No. 17-647

In The
Supreme Court of the United States

ROSE MARY KNICK,

Petitioner,

v.

TOWNSHIP OF SCOTT, PENNSYLVANIA, ET AL.

Respondents.

On Petition For A Writ of Certiorari To
The United States Court Of Appeals
For the Third Circuit

BRIEF OF *AMICUS CURIAE* THE NATIONAL ASSOCIATION OF HOME BUILDERS IN SUPPORT OF PETITIONER

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, *Amicus* National Association of Home Builders (NAHB) states that it is a non-profit 501(c)(6) corporation incorporated in the State of Nevada, with its principal place of business in Washington, D.C. NAHB has no corporate parents, subsidiaries or affiliates, and no publicly traded stock. No publicly traded company has a ten percent or greater ownership interest in NAHB.

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INTEREST OF *AMICUS 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 goals is providing and expanding opportunities for all people to have safe, decent, and affordable housing. Founded in 1942, NAHB is a federation of more than 700 state and local associations. About one-third of NAHB's approximately 140,000 members are home builders or remodelers.

NAHB is a vigilant advocate in the nation's courts. It frequently participates as a party litigant and *amicus curiae* to safeguard the constitutional and statutory rights and economic interests of its members and those similarly situated.

NAHB members provide 80% of all homes constructed in the United States; thus, NAHB members have a vested interest in the application and expansion of *Williamson County*'s state exhaustion ripeness requirement. *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 *amicus curiae's* intention to file this brief. All parties have consented. 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 *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

The home building sector depends on clear regulatory and legal processes that do not infringe on constitutionally-protected property rights. The ability of property owners to have their constitutional claims heard predictably and transparently is vital to the interest of NAHB's members. Unfortunately, this Court's decision in *Williamson County* has had the opposite effect; not only confusing property owners but also creating chaos between the federal circuits.

NAHB is disturbed that the federal circuits have applied *Williamson County* in a manner that allows municipalities to use procedural gamesmanship to eliminate otherwise valid constitutional claims. This process effectively eliminates any federal forum for NAHB members to have their takings, due process, and equal protection land use claims heard.

ARGUMENT

I. THIS COURT SHOULD GRANT CERTIORARI TO ESTABLISH UNIFORMITY AMONG THE CIRCUITS ON THE APPLICATION OF *WILLIAMSON COUNTY* TO LAND USE CLAIMS.

Over 30 years ago, this Court created a two-part ripeness test applicable in whole to only one type of claim: regulatory takings. *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985); *see e.g., Kurtz v. Verizon New* York, 758 F.3d 506, 514 (2d Cir. 2014) (In *Williamson County,* this Court "did not reach any issue of exhaustion" for any claims other than Fifth Amendment Takings).

In *Williamson County*, the Court held that regulatory takings litigants must meet two special conditions before their claims ripen. First, the plaintiff must show that the government's decision to take the property is final. Second, the plaintiff must exhaust all available state remedies for compensation. 473 U.S. at 191, 193. *See also* R.S. Radford & Jennifer Fry Thompson, *The Accidental Abstention Doctrine: After Thirty Years, the Case for Diverting Federal Takings Claims to State Court Under Williamson County Has Yet to Be Made*, 67 Baylor L. Rev. 567, 575 (2015).

As Petitioner correctly notes, *Williamson County* has caused more conflict in federal takings litigation than any other takings principle. Petition for Writ of Certiorari at 2-4, *Rose Mary Knick v. Twp of Scott,*

Pennsylvania, No, 17-647 (filed Oct. 31, 2017). The conflict is particularly prevalent with *Williamson County's* "state exhaustion" ripeness prong, which serves as a lock to the courthouse door for takings claims, "despite *Williamson County's* assurances that property owners are guaranteed access to court at some point." *Arrigoni Enterprises, LLC v. Town of Durham*, *Conn.,* 136 S. Ct. 1409 (2016) (Thomas, J., joined by Kennedy, J., dissenting from denial of certiorari); *See also* John J. Delaney & Duane J. Desiderio*, Who Will Clean Up the "Ripeness Mess"? A Call for Reform so Takings Plaintiffs Can Enter the Federal Courthouse*, 31 Urb. Law. 195 (1999); 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 (2004).

Unfortunately, the application of *Williamson County* by the lower courts is not limited to federal takings claims. With no clarifying direction by this Court, lower courts are understandably split over the extent of *Williamson County*, including whether the state exhaustion ripeness requirement applies to substantive due process, procedural due process, and equal protection land use claims. There is a dire need for this Court to grant certiorari.

II. IN THE ABSENCE OF THIS COURT'S GUIDANCE, LOWER COURTS ARE CONFLICTED ON APPLICATION OF *WILLIAMSON COUNTY'S* STATE EXHAUSTION RULE TO CONSTITUTIONAL CLAIMS, INCLUDING DUE PROCESS AND EQUAL PROTECTION.

For well over a decade, it has been clear that Fifth Amendment Takings claims are separate and distinct from due process cases. *Lingle v. Chevron,* 544 U.S. 528 (2005). In *Lingle*, the Court determined that the "substantially advances legitimate state interests [test]" was not a proper takings standard. *Agins v. City v. Tiburon*, 447 U.S. 255 (1980), *abrogated by Lingle* at 542. By eliminating the substantially advances test, the Court separated due process claims from Fifth Amendment regulatory takings claims.

In *Lingle*, this Court admitted the *Agins* means-ends inquiry was one that "commingl[ed] of due process and takings inquiries," and that such "reliance on due process precedents" has "no proper place in [our] takings jurisprudence." *Id.* at 529; *see also Williamson County*, 473 U.S. 172, 197 (1995) ("The remedy for a regulation that goes too far, under the due process theory, is not 'just compensation', but invalidation of the regulation[.]"). Certainly, "[a takings] suit pursuing just compensation is entirely irrelevant to the validity of land use regulations, and has no effect on any facts relevant to [a due process] claim." Nader James Khorassani*, Must Substantive*

Due Process Land Use Claims be so "Exhaust" ing?, 81 Fordham L. Rev. 409, 443 (2012).

Perhaps not surprisingly, four of this Court's Justices voiced their concern that *Williamson County* should be reevaluated in the same year as the *Lingle* decision. *San Remo Hotel, L.P.* v. *City and County of San Francisco*, 545 U.S. 323, 348-52 (2005) (Rehnquist, C.J., concurring); *See also* Michael M. Berger*, The Ripeness Game: Why Are We Still Forced to Play*, 30 Touro L. Rev. 297 n.13 (2014) (commenting that descriptions of *Williamson County* by lower courts include "unpleasant," "unfortunate," "unclear," "nonsense," "draconian," and "Kafkaesque")(citations omitted).

A decade afterward, this Court has done little to clarify the reach of *Williamson County* to land use constitutional claims other than federal takings. Without guidance by this Court, the circuit split has deepened over the applicability of *Williamson County* exhaustion requirements to substantive due process, procedural due process, and equal protection claims. In particular, some lower courts hold that *Williamson's* exhaustion prong is mandatory and extend it to due process and equal protection land use claims. Other courts treat *Williamson County* as rightly prudential, but this results in a confusing set of inter- and intra-circuit ripeness rules that are nigh impossible for a common property owner to comprehend. *See Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 733-34 (1997) (referring to *Williamson County's* "two independent prudential hurdles to a regulatory takings claim brought against a state entity in federal court.").

Other courts hold that *Williamson County's* exhaustion prong does not apply to due process or equal protection land use claims.

The circuit split is deep and ready for this Court's intervention.

A. The First, Seventh, and Tenth Circuits Apply *Williamson County's* Exhaustion Requirement to Due Process Land Use Claims.

The First, Seventh, and Tenth Circuits require property owners to exhaust state remedies to ripen substantive due process claims for federal court. In *Forseth v. Village of Sussex*, the plaintiffs attempted to develop a piece of property, but the village board president who lived immediately adjacent conditioned final approval upon a private conveyance of a buffer strip from the plaintiffs to him. 199 F.3d 363, 366 (7th Cir. 2000). The plaintiffs conveyed the strip and subsequently brought a claim in federal district court, claiming violations of substantive due process, equal protection, and takings. *Id.* at 367. Despite recognizing that plaintiffs bringing substantive due process claims in the land use context were not seeking just compensation, the court nevertheless applied *Williamson County* because the claim fell "within the framework for takings claims." *Id.* at 369. The court held that *Williamson County's* ripeness requirements are nearly absolute, noting that "we have yet to excuse any substantive due process claim[s] in the land-use context . . . ." *Id.*

The Seventh Circuit's stubborn refusal to allow due process claims in federal court extends to procedural due process. In *River Park, Inc. v. City of Highland Park*, the court held that "a property owner may not avoid *Williamson* by applying the label 'substantive due process' to the claim …. So too with the label 'procedural due process.' Labels do not matter. A person contending that state or local regulation of the use of land has gone overboard must repair to state court." 23 F.3d 164, 167 (7th Cir. 1994).

The First Circuit applies exhaustion to substantive due process claims. In *Deniz v. Mun. of Guaynabo*, 285 F.3d 142, 149 (1st Cir. 2002), the court refused to hear a due process claim, noting that "[d]ressing a takings claim in the raiment of a due process violation does not serve to evade the exhaustion requirement. Here as we have said, the inverse condemnation remedy represents an arguably available and adequate means of obtaining compensation for the alleged taking. Thus, no substantive due process claim will lie until that remedy is exhausted." *Deniz, quoting Ochoa*, 815 F.2d at 817 n.4; *See also Downing/Salt Pond Partner*s, *L.P. v. Rhode Island and Providence Plantations*, 643 F.3d 16 (1st Cir. 2011) (noting that the court has "held that a plaintiff cannot, [evade *Williamson County*] merely by recasting its takings claim in the raiment of a due process violation.") (citations omitted).

The Tenth Circuit likely requires exhaustion, noting that due process or equal protection claims must satisfy *Williamson County* if the claims "rest upon the same facts as a concomitant takings claim."

Bateman v. City of West Bountiful, 89 F.3d 704 (10th Cir. 1996). In *Signature Properties Int'l Ltd. P'ship v. City of Edmond*, the plaintiff did not bring a Fifth Amendment Takings claim; yet, the court applied *Williamson County* and ruled that the plaintiff's substantive due process arbitrary and capricious claim was unripe. 310 F.3d 1258 (10th Cir. 2002). *See also, J.B., Ranch, Inc. v. Grand County,* 958 F.2d 306, 308 (10th Cir. 1992) (applying *Williamson County* to plaintiff's substantive due process claim because the facts of the case "fit squarely within the analysis developed in just compensation cases."); *B. Willis, C.P.A., Inc. v. BNSF Ry. Corp.*, 531 F.3d 1282, 1298 n.19 (10th Cir. 2008) ("this court has held that, 'where the property interest in which a plaintiff asserts a right to procedural due process is coextensive with the asserted takings claim,' *Williamson County's* ripeness principle still applies.").

B. The Ninth and Second Circuits are Unable to Apply *Williamson County* in a Consistent and Fair Manner to Due Process and Equal Protection Claims.

Several federal courts have determined that due process and equal protection claims were ripe even though related takings claims were not ripe under *Williamson County*. These courts distinguish between a property owner's takings claim and other constitutional claims by holding that due process and equal protection claims are only subject to *Williamson County's* administrative finality prong. *See, e.g., McKenzie v. City of White Hall*, 112 F.3d 313 (8th Cir. 1997); *County Concrete Corp. v. Twp of*

Roxbury, 442 F.3d 159, 168-169 (3d Cir. 2006) ("The absence of 'just compensation' is not part of a due process or equal protection injury"). Not all courts, however, have been so clear.

An examination of Ninth Circuit jurisprudence is a prime example of how courts have been unable to apply *Williamson County* in a consistent and principled way. The Ninth Circuit has recognized that *Lingle* forecloses the ability of federal courts to hold that Fifth Amendment takings claims absorb other constitutional claims, like due process, in property rights cases. *Crown Point Dev., Inc. v. City of Sun Valley*, 506 F.3d 851 (9th Cir. 2007); *see also, A Helping Hand, LLC v. Baltimore Cty., MD.,* 515 F.3d 356, 369 n.6 (4th Cir. 2008); *Rose Acre Farms, Inc. v. U.S.,* 559 F.3d 1260, 1277 (Fed. Cir. 2009). Here, the court explained that "*Lingle* pulls the rug out from under our rationale for totally precluding substantive due process claims based on arbitrary or unreasonable conduct." *Crown Point* at 855.

However, it is not clear whether the Ninth Circuit requires exhaustion for due process and equal protection claims. *See e.g., Hoehne v. Cty. of San Benito*, 870 F.2d 529, 532 (9th Cir. 1989) (holding that *Williamson County's* finality requirement applies to due process and equal protection, but not commenting similarly on exhaustion.); *but see Carpinteria Valley Farms, Ltd. v. County of Santa Barbara*, 344 F.3d 822, 831 (9th Cir. 2003) (there are "certain limited and appropriate circumstances" where 42 U.S.C. § 1983 claims may be ripe even when related Fifth Amendment Takings claims are unripe). More recently, a federal district court has

held that "it would be illogical to require a plaintiff to seek compensation in state proceedings for a due process violation, because such violations, if proven, are not remedied by 'compensation.'" *Surf and Sand, LLC v. City of Capitola*, 717 F.Supp.2d 934 (N.D. Cal. 2010); *See also Guggenheim v. City of Goleta,* 638 F.3d 111 (9th Cir. 2010) (commenting that "*Williamson* is the law by which we are bound" but "[w]ith all due respect [to this Court], we do not think the Constitution requires [an exhaustion requirement].")

Other Circuits mirror the Ninth Circuit in the ambiguity of whether substantive due process, procedural due process, and equal protection[2] claims are subject to *Williamson County's* exhaustion requirement.

For example, the Second Circuit admittedly applies a complex set of rules to determine whether constitutional claims are subject to any of *Williamson County's* requirements. *Kurtz v. Verizon New York, Inc.,* 738 F.3d 506, 514 (2d Cir. 2014). ("After *Williamson County,* courts have attempted to

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[2] Even the Seventh Circuit, which applies a bright line state exhaustion rule to due process claims, is less confident with equal protection claims. *See Forseth* at 371. (holding that the plaintiff's equal protection claim was not subject to *Williamson County* in the land use context when the plaintiff can show "circumstances . . . that sufficiently suggest that the plaintiff has not raised just a single takings claim with different disguises"); *But see Unity Ventures v. Cty. Of Lake,* 841 F.2d 770, 774-75 (7th Cir. 1988) (holding that Williamson County "applies as well to equal protection and due process claims" in land use cases).

settle questions of ripeness in the several contexts of due process claims: substantive or procedural; substantive claims alleging regulatory overreach or those alleging arbitrary and capricious conduct; claims arising from the same nucleus of fact as a takings claim, or not; and regulatory or physical takings. Myriad permutations can result.").

In *Southview Associates, Ltd. v. Bongartz*, the Second Circuit held that substantive due process claims alleging regulatory overreach must satisfy both the finality and exhaustion prongs of *Williamson County*. 980 F.2d 84, 96 (2d Cir. 1992). However, claims alleging arbitrary and capricious conduct by the government must only meet *Williamson County's* finality requirement, not exhaustion. *Id.* at 97; *see also Villager Pond, Inc. v. Town of Darien,* 56 F.3d 375, 381 (2d Cir. 1995). At the same time, the Second Circuit further confuses the issue by holding that *Williamson County* "has been extended to equal protection and due process claims asserted in the context of land use challenges." *Kurtz* at 515, citing *Murphy v. New Milford Zoning Comm'n,* 402 F.3d 342, 349-50 (2d Cir. 2005).

C. Government Entities Utilize *Williamson County* to Evade Their Constitutional Obligations.

Due to the confusion caused by *Williamson County*, defendant governments bob and weave through *Williamson County's* ripeness maze, allowing them to evade liability for takings, due process, and equal protection claims. The typical defendants 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).

In a few instances, courts catch on. 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 locality 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.

The Second Circuit recognized the absurdity throwing out a federal takings claim under *Williamson* County ripeness rules when the government removes a case to federal court. The Second Circuit, relying a Fourth Circuit case, held that "refusing to apply the state-litigation requirement in this instance ensures that a state or its political subdivision cannot manipulate litigation to deny a plaintiff a forum for his claim." *Sherman* at 564, citing *Sansotta v. Town of Nags Head*, 724 F.3d 533 (4th Cir. 2013).

Unfortunately, government defendants are often successful in dismissing cases after removing them

from state to federal court. The litigation landscape is littered with cases that have been removed from state court to federal court, only to be dismissed under *Williamson County*. *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, 335 n.79 (2014) (providing numerous examples of cases dismissed under *Williamson County* after defendant removed case from state to federal court).

It should not be that a case that is fully ripe in state court suddenly becomes unripe the moment a government defendant removes the case from state to federal court. Home builders and all other property owners deserve more constitutional certainty than this.

CONCLUSION

The Court should no longer delay its reconsideration of the exhaustion of state remedies rule. When this Court decided *Williamson County* in 1985, modern takings jurisprudence was 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 the self-effecting remedy required by the Takings Clause. Since then, the contours of the Fifth Amendment's substantive protections have been analyzed by this Court, but the most fundamental jurisdiction question – "Can a federal court decide a federal takings, due process, or equal protection land use claim?" – remains

unanswered. The confusion caused by *Williamson County* is vast and requires this Court's intervention. *Amicus* urges the Court to grant certiorari.

Dated: December 4, 2017

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