No. 17-647

IN THE
Supreme Court of the United States

ROSE MARY KNICK,
Petitioner,
v.

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

On Writ of Certiorari to the U.S. Court of Appeals for the Third Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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Date: June 1, 2018

QUESTIONS PRESENTED

Amici curiae address the first question only:

Whether the Court should reconsider the portion of *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194-96 (1985), requiring property owners to exhaust state-court remedies to ripen federal takings claims.

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INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a nonprofit, public-interest law firm and policy center with supporters in all 50 states.[1] WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, a limited and accountable government, and the rule of law.

WLF has regularly appeared before this and other federal courts in cases involving claims arising under the Fifth Amendment's Takings Clause. *See, e.g., Horne v. U.S. Dep't of Agriculture* ["*Horne II*"], 135 S. Ct. 2419 (2015); *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23 (2012); *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005); *Phillips v. Washington Legal Found.*, 524 U.S. 156 (1998).

The Allied Educational Foundation (AEF) is a nonprofit charitable and educational foundation based in Tenafly, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

Amici are concerned that *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), by requiring Takings Clause claimants to exhaust state-court

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing.

remedies before filing their claims in federal court, has had the practical effect of denying them a federal forum. That result is anomalous; a federal forum is available to virtually all other claimants asserting rights under the U.S. Constitution. *Amici* believe that *Williamson County* is based on a misinterpretation of the Fifth Amendment, is inconsistent with both previous and subsequent Court decisions, and has created undue hardship for litigants seeking compensation under the Takings Clause. It ought to be overruled.

STATEMENT OF THE CASE

Respondent Scott Township is a local government unit located in Lackawanna County, Pennsylvania. In 2012, it adopted an ordinance governing the operation of cemeteries and burial places within the township. Among the ordinance's provisions is a public-access provision: owners of cemeteries must keep their property "open and accessible to the general public during daylight hours." Pet. App. A-3.

Petitioner Rose Mary Knick owns 90 acres of land in Scott Township, where she and other members of her family have lived since 1970. There are no public cemeteries on the land, nor has Knick seen any signs of a burial ground. Nonetheless, in April 2013, Scott Township served her with a Notice of Violation stating that an inspection of the land revealed "[m]ultiple grave markers/tombstones" and directing Knick to come into compliance with the public-access provision by providing the general public with access to those markers during daylight hours. A second Notice of Violation, issued in October 2014, again directed Knick

to "make access to the cemetery available to the public." *Id.* at 5-A.

Knick responded by filing suit in federal district court seeking relief under 42 U.S.C. § 1983, alleging *inter alia* that Scott Township had "executed an uncompensated physical invasion" of her property, in violation of the Fifth and Fourteenth Amendments. Pet. App. B-9. The district court granted Scott Township's motion to dismiss, ruling (based on *Williamson County*) that the Second Amended Complaint was not ripe for review because Knick "failed to exhaust available state law remedies" before filing suit in federal court. *Ibid.* In light of its failure-to-exhaust ruling, the court declined to address whether the complaint stated "plausible grounds for a physical invasion taking of her property without just compensation." *Id.* at B-13.

The Third Circuit affirmed, citing *Williamson County*. Pet. App. A-1 - A-33. The appeals court explained that *Williamson County* established two prerequisites for property owners seeking to assert Takings Clause claims in federal court against a state or local government:

> First, the "finality rule" requires that the government "has reached a final decision regarding the application of the regulation to the property at issue." [*Williamson County*, 473 U.S.] at 186. Second, the plaintiff must seek and be denied just compensation using the state's procedures, provided those procedures are adequate. *Id.* at 194.

Pet. App. A-20 - A-21.

The Third Circuit agreed with Scott Township that "Knick failed to comply with the second *Williamson County* prong, exhaustion of state-law compensation remedies, because Knick did not pursue inverse-condemnation proceedings under Pennsylvania's Eminent Domain Code." *Id.* at A-21, A-28. The court stated that "Knick has no surviving claim that the *taking itself* was invalid, apart from the fact that she has not received compensation. The remedy for an uncompensated (but otherwise valid) taking is compensation." *Id.* at 28a (emphasis in original). It held that Pennsylvania law provides Knick with an "adequate" procedure for seeking compensation (a state-court lawsuit under the Eminent Domain Code) and thus that *Williamson County* requires dismissal of her federal-court claim. *Ibid.*

SUMMARY OF ARGUMENT

Williamson County grounded its state-court exhaustion requirement on the language of the Fifth Amendment's Takings Clause: "[N]or shall private property be taken for public use, without just compensation." As the Court interpreted that language, no constitutional violation exists until after the relevant government body not only has taken private property but also has rebuffed all efforts by the property owner to obtain compensation for the taking. *Williamson County*, 473 U.S. at 194-197. Among the steps the property owner must take before her Fifth Amendment claims against a local government ripens: she must pursue compensation claims in state court, so long as the state courts "provide an adequate process

for obtaining compensation." *Id.* at 194. If the state court awards just compensation, then no Fifth Amendment violation will ever have occurred. *Id.* at 194-95.

Williamson County was based on a clear misreading of the Fifth Amendment and ought to be overruled. The Court held, "Nor does the Fifth Amendment require that just compensation be paid in advance of, *or contemporaneously with*, the taking; all that is required is that a reasonable, certain, and adequate provision for obtaining compensation exist at the time of the taking." *Id.* at 194 (emphasis added and citations omitted). That holding is contradicted by strong evidence that drafters of the Fifth and Fourteenth Amendments expected that governments would, in fact, pay "just compensation" at the time they took private property. Yet *Williamson County* declares that no constitutional violation has occurred even when a local government delays paying compensation for many years while contesting state-court inverse-condemnation proceedings.

That holding makes little sense. The Constitution no doubt contemplates that just-compensation may be delayed while parties litigate over whether a taking actually occurred. But if the property owner is correct that a taking occurred, the constitutional violation dates back to the month in which the government refused to provide the requested compensation. *Williamson County*'s contrary holding misreads the Fifth Amendment. And because a constitutional violation occurs on the date when the government wrongfully withholds just compensation, *Williamson County*'s rationale for precluding federal-

court litigation evaporates.

None of the decisions cited by *Williamson County* support its interpretation of the Fifth Amendment. Most of the cited decisions involved Takings Clause claims against the federal government. Each held that such claims must be filed in the Court of Federal Claims pursuant to the Tucker Act. But contrary to *Williamson County*'s contention, 473 U.S. at 195, none of those decisions stated that the Takings Clause claims were "premature" until after the property owner files a Tucker Act claim. Lawsuits filed in the Court of Federal Claims seeking just compensation are, in fact, suits asserting violations of the Takings Clause.

Williamson County's state-court exhaustion requirement has caused undue hardship for Takings Clause claimants. The premise underlying that requirement was that such claims would "ripen" after a state-court judgment positively established that the property owner would not be receiving his requested "just compensation." But *San Remo Hotel* made clear that pursuing inverse-condemnation claims in state court has no such ripening effect. Rather, once a state court has issued a ruling denying a just-compensation claim, preclusion principles prevent the property owner from asserting Takings Clause claims in federal court. 546 U.S. at 336-38. The combined effect of *Williamson County* and *San Remo Hotel* is that virtually all Takings Clause claimants are denied any opportunity to present their federal constitutional claims in federal court. That result is unlikely to have been contemplated by the Court when it issued its *Williamson County* decision.

Moreover, in the 33 years since *Williamson County* was decided, the Court has repeatedly repudiated that decision's rationale even as it has given lip service to the decision itself. For example, the Court on several occasions has referred to the state-court exhaustion requirement as "prudential." But that description makes little sense if, as *Williamson County* reasoned, the requirement is based on an interpretation of the Fifth Amendment's language. If no Takings Clause violation exists until compensation has been denied in an "adequate" state-court proceeding, then *all* federal-court Takings Clause claims should be dismissed on the pleadings until after a state-court judgment has been rendered, and there are no "prudential" grounds for waiving the state-court exhaustion requirement. Indeed, *Williamson County*'s rationale should similarly bar all *state-court* Takings Clause claims, and dozens of state courts so held in response to *Williamson County*. But *San Remo Hotel* overruled all of those state-court decisions; it held that property owners could raise Takings Clause claims as part of their state-court inverse-condemnation proceedings, but it included no explanation why its holding was not wholly inconsistent with *Williamson County*'s interpretation of the Fifth Amendment. *San Remo Hotel*, 545 U.S. at 346.

The Court's failure to adhere to *Williamson County*'s rationale in later decisions is a strong indication—along with the absence of any pre-1985 precedent supporting the decision—that *Williamson County* was wrongly decided. The Court should overrule *Williamson County*'s state-court exhaustion requirement and reverse the dismissal of Knick's federal-court Takings Clause claims.

If the Court is reluctant to abandon that requirement altogether, alternative grounds exist for ruling in Knick's favor. *Amici* urge the Court, as an alternative basis for reversing the Third Circuit, to rule that the state-court exhaustion requirement is inapplicable when the defendant is a local government and to defer to another day the issue of whether to overrule *Williamson County* when the defendant is a State.

Several rationales support that alternative holding. First, state courts and a state executive-branch agency are both components of a State's government. So when the latter denies a just-compensation claim, the denial is at least arguably non-final so long as the decision is subject to revision by another component of the same government. But local governments, while they may be established by and subservient to the State, are distinct entities. A local government's denial of a just-compensation claim cannot plausibly be classified as anything other than a final decision when it provides no forum of its own within which to appeal the denial. Nothing in the text of the Takings Clause suggests that the courts of a State, and not those of the federal government, are the appropriate forums for resolving Fifth Amendment claims filed against a local government.

Second, Eleventh Amendment considerations merit careful review when deciding whether to sanction federal-court Takings Clause claims against state governments. The Court has never addressed whether the Eleventh Amendment grants States immunity from federal-court suits raising claims under the Takings Clause. Lower-court decisions and legal

scholarship suggest that the issue is a close one. But there is no doubt that local governments such as Scott Township are *not* entitled to any Eleventh Amendment immunity. So there can be no federalism-based objections to a ruling that overturns *Williamson County*'s state-court exhaustion requirement with respect to claims filed against local governments.

ARGUMENT

I. THE COURT SHOULD OVERRULE *WILLIAMSON COUNTY*'S STATE-COURT EXHAUSTION REQUIREMENT

Williamson County's adoption of a state-court exhaustion requirement was based on a misinterpretation of the Fifth Amendment, is inconsistent with both previous and subsequent Court decisions, and has created undue hardship for litigants seeking compensation under the Takings Clause. It ought to be overruled.

Amici note that *Williamson County*'s recognition of a state-court exhaustion requirement was at most an alternative basis for its decision to overturn a Takings Clause judgment entered against a Tennessee county. The Court initially determined that a property owner's constitutional challenge to the county's land-use regulations was not yet ripe for review because the county had not made "a final decision regarding the application of [the] regulations to the property at issue." 473 U.S. at 187. The Court noted that the owner had not yet sought any variances from the land-use regulations; while the county had disapproved one preliminary development plan based on those

regulations, the Court concluded that the disapproval should not be deemed final given the very real possibility that variance requests would be granted—thereby permitting development to proceed. *Id*. at 193-94. Only after determining that the county's land-use decision was insufficiently final to permit a Takings Clause challenge did the Court turn to the issue of a state-court exhaustion requirement.

The Court's analysis of that issue focused on the Takings Clause's "just compensation" language. It initially observed, "The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation." *Id.* at 194. The Court held that a local government, even if its interference with property-development plans constitutes a taking of the property, cannot be deemed to have denied the requisite just compensation unless the property owner is unable to obtain that compensation in inverse-condemnation proceedings initiated in state court. *Id.* at 194-95. Although resort to state-court proceedings would likely delay compensation payments for a number of years, the Court concluded that such delays did not amount to a constitutional violation because the Fifth Amendment does not

> require that just compensation be paid in advance of, or contemporaneously with, the taking; all that is required is that a reasonable, certain and adequate provision for obtaining compensation exist at the time of the taking. If the government has provided an adequate process for obtaining compensation, and if resort to that process yields just

> compensation, then *the property owner has no claim against the Government for a taking*.

Ibid (emphasis added and citations omitted). The Court concluded that the takings claim was premature because the property owner had "not shown that the [Tennessee state-court] inverse condemnation procedure is unavailable or inadequate" and had not utilized that procedure. *Id.* at 197.

A. *Williamson County* Was Premised on a Misreading of the Fifth Amendment's "Just Compensation" Requirement

The linchpin of *Williamson County*'s adoption of a state-court exhaustion requirement was its conclusion that the Fifth Amendment does not require "contemporaneous" payment of just compensation for a taking and thus that *no violation occurs* even if compensation is delayed until after a property owner has initiated and completed a state-court inverse condemnation proceeding. That conclusion is at odds with the plain language of the Takings Clause.

The Fifth Amendment states, "Nor shall private property be taken for public use, without just compensation." The most natural reading of that language is that a taking is prohibited unless the government contemporaneously pays just compensation; one would not normally refer to a taking being undertaken "with" just compensation unless the payment is made at the time of the taking. *See, e.g.*, *Webster's New Collegiate Dictionary* (G. & C. Merriam

Co. 1981) ("with" is "used as a function word to indicate combination, accompaniment, or addition"); *Arrigoni Enterprises, LLC v. Town of Durham*, 136 S. Ct. 1409, 1410 (2016) (Thomas, J., joined by Kennedy, J., dissenting from denial of *certiorari*) (stating that the Takings Clause "is most naturally read to mean that compensation must accompany the taking, and not that the claimant shall have the opportunity to ask for the compensation remedy in a post-taking court action") (citation omitted).

The Court never held otherwise prior to *Williamson County*. The Court later examined the history of just-compensation proceedings (both under the Takings Clause and the common law) in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 528 U.S. 687 (1999). It concluded that common-law inverse-condemnation claims were classified by 18th and 19th-century American courts as tort actions, in which a property owner sought damages for trespass. 528 U.S. at 715. The implication is clear: requiring a landowner whose property has been taken to resort to an inverse-condemnation proceeding to obtain just compensation was viewed as a legal wrong—not simply an orderly procedure for determining the requisite compensation.

Indeed, the 19th-century decision principally relied on by *Del Monte Dunes* for its characterization of inverse-condemnation claims, *Gardner v. Village of Newburgh*, 2 Johns.Ch. 162 (N.Y. 1816) (Kent, Ch.), held explicitly that the common law requires the government to pay contemporaneously whenever it takes private property for a public use. The defendant in *Gardner* (a local government), in an effort to create

a source of public drinking water, diverted water that normally passed through property owned by the plaintiff, who used the water for irrigation and to operate a mill. Because the government failed to compensate the landowner for this interference with his riparian rights, Chancellor James Kent issued an injunction against the water diversion. Kent held that governments are entitled to take property for a public purpose, but only if contemporaneous payment is made: "But to render the exercise of the power valid, a fair compensation *must, in all cases, be previously made* to the individuals affected, under some equitable assessment to be provided by law." *Id.* at 166 (emphasis added). *See also Horne II*, 135 S. Ct. at 2426 (quoting Magna Carta's provision prohibiting any government official from "taking 'corn or other provisions from any one without *immediately* tendering money therefor, unless he can have postponement thereof by permission of the seller'") (emphasis added).

Of course, a property owner who has suffered a taking has no need to file an inverse-condemnation action in state court unless she has been told by government officials that she will not receive the compensation to which she believes herself entitled. Once she files the inverse-condemnation action in state court and demands compensation, the government answers by reiterating its denial that compensation is due. Yet despite that express denial, *Williamson County* holds that no Fifth Amendment violation occurs unless and until the state court—years later—rules

against the property owner.[2] According to *Williamson County*, "no" does not mean "no" unless a state court agrees years later with the government's answer. That holding cannot be squared with the plain language of the Fifth Amendment.

Moreover, the state-court exhaustion requirement is unique to claims filed under the Takings Clause. Civil litigants asserting violation of their rights under other constitutional provisions are permitted to file suit in federal court without first bringing their claims before a state court—even though the *Williamson County* rationale could logically be applied to their claims. For example, an applicant for financial benefits from a local government may have been denied the benefits on the basis of her race or gender. Applying *Williamson County*'s rationale, the local government could argue that the unsuccessful applicant should be relegated to state court because there would be no equal-protection violation if the state court awards her all requested benefits. But of course, courts have never so held; they routinely recognize the right to file a federal-court claim for damages under 42 U.S.C. § 1983 for violations of the Fourteenth Amendment's Equal Protection Clause. *See. e.g., Fitzgerald v. Barnstable School Comm.*, 555 U.S. 246 (2009). Nothing in the Fifth Amendment's language supports denying the same right to Takings Clause claimants.

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[2] If the property owner ultimately prevails in state court and is awarded her requested compensation, *Williamson County* holds that the government has satisfied its Fifth Amendment obligations and no constitutional violation has occurred. 473 U.S. at 194-95.

B. Prior Decisions on which *Williamson County* Purported to Rely Do not Support the Court's Holding

Williamson County cited several of the Court's prior decisions in support of its interpretation of the Takings Clause. None of the cited cases support *Williamson County*'s no-need-for-contemporaneous-compensation holding.

The Court relied principally on *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984), a case in which a pesticide manufacturer sued for injunctive and declaratory relief, alleging that the federal government had taken its intellectual property without providing just compensation. According to *Williamson County*, the Court held in *Ruckelshaus* that "takings claims against the Federal Government are premature until the property owner has availed itself of the process provided by the Tucker Act, 28 U.S.C. § 1491." 473 U.S. at 195. That statement mischaracterizes *Ruckelshaus*, which quite clearly did *not* hold that the manufacturer's takings claims were "premature." Rather, it simply held that the manufacturer had filed suit in the wrong federal court: instead of filing suit in federal district court for injunctive and declaratory relief, the manufacturer should have filed suit in the Court of Federal Claims for damages, as specified by the Tucker Act. *Ruckelshaus*, 467 U.S. at 1016-19.

Williamson County's reference to "the process provided by the Tucker Act" suggests that the referenced Tucker Act "process" is something other than a Takings Clause claim. That suggestion is incorrect. Indeed, the Tucker Act creates no causes of

action; it is a jurisdictional statute that grants the Court of Federal Claims exclusive jurisdiction for "any claims against the United States founded ... upon the Constitution" in excess of $10,000. 28 U.S.C. § 1491(a)(1); 28 U.S.C. § 1346(a)(2). It is well accepted that "[a] Fifth Amendment takings claim falls within the Tucker Act's grant of jurisdiction because it is a claim against the United States founded upon the Constitution." *Acceptance Ins. Cos. v. United States*, 503 F.3d 1328 (Fed. Cir. 2007). So by holding that the plaintiff was required to file his damages claim in the Court of Federal Claims under the Tucker Act, *Ruckelshaus* was not suggesting that the plaintiff's Takings Clause claim was "premature" until after it had availed itself of "the process provided by the Tucker Act."[3]

All but one of the other decisions relied on by *Williamson County* also involved claims filed against the federal government. Each simply affirmed that Takings Clause claims should be filed in the Court of Federal Claims and never suggested that such claims were premature until "the process provided by the Tucker Act" had been completed.

Williamson County cited one of those cases, *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 124-25 (1974), for the proposition that the Takings Clause does not "require that just compensation be

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[3] *Ruckelshaus* also stated, "The Fifth Amendment does not require that compensation precede the taking." 467 U.S. at 1016 (citing *Hurley v. Kincaid*, 285 U.S. 95, 104 (1932)). But it never stated that the Fifth Amendment does not require the *contemporaneous* payment of just compensation.

paid ... contemporaneously with the taking; all that is required is that a 'reasonable, certain and adequate provision for obtaining compensation' exist at the time of the taking." 473 U.S. at 194. *Regional Rail* held no such thing. At issue in the case was whether a 1973 federal statute adopted to assist in the reorganization of bankrupt Northeast railroads (the "Rail Act") had withdrawn Tucker Act jurisdiction over Takings Clause claims. The Court held that the Rail Act had not withdrawn Tucker Act jurisdiction, and thus that the Court of Claims possessed jurisdiction to hear any just-compensation claims that railroad creditors might raise if they later concluded that the Rail Act effected a taking of their property. 419 U.S. at 125-136, 148.

Regional Rail did not state that the federal government would remain in compliance with the Takings Clause even if it delayed paying just compensation after taking private property. To the contrary, the Court held that the Court of Claims would have jurisdiction under the Tucker Act to hear a Takings Clause claim as soon as an uncompensated taking of private property was alleged. While acknowledging that a final adjudication of whether an uncompensated taking had occurred would be delayed while Court of Claims proceedings continued, the Court noted that "[i]nterest on a just-compensation award runs from the date of the taking"—thereby recognizing that the constitutional violation is complete as soon as the government takes private property yet fails to provide just compensation. *Id.* at 148 n.35.

The only other case relied on by *Williamson County* for its state-court exhaustion requirement did not even involve the Takings Clause. *Parratt v. Taylor*,

451 U.S. 527 (1981), involved a due-process claim raised by a prisoner whose hobby kit was lost due to the alleged negligence of state prison officials. 473 U.S. at 195 & n.14. The Court concluded in *Parratt* that prison officials did not violate the plaintiff's constitutional rights by failing to provide him with pre-deprivation "process"—noting the obvious difficulty in providing a hearing prior to depriving the prisoner of his property when the defendants never intended to lose the hobby kit. The Court held that prison officials satisfied the prisoner's due process rights by providing him with an opportunity for a post-deprivation hearing. 451 U.S. at 543-44. That holding is far afield from *Williamson County*; the issue in *Parratt* had nothing to do with a prisoner's right to compensation for property taken by prison officials—a right that prison officials never denied.

C. *Williamson County* Creates Undue Hardship for Property Owners Asserting Takings Clause Claims

Overruling *Williamson County*'s state-court exhaustion requirement is warranted for the additional reason that it creates undue hardship for property owners asserting Takings Clause claims. Those hardships are well-illustrated by the Court's decision in *San Remo Hotel*; instead of ripening Takings Clause claims for later assertion in federal court (the Court's stated intention in creating a state-court exhaustion requirement), the effect of the requirement is to ensure that Takings Clause claims can virtually *never* be

heard in federal court.[4]

San Remo Hotel involved a California property owner who sought to assert as-applied Takings Clause claims in federal court against a California city whose regulations significantly restricted permissible uses of the property. The Ninth Circuit dismissed the claim as unripe, holding that *Williamson County* required the property owner first to seek relief in California state court. The property owner complied, filing an inverse condemnation lawsuit alleging violation of California law—but not any constitutional claims, because California courts deemed Takings Clause claims unripe until after a property owner had exhausted state-law remedies.[5] After fully complying with *Williamson County* by exhausting his state-court remedies (the California courts denied compensation), the property owner returned to federal court to pursue his Takings

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[4] The hardship for property owners is reduced considerably if the government concedes that a taking has occurred and files a condemnation action in state court. Under those circumstances, the property owner is relieved of the burden of initiating litigation, and the only contested issue left for decision is the amount of compensation to be paid. *See Del Monte Dunes*, 526 U.S. at 711-12 (cataloging the "important legal and practical differences between an inverse condemnation suit and a condemnation proceeding"). If the Court is reluctant to overrule *Williamson County*'s state-court exhaustion requirement in its entirety, it may wish to consider ruling, in the alternative, that the requirement should remain in place only when the government has filed a condemnation proceeding in state court. Scott Township has not, of course, initiated any such proceeding with respect to its taking of Knick's property.

[5] *Breneric Associates v. City of Del Mar*, 9 Cal. App. 4th 166, 188 (1998) (citing *Williamson County*).

Clause claims. But this Court ruled unanimously that preclusion rules now barred the property owner from asserting those claims. *San Remo Hotel*, 545 U.S. at 336-48.

The combined effect of *Williamson County* and *San Remo Hotel* was to deny the property owner *any* opportunity to raise his substantial Takings Clause claims, whether in federal court *or* in state court. Thus, a rule initially created in *Williamson County* for the purpose of requiring Takings Clause claims to be ripened before being asserted in federal court has transmogrified into a rule that precludes federal-court consideration of such claims—and in some instances, as in *San Remo Hotel*, precludes *all* consideration.

The effective ban on federal-court review of Takings Clause claims undercuts one of Congress's central purposes in adopting 42 U.S.C. § 1983, which creates a cause of action against state actors for violating federal constitutional rights:

> It is abundantly clear that one reason [42 U.S.C. § 1983] was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance, or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.

Monroe v. Pape, 365 U.S. 167, 180 (1961), *overruled in part on other grounds, Monell v. New York City Dep't of*

Social Servs., 436 U.S. 658 (1978).

Indeed, four justices who concurred in *San Remo Hotel* nonetheless recognized the unfairness of a rule that "all but guarantees that claimants will be unable to utilize the federal courts to enforce the Fifth Amendment's just compensation guarantee." *San Remo Hotel*, 545 U.S. at 351 (Rehnquist, C.J., concurring, joined by O'Connor, Kennedy, & Thomas, JJ.). The justices stated that *Williamson County*'s impact on takings plaintiffs was "dramatic" and that its justifications were "suspect"; they urged that the state-court exhaustion requirement be reconsidered. *Id.* at 352. The undue burdens imposed on litigants by *Williamson County* provide ample justification for overturning a precedent that has not withstood the test of time.

D. Subsequent Court Decisions Have Largely Abandoned the Rationale Underlying *Williamson County*

Williamson County adopted its state-court exhaustion requirement based on its understanding of the meaning of the Fifth Amendment. The Court interpreted the Takings Clause as imposing no requirement that just compensation be paid *contemporaneously* with the taking of private property; no constitutional violation occurs even if the government delays for years following the taking before making its final decision to pay compensation. Later Court decisions have largely abandoned that understanding of the Fifth Amendment. In light of that abandonment, *stare decisis* considerations should carry little or no weight in the decision whether to

overrule *Williamson County*.

Less than two years following its decision in *Williamson County*, the Court addressed whether litigants were entitled to recover monetary damages for temporary "regulatory" takings—those regulatory takings that are ultimately invalidated by the courts. The Court determined that such damages are recoverable, even when the government decides to discontinue its regulations to avoid being forced to pay for a permanent taking of the regulated property. *First English Evangelical Lutheran Church of Glendale v. City of Los Angeles*, 482 U.S. 304, 322 (1987). Although the Court sought to distinguish *Williamson County*, 482 U.S. at 321,the two decisions are in considerable tension.

First English was premised on a conclusion that awarding damages for a temporary taking is constitutionally required because it is unfair to property owners to deny them both compensation and the use of their property during the years (following a taking) often required to litigate contested takings claims. *Id.* at 318-19. But if, as *Williamson County* held, no Fifth Amendment violation can come into existence until a state court denies a just-compensation claim, *First English*'s unfairness rationale is substantially undercut. *Williamson County* suggests that the time necessary to resolve inverse-condemnation proceedings in a state court is part of the delay inherent in the "normal" process undertaken by governments in determining whether to approve property-development plans. *First English*, 482 U.S. at 334-35 & n.12 (Stevens, J., dissenting) (citing *Williamson County*).

Williamson County's rationale is also called into question by the numerous decisions that have referred to the state-court exhaustion requirement as "prudential" in nature. *See, e.g.*. *Suitam v. Tahoe Regional Planning Agency*, 520 U.S. 725, 734 (1997). In *Stop the Beach Renourishment, Inc. v. Florida Dep't of Environmental Protection*, 560 U.S. 702, 729 (2010), the Court said that the requirement is not "jurisdictional" and thus was waived by Florida officials when they failed to raise it explicitly in their opposition to the certiorari petition. But describing the requirement to exhaust remedies by seeking just compensation in "adequate" state-court proceedings as "prudential" and not "jurisdictional" suggests that the Court now views it as a mere procedural requirement rather than, as *Williamson County* held, a required element of a Takings Clause claim.

Florida asserted at all stages of the *Stop the Beach Renourishment* litigation (including in its opposition to the certiorari petition) that its activities did not constitute an uncompensated taking of the plaintiffs' property. The Court addressed the merits of that issue and agreed with Florida that no Takings Clause violation had occurred. 560 U.S. at 729-33. Had the Court concluded that Florida's failure-to-exhaust-state-court-remedies argument was part and parcel of its no-Takings-Clause-violation argument (a conclusion it would have reached had it adhered to *Williamson County*'s interpretation of the Fifth Amendment), it would have had no basis for concluding that Florida waived its *Williamson County* failure-to-exhaust argument.

That the Court now views *Williamson County* as

imposing merely a procedural requirement is also supported by its *San Remo Hotel* decision. In the years following the *Williamson County* decision, most of the state courts that addressed the issue concluded that property owners could not raise Takings Clause claims as part of a state-court inverse-condemnation proceeding. They very reasonably concluded that if, as *Williamson County* held, no Fifth Amendment violation can exist until after "adequate" state-court just-compensation proceedings are completed, then pre-exhaustion Takings Clause claims are no more actionable in state court then they are in federal court. *See, e.g., Breneric Associates v. City of Del Mar*, 69 Cal. App. 4th 166, 188 (1998); *Droste v. Bd. of County Comm'rs*, 85 P.3d 585, 591 (Colo. App. 2003); *Milillo v. City of New Haven*, 249 Conn. 138, 154 n.28 (1999); *Blumenthal Inv. Trusts v. City of West Des Moines*, 636 N.W.2d 255, 262-64 (Iowa 2001); *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 929 n.2 (Tex. 1998), *cert. denied*, 526 U.S. 1144 (1999); *Levatte v. City of Wichita Falls,* 144 S.W.3d 218, 224 (Tex. App. 2004); *Sintra v. City of Seattle,* 119 Wn.2d 1, 20 (1992); *Eberle v. Dane County Bd. of Adjustment*, 227 Wis.2d 609, 638-39 (1999).

San Remo Hotel overturned that case law, perhaps concerned that those decisions—when combined with *Williamson County* and issue-preclusion principles—effectively barred most property owners from *ever* raising Takings Clause claims. 545 U.S. at 346 ("Reading *Williamson County* to preclude plaintiffs [in state-court inverse-condemnation proceedings] from raising [Takings Clause] claims in the alternative would erroneously interpret our cases as requiring property owners to resort to piecemeal litigation or

otherwise unfair procedures.") (citation omitted). Of course, the very same criticism could be leveled at *Williamson County*'s state-court exhaustion requirement. More importantly, *San Remo Hotel*'s holding that *Williamson County* does not command state courts themselves to impose the state-court exhaustion requirement suggests that the Court no longer adheres to *Williamson County*'s interpretation of the Fifth Amendment. As the concurring justices pointed out, *Williamson County* can be understood not to impose such a command "only if *Williamson County*'s state-litigation requirement is merely a prudential rule, and not a constitutional mandate." *San Remo Hotel*, 545 U.S. at 351 n.2 (Rehnquist, C.J., concurring).

If *Williamson County* is a prudential rule, it is in considerable tension with the principle, long recognized by this Court, that "a federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*,134 S. Ct. 1377, 1386 (2014). The Takings Clause claims of Petitioner Knick and similarly situated property owners fall within the Article III jurisdiction of the federal courts. *Horne v. Dep't of Agriculture* ["*Horne I*"], 569 U.S. 513, 526 & n.6 (2013). Yet *Williamson County* provided no prudential rationale for imposing a state-court exhaustion requirement on Takings Clause claimants while imposing no similar obstacles in the path of those asserting other constitutional rights.

In *Abbott Labs. v. Gardner*, 387 U.S. 136 (1967), the Court articulated a prudential ripeness rationale for deferring federal-court review of some federal-law

challenges to the actions of government agencies.[6] But *Abbott Labs* stressed that its prudential ripeness doctrine was limited to lawsuits seeking injunctive or declaratory relief; that doctrine can justify deferred adjudication of federal claims only because "[t]he injunctive and declaratory remedies are discretionary." 387 U.S. at 148. The Court has never invoked prudential ripeness to deny federal-court access to litigants who possess Article III standing and assert claims for monetary damages.

In sum, the Court's post-*Williamson County* case law has largely abandoned that decision's rationale for adopting a state-court exhaustion requirement and has re-characterized the requirement as a "prudential" ripeness doctrine. Moreover, the Court has never attempted to explain the rationale for a prudential rule that is inconsistent with the longstanding doctrine requiring federal courts to hear and decide cases coming within their jurisdiction. The absence of any coherent rationale for adhering to *Williamson County* is yet another reason to overturn that decision and permit Petitioner to assert her Fifth Amendment claims in federal court.

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[6] In determining prudential ripeness, federal courts are directed to evaluate both "the fitness of the issues for judicial decision" and "the hardship to the parties of withholding court consideration." *Abbott Labs*, 387 U.S. at 149.

II. ALTERNATIVELY, THE COURT SHOULD OVERRULE *WILLIAMSON COUNTY* WITH RESPECT TO CLAIMS FILED AGAINST LOCAL GOVERNMENTS

If the Court is reluctant to abandon the state-court exhaustion requirement altogether, alternative grounds exist for ruling in Knick's favor. *Amici* urge the Court, as an alternative basis for reversing the Third Circuit, to rule that the state-court exhaustion requirement is inapplicable when the defendant is not a State. Whatever justifications may exist for upholding the requirement with respect to a State defendant, those justifications are inapplicable to Scott Township and the many other Takings Clause defendants that are not States.

A. Unlike States, Local Governments Do not Provide Their Own Forums within which Property Owners Can Assert Inverse Condemnation Claims

Williamson County premised its state-court exhaustion requirement on an understanding that a government should not be deemed to have issued a "final" denial of a just-compensation request until all branches of that government have signed off on the denial. 473 U.S. at 194-95. If the executive branch of a State denies a property owner's request for just compensation for an alleged taking, it is arguable that the State has not yet denied the request if it provides a judicial forum within which the owner can re-assert that claim.

But that argument is inapplicable to Knick's

claims against Scott Township. Despite Knick's protests that the township is violating her Fifth Amendment rights, it has served her with two Notices of Violation directing her to make access to her property "available to the public." Pet. App. 5-A. Scott Township has not established any forum within which Knick could assert either that its actions constituted a taking or that she is entitled to just compensation. Scott Township asserts that Knick should be required to raise her federal constitutional claims in a forum created by the Commonwealth of Pennsylvania rather than a forum created by the federal government, but it has provided no coherent rationale regarding why the Fifth Amendment requires that its choice of forums should take precedence over Knick's. And the fact that Pennsylvania has made available a forum in which Knick may assert a reverse condemnation claim does not make the actions of Scott Township any less final.

Scott Township apparently premises its *Williamson County* defense on its contention that it should be considered the same entity as the Commonwealth of Pennsylvania and thus that Pennsylvania's decision to permit Knick to seek redress in its Court should be attributed to Scott Township itself. That contention has never been accepted by this Court. In a wide variety of cases, the Court has treated state and local entities as distinct entities. *See, e.g., City of Columbus v. Ours Garage and Wrecker Services, Inc.*, 536 U.S. 424 (2002) (treating state governments and local governments as separate entities for purposes of determining whether federal law preempts government regulation of towing services); *Auer v. Robbins*, 519 U.S. 452, 456 n.1 (1997) (state governments generally are not liable for the financial

obligations of local governments). While it is true that local governments are established by and subservient to state governments, those facts do not negate their status as distinct entities. Because Scott Township is not the entity that has provided a state-court forum for the adjudication of Knick's Fifth Amendment claims, it cannot plausibly allege that it has not yet rejected those claims. The Court should reverse the Third Circuit's dismissal of those claims regardless whether state-court exhaustion is properly required for Taking Clause claims filed against *States* that authorize the filing of inverse-condemnation claims in their own courts.

B. Unlike Proceedings Against States, Proceedings Against Local Governments Raise No Eleventh Amendment Concerns

The filing of damages claims against local governments in federal court raises none of the federalism concerns that arise from similar lawsuits filed against States. The Court has repeatedly held that the States' Eleventh Amendment immunity from federal-court litigation does not extend to local governments. *See. e.g., Mt. Healthy City School Dist. Bd. of Education v. Doyle*, 429 U.S. 274, 280 (1977). Eleventh Amendment issues are thus irrelevant to whether the Court should overturn *Williamson County* as it applies to Takings Clause claims filed against local governments.

The Court has never addressed the applicability of Eleventh Amendment immunity to Takings Clause claims filed against States. Substantial scholarship

supports the view that the Eleventh Amendment is inapplicable to such claims. *See, e.g.*, Eric Berger, *The Collision of the Takings and State Sovereign Immunity Doctrines*, 63 WASH. & LEE L. REV. 493 (2006); Note, *Reconciling State Sovereign Immunity with the Fourteenth Amendment*, 129 HARV. L. REV. 1068 (2016). Proponents of the Eleventh-Amendment-is-inapplicable viewpoint cite *First English*, in which the Court noted the Takings Clause's "self-executing character" and stated that "in the event of a taking, the compensation remedy is required by the Constitution." 482 U.S. at 315-16. Because the Fourteenth Amendment made the Fifth Amendment applicable to the States, *Chicago, Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226, 239 (1897), there is considerable force to the argument that the Fourteenth Amendment abrogated States' Eleventh Amendment immunity from Takings Clause claims.

Moreover, this Court has frequently adjudicated Takings Clause claims asserted against state governments, without commenting on any Eleventh Amendment implications of its assertion of jurisdiction. Such instances include cases that were initially heard in federal court—*Williamson County* did not bar federal court review in those case because an adequate state-court remedy did not exist. *See, e.g., Brown v. Legal Found. of Washington*, 538 U.S. 216 (2003); *Phillips v. Washington Legal Found.*, 524 U.S. 156 (1998).[7] Other instances include cases in which the Court reviewed state supreme court decisions that

[7] In *Phillips*, the lower federal courts rejected efforts by the State of Texas to invoke Eleventh Amendment immunity.

rejected a landowner's Takings Clause claims against a State,[8] even though the Court's leading Eleventh Amendment decision regarding appellate review limited its approval of appellate review of state-court decisions in which a State prevailed in the court below to cases in which the State initiated the litigation. *Cohens v. Virginia*, 19 U.S. 264, 405-12 (1821). Indeed, in an area of the law closely analogous to Takings Clause claims—due-process lawsuits against States for a refund of taxes paid under protest—the Court has explicitly held that the Eleventh Amendment does not bar the Court from reviewing state-court decisions that reject a tax refund claim. *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 26-31 (1990).

Nonetheless, the issue of whether States may assert Eleventh Amendment immunity from federal-court Takings Clause lawsuits is far from clear. At least three federal appellate courts have held that the Eleventh Amendment bars Takings Clause claims filed against a State in federal court, at least where the State's courts are open and available to hear such claims. *Hutto v. South Carolina Retirement System*, 773 F.3d 536 (4th Cir. 2014); *Seven Up Pete Venture v. Schweitzer*, 523 F.3d 948, 954-56 (9th Cir. 2008); *DLX, Inc. v. Kentucky*, 381 F.3d 511, 526-28 (6th Cir. 2004).

The Court need not, of course, reach the Eleventh Amendment issue. For the reasons explained

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[8] *See, e.g., Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Nollan v. California Coastal Comm'n*, 482 U.S. 825 (1987).

in Section I of this brief, it should overrule *Williamson County*, reverse the lower courts' dismissal of Knick's lawsuit, and remand the suit for further proceedings. Because Scott Township is not a State, the Eleventh Amendment will play no part in the remanded proceedings. Even if the Court is concerned by the Eleventh Amendment implications of overruling *Williamson County*, it can appropriately defer any consideration of those implications until it is faced with a Takings Clause case in which the plaintiff asserts monetary claims against a State. Overruling *Williamson County* will do nothing to undermine the Eleventh Amendment immunity to which a State might otherwise be entitled.

But if, due to Eleventh Amendment concerns, the Court is nonetheless reluctant to overturn *Williamson County* entirely, *amici* urge the Court, as an alternative basis for reversing the Third Circuit, to rule that the state-court exhaustion requirement is inapplicable when the defendant is a local government and to defer to another day the issue of whether to overrule *Williamson County* when the defendant is a State. Whatever relevance the Eleventh Amendment may have to Takings Clause claims filed against a State, it has no relevance to claims filed against local governments such as Scott Township. Limiting the overruling of *Williamson County* to claims filed against local governments would allow the Court await the arrival of a case involving Takings Clause claims against a State before determining the proper procedures for handling such claims.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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June 1, 2018