No. 17-647

In The
Supreme Court of the United States

ROSE MARY KNICK,
Petitioner,

v.

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

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

PETITIONER'S REPLY BRIEF

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INTRODUCTION AND SUMMARY OF REPLY ARGUMENT

This Court granted certiorari in this case to reconsider the principle, articulated in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 192-94 (1985), that a property owner cannot file an "inverse condemnation" takings claim[1] in federal court until she unsuccessfully seeks compensation through state court procedures. This doctrine rests on the assumption that a takings claim is not "complete" until there is a "violation" of the Just Compensation Clause and that this will not occur until "the State fails to provide adequate compensation for the taking." *Id.* at 195. Petitioner Rose Mary Knick (Ms. Knick) and her amici have shown that this state litigation or state compensation ripeness rule is logically flawed, unworkable, and unnecessary for ripeness in Fifth Amendment inverse condemnation takings cases. Petitioner's Brief at 15-43.

As Ms. Knick's opening brief explains, the state compensation rule is incorrect because it fails to account for the fact that an inverse condemnation

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[1] Ms. Knick uses the term "inverse condemnation" in a general sense as (1) a "proceeding initiated by the property owner . . . [that is] available where private property has actually been taken for public use without formal condemnation proceedings and where it appears that there is no intention or willingness of the taker to bring such proceedings," Eugene McQuillin, *The Law of Municipal Corporations, Eminent Domain* § 32:158 (3d ed.), and (2) where the constitutional concept of "just compensation" supplies a compensatory remedy. *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304, 315-16 (1987).

action does not assert that a taking violates the Constitution due to the absence of compensation. It seeks to prove that a government act not recognized as a taking is in fact a taking that entitles the claimant to a monetary remedy under the Just Compensation Clause. *Id.* at 33-39. *Williamson County* cannot be right in stating that an inverse condemnation claimant must seek compensation to create a ripe claim when lack of compensation is not an aspect of the claim.

In response, the Township of Scott (Township) argues that *Williamson County* (correctly) derived the state compensation requirement from 42 U.S.C. § 1983, rather than from the Just Compensation Clause. But *Williamson County* cannot be repackaged in this way. 473 U.S. at 195 n.14. Moreover, the new argument fails to salvage *Williamson County*. The state compensation requirement is just as incorrect as a Section 1983 barrier as it is as a general, constitutionally premised takings rule.

The Township also fails to allay concerns that *Williamson County*'s state compensation requirement is incoherent and unfair in application. It suggests lower courts have means to mitigate the *Williamson County* preclusion barrier that divests federal courts of power to hear "ripe" takings claims and the removal/ripeness trap that allows defendants to avoid takings litigation by removing a takings claim properly filed in state court to a federal court. Unfortunately, courts have already tried the suggested judicial tools and found them too weak to remedy *Williamson County*'s pernicious impact on takings litigation.

Ultimately, the Township focuses its fire on Ms. Knick's takings claims. It contends, for the first time, that Ms. Knick could not raise inverse condemnation takings claims under Section 1983 at all. The Township is wrong. She properly raised the claims under Section 1983 and the Constitution itself. Its suggestion that a state common law cemetery access principle might hinder federal adjudication is also baseless. No such principle exists, and federal courts could handle it if it did. Notably, the Township does not deny it made a "final decision" applying its Ordinance to Ms. Knick and that her claims are therefore fit for review under traditional ripeness principles. Only *Williamson County*'s mistaken and dysfunctional state compensation doctrine stands between Ms. Knick and a hearing on the merits of her physical takings claims.

The Court should abrogate that doctrine and hold that Ms. Knick may litigate her claims that the Township caused a taking warranting compensation in federal court.

ARGUMENT

I.

