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 NATIONAL GOVERNORS ASSOCIATION, ET AL. IN SUPPORT OF RESPONDENTS

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State and local governments have the "important responsibilities" of "protecting the health, safety, and welfare of [their] citizens." *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 342-43 (2007). Amici are groups representing the interests of those government entities, which for over 30 years have relied on *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985).

By requiring takings claimants to seek compensation under the state's procedure for providing it, *Williamson County* protects those governments from the typically higher costs of litigating challenges to police-power regulation in federal courts. It also ensures that those challenges are heard in state courts, which have greater knowledge of and experience with the state law issues they present.

This brief is filed on behalf of the following amicus organizations:

- The National Governors Association (NGA), founded in 1908, is the collective voice of the Nation's governors. NGA's members are the governors of the 50 States, three Territories, and two Commonwealths.

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

- The National Conference of State Legislatures (NCSL) is a bipartisan organization that serves the legislators and staffs of the Nation's 50 States, its Commonwealths, and Territories. NCSL provides research, technical assistance, and opportunities for policymakers to exchange ideas on the most pressing state issues. NCSL advocates for the interests of state governments before Congress and federal agencies and regularly submits amicus briefs to this Court in cases, like this one, that raise issues of vital state concern.
- The Council of State Governments (CSG) is the Nation's only organization serving all three branches of state government. CSG is a region-based forum that fosters the exchange of insights and ideas to help state officials shape public policy. This offers unparalleled regional, national, and international opportunities to network, develop leaders, collaborate, and create problem-solving partnerships.
- The National Association of Counties (NACo) is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the nation's 3,069 counties through advocacy, education, and research.
- The National League of Cities (NLC) is dedicated to helping city leaders build better communities. NLC is a resource and advocate for 19,000 cities, towns, and villages, representing more than 218 million Americans.

- The U.S. Conference of Mayors (USCM), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people, which includes over 1,200 cities at present. Each city is represented in the USCM by its chief elected official, the mayor.
- The International City/County Management Association (ICMA) is a nonprofit professional and educational organization of over 9,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating and developing the professional management of local governments throughout the world.
- The International Municipal Lawyers Association (IMLA) has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 2,500 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters.

SUMMARY OF ARGUMENT

Since the moment this Court decided *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), plaintiffs and property-rights-advocacy groups have tilted at the Court's holding that plaintiffs challenging state or local regulation as a taking of property must seek and be denied just compensation through the procedures provided by the state. They argue the requirement has

created a procedural morass and fundamental unfairness. That is their justification for asking this Court to overturn 30 years of precedent.

But the lower courts' application of *Williamson County*—including the cases Petitioner and her amici rely on—show the state-compensation requirement to be merely a windmill. Not one of those cases supports their depiction of *Williamson County* as a menace. On the contrary, this Court and the lower courts have ensured that the state-compensation requirement is not gamed to deprive property owners of their day in court.

At root, Petitioner's complaint is that she cannot have her favored forum (she did not even attempt to seek compensation under the procedure provided by Pennsylvania). But as this Court unanimously recognized in *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005), plaintiffs have no constitutional right to a federal forum. State courts are fully competent to fairly adjudicate claims that regulation has "taken" property. If there is a problem with *Williamson County,* it is not that it is unmanageable, as Petitioner contends. It is rather that claimants like Petitioner have refused to accept the rule, causing unnecessary procedural disputes.

To be sure, several justices of this Court have questioned the state-compensation requirement in light of the rule that claimants under 42 U.S.C. § 1983 need not exhaust state judicial remedies. The answer is that the Fifth Amendment's Takings Clause is unlike its neighbors. It does not limit the government's power to burden the exercise of property rights. Rather, it imposes a *condition* on the sovereign prerogative to take private property—a condi-

tion that the owner be justly compensated. Unlike denial of equal protection or infringement of the liberty of free expression—neither of which can be sustained by payment of compensation—taking of property is not unconstitutional if the property owner is compensated. The state's denial of just compensation is therefore an element of a claim for violation of the Takings Clause. *Williamson County* is thus *not* an exhaustion requirement.

Takings claims are also different from other constitutional claims because questions of state law—in particular the law of property, which varies considerably among the states—are intimately bound up with the constitutional analysis. Specifically, the court must construe state law to determine whether a compensable interest exists *vel non*, the boundaries of that interest, the extent to which existing property law gave rise to reasonable expectations of a particular use of the property, and whether the government's action merely implemented "background principles" of property law that inhere in the owner's title. No other constitutional provision imposes such demands on a reviewing court. This Court's federalism principles point to state courts as the optimal fora to apply their own law.

Williamson County's critics are also wrong about the supposed efficiency benefits of overruling it; efficiency in fact cuts the other way. Beyond state courts' familiarity with state property law, they are far more expert in the state statutory issues that so often accompany takings claims. Federal courts have consistently refused to referee the run-of-the-mill land-use disputes that form the basis of most takings cases. Accordingly, if the state-compensation re-

quirement were eliminated, federal courts would either become bogged down in picayune battles, or they would repeatedly abstain from hearing claims until the state law issues are resolved by state courts. Trading the clear state-compensation requirement for ad hoc abstention is a lousy deal.

This Court granted certiorari in this case after years of turning away petitions seeking to undo *Williamson County*. Yet Petitioner has jarringly *abandoned* the primary argument she made in support of the petition. The Court has previously dismissed petitions as improvidently granted in such circumstances. That Petitioner asks the Court to take the extraordinary step of repudiating a settled precedent provides additional reason for doing so here.

ARGUMENT

I. *Williamson County*'s state-compensation requirement is neither unworkable nor unfair.

"Before overturning a long-settled precedent," this Court requires "'special justification,' not just an argument that the precedent was wrongly decided." *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2407 (2014) (quoting *Dickerson v. United States*, 530 U.S. 428, 443 (2000)). As the sole "special justification" for overruling 30 years of precedent, Petitioner and her amici depict *Williamson County* as an unworkable and unfair doctrine that prevents aggrieved property owners from having their takings claims heard.

But the cases they cite paint an entirely different picture. Courts have consistently applied *Williamson County* to avoid injustice. Only when property own-

ers have attempted to evade its clear rule—as Petitioner did here—have they encountered problems.

