, the Court seemed to understand this, explaining *Williamson County* as being based on the premise that "a court cannot determine whether a municipality has failed to provide 'just compensation' until it knows what, if any, compensation *the responsible administrative body intends to provide*." (*MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 350 [1986]; citation omitted; emphasis added.) At another point, the same opinion talks of determining "if *proffered* compensation is 'just.'" (477 U.S. at 350; emphasis added.) Neither formulation requires state court litigation. If needed, a simple inquiry can answer questions of "intent" and "proffer."

After saying that in *MacDonald*, the Court again explained *Williamson County* as holding that "an illegitimate taking might not occur *until the government refuses to pay*" (*First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 320, fn. 10 [1987]; emphasis added), without any reference

to whether a state court had refused to *order* payment. In any event, if a city refuses to provide compensation as required by the U.S. Constitution and recourse to the courts must be had, there is no reason why such recourse should — let alone must — be had only in *state* courts when the *federal* constitution is being violated.

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

D.

State Courts Cannot Control Federal Court Jurisdiction

Mandating suit in state court imports into the 5th Amendment a remedial requirement when the just compensation language is a limitation on government's inherent power, not an invitation to sue for

payment,[5] and where the Just Compensation Clause is self-executing. (*First English*, 482 U.S. at 315.)

If nothing else, any required suit for payment is contrary to Congressional policy established in 1970 in the Uniform Relocation Assistance and Real Property Acquisition Policies Act, which provides that the old days of grabbing property first and then saying "sue me" to the aggrieved owner are over. That Act makes it illegal for government agencies to make it necessary for property owners to sue for their just compensation. Rather, the duty is the government's to acquire whatever property interests are needed for the public good, either by negotiation (42 U.S.C. § 4651[1]) or, failing that, condemnation (42 U.S.C. § 4651[8]).[6]

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[5] See Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century Just Compensation Law*, 52 Vand. L. Rev. 57, 60-61 (1999); J. David Breemer, *Overcoming* Williamson County's *Troubling State Procedures Rule: How the* England *Reservation, Issue Preclusion Exceptions, and the Inadequacy Exception Open the Federal Courthouse Door to Ripe Takings Claims*, 18 J. Land Use & Envtl. L. 209, 219-225 (2003).

[6] The Act provides succinctly, "No Federal agency head shall intentionally make it necessary for an owner to institute legal proceedings to prove the

In any event, if suit is required to demonstrate the actuality of a 5th Amendment violation, there is nothing in the 5th Amendment directing that the *only* place to seek that determination is in *state* court. As state and federal courts have concurrent jurisdiction to decide constitutional claims, the choice of forum, as in other cases, should belong in the first instance to the plaintiff.[7]

Nor are other constitutional rights treated that way.[8] Just as the Constitution

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fact of the taking of his real property." (42 U.S.C. § 4651[8].) To make this a truly "uniform" law, as its title advertised, the policies in were made applicable to the states — by directing that federal funds could not be spent on state projects unless the state agreed to comply with these policies. (42 U.S.C. § 4655.)

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

[8] *Williamson County*'s analogy to the Tucker Act's provisions for suing the United States for a taking (473 U.S. at 194), while superficially plausible, seems inapt. All that the Tucker Act cases say is that, before a property owner can sue to *invalidate* a federal law as a taking, the owner must first sue in a *federal* court for compensation under the *federal* Constitution. (E.g., *Preseault v. I.C.C.*, 494

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

U.S. 1 [1990].) That is all the Petitioners (and others like them) want: the ability to sue the offending municipality immediately in a *federal* court for compensation for violating the *federal* Constitution.

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

U.S. 131, 148 [1988] [Section 1983 suits are enforceable in federal court "in the first instance"]; cf. *Screws v. U.S.*, 325 U.S. 91, 108 [1945].)

If, as *Williamson County* said, the federal violation is not ripe until a *state court* verifies that state law provides no remedy, then *all* Section 1983 litigation would have to begin in state courts. In the words of the leading treatise, "If there is a reason why free speech cases are heard by federal judges with alacrity and property rights cases receive the treatment indicated above [i.e., diversion to state courts], it is not readily discernible from the Constitution." (Steven J. Eagle, Regulatory Takings 1070 [2d ed. 2001].)[10]

There is no need to sue in State court merely to confirm the non-payment of just compensation. The non-payment is obvious; it is the reason for the suit. Had there been payment, there would be no litigation. This can

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10 See also Peter A. Buchsbaum, *Should Land Use Be Different? Reflections on Williamson County Regional Planning Board v. Hamilton Bank*, in Taking Sides on Takings Issues: Public and Private Perspectives, ch. 20 (ABA 2002; Thomas E. Roberts, ed.) (contrasting the treatment of land use cases with police brutality and parade permit cases).

be seen in any regulatory taking case. In *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999), for example, the taking occurred in 1986, the case was furiously litigated, through two appeals to the 9th Circuit and one trip to this Court. That process consumed 13 years. At no time — even after a trial on the merits resulted in a compensatory judgment — did the city volunteer to pay anything. Suit was not necessary to determine the lack of compensation, or the city's lack of interest in paying.