THE TOWNSHIP FAILS TO JUSTIFY *WILLIAMSON COUNTY*'S STATE COMPENSATION REQUIREMENT

A. *Williamson County*'s Doctrine Cannot Be Sustained as a Section 1983 Rule

The Township's core argument is that *Williamson County*'s state compensation ripeness doctrine is

correct as a rule governing takings claims raised pursuant to 42 U.S.C. § 1983. Respondents' Brief at 7-10. Asserting that Section 1983 is available only to remedy a constitutional "violation," *id.* at 28-29, the Township reads *Williamson County* to hold that a Section 1983 takings claim cannot accrue until a state denies compensation, because no Just Compensation Clause "violation" occurs until that time. *Id.* at 29-34. In essence, it contends that Section 1983 will not support an inverse condemnation action that invokes the Just Compensation Clause as a *remedy*, rather than as a violated constitutional provision. Based on this logic, the Township asserts that *Williamson County* is correct in holding that a Section 1983 takings claimant must seek and be denied compensation to allege a complete claim. This novel position is unsupportable.

1. *Williamson County* Is Premised on an Incorrect Reading of the Just Compensation Clause, Not Section 1983

The Township's argument begins from the premise that *Williamson County* derived the state compensation requirement as a construction of Section 1983, rather than from the Just Compensation Clause.[2] But this quickly falls apart

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[2] The Solicitor General also contends *Williamson County* is a Section 1983 rule, albeit one that is incorrect. Brief for the United States at 20-21. This is puzzling, since it took the *opposite* position—that state exhaustion is a *constitutionally* based rule—in the *Williamson County* proceedings, Br. for the United States as Amicus Curiae Supporting Pet'rs, No. 84-4, 1984 WL 565763, at 10 (U.S. Nov. 15, 1984); Oral. Arg. Tr. No. 84-4 at 22:3-4 (U.S. Feb. 19, 1985) ("essential element of a Fifth Amendment claim"), and in *Horne v. Dep't of Agric.*, 569 U.S. 513 (2013). *See* Br. for

with the recognition that the takings claim in *Williamson County* did not arise solely under Section 1983; it was also raised "pursuant to the Fifth Amendment." Br. for Resp't Hamilton Bank of Johnson City, *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, No. 84-4, 1984 WL 565756, at *3 (U.S. 1984); Oral Arg. Tr. No. 84-4 at 51 (U.S. Feb. 19, 1985). In beginning its analysis, the *Williamson County* Court confirmed that the claim at issue was "*a claim under the Just Compensation Clause*." 473 U.S. at 186 (emphasis added).

Williamson County repeatedly described the state compensation requirement as a general rule for takings claims, not as a Section 1983 concept. For instance, it states: "*the taking claim* is not yet ripe [because] respondent did not seek compensation through the procedures the State has provided," *id.* at 194 (emphasis added), and "if resort to that [state compensation] process 'yield[s] just compensation,' then the property owner 'has *no claim against the Government' for a taking*." *Id.* at 194-95 (emphasis added; citation omitted). When rejecting the plaintiff's specific claim, the *Williamson County* Court did not point to a Section 1983 problem; it held that "its *taking claim* is premature" until the plaintiff used

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Resp't, *Horne v. Dep't of Agric.*, No. 12-123, 2013 WL 543625, at **21-22, *40 (U.S. Feb. 12, 2013). The United States' new and mistaken focus on Section 1983 likely derives from a desire to avoid any impact on the Tucker Act/Claims Court procedure that governs takings claims against the United States. It need not be concerned. Ms. Knick does not challenge that process and it is not at issue.

Tennessee procedures. *Id.* at 196-97 (emphasis added).

The Court articulated the state compensation requirement as a general takings rule because it rooted the requirement in the Fifth Amendment. 473 U.S. at 194-95. *Williamson County* declares that the state compensation requirement derives from "*the special nature of the Just Compensation Clause*." *Id.* at 195 n.14 (emphasis added); *see also San Remo Hotel, L.P. v. City & County of San Francisco*, 545 U.S. 323, 349 (2005) (Rehnquist, C.J., concurring) ("*Williamson County* purported to interpret the Fifth Amendment in divining this state-litigation requirement."); *Kurtz v. Verizon New York, Inc.*, 758 F.3d 506, 512 (2d Cir. 2014) (*Williamson County*'s "exhaustion requirements are [ ] derived from elements that must be shown in any takings claim: [1] a 'taking' [ii] 'without just compensation.'").