A. The cases cited by Petitioner and her amici bear no resemblance to the rogues' gallery depicted in their briefs.

Petitioner and her amici cite purported examples of takings plaintiffs stymied by the state-compensation requirement. *See, e.g.*, Petitioner's Brief on the Merits ("Pet. Br.") 24-27, 30-33; Brief of AARP et al. ("AARP Br.") 7-10; Brief of Citizens' Alliance for Property Rights Legal Fund et al. ("Citizens' Alliance Br.") 13-14; Brief of Ohio Farm Bureau ("OFB Br.") 9; Brief of San Remo Hotel et al. ("San Remo Br.") 7-9. Specifically, Petitioner appears concerned that a plaintiff's access to state court is "illusory" when, to comply with *Williamson County* and *San Remo*, the plaintiff first files both state inverse condemnation and federal takings claims in state court, only to have the defendant remove the case to federal court. Pet. Br. 30. Then, Petitioner fears, the federal court will dismiss the claims for failure to comply with *Williamson County*, leaving a plaintiff without a lawsuit despite her efforts to follow the correct procedure.

The cases cited reveal no such injustice. Instead, they show that on removal of a takings case, federal courts either remand the case to state court or consider any *Williamson County* argument waived. Either way, the plaintiff gets her day in court. Notably, in none of Petitioner's cases was a plaintiff deprived of a hearing on her takings claim where she followed the proper procedure.

Petitioner points to *Koscielski v. City of Minneapolis*, 435 F.3d 898 (8th Cir. 2006), as a case in which a federal court dismissed a takings claim removed from state court. Pet. Br. 31. But there, the plaintiffs did not comply with *Williamson County*: they brought only a federal takings claim in state court and thus failed to follow the state's inverse condemnation procedure for seeking compensation. *See Koscielski v. City of Minneapolis*, 393 F. Supp. 2d 811, 818 (D. Minn. 2005). Had they raised the inverse condemnation claim along with their federal takings claim, the federal court could have exercised supplemental jurisdiction over the state claim or remanded it to state court, allowing the merits to be heard either way. It was not *Williamson County* that barred the plaintiffs' way; it was their own failure to follow the available state procedure.

As for *Clifty Properties, LLC v. City of Somerset*, Petitioner fails to tell the whole story. Pet. Br. 31 (citing *Clifty Props., LLC v. City of Somerset*, No. 6:17-41, 2017 U.S. Dist. LEXIS 146474 (E.D. Ky. Sept. 11, 2017)). In the September 11, 2017 ruling Petitioner cites, the district court dismissed federal and state claims removed from state court. But on the plaintiff's motion to amend or vacate that decision, the court held that the defendant waived any *Williamson County* argument by removing the case. *Clifty Props., LLC v. City of Somerset*, No. 6:17-41, 2017 U.S. Dist. LEXIS 207937, at *9 (E.D. Ky. Dec. 19, 2017). The court reinstated the federal takings claim and state law claims, and the plaintiff had its day in federal court. *Id.*

In *Wayside Church v. Van Buren County*, cited by Amicus AARP (AARP Br. 8-15), the plaintiff never

attempted to follow the state's compensation procedure. 847 F.3d 812, 816 (6th Cir.), *cert. denied* 138 S. Ct. 380 (2017). Instead, it filed suit in federal court, alleging that no adequate state procedures for compensation were available. *Id.* at 816, 819. The Sixth Circuit held that the plaintiff could have brought its state and federal takings claims in state court. *Id.* at 821. There is no injustice here, just a failed litigation strategy. Regardless, the plaintiff could still seek compensation through the state's procedure.

The problems encountered by the San Remo Amici (San Remo Br. 7-9) similarly were of their own making: they refused to pursue state-compensation procedures before bringing their claims in federal court. *See Kottschade v. City of Rochester*, 319 F.3d 1038, 1039-40 (8th Cir. 2003); *Pakdel v. City & County of San Francisco*, No. 17-cv-03638, 2017 U.S. Dist. LEXIS 211032, at *11 (N.D. Cal. Nov. 20, 2017).

The remaining cases cited by Petitioner and her amici are no more helpful. Each falls into one of two categories: (1) the plaintiff never attempted to follow the state's compensation procedure, or (2) the plaintiff's claims were heard in state or federal court:

- In *Sandy Creek Investors, Ltd. v. City of Jonestown*, the defendant removed state and federal takings claims that plaintiff filed in state court. 325 F.3d 623, 625 (5th Cir. 2003). The Fifth Circuit held that *Williamson County* required the matter to be remanded. *Id.* at 626.

- In *Ohad Associates, LLC v. Township of Marlboro*, the plaintiff filed a lawsuit in state court alleging some state claims and a federal tak-

ings claim, but did not include a claim under the state's eminent domain act, as required to seek compensation for an alleged taking. No. 10-2183, 2011 U.S. Dist. LEXIS 8414, at *3 (D.N.J. Jan. 28, 2011). The defendant removed the suit, and the district court dismissed the federal takings claim for failure to comply with *Williamson County* due to the plaintiff's failure to follow the available state-compensation procedure. *Id.* at *3, 8.

- In *Arrigoni Enterprises, LLC v. Town of Durham*, the plaintiff sought only to overturn a zoning decision in state court before filing a federal takings claim in federal court. 606 F. Supp. 2d 295, 297, 299-300 (D. Conn. 2009). Because the plaintiff never sought compensation under the state's procedure, the Second Circuit held that the district court properly dismissed the federal takings claim. *Arrigoni Enters., LLC v. Town of Durham*, 629 Fed. Appx. 23, 25 (2d Cir. 2015), *cert. denied* 136 S. Ct. 1409 (2016).

- In *Warner v. City of Marathon*, the plaintiff's state lawsuit was removed to federal court, after which the plaintiff amended his complaint three times. The final complaint alleged a federal takings claim and other state and federal claims. 718 Fed. Appx. 834, 836-37 (11th Cir. 2017). The district court dismissed the federal takings claim with prejudice, but the Eleventh Circuit vacated that order, and instructed the district court to dismiss it without prejudice, to allow the plaintiff to bring a state-

compensation claim in state court. *Id.* at 838. The plaintiff was able to successfully pursue his claim in state court. Citizens' Alliance Br. 14-15.

- Petitioner's remaining cases—*Reahard v. Lee County*, 30 F.3d 1412, 1418 (11th Cir. 1994); *8679 Trout, LLC v. North Tahoe Public Utilities District*, No. 2:10-cv-01569, 2010 U.S. Dist. LEXIS 93303, at *17 (E.D. Cal. Sept. 8, 2010); *Doak Homes, Inc. v. City of Tukwila*, No. C07-1148, 2008 U.S. Dist. LEXIS 7740, at *11-12 (W.D. Wash. Jan. 18, 2008); *Anderson v. Chamberlain*, 134 F. Supp. 2d 156, 162 (D. Mass. 2001); *Rau v. City of Garden Plain*, 76 F. Supp. 2d 1173, 1174 (D. Kan. 1999); and *Seiler v. Charter Township of Northville*, 53 F. Supp. 2d 957, 964 (E.D. Mich. 1999)—were all remanded to state court for adjudication.

In sum, Petitioner and her amici cannot point to a *single* case in which a takings claimant was denied a forum for her claim. Given that *Williamson County*'s supposed "unworkability" is Petitioner's sole "special justification" for its overruling, the Court should decline her request. *See Halliburton Co.*, 134 S. Ct. at 2407.

B. Courts have ample flexibility to avoid the unfair outcomes Petitioner fears.

In *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, the Court clarified that the state-compensation requirement is not jurisdictional. 560 U.S. 702, 729 (2010); *see also*

Horne v. Dep't of Agric., 569 U.S. 513, 525-26 (2013). Rather, having sought and been denied compensation through an available and adequate state-compensation procedure is an "element[] that must be shown in any [federal] takings claim." *Kurtz v. Verizon N.Y., Inc.*, 758 F.3d 506, 512 (2d Cir. 2014); *see also infra* Section II.A.

That clarification, which the lower courts have now almost universally acknowledged,[2] has ensured that courts can apply *Williamson County* pragmatically to avoid the parade of horribles Petitioner fears. (In fact, most of Petitioner's cases were decided before that clarification.)

First, courts have found that a defendant has waived the state-compensation requirement through its actions or neglect of the argument. In *Stop the Beach Renourishment*, this Court held that the respondent waived its state-compensation defense because it was not raised in the opposition to the peti-

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[2] *See Sherman v. Town of Chester*, 752 F.3d 554, 561 (2d Cir. 2014); *Knick v. Twp. of Scott*, 862 F.3d 310, 327 (3d Cir. 2017); *Sansotta v. Town of Nags Head*, 724 F.3d 533, 545 (4th Cir. 2013); *Rosedale Missionary Baptist Church v. New Orleans City*, 641 F.3d 86, 88-89 (5th Cir. 2011); *Lilly Invs. v. City of Rochester*, 674 Fed. Appx. 523, 526 (6th Cir. 2017); *Peters v. Vill. of Clifton*, 498 F.3d 727, 734 (7th Cir. 2007); *Guggenheim v. City of Goleta*, 638 F.3d 1111, 1118 (9th Cir. 2010) (en banc); *B. Willis, C.P.A., Inc. v. BNSF Ry. Corp.*, 531 F.3d 1282, 1299 n.21 (10th Cir. 2008); *Hadar v. Broward County*, 692 Fed. Appx. 618, 623 (11th Cir. 2017). The First Circuit has not taken a firm position on the issue, *see Perfect Puppy, Inc. v. City of E. Providence*, 807 F.3d 415, 420-21 (1st Cir. 2015), and the Eighth Circuit has not addressed it since this Court's decision in *Stop the Beach Renourishment*, *see Snaza v. City of St. Paul*, 548 F.3d 1178, 1182 (8th Cir. 2008).

tion for certiorari. 560 U.S. at 729; *see also, e.g.*, *Yamagiwa v. City of Half Moon Bay*, 523 F. Supp. 2d 1036, 1108-10 (N.D. Cal. 2007) (declining to entertain *Williamson County* argument first raised after two years of litigation and defendant's own removal to federal court).

Likewise, if a defendant removes a lawsuit alleging both a federal takings claim and a properly pled state inverse condemnation claim, the district court may hear the claims because the defendant's voluntary action in removing the case prevented the plaintiff from complying with the state-compensation requirement.[3] *See, e.g.*, *Lilly Invs. v. City of Rochester*, 674 Fed. Appx. 523, 531 (6th Cir. 2017); *Robinson v. City of Baton Rouge*, No. 13-375, 2016 U.S. Dist. LEXIS 146461, at *88 (M.D. La. Oct. 22, 2016); *Race v. Bd. of County Comm'rs of Lake*, No. 15-cv-1761, 2016 U.S. Dist. LEXIS 40331, at *11 (D. Colo. Mar. 28, 2016); *Athanasiou v. Town of Westhampton*, 30 F. Supp. 3d 84, 88 (D. Mass. 2014); *Merrill v. Summit County*, No. 2:08CV723, 2009 U.S. Dist. LEXIS 16056, at *5, 10 (D. Utah Mar. 2, 2009).

To do otherwise would "create the possibility for judicially condoned manipulation of litigation." *Sansotta*, 724 F.3d at 545; *accord Sherman v. Town of Chester*, 752 F.3d 554, 568-69 (2d Cir. 2014) (court "cannot accept" tactic of removing federal takings claim to federal court, then seeking to dismiss

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[3] Nevertheless, the plaintiff may request remand to state court based on *Williamson County*. *See, e.g.*, *Norma Faye Pyles Lynch Family Purpose, LLC v. City of Cookeville, Tenn.*, 207 F. Supp. 3d 825, 831-32 (M.D. Tenn. 2016); *VRC, LLC v. City of Dallas*, 391 F. Supp. 2d 437, 440, 442 (N.D. Tex. 2005).

claim); *Key Outdoor, Inc. v. City of Galesburg*, 327 F.3d 549, 550 (7th Cir. 2003) (because removal "frustrated plaintiffs' efforts to invoke state remedies," defendant "either surrendered the benefit of *Williamson* or consented in advance to the remand of state-law theories, so that the process required by *Williamson* could run its course").

Second, federal courts have exercised their discretion to bypass the state-compensation requirement where a federal takings claim can be disposed of on another basis, thus avoiding a pointless further round of litigation in state court. In *Guggenheim v. City of Goleta*, the Ninth Circuit en banc rejected the plaintiff's federal takings claim on the merits despite the city's state-compensation defense, thus avoiding "wast[ing] the parties' and the courts' resources to bounce the case through more rounds of litigation." 638 F.3d at 1118; *see also, e.g.*, *Wilkins v. Daniels*, 744 F.3d 409, 418 (6th Cir. 2014) (declining to apply *Williamson County* where it was "clear that there has been no 'taking,'" and thus "no jurisprudential purpose is served by delaying consideration of the issue"); *Vasquez v. Foxx*, No. 17-1061, 2018 U.S. App. LEXIS 18839, at *15 (7th Cir. July 11, 2018) (rejecting takings claim on merits); *Adam Bros. Farming, Inc. v. County of Santa Barbara*, 604 F.3d 1142, 1148-49 (9th Cir. 2010) (rejecting claim based on res judicata).

