No. 17-647

In The
Supreme Court of the United States

ROSE MARY KNICK,
Petitioner,

v.

TOWNSHIP OF SCOTT; CARL S. FERRARO, Individually and in his Official Capacity as Scott Township Code Enforcement Officer,
Respondents.

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

REPLY ON PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION AND SUMMARY OF ARGUMENT

It is well known in this Court,[1] amongst lower courts,[2] and the legal profession[3] that this Court's decision in *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), is deeply flawed to the extent it requires property owners to exhaust state court remedies before asserting a violation of the Takings Clause of the Fifth Amendment. *Id.* at 194-96. It is also well known that *Williamson County* is the source of an ever-expanding class of jurisdictional "anomalies,"

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[1] *Arrigoni Enterprises, LLC v. Town of Durham*, 136 S. Ct. 1409 (2016) (Thomas, J., joined by Kennedy, J., dissenting from denial of certiorari); *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323, 348 (2005) (Rehnquist, C.J., joined by O'Connor, Kennedy, & Thomas, JJ., concurring in judgment).

[2] *Dodd v. Hood River County*, 59 F.3d 852, 861 (9th Cir. 1995) (*Williamson County* can be applied to create "draconian" results); *Front Royal & Warren County Industrial Park Corp. v. Town of Front Royal*, 135 F.3d 275, 283-84 (4th Cir. 1998) (*Williamson County* caused a takings plaintiff to pass "through procedural purgatory and wended its way to procedural hell"); *Wayside Church v. Van Buren County*, 847 F.3d 812, 825 (6th Cir. 2017) (Kethledge, J., dissenting) (*Williamson County* "has undermined the adjudication of federal takings claims against states and local governments."); *Del-Prairie Stock Farm, Inc. v. County of Walworth*, 572 F. Supp. 2d 1031, 1033 (E.D. Wis. 2008) (*Williamson County* creates a "catch-22" and functions to "strip[] federal courts of jurisdiction over federal takings claims" contrary to its "ripeness" purposes.).

[3] *See* 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, 702-03 (2004) (collecting critical commentary on *Williamson County*).

inefficiencies, and injustices in property rights litigation. *San Remo Hotel*, 545 U.S. at 348-52 (Rehnquist, C.J., joined by O'Connor, Kennedy, & Thomas, JJ., concurring in judgment). For these reasons, those with knowledge of *Williamson County*'s history and role in takings litigation agree with Justices of this Court that the precedent should be reconsidered.[4] *Id.* at 352 (Rehnquist, C.J., concurring).

Respondent Township of Scott (Township) disagrees, however. In so doing, it gives great weight to the fact that *Williamson County* continues to exist, despite its near universal condemnation. *See* Brief in Opposition (Opp.) at 6-7, 16-17. But the mere fact that a mistaken and unworkable decision has managed to survive thus far does not make it correct or immunize it from reconsideration, particularly in an area as fluctuating as federal takings law. In *Lingle v.*

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[4] *See, e.g.*, 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, 620 (2015) ("*Williamson County*'s hastily crafted, poorly-thought-out state procedures requirement has imposed incalculable losses on landowners and deprived them of rights supposedly guaranteed by both the Constitution and Congress. It is time to eat more crow" and overturn the precedent.); 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, 201 (2006) ("[T]he *Williamson County* State Litigation prong should be reexamined and eliminated."); Joshua D. Hawley, *The Beginning of the End?* Horne v. Department of Agriculture *and the Future of* Williamson County, 2013 Cato Sup. Ct. Rev. 245, 263 (*Williamson County* "was also wrong. . . . The Court's confusion about these points in *Williamson County* led it, and eventually all of takings law, down a doctrinal cul-de-sac. It is time for a new turn.").

Chevron U.S.A. Inc., 544 U.S. 528 (2005), this Court reconsidered and abrogated a federal takings test that had been in place for the previous quarter-century because it was "doctrinally untenable as a takings test [and] its application as such would also present serious practical difficulties." *Id.* at 544. The same principles apply, to an even greater degree, to *Williamson County*. The Court should follow the same course it did in *Lingle* and overrule *Williamson County*'s state litigation ripeness rule to bring doctrinal clarity, fairness, and predictability to federal takings litigation.

This is an appropriate case for taking such a step for several reasons. The decision below takes the wrong side in an important, direct conflict among the lower courts on the applicability of *Williamson County*'s state litigation doctrine to facial takings claims; a conflict the Township fails to refute. Moreover, the case is squarely postured for resolution of the questions presented. The Township does not identify any procedural or jurisdictional defect in this case that would preclude the Court from using it as a vehicle to reconsider *Williamson County*. The Township is content to defend that decision on its merits. Opp. at 14-15. While Justices Kennedy and Thomas and former Justices Rehnquist and O'Connor believe that *Williamson County* is mistaken, *Arrigoni*, 136 S. Ct. 1409 (Thomas, J., dissenting from denial of certiorari); *San Remo Hotel*, 545 U.S. at 348-52 (Rehnquist, C.J., concurring), the Township believes it is correct. The Court should grant the Petition to resolve the issue.

ARGUMENT

I.

THE TOWNSHIP FAILS TO REFUTE THE SUBSTANTIAL REASONS FOR RECONSIDERING *WILLIAMSON COUNTY*

The Township does not deny that *Williamson County*'s state litigation doctrine causes tremendous confusion and injustice in federal takings litigation, or that Justices of this Court have urged the Court to reconsider the doctrine. Instead, it argues that the Court should not use this case to reassess *Williamson County* because (1) it does not directly involve all the jurisdictional problems flowing from *Williamson County*, and (2) the Court has denied certiorari in other cases, allowing *Williamson County* to survive. Neither has merit.

Initially, the Township fails to understand the scope of the Court's review of a petition for certiorari. As the Court's rules make clear, the Court is concerned with far more than the specific facts and outcome in a particular case on which certiorari is sought. Sup. Ct. R. 10. It is concerned with the broader implications of the case and, particularly, whether the decision below raises federal issues of national importance. *Id.* In weighing these concerns, the Court naturally considers the broader effect of the precedent, law, or reasoning challenged in a petition for certiorari. This is especially true when the Court is asked to reconsider one of its precedents. The Court must consider whether the subject precedent is "unworkable in practice." *Swift & Co., Inc. v. Wickham*, 382 U.S. 111, 116 (1965). This obviously allows and, indeed, requires consideration of the

overall impact of the precedent on the area of law and human activity on which it operates. *See, e.g.*, *Payne v. Tennessee*, 501 U.S. 808, 816-26 (1991) (considering overall effect of the evidentiary rules adopted in *Booth v. Maryland*, 482 U.S. 496 (1987), and *South Carolina v. Gathers*, 490 U.S. 805 (1989), in overruling those decisions).

The fact that this case does not directly involve the removal-ripeness or res judicata problems arising from *Williamson County* and decried by Justices of this Court, *Arrigoni*, 136 S. Ct. at 1410-11 (Thomas, J., dissenting from denial of certiorari), has no bearing on its suitability for review. This case directly challenges the state litigation ripeness principle creating those problems. Their existence shows that *Williamson County*'s state litigation doctrine is unworkable in a variety of contexts and, thus, that the Court can and should reconsider it. The Township does not deny that this Petition asks the Court to do so, or that taking the case to overrule *Williamson County* would solve the many problems it has engendered.

The Township's second argument—that review of *Williamson County* is unwarranted because the Court has denied certiorari in other cases—is equally inapt. The denial of certiorari in a particular case does not imply anything about the merits of the case. *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 919 (1950) (Frankfurter, J., respecting denial of certiorari) (denial "carries with it no implication whatever regarding the Court's views on the merits of a case"). Certainly, it does not suggest that the issues in the denied petition are unworthy of review. After all, the Justices of this Court may decline review for

numerous, often differing, procedural and resource-based reasons. *Id.* at 917-18 (Frankfurter, J., respecting denial of certiorari). Given this reality, "[a]ll that a denial of a petition for a writ of certiorari means is that fewer than four members of the Court thought it should be granted." *Id.* at 919 (Frankfurter, J., respecting denial of certiorari); *see also Darr v. Burford*, 339 U.S. 200, 226 (1950) (Frankfurter, J., dissenting) ("[D]enial means that this Court has refused to take the case. It means nothing else."). Consequently, the fact that this Court previously denied certiorari in a few other *Williamson County* cases arising from different courts, under different facts, and at different times than that here, is irrelevant to the important issues in the instant Petition.

It is far more common for this Court to grant petitions to overrule mistaken and unworkable precedent than one might suspect. *Payne*, 501 U.S. at 828 ("[T]he Court has during the past 20 Terms overruled in whole or in part 33 of its previous constitutional decisions."). This is especially true when it involves a constitutional doctrine that only this Court can rectify. *Id.*; *Lingle*, 544 U.S. at 544. *Williamson County*'s state litigation doctrine is a constitutionally imbued ripeness concept, "whose 'underpinnings' have been 'eroded' by subsequent developments of constitutional law." *Alleyne v. United States*, 570 U.S. 99, 133 S. Ct. 2151, 2164-65 (2013) (Sotomayor, J., concurring) (quoting *United States v. Gaudin*, 515 U.S. 506, 521 (1995)). It cries out for a corrective reassessment, and there is only one entity that can solve the problem: this Court. *Bosse v. Oklahoma*, 137 S. Ct. 1 (2016) (per curiam). It is time for the Court to engage in the needed and inevitable

reassessment of *Williamson County*, and the Township has provided no good reason for avoiding that step.

II.

THE TOWNSHIP FAILS TO NEGATE THE CONFLICT AMONG THE COURTS ON *WILLIAMSON COUNTY*'S APPLICATION TO FACIAL TAKINGS CLAIMS

As the Petition demonstrates, this case not only presents an important issue as to the correctness of *Williamson County*, it presents a conflict among the circuit courts as to whether facial takings claims are subject to *Williamson County* and unripe without exhaustion of state court litigation. Pet. at 24-29. The Township asserts that the "[c]ircuit split alleged by Petitioner does not exist," Opp. at 23, but it is almost impossible to understand how or why it makes this assertion. If the Township has a coherent basis for disputing the conflict, it is lost in a sea of semantic quibbling over purported distinctions between facial takings "claims" and "challenges."

The issue is simply this: is there a conflict among the circuit courts on whether property owners must use state procedures to ripen a claim that a law causes a taking of private property without just compensation on its face? Sometimes these facial takings allegations are called "claims" and sometimes "challenges." *Kamaole Pointe Development L.P. v. County of Maui*, 573 F. Supp. 2d 1354, 1373 (D. Haw. 2008) (using both terms interchangeably); *Goodwin v. Walton County*, 248 F. Supp. 3d 1257, 1265 (N.D. Fla. 2017) (same). The term does not matter. On the core question, circuit court precedent is loud and clear. It

plainly shows that some circuits, such as the First, Fourth, Seventh, and Eleventh, consider a claim that a law causes a regulatory or physical taking without just compensation[5] on its face to be exempt from *Williamson County*. These circuits immediately allow facial takings claims in federal court upon enactment of the challenged law. Other circuits, such as the Sixth, Ninth, Tenth, and now the Third, require federal takings claimants to sue in state court under *Williamson County* to ripen their facial claims. *See* Pet. at 24-29.

A sample of district court decisions within the relevant jurisdictions confirms the conflict:

District court decisions from the First, Fourth, Seventh, and Eleventh Circuits:

- *Pharmaceutical Care Management Ass'n v. Rowe*, 307 F. Supp. 2d 164, 180 n.17 (D. Me. 2004) (Plaintiff raised "a facial challenge to the [Unfair Prescriptive Drug Practices Act], arguing by its terms, the law effects a [physical] taking of the Plaintiff's members' trade secrets. The offense is not the State's lack of adequate compensation for the taking, but rather the

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[5] As noted in the Petition, a regulatory takings claim alleges an unconstitutional taking arising from restrictions on the use of private property without just compensation. A physical taking involves an uncompensated occupation of property. Pet. at 13-14. In a different class of disputes, one may allege the government has violated the Fifth Amendment by taking property for a *non-public* use. *See Kelo v. City of New London*, 545 U.S. 469, 476 (2005). These "public use" cases are typically not called "takings" claims, *id.*, are not at issue here, and are not included within Knick's discussion of circuit court conflict on facial takings claims.

taking itself. As a facial challenge, the argument ripened when the State enacted the UPDPA." (citing *Yee v. City of Escondido*, 503 U.S. 519, 533 (1992))).

- *Klemic v. Dominion Transmission, Inc.*, 138 F. Supp. 3d 673, 684 (W.D. Va. 2015) ("Plaintiffs' facial [physical takings] challenges are fit for judicial review at this time.").
- *International Union of Operating Engineers Local 139 v. Schimel*, 210 F. Supp. 3d 1088, 1100 (E.D. Wis. 2016) ("[P]roperly read as a facial challenge to Act 1, the Court concludes that the plaintiffs' takings claim is ripe for adjudication by this Court." (footnote omitted)).
- *Goodwin*, 248 F. Supp. 3d at 1265 ("The [*Williamson County*] doctrine does not apply to a *facial* takings claim because a facial challenge is 'generally ripe the moment the challenged regulation or ordinance is passed.'" (quoting *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 736 n.10 (1997))).
- *Hillcrest Property, LLP v. Pasco County*, 731 F. Supp. 2d 1288, 1294 (M.D. Fla. 2010) ("In the case of a regulatory taking, if the 'claim arises in . . . a facial challenge rather than in . . . a concrete controversy concerning the effect of a regulation on a specific parcel of land, the only issue is whether the mere enactment of the regulation constitutes a taking.'" (citation omitted)).

District court decisions from the Sixth, Ninth, and Tenth Circuits:

- *Cornerstone Developers, Ltd. v. Sugarcreek Township*, No. 3:15-cv-93, 2015 WL 6472260, at *4 (S.D. Ohio Oct. 27, 2015) ("[R]egardless of whether a plaintiff is asserting a facial challenge or an as-applied challenge, a plaintiff seeking 'just compensation' under the Takings Clause is still required to satisfy the second requirement of *Williamson County*.").
- *Kamaole Pointe Development*, 573 F. Supp. 2d at 1373 ("[A] facial takings claim . . . may only be brought after *Williamson County*'s state compensation requirement is fulfilled.").
- *Swepi, L.P. v. Mora County*, 81 F. Supp. 3d 1075, 1158-59 (D.N.M. 2015) (holding that a facial regulatory takings claim was unripe under *Williamson County* until the plaintiff filed an action in state court).

In this case, the Third Circuit sided with courts that apply *Williamson County* to facial takings claims, in conflict with circuits that do not. The split is highly consequential. In circuits that do not apply *Williamson County*, facial takings claimants receive a hearing on the merits of their constitutional claim, just like most other classes of federal constitutional plaintiffs. *See, e.g.*, *International Union of Operating Engineers Local 139 v. Schimel*, 210 F. Supp. 3d at 1097-1101. But in circuits that apply *Williamson County*, the claimants have no right to review until they finish state court litigation, a requirement that creates jurisdictional traps that few takings plaintiffs can survive. *Arrigoni*, 136 S. Ct. at 1411 (Thomas, J.,

dissenting from denial of certiorari); *Kruse v. Village of Chagrin Falls*, 74 F.3d 694, 701 (6th Cir. 1996) (Under the government's *Williamson County* arguments, "this case will become another *Jarndyce v. Jarndyce*, with the participants 'mistily engaged in one of the ten thousand stages of an endless cause, tripping one another up on slippery precedents, groping knee-deep in technicalities, running their . . . heads against walls of words, and making a pretence of equity . . . .'" (quoting Charles Dickens, *Bleak House* 2 (Oxford University Press ed. 1989) (London 1853))).

To be precise, when courts require state litigation, the dutiful filing of a facial claim in state court often leads to its subsequent removal to federal court, where it may then be dismissed under *Williamson County* for lack of finished state litigation. *See, e.g.*, *Ohad Associates, LLC v. Township of Marlboro*, No. 10-2183, 2011 WL 310708, at *1-2 (D.N.J. Jan. 28, 2011). If the facial claimant is lucky enough to finish state court proceedings, it will find that its now ripe claim is actually barred in federal court under res judicata and issue preclusion rules. *See, e.g.*, *B. Willis, C.P.A., Inc. v. BNSF Ry. Corp.*, 531 F.3d 1282, 1099-1103 (10th Cir. 2008). Meanwhile, in *Williamson County*-free jurisdictions, facial takings claims are resolved or well on their way to resolution relatively soon after filing in federal court. *Rowe*, 307 F. Supp. 2d at 177-80 (granting a preliminary injunction based in part on a valid—and ripe—facial takings claim). Litigation of a right as important as the constitutional right to be free from laws that take private property without just compensation should not depend on the jurisdiction in which the complaint arises, and yet this is how the law now stands.

If the Court does not take the case to reconsider *Williamson County*'s state litigation doctrine in its entirety, it should take it to resolve the conflict among the courts on whether the doctrine applies to facial takings claims.

CONCLUSION

The petition should be granted.

DATED: January, 2018.

Respectfully submitted,

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