If there was any doubt that *Williamson County* crafted the state compensation requirement as a takings rule rooted in a reading of the Just Compensation Clause, this Court's post-*Williamson County* decisions dispel it. *Horne v. Dep't of Agric.*, 569 U.S. 513, 525-26 (2013) (reading *Williamson County* to hold that "a Fifth Amendment claim is premature" until the claimant is "denied just compensation"); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 734 (1997) ("The second hurdle [in *Williamson County*] stems from the Fifth Amendment's proviso that only takings without 'just compensation' infringe that Amendment . . . ."); *San Remo*, 545 U.S. at 327 (observing that *Williamson County* "held that *takings claims* are not ripe until a State fails 'to provide

adequate compensation for the taking'" (emphasis added)); *id.* at 349 (Rehnquist, C.J., concurring) (*Williamson County* "interpret[s] the Fifth Amendment."). No decision from this Court grounds the state compensation requirement in a construction of Section 1983. Similarly, the Township fails to cite a single lower federal court decision that views *Williamson County*'s doctrine as a construction of Section 1983.

The Township and the Solicitor General suggest that *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 710 (1999), reframed *Williamson County*'s state compensation requirement as a Section 1983 rule. Not so. *Del Monte Dunes* assumed the correctness of *Williamson County* as a general takings doctrine in discussing its application to a Section 1983 claim. 526 U.S. at 710. The decision did not renounce *Williamson County*'s reliance on constitutional interpretation or its general reach; it accepted both. *Id.* (citing *Williamson County* for the proposition that "[h]ad the city paid for the property or had an adequate postdeprivation remedy been available, Del Monte Dunes would have suffered *no constitutional injury*" (emphasis added)).

The ending of the *Del Monte Dunes* opinion does note that "[a] federal court . . . cannot entertain a takings claim under § 1983 unless or until the complaining landowner has been denied an adequate postdeprivation remedy." *Id.* at 721. The Solicitor General contends this sentence "explicitly formulated the *Williamson County* rule" as a Section 1983 doctrine. Brief for the United States at 21. This is meritless. The origin of *Williamson County*'s doctrine

was not at issue in *Del Monte Dunes*, that decision never says it is meant to modify *Williamson County*, and cases subsequent to *Del Monte Dunes* show that no such thing occurred. *San Remo*, 545 U.S. at 349 (Rehnquist, C.J., concurring) (*Williamson County* "interpret[s] the Fifth Amendment."). The *Del Monte Dunes* statement is simply a recitation of *Williamson County*'s erroneous state requirement in the Section 1983 context, 526 U.S. at 710, not a "reformulation" of *Williamson County* as a Section 1983 doctrine or a holding that the statute independently requires state procedures.

Since *Williamson County* articulated the state compensation ripeness doctrine as an outgrowth of the Just Compensation Clause, and this Court has treated it that way ever since, *Suitum*, 520 U.S. at 734; *San Remo*, 545 U.S. at 349 (Rehnquist, C.J., concurring), the proper interpretation of the Clause is highly relevant to the issue of whether *Williamson County* is correct. This Court's repeated statements that the "without just compensation" language in the Just Compensation Clause serves as a damages remedy in inverse condemnation takings cases—a principle the Township does not dispute—ends the debate. *First English*, 482 U.S. at 315-16, 321; *Jacobs v. United States*, 290 U.S. 13, 16 (1933); *Murr v. Wisconsin*, 137 S. Ct. 1933, 1952 (2017) (Roberts, C.J., dissenting) (The issue of "tabulating the 'just compensation' to which the property owner is entitled" comes into play after a court finds that "a taking has occurred."). It cannot be the case that one must establish a failure to receive compensation to create a "complete" inverse condemnation takings claim, as *Williamson County* concludes, when the claim is about whether a taking

occurred at all, and the "Just Compensation Clause" supplies a remedy after liability is established. *Kirby Forest Industries v. United States*, 467 U.S. 1, 5 (1984) ("[T]he owner has a right to bring an 'inverse condemnation' suit . . . *on the date of the intrusion* by the Government." (emphasis added)); *United States v. Dow*, 357 U.S. 17, 22 (1958) (it is the invasion of property that "gives rise to the claim for compensation."); *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621, 654 (1981) (Brennan, J., dissenting) ("the landowner has already suffered a constitutional violation" when subject to "occupancy, physical invasion, or regulation" that causes a taking).