As these cases demonstrate, courts have applied *Williamson County* pragmatically. In lieu of uprooting that precedent, this Court can reaffirm that compliance with the state-compensation requirement is an element of a Fifth Amendment takings claim, rather than a requirement of Article III ripeness. It

can thus underscore that courts can consider it waived in appropriate circumstances or decline to require resort to state court where doing so would be futile. *Cf. Halliburton Co.*, 134 S. Ct. at 2414-17 (declining to overrule precedent but clarifying how it must be applied).

C. *Williamson County* does not require a claimant to seek compensation from the state if the state offers no fair process for doing so.

Under *Williamson County*, a plaintiff must follow the state's compensation procedure only if "a 'reasonable, certain and adequate provision for obtaining compensation' exists at the time of the taking." 473 U.S. at 194 (quoting *Reg'l Rail Reorganization Act Cases*, 419 U.S. 102, 124-25 (1974)). Federal courts have thus heard federal takings claims where state procedures are unavailable or inadequate. For example, where a state lacks *any* compensation procedure—such as an inverse condemnation statute—federal courts will hear a federal claim. *See, e.g.*, *Kruse v. Vill. of Chagrin Falls*, 74 F.3d 694, 700-01 (6th Cir. 1996); *Del Monte Dunes v. City of Monterey*, 920 F.2d 1496, 1507 (9th Cir. 1990). Additionally, where a state procedure exists but is not available for the specific situation at hand, courts recognize that the state remedy is inadequate. *See, e.g.*, *Daniels v. Area Plan Comm'n*, 306 F.3d 445, 456-58 (7th Cir. 2002) (pursuing state compensation futile where nature of claim did not satisfy criteria for state inverse condemnation procedure); *Clajon Prod. Corp. v. Petera*, 70 F.3d 1556, 1575 (10th Cir. 1995) (no state remedy available where alleged taking was

caused by government officials not subject to inverse condemnation statute). This safeguard further ensures no plaintiff will be barred from having a takings claim heard through no fault of her own.

D. The interaction of *San Remo* and *Williamson County* creates no injustice.

As this Court recognized unanimously in *San Remo Hotel, L.P. v. City and County of San Francisco*, if issues essential to a federal takings claim are decided in state court in the process of litigating a state inverse condemnation claim, the Full Faith and Credit Act (FFCA), 28 U.S.C. § 1738, precludes the plaintiff from relitigating those issues in federal court. *See* 545 U.S. at 347-48 (Rehnquist, C.J., concurring) ("Whatever the reasons for petitioners' chosen course of litigation in the state courts, it is *quite clear* that they are now precluded by the full faith and credit statute … from relitigating in their [federal] action those issues which were adjudicated by the California courts.") (emphasis added). This straightforward application of the FFCA also does not unfairly prejudice takings claimants, contrary to Petitioner's contention. Pet. Br. 24-25; Brief of American Farm Bureau Federation et al. 18; Brief of New England Legal Foundation 14; OFB Br. 10; Brief for the States of Texas & Oklahoma 9-10.

San Remo reflects the same respect afforded to state judicial decisions in any other context, and Petitioner is unable to explain why takings claims should be treated differently. This Court has consistently reaffirmed that state courts are fully competent to adjudicate federal claims, including constitu-

tional claims. *San Remo*, 545 U.S at 342-43 (citing *Allen v. McCurry*, 449 U.S. 90, 93, 103-04 (1980)); *see also Tafflin v. Levitt*, 493 U.S. 455, 458 (1990) (holding state courts are "presumptively competent . . . to adjudicate claims arising under the laws of the United States"); *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 275 (1997) (opinion of Kennedy, J.) (rejecting the notion that "state courts are a less than adequate forum for resolving federal questions. A doctrine based on the inherent inadequacy of state forums would run counter to basic principles of federalism."). And just like federal courts, "[s]tate courts . . . have a constitutional obligation to safeguard personal liberties and to uphold federal law."[4] *Stone v. Powell*, 428 U.S. 465, 493 n.35 (1976). There is no constitutional or statutory reason that a plaintiff must have a federal forum. *See San Remo*, 545 U.S. at 344.

State inverse condemnation claims can preclude relitigation of identical issues in Fifth Amendment claims merely because state courts often rely on this Court's Fifth Amendment principles in applying their own inverse condemnation statutes and state-constitutional takings provisions. *See, e.g.*, *San Remo Hotel v. City & County of San Francisco*, 41 P.3d 87, 108-10 (Cal. 2002); *Tolksdorf v. Griffith*, 626 N.W.2d 163, 167-68 (Mich. 2001); *City of Houston v. Carlson*, 451 S.W.3d 828, 831 (Tex. 2014). Consequently, the result in *San Remo* is troubling only if

[4] Petitioner has provided no evidence or argument that local courts are more predisposed to favor local governments than local property owners.

one believes that state courts are less competent than federal courts to apply those principles.

Petitioner's contention that the combination of *Williamson County* and *San Remo* creates a "catch-22" or "trap," Pet. Br. 25, appears to be based on the belief, unfortunately fostered by *Williamson County* itself, that the state-compensation requirement is a requirement of ripeness. *See Williamson County*, 473 U.S. at 194-95. How can it be, Petitioner asks, that a procedure necessary to "ripen" a federal takings claim also prevents the claim from being adjudicated? Pet. Br. 25-26 (takings claims go from "unripe" to "rotten"). However, when the state-compensation requirement is properly viewed—as an element of the plaintiff's claim—any rhetorical force of Petitioner's "catch-22" dissolves. It is hardly anomalous that a plaintiff cannot litigate an issue essential to two claims in two consecutive lawsuits. Here, too, the Court can clarify rather than vitiate, by emphasizing that the state-compensation requirement is not one of ripeness.

As this Court held in *San Remo*, the FFCA applies unless Congress has carved out an exception for a particular claim or issue. 545 U.S. at 344. There is no such exception for federal takings claims, *id.* at 348 (Rehnquist, C.J., concurring), despite what Petitioner might hope, *see* Pet. Br. 26-27. However, Congress can resolve any perceived unfairness by creating such an exception to the FFCA. The Constitution does not compel Congress to maintain the FFCA in its current form, and if a change is warranted, Congress may make the change.

