No. 14-439

In The
# Supreme Court of the United States

JACK KURTZ, *ET AL.*,

*Petitioners*,

v.

VERIZON NEW YORK, INC., *ET AL.*,

*Respondents.*

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

## BRIEF *AMICUS CURIAE* OF NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF PETITIONERS


EMILY ADAMS
Adams Legal, LLC
1310 Madera Hills Drive
Bountiful, Utah 84010
(801) 309-9625

KAREN R. HARNED
LUKE A. WAKE
NFIB Small Business
Legal Center
1201 F Street, NW, Suite 200
Washington, D.C. 20004
(202) 314-2048

ROBERT H. THOMAS
*Counsel of Record*
CHRISTOPHER J.I. LEONG
Damon Key Leong Kupchak Hastert
1003 Bishop Street, 16th Floor
Honolulu, Hawaii 96813
(808) 531-8031
*rht@hawaiilawyer.com*

*Counsel for* Amicus Curiae

## QUESTIONS PRESENTED

*Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), held that to state a ripe claim for a regulatory taking, property owners must both (1) demonstrate the government reached a "final decision" about what uses may be made of the property, and (2) seek and be denied just compensation in state court. The rationale supporting the second prong—the "state remedies" requirement—was takings-specific: there can be no "taking without just compensation" under the Fifth and Fourteenth Amendments if a state court has not denied compensation. This required takings plaintiffs to exhaust state remedies before coming to federal court, a requirement inapplicable to any other constitutional right. The Second Circuit in this case expanded the exhaustion requirement beyond takings claims, holding that a property owner's procedural due process claim is not ripe in federal court when the due process claim shares facts in common with a takings claim, and the property owner has not sought just compensation in state court. The questions presented are:

1. Does *Williamson County*'s exhaustion of state remedies requirement apply to a procedural due process claim if that claim shares some of the same facts as a takings claim?

2. Should *Williamson County*'s state remedies requirement be overruled?

## TABLE OF CONTENTS

# TABLE OF AUTHORITIES

Page

**CASES**

**TABLE OF AUTHORITIES—Continued**

Page

**TABLE OF AUTHORITIES—Continued**

Page

**TABLE OF AUTHORITIES—Continued**

Page

**TABLE OF AUTHORITIES—Continued**



**CONSTITUTIONS, STATUTES, AND RULES**



**OTHER AUTHORITIES**

**TABLE OF AUTHORITIES—Continued**

Page

**TABLE OF AUTHORITIES—Continued**

Page

**TABLE OF AUTHORITIES—Continued**

Page

## INTEREST OF THE *AMICUS CURIAE*

The National Federation of Independent Business Small Business Legal Center (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses.[1] The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitols. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses.

NFIB represents 350,000 member businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business.

---

1. Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the *Amicus Curiae*'s intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court. Pursuant to Rule 37.6, *Amicus* affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus*, its members, or its counsel made a monetary contribution to its preparation or submission.

To fulfill its role as the voice for small business, the NFIB Legal Center frequently files amicus briefs in cases that will impact small businesses. Because small business owners typically invest substantial assets into acquisition of property for their entrepreneurial endeavors—often including their personal savings—it is imperative to ensure that their property rights are guaranteed meaningful protections, and that they are allowed access to federal courts when their rights have been violated. For this reason, NFIB Legal Center has taken a special interest in property rights cases. Specifically, NFIB Legal Center seeks to file in the present case to encourage this Court to reconsider its decision in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), because *Williamson County* has been applied to preclude small business owners from vindicating their federal rights in federal courts.

## SUMMARY OF ARGUMENT

For nearly 30 years, *Williamson County*'s state remedies requirement has required federal courts to wash their hands of their most sacred obligation: to serve as the forum for protecting federal constitutional rights. This Court cast the state remedies requirement as a necessary step in ripening a regulatory takings claim for eventual federal court review. But in practice, the state remedies requirement has become an insurmountable procedural hurdle for property owners asserting their federal constitutional rights, and is a categorical bar to federal review even where, as in this case, a property owner may assert more than just a takings claim. Not surprisingly, *Williamson County* has been subject to criticism from the academy, the practicing bar, and members of this Court.