2. *Williamson County*'s State Compensation Requirement Is Wrong as a Section 1983 Rule

Even if one could plausibly read *Williamson County*'s doctrine as a Section 1983 rule, it is still incorrect. As the Township sees it, a property owner cannot raise a Section 1983 takings claim until denied compensation at the state level because a constitutional "violation" subject to Section 1983 does not arise until then. In this way, it claims property owners are categorically barred from using Section 1983 to raise an inverse condemnation claim that invokes the Just Compensation Clause only as a damages remedy. Respondents' Brief at 31. This argument was never raised or considered below, nor did the Township present it in its opposition to the petition for certiorari. The Court could accordingly deem it waived. Sup. Ct. R. 15.2. In that event, this case would simply proceed on the assumption that Section 1983 is an available vehicle for raising a

takings claim that seeks to prove the government has carried out a taking warranting a compensatory remedy under the Just Compensation Clause.

In any case, as the Solicitor General recognizes, the Township's argument that Section 1983 is unavailable for inverse condemnation claims is wrong on the merits. Brief for the United States at 29-31. Section 1983 forbids local governments from subjecting any person to "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" of the United States. This Court has held that this language is to be broadly construed to protect the widest array of federal rights. *See Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 237 (1969) (noting Act's "broad and sweeping . . . protection"). Section 1983 "must be given a liberal construction," *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 399-400 (1979), and it is settled that property rights "are basic civil rights" within the broad reach of the statute. *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972). Consequently, the Court has reviewed takings claims arising under Section 1983 on many occasions, without any concern that this is improper. *See, e.g., Suitum*, 520 U.S. at 728 ("Suitum has brought an action for compensation under . . . 42 U.S.C. § 1983, claiming that the agency's determinations amounted to a regulatory taking of her property."); *Lake Country Estates*, 440 U.S. at 399-400; *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987).[3]

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[3] *See Keystone Bituminous Coal Ass'n v. Duncan*, 771 F.2d 707, 709 (3d Cir. 1985).

Nevertheless, the Township hinges its hopes on the text of Section 1983. Respondents' Brief at 29-31. Highlighting the statute's application to a "deprivation" of a "right . . . secured by the Constitution," *id.* at 33, the Township asserts that the only Takings Clause "right" is freedom from a taking that violates the Just Compensation Clause's "without just compensation" language. From there, it argues that Section 1983 requires a takings claimant to allege a failure to receive compensation, an assertion it believes can only be made after the claimant unsuccessfully utilizes state court procedures.

This is mistaken at several levels. Most importantly, it continues to misunderstand the concept of inverse condemnation and its place in federal law. The right protected by an inverse condemnation action is the right to have interference with property that amounts to a de-facto taking *treated as a condemnation action requiring compensation, or rescinded*. *First English*, 482 U.S. at 321. This right emanates directly from the Just Compensation Clause, and is therefore protected by Section 1983. *Id.*; *Suitum*, 520 U.S. at 728; *Lake Country Estates*, 440 U.S. at 399-400; *see also Martino v. Santa Clara Valley Water Dist.*, 703 F.2d 1141, 1148 (9th Cir. 1983). *Williamson County*'s conclusion that a takings claimant must show a constitutional "violation" rooted in the government's failure to compensate (and proven through state litigation) is accordingly wrong even in the Section 1983 context. *Id.*[4]

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[4] Even if the Township is correct that Section 1983 takings claims require a prior denial of compensation, the Court would

Moreover, the Township's defense of *Williamson County*'s state compensation rule on Section 1983 grounds fails even if the statute does require a "violation" of the Just Compensation Clause. This is because there is no reason that such a violation should depend on the actions of a *state court*. Those courts are not obligated to pay when a local or state agency takes property. The agency taking property has the duty. *Cf. United States 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."). Whether an action challenged as a taking "violates" the Just Compensation Clause because it is uncompensated, should depend on the actions of the responsible "entity." *San Diego Gas & Elec. Co.*, 450 U.S. at 636 (Brennan, J., dissenting). If a local entity harms property, and has no intent or means to treat it as a compensable taking, the action is uncompensated. The subsequent action of a state court is beside the point because the constitutional violation which the