II. The Takings Clause *is* different.

Chief Justice Rehnquist's *San Remo* concurrence presents the central question to be resolved in this case. Why, he asked, must takings claimants first go to state court, "while . . . plaintiffs [may] proceed directly to federal court in cases involving, for example, challenges to municipal land-use regulations based on the First Amendment, or the Equal Protection Clause"? 545 U.S. at 350-51 (Rehnquist, C.J., concurring) (citations omitted). The answer is that a Fifth Amendment takings claim is unlike those other constitutional claims in two fundamental, structural ways: (1) the state's denial of compensation is an element of a claim under the Takings Clause, and (2) state law dictates, literally and figuratively, the boundaries of the "private property" that the Clause protects.

A. The state's denial of compensation is an element of a claim for violation of the Takings Clause.

Williamson County is a straightforward application of the principle that only *uncompensated* takings are unconstitutional. The government has the sovereign power to take property with payment of compensation. *Boom Co. v. Patterson*, 98 U.S. 403, 406 (1878). The Takings Clause therefore provides that "nor shall private property be taken for public use, *without just compensation*." (Emphasis added.) Accordingly, this Court has held, and merely reaffirmed in *Williamson County*, that takings are unconstitutional only if uncompensated. *See Williamson County*, 473 U.S. at 194 n.13 ("[B]ecause the Fifth Amendment proscribes takings *without just*

compensation, no constitutional violation occurs until just compensation has been denied."); *see also, e.g.*, *City of Monterey v. Del Monte Dunes, Ltd.*, 526 U.S. 687, 718 (1999) (opinion of Kennedy, J.) ("[T]here is no constitutional or tortious injury until the landowner is denied just compensation."); *Preseault v. ICC*, 494 U.S. 1, 11 (1990); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 320 n.10 (1987) ("[A]s a matter of law, an illegitimate taking [does] not occur until the government refuses to pay . . . ."); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 697 n.18 (1949) (holding "the availability of a suit for compensation against the sovereign will defeat a contention that the action is unconstitutional as a violation of the Fifth Amendment"); *Hurley v. Kincaid*, 285 U.S. 95, 104 (1932) (holding "the illegality . . . is confined to the failure to compensate [the plaintiff] for the taking"). The Court referred to this principle in *Williamson County* as "the special nature of the Just Compensation Clause." 473 U.S. at 195 n.14.

Williamson County was therefore correct to hold that if the state "has provided an adequate process for obtaining compensation, and if resort to that process 'yield[s] just compensation,'" then "a property owner has not suffered a violation of the Just Compensation Clause until the owner has unsuccessfully attempted to obtain just compensation through the procedures provided by the State for obtaining such compensation." 473 U.S. at 194-95 (quoting *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1013, 1018 n.21 (1984)). As the United States explained in its brief, the Fifth Amendment has never been under-

stood to require that compensation be paid at the time of a taking. Brief for the United States ("U.S. Br.") 8-16. As long as the state offers a viable post-taking process for obtaining compensation, a property owner has not suffered an uncompensated taking until she has followed that process.

The state's denial of just compensation is an element of a Fifth Amendment takings claim that is missing from all other constitutional claims. To use the examples noted by Chief Justice Rehnquist, the Equal Protection Clause does not ask whether a state has compensated the plaintiff after treating her differently from someone similarly situated. And the First Amendment does not ask whether the state has compensated a speaker in censoring her speech. In both cases, even if compensation were provided, the challenged state action could not stand. "No amount of compensation can authorize such action," this Court held in *Lingle v. Chevron U.S.A. Inc.*, in distinguishing such typical constitutional claims from takings claims. 544 U.S. 528, 543 (2005). The Takings Clause, by contrast, imposes only an "obligation to pay just compensation." *Armstrong v. United States*, 364 U.S. 40, 49 (1960); *see also Stop the Beach Renourishment*, 560 U.S. at 736 (Kennedy, J., concurring) ("Unlike the Due Process Clause, . . . the Takings Clause implicitly recognizes a governmental power while placing limits upon that power.").

The Takings Clause does recognize a different claim that is directly akin to an equal protection or First Amendment claim: a claim that property has been taken for something other than a *public use.* Like a regulation that censors speech, a regulation that takes property for a *private* use is "impermissi-

ble"; it cannot be saved by paying compensation. *Lingle,* 544 U.S. at 543. Because payment of compensation *vel non* is irrelevant to such a claim, a property owner need not seek it before she can state a claim for violation of the Fifth Amendment. *See, e.g.*, *Carole Media LLC v. N.J. Transit Co.*, 550 F.3d 302, 308 (3d Cir. 2008).

For the first time, Petitioner asserts in her merits brief that denial of compensation is not an element of the claim and that the Takings Clause is instead solely "remedial," citing *First English*. Pet. Br. 17-19. *First English* held no such thing. On the contrary, it expressly recognized that only uncompensated takings are unconstitutional, consistent with the numerous cases cited above. 482 U.S. at 320 n.10. The notion that the Clause merely provides a procedural mechanism for obtaining compensation for state takings is also inconsistent with the Clause's history: it was applied to the states only because an uncompensated taking was considered a violation of the right to due process. *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 241 (1897). Petitioner's argument thus conflicts with over a century of precedent.[5]

In sum, the "special nature" of the Takings Clause—that it imposes a condition on the lawful taking of property—distinguishes takings claims from other constitutional claims. Other constitutional rights like freedom of expression or equal treatment under the law are subject to no comparable

[5] Petitioner's theory of the Clause as providing only a remedial procedure also entirely ignores the public-use requirement, which imposes a further condition on the exercise of the power to take property.

limitation because no amount of money can sustain actions that violate those rights.

B. Takings claims rely on state property law, and *Williamson County* ensures that state courts have the opportunity to construe and apply that law.

A more practical answer to Chief Justice Rehnquist's question lies in the uniquely pivotal role of state property law in takings claims. No constitutional provision beyond the Takings Clause leans so heavily on state law.

This Court has repeatedly emphasized "the basic axiom that '[property] interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.'" *Monsanto*, 467 U.S. at 1001 (quoting *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980)) (alterations in original); *see also Murr v. Wisconsin*, 137 S. Ct. 1933, 1950 (2017) (Roberts, C.J., dissenting) ("Our decisions have, time and again, declared that the Takings Clause protects private property rights as state law creates and defines them."); *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 164 (1998); *Preseault*, 494 U.S. at 21 (O'Connor, J., concurring) (citing *Monsanto*). State courts are the authoritative exponents of that law, and *Williamson County* sensibly affords them the primary opportunity to construe and apply it.

