No. 17-647

In the
Supreme Court of the United States

ROSE MARY KNICK,
Petitioner,
v.
TOWNSHIP OF SCOTT, PENNSYLVANIA ET AL.,
Respondents.

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

BRIEF OF *AMICUS CURIAE* CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Court should reconsider the portion of *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 194-96 (1985), requiring property owners to exhaust state court remedies to ripen federal takings claims, as suggested by Justices of this Court? *See 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, and Thomas, JJ., concurring in judgment).

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IDENTITY AND INTEREST OF AMICUS

The Center for Constitutional Jurisprudence[1] is the public interest law arm of the Claremont Institute, whose stated mission is to restore the principles of the American founding to their rightful and preeminent authority in our national life. This includes the protections for the natural right to own and use private property recognized in the Fifth Amendment. The Center has previously appeared before this Court as *amicus curiae* in several cases addressing the constitutionality of property restrictions, including *Arrigoni Enterprises, LLC v. Town of Durham*, 136 S. Ct. 1409 (2016) (cert. denied); *Horne v. Dep't of Agric.*, 135 S. Ct. 2419 (2015); *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013); *Arkansas Game & Fish Comm'n v. United States*, 133 S. Ct. 511 (2012); *Sackett v. Environmental Protection Agency*, 566 U.S. 120 (2012); and *Stop the Beach Renourishment v. Florida Department of Environmental Protection*, 560 U.S. 702 (2010).

SUMMARY OF ARGUMENT

The state-litigation requirement of *Williamson County* is contrary to the text and history of the Fifth Amendment. The rights protected in the Bill of Rights are not granted by governments, but are instead inalienable natural rights. One of the chief rights in this

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[1] Pursuant to this Court's Rule 37.3(a), this amicus brief is filed with the consent of the parties. Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than Amicus Curiae, its members, or its counsel made a monetary contribution to fund the preparation and submission of this brief.

group is the individual right to own and use private property. The Founders sought to protect this inalienable right by imposing a condition on the exercise of government power to take or interfere with property. That condition was the payment of just compensation. Thus, when state or local governments take property without paying compensation, they have violated this restriction on the exercise of their powers. A requirement that an individual litigate his rights in private property, rights protected by the federal constitution, in state court simply ignores the text and history of the Constitution.

ARGUMENT

The *Williamson County* State Litigation Requirement Is Inconsistent With The Text And History of the Takings Clause of the Fifth Amendment

One of the core principles of the American Founding is that individual rights are not granted by majorities or governments, but are inalienable. 1 Stats 1 (Declaration of Independence ¶2). The Fifth Amendment seeks to capture a part of this principle in its announcement that "private property [shall not] be taken for public use, without just compensation." U.S. Const. Amend. V. The Takings Clause sets out both a condition for the exercise of government power and the remedy for the failure of that condition – Just Compensation.[2] *First English Evangelical Lutheran Church of Glendale v. Los Angeles*, 482 U.S. 304, 314 (1987).

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[2] We save for another day the argument that "public use" is also a condition set forth in the text of the Fifth Amendment.

The *Williamson County* state-litigation rule ignores the requirement of compensation as a *condition* on the exercise of government power over the ownership and use of private property. Instead, the state litigation requirement relegates "just compensation" to the status of a mere remedy. In so doing, it ignores the importance of ownership and use of private property in the scheme of inalienable natural rights that form the foundation of the American concept of individual liberty.

Recognition of the vital nature of individual rights in property predated the American Constitution. Blackstone noted that property is an "absolute right, inherent in every Englishman . . . which consists of the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land." Blackstone, 1 COMMENTARIES ON THE LAWS OF ENGLAND 135 (Univ. of Chicago Press 1979) (1765).

The founding generation also relied on the writings of John Locke who noted that private property was natural, inseparable from liberty in general and actually preceded state's political authority. John Locke, SECOND TREATISE OF GOVERNMENT, (Indianapolis: Hackett Publishing Company, 1980) 111; James W. Ely, Jr., PROPERTY RIGHTS: THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 17 (1997). Locke argued that government was formed to protect as "life, liberty, and estates" and Thomas Jefferson merely substituted "estates" with "pursuit of happiness" in the Declaration. Willi Paul Adams, THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE

STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA 193 (1980).

Alexander Hamilton, building on these concepts, noted the central role of property rights in the protection of all of our liberties. If property rights are eliminated, he argued, the people are stripped of their "security of liberty. Nothing is then safe, all our favorite notions of national and constitutional rights vanish." Alexander Hamilton, The Defense of the Funding System, in 19 THE PAPERS OF ALEXANDER HAMILTON 47 (Harold C. Syrett ed., 1973). This idea was also endorsed by John Adams, "Property must be secured, or liberty cannot exist." John Adams, Discourses on Davila, in 6 THE WORKS OF JOHN ADAMS 280 (Charles Francis Adams ed., 1851).

Our nation's Founders believed that all that which liberty encompassed was described and protected by their property rights. Noah Webster explained in 1787: "Let the people have property and they will have power that will forever be exerted to prevent the restriction of the press, the abolition of trial by jury, or the abridgment of many other privileges." Noah Webster, AN EXAMINATION INTO THE LEADING PRINCIPLES OF THE FEDERAL CONSTITUTION 58-61 (Oct. 10, 1787) . From the beginnings of our country, and always in the minds of the Founders, these rights stood or fell together. Ely, *supra*, at 5.

This natural right to own and use property is not absolute. But if the government wants to take the property it must pay just compensation. This requirement is both a condition on the exercise of the power and a remedy for its abuse. The concept of just com-

pensation is one imported by the Founders from English common law, and particularly the Magna Carta. *Horne v. U.S. Dept. Ag.*, 135 S.Ct. 2419, 2426 (2015). This source of the just compensation rule helps to understand *when* compensation must be paid.

The barons who compelled King John to sign Magna Carta brought forth several grievances, of importance here was the King's abuse of the royal right of "purveyance." Purveyance was the right of the king to "bu[y] up provisions and other necessaries ... at an appraised valuation, in preference to all others, and even without consent of the owner." 1 William Blackstone, COMMENTARIES 277. The King, in 1215, acting as the government, used his royal right of purveyance in a manner much the same as the modern day eminent domain. *See Little Rock Junction Ry. v. Woodruff*, 49 Ark. 381 (1887) ("[Eminent domain] bears a striking analogy to the king's ancient prerogative of purveyance, which was recognized and regulated by the twenty-eighth section of *magna carta*."). While legally permissible for the Kings of England to requisition supplies in exchange for *prompt payment* of a market price, purveyance was prone to serious abuse. William Sharp McKechnie, MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN, WITH AN HISTORICAL INTRODUCTION 330 (1914).

At the time Magna Carta was signed, there was no dispute that the King was required to pay for the provisions he took. *Id.* The issue then, as now, was with the timing and type of payment, which was often "indefinitely delayed or made not in coin but in exchequer tallies." *Id.* Instead of paying cash, the king's

officers would "pay" with exchequer tallies. These tallies were sticks used to memorialize royal debts owed to particular subjects – essentially a Royal IOU. Marks would be made along the length of the stick to record the size of the debt, and then the stick would be split lengthwise. Each half of the stick would contain a portion of all of the lines, and because of irregularities in the wood, the sticks were difficult to forge. Each party would keep half of the stick; those halves later could be matched up to prove their authenticity.

But exchequer tallies were not necessarily negotiable in the same way as money because of the difficulty in proving to potential transferees that one half of a stick actually conformed to another half held by the Exchequer. So, in practice, Exchequer tallies' primary use was to offset the creditor's future taxes. *See* Christine Desan, MAKING MONEY: COIN, CURRENCY, AND THE COMING OF CAPITALISM 175-185 (2014).

Magna Carta provided several distinct clauses that addressed the king's abuse of his right to purveyance which are relevant to the discussion of the Fifth Amendment's historical background the most vital of which is Clause 28. Clause 28 stated, "No constable or other bailiff of ours shall take corn or other provisions from any one without immediately tendering money therfor, unless he can have postponement thereof by permission of the seller." McKechnie at 329.

The Takings Clause of the Fifth Amendment imported these protections into the federal Constitution. As Justice Story noted, the Takings Clause is "an affirmance of a great doctrine established by the com-

mon law for the *protection of private property*." 3 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 661 (1833) (emphasis added).

In a sense, the *Williamson County* state-litigation requirement is akin to the old tally sticks from the Middle Ages in England. In much of the same way that tally sticks afforded no immediately tangible value to the individual whose property was taken (except a mere promise to pay a debt in the future), the state-litigation requirement offers a party with a takings claim a "chose in action" rather than immediate compensation.

This view that payment of compensation was a condition on the exercise of government's power to take property is nothing new. Justice Brennan, in his dissenting opinion in *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 654 (1981), noted "[a]s soon as private property has been taken, whether through formal condemnation proceedings, occupancy, physical invasion, or regulation, the landowner has *already* suffered a constitutional violation." Prior to the decision in *Williamson County*, this Court routinely recognized that payment of just compensation was a condition on the exercise of the power of government to take private property. *See Danforth v. United States*, 308 U.S. 271, 283-84 (1939) ("compensation is due at the time of taking...."); *Seaboard Air Line Ry. Co. v. U.S.*, 261 U.S. 299, 306 (1923) ("[I]t was the duty of the government to make just compensation as of the time when the owners were deprived of their property." (Citation omitted)); *U.S. v. Dickinson*, 331 U.S. 745, 751 (1947) ("[T]he land was taken when it was taken and an obligation to pay for it then arose."); *U.S.*

v. Dow, 357 U.S. 17, 20 (1958) ("For it is undisputed that '(since) compensation is due at the time of taking, the owner at that time ... receives the payment.").

The *Cherokee Nation* decision is not to the contrary. There, Congress exercised its power of eminent domain and created a commission for the purpose of calculating the compensation due. *Cherokee Nation v. Southern Kan. Ry. Co.*, 135 U.S. 641 (1890). Indeed, the litigation over the compensation occurred before the property was taken. *Id*. Importantly, Congress recognized that actions taken pursuant to the statute required the payment of compensation. The state-litigation requirement of *Williamson County*, by contrast, involves state and local entities that claim no taking has occurred. Compensation is not the primary issue in the state litigation. Instead, the issue is whether the *federally protected right* has been violated. *San Remo Hotel, L.P. v. City & County of San Francisco*, 545 U.S. 323, 345 (2005). There is simply no basis for *requiring* litigation of federal constitutional rights in state courts.

The *Williamson County* state-litigation rule ignores the text and history of the constitutionally protected rights in private property. *See, e.g., San Remo Hotel*, 545 U.S. at 351 (Rehnquist, C.J. joined by O'Connor, Kennedy, and Thomas, JJ., concurring in judgment) ("*Williamson County's* state-litigation rule has created some real anomalies, justifying our revisiting the issue ... [the rule] all but guarantees that claimants will be unable to utilize the federal courts to enforce the Fifth Amendment's just compensation guarantee."); *Stop the Beach Renouirshent, Inc. v. Fla.*

Dep't of Envtl. Prot., 560 U.S. 702, 742 (2010) (Kennedy, J., concurring in part and concurring in the judgment) ("Until *Williamson County* is reconsidered, litigants will have to press most of their judicial takings claims before state courts...."); *Arrigoni Enterprises, LLC v. Town of Durham*, 136 S. Ct. 1409 (2016) (Thomas, J., dissenting from denial of cert., joined by Kennedy, J.).

CONCLUSION

The Court should return to the original understanding of the Takings Clause. The compensation requirement is a condition on the power of the government to take private property. Requiring litigation in state court over this federally protected constitutional right serves no purpose.

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