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still need to overrule *Williamson County*'s state compensation requirement for inverse condemnation claims raised directly *under the Fifth Amendment*. *First English*, 482 U.S. at 315 ("[A] landowner is entitled to bring an action in inverse condemnation as a result of 'the self-executing character of the constitutional provision with respect to compensation . . . .'" *Id.* (quoting *United States v. Clarke*, 445 U.S. 253, 257 (1980)); *Jacobs*, 290 U.S. at 16 ("[s]tatutory recognition [is] not necessary" for an inverse condemnation claim). Such direct actions are plainly available. *id*., and trigger federal court jurisdiction under 42 U.S.C. § 1331. *See Mosher v. City of Phoenix*, 287 U.S. 29, 31-32 (1932); *Amen v. City of Dearborn*, 718 F.2d 789, 792-94 (6th Cir. 1983).

Township contends is required for a Section 1983 takings claim is already apparent.[5]

Whether read as a general takings rule or a Section 1983 rule,[6] *Williamson County* erred in concluding that a takings claim does not ripen until a property owner seeks and is denied compensation in state court, because this wrongly assumes that the owner must assert a failure to receive compensation to create a "complete" claim. In the inverse condemnation context, the elements of a takings claim are simply: (1) a protected property interest and (2) an injury to property occurring without condemnation proceedings. *Kirby*, 467 U.S. at 5; *see also* McQuillin, *The Law of Municipal Corporations, Eminent Domain* § 32:158. If these elements exist, the claim is fit for review. *See, e.g.*, *Mosher*, 287 U.S. at 31-32 (a takings claim raised a "substantial federal question" where a city confiscated property for use as a road and "there had been . . . no proceedings for condemnation").

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[5] This reasoning supplies an alternate basis (to Ms. Knick's inverse condemnation arguments) for finding that *Williamson County* was wrongly decided as a general matter.

[6] Notably, under the Township's position, Section 1983 takings claims would be improper even in *state* courts without prior state procedures—unless the Court created some kind of ad-hoc state court exception. *Haywood v. Drown*, 556 U.S. 729, 735 (2009) (state courts have jurisdiction over Section 1983 claims). Indeed, in general, the Township seeks to keep the *Williamson County* doctrine intact as a patchwork of ad-hoc and accidental rules that lack any consistent doctrinal thread and which create unpredictable and unjust outcomes in practice.

3. Ms. Knick's Claims Expose *Williamson County*'s Flaws

This case aptly illustrates the error of requiring state compensation procedures in an inverse condemnation takings case. Ms. Knick alleges that the Town caused a taking by authorizing public and governmental access to her property. The Township does not deny that the underlying injury—the enactment and application of the cemetery access ordinance—occurred. It denies that it caused a taking. Respondents' Brief at 48. The controversy is accordingly about whether liability for a taking exists. Ms. Knick says it does. The Township says it doesn't. If Ms. Knick is right, and a taking is found, the Just Compensation Clause will come into play at the time of such a finding, providing her with a federal damages remedy. *First English*, 482 U.S. at 315-16; 321.

Williamson County's state compensation requirement would require Ms. Knick to ask a Pennsylvania court for compensation before she can assert that the Township is liable for a taking. It demands that she ask for her remedy (compensation) before she alleges and proves liability (a taking). This is backward. Again, the issue on which her case, and all similar inverse condemnation cases, hinges is whether a taking warranting damages under the Just Compensation Clause occurred in the first place. When a dispute is otherwise ripe, as here, the issue of takings liability is perfectly suited for resolution by a federal court. *See, e.g.*, *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 614-15, 643-46 (1993) (federal

courts adjudicate regulatory takings liability); *F.C.C. v. Florida Power Corp.*, 480 U.S. 245, 250 (1987) (federal courts adjudicate physical takings liability).