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

With respect, *Williamson County* erroneously construed the 5th Amendment to require a wasteful detour through state courts as a precursor to federal court litigation of a

core federal constitutional issue. As shown below, lower court efforts to grapple with this rule, attempting to apply it while also giving deference to general rules of preclusion, have created only chaos. It is time for this Court to acknowledge the original error and overrule the state court ripening requirement.

II.

THE *SAN REMO* CONCURRENCE WAS CORRECT: IT IS TIME TO END THE CONFUSION AND THE UNFAIRNESS CAUSED BY *WILLIAMSON COUNTY*

Precedent is not cast aside lightly. Nor should it be. However, as important to the law as *stare decisis* is, even this Court's decisions are not carved on stone tablets.[11] History has shown that when the scholarly community has been critical of its decisions,[12] when application of a precedent has produced a rule which "stands only as a trap for the unwary,"[13] when

[11] See *Lingle v. Chevron U.S.A.*, 544 U.S. 528, 531, 548 (2005) (overruling a relatively recent takings law precedent which proved to be doctrinally anomalous) ("Today we correct course.").

[12] *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 48 (1977).

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

necessary to clarify the implications of earlier decisions in light of more recent history,[14] when decisions of this Court are "if not directly" conflicting, "are so in principle,"[15] or when "the answer suggested by our prior opinion is not free of ambiguity,"[16] the Court has reconsidered prior decisions.[17] This is such an historic moment.

That the *Williamson County* rule fits the Court's list of reasons to reexamine precedent was made evident in *San Remo Hotel*. The late Chief Justice's concurring opinion (joined by Justices O'Connor, Kennedy and Thomas) noted that "*Williamson County*'s state-litigation rule has created some real anomalies . . . all but guarantee[ing] that claimants will be unable to utilize the federal courts to enforce the Fifth Amendment's just compensation guarantee." (545 U.S. at 351.) Acknowledging that other litigants are not subjected to such a rule, the *San Remo* concurrence questioned "why federal takings claims in particular should be singled out to be confined to state court . . . ." (545 U.S. at 351.) The opinion concludes that "the

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

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

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

[17] *Continental*, 433 U.S. at 48-49.

justifications for [*Williamson County*'s] state litigation requirement are suspect, while its impact on takings plaintiffs is dramatic" and urges the Court to "reconsider whether plaintiffs asserting a Fifth Amendment takings claim based on the final decision of a state or local government entity must first seek compensation in state courts." (545 U.S. at 352.)

This is the case for which the *San Remo* concurrence was searching. It is time to reexamine the *Williamson County* rule and, upon such examination, to align the rights of property owners with those of others seeking to enforce guarantees from the Bill of Rights.

A.

The Scholarly Community Has Harshly Criticized *Williamson County*'s "Ripeness" Test

Almost from its inception, *Williamson County*'s ripeness rule has been questioned by legal scholars. Even those who favor its result, agree that its wording and its application are, at best, confusing and perhaps much worse.

Indeed, legal scholars seem to have engaged in some sort of competition to discern who could devise the harshest way to describe the impact of *Williamson County* on litigants.

Scholarly descriptions run the gamut and include "unpleasant,"[18] "ironic,"[19] "ill-considered,"[20] "dramatic,"[21] "shocking" and "absurd"[22] "worse than mere chaos,"[23] "inherently nonsensical" and "self-stultifying,"[24] "riddled with obfuscation and inconsistency,"[25]

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[18] Thomas E. Roberts, *Fifth Amendment Taking Claims in Federal Court: The State Compensation Requirement and Principles of Res Judicata*, 24 Urb. Law. 479, 480 (1992).

[19] Kathryn E. Kovacs, *Accepting the Relegation of Takings Claims to State Courts: The Federal Courts' Misguided Attempts to Avoid Preclusion Under* Williamson County, 26 Ecology L.Q. 1, 20 (1999).

[20] Thomas E. Roberts, *Facial Takings Claims Under* Agins-Nectow: *A Procedural Loose End*, 24 U. Hawaii L. Rev. 623, 635 (2002).

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

[22] *Id.* at 27.

[23] Robert H. Freilich & Joseph M. Divebliss, *The Public Interest is Vindicated*: City of Monterey v. Del Monte Dunes, 31 Urb. Law. 371, 387 (1999).

[24] *Id.*

[25] Testimony of Prof. Daniel R. Mandelker, reproduced at 31 Urb. Law. 232, 236 (1999).

"surprising,"[26] "misleading,"[27] "bewildering,"[28] "unclear and inexact,"[29] "paradoxical,"[30] "nonsense" and "an anomaly,"[31] "most confusing,"[32] and containing an "*Alice in Wonderland* quality."[33]

While it is true that the scholarly community does not constitute some sort of

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[26] Thomas E. Roberts, *Ripeness and Forum Selection in Fifth Amendment Takings Litigation*, 11 J. Land Use & Envt'l L. 37, 67 (1995).

[27] *Id*. at 71.

[28] Stephen E. Abraham, Williamson County *Fifteen Years Later: When Is a Takings Claim (Ever) Ripe?* 36 Real Prop., Probate & Trust J. 101, 126 (2001).

[29] Robert Meltz, Dwight H. Merriam & Richard M. Frank, The Takings Issue 67 (1999).

[30] Gregory M. Stein, *Regulatory Takings and Ripeness in the Federal Courts*, 48 Vand. L. Rev. 1, 22 (1995).

[31] Peter A. Buchsbaum, *Should Land Use Be Different? Reflections on* Williamson County Reg'l Planning Bd. v. Hamilton Bank in Taking Sides on Takings Issues 471, 472, 480 (Thomas E. Roberts, ed. 2002).

[32] Jan G. Laitos, Law of Property Rights Protection, p. 10-20 (1999).

[33] Steven J. Eagle, *The Development of Property Rights in America and the Property Rights Movement*, 1 Geo. J.L. & Pub. Pol'y 77, 111 (2002).

super reviewing body able to disavow the Court's opinions, the sheer volume and intensity of criticism should give the Court pause. More than that, the criticism comes not only from those who oppose the rule, but from commentators who believe that regulatory taking litigation belongs in state court — precisely where *Williamson County* puts it. However, even they agree that the analysis and application of *Williamson County*, with its clear promise of a federal litigational forum after a state litigation loss is theoretically wrong, factually incorrect, and cruel to property owners seeking constitutional protection of their rights. Such scholarly unanimity shows the need for reconsideration.

B.

Lower Courts Found The *Williamson County* Rule So Unsatisfying That They Sought Ways Around It

Federal Courts of Appeals agreed with the scholarly unhappiness with *Williamson County* and the way they perceived its rule to operate. They termed it "odd,"[34]

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[34] *Fields v. Sarasota-Manatee Airport Auth.*, 953 F.2d 1299, 1307, n. 8 (11th Cir. 1992).

"unfortunate,"[35] "anomalous,"[36] "draconian" and "revolutionary,"[37] "ironic and unfair."[38]

In consequence, some courts sought to devise rules to fulfill what they thought was the promise of *Williamson County*, i.e., that after landowners had ripened their federal claims by filing *and losing* parallel constitutional claims under state law in state court, they could litigate their Fifth Amendment claims in federal court. (E.g., *Santini*, 342 F.3d at 130; *Fields*, 953 F.2d at 1307.)

Ultimately, this Court held that such exceptions to the Full Faith and Credit Act could not stand. (*San Remo*, 545 U.S. at 342-345.) Nonetheless, the fact that federal courts of appeals found it necessary to create such exceptions due to their view of the role of federal courts as the protectors of individual rights, demonstrates the concerns that those

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[35] *Id.* at 1306, n. 5.

[36] *Kottschade v. City of Rochester*, 319 F.3d 1038, 1041 (8th Cir. 2003).

[37] *Dodd v. Hood River County*, 59 F.3d 852, 861 (9th Cir. 1995).

[38] *Santini v. Connecticut Hazardous Waste Management Service*, 342 F.3d 118, 130 (2d Cir. 2003).

courts had about the unfairness inherent in the workings of *Williamson County*.

C.

Williamson County Has Plainly Operated as a Trap For Property Owners With Takings Claims

Both courts and commentators agree that litigants who attempt to follow *Williamson County* fall into the kind of "trap" described by this Court in *Complete Auto Transit,* 430 U.S. at 279,[39] a trap that should be eliminated from American jurisprudence. Regardless of the Court's rejection of Circuit Court efforts to avoid springing such a trap in *San Remo*, the existence of the trap cannot be gainsaid. *Williamson County* remains on the books, along with *San Remo*'s affirmation of the impact of state court litigation. The trap remains.