This brief makes two points. First, NFIB Legal Center argues that there is no basis to extend *Williamson County*'s state remedies requirement to non-takings claims simply because those claims may share the same underlying facts with a takings claim. As this Court has held, takings and due process are distinct theories, with distinct remedies. The Second Circuit, however, abandoned that distinction. In doing so, it rewrote the plaintiffs' complaint and effectively eliminated their due process claims, requiring the plaintiffs to seek just compensation in state court. A procedural due process claim should not be subjected to a requirement to pursue "just compensation" in state courts, because in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 540-45 (2005), this Court made clear that due process and takings are different.

Second, this brief summarizes the tortured history of *Williamson County*, briefly reciting how the case has created inconsistent and irreconcilable decisions regarding claim preclusion, issue preclusion, and removal, the net result of which is that a property owner has almost no chance of having a federal court resolve her federal constitutional claim. NFIB Legal Center explicitly calls for this Court to overrule the *Williamson County* state remedies requirement.

## ARGUMENT

### I. *WILLIAMSON COUNTY*'S STATE REMEDIES REQUIREMENT DOES NOT APPLY TO PROCEDURAL DUE PROCESS CLAIMS

In *Williamson County*, a property owner sought compensation for a temporary regulatory taking when the county refused to allow it to complete a subdivision. Rather than addressing the merits of the question, this Court delved into the procedural question of whether the takings claim was premature. *Williamson County*, 473 U.S. at 181-82, 185. The Court first concluded that a regulatory takings claim is not ripe "until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Id.* at 186. Next, in dicta,[2] the Court articulated a second rule—the state remedies requirement—that required a property owner to avail itself of a state's adequate procedure for seeking just compensation and be denied compensation before bringing a federal takings claim in federal court. *Id.* at 195.

This state remedies requirement—which was not briefed by the parties or addressed by the lower courts in *Williamson County*—created a procedural purgatory for property owners. *See* 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*

2. In *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 741-42 (2010) (Kennedy, J., concurring), Justice Kennedy characterized *Williamson County*'s discussion of the state remedies prong as dicta.

*Claims*, 18 J. Land Use & Envtl. L. 209, 214-18 (2003). The distinction being that in the non-metaphorical Purgatory, one has at least the promise of eventually exiting. Not so with property owners caught in *Williamson County*'s purgatory where, as one author wrote, you can check out, but you can never leave. *See* David J. Breemer, *You Can Check Out But You Can Never Leave: The Story of the San Remo Hotel—The Supreme Court Relegates Federal Takings Claims to State Courts Under a Rule Intended to Ripen the Claims for Federal Review*, 33 B.C. Envtl. Aff. L. Rev. 247 (2006). The Second Circuit has now extended that Purgatory to due process claims as well.

### A. The Second Circuit Rewrote The Plaintiffs' Complaint

Complaints about so-called "judicial activism" usually object to courts "legislating from the bench" by reading words into statutes that aren't there, and the like. *See, e.g.,* Keenan D. Kmiec, *The Origin and Current Meanings of "Judicial Activism"*, 92 Calif. L. Rev. 1441, 1471 (2004) (quoting *Florida v. Wells*, 495 U.S. 1, 13 (1990) (Stevens, J., dissenting) ("But to reach out so blatantly and unnecessarily to make new law in a case of this kind is unabashed judicial activism.")). But perhaps the most pernicious—and ultimately more troubling—form of judicial activism is on full display in the Second Circuit's opinion here, because in order to reach its conclusion that Kurtz's procedural due process claims were subject to *Williamson County*'s requirements, the court first had to rewrite the plaintiffs' complaint.

In addition to the plaintiffs' takings claim that Verizon's placement of the terminal boxes on their proper-

ties is a *Loretto* invasion,[3] they asserted "Verizon violated their procedural due process rights by: 1) concealing their right to full compensation, or failing to notify them of it; 2) offering them no compensation; 3) giving the false impression that they must consent if they wanted telephone service in their own buildings; and 4) placing the onus on them to initiate an eminent domain proceeding if no agreement was reached." Pet. App. at 5. *See also Corsello*, 976 F. Supp. 2d at 356. The Second Circuit admitted that applying *Williamson County* ripeness to such procedural due process claims "is less clear." Pet. App. at 13.