That Pennsylvania provides a process for proving a taking (and a compensatory remedy) that is similar to the federal process associated with the Just Compensation Clause has no bearing on Ms. Knick's right to resolve the dispute on federal grounds in federal court. *Monroe v. Pape*, 365 U.S. 167, 183 (1961) ("The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked. Hence the fact that Illinois by its constitution and laws outlaws unreasonable searches and seizures is no barrier to the present suit in the federal court."); *McNeese v. Board of Educ. for Cmty. United Sch. Dist. 187, Cahokia, Ill.*, 373 U.S. 668, 672 (1963) (rejecting the idea that "assertion of a federal claim in a federal court must await an attempt to vindicate the same claim in a state court"). State constitutional protections mirror federal ones in many areas, yet it has always been the case that a plaintiff may choose to pursue only the federal remedy. *Steffel v. Thompson*, 415 U.S. 452, 472-73 (1974) ("When federal claims are premised on [§ 1983] . . . we have not required exhaustion of state judicial or administrative remedies . . . ."). *Williamson County* was wrong in deviating from this principle, and the Township has identified no other reason for preventing property owners from electing to establish a taking and resulting entitlement to damages in federal court rather than in a state tribunal. *Felder v. Casey*, 487 U.S. 131, 149 (1988) (rejecting "as utterly inconsistent with the remedial purposes of its broad

statute the notion that a State could require civil rights victims to seek compensation from offending state officials before they could assert a federal action").

II.

THE TOWNSHIP HAS FAILED TO JUSTIFY THE JURISDICTIONAL CHAOS ARISING FROM *WILLIAMSON COUNTY*

The Township fails to rebut the evidence that *Williamson County* is "draconian," *Murphy v. Village of Plainfield*, 918 F. Supp. 2d 753, 761 (N.D. Ill. 2013), and "paradoxical" in practice, *Chapman v. City of Blanco*, No. A-08-CA-392-SS, 2008 WL 11411224, at *3 (W.D. Tex. July 25, 2008), because it unintentionally prevents federal courts from resolving ripe takings claims and creates a removal trap that prevents litigation in state *and* federal court. *See* Petitioner's Brief at 24-33.

A. The Township Fails To Justify the Preclusion Barrier

The Township does not deny the existence of the *Williamson County*/*San Remo Hotel* anomaly that sends takings claims to state courts for ripeness purposes but then precludes federal courts from hearing the claims after failed state litigation supposedly ripens them. Petitioner's Brief at 24-27. Yet, it views the banishment of takings litigation from federal courts as an unremarkable event justified by "federalism." Respondents' Brief at 33, 46.

In *San Remo Hotel*, the concurring justices considered and rejected this rationale, finding that no "longstanding principle of comity toward state courts in handling federal takings claims existed at the time *Williamson County* was decided, nor that one has since developed." *San Remo*, 545 U.S. at 350 (Rehnquist, C.J., concurring in the judgment). Nevertheless, the Township argues federal courts are not suited to deal with takings claims that may implicate state law property issues. Again, the Court has rejected this argument. In *Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Prot.*, 560 U.S. 702, 725-26 (2010), a plurality of Justices rejected the idea that federal courts "lack the knowledge of state law" needed to decide takings cases. *Id.* The plurality noted that federal courts "often decide what state property rights exist" in due process cases, *id.* at 726, and have the same capability in takings claims. *Id.* at 726-27 (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992)). As an example of an issue within the federal courts' competence, the *Stop the Beach* plurality cited the "background principles of the State's law and property" inquiry in takings cases—the same standard which the Township fingers in *questioning* federal competence to address takings disputes. 560 U.S. at 725-27.

Still, the Township suggests that state courts have more familiarity with the local issues relevant to takings claims. If so, this is only because *Williamson County* has wrongly shunted takings claims to state courts for the last thirty years, not because of some institutional deficiency in the federal system. *Stop the Beach*, 560 U.S at 742 (Kennedy, J., concurring in the

judgment) ("[This Court's dicta in *Williamson County* . . . explains why federal courts have not been able to provide much analysis" on a particular takings issue (citation omitted)). As Chief Justice Rehnquist noted in *San Remo Hotel*, federal courts often deal with local land use issues in First Amendment, Equal Protection and other constitutional cases. 545 U.S. at 350-51 (Rehnquist, C.J., concurring); *see also* Brief Amicus Curiae of Institute for Justice at 16-22. There is no reason they cannot do so in takings cases.

