No. 14-439

In The
Supreme Court of the United States

JACK KURTZ, et al.,

Petitioners,

v.

VERIZON NEW YORK, INC., fka NEW YORK TELEPHONE COMPANY, et al.,

Respondents.

On Petition For A Writ Of Certiorari To
The United States Court Of Appeals
For The Second Circuit

BRIEF OF *AMICI CURIAE* THE NATIONAL ASSOCIATION OF HOME BUILDERS AND FRANKLIN P. KOTTSCHADE IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

The National Association of Home Builders (NAHB) is a Washington, D.C.-based trade association whose mission is to enhance the climate for housing and the building industry. Chief among NAHB's mission is to provide and expand opportunities for all people to have safe, decent, and affordable housing. Founded in 1942, NAHB is a federation of more than 800 state and local associations. About one-third of NAHB's approximately 140,000 members are home builders or remodelers, and its builder members construct about 80 percent of the new homes each year in the United States.

NAHB is a vigilant advocate in the Nation's courts, and it frequently participates as a party litigation and *amicus curiae* to safeguard property rights and interests of its members. For example, NAHB was a petitioner in *NAHB v. Defenders of Wildlife*, 551 U.S. 644 (2007) and NAHB attorneys acted as co-counsel for Respondent Hamilton Bank of Johnson City in *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City,* 473 U.S. 172 (1985).

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1 Counsel of record for all parties received notice at least 10 days prior to the due date of the *amici curiae's* intention to file this brief. Letters of consent are on file with the Clerk. No counsel for a 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 *amici curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

Home builders and developers are primary participants in the land use process. The overwhelming number of these builders are small businesses who take on extraordinary amounts of risk to develop properties. The success or failure of these businesses hinge on a regulatory and development environment that: 1) provides builder confidence through consistent and fair government interaction; and 2) includes a clear legal process that protects constitutionally-provided property rights.

Unfortunately, this Court's decision in *Williamson County* has had the opposite effect; not only confusing property owners, but also creating nationwide chaos between courts in the United States.

Perhaps more importantly, government entities unscrupulously employ *Williamson County* to their advantage. They use the decision as a delay tactic to dry up a property owner's resources, rather than allowing courts to hear a land use case. It is a sad note that *Williamson County*, a case which was "simply one in a series of cases in which the Supreme Court ducked the issue of the constitutional remedy for a regulatory taking" has now turned from "a minor anomaly into a procedural monster." Michael M. Berger, Supreme Bait & Switch: The Ripeness Ruse in Regulatory Takings, 3 Wash. U. J.L. & Pol'y 99, 101-102 (2000). In short, *amici* is troubled by the tactic utilized by government entities to use *Williamson County* as a shield against legitimate Fifth Amendment claims. Expansion of *Williamson County* to include procedural due process claims only further complicates and confuses a clear

process for home builders to provide the housing necessary for this country.

A case in point, discussed in detail below, is *amicus* Mr. Frank Kottschade's litigation odyssey. A home builder and developer from Rochester Minnesota, he negotiated and litigated the constitutionality of government decisions on his property for a decade, in federal and state court. It is shocking to note, but this legal battle had nothing to do with the underlying merit of his case. It was only *after* this drawn-out battle over *Williamson County* that a court would hear his Fifth Amendment claims. Mr. Kottschade's example is simply one in thousands of permit applicants that operate under *Williamson County's* ever-changing rule. There is a dire need for this Court to grant *certiorari* to review the manner in which the lower courts have applied *Williamson County*, which has created an ineffective and inefficient judiciary.

ARGUMENT

It is a droll understatement to say that *Williamson County* is simply "confusing" and "controversial." Rarely has a legal doctrine been the object of so much enthusiastic invective:

> [[T]he Supreme Court's decision in (and lower court applications of) *Williamson County* were described by courts and commentators as "odd," "unpleasant," unfortunate," "ironic," "ill-considered," "unclear and inexact," "surprising," "bewildering," "worse than mere chaos," "dramatic," "misleading," "deceptive," an "anomaly," "paradoxical," "most confusing," a

> "source of intense confusion," "inherently nonsensical," "shocking," "absurd," "unjust," "self-stultifying," "pernicious," "revolutionary," "nonsense," "draconian," "riddled with obfuscation and inconsistency," "containing an *Alice in Wonderland* quality," and thereby creating "a procedural morass," a "labyrinth," "conflict of decision," a "result [that] makes no sense," "doctrinal confusion," "havoc," "a "mess," "a "trap," a "quagmire," a "Kafkaesque maze," a "fraud or hoax on landowners," a "weapon of mass obstruction," and "a Catch-22 for takings plaintiffs."

Michael Berger and Gideon Kanner, *Shell Game! You Can't Get There From Here: Supreme Court Ripeness Jurisprudence in Takings Cases at Long Last Reaches the Self-Parody Stage*, 36 Urb. Law. 671, 702-703 (Fall 2004)(citations omitted).

Much of the discussion around *Williamson County* is conducted at the academic level or through court decisions, but unfortunately these conversations neglect the practical and everyday effect that *Williamson County* has on the property owner, including small businesses and individual property owners. This should not be ignored.

I. HOME BUILDERS AND THE DEVELOPMENT COMMUNITY ARE SMALL BUSINESS OWNERS WHO PLEAD FOR CONSISTENCY AND FAIRNESS IN LAND USE PROCEDURES IN ORDER TO SURVIVE.

The Second Circuit claims that allowing for a procedural due process claim to be independent from *Williamson County* ripeness requirements would "enable a resourceful litigant to circumvent the ripeness requirements simply by alleging a more generalized due process or equal protection violation." *Kurtz v. Verizon New York, Inc*, 758 F.3d 506, 516 (2d Cir. 2014). What the Second Circuit fails to realize, however, is that "resourceful litigant[s]" are few and far between.

The true depiction of the average development permit applicant, particularly in the home building sector, consists of small business owners who depend on consistent and straight forward legal procedures in order to survive. Because these businesses have limited resources, the mere threat of *Williamson County* places the development community in a severely compromised bargaining position when attempting to assert constitutionally-protected rights.

To qualify as a small business, the U.S. Small Business Administration (SBA) has established ceilings of $33.5 million for all types of builders (including residential remodelers), $7.0 million for land developers, and $14.0 million for specialty trade contractors. U.S. Small Business Administration,

Table of Small Business Size Standards Matched to North American Industry Classification System Codes (July 14, 2014), http://www.sba.gov/sites/default/files/files/Size_Standards_Table.pdf (last visited Nov. 6, 2014). Incredibly, *96 percent of builders, 94 percent of land developers, and 98 percent of trade contractor establishments are small by SBA standards*. Stephen Melman*, Structure of the Home Building Industry* at 3, Special Studies*,* (Dec. 1, 2010), http://www.nahb.org/generic.aspx?sectionID=734&genericContentID=148743&channelID=311 (last visited Nov. 4, 2014).

Even when using a smaller cap than utilized by the SBA, home builders are still small business owners. A study by NAHB shows that 65 percent of all home building establishments had annual receipts of under $1 million and 31 percent generated revenue of between $1 million and $10 million. *Id*. at 1-2. In fact, just 4.1 percent of home builders finished 2007 with $10 million or more in annual receipts. *Id*. at 1. Land developers follow a similar profile; 61 percent of land developers did less than $1 million in business. *Id*. at 2. Home remodelers are even smaller with 84 percent of all residential remodelers having annual receipts of under $1 million. *Id*.

In short, those affected by land use procedures, such as home builders and developers, don't just create vibrant neighborhoods, they also fit the profile of your average neighbor. The average home builder simply does not have a bottomless bank of financial resources in which to follow a case through a basket weaving exercise. Additionally, home builders work in a volatile industry and the line between success and failure as a

small business often hinges on a single permit. This is particularly amplified by the fact that home builders and developers take on enormous risk almost immediately upon a project proposal.

In 2007, the U.S. Census Bureau reported on the births and deaths of U.S. businesses in the preceding year. With a baseline of 161,650 establishments in the residential construction industry, 30,697 firms entered the industry and 29,095 business failed. *Id.* at 5. The percent change of business births was 19.0 percent and the percent change in deaths was -18.0 percent. *Id.* Shockingly, this is over twice the turnover as compared to the US manufacturing sector. *Id.*

With such a high turnover, uniform, consistent, and predictable land use procedures are paramount, and often are the determinative factor between the success or failure of a single project or the entire business. The majority of home builders, home remodelers, and individual owners who apply for permits simply do not have the legal or financial resources to enter into a procedural fight lasting multiple years or even decades. *Williamson County,* conversely, has resulted in confusion from the top, by the courts, to the bottom, by home builders and other property owners.

II. *WILLIAMSON COUNTY* ENABLES GOVERNMENT ENTITIES TO UTILIZE GAMESMANSHIP, AND WILL CONTINUE TO GENERATE UNFAIR AND ARBITRARY RESULTS UNLESS THIS COURT INTERVENES.

The lower court in this case claims that "[a]pplying *Williamson County* more broadly to . . . due process claims . . . . prevents evasion of the ripeness test by artful pleading of a takings claim as a due process claim." *Kurtz* at 516.

Yet, it is action by the government as defendant where constitutional rights are made illusory through a system of gamesmanship, where defendants bob and weave through a ripeness maze that allows them to hide from the merits of a takings claim. The typical defendant in a land use case "are municipal bodies, often at the local level, that are inherently slow moving and that possess numerous incentives to delay their final decisions." Gregory M. Stein, Regulatory Takings and Ripeness in the Federal Courts, 48 Vand. L. Rev. 1, 45 (1995). These delay tactics start in the planning phase, and continue through litigation.

For example, in *Sherman v. Town of Chester*, the locality used delay tactics for over 10 years, forcing a developer to spend $5.5 million on top of the $2.7 million purchase price in his attempts to obtain a subdivision approval. 752 F.3d 554 (2d Cir. 2014). The gamesmanship by the Town continued into the courtroom. In 2007, Sherman filed suit in federal court.

The Town made a motion to dismiss based on *Williamson County* and Sherman voluntarily withdrew the case. Once Sherman brought a claim in state court, the Town removed the case back to federal court, where it moved again to dismiss in part on ripeness grounds.

Admittedly, the Second Circuit in *Sherman* recognized the absurdity in throwing out Sherman's claim based on *Williamson County*, and followed the more recent movement to label *Williamson* as a prudential rather than a jurisdictional rule. *Town of Chester* at 561, *citing Sansotta v. Town of Nags Head*, 724 F.3d 533, 545 (4th Cir. 2013).

However, not all property owners are so "lucky". A recent journal article presents a number of cases littered throughout our courts that have dismissed a federal takings claim as unripe after the government defendant removed the case from state court to federal court. 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, 335 fn. 79 (2014), *citing Koscielski v. City of Minneapolis,* 435 F.3d 898, 903 (8th Cir. 2006)*; Rau v. City of Garden Plain,* 76 F. Supp. 2d 1173, 1174-75 (D. Kan. 1999); *Ohad Assoc. LLC v. Twp. of Marlboro,* No. 10-2183, 2011 U.S. Dist. LEXIS 8414, at *4, *6 (D. N.J. Jan. 28, 2011); *Hendrix v. Plambeck,* 1:09-cv-99-SEB-DML, 2010 U.S. Dist. LEXIS 92140, at *17-19 (S.D. Ind. Sept. 2, 2010); *AM Rodriguez Assocs. v. City Council,* No. 1:08-CV-214, 2009 U.S. Dist. LEXIS 110998, at *9 (W.D. Mich. Nov. 30, 2009); *Thomas v. Shelby Cnty.,* No. 06-2433 Ml/P, 2006 U.S. Dist. LEXIS 94365, at *10-11 (W.D. Tenn.

Dec. 12, 2006); *Jones v. City of McMinnville,* No. 04-0047-AA, 2004 U.S. Dist. LEXIS 7250, at *6 (D. Or. April 20, 2004); *Bass v. City of Dallas,* No. 3-97-CV-2327-BD, 1998 U.S. Dist. LEXIS 11263, at *11 (N.D. Tex. July 21, 1998); *Standard Materials Inc. v. City of Slidell,* No. 92-2509, 1994 U.S. Dist. LEXIS 8470, at *11 (E.D. La. June 21, 1994).

Simply put, the use of *Williamson County* as a resource eliminator and as a general delay tactic is widespread and has financial and negative practical consequences for the development community.

Williamson County even has financial consequences on the ultimate buyer, the homeowner. A study by NAHB shows that the financial cost of delay by government can increase the price of a finished lot sold to a builder by 11 percent, and another 3 percent in the price of the home sold to the ultimate buyer. Paul Emrath, *How Government Regulation Affects the Price of a New Home,* HousingEconomics.com at Table 2. Estimated Impact of Regulation During Development, http://www.nahb.org/generic.aspx?genericContentID=161065&channelID=311 (last visited Nov. 7, 2014). Even a modest increase in the price of a home has drastic effects on housing affordability for a large number of potential home buyers. Nationally, each $1,000 increase in home price to the ultimate buyer prevents approximately 232,000 households from being able to afford a median-priced new home. Natalia Siniavskaia*, Metro Area House Prices: The "Priced Out" Effect*, Special Studied (Feb. 1, 2012), http://www.nahb.org/generic.aspx?genericContentID=174956&channelID=311 (last visited Nov. 6, 2014). It

is chilling to think of how many homebuyers are ultimately priced-out of a home due to the delays imposed by government defendants.

On the practical side, *Williamson County* has a chilling effect on the construction of housing necessary to accommodate this country's growing population. Home builders and developers bear enormous financial risk at the immediate start of a project proposal, and are often leveraged for years before hoping to realize a gain on the project. As one academic states, "[d]evelopers typically obtain construction and permanent loan commitments early in the development process; such commitments will expire during a prolonged permitting process, leaving developers with the risk of interest rate increased and uncertainty as to the availability of any funds at all . . . . The ripeness requirements, which delay a landowner's access to court, can be fatal to these sorts of plaintiffs engaged in these sorts of transactions." Stein, 48 Vand. L. Rev. 1, 44-45 (1995). This is certainly amplified by the government's "knowledge that developers cannot survive forever and that business cycles fluctuate may lead them to stretch out the process out as much as possible, in the hope that the need to decide will evaporate." *Id.* at 45-46. And this is how it plays out in reality. When landowners are faced with the possibility of a decades-long court battle, they often either acquiesce to the harsh demands of the government, or they "scale down their plans (more, perhaps, than the law requires), sell their land, give up, go out of business, or are otherwise frustrated." *Id.* at 47.

Moreover, if the property owner does decide to go to court, even a cursory examination of land use cases included in just this brief presents a dreadful outlook, as the arrival of the grim reaper often occurs before the case reaches a final decision. *See e.g.,* Stein, 48 Vand. L. Rev. 1, 47 (1995) ("A foreclosure sale purchaser, for example, was the landowner in [*Williamson County*]: The claim survived even though the original developer did not."); Press Release, Pacific Legal Foundation, PLF Client Coy Koontz Jr. is Honored by Owners' Counsel of America (Jan. 27, 2014), *available at* http://www.pacificlegal.org/releases (Coy Koontz, Sr. filed the original lawsuit 20 years before the Supreme Court made its decision in 2013. Koontz Sr. passed away in 2000). *Town of Chester*, 752 F.3d 554, 560 (2d Cir. 2014) (" . . . . Sherman became financially exhausted to the point of facing foreclosure and possible personal bankruptcy. And while the case was pending on appeal, Sherman died.")

It is time to end the death-inducing fiction that the Fifth Amendment requires a permit applicant to run an endless gauntlet of administrative and courtroom delays before hearing the merits of a case. It is also time to end the infinite guessing game that a litigant must play in order to ascertain whether procedural due process claims and/or any other constitutionally protected right must follow *Willamson County's* Chutes and Ladders[2] path to federal court. On one hand, the

2 Chutes and Ladders is a popular board game introduced to the United States by the Milton Bradley Company in 1943, based off a game that originated in India. The object of the game is to move from the bottom of the board to the top, aided or hindered by various ladders and "chutes" that allow you to skip forward or slide down spaces on the board.

Second Circuit has ruled that First Amendment retaliation claims attached to Fifth Amendment claims should not be subject to *Williamson*, yet has also "suggested that *Williamson County* (the finality requirement at least) applies broadly in the context of land use challenges." *Kurtz* at 514-515 citing *Doughtery v. Town of North Hempstead Bd. Of Zoning Appeals*, 282 F.3d 83, 88 (2d Cir. 2002).

III. *WILLIAMSON COUNTY* ENTOILS A TRICKY TRAP IN REALITY THAT IS PERFECTLY ILLUSTRATED BY *AMICUS* FRANKLIN KOTTSCHADE'S DECADE LONG ATTEMPT TO DEVELOP PROPERTY.

Amicus curiae Franklin P. Kottschade owns a small home building and developing business, with three employees, in Rochester, Minnesota. He knows all too well the dilemma created by *Williamson County's* ripeness requirements. Respectfully, the Court must understand that the conflicts and confusion created by *Williamson* are not simply that stuff of law review articles, or rarefied judicial debates on jurisdictional ripeness. This issue has real world consequences. It affects families, businesses, and livelihoods. Indeed, for almost a decade, Mr. Kottschade tried to overcome the virtually insurmountable hurdles that *Williamson County* erected for property rights claimants. Any expansion of *Williamson County* will have devastating effects on development efforts.

For a decade, Mr. Kottschade endeavored to obtain just compensation from the City of Rochester, to

redress what he believed was a taking of his property under this Court's precedents. Despite good faith attempts to comply with this Court's ripeness requirements, he was relegated to a procedural purgatory with courts at all levels in both the federal and state systems dodging the merits of his claims.

A. The City Imposed Financially Ruinous Conditions on Mr. Kottschade's Development Application, Causing Mr. Kottschade to Initiate a Federal Suit.

In 2000, Mr. Kottschade sought to develop townhomes on a 16.4 acre parcel of land he acquired in 1992. The City of Rochester granted him a permit approval in 2000, but only if he agreed to myriad, onerous conditions.[3] These exactions had the effect of reducing the number of townhomes by 75 percent, from 104 units to just 26 units, and increased the development cost for the homes from $22,000 to $90,000 per unit. Mr. Kottschade believed that the City's extortionate demands contravened precedent on unconstitutional exactions. As this Court has ruled, development conditions imposed by land-use officials must be based on an "individualized determination" of the impacts cause by the development, and the government must provde both an "essential nexus" and

3 Among other things, the City demanded that Mr. Kottschade convey to the City a 50-foot public right-of-way because it might have needed it at some future point for a road; accept "limited access" to the expanded collector road from his development; grade the property at his expense to make it compatible with one of the City's proposed road reconstruction projects; and pay the cash equivalent of a 1.7-acre parkland dedication requirement.

"rough proportionality" – logic and balance – between the development's impacts and the what the government exacts from the property owner. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Koontz v. St. Johns River Water Management District*, 133 S.Ct. 2586 (2013).

To achieve administrative finality, Mr. Kottshade petitioned the City for relief from the conditions by seeking a variance, explaining that the conditions would render the proposed development economically unfeasible.[4] In 2001, the city upheld the development conditions and denied Mr. Kottschade's variance.

To vindicate his Fifth Amendment rights, Mr. Kottscahde filed an action in the U.S. District Court for the District of Minnesota in 2001. He alleged that the permit exactions violated the takings clause under the *Nollan/Dolan* doctrine, and that he was therefore owed just compensation. In 2002, the district court

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4 To receive a "final decision" from a land-use agency and thus render a takings claim ripe for judicial review, this Court has stated that the aggrieved property owner must pursue any administrative variances from the government's determination. See, *e.g., Williamson*, 473 U.S. at 193 ("Resort to the procedure for obtaining variances would result in a conclusive determination by the Commission whether it would allow respondent to develop the subdivision in the manner respondent proposed.") *Palazzolo v. Rhode Island*, 533 U.S. 606, 620-621 (2001)("A takings claim based on a law or regulation which is alleged to go too far in burdening property depends upon the landowner's first having followed reasonable and necessary steps to allow regulatory agencies to exercise their full discretion in considering development plans for the property, including the opportunity to grant any variances or waivers allowed by law.")

dismissed the federal case, holding that Mr. Kottschade's claims were not ripe because he did not first exhaust litigation in the Minnesota state courts as required by *Williamson*. He then appealed to the Eighth Circuit.

B. The Eighth Circuit Affirms Dismissal of Mr. Kottschade's Federal Takings Case.

In his federal appeal, Mr. Kottschade argued that *Williamson County's* state-litigation rule is contrary to *Chicago v. Int'l College of Surgeons'* determination that federal courts have original jurisdiction over federal takings claims. 522 U.S. 156 (1997). He explained that if he was required to seek a state-court remedy first, that he will most likely be denied a federal forum altogether under claim and/or issue preclusion. He even asked the Eighth Circuit to hold that an adverse state-court decision would not bar him from filing a subsequent federal takings claim in order to preserve his Fifth Amendment claims.

Sympathetic to a degree, the Eighth Circuit acknowledged that his "suggestion has the virtue of logic and is tempting," but ultimately declined to adopt it. *Kottschade v. City of Rochester,* 540 U.S. 825 (2003), *cert. denied* 319 F.3d 1038, 1041 (8th Cir. 2003). The court held that it was simply too early to determine whether claim or issue preclusion would, in fact, be applied in the future. *Id.* at 1042. Ultimately, the Eighth Circuit ruled that Mr. Kottschade's claim was not ripe under *Williamson*, because he did not pursue initial state court litigation for a compensation remedy. *Id.* This Court subsequently denied *certiorari* review.

C. As a Result, Mr. Kottschade Remained Stuck in Williamson's Procedural Quaqmire – In State Court.

After Mr. Kottschade was dismissed in federal court, he pursued another round of negotiations with the city to try and salvage his project, but City officials were still unwilling to budge on their financially ruinous conditions. Thus, in December 2006, Mr. Kottschade brought an action in state court. There, he sought mandamus relief ordering the city to commence a condemnation action to determine the damages arising from the taking. He also sought damages under 42 U.S.C. § 1983, to redress the City's violations of the Fifth and Fourteenth Amendments.

The City moved for summary judgment, arguing that Mr. Kottschade's claims were barred by the applicable six-year statute of limitations under state statute law. The initial development approval (with the unconstitutional exactions) came on July 5, 2000, and Mt. Kottschade brought his state court action on December 22, 2006. Despite clear Supreme Court precedent that pursuit of a variance is necessary before local officials render a final decision for land-use purposes, the City contended that Mr. Kottschade did not need to seek a variance, and that he should have realized that the city's initial approval constituted a final decision. Of course, if Mr. Kottschade had not sought a variance, the City could have just as easily argued that he needed to pursue that procedure as a necessary element to ripen his claim, and wielded *Williamson County* to argue that no final decision had been rendered.

Despite the fact that the City accepted, processed and ruled on Mr. Kottschade's variance request, the state trial court granted the city's motion for summary judgment, concluding that the action was time-barred. That decision left him, once again, without a ruling on the constitutionality of the City's onerous permit conditions.

Eventually, in 2009, Mr. Kottschade's appeal to the intermediate appellate level in Minnesota was successful. *Kottschade v. City of Rochester*, 760 N.W.2d 342 (Minn. Ct. App. 2009). He argued that the trial court erred when it determined that a variance was not necessary to achieve administrative finality under *Williamson*. Finally in March 2010, the case was settled.

The commentary here is to focus on the fact that during this entire decade-long saga, Mr. Kottschade never had the opportunity to litigate the merits of his takings claim. *Williamson County* has the ironic effect of rendering constitutionally-protected property rights a fiction, because they cannot be robustly discussed, debated, and defended in federal court. Constitutional rights are made illusory in this system of municipal gamesmanship, where courts are given license to bob and weave through a jurisdiction maze that allows them to hide from the merits. Respectfully, the petition should be granted so this Court can reconfirm that it "see[s] no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be

relegated to the status of a poor relation . . . ." *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994).

CONCLUSION

The Court should no longer delay its reconsideration of the state-litigation rule. When *Williamson County* was decided in 1985, the Court's modern takings jurisprudence was still in its infancy. Indeed, only after *Williamson*, in *First English Evangelical Lutheran Church of Glendale v. Los Angeles*, 482 U.S. 304 (1987), did this Court even decide that monetary compensation was self-effecting remedy required by the Takings Clause. Since then, the contours of the Fifth Amendment's substantive protections have become somewhat more defined, but the most basic, fundamental jurisdiction question – "Can a federal court ever decide a federal takings claim?" – remains undeciphered. This is a question of overwhelming constitutional importance. Attempts by lower courts to expand *Williamson County* to other constitutional claims is concerning, particularly when Justices on this Court have expressed concern as to its viability. *San Remo Hotel, L.P. v. City of San Francisco*, 545 U.S. 323, 348 (2005) (Rehnquist, C.J., concurring).

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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