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 AMICI CURIAE CITIZENS' ALLIANCE FOR PROPERTY RIGHTS LEGAL FUND AND INVERSECONDEMNATION.COM 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).

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES--Continued

Page

TABLE OF AUTHORITIES--Continued

Page

TABLE OF AUTHORITIES--Continued

Page

CONSTITUTIONS AND STATUTES

TABLE OF AUTHORITIES—Continued

Page

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

Page

INTEREST OF AMICI CURIAE[1]

Citizens' Alliance for Property Rights Legal Fund is a Washington state non-profit 501(c)(3) which handles the legal defense of our property rights as well as the education of citizens, politicians, and bureaucrats on property rights issues. It is an affiliated organization of Citizens' Alliance for Property Rights, which was organized in 2003 as a non-partisan entity where individual citizens and other organizations can work together to protect property rights. Together, they support equitable and scientifically sound land use regulations that do not force private landowners to pay disproportionately for public benefits enjoyed by all. They protect everyone's rights by presenting a single coordinated voice dedicated to preserving and protecting individual property rights, and to reducing the regulatory cost of property ownership.

Inversecondemnation.com is a law blog, published since 2006 by undersigned Counsel of Record, which focuses on recent developments and analysis of regulatory takings, eminent domain, inverse condemnation, property rights, and land use law.

We are submitting this brief because *Williamson*'s state exhaustion requirement is an anomaly, and wrongly relegates property rights to the status of "poor relation" in the constitutional canon. When asked by our constituents and our clients why a

1. All parties have filed with the Clerk a letter granting blanket consent to amicus briefs. No counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund this brief's preparation or submission.

federal court cannot review a claim that a state or local government is violating the federal constitution (unlike every other right in the Bill of Rights), we have no good response to explain *Williamson*'s rationale, or its effect.

SUMMARY OF ARGUMENT

Our brief makes two main points. First, to show the corrosive effect *Williamson* has on the average property owner's reasonable assumption that she can bring a federal constitutional claim in federal court. Second, to point out a foundational flaw in *Williamson*, and to highlight a particularly egregious example of how that case is employed to run owners though a pointless maze.

ARGUMENT

I. THE AVERAGE LANDOWNER CAN'T UNDERSTAND WHY A MONKEY CAN GET TO FEDERAL COURT, BUT PROPERTY OWNERS CANNOT

A monkey—*a monkey!*—has the keys to the federal courthouse door to assert its property rights in a "selfie." *Naruto v. Slater*, 888 F.3d 418 (9th Cir. 2018) (the court concluded Naruto has Article III standing, but no standing under the Copyright Act; the case is pending the *en banc* process).[2] Federal courts regularly entertain cases about whether—contrary to Chris Rock's dictum—something untoward really might be going on in the Champagne Room.[3] *See*, *e.g.*, *Flanigan's Enters. v. Fulton County*, 596 F.3d 1265 (11th Cir. 2010) (challenging ordinance prohibiting alcohol sales at nude dancing establishments). A local law interferes with your

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2. Although the law may not be an ass, it seems it might be a monkey. *Cf. Collins v. Virginia*, No. 16-1027, 2018 U.S. LEXIS 3210 at *33 (U.S. May 29, 2018) (Alito, J., dissenting) ("The Fourth Amendment is neither an 'ass' nor an 'idiot.'").

3. *Cf.* Chris Rock, *No Sex (in the Champagne Room)*, on *Bigger & Blacker* (DreamWorks Records 1999).

desire to create Valentine's Day artwork out of live nude bodies? Go straight to federal court, no questions asked. *See*, *e.g.*, *Sole v. Wyner*, 551 U.S. 74 (2007). City animal control officers take a homeless man's 18 diseased pigeons and his pet crow and seagull? Go straight to federal court, too (just be sure to couch the claim as a violation of the Fourth Amendment, not the Fifth). *See Recchia v. City of Los Angeles*, No. 13-57002, 2018 U.S. App. LEXIS 11364 (9th Cir. May 1, 2018). But if a state or local government infringes on a Fifth Amendment property right? Go to state court. And stay there: as a consequence of *Williamson*'s state procedures requirement and the you're-either-too-early-or-you're-too-late trap endorsed by *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005), federal courts simply do not "do" takings, unless the government decides to remove it. *See City of Chicago v. Int'l College of Surgeons*, 522 U.S. 156, 164 (1997).

To a lawyer's eyes, *Williamson*'s state procedures requirement might charitably be called opaque; but to landowners who needlessly must budget years of legal fees if they want to even think about ripening a federal constitutional takings claim for federal court, it is impossibly dense. *See* Michael M. Berger, *Supreme Bait & Switch: The Ripeness Ruse in Regulatory Takings*, 3 Wash. U. J. L. & Pol'y 99, 103 (2000) ("Ripeness rules are used as an offensive weapon to delay litigation, increase both fiscal and emotional costs to the property owner, and convince potential plaintiffs that they should not even try to 'fight city hall.'") (internal citations omitted). The Sixth Circuit summed up well the odyssey on which property owners must embark:

> [I]t is obvious to us that, left to the devices of the Village's counsel, 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. . . ." For nearly ten years, the Kruses have endeavored to vindicate their property rights guaranteed by the Constitution and by state statutes. The Village's actions threaten to turn the Kruse family into generations of "ruined suitors" pursuing legal redress in a system "which gives to monied might, the means abundantly of wearying out the right; which so exhausts finances, patience, courage, hope" as to leave them "perennially hopeless." Enough is enough, and then some.

Kruse v. Vill. of Chagrin Falls, 74 F.3d 694, 701 (6th Cir. 1996) (quoting Charles Dickens, Bleak House (Oxford University Press ed. 1989)). How do we explain this unequal treatment—this "procedural monster"—to landowners? Berger, *Supreme Bait & Switch*, 3 Wash. U. J. L. & Pol'y at 102 (*Williamson* transformed "the ripeness doctrine from a minor anomaly into a procedural monster"). *Williamson*'s state exhaustion requirement certainly could not have been intended to be a tool to financially bleed out property owners by running them through a time-consuming and ultimately pointless maze.

This Court appreciates that its rulings have real-life consequences for litigants and the lawyers who try to apply them. Most recently, in *Upper Skagit Indian Tribe v. Lundgren*, No. 17-387, 2018 U.S. LEXIS 3085 (May 21, 2018), the Chief Justice (joined

by Justice Kennedy) focused on the practical consequences of the majority ruling on the parties, and the need for "a meaningful remedy." *Id*. at *13 (Roberts, C.J., concurring). Justices Thomas and Alito expressed similar concerns about leaving litigants "in limbo," and the associated costs. *Id*. at *16 (Thomas, J., dissenting) ("It forces the Lundgrens to squander additional years and resources litigating their right to litigate."). The procedures for vindicating federal constitutional rights should be accessible to the ordinary landowner. *See Collins v. Virginia*, No. 16-1027, 2018 U.S. LEXIS 3210 at *33 (U.S. May 29, 2018) (Alito, J., dissenting) (noting how "[a]n ordinary person of common sense would react" to a ruling); *Brody v. Vill. of Port Chester*, 434 F.3d 121, 132 (2d Cir. 2005) ("It is not likely that the average landowner would have appreciated [the short repose period in New York condemnation law].").[4] In the end, legal rules should be considered through the lens of the parties who must bear the cost of putting them into action. If an owner cannot understand why the federal courthouse doors are closed—and why the courts are reduced to resolving esoteric pleading games and not the merits—those rights are in danger of becoming meaningless. In that spirit, we present the following, an attempt to squeeze three decades of property owners' views of *Williamson*'s exhaustion requirement into a popular five-panel "meme."

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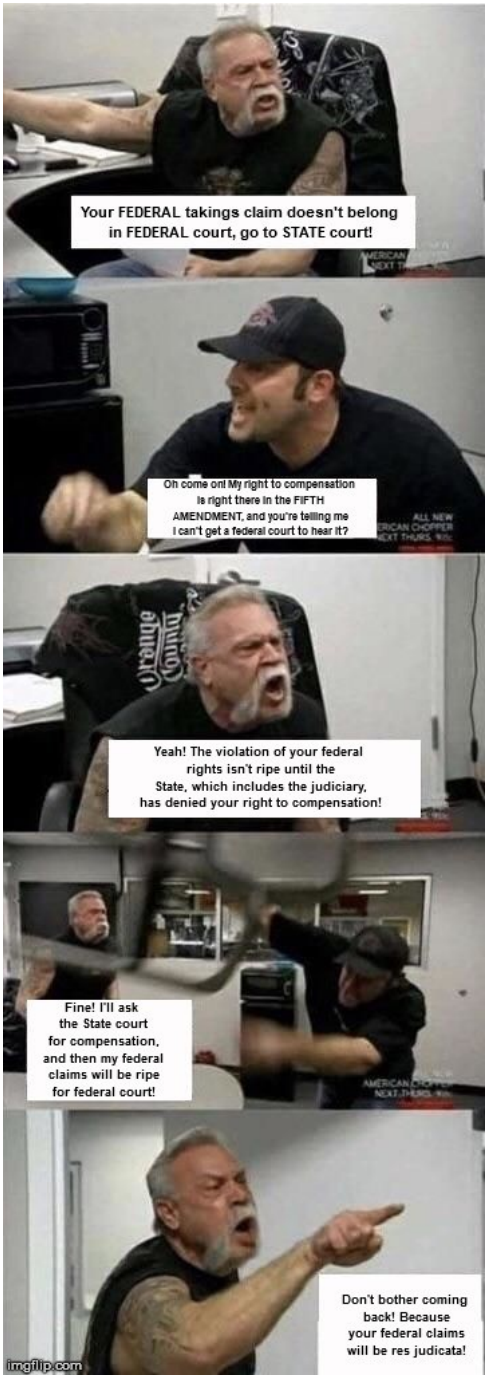
4. *See also M.A.K. Inv. Group, LLC v. City of Glendale*, No. 16-1492, 2018 U.S. App. LEXIS 12468 (10th Cir. May 14, 2018) (thirty days is enough for landowner to research what procedural avenues for relief are available).


Your FEDERAL takings claim doesn't belong in FEDERAL court, go to STATE court!
Oh come on! My right to compensation is right there in the FIFTH AMENDMENT, and you're telling me I can't get a federal court to hear it?
Yeah! The violation of your federal rights isn't ripe until the State, which includes the judiciary, has denied your right to compensation!
Fine! I'll ask the State court for compensation, and then my federal claims will be ripe for federal court!
Don't bother coming back! Because your federal claims will be res judicata!
imgflip.com

Some context may be helpful. User-added text and a series of still photos lifted from a now-cancelled reality television program are combined to succinctly illustrate the competing viewpoints in an argument:

> American Chopper Argument refers to a scene from American reality TV show *American Chopper* in which Paul Teutul Sr. and Paul Teutul Jr. get in a shouting match about Jr.'s tardiness. Since its original airing in 2009, the explosive scene has spawned an exploitable photocomic series that humorously illustrate various debates in pop culture fandom.

American Chopper Argument, Know Your Meme, http://knowyourmeme.com/memes/american-chopper-argument (last visited May 31, 2018).[5]

Admittedly, its use here does not capture much of whatever nuance might be lurking in the *Williamson* majority's rationale. *See* Matthew Yglesias, *The American Chopper meme, explained—It all goes back to Plato*, Vox (Apr. 10, 2018) ("American Chopper more than makes up for its aesthetic shortcomings with its ability to present complicated ideas. . . . More broadly, in an era of performative social media dunking and tribalism run amok, the Chopper offers a lighthearted way to demonstrate that you actually understand the viewpoints of people on both sides of an issue."). But it does strip the state procedures requirement to its essential core: file a federal tak-

5. A meme is "an amusing or interesting item (such as a captioned picture or video) or genre of items that is spread widely online especially through social media." *Meme*, Merriam-Webster Dictionary Online, https://www.merriam-webster.com/dictionary/meme (last visited June 1, 2018).

ings claim in federal court and the presumption is that it is premature because the state has not yet denied just compensation; you need to try and force the government to pay, which includes suing in state court for compensation—and lose that claim—before the federal court can even consider whether the Fifth and Fourteenth Amendments have been violated. But by doing so, you will later be deemed to have litigated the federal claim (even if you didn't) and will be precluded from doing so "again."

Property owners should not be caught up in a procedural trap applicable "to no other species of litigant." Berger, *Supreme Bait & Switch*, 3 Wash. U. J. L. & Pol'y at 103 ("government lawyers have learned to play the ripeness game like Perlman on a Stradivarius"). The state procedures rule has managed to cut a swath of destruction through takings doctrine and property owners' wallets, and unless checked by this Court, will continue to do so. *Williamson*'s costly three-decade experiment with property owners' rights has run its course and come up short. It should be jettisoned for good.

II. THE STATE EXHAUSTION REQUIREMENT IS RIPE FOR ABANDONMENT

This case presents the Court with a long-overdue opportunity to right the ship and return Fifth Amendment property rights to their coequal status. The last time this Court considered *Williamson*'s takings ripeness requirements in an argued case, the property owners did not ask the Court to overrule or revisit the state procedures requirement. An exchange with Justice O'Connor went like this:

> JUSTICE O'CONNOR: And you haven't asked us to revisit that Williamson County case, have you?
>
> MR. UTRECHT: We have not asked that this Court reconsider the decision in Williamson County.
>
> JUSTICE O'CONNOR: Maybe you should have.

Oral Argument Transcript, *San Remo Hotel, L.P. v. City and County of San Francisco*, No. 04-340 (Mar. 28, 2005). This time, however, Petitioner did not take the same approach and has squarely asked the Court to revisit the state litigation requirement.

A. *Williamson*'s Mistaken Foundation: Tennessee Did Not Recognize A Compensation Remedy Until 2014

We first note *Williamson*'s erroneous foundation, the majority opinion's conclusion that Tennessee property owners could—and therefore must—pursue compensation for a regulatory taking under Tennessee law:

> The Tennessee state courts have interpreted § 29-16-123 to allow recovery through inverse condemnation where the "taking" is effected by restrictive zoning laws or development regulations.

Williamson, 473 U.S. at 196 (citing *Davis v. Metropolitan Govt. of Nashville*, 620 S.W.2d 532, 533-534 (Tenn. App. 1981); *Speight v. Lockhart*, 524 S.W.2d 249 (Tenn. App. 1975)).

The problem was that the only Tennessee court that mattered—the Tennessee Supreme Court—had actually *not* interpreted the statute that way, and would not do so for another 29 years. Indeed, at the

time of *Williamson*, that court limited recovery of compensation under the inverse condemnation statute to physical occupation and "nuisance-type" takings, as it later recognized in *Phillips v. Montgomery County*, 442 S.W.3d 233 (Tenn. 2014):

> It is true that until today this Court has recognized only physical occupation takings and nuisance-type takings.
>
> . . . .
>
> We hold that, like the Takings Clause of the United States Constitution, article I, section 21 of the Tennessee Constitution encompasses regulatory takings and that the Property Owners' complaint is sufficient to allege a state constitutional regulatory taking claim, for which they may seek compensation under Tennessee's inverse condemnation statute, Tennessee Code Annotated section 29-16-123.

Id. at 243, 244. *See also id.* at 242 (the issue of whether compensation under the inverse condemnation statute was available for regulatory takings claims was "an issue of first impression for this Court.").

In short, *Williamson* was simply wrong when it concluded the property owner had a compensation remedy under state law and therefore was required to use it.

B. One Particularly Egregious Procedural Game Highlights How *Williamson* Whipsaws Property Owners Between State And Federal Courts

This section of our brief highlights one of the most unfair consequences of *Williamson*'s exhaustion

requirement: how, when combined with the government's power to remove federal takings cases, it allows property owners to be bludgeoned by procedural games, and how *Williamson*'s exhaustion rule, designed to ensure federal takings claims are ready for federal review, have instead ripened into a nearly impossibly high wall around federal courts.[6]

In *City of Chicago v. Int'l College of Surgeons*, 522 U.S. 156 (1997), this Court held that a takings claim, filed by the property owner in state court could be removed by the defendant to federal court as a matter "arising under" the Constitution. *Id.* at 161, 164. The majority never mentioned the *Williamson* state litigation requirement, nor that case's rationale that a "takings" claim is complaining about the lack of state-provided compensation, not the unconstitutional taking. Employing *Int'l College*, governmental defendants enjoy the option of a federal forum, even where property owner plaintiffs do not. The asymmetry alone should be enough to jettison *Williamson*.

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6. "Mission creep" has set in, and claims subject to *Williamson* are not limited to regulatory takings; physical takings claims have also been subject to the state exhaustion requirement. *Peters v. Vill. of Clifton*, 498 F.3d 727, 732 (7th Cir. 2007); *Urban Developers LLC v. City of Jackson*, 468 F.3d 281, 294-95 (5th Cir. 2006); *Pascoag Reservoir & Dam, LLC v. Rhode Island*, 337 F.3d 87, 91 (1st Cir. 2003). Procedural due process claims as well. *Kurtz v. Verizon N.Y., Inc.*, 758 F.3d 506 (2d Cir. 2014), *cert. denied*, 135 S. Ct. 1156 (2015). And in *Sunrise Detox V, LLC v. City of White Plains*, 769 F.3d 118 (2d Cir. 2014), the Second Circuit applied the doctrine to a claim under the Americans With Disabilities Act. It has even been applied by the Federal Circuit to affirm the Court of Federal Claims' dismissal of a Fifth Amendment takings claim against the federal government. *Alpine PCS, Inc. v. United States*, 878 F.3d 1086 (Fed. Cir. 2018).

But where this exercise becomes especially unjust is when—after removing a state-filed compensation claim case to federal court based on federal question jurisdiction—the defendant argues under *Williamson*'s state procedures requirement that the case which they removed is not ripe for federal court review *because the compensation claim was not raised in state court*.

Some courts don't buy this tactic. *See, e.g.*, *Yamagiwa v. City of Half Moon Bay*, 523 F. Supp. 2d 1036, 1110 (N.D. Cal. 2007) (city removed case to federal court, and on the eve of trial sought remand under *Williamson*; court rejected the argument, concluding, "the City having invoked federal jurisdiction, its effort to multiply these proceedings by a remand to state court smacks of bad faith"). *See also Sherman v. Town of Chester*, 752 F.3d 554, 564 (2d Cir. 2014); *Sansotta v. Town Nags Head*, 724 F.3d 533, 544-47 (4th Cir. 2013); *Key Outdoor Inc. v. City of Galesburg*, 327 F.3d 549, 550 (7th Cir. 2003).

But many do. *See Koscielski v. City of Minneapolis*, 435 F.3d 898, 903-04 (8th Cir. 2006); *Sandy Creek Investors, Ltd. v. City of Jonestown*, 325 F.3d 623, 626 (5th Cir. 2003) (dismissing case on appeal because district court did not have jurisdiction to resolve takings claims that were removed from state court); *Ohad Assocs., LLC v. Twp. of Marlboro*, Civil No. 10-2183 (AET), 2011 U.S. Dist. LEXIS 8414, at *3, 6-8 (D.N.J. Jan. 28, 2011); *8679 Trout, LLC v. N. Tahoe Pub. Utils. Dist.*, No. 2:10-cv-01569-MCE-EFB, 2010 U.S. Dist. LEXIS 93303, at *4, 13-14 (E.D. Cal. Sept. 8, 2010); *Rau v. City of Garden Plain*, 76 F. Supp. 2d 1173, 1174-75 (D. Kan. 1999); *see also Del-Prairie Stock Farm, Inc. v. Cnty. of Walworth*, 572 F. Supp. 2d 1031, 1034 (E.D. Wis.

2008) (recognizing the incoherent application of the *Williamson* state litigation requirement and remanding a removed case to state court rather than dismiss the takings claims).

Warner v. City of Marathon, 718 Fed. Appx. 834 (11th Cir. 2017) (per curiam) exemplifies these latter cases. There, Florida property owners raised a regulatory takings claim in Florida state court. A prudent move, given *Williamson*. The city removed the case as a federal question, exercising its *Int'l College* power. The district court dismissed the case as unripe under *Williamson*'s state procedures requirement, and the Eleventh Circuit affirmed.

Wait a minute, the property owner argued, we did what the Supreme Court told us in *Williamson* we had to do: we brought our takings claim in a Florida court, asking for compensation through available state procedures, so we're not here in federal court willingly: we were ripening our federal claim in state court when *the city* removed us to federal court.

But the Eleventh Circuit rejected that argument, concluding the case wasn't ripe because the property owners had not secured a *denial* of their compensation claim by the state court:

> The plaintiffs also did not allege in their complaint that they availed themselves of this remedy and were denied relief. Instead, the plaintiffs seem to assert on appeal that the takings claim presented in their complaint is their just compensation claim. Notwithstanding the possibility that they were attempting to assert an inverse condemnation claim in Florida state court before the case was removed to federal court, we cannot re-

> view the claim until the plaintiffs have been denied relief by a Florida court.

Id. at *10-*11.

Just how were the plaintiffs supposed to be denied compensation in state court when the city removed it before they could pursue relief there? Nonetheless, the court affirmed the district court's dismissal of the takings claim for lack of subject matter jurisdiction (without prejudice), which effectively served as a remand order of the city's removal. Thus, the case was back in state court. Although the property owner lost time (and attorneys' fees), it did not lose the case.

Even if so, the case highlights the foolishness that *Williamson* has spawned, because if the plaintiffs went back to state court (where they were originally) and filed a new suit against the city, what would prevent the city from removing it yet again? This case is just one example of the very real problems *Williamson* has enabled.

CONCLUSION

For more than three decades, the state procedures requirement has confused litigants, fractured courts, and has forced property owners to assert their federal constitutional rights in state courts, most never to see the light of day again. Until *Williamson*'s state procedures requirement is finally relegated to history's dustbin, this confusion and injustice will continue. All that property owners ask for is the same opportunity afforded others who assert their federal constitutional civil rights claims: the chance to have a federal court adjudicate their federal rights, nothing more.

Respectfully submitted.

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