The Township's defense of *Williamson County* on "federalism" and "comity" grounds is ultimately grounded in the local and state governments' desire to keep an important constitutional issue close to home. The Court put this aspiration to rest long ago. *Home Tel. & Tel. Co. v. City of Los Angeles*, 227 U.S. 278, 313-15 (1913).

B. The Township Fails To Justify the Takings Removal Problem

The Township also fails to justify the bar to takings litigation in federal or state courts that arises from *Williamson County* interaction with removal jurisdiction. It recognizes that government defendants may frustrate state and federal court review of takings claims by removing a claim that is properly filed in state court under *Williamson County* to a federal forum that must treat the claim as unripe under that decision's state compensation requirement. Nevertheless, it argues that there is only "*one*" removal/ripeness case "in which a federal district court wrongly refused a property owners'

entreaty" for a hearing. Respondents' Brief at 39. This is absurd.

Ms. Knick's opening brief provided a sample of federal cases holding that a takings claim properly filed in state court is nonjusticiable under *Williamson County* because removal prevented completion of state litigation. Petitioner's Brief at 31-32. There are many more.[7] The removal/ripeness trap swallows takings claims arising directly under constitutional provisions, *see, e.g.*, *BFI Waste Systems of North America v. Dekalb County*, 303 F. Supp. 2d 1335, 1347-49 (N.D. Ga. 2004), as well as those based on Section 1983. This is defensible only if one believes it is just and jurisdictionally sound to direct takings claimants to take a step to secure prompt judicial review—go to state court—that will likely destroy their claim instead, or at least, create unnecessary confusion, delay and waste.

Not to worry, the Township says, federal courts have tools to avoid the removal/ripeness trap. Respondents' Brief at 38. It points to a power to exercise supplemental jurisdiction over state law takings claims, to find defendants "estopped" from invoking *Williamson County* after removal or to find the scheme inconsistent with due process. *Id.* Yet, courts have had these tools for decades, and have generally not used them to soften *Williamson County*, believing that the decision reflects a strict policy of

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[7] *See, e.g.*, *Murphy*, 918 F. Supp. 2d at 760-61; *Save More Food Markets, Inc. v. Wisconsin Dep't of Transp.*, No. 16-cv-447-jdp, 2016 WL 4131866, at *2 (W.D. Wis. Aug. 3, 2016); *Chapman v. City of Blanco*, No. A-08-CA-392-SS, 2008 WL 11411224 (W.D. Tex. July 25, 2008).

requiring takings claims to begin and end in state court—even when this triggers a wasteful and unjust jurisdictional merry-go-round. *See Murphy*, 918 F. Supp. 2d at 761 (stating that the court "must adhere to *Williamson County*" and declining to waive it in a takings removal case); *Chapman*, 2008 WL 11411224, at *3 (stating that the "Court remains bound by" *Williamson County* and required to find a removed takings claim unripe because state procedures were incomplete).

III.

THE TOWNSHIP HAS FAILED TO SHOW THAT MS. KNICK'S CLAIMS ARE IMPROPER IN FEDERAL COURT

Finally, the Township argues that Ms. Knick's claims are not justiciable because it believes they arise solely through a Section 1983 vehicle that (in its view) is not available for inverse condemnation claims. It further suggests her claims raise state common law property issues that are ill-suited to a federal forum. It is mistaken again.