That may be an understatement, because bringing an inverse condemnation lawsuit in a New York court won't address a due process violation: obtaining just compensation will do nothing to remedy a lack of notice and the opportunity to be heard, because just compensation is not a remedy under the Due Process Clause. *See* Stuart Minor Benjamin, *The Applicability of Just Compensation to Substantive Due Process Claims*, 100 Yale L.J. 2667, 2674 (1991) ("The most obvious problem with requiring that a litigant pursue just compensation in order to have a ripe substantive due process claim is that there seems to be no basis for such a rule in the language of the Fourteenth Amendment. The takings clause of the Fifth Amendment specifically refers to just compensation; the due process clause of the Fourteenth Amendment does not

3. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (placement of small cable box on property was a taking). The *Kurtz* plaintiffs alleged such a claim. *See Corsello v. Verizon N.Y., Inc.*, 976 F. Supp. 2d 354, 356 (E.D.N.Y. 2013).

include any language about compensation."). Takings claims are focused on the severity of the burden borne by a property owner as a consequence of a government's actions and what, if any, compensation is due. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539-40 (2005). Due process claims, on the other hand, are subject to an entirely separate test. *Id*. at 542 (noting that a test derived from due process jurisprudence "is not a valid method of discerning whether private property has been 'taken'"). Substantive due process claims examine whether a government's action is arbitrary or irrational. *Id.* Procedural due process claims focus on whether the process the government provided was constitutionally adequate. *See, e.g.*, *Bowlby v. City of Aberdeen*, 681 F.3d 215, 220-21 (5th Cir. 2012).[4] These due process claims do not hinge on whether a property owner was compensated. *Id*. at 225 (procedural due process claims can be "separately cognizable" from a takings claim). In other words, there are no state remedies to exhaust to ripen a due

4. There is a corollary between the case at bar and the petition now pending before this Court in *Kentner v. City of Sanibel*, No. 14-404 (cert. petition filed Oct. 3, 2014). Both ask the Court to clarify that due process claims are treated differently from takings claims. In *Kentner*, the Eleventh Circuit essentially said there are no due process property rights, so owners are left only with the Takings Clause for protection. In the present case, the Second Circuit treated a procedural due process claim the same as it would a takings claim. The point is that in the wake of *Lingle*, there is continued confusion among the lower courts over how they should approach cases where an owner might have conceivably brought a takings claim. Courts seem confused over the "inter-relatedness" or "separateness" of due process and takings claims, and need definitive guidance from this Court.

process claim.[5] Which means that to reach its conclusion, the Second Circuit simply rewrote the plaintiffs' complaint by merging its due process and takings claims, and in the process, blurred the distinction between them. But they are different claims, with different remedies, even if they may arise from the same circumstances.

But in the Second Circuit's view, they are the *same* claim ("coextensive," in the court's words), even though that is not what the plaintiffs alleged, nor what their claims sought. To the court, when a plaintiff's due process and takings claims arise from the same "nucleus of facts," she must "exhaust available state remedies," held the court. Pet. App. at 16, 18-19. The court concluded that applying *Williamson County*'s takings rule to due process claims would prevent clever lawyers from artfully pleading around the ripeness requirement, *see* Pet. App. at 17, and insulated the court from having to untangle "messy distinctions based upon how a due process claim is pled." Pet. App. at 18.

However, if the facts support a both a takings claim and a due process claim, it is not the place of the court to rewrite a complaint. And where, as here, a court does so, that's not law, it's naked judicial activism dressed up as law.

---

5. The other *Williamson County* test (finality) makes even less sense in the due process context: no other action by Verizon would make the extent of the due process violation more clear, when Kurtz's cause of action was based on Verizon's alleged bad acts and omissions, and not on whether it took action that resulted in an impact to Kurtz's property that was the functional equivalent of an exercise of eminent domain.