1. Several interrelated strands of takings doctrine require courts to apply state property law.

First and foremost, "the first step of the Takings Clause analysis is still to identify the relevant 'private property.'" *Murr*, 137 S. Ct. at 1953 (Roberts, C.J., dissenting). In doing so, courts look to state law. *See, e.g.*, *Phillips*, 524 U.S. at 164 (interest accrued in trust accounts is property under Texas law); *Monsanto*, 467 U.S. at 1001-02 (Missouri law recognized trade secrets as property); *Armstrong*, 364 U.S. at 44 (in Maine, materialman's lien constituted compensable property interest); *Collopy v. Wildlife Comm'n, Dep't of Natural Res.*, 625 P.2d 994, 999 (Colo. 1981) (Colorado law does not recognize a compensable "right to hunt wild game upon one's own land"); *New Eng. Estates, LLC v. Town of Branford*, 988 A.2d 229, 243 (Conn. 2010) (option contract not compensable property interest under Connecticut law).

Second, under the test adopted in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), which now forms the bedrock of the Court's takings jurisprudence, *see Lingle*, 544 U.S. at 538-39, a court must consider the extent to which the challenged action interferes with "distinct investment-backed expectations." *Penn Cent.*, 438 U.S. at 124; *see also Monsanto*, 467 U.S. at 1005-06. The reasonableness of those expectations is shaped in substantial part by state property law. *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1034-35 (1992) (Kennedy, J., concurring); *Palazzolo v. Rhode Island*, 533 U.S. 606, 634-36 (2001) (O'Connor, J., concurring); *see also, e.g.*, *Philip Morris v. Reilly*, 312 F.3d 24, 50 n.25 (1st Cir. 2002) (state law defined reasonable investment-backed expectations in trade secret); *Allegretti & Co. v. County of Imperial*, 138 Cal. App.

4th 1261, 1279 (Cal. Ct. App. 2006) (evaluating reasonableness of expectations based on state groundwater rights law).

Third, in *Lucas*, the Court recognized an affirmative defense based on "background principles of nuisance and property law." 505 U.S. at 1030-31. The background-principles defense has subsequently been applied to a variety of state law property rules. *See, e.g.*, *Sansotta*, 724 F.3d at 541 (public trust doctrine and nuisance); *Esplanade Props., LLC v. City of Seattle*, 307 F.3d 978, 985-87 (9th Cir. 2002) (public trust doctrine); *Vanek v. State*, 193 P.3d 283, 292 (Alaska 2008) (fishing permits); *Stevens v. City of Cannon Beach*, 854 P.2d 449, 456 (Or. 1993) (doctrine of custom). The application of such principles differs markedly from state to state. *Compare, e.g.*, *State ex rel. Thornton v. Hay*, 462 P.2d 671, 676-77 (Or. 1969) (Oregon doctrine of custom mandates public access to dry sand beach) *with Op. of the Justices (Pub. Use of Coastal Beaches)*, 649 A.2d 604, 610-11 (N.H. 1994) (dry sand beach private property to high-water mark). In fact, Petitioner's claim may be susceptible to the background-principles defense insofar as the challenged regulation replicates the special treatment of burial grounds at common law in Pennsylvania. *See* Brief for Respondents 11-13, 48.

Finally, the Court has looked in principal part to state law in defining the "parcel as a whole" to evaluate the severity of the challenged regulation's impact on the property. *See Murr*, 137 S. Ct. at 1948; *see also id.* at 1954 (Roberts, C.J., dissenting) (parcel-as-a-whole inquiry should be based solely on "state property principles"); *see also, e.g.*, *Coast Range Conifers, LLC v. Oregon*, 117 P.3d 990, 998

(Or. 2005) (holding under Oregon law that "timber is part of the underlying real property unless it is subject to a contract to be cut," and refusing to sever timber for purposes of parcel as a whole rule).

Each of these aspects of the Court's takings doctrine provides a different view of the same landscape: the "objective rules and customs" created by state law that shape private property interests. *Lucas*, 505 U.S. at 1035 (Kennedy, J., concurring). The nature of those state "rules and customs" is often determinative of whether regulation effects a taking.

Neither the First Amendment nor the Equal Protection Clause requires courts to wade so deeply, if at all, into state law. *See* Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 Yale L.J. 203, 218-19 (2004). For example, none of the equal protection or First Amendment cases cited by Chief Justice Rehnquist involved any substantial question of state law. *San Remo*, 545 U.S. at 350-51 (Rehnquist, C.J., concurring).

2. State courts, of course, have the principal role in creating, construing, and applying state property law. *See, e.g.*, *Stop the Beach Renourishment*, 560 U.S. at 743 (Breyer, J., concurring); *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975). Thus "[t]he requirement to seek compensation prior to bringing suit will often serve important federalism interests." *Wilkins*, 744 F.3d at 418. In "cases that turn on whether the plaintiff has a property interest as defined by state law"—as noted above, a wide swath of takings cases—the state-compensation requirement "will prevent a federal court from reaching the merits prematurely." *Id.* *Williamson County* therefore appropri-

ately gives state courts the first bite at the apple in applying their own law.

However, in cases in which state courts apply federal case law in implementing state procedures, this Court has the final say as to whether the cases have been properly applied. *See ASARCO, Inc. v. Kadish*, 490 U.S. 605, 617-25 (1989). And in extreme circumstances, the Court has recognized that a state court's egregious realignment of state property law may itself raise constitutional concerns. *See Stop the Beach Renourishment,* 560 U.S. at 715 (opinion of Scalia, J.); *id.* at 737 (Kennedy, J., concurring); *Webb's Fabulous Pharmacies*, 449 U.S. at 164. However, the possibility that federal courts might provide a backstop to police state courts' application of their own property law in extreme circumstances does not undercut the basic principle of federalism that state courts should retain responsibility for developing and applying their own property law in the vast run of cases.

III. Overruling *Williamson County* would not serve judicial economy.

Petitioner claims that overruling *Williamson County* would conserve the resources of courts and litigants. Pet. Br. 32-33. But Petitioner has it backwards: she would have this Court replace a simple rule with new, substantial burdens and uncertainty for the federal courts and litigants. Overruling *Williamson County* offers a penny-wise, pound-foolish "economy."

A. *Williamson County* protects federal courts from refereeing routine state law disputes over land-use regulation.

Takings claims arise frequently, perhaps most frequently, in disputes over local governments' regulation of land use.[6] In *San Remo*, the Court recognized that "state courts undoubtedly have more experience than federal courts do in resolving the complex factual, technical, and legal questions related to zoning and land-use regulation." 545 U.S. at 347. This is because "regulation of land use is perhaps the *quintessential* state activity." *FERC v. Mississippi*, 456 U.S. 742, 767 n.30 (1982) (emphasis added); *see also Mt. Olivet Cemetery Ass'n v. Salt Lake City*, 164 F.3d 480, 487 (10th Cir. 1998) ("Land use policy such as zoning customarily has been considered a feature of local government and an area in which the tenets of federalism are particularly strong.").

Such disputes are particularly fraught with questions of state and local community policy. They thus typically involve numerous state law issues beyond the claim that the regulation effects a taking.

> State courts frequently invalidate local land use regulations based on inadequate statutory authority, state preemption principles, or provisions in state constitutions. In addition, state courts frequently scrutinize local land use decisions to determine whether they are

[6] Of the 21 *Williamson County* cases cited by Petitioner, 15 involve takings claims concerning local land-use regulation.

> arbitrary, unreasonable, or unsupported by substantial evidence. These doctrinal limitations operate in conjunction with takings claims to police local regulators.

Stewart E. Sterk, *The Demise of Federal Takings Litigation*, 48 Wm. & Mary L. Rev. 251, 290-291 (2006) (footnotes omitted; citing cases).

Takings cases abound involving state law issues such as compliance with state planning and zoning statutes,[7] statutes limiting exactions,[8] statutes governing subdivision of land,[9] and compliance with state constitutional provisions.[10] And they are called

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[7] *See, e.g.*, *Iowa Coal Mining Co. v. Monroe County*, 494 N.W.2d 664 (Iowa 1993) (alleging zoning ordinance in violation of state enabling statute and regulatory taking based on denial of landfill permit); *Edwards v. City of Warner Robins*, 807 S.E.2d 438 (Ga. 2017) (claim that adoption of zoning ordinance prohibiting mobile home park violated notice requirements of state law and effected a taking); *State ex rel. Chiavola v. Vill. of Oakwood*, 931 S.W.2d 819 (Mo. Ct. App. 1996) (second appeal in action alleging zoning ordinance violated state planning statutes and state constitutional provisions and effected taking); *Mayhew v. Sunnyvale*, 774 S.W.2d 284 (Tex. App. 1989) (case alleging violation of Texas Zoning Enabling Act and takings claims).

[8] *See, e.g.*, *Ehrlich v. City of Culver City*, 911 P.2d 429 (Cal. 1996) (applying state Mitigation Fee Act to avoid reaching takings claim based on monetary exaction imposed on developer).

[9] *See, e.g.*, *Marshall v. Bd. of County Comm'rs*, 912 F. Supp. 1456 (D. Wyo. 1996) (claims for violation of subdivision statute and inverse condemnation); *Bd. of Supervisors v. Greengael, LLC*, 626 S.E.2d 357 (Va. 2006) (same).

[10] *See, e.g.*, *Moon v. N. Idaho Farmers Ass'n*, 96 P.3d 637 (Idaho 2004) (challenging statute that authorized agricultural field burning as taking and on multiple state constitutional grounds); *Gacke v. Pork Xtra, LLC*, 684 N.W.2d 168 (Iowa 2004) (challenging statute granting animal feeding operations

upon to construe and apply land-use statutes in adjudicating inverse condemnation claims.[11]

For example, in *Landgate, Inc. v. California Coastal Commission*, 953 P.2d 1188 (Cal. 1998), the plaintiff challenged the Commission's jurisdiction under the California Coastal Act and alleged that its assertion of jurisdiction over a lot-line adjustment effected a taking by delaying the plaintiff's development project. *Id.* at 1192. The court "recogni[zed] that a judicial determination of the validity of certain preconditions to development is a normal part of the development process," and noted that "[t]he resolution of these cases often turns on the construction and application of complex statutory schemes." *Id.* at 1203 (citing numerous cases).

The courts of appeals have therefore long recognized that land-use disputes present fundamentally local fights that federal courts should not referee. In *Hoehne v. County of San Benito*, 870 F.2d 529 (9th Cir. 1989), for example, the court noted that the final decision component of *Williamson County* "guard[s] against the federal courts becoming the Grand Mufti of local zoning boards." *Id.* at 532; *see also Murphy v. New Milford Zoning Comm'n*, 402 F.3d 342, 348 (2d Cir. 2005) (*Williamson County* recognizes that "land use disputes are uniquely matters of local concern more aptly suited for local resolution."). The courts have thus "repeat[ed] the admonition that federal

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immunity from nuisance suit as taking and violation of state constitution).

[11] *See, e.g.*, *Hill-Grant Living Tr. v. Kearsarge Lighting Precinct*, 986 A.2d 662 (N.H. 2009) (construing zoning statute to determine ripeness of inverse condemnation claim).

courts should not become zoning boards of appeal. State courts are better equipped in this arena and we should respect principles of federalism . . . [and avoid] unnecessary state-federal conflict with respect to governing principles in an area principally of state concern." *Harlen Assocs. v. Inc. Vill. of Mineola*, 273 F.3d 494, 505 (2d Cir. 2001) (quotation marks and citations omitted); *see also Creative Env'ts, Inc. v. Estabrook*, 680 F.2d 822, 833 (1st Cir. 1982); *United Artists Theatre Circuit, Inc. v. Twp. of Warrington*, 316 F.3d 392, 402 (3d Cir. 2003) (Alito, J.); *Gardner v. City of Baltimore*, 969 F.2d 63, 68 (4th Cir. 1992); *New Burnham Prairie Homes, Inc. v. Vill. of Burnham*, 910 F.2d 1474, 1481 (7th Cir. 1990); *Chesterfield Dev. Corp. v. City of Chesterfield*, 963 F.2d 1102, 1104 (8th Cir. 1992).

Contrary to this longstanding view, abandoning *Williamson County*'s state-compensation requirement would demand that federal courts intervene in these common, distinctly local controversies, and it would put district courts in the position of routinely facing state statutory and administrative law claims under their supplemental jurisdiction. *But cf. Coeur d'Alene Tribe*, 521 U.S. at 276 (opinion of Kennedy, J.) ("[T]he elaboration of administrative law" is a "prime responsibilit[y] of the state judiciary.").

B. Overruling *Williamson County* would trade its predictable rule for unpredictable, ad hoc abstention.

In fact, if *Williamson County* is overturned, the federal courts are likely to shunt much of that litigation over state law questions back to the state courts. Given the prevalence of issues of state law

integral to and accompanying takings claims, district courts are likely in many cases to abstain under *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941), to allow state courts to resolve those issues before deciding the takings claim.[12] If so, overruling *Williamson County* will not guarantee takings claimants a single, clear path through the federal courts, and the claimed efficiency benefits of overruling *Williamson County* will prove illusory.

Indeed, district courts have abstained when confronted with takings claims that are not subject to *Williamson County*, such as the now-repudiated claims that regulation failed to "substantially advance a legitimate state interest."[13] *See, e.g.*, *San Remo Hotel v. City & County of San Francisco*, 145 F.3d 1095, 1104-05 (9th Cir. 1998); *Sinclair Oil Corp. v. County of Santa Barbara*, 96 F.3d 401, 409-10 (9th Cir. 1996); *Sea Cabin on the Ocean IV Homeowners Ass'n v. City of N. Myrtle Beach*, 828 F. Supp. 1241, 1249-50 (D.S.C. 1993) (abstaining under *Pullman* to allow state court to evaluate case under local non-conforming use statute before deciding federal takings claim); *see also Anderson v. Charter Twp. of*

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[12] In some cases, they might instead certify questions to the state supreme courts. *See* Sterk, *supra*, 48 Wm. & Mary L. Rev. at 293. There too, however, we would exchange a simple rule requiring direct recourse to state courts with a far more cumbersome route to state-court adjudication.

[13] This Court had held that such claims were not subject to the state-compensation requirement because they did not seek compensation, but rather invalidation, of the challenged regulation. *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992). This Court repudiated the "substantially advances" test in *Lingle*. 544 U.S. at 543-44.

Ypsilanti, 266 F.3d 487, 490 (6th Cir. 2001) (reversing district court's abstention under *Pullman* because state and federal constitutional provisions were identical). Indeed, this Court has recognized that abstention is often appropriate in the cognate context of eminent domain. *See La. Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 29 (1959).

Abstention is discretionary. *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 730 (1996). It is therefore impossible to predict whether a court in any given suit will send the parties to state court. However, it *will* happen, and the federal courts' demonstrated reluctance to referee land-use disputes suggests it will happen frequently. Regardless, the lack of predictability about whether a court will abstain guarantees additional litigation over the issue.

Williamson County's clear state-compensation requirement avoids this problem. Given that its application has demonstrably *not* led to the inefficiency Petitioner claims, *see supra* Section I, it would be counterproductive to discard that rule.

C. The United States' novel theory would give district courts removal jurisdiction over state eminent domain actions.

The Solicitor General argues, remarkably, that plaintiffs may bring *state* inverse condemnation claims in federal court. U.S. Br. 19-21. He contends that a state inverse condemnation claim "arises" under the Constitution and therefore comes within the district courts' federal question jurisdiction under 28 U.S.C. § 1331(a). U.S. Br. 19.

If accepted, this argument would cause a radical departure from existing practice. But it also promises a mind-boggling side effect: it would allow non-diverse defendants to remove ordinary state and local eminent domain actions to federal court.

If the Solicitor General were correct, an affirmative eminent domain action would also present a federal question that a property-owner defendant could remove to federal court under 28 U.S.C. § 1441(a), which applies to "any civil action brought in a State court of which the district courts of the United States have original jurisdiction." Like inverse condemnation claims, eminent domain actions involve a constitutional component—determination of "just compensation"—that implicates federal Fifth Amendment precedent. *See, e.g.*, *Del Monte Dunes*, 526 U.S. at 714 (opinion of Kennedy, J.) ("When the government condemns property for public use, it provides the landowner a forum for seeking just compensation, as is required by the Constitution."); *Hurley*, 285 U.S. at 104. A landowner's ability to remove any eminent domain action to federal court would transform the law of eminent domain and the federal courts' dockets.

To be sure, eminent domain actions involving wholly diverse parties are already removable. But the difference between removal of the occasional eminent domain action involving an out-of-state property owner and potential removal of *any* eminent domain action is a chasm.

Moreover, recognizing that eminent domain actions brought by state or local condemnors do not belong in federal court, this Court developed a special abstention doctrine to allow district courts to return

them to state court. *La. Power & Light Co.*, 360 U.S. at 28. Even if this Court were to later expand that case in accepting the Solicitor General's novel argument, many eminent domain actions would be removed to district court. At a minimum, the courts would be burdened with another expansion in abstention motion practice. The simple state-compensation requirement avoids this unintended consequence.

IV. The Court should dismiss the petition as improvidently granted.

Between her petition and opening brief on the merits, Petitioner switched her explanation of why *Williamson County* was supposedly wrongly decided. This Court should therefore dismiss the petition as improvidently granted.

Dismissing certiorari is appropriate where the petitioner "rel[ies] on a different argument in [her] merits briefing" from the one she relied on in her petition to "persuade[] [the Court] to grant certiorari." *Visa Inc. v. Osborn*, 137 S. Ct. 289, 289 (2016) (quoting *City & County of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1772 (2015)).

Here, Petitioner first argued in her petition that *Williamson County* was doctrinally flawed and should be overturned because a regulatory taking is "uncompensated" at the moment of the final decision, rendering pursuit of state compensation unnecessary. Petition for Writ of Certiorari 20-23 (citing *Arrigoni*, 136 S. Ct. at 1410 (Thomas, J., dissenting from denial of certiorari)). In short, her argument accepted the premise that denial of just compensation is an element of a takings claim.

But her merits brief abruptly changes course, arguing instead that *Williamson County* was wrongly decided because the Takings Clause merely offers a remedial procedure, Pet. Br. at 34-35, relegating to a footnote the primary theory of the case from her petition, *id.* 38 n.14. With such "scant argumentation," it is as good as abandoned. *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 615 (2013) (Roberts, C.J., concurring) (quoting *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 223-24 (1997)).

In her petition, Petitioner invited this Court to repudiate settled precedent based on a particular legal argument and allegations that the precedent had proven unworkable. Petitioner has now pocketed that legal argument, and her allegations of the precedent's supposed practical problems have been shown to lack foundation. This is thus not the case presented in the petition. The Court should therefore dismiss the petition as improvidently granted.

CONCLUSION

This Court should refuse to overrule *Williamson County*. It should either affirm the judgment or dismiss the petition as improvidently granted.

Respectfully submitted,

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