A. Ms. Knick Properly Raised Her Claims Under Section 1983 and the Constitution

The allegations in Ms. Knick's complaint are enough to refute the Township's attempt to tie her inverse condemnation takings claims to Section 1983 alone—though they would still be proper in that

guise.[8] In the jurisdictional section of the complaint, Ms. Knick alleges that her "action arises under the Constitution *and* Laws of the United States, including 42 U.S.C. Section 1983," and thus, that jurisdiction exists under "28 U.S.C. Section 1331 *and* 1343." JA at 93, ¶ 2 (emphasis added). In her request for relief, Ms. Knick ask for "compensatory damages" in general. More generally, the complaint consistently points to the Constitution as the source of Ms. Knick's request for compensation for a taking of her property. If the Court were to agree with the Township's new argument that Ms. Knick cannot assert an inverse condemnation taking under Section 1983, it should recognize that she sufficiently raised her claims under the Fifth Amendment and 28 U.S.C. § 1331. *Bell v. Hood*, 327 U.S. 678, 679-84 (1946); *Dickinson*, 331 U.S. at 748 ("The Fifth Amendment expresses a principle of fairness and not a technical rule of procedure enshrining old or new niceties regarding 'causes of action'—when they are born, whether they proliferate, and when they die.").

The Township raises no other ripeness or jurisdictional barriers to Ms. Knick's takings claims. It does not deny that her as-applied and facial takings allegations satisfy the "final decision" and injury-based ripeness inquiry that pre-dates *Williamson County*. Petitioner's Brief at 41-48. It only denies liability for a taking, confirming that it has no plan to

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[8] The Solicitor General suggests Section 1983 is the exclusive vehicle for raising a constitutional takings claim. It is not. It simply provides an alternative to raising the cause of action directly under the Constitution. *See Carlson v. Green*, 446 U.S. 14, 18-19 (1980).

compensate her and that a concrete controversy exists.

B. There Is No Pennsylvania Common Law Access Principle at Issue Here

The Township does suggest that this case is more appropriate for state court because it believes Ms. Knick's takings claims depend on resolution of an alleged Pennsylvania common law principle allowing access to private cemeteries. Respondents' Brief at 48. As noted above, the Court has already rejected this type of argument as a basis for a general limit on federal court review of takings claims. *Stop the Beach*, 560 U.S. at 725.

But the Township's argument also fails because the alleged Pennsylvania common law issue is simply not in play. Pennsylvania courts have never held—or even hinted—that the general public has a right to access private land containing a private cemetery. The Township cites *St. Peter's Evangelical Lutheran Church v. Kleinfelter*, 8 Pa. D & C. 612 (Pa. Ct. Com. Pl. 1926), and *McDonald v. Monongahela Cemetery Co.*, 75 A. 38 (Pa. 1909), but neither is on point. The first case involved a dispute about destruction of a public burial ground. The second involved a financial dispute about burial plots in a public cemetery. Neither comes close to recognizing a public easement over private land.

It is true that some state courts have implied a private cemetery access easement in favor of *relatives*

of the deceased.[9] But Pennsylvania case law does not even recognize this principle, much less one granting an access easement to the general public.

The Township observes that the Pennsylvania legislature adopted a cemetery statute in 2017. *See* Respondents' Brief, Appendix 5a-7a. It suggests that the new statute "codified" state common law. There is no evidence that this is true. *See id.* In any case, the 2017 statute is significantly different from the Township's Ordinance. Although the new statute declares an "individual has a right to reasonable access for visitation to a burial plot," it explicitly allows the owner of subject land to "designate the frequency, hours and duration of visitation" and "the route of ingress and egress" to the plot. *Id.* at 5a-6a. Further, for land on which there is a house, like Ms. Knick's, the statute allows a landowner to require "prearranged times for visitation" and to decide the "methods of ingress and egress" to a burial plot. *Id.* at 6a. In contrast, the Township's Ordinance contains no limits on the frequency, hours, and duration of public access to Ms. Knick's residential property, and affords her no right to control "the route of ingress and egress." JA at 20-24.

A statute that is far narrower than the Ordinance, and which was enacted forty-seven years after Ms. Knick acquired her land, and five years after passage

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[9] The amicus brief of the "Cemetery Law Scholars" claims some states protect "public" access to private grave sites. Brief Amicus Curiae of Cemetery Law Scholars at 15. It cites three cases for this principle. *Id.* at 5 n.10. None are from Pennsylvania, and none recognize unfettered public access to private cemeteries even in the states from which they arise.

of the Ordinance, hardly qualifies as a complex state law defense to a takings claim. *Lucas*, 505 U.S. at 1029-31 (a common law property rule can be a potential takings defense only if it "inhere[s] in the title" to property); