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

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND CATO INSTITUTE IN SUPPORT OF PETITIONERS

ILYA SHAPIRO
Of Counsel
Cato Institute
1000 Mass. Avenue NW
Washington, DC 20001
Telephone: (202) 842-0200
E-mail: ishapiro@cato.org

J. DAVID BREEMER*
Counsel of Record
CHRISTOPHER M. KIESER
Of Counsel
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: jdb@pacificlegal.org
E-mail: cmk@pacificlegal.org

Counsel for Amici Curiae
Pacific Legal Foundation and Cato Institute

QUESTION PRESENTED

Should the Court overrule the "state litigation" ripeness requirement for takings claims, *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194-95 (1985), where that requirement is based on a mistaken premise and often operates to deprive citizens of all judicial review of Fifth and Fourteenth Amendment property rights claims?

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INTEREST AND IDENTITY OF AMICI CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation and the Cato Institute respectfully submit this brief amicus curiae in support of Petitioners, John Kurtz, et al.[1]

Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt corporation organized for the purpose of litigating matters affecting the public interest in private property, individual liberty, and economic freedom. Founded over 40 years ago, PLF is the largest and most experienced legal organization of its kind. PLF maintains its headquarters office in Sacramento, California, and has regional offices in Bellevue, Washington, and Palm Beach Gardens, Florida. The Foundation is supported primarily by donations from individuals interested in the preservation of traditional individual liberties.

PLF attorneys have regularly appeared before this Court as lead counsel on behalf of landowners whose ability to use their property was unlawfully curtailed. *See Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725

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[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 Amici 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, Amici Curiae 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 Amici Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

(1997); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987); *Rapanos v. United States*, 547 U.S. 715 (2006); *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013). PLF also routinely participates in important property rights cases as amicus curiae. *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); *San Remo Hotel, L.P. v. City & Cnty. of San Francisco*, 545 U.S. 323 (2005).

The instant petition raises a significant question as to whether and when a property owner can challenge government actions against private property as a taking under the Fifth Amendment. In particular, the Petition challenges the *Williamson County* requirement that property owners complete state court litigation to ripen federal claims. PLF attorneys have a wealth of experience on this issue, having acted as lead counsel in many federal cases involving *Williamson County*'s state litigation requirement. *See, e.g.*, *Sansotta v. Town of Nags Head*, 724 F.3d 533 (4th Cir. 2013); *Levin v. City & Cnty. of San Francisco*, _ F. Supp. 3d _, 2014 WL 5355088 (N.D. Cal. Oct. 21, 2014).

PLF attorneys have also published numerous law review articles addressing the impact of *Williamson County* on constitutional protections for private property. *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 (2014); 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 (2006). PLF believes its experience in litigating

and publishing on matters pertaining to federal jurisdiction over federal takings claims will assist this Court in deciding whether to grant the Petition in this case.

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, publishes the annual *Cato Supreme Court Review*, and files amicus briefs, including in various cases concerning property rights. This case is of central concern to Cato because it implicates the safeguards the Fifth Amendment provides for the protection of property rights against uncompensated takings, irrespective of how they are characterized.

INTRODUCTION

In *Williamson County*, this Court created an unprecedented and regressive procedural hurdle for property owners seeking to vindicate their Fifth Amendment right to be free from an uncompensated taking. *Williamson County* declared that before a landowner may claim an unconstitutional taking of private property, he must unsuccessfully "seek compensation through the procedures the State has provided for doing so." *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194 (1985). This "state litigation" ripeness rule has been interpreted to require property owners to litigate and lose a claim for compensation in

state court before raising a Fifth Amendment takings claim in federal court. *See San Remo*, 545 U.S. at 346-47.

The state litigation ripeness rule has been subject to severe criticism from courts and commentators.[2] Indeed, nine years ago, four members of this Court reviewed the rule, and concluded it "may have been mistaken." *San Remo*, 545 U.S. at 348 (Rehnquist, C.J., concurring in the judgment). The concurring *San Remo* justices argued that "the affirmative case for the state-litigation requirement has yet to be made." *Id*. at 351. They also pointed out the many jurisdictional injustices resulting from the interaction of the state litigation requirement and pre-existing jurisdictional doctrines, including its bizarre effect of stripping federal courts of jurisdiction over federal takings claims. *Id*. The justices concluded that the Court should reconsider *Williamson County*'s state-litigation requirement "[i]n an appropriate case." *Id*. at 352.