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[39] E.g., *Santini*, 342 F.3d at 127 ("a Catch-22 for takings plaintiffs"); Buchsbaum, *supra*, at 482 ("procedural morass"); Eagle, *supra*, at 109 ("labyrinth," "havoc"); David A. Dana & Thomas W. Merrill, Property Takings 264 (2002) ("trap"); Timothy V. Kassouni, *The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights*, 29 Cal. West. L. Rev. 1, 51 (1992) ("Kafkaesque maze").

D.

This Court Created At Least Confusion — If Not Outright Conflict — When It Added Both *City of Chicago* and *San Remo* To Its Jurisprudence

Twelve years after *Williamson County*, the Court decided *City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997). There, the property owner sued a city in state court, alleging both federal and state causes of action. The City of Chicago promptly removed the case to U.S. District Court.

This Court held that removal was proper. In spite of the facts that (1) 28 U.S.C. § 1441(a) allows removal only when the plaintiff could have brought suit in federal court in the first instance and (2) the *Williamson County* rule precluded the plaintiff from so doing, the Court held that "a case containing claims that local administrative action violates federal law . . . is within the jurisdiction of federal district courts." (522 U.S. at 528-529.)

Thus, after *City of Chicago*, the law apparently forbade property owners from seeking Fifth Amendment relief in federal court while allowing their municipal adversaries to invoke federal jurisdiction at their pleasure.

The lower federal courts have obviously been confused by the juxtaposition of these

cases. Some, as noted in the Petition, have refused to permit removal, going so far as to dismiss removed cases on appeal after trial and judgment. Others have allowed removal.

In a thoughtful examination of *Williamson County* and *City of Chicago*, the Eighth Circuit Court of Appeals believed that they disclosed an "anomalous . . . gap in Supreme Court jurisprudence," but declined to resolve the evident conflict because finding a resolution "is for the Supreme Court to say, not us." (*Kottschade*, 319 F.3d at 1041.)

Then came *San Remo*. Although *San Remo* presented ripeness issues, the property owner did not challenge the soundness of *Williamson County* in this Court. Thus, as the underlying merits had been decided in the California courts, the issue became one of res judicata and the Full Faith and Credit Act. The Court applied both in concluding that the state court decision was binding.

Two things stand out in *San Remo*. First, as *Williamson County*'s validity had not been drawn in issue, the Court's opinion simply assumed its continuing validity without any discussion. Second, as discussed in the Petition, four Justices signed a separate concurring opinion calling the validity of the state court litigation requirement of *Williamson County* into serious question. They

called for its review by the Court when the opportunity arose.

In the certiorari context, the point is that ripeness jurisprudence is not only confused, the confusion is apparent in decisions of this Court which, as the Eighth Circuit pointed out, is the only Court that can resolve the anomaly. It is time to do so, and this case provides an appropriate opportunity to bring some sense into this doctrine.

III.

THE NINTH CIRCUIT HAS PRECLUDED MOBILE HOME PARK OWNERS AS A CLASS FROM THE BENEFITS OF 42 U.S.C. §1983

By demanding that property owners like Colony Cove seek relief in the California courts under California law, the Ninth Circuit has effectively removed from that entire class of citizens the protection intended by 42 U.S.C. §1983.

As the Petition aptly shows, *there is no remedy available under California law for a Fifth Amendment taking under these circumstances.* (See *Kavanau v. Santa Monica Rent Control Bd*, 941 P.2d 851 [Cal. 1997]; *Galland v. City of Clovis*, 16 P.3d 130 [Cal. 2001].)

Moreover, if a property owner seeks relief in California's courts, the Ninth Circuit will not permit later litigation of any federal claims, as the decision at bar plainly shows.

Thus, the California courts have eliminated any ability for these property owners to recover just compensation for Fifth Amendment violations, and the federal courts in California have eliminated any federal avenue for redress. That makes a mockery of this Court's consistent application of 42 U.S.C. §1983, a statute whose "central purpose . . . is to provide *compensatory relief* to those deprived of their federal rights by state actors". (*Felder v. Casey*, 487 U.S. 131, 141 [1988].) The California courts' defiance of federal constitutional standards will have to await a certiorari petition from a California decision. The Ninth Circuit's closure of the federal courthouse doors can — and should — be remedied here.

CONCLUSION

Certiorari should be granted.

Respectfully submitted,

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