### B. *Williamson County*'s State Remedies Requirement Does Not Make Sense In Non-Takings Claims

The Second Circuit's lumping of procedural due process claims into takings jurisprudence was not merely "less than clear" as the court candidly recognized. It was nonsensical: if left unreviewed by this Court, Kurtz must seek just compensation in state court for a violation of due process. *Williamson County*'s ripeness requirements have been subject to withering criticism from the academy and the practicing bar,[6] and members of this Court. *See San Remo Hotel, L.P. v. City & Cnty. of San Francisco*, 545 U.S. 323, 348-49 (2005) (Rehnquist, C.J., joined by O'Connor, Kennedy, and Thomas, JJ., concurring) (state remedies requirement was a mistake). It makes even less sense to transport a maligned doctrine that was

---

6. *See, e.g.*, Michael M. Berger & Gideon Kanner, *Shell Game! You Can't Get There from Here: Supreme Court Ripeness Jurisprudence in Takings Cases at Long Last Reaches Self-parody Stage*, 36 Urb. Law. 671, 702-03 (2004); J. David Breemer, *You Can Check Out But You Can Never Leave: The Story of* San Remo Hotel—*The Supreme Court Relegates Federal Takings Claims to State Courts Under a Rule Intended to Ripen the Claims for Federal Review*, 33 B.C. Envtl. Aff. L. Rev. 247, 306 (2006); Barry Friedman, *Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts*, 104 Colum. L. Rev. 1211, 1264 (2004); Douglas T. Kendall *et al.*, *Choice of Forum and Finality Ripeness: The Unappreciated Hot Topics in Regulatory Takings Cases*, 33 Urb. Law. 405, 408-09 (2001); Michael B. Kent, Jr., *Fourth Circuit Survey: Comment: Weakening the "Ripeness Trap" for Federal Takings Claims:* Sansotta v. Town of Nags Head *and* Town of Nags Head v. Toloczko, 65 S.C L. Rev. 935, 936 (2014); Thomas E. Roberts, *Ripeness and Forum Selection in Fifth Amendment Takings Litigation*, 11 J. Land Use & Envtl. L. 37, 71 (1995).

developed especially to ensure ripe takings claims to due process, because compensation plays no role in due process remedies. *See Grace Cmty. Church v. Lenox Twp.*, 544 F.3d 609, 618 (6th Cir. 2008) ("[A] procedural due process claim is the only type of case in which we have not imposed the finality requirement on constitutional claims arising out of land use disputes." (quotation omitted)); *Front Royal & Warren Cnty. Indus. Park Corp. v. Town of Front Royal*, 135 F.3d 275, 283 n.3 (4th Cir. 1998) (stating that *Williamson County*'s exhaustion concerns are absent in due process and equal protection claims). And the ripeness of due process claims can be determined through normal ripeness rules. *See Bowlby*, 681 F.3d at 223-24.

In light of the Second Circuit's actions, and this Court's direction in *Lingle* about the separateness of takings and due process claims, this case presents an ideal vehicle for this Court to finally clarify that the *Williamson County* state remedies requirement does not apply to non-takings claims—if it should apply to any claims at all. The lower courts only decided the threshold *Williamson County* issue without addressing the merits of the case, so this Court could release a narrow opinion focused only on the *Williamson County* issue.

## II. *WILLIAMSON COUNTY*'S STATE REMEDIES REQUIREMENT IS RIPE FOR ABANDONMENT

*Williamson County*'s three-decade experiment with property owners' rights has run its course, and it is time to jettison it for good. The case has managed to cut a swath of destruction through takings doctrine, and unless checked by this Court, will continue to

expand beyond its borders to taint other areas of law, as in the case at bar.

This section of our brief summarizes how the state remedies requirement, combined with doctrines such as issue and claim preclusion, removal, and abstention, has bludgeoned property owners, and how *Williamson County*'s rules, designed to ensure federal takings claims are ready for federal review, have instead ripened into a nearly impossibly high wall around federal courts that sentences property owners to litigate all of their federal constitutional claims in state court.[7] An initial issue arose with the interplay between *Williamson County* and claim preclusion. *Williamson County* required takings plaintiffs to first bring their claims in state court, and the Full Faith and Credit Act, 28 U.S.C. § 1738, required preclusive effect be given a state-court judgment according to the state's claim preclusion rules. *See DLX, Inc. v. Kentucky*, 381 F.3d 511, 520 (6th Cir. 2004). Many state claim preclusion rules prevented litigants from relitigating claims that were raised or should have been raised in prior litigation. *See, e.g.*, *San Remo Hotel L.P. v. San Francisco City & Cnty.*, 364 F.3d 1088, 1094 (9th Cir. 2004); *DLX*, 381 F.3d at 520. Consequently, takings plaintiffs were required to bring all their claims—state and federal—in their initial state court proceedings or risk waiving their federal claims indefinitely. *See, e.g.*, *Fields v. Sarasota Manatee Airport Auth.*, 953 F.2d 1299, 1303 (11th Cir. 1992). Many federal courts strictly applied claim preclusion

7. The claims subject to *Williamson County* are not limited to takings and related claims. In *Sunrise Detox V, LLC v. City of White Plains*, 769 F.3d 118 (2d Cir. 2014), the Second Circuit applied the doctrine to a claim under the Americans With Disabilities Act.

to these takings claims, even though they recognized that takings litigants were only litigating in state court to comply with the *Williamson County* state remedies rule. *See Wilkinson v. Pitkin Cnty. Bd. of Cnty. Comm'rs*, 142 F.3d 1319, 1324 (10th Cir. 1998) ("We conclude the *Williamson* ripeness requirement is insufficient to preclude application of res judicata and collateral estoppel principles in this case."); *Palomar Mobilehome Park Ass'n v. City of San Marcos*, 989 F.2d 362, 365 (9th Cir. 1993) ("We are compelled to conclude that res judicata bars Palomar's claims in federal court, despite the requirements of *Williamson*.").

In an effort to alleviate the rigid application of claim preclusion rules that prevented takings plaintiffs from litigating their federal claims in federal court, some courts carved out an exception: following this Court's guidance in *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 421 (1964),[8] these courts held that a takings plaintiff could bring its federal claims in federal court after the conclusion of the state court proceedings if, during the state court proceedings, the plaintiff made a formal reservation on the record that in the event of an adverse state court ruling, the plaintiff would bring federal claims in federal court.[9] But several federal courts refused to

8. *England* held that a litigant who involuntarily litigates in state court may "inform the state courts that he is exposing his federal claims there only for the purpose of complying with *Windsor* [which requires a litigant to inform the state courts what the federal claims are], and that he intends, should the state courts hold against him on the question of state law, to return to the [federal] District Court for disposition of his federal contentions." *Id.* at 421.

9. *San Remo Hotel L.P. v. San Francisco City & Cnty.*, 364 F.3d 1088, 1094 (9th Cir. 2004) ("The City does not dispute that

apply an *England* reservation to takings claims because, according to those courts, *England* only applied when a case originated in federal court, and in a takings case, *Williamson County* required that the case originate in state court.[10] But even if a takings plaintiff were allowed to make an *England* reservation in state court, a plaintiff reaching federal court faced issue preclusion. *See Dodd v. Hood River Cnty.*, 136 F.3d 1219, 1227 (9th Cir. 1998) ("Because the [takings claimants] were effectively able to reserve

---

the plaintiffs' *England* reservation was sufficient to avoid the doctrine of *claim* preclusion . . . ."); *DLX*, 381 F.3d at 523 ("[A] party's *England* reservation of federal takings claims in a state takings action will suffice to defeat claim preclusion in a subsequent federal action."); *Santini v. Conn. Hazardous Waste Mgmt. Serv.*, 342 F.3d 118, 121 (2d Cir. 2003) ("We hold that litigants who pursue inverse condemnation actions in state court in order to comply with *Williamson County* may reserve their federal takings claims for later resolution in federal court."); *Saboff v. St. John's River Water Mgmt. Dist.*, 200 F.3d 1356, 1359-60 (11th Cir. 2000) (noting that a plaintiff may reserve "her constitutional claims for subsequent litigation in federal court by making on the state record a reservation as to the disposition of the entire case by the state courts to preserve access to the federal forum" (quotations omitted)); *Front Royal & Warren Cnty. Indus. Park Corp. v. Town of Front Royal*, 135 F.3d 275, 283 (4th Cir. 1998) (noting that "an *England*-type reservation may be made of a federal takings claim when a litigant proceeds first in state court pursuant to *Williamson County*").

10. *Peduto v. City of N. Wildwood*, 878 F.2d 725, 729 n.5 (3d Cir. 1989) ("[A]s plaintiffs here invoked the jurisdiction of the state court in the first instance, the application of *England* has no relevance here. . . ."); *Fuller Co. v. Ramon I. Gil, Inc.*, 782 F.2d 306, 312 (1st Cir. 1986) ("In order to make an *England* reservation, a litigant must establish its right to have its federal claims adjudicated in a federal forum by properly invoking the jurisdiction of the federal court in the first instance.").

their claim for federal court [under *England*], the reservation doctrine does not enable them to avoid preclusion of issues actually litigated in the state forum." (citation omitted)). The issue preclusion doctrine, in relevant part, prohibits the relitigation in a subsequent proceeding of a necessary factual or legal issue that was decided in the prior proceeding. *Id.* at 1224. Oftentimes, the issues raised in the state court inverse condemnation proceeding were identical to the issues that would be raised in a Fifth Amendment takings clause claim in federal court, and those issues would be actually litigated and decided by the state court; once decided in state court, those issues could not be relitigated in federal court. *See, e.g.*, *San Remo Hotel L.P. v. San Francisco City & Cnty.*, 364 F.3d 1088, 1096 (9th Cir. 2004) ("[T]he doctrine of issue preclusion can apply to bar relitigation in federal court of issues necessarily decided in state court, notwithstanding that plaintiffs must litigate in state court pursuant to . . . *Williamson County*."). But some circuits found that applying issue preclusion to takings claims in federal court was unfair and instead ruled that a takings plaintiff, having made the *England* reservation, was not barred by issue preclusion from bringing federal takings claims in federal court. *See Santini*, 342 F.3d at 130 ("It would be both ironic and unfair if the very procedure that the Supreme Court required Santini to follow before bringing a Fifth Amendment takings claim—a state-court inverse condemnation action—also precluded Santini from ever bringing a Fifth Amendment takings claim.").

Given this division in the circuits, this Court granted review in *San Remo* to decide the question whether it "should create an exception to the full faith and

credit statute . . . in order to provide a federal forum for litigants who seek to advance federal takings claims that are not ripe until the entry of a final state judgment denying just compensation [i.e., the *Williamson County* requirement]." *San Remo Hotel, L.P. v. City & Cnty. of San Francisco*, 545 U.S. 323, 337 (2005). In answering this question, this Court held that parties could not use an *England* reservation to "negate the preclusive effect of the state-court judgment with respect to any and all federal issues that might arise in . . . future federal litigation." *Id.* at 338.

But Chief Justice Rehnquist—joined by Justices O'Connor, Kennedy, and Thomas—concurred and wrote separately to explain why he believed that the *Williamson County* state remedies requirement was a mistake. *Id.* at 348-49 (Rehnquist, C.J., concurring). He noted the Court had construed the state remedies requirement as a prudential concern, rather than as a requirement stemming from the Constitution, and expressed doubt that constitutional or prudential principles actually necessitated the requirement. *Id.* at 349 (Rehnquist, C.J., concurring). The four Justices noted the state remedies requirement had "created some real anomalies" and practically ensured that litigants who go to state court to seek compensation for the taking would not be able to assert their federal claims in federal court. *Id.* at 351 (Rehnquist, C.J., concurring). In the absence of "any asserted justification or congressional directive[,]" it was unclear "why federal takings claims in particular should be singled out to be confined to state court," especially when the impact of such a requirement on takings plaintiffs "is dramatic." *Id.* at 351-52 (Rehnquist, C.J., concurring).

That dramatic effect has become even more pronounced as governments have employed the *William-*

*son County* state remedies requirement as a weapon to short-circuit property owners' claims that are brought, as they are required to, in state court. In *City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156 (1997), this Court held that a takings claim, among others, that was filed in state court could be properly removed to federal court. *Id.* at 161, 164. The majority never mentioned the *Williamson County* state litigation requirement. Employing that decision, governmental defendants have even removed these cases to federal court based on federal question jurisdiction, and then, with all the *chutzpah* that can be mustered, asserted under *Williamson County* that the claims are not ripe for federal court review *because they were not raised in state court*.

Some courts don't buy this tactic. *See, e.g.*, *Yamagiwa v. City of Half Moon Bay*, 523 F. Supp. 2d 1036, 1110 (N.D. Cal. 2007) (city removed case to federal court, and on the eve of trial sought remand under *Williamson County*; court rejected the argument, concluding, "the City having invoked federal jurisdiction, its effort to multiply these proceedings by a remand to state court smacks of bad faith"). *See also Sherman v. Town of Chester*, 752 F.3d 554, 564 (2d Cir. 2014); *Sansotta v. Town Nags Head*, 724 F.3d 533, 544-47 (4th Cir. 2013); *Key Outdoor Inc. v. City of Galesburg*, 327 F.3d 549, 550 (7th Cir. 2003). But many do.[11] Consequently, many takings plaintiffs are

11. *See Koscielski v. City of Minneapolis*, 435 F.3d 898, 903-04 (8th Cir. 2006); *Sandy Creek Investors, Ltd. v. City of Jonestown*, 325 F.3d 623, 626 (5th Cir. 2003) (dismissing case on appeal because district court did not have jurisdiction to resolve takings claims that were removed from state court); *Ohad Assocs., LLC v. Twp. of Marlboro*, Civil No. 10-2183 (AET), 2011 U.S. Dist. LEXIS 8414, at *3, 6-8 (D.N.J. Jan. 28, 2011); *8679 Trout, LLC v. N. Tahoe Pub. Utils. Dist.*, No. 2:10-

unable to complete the *Williamson County* state remedies requirement and may be barred from filing a second suit by the statute of limitations. *See* J. David Breemer, *The Rebirth of Federal Takings Review? The Courts' "Prudential" Answer to* Williamson County*'s Flawed State Litigation Ripeness Requirement*, 30 Touro L. Rev. 319, 334 n.78 (2014).

The problems do not end with removal and preclusion. The *Rooker-Feldman* doctrine prevents any meaningful federal review of federal takings claims that are brought in state court.[12] And finally, even though the *Williamson County* requirements were developed in the context of temporary regulatory takings, several courts have expanded the *Williamson County* state remedy rule to physical takings.[13]

In its wake, the *Williamson County* state remedies requirement has created confused courts, fractured circuits, and left takings plaintiffs to the whims of state courts. For three decades, the requirement has prevented any effective redress for property owners,

---

cv-01569-MCE-EFB, 2010 U.S. Dist. LEXIS 93303, at *4, 13-14 (E.D. Cal. Sept. 8, 2010); *Rau v. City of Garden Plain*, 76 F. Supp. 2d 1173, 1174-75 (D. Kan. 1999); *see also Del-Prairie Stock Farm, Inc. v. Cnty. of Walworth*, 572 F. Supp. 2d 1031, 1034 (E.D. Wis. 2008) (recognizing the incoherent application of the *Williamson County* state litigation requirement and remanding a removed case to state court rather than dismiss the takings claims).

12. *San Remo Hotel*, 545 U.S. at 351 (Rehnquist, C.J., concurring); *Johnson v. City of Shorewood*, 360 F.3d 810, 819 (8th Cir. 2004).

13. *Peters v. Village of Clifton*, 498 F.3d 727, 732 (7th Cir. 2007); *Urban Developers LLC v. City of Jackson*, 468 F.3d 281, 294-95 (5th Cir. 2006); *Pascoag Reservoir & Dam, LLC v. Rhode Island*, 337 F.3d 87, 91 (1st Cir. 2003).

and without effective redress, the constitutional guarantee enshrined in the Fifth Amendment against uncompensated takings is meaningless.

Until *Williamson County* is finally relegated to history's dustbin, these tactics will continue, and will no doubt resonate with those federal courts wanting to avoid addressing takings claims. All property owners seek are the same opportunities afforded others who assert their federal constitutional civil rights claims: the chance to have a federal court determine their federal rights.

## CONCLUSION

For the foregoing reasons, this Court should grant certiorari to review the Second Circuit's judgment.

Respectfully submitted.

EMILY ADAMS
Adams Legal, LLC
1310 Madera Hills Drive
Bountiful, Utah 84010
(801) 309-9625

KAREN R. HARNED
LUKE A. WAKE
NFIB Small Business
Legal Center
1201 F Street, NW, Suite 200
Washington, D.C. 20004
(202) 314-2048

ROBERT H. THOMAS
*Counsel of Record*
CHRISTOPHER J.I. LEONG
Damon Key Leong Kupchak Hastert
1003 Bishop Street, 16th Floor
Honolulu, Hawaii 96813
(808) 531-8031
*rht@hawaiilawyer.com*

*Counsel for* Amicus Curiae

NOVEMBER 2014.