No. 14-439

# In the Supreme Court of the United States

JACK KURTZ, on behalf of himself and all others similarly situated, JOSEPH GRILLO, husband, VIVIAN GRILLO, wife, JEFF MICHAELS, husband, BARBARA MICHAELS, wife, 31-11 30TH AVE LLC, AGRINIOS REALTY INC., K.A.P. REALTY INC., LINDA DAVIS, PETER BLIDY, VASILIOS CHRYSIKOS, 3212 ASTORIA BLVD. REALTY CORP., MNT REALTY LLC, ANTHONY CARDELLA, BRIAN CARDELLA, 46-06 30TH AVENUE REALTY CORP., CATHERINE PICCIONE, CROMWELL ASSOC. LLC,

*Petitioners,*

v.

VERIZON NEW YORK, INC., FKA NEW YORK 25 TELEPHONE COMPANY, VERIZON 26 COMMUNICATIONS INC., IVAN G. SEIDENBERG, 27 LOWELL C. MCADAM, RANDALL S. MILCH, JOHN DOES,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF FOR *AMICUS CURIAE* THE PROPERTY RIGHTS FOUNDATION OF AMERICA, INC. IN SUPPORT OF PETITION FOR CERTIORARI

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## Interest of the *Amicus Curiae*

Pursuant to Rule 37 of the Rules of the Supreme Court of the United States, the Property Rights Foundation of America, Inc. (the "PRFA") respectfully submits this amicus brief in support of the Petitioners.[1]

The PRFA is a New York-based nonprofit organization dedicated to providing information and education regarding and promoting understanding of the fundamental Constitutional rights of America's citizens, especially the right to own and use private property. The PRFA is a volunteer, grassroots organization committed to assisting citizens, policy-makers and those in the media concerned with protecting the rights of property owners against governmental abuse.

The PRFA has been recognized for its public events, publications, and outreach programs. It sponsors the Annual National Conference on Private Property Rights, at which experts from across the country speak on topics of prime importance to property rights advocates and policymakers. Since 1994, the PRFA has published *Positions on Property*, cataloging and exposing the multitude of land-use regulations and controls in the State of New York, and the *New York Property Rights Clearinghouse*, a

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[1] Pursuant to Rule 37.2, all Parties received timely notice of *amicus curiae*'s intent to file this brief and have consented thereto. Pursuant to Rule 37.6, *amicus curiae* affirm that no counsel for any Party authored this brief in whole or in part. Other than *amicus curiae*, its members, and its counsel, no person made a monetary contribution to fund the preparation or submission of this brief.

quarterly newsletter of information and analysis about property rights issues in the State of New York. The PRFA also helps other grassroots organizations seeking advice or assistance by providing information and connecting those organizations to members of the PRFA's National Advisory Board and other experts.

Between 1994 and 2010, PRFA President Carol W. LaGrasse has testified on property rights issues at eight separate hearings at the invitation of committees of the United States Senate and House of Representatives. Ms. LaGrasse has also testified on eminent domain issues before the New York State Legislature, including at the joint hearing on "Eminent Domain and the Effect of the Recent Supreme Court Ruling," held by the Senate Committee on Commerce, Economic Development and Small Business and the Senate Committee on Local Government; the joint hearing on "The Exercise of Eminent Domain in New York State" before the Assembly Committee on Judiciary, the Assembly Committee on Corporations, Authorities and Commissions, the Assembly Committee on Local Governments, and the Assembly Committee on Governmental Operations; and the hearing on "Eminent Domain Reform" before the Senate Judiciary Committee.

Reflecting its strong interest and involvement in the development of eminent domain law at both the federal and State levels, the PRFA has submitted *amicus curiae* briefs at the certiorari and merits stages in this Court in *Kelo v. City of New London*, No. 04-108, as well as in *Serrone v. City of New York*, Docket No: 2011-05147, in the State of New York's

Appellate Division for the Second Department. The PRFA has also submitted other *amicus curiae* briefs on property rights issues on numerous other occasions.

The PRFA has a particular interest in *Kurtz v. Verizon N.Y.* because this case raises important Constitutional questions related to private property rights. Specifically, the PRFA is interested in the extent, if any, the exhaustion exception in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), applies to claims of private property owners who are victims of physical takings.

## Summary of the Argument

In affirming the district court's order dismissing the Petitioners' takings claims, the U.S. Court of Appeals for the Second Circuit ignored the fundamental rule that claims arising under Section 1983, such as takings claims redressable under the Fifth and Fourteenth Amendments, do not have an exhaustion of remedies requirement unless expressly provided for by Congress. Glossing over this prerequisite, the Second Circuit adopted an exhaustion requirement – at most, applicable only to regulatory takings – despite the fact that this is a case involving direct, physical takings claims. In doing so, the Second Circuit ignored decades of jurisprudence distinguishing regulatory takings from physical takings claims, and improperly expanded the exhaustion exception of *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985) ("*Williamson County*") for regulatory takings to this physical takings case.

Furthermore, the Second Circuit addressed and explicitly rejected the sound reasoning of the U.S. Court of Appeals for the Sixth Circuit in *Kruse v. Village of Chagrin Falls*, 74 F.3d 694 (6th Cir. 1996), *cert. denied*, 519 U.S. 818 (1996), which immunized physical takings from the reach of the *Williamson County* exhaustion exception, in a case with facts comparable to those at issue here. As a result, there is now a disagreement among the Circuit Courts as to whether the *Williamson County* exhaustion exception is properly expanded to physical takings claims.

The Second Circuit's ruling below leaves citizens whose real property has been physically appropriated without recourse to pursue violations of rights guaranteed by the United States Constitution in United States courts, necessitating this Court to clarify and limit the *Williamson County* exhaustion exception. Members of this Court have not only recommended review of the unanticipated breadth and expansion of the *Williamson County* exhaustion exception, but have also called for reconsideration of such exception in its entirety. For the reasons that follow, *amicus curiae* respectfully urge this Court to grant Petitioners' Writ for Certiorari to resolve this matter of great public importance and cease this conflict among the Circuit Courts.

## Argument

### I. Claims Arising under 42 U.S.C. § 1983 Do Not Have an Exhaustion Requirement Unless Explicitly Adopted by Congress

In 1871, Congress enacted 42 U.S.C. § 1983 ("Section 1983") to provide a federal cause of action

for the "deprivation of any rights, privileges, or immunities secured by the Constitution" as suffered by the citizens. 42 U.S.C. § 1983. A Section 1983 claim is the vehicle by which to pursue, among other things, a claim arising under the Fifth and Fourteenth Amendments, such as here, where the Petitioners allege the taking of their private property for public use, without just compensation.

It has long been settled that State remedies need not be exhausted before a Section 1983 action may be heard in federal court. In fact, only three years prior to deciding *Williamson County*, this Court examined the Congressional intent and decades of jurisprudence surrounding Section 1983 when resolving the "vigorous debate and disagreement" regarding the potential existence of an exhaustion requirement under the statute. *Patsy v. Bd. of Regents*, 457 U.S. 496, 500 (1982).

In *Patsy*, this Court unequivocally declared that the "exhaustion of administrative remedies in § 1983 actions should not be judicially imposed" before a plaintiff may seek protection from the federal courts. *Id.* at 502; *see also Monroe v. Pape*, 365 U.S. 167, 183 (1961) (holding a Section 1983 plaintiff need not exhaust State judicial remedies, this Court reasoned, "[i]t is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked."). In so holding, this Court examined the history of the Civil Rights Act of 1871 – the precursor to Section 1983 – and noted the recurring theme that "Congress assigned to the *federal courts* a paramount role in protecting

constitutional rights." *Patsy*, 457 U.S. at 503 (emphasis supplied). Adopting a judicially-imposed limit would fly in the face of "Congress' superior institutional competence" and raise equally difficult questions concerning the scope of any such exhaustion requirement. *Id.* at 513.

This Court specifically recognized in *Patsy* instances where Congress had carved out explicit, narrow exceptions to this "no-exhaustion" rule for certain Section 1983 claims. Importantly, the Court reasoned that because Congress found it necessary to specifically mandate exhaustion requirements for only certain classes of Section 1983 plaintiffs (*e.g.*, 42 U.S.C. § 1997, *et seq.*), Congress must have intended that Section 1983 itself does not require exhaustion at the State level. Specifically addressing one such limited exception to the general rule, this Court reasoned: "It is not for us to say whether Congress will or should create a similar scheme for other categories of § 1983 claims..." *Patsy*, 457 U.S. at 515. Thus, this Court was clear that exceptions to the "no-exhaustion" rule of Section 1983 actions are best left to Congress to avoid "costly, remedy-delaying, and court-burdening litigation if answered incrementally by the judiciary in the context of diverse constitutional claims..." *Id.* at 514.

Indeed, the "very purpose of § 1983 was to impose the federal courts between the States and the people, as guardians of the people's federal rights – to protect the people from unconstitutional action under color of state law..." *Id.* at 503 (citation omitted). One of the most basic of such rights is the prohibition of governmental taking of property without just compensation. *See* U.S. Const., amend. V. As this

Court has recognized, a permanent physical occupation of another's property is the "most serious form of invasion" whereby the "government does not simply take a single 'strand' from the 'bundle' of property rights: it chops through the bundle, taking a slice of every strand." *Loretto v. Teleprompter Manhattan Catv Corp.*, 458 U.S. 419, 435 (1982) (citation omitted).

Unfortunately, since this Court's decision in *Williamson County*, lower courts have departed from such admonitions by repeatedly barring takings claimants proceeding under Section 1983 from their day in federal court.

## II. The *Williamson County* Exhaustion Exception

In *Williamson County*, this Court was asked to consider whether the implementation of various zoning laws and local regulations constituted the taking of a landowner's property. *See Williamson County*, 473 U.S. at 175. The Court ruled that a regulatory takings claim does not ripen until there is a "final decision" on the application of such regulations to the property at issue. *See id.* at 186-90. Though application of this rule in *Williamson County* deemed the landowner's regulatory takings claim unripe for consideration, the Court additionally required a regulatory takings plaintiff to exhaust State compensation remedies prior to pursuing a federal claim. *See id.* at 194.

*Williamson County*'s two prerequisites may be understandable when properly confined to the context in which they were promulgated – a

regulatory takings case. Elementally, such requirements make sense in the case of local regulations due to the uncertainty, ambiguity, and a lack of finality that are inherent in such matters. *See, e.g.*, *Patsy*, 457 U.S. at 506 ("exhaustion rules are often applied in deference to the superior factfinding ability of the relevant administrative agency."). Indeed, this Court has described regulatory takings as "ubiquitous ... [and] impact[ing] property values in some tangential way – often completely unanticipated ways" and reasoned that "the predicate of a [regulatory] taking is not self-evident, and the analysis is more complex." *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322-24 & n.17 (2002). The very nature of a regulatory taking often requires extensive examination and review at the local level in order to accurately determine the nature, scope, and value of the purported taking.

There is no basis, however, for such considerations to be extended to clear and final[2] physical takings claims, which this Court has described as "typically obvious and undisputed" and "relatively rare, easily identified, and usually represent[ing] a greater affront to individual property rights." *Tahoe-Sierra*, 535 U.S. at 322-24 & n.17.

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[2] The Second Circuit recognized the undisputed rule of law that a physical taking in and of itself satisfies finality, and correctly determined that the physical takings at issue here are final. *See Kurtz v. Verizon N.Y., Inc.*, 758 F.3d 506, 513 (2d Cir. 2014).

## III. There is No Basis to Extend *Williamson County*'s Exhaustion Exception to a Physical Takings Claim

As indicated by this Court's decision in *Patsy* and subsequent cases, there is no State exhaustion prerequisite for bringing a claim under Section 1983, absent an explicit, legislative mandate. While *Williamson County* may constitute a narrow and identifiable exception to this "no-exhaustion" rule, the underlying facts of that case, as well as this Court's reasoning in promulgating such a narrow exception, make clear that the Court only intended it to apply in the case of regulatory takings claims.

If left unchecked, the Second Circuit's decision below would effectively close the doors to the federal courthouse for one of the most established claims under the Fifth Amendment – the direct, physical taking of property, contrary to this Court's longstanding jurisprudence distinguishing such claims from mere regulatory takings.

### A. This Court Has Long Distinguished Physical Takings from Regulatory Takings

The federal "jurisprudence involving condemnations and physical takings is as old as the Republic..." *Tahoe-Sierra*, 535 U.S. at 322. Throughout its long history of reviewing takings claims, this Court has repeatedly "emphasized that physical *invasion* cases are special..." *Loretto*, 458 U.S. at 430 (emphasis in original). Indeed, a "permanent physical invasion, however minimal the economic cost it entails, eviscerates the owner's right

to exclude others from entering or using her property – perhaps the most fundamental of all property interests." *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 539 (2005). In reviewing such claims, this Court has unequivocally distinguished regulatory takings from physical takings on many occasions. Indeed, in a case with facts nearly-identical to those below, this Court "confirm[ed] the distinction between a permanent physical occupation, a physical invasion short of an occupation, and a regulation that merely restricts the use of property." *Loretto*, 458 U.S. at 430 (finding permanent installations of telecommunications equipment constitute a taking).

This Court has found a physical "occupation is qualitatively more severe than a regulation of the *use* of property, even a regulation that imposes affirmative duties on the owner..." *Id.* at 436 (emphasis in original). With a physical taking, a "property owner entertains a historically rooted expectation of compensation, and the character of the invasion is qualitatively more intrusive than perhaps any other category of property regulation." *Id.* at 441. More recently, this Court has reasoned, "Direct condemnation, by invocation of the State's power of eminent domain, presents different considerations than cases alleging a taking based on a burdensome regulation." *Palazzolo v. Rhode Island*, 533 U.S. 606, 628 (2001).

In *Tahoe-Sierra*, the Court emphasized the Constitutional basis for distinguishing physical and regulatory takings claims by explaining:

> The text of the Fifth Amendment itself provides a basis for drawing a

> distinction between physical takings and regulatory takings. Its plain language requires the payment of compensation whenever the government acquires private property for a public purpose, whether the acquisition is the result of a condemnation proceeding or a physical appropriation. But the Constitution contains no comparable reference to regulations that prohibit a property owner from making certain uses of her property.
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> ***
>
> This longstanding distinction between acquisitions of property for public use, on the one hand, and regulations prohibiting private uses, on the other, makes it inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a regulatory taking, and vice versa.

*Tahoe-Sierra*, 535 U.S. at 321-23 (internal quotation marks omitted).

As should be evident from the application of decades of unambiguous jurisprudence, judicial scrutiny of physical and regulatory takings claims requires different analyses. Thus, the Second Circuit's expansion of the *Williamson County* exhaustion exception in regulatory takings cases to physical takings claims ignores this Court's consistent distinction between the two kinds of harms. While the uncertain nature of regulatory

takings themselves (*e.g.*, ambiguity, scope, etc.) may necessitate an exception to the "no-exhaustion" rule in *Patsy*, physical takings are distinctly grounded in the Fifth Amendment, requiring no such barrier to the federal courts. There is simply no Constitutionally cognizable basis for expanding such a narrow exception to the federal courts' power to hear and adjudicate federal claims.

### B. The Second Circuit's Decision Directly Conflicts with this Court's Jurisprudence and that of the Sixth Circuit

Despite the federal courts' undeniably distinct treatment of physical and regulatory takings, the Second Circuit nevertheless applied *Williamson County* to affirm the dismissal of the Petitioners' physical takings claims, reasoning they were unripe for consideration because of a failure to exhaust State administrative remedies. In doing so, the Second Circuit expressly rejected a Sixth Circuit decision where the court found *Williamson County* inapplicable in the case of a physical taking. *See Kruse v. Village of Chagrin Falls*, 74 F.3d 694 (6th Cir. 1996), *cert. denied*, 519 U.S. 818 (1996).

In *Kruse*, the Sixth Circuit was tasked with determining whether certain landowners' physical takings claims were properly dismissed under the *Williamson County* exhaustion exception. *See Kruse*, 74 F.3d at 696-97. In assessing the district court's dismissal, the Sixth Circuit, relying on this Court's holding in *Loretto*, another physical takings case, found that "[c]ases involving physical occupation/invasion takings are treated differently

than those involving claims of regulatory takings." *Id.* at 700 (citing *Loretto*, among others).

Continuing, the Sixth Circuit reasoned that in regulatory takings cases, where advance notice of a threatened governmental action is inherent, it may be "fair to place the burden of making the next move on the landowner" especially when there are "generally numerous opportunities available to landowners to be heard and to attempt to prevent a proposed zoning ordinance from taking effect or to reach a compromise..." *Kruse*, 74 F.3d at 700. On the contrary, a physical taking "shifts to the landowner the burden to discover the encroachment and to take affirmative action to recover just compensation ... plac[ing] [him] at a significant disadvantage..." *Id.* (citing *United States v. Clark*, 445 U.S. 253, 257-58 (1980)).

Finding there was "no question" the property belonged to the landowners and a taking had ensued, the Sixth Circuit reversed the district court's dismissal of the physical takings claims, rejecting application of the *Williamson County* exhaustion exception to physical takings cases. *Kruse*, 74 F.3d at 701.[3]

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[3] While *Kruse* has since been tempered by the Sixth Circuit on facts limited to Ohio state law (*see River City Capital, L.P. v. Bd. of County Comm'rs*, 491 F.3d 301 (6th Cir. 2007); *Coles v. Granville*, 448 F.3d 853 (6th Cir. 2006)), the Sixth Circuit's reasoning in rejecting the *Williamson County* exhaustion exception in physical takings cases is still controlling. *See Timmreck v. United States*, 577 F.2d 372, 376 n.15 (6th Cir. 1978) ("One panel of this Court cannot overrule the decision of another panel; only the Court sitting *en banc* can overrule a prior decision."), *rev'd on other grounds*, 441 U.S. 780 (1979).

Addressing the Petitioners' arguments under *Kruse* below, the Second Circuit expressly rejected the Sixth Circuit's reasoning, improperly deeming it *dicta* and in contradiction to *Williamson County*, which purportedly "ties the exhaustion requirement directly to the wording of the Fifth Amendment." *Kurtz*, 758 F.3d at 513 n.1.[4] In doing so, the Second Circuit ignored this Court's distinction between physical and regulatory takings, and erroneously expanded a narrow exhaustion exception to effectively make it the rule under the physical takings scheme. Perhaps most importantly, the Second Circuit did not address – or even mention – the *rule* that Section 1983 claimants need not exhaust State remedies under *Patsy*, when advancing the *exception* under *Williamson County*.

## IV. Confusion over the Effect of the *Williamson County* Exhaustion Exception – Even in Regulatory Takings Cases – Requires Clarification of its Scope and Continued Viability

Expansive application of the *Williamson County* exhaustion exception, such as the action taken by the lower courts in this case, has bred confusion as to the effect and reach of such exception. Indeed, there has been no lack of scholarly[5] and

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[4] This is despite this Court's recognition of the absence of reference to regulatory takings claims in the Fifth Amendment. *See Tahoe-Sierra*, 535 U.S. at 321-23 (as discussed *supra*).

[5] *See, e.g.*, 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, 319 (2014) (construing this exception as "one of the most controversial and puzzling constitutional

judicial criticism of *Williamson County*'s exhaustion exception. Prior to *Williamson County*, this Court had already raised questions such as which categories of claims under Section 1983 might require exhaustion and what the *res judicata*[6] and collateral estoppel effects of such State determinations might be. *See Patsy*, 457 U.S. at 513-14. Such questions, among others, were "equally difficult" concerning the design and scope of any such exhaustion requirement, which is another reason why the Court rejected such a requirement for claims brought under Section 1983. *Id.*

In *San Remo*, twenty years after *Williamson County*, four concurring Justices, including the only Justice to take part in the *Williamson County* decision, joined the chorus of criticism by flatly declaring that *Williamson County* was "mistaken." *San Remo Hotel, L.P. v. City & County of San*

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principles of the modern era..."); Joshua D. Hawley, *The Beginning of the End? Horne v. Department of Agriculture and the Future of Williamson County*, 2012-2013 CATO SUP. CT. REV. 245 (I. Sharpiro ed. 2012-2013); Michael M. Berger, *Supreme Bait & Switch: The Ripeness Ruse in Regulatory Takings*, 3 WASH. U. J.L. & POL'Y. 99, 121 (2000) ("Of all the aspects of regulatory taking law that critics have criticized as confusing, the ripeness doctrine of *Williamson County* has received the most.").

[6] Expansion of the *Williamson County* exception to physical takings claims effectively prohibits the filing of such claims in the federal courts both before *and* after compliance with the exhaustion requirement. While the Second Circuit's holding here prohibits federal adjudication in the first instance, compliance with such rule by prosecution in State court would later initiate *res judicata*. It cannot be the intent of this Court (or the law) for federal courts to be divested of their authority to hear takings claims under the Fifth Amendment.

*Francisco*, 545 U.S. 323, 348 (2005) (Rehnquist, C.J., concurring, joined by O'Connor, Kennedy, & Thomas, JJ., concurring in the judgment). In doing so, the concurring Justices criticized the very language the Second Circuit relied upon in *Williamson County* when rejecting the Sixth Circuit's reasoning in *Kruse* – that until a property owner exhausts his state remedies, he purportedly cannot "claim a violation of the Just Compensation Clause". *Compare id.* at 349, *with Kurtz*, 758 F.3d at 513 n.1.[7] Thus, the Second Circuit's reason for rejecting the Sixth Circuit's findings in *Kruse* is questionable – at best.

The concurring Justices in *San Remo* sharply questioned whether the exhaustion exception, as relied upon in *Williamson County* (and the Second Circuit below), as purportedly operating under the auspices of the Fifth Amendment, was accurate. They reasoned, "[i]t is not obvious that either constitutional or prudential principles require claimants to utilize all state compensation procedures before they can bring a federal takings claim." *San Remo*, 545 U.S. at 349 (concurring opinion) (citing *Patsy*, 457 U.S. at 496). In particular, while the Justices noted the advantage of State familiarity with local land use and zoning regulations (which, again, are only applicable to regulatory takings), they noted that this Court had yet to explain why it should hand over the authority of takings cases to State courts while federal courts review other similar claims arising under Section 1983. *See San Remo*, 545 U.S.

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[7] *See also Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 742 (2010) (Kennedy, J., joined by Sotomayor, J., concurring in part and concurring in the judgment); *Tahoe-Sierra*, 535 U.S. at 321-23.

at 349. This point is full-circle and directly congruent with the rule of law in *Patsy*, where this Court declined to adopt a State exhaustion requirement for Section 1983 claims unless specifically mandated by Congress. *See Patsy*, 457 U.S. at 515 ("It is not for us to say whether Congress will or should create a similar scheme for other categories of § 1983 claims...").

Along these same lines, there can be no reason why an *exception* grounded in regulatory takings jurisprudence should be applied across the board to physical takings claims as well.[8] In fact, the concurring Justices' criticism of the *Williamson County* exhaustion exception in the context of regulatory takings claims is not only persuasive to the exception's inapplicability to physical takings claims, but even more so, encouragement for the departure from the *Williamson County* exhaustion exception in *all* takings cases. *See id.* at 350-51 ("In short, the affirmative case for the state-litigation requirement has yet to be made.").

Consider this Court's inquiry of the continued viability of the *Williamson County* exception:

JUSTICE O'CONNOR: Do you think it's open to us to reconsider aspects of Williamson County in this case?

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It -- frankly, it isn't clear to me that the Court ever contemplated just cutting off any determination

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[8] Only last year, this Court was again moved to explain the limits of *Williamson County*. *See Horne v. Dep't of Agric.*, 133 S.Ct. 2053, 2062 (2013).

in Federal court of takings claims in the way that it seems to work out by application of Williamson County.

RESPONDENTS: Let me explain why I think it would be imprudent for the Court to resolve it and then explain why I think it's fair to say that the Court didn't consider one way or the other principles of preclusion in application of the Full Faith and Credit Act in Williamson County.

JUSTICE O'CONNOR: Well, it's clear we didn't. So now we're faced with the consequences of that, and it looks to me like the lower courts have run pretty far with Williamson County. ***So what's a takings claimant supposed to do?*** [9]

As former Chief Justice Rehnquist concluded in his concurring opinion in *San Remo*, the justifications for the *Williamson County* exhaustion exception are "suspect, while its impact on takings plaintiffs is dramatic." *San Remo*, 545 U.S. at 352 (concurring opinion). "*Williamson County* all but guarantees that claimants will be unable to utilize the federal courts to enforce the Fifth Amendment's just compensation guarantee." *Id.* at 348.

## Conclusion

*Amicus Curiae*, the Property Rights Foundation of America, respectfully urges this Court to take this opportunity to resolve the disagreement

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[9] Transcript of Oral Argument, at *29-30, *San Remo Hotel, L.P. v. City & County of San Francisco*, 545 U.S. 323 (No. 04-340) (emphasis supplied).

between the U.S. Courts of Appeal for the Second and Sixth Circuits by issuing a definitive answer to the question of whether the *Williamson County* exhaustion exception is applicable to physical takings claims brought under 42 U.S.C. § 1983. Review is not only warranted by the Circuit conflict, but also for the reasons that many members of this Court have expressed in commenting on the questionable viability of the *Williamson County* exception.

For the foregoing reasons, this Court should grant the Petitioners' Writ for Certiorari.

Respectfully submitted,

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