The time has come to revisit *Williamson County*. That decision was clearly wrong in holding that a takings violation is only "without just compensation"

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[2] *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 the Self-Parody Stage*, 36 Urb. Law. 671, 694-95 (2004); Scott A. Keller, *Judicial Jurisdiction Stripping Masquerading as Ripeness: Eliminating the* Williamson County *State Litigation Requirement for Regulatory Takings Claims*, 85 Tex. L. Rev. 199, 239 (1996); Peter A. Buchsbaum, *Should Land Use Be Different? Reflection on* Williamson County Regional Planning Board v. Hamilton Bank*, in Taking Sides on Takings Issues* 471, 473-74 (Thomas E. Roberts ed., 2002); Gregory Overstreet, *Update on the Continuing and Dramatic Effect of the Ripeness Doctrine on Federal Land Use Litigation*, 20 Zoning & Plan. L. Rep. 25, 27 (1997).

and complete after a state court denies damages subsequent to the challenged invasion of property. The proper view is that a taking is with or "without just compensation" depending on the actions and procedures of the defendant charged with the taking. Moreover, the concurring *San Remo* justices understated the jurisdictional chaos arising from *Williamson County*'s state litigation requirement. Because of that requirement, property owners are shut out of federal courts and must bring a federal takings claim in state court or not at all. But when they actually raise a federal takings claim in state court, the claim can be removed to federal court, where it instantly becomes unripe and subject to dismissal because the plaintiff didn't fully exhaust state litigation. The plaintiff is left without a forum for vindicating his Fifth Amendment rights. No other constitutional right faces such convoluted, unfair, Kafka-esque absurdities.

This case provides the ideal vehicle to change course. Here, an existing statute directed the entity accused of taking private property (Verizon) to compensate affected property owners by certain procedures. *Kurtz v. Verizon N.Y., Inc.*, 758 F.3d 506, 510 (2d Cir. 2014). But Verizon failed to use those procedures and left Petitioners without just compensation. *Id*. It makes no sense to hold that Petitioners must now litigate in state court to show that their takings claim is complete when it is already clear that Verizon's action occurred "without just compensation." When, as here, the entity that is charged with taking property fails to utilize an administrative or statutory mechanism for compensating property owners, a violation of the Takings Clause is final and actionable. This case

exposes *Williamson County*'s error in making state-court litigation, rather than administrative actions, the locus of whether an alleged taking is occurring without compensation and is therefore ripe. For this reason, and because the state litigation error has had disastrous practical consequences, the Court should take this case to overrule the state litigation ripeness doctrine.

REASONS FOR GRANTING THE WRIT

I

THIS CASE RAISES THE IMPORTANT QUESTION OF WHETHER THE COURT SHOULD OVERRULE *WILLIAMSON COUNTY*'S DOCTRINALLY UNSUPPORTABLE AND PRACTICALLY UNWORKABLE "STATE LITIGATION" RIPENESS REQUIREMENT

Williamson County's state litigation ripeness requirement was wrong when created and always will be wrong because it rests on flawed logic. In particular, at the core of *Williamson County* is this premise: a taking is "without just compensation," and in violation of the Constitution, only when a state court denies monetary damages after the taking. *Williamson Cnty.*, 473 U.S. at 194-95 & n.13. As the following shows, there is no basis in logic or this Court's precedent for this foundational premise.

A. *Williamson County* Was Wrong in Concluding a Taking Is "Without Just Compensation" and Ripe Only after a State Court Denies Damages

1. The Origin and Logic of the State Litigation Requirement

In *Williamson County*, this Court considered whether a regulatory takings claim was ripe for adjudication. After initially concluding that the claim was unripe because the defendant had not reached a "final decision"[3] on application of its regulations to the subject property, the *Williamson County* Court proceeded to create a second ripeness hurdle: the state litigation requirement[4]. Specifically, the Court held that a takings claim will not ripen until the claimant unsuccessfully "seek[s] compensation through the procedures the State has provided for doing so." *Id*. at 194. In announcing this rule, the Court reasoned that the Fifth Amendment only prohibits takings "without just compensation," and thus that no actionable taking has occurred until a claimant is denied just compensation. *Id*. at 194-95. From there, the Court concluded that a property owner must seek and be denied compensation through state procedures before a federal takings claim accrues. *Id*. The Court ultimately held that the takings claim in *Williamson*

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[3] This ripeness requirement is not at issue in this case.

[4] Members of this Court have recognized that *Williamson County*'s state litigation requirement is *dicta* because the Court had already held the plaintiff's takings claim unripe under the final decision prong. *Id*. at 186-90; *See Stop the Beach Renourishment v. Fla. Dep't of Envtl. Protection*, 560 U.S. 702, 742 (2010) (Kennedy, J., concurring in part and concurring in the judgment).

County was unripe under this rule because the plaintiff had not sought compensation through a state court action—Tennessee's inverse condemnation procedure. *Id*. at 196-97. It is this rule that is challenged here, and for good reason.

2. *Williamson County* Was Wrong in Concluding That the Actions of a State Court, Rather than Those of the Defendant, Determine Whether a Taking Is Without Just Compensation and Complete

It is hard to find fault with the initial premise behind the state litigation requirement—that there is no violation of the Constitution unless a taking is "without just compensation." But *Williamson County*'s subsequent assumption that it takes a state court's denial of compensation to render a taking "without just compensation" is unsupportable and should have never been adopted.

Initially, consider the nature of takings liability in a typical property rights dispute. Invasions of property are almost always carried out by an administrative or legislative body. *See*, *e.g.*, *Nollan*, 483 U.S. 825; *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Lucas*, 505 U.S. 1003. In less common instances, such as here, a private company acting as a public carrier may commit a taking. *See, e.g.*, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (eminent domain power delegated to cable television company); *Kurtz*, 758 F.3d 506 (eminent domain power delegated to telecommunications company). In all these instances, the entity responsible for the invasion is also responsible for paying compensation. State courts have no duty to compensate for takings carried out by

other agencies. *See, e.g.*, *Caldwell v. Comm'rs of Highways*, 94 N.E. 490, 493 (Ill. 1911) (the state typically "assumes no liability" for local government takings). Since our courts are not responsible for takings, it makes no sense to conclude, as *Williamson County* does, that the issue of whether a taking is compensated depends on how a state court rules. Berger & Kanner, *supra*, at 695 ("[T]he festering problem at the core of *Williamson County* is *blurring the state legal system with the local agency defendant*") (emphasis in original)). Instead, the actions and procedures of the takings defendant logically determine whether its taking is uncompensated and final. *Horne v. Department of Agriculture*, 133 S. Ct. 2053, 2062, n.6 (2013) ("A 'Case' or 'Controversy' exists once the government has taken private property without paying for it. Accordingly, whether an alternative [judicial] remedy exists does not affect the jurisdiction of the federal court."); *see also,* Timothy V. Kassouni, *The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights*, 29 Cal. W. L. Rev. 1, 43 (1992) ("[I]t makes little sense to require property owners to seek just compensation from the *courts*, as opposed to the governmental entity which imposed the regulation.").

This Court's precedent on the timing of the just compensation obligation confirms *Williamson County*'s error. This Court has repeatedly held that the defendant's duty to provide compensation, and the owner's right to compensation, arises at the time of the taking. *United States v. Dickinson*, 331 U.S. 745, 751 (1947) ("[T]he land was taken when it was taken and an obligation to pay for it then arose."); *United States v. Clarke*, 445 U.S. 253, 258 (1980) ("[T]he usual rule is that the time of the invasion constitutes the act of

taking, and '[i]t is that event which gives rise to the claim for compensation. . . .'") (quoting *United States v. Dow*, 357 U.S. 17, 22 (1958)). Again, if there is an obligation on the defendant to provide a means for compensation with the taking, the defendant's procedures and actions at the time of the taking should determine whether the taking is uncompensated (and thus whether the claim is ripe).

This Court's exhaustion of remedies precedent provides further evidence that, contrary to *Williamson County*, the acts of the agency causing the taking, not a state court ruling, should determine whether a complete constitutional violation exists. Under that precedent, it is well settled that state judicial and administrative remedies have no bearing on a defendant's liability for a constitutional violation. *Steffel v. Thompson*, 415 U.S. 452, 472-73 (1974) (In Section 1983 cases, "we have not required exhaustion of state judicial or administrative remedies, recognizing the paramount role Congress has assigned to the federal courts to protect constitutional rights."); *Patsy v. Bd. of Regents*, 457 U.S. 496, 507 (1982). Federal constitutional violations are instead generally complete when the defendant's acts are complete. *Horne*, 133 S. Ct. at 2062, n.6 ; *Zinermon v. Burch*, 494 U.S. 113, 125 (1990) (holding that as to actions brought to vindicate Bill of Rights protections, "the constitutional violation actionable under § 1983 is complete when the wrongful action is taken"). *Williamson County* is wholly inconsistent with this core constitutional understanding in requiring a property owner to ask a state court for damages (a judicial remedy) before he can challenge a different agency's otherwise uncompensated invasion of property as a taking. *See* John F. Preis, *Alternative State*

Remedies in Constitutional Torts, 40 Conn. L. Rev. 723, 726, 732 (2008).

Finally, there is nothing in the text of the Takings Clause to suggest that a state court must act and deny damages before an unconstitutional taking exists. Berger & Kanner, *supra*, 694 ("There is nothing in . . . the language of the Fifth Amendment that requires municipal nonpayment [of compensation] to be certified by a state court before it is complete."). The more natural reading of the prohibition against takings "without just compensation" is that a constitutional violation exists when, at the time of the taking, the defendant has no method, means or intent to compensate. And in fact, this is the understanding that controlled for approximately two hundred years before *Williamson County* was decided. *Joslin Mfg. Co. v. City of Providence*, 262 U.S. 668, 688-89 (1923); Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52 Vand. L. Rev. 57, 60 (1999).

In sum, the central premise for the state litigation ripeness requirement—that a taking is without just compensation and final only after a state court fails to order compensation—is wrong.[5] The correct view—a

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[5] The *Williamson County* Court also analogized to *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984), in articulating the rule that a takings claimant must ask a state court for damages before suing for compensation under a federal takings claim. But *Monsanto* is inapposite. That case did not even involve a claim for just compensation; it involved a claim for injunctive and declaratory relief. 467 U.S. at 998. *Monsanto* held that a takings claimant suing the federal government could not seek *equitable relief* in federal district court, *id*. at 1016, but must instead sue for just compensation, in the Court of Federal Claims. *Id*.

(continued...)

view sanctioned by this Court one year after *Williamson County*—is that a taking is complete when the defendant itself fails to provide compensation or a prompt and reasonable mechanism for securing it at the time of the taking. *MacDonald, Sommer & Frates v. Yolo Cnty.*, 477 U.S. 340, 350 (1986) ("[A] court cannot determine whether a municipality has failed to provide 'just compensation' until it knows what, if any, compensation *the responsible administrative body intends to provide"*) (emphasis added)*; San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 654

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[5] (...continued)

As a brief amicus curiae cited in the *San Remo* concurrence explains: "[T]he [Monsanto] company's request for equitable relief was not merely premature, it was not available at all. In other words, there was nothing the company could do to 'ripen' its claims for equitable relief; that claim simply had no merit, period." *San Remo*, Brief for Elizabeth J. Nuemont, et. al. as Amici Curiae, at 12. *Monsanto* thus says nothing about when a claim *for just compensation* is ripe.

Moreover, in holding that Monsanto should seek monetary compensation, in the Court of Federal Claims, the Court did not require it to go to a different court first for preliminary compensatory procedures—as a *Williamson*-type state litigation ripeness rule would require. Instead, *Monsanto* says that the plaintiff can sue immediately for compensation as soon as it has used any available non-judicial compensation procedures. *Id.* at 1018 ("claimant [must] first seek satisfaction through the statutory procedure"). Far from supporting the state litigation rule, *Monsanto* instead supports the more doctrinally and logically sound understanding that a taking will be considered "without just compensation" and actionable when it is apparent the defendant has no compensation options at the administrative level at the time of the taking. *Id.* at 1018, n.21 ("[E]xhaustion of the statutory remedy is necessary to determine the extent of the taking that has occurred. To the extent that the operation of the statute [which allegedly caused the taking] provides compensation, no taking has occurred.").

(1981) (Brennan, J., dissenting) ("As soon as private property has been taken, whether through formal condemnation proceedings, occupancy, physical invasion, or regulation, the landowner has *already* suffered a constitutional violation . . . .") (emphasis in original). The Court should make clear that this understanding controls.

B. This Case Provides the Court the Opportunity to Clarify That a Taking Is Final When the Agency Causing the Taking Fails to Provide Compensation

This case provides the Court with an excellent vehicle to correct *Williamson County*'s mistake in presuming that an alleged taking is "without just compensation" and complete only when a state court rules. Here, a New York statute delegated the State's eminent domain power to Verizon to install telecommunications infrastructure on private property "subject to the right of the owners thereof to full compensation." N.Y. Transp. Corp. Law § 27. The statute gave Verizon two options for compensating property owners: it could either agree with individual property owners on the amount of compensation or use the State's eminent domain procedures. *Id*. But Verizon did neither. *Kurtz,* 758 F.3d at 510. It did not compensate Petitioners.

Nothing more is needed to conclude that the taking Verizon is accused of causing occurred "without just compensation." Requiring Petitioners to get a state court ruling before they can raise their federal takings claim simply burdens their Fifth Amendment rights with an expensive, time-consuming, inefficient and ultimately, pointless procedural barrier. Verizon's

invasion of Petitioners' properties being complete, and the lack of compensation being certain, Petitioners' takings claim is already fit for adjudication.

The Court should grant the petition and abrogate the state litigation rule.

II

WILLIAMSON COUNTY'S STATE COURT RIPENESS REQUIREMENT IS UNWORKABLE AND CONTINUES TO CAUSE CHAOS AND INJUSTICE IN FEDERAL PROPERTY RIGHTS LITIGATION

The state-court litigation requirement is not only doctrinally unjustified, it is also unworkable in practice. *See San Remo*, 545 U.S. at 351 (Rehnquist, C.J., concurring in the judgment); Keller, *supra*, at 239. Indeed, the requirement interacts with numerous preexisting procedural doctrines to confuse, delay and often bar judicial review of federal takings claims. *See Sansotta,* 724 F.3d at 544-45. To make matters worse, some courts have extended the state litigation rule to basic federal Equal Protection and Due Process claims, thus infecting these areas with *Williamson County*'s problems. Any one of these developments would justify reconsideration of the state litigation rule. Together, they positively cry out for the Court to immediately jettison it.

A. The State Court Ripeness Rule Interacts with Res Judicata Principles to Strip Federal Courts of Jurisdiction over Federal Takings Claims

The most heavily-criticized aspect of the state-court litigation doctrine is its interaction with the federal full-faith-and-credit statute, 28 U.S.C. § 1738. *See San Remo*, 545 U.S. at 346-47 (majority opinion). That statute "obliges federal courts to give the same preclusive effect to a state-court judgment as would the courts of the State rendering the judgment." *McDonald v. City of West Branch*, 466 U.S. 284, 287 (1984). In other words, federal courts cannot review claims or issues that were or could have been litigated in a prior state court action. *San Remo*, 545 U.S. at 336 & n.16. This creates a Catch-22 for takings plaintiffs required by *Williamson County* to litigate in state court in order to "ripen" their federal takings claim. As one district court explained,

> *Williamson* [*County*] and its progeny place Plaintiffs in a precarious situation. Plaintiffs must seek redress from the State court before their federal taking claims ripen, and failure to do so will result in dismissal by the federal court. However, once having gone through the State court system, plaintiffs who then try to have their federal claims adjudicated in a federal forum face, in many cases, potential preclusion defenses. This appears to preclude completely litigants . . . from bringing federal taking claims in a federal forum, providing a federal forum only by way of the United

> States Supreme Court review of a State court judgment.

W.J.F. Realty Corp. v. Town of Southampton, 220 F. Supp. 2d 140, 146 (E.D.N.Y. 2002); *see also DLX, Inc. v. Kentucky*, 381 F.3d 511, 519-20 (6th Cir. 2004) ("The availability of federal courts to hear federal constitutional takings claims has often seemed illusory, because under *Williamson County* takings plaintiffs must first file in state court . . . before filing a federal claim, and because in deciding that federal claim, preclusive effect must be given to that prior state-court action under [Section 1738] according to the res judicata law of the state, including the doctrines of merger and bar whereby all claims which could have been brought in an earlier cause of action are precluded." (footnote omitted)).

Thus, although the Court intended state litigation to perfect federal court review of federal takings claims, *Williamson County*, 473 U.S. at 194-95, its actual effect is to completely eliminate that review. *See San Remo*, 545 U.S. at 346-47; *DLX*, 381 F.3d at 521 ("The barring of the federal courthouse door to takings litigants seems an unanticipated effect of *Williamson County* . . . ."); *see also*, Michael M. Berger, *Supreme Bait & Switch: The Ripeness Ruse in Regulatory Takings*, 2 Wash. U.J.L. Pol'y 99, 102 (2000) ("[T]he very act of ripening a case also ends it.").

This result is contrary to Congressional mandate on federal court jurisdiction and a century of this Court's precedent. Long ago, this Court held that the right and duty of federal courts to protect constitutional property rights was so essential and immediate that federal review could not be barred or forestalled by the availability of a state court suit. *See*

Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 344-50 (1816) (defending primacy of federal review of constitutional issues to avoid state court bias and to ensure uniformity of constitutional decision-making), *Home Telephone & Telegraph Co. v. City of Los Angeles*, 227 U.S. 278, 284-85 (1913) (rejecting a contention that the federal courts had no power to hear a due process property claim until state courts had passed on the issue, in part because it would "cause the state courts to become the primary source for applying and enforcing the constitution of the United States in all cases covered by the [Fourteenth] Amendment"). Since then, the Court has repeatedly confirmed the primacy of federal courts in constitutional disputes. *See Steffel,* 415 U.S. at 472-73*; Mitchum v. Foster*, 407 U.S. 225, 242 (1972) ("The very purpose of [42 U.S.C.] § 1983 was to interpose 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 . . . .").

Williamson County's evisceration of federal review over federal takings claims amounts to a radical departure from the post-Civil War constitutional framework. Preis, *supra*, at 726, 732 (arguing that *Williamson County* represents "a marked change from past practice" in the Court's willingness to allow state law to essentially decide federal constitutional tort actions, and noting that "*Williamson County*'s conflict with Section 1983's no-exhaustion principle is obvious and has been widely criticized"); Henry Paul Monaghan, *State Law Wrongs, State Law Remedies, and the Fourteenth Amendment*, 86 Colum. L. Rev. 979, 989 (1986) ("No authority supports use of ripeness doctrine to bar federal judicial consideration of an otherwise sufficiently focused controversy simply

because corrective state judicial process had not been invoked."). No other class of constitutional claimants are shut out of federal courts like property owners are under *Williamson County*'s regime.

While *San Remo* may have reluctantly accepted this deviation from the post-Civil War system in the context of that case, it did not make the problem disappear. Nor did it provide any persuasive justification for continuing to deny federal courts of jurisdiction over the Takings Clause. *San Remo*, 545 U.S. at 351 (Rehnquist, C.J., concurring in the judgment). This Court should overrule *Williamson County*'s state litigation rule to restore federal judicial oversight over federal takings claims.

B. The State Court Ripeness Doctrine Often Interacts With Removal Jurisdiction to Deprive Takings Plaintiffs of any Forum for Their Claim

Perhaps even more troubling than the destruction of federal court jurisdiction arising from *Williamson County* is the dysfunction it creates in the context of removal. *See* 28 U.S.C. § 1441. In particular, when the state litigation requirement clashes with a defendant's right to remove a federal question from state to federal court, takings plaintiffs are often deprived of *any* judicial forum for their federal takings claim.

Because claim and issue preclusion barriers bar property owners from going to federal court after suing in state court under *Williamson County,* they must file their federal takings claim in state court, or not at all. *San Remo*, 545 U.S. at 346-47. Yet, in state court, defendants have a right under 28 U.S.C. § 1331 to

remove any complaint raising a federal issue. *Sansotta*, 724 F.3d at 545. When defendants use that right to remove a takings claim, the plaintiff's takings claim instantly goes from ripe and proper in state court to unripe in federal court due to the failure to exhaust state proceedings.

Thus, upon removing a federal takings claim, defendants are able to argue that the claim must be dismissed because the plaintiff did not complete the state litigation, as required by *Williamson County*. Despite the irony and unfairness of this situation, federal courts often accept the argument. *See*, *e.g.*, *8679 Trout, Inc. v. N. Tahoe Pub. Utils. Dist.*, No. 2:10-cv-01569, 2010 WL 3521952, at *5-6 (E.D. Cal. Sept. 8, 2010); *CBS Outdoor, Inc. v. Village of Itasca*, No. 08 C 4616, 2009 WL 3187250, (N.D. Ill. Sept. 30, 2009). The end result is that the removed takings claimant loses every avenue for judicial review of the federal takings claim. He cannot raise the claim initially in federal court due to *Williamson County*'s state litigation rule, he cannot raise it in federal court after losing a state court suit due to preclusion doctrines, and he cannot raise it in state court because the defendant can simply remove the claim to the federal court, where it is unripe again under *Williamson County*. *Doak Homes, Inc. v. City of Tukwila*, No. C07-1148MJP, 2008 WL 191205, at *4 (W.D. Wash. Jan. 18, 2008) ("Defendants' decision to remove this case from state court effectively denied [the plaintiff] an opportunity to utilize [the state's] procedure for reimbursement, and brought a takings claim to this [federal] Court that was not ripe for review.").

It is true that, in some takings removal cases, federal courts will remand the claim to the state tribunal, rather than dismiss it. *See, e.g.*, *Del-Prairie Stock Farm, Inc. v. Cnty. of Walworth*, 572 F. Supp. 2d 1031 (E.D. Wis. 2008); *Doney v. Pacific Cnty.*, No. C07-5123RJB, 2007 WL 1381515, at *4-6 (W.D. Wash. May 9, 2007). But, as a practical matter, this result is no better for a takings claimant. That plaintiff did exactly what the *Williamson County* doctrine says he must do to litigate a takings claim: file it in state court. But instead of receiving a hearing, the plaintiff is whip-sawed from state to federal court and back again, with litigant and judicial resources being wasted along the way, and the takings claim no closer to adjudication than when first filed. *Cf. Martin v. Franklin Capital Corp.*, 546 U.S. 132, 140 (2005) ("The process of removing a case to federal court and then having it remanded back to state court delays resolution of the case, imposes additional costs on both parties, and wastes judicial resources."); Breemer, *The Rebirth of Federal Takings Review?*, *supra*, at 333.

This cannot be what the *Williamson County* Court envisioned. In fact, this Court has said that takings claimants do not have to endure "piecemeal litigation or otherwise unfair procedures" to secure judicial review. *MacDonald, Sommer, & Frates*, 477 U.S. at 350 n.7. Yet, due to the state litigation requirement, this is exactly what they must go through when takings claims are removed. *See Sansotta*, 724 F.3d at 544-45; *Sherman v. Town of Chester*, 752 F.3d 554, 563-64 (2d Cir. 2014). No "other species of American plaintiffs are subjected to such judicial jiggery-pokery" in the removal process. Gideon Kanner, *"[Un]equal Justice Under Law": The Invidiously Disparate*

Treatment of American Property Owners in Taking Cases, 40 Loy. L.A. L. Rev. 1065, 1077-78 (2007).

Williamson County's state litigation ripeness prong does not ripen takings claims. It destroys them. It makes a mockery of the concept of due process in judicial review, and ultimately strips the Takings Clause of meaningful application. The Court should take this case to overrule the state litigation doctrine. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 63 (1996) (reconsideration justified "when governing decisions are unworkable or are badly reasoned.").

C. *Williamson County*'s Dysfunction Now Burdens Basic Due Process and Equal Protection Claims

Given the difficulty of securing judicial review of a federal takings claim under *Williamson County*, it is not surprising that some property owners are foregoing their Fifth Amendment rights in favor of due process and equal protection claims. *See*, *e.g.*, *Penner v. City of Topeka*, 437 F. App'x 751, 753 (10th Cir. 2011) (involving due process and equal protection claims, but no takings claims, challenging repeated denials of land use permits); *Ziss Bros. Const. Co. v. City of Independence*, 439 F. App'x 467, 470 (6th Cir. 2011) (involving a denial of development plat challenged only on due process and equal protection grounds). But even this provides no safe haven from *Williamson County* because federal courts are increasingly applying the state litigation requirement in the procedural due process and equal protection context. *See generally*, J. David Breemer, *Ripeness Madness: The Expansion of* Williamson County*'s Baseless "State Procedures" Takings Ripeness Requirement to*

Non-Takings Claims, 41 The Urban Lawyer 615 (2009).

Some courts, such as the Seventh Circuit, have directly held that *Williamson County*'s state litigation rule applies to non-takings property rights claims. *River Park, Inc. v. City of Highland Park*, 23 F.3d 164, 167 (7th Cir. 1994) ("[A] property owner may not avoid *Williamson* [*County*] by applying the label 'substantive due process' to the claim. So too with the label 'procedural due process.' "). Others, including the Second Circuit in the decision below, have applied the state litigation rule to due process and equal protection claims, by indirect means, such as by holding that all property rights claims raised with a takings claim must be analyzed under takings rules. *See Kurtz*, 758 F.3d at 514-16; *Braun v. Ann Arbor Charter Twp.*, 519 F.3d 564, 572 (6th Cir. 2008); *Bateman v. City of West Bountiful*, 89 F.3d 704, 709 (10th Cir. 1996) ("[T]he ripeness requirement of *Williamson [County]* applies to due process and equal protection claims that rest upon the same facts as a concomitant takings claim.").[6]

Either way, Fourteenth Amendment claims which should be justiciable in federal courts without any exhaustion of state remedies requirement are now impeded by *Williamson County*. This extension is occurring even when courts are informed that the state litigation doctrine was meant to apply only to takings claims seeking just compensation. *See Williamson Cnty.*, 473 U.S. at 194-95; *Culebras Enters. Corp. v. Rivera Rios*, 813 F.2d 506, 515-16 (1st Cir. 1987) (acknowledging that *Williamson County* applied only

[6] As Petitioners correctly argue, not all courts have agreed to extend *Williamson County*'s state litigation rule applies to non-takings claims. There is a conflict among the circuits.

to a claim under the Just Compensation Clause, but applying the state litigation requirement to a substantive due process claim). The problem is that wherever *Williamson County* goes, its pernicious side-effects follow. Requiring state court litigation to "ripen" federal due process and equal protection claims triggers the same claim/issue preclusion barrier that bars federal court review of state court-ripened takings suits. *Wilkinson v. Pitkin Cnty. Bd. of Cnty. Comm'rs*, 142 F.3d 1319, 1322-23 (10th Cir. 1998); *Rainey Bros. Const. Co. v. Memphis and Shelby Cnty. Bd. of Adjustment*, 967 F. Supp. 998, 1004 (W.D. Tenn. 1997). Therefore, in practice, due process and equal protection claimants may be shut out of federal courts and relegated, like takings claimants, to state courts—assuming their complaint is not removed on federal question grounds. This too was surely not intended by the *Williamson County* Court and nothing in due process and equal protection jurisprudence justifies its continuance.

D. This Case Provides the Court with an Opportunity to Bring Order, Efficiency and Fairness Back into Federal Property Rights Litigation

The Court can and should use this case to correct all of the foregoing problems by simply repudiating *Williamson County*. The only issue addressed by the court below was whether *Williamson County* required Petitioners to litigate in state courts before raising their takings and due process claims. The lower court answered in the affirmative, holding that *Williamson County* not only barred federal review of Petitioners' takings claim, but also their federal procedural due process claim. *Kurtz*, 758 F.3d at 515. In so doing, the

lower court ensured that Petitioners can never "ripen" their constitutional claims for federal judicial review because preclusion principles will prevent that review after the *Williamson County*-mandated state court proceedings. *San Remo*, 545 U.S. at 346-47. This Court should take the case to overrule the state litigation ripeness requirement, and return consistency, order and fairness to the jurisdictional regime governing Fifth and Fourteenth Amendment property rights cases.

CONCLUSION

The Court should grant the petition.

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Respectfully submitted,

ILYA SHAPIRO
Of Counsel
Cato Institute
1000 Mass. Avenue NW
Washington, DC 20001
Telephone: (202) 842-0200
E-mail: ishapiro@cato.org

J. DAVID BREEMER
Counsel of Record
CHRISTOPHER M. KIESER
Of Counsel
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: jdb@pacificlegal.org
E-mail: cmk@pacificlegal.org

Counsel for Amici Curiae
Pacific Legal Foundation and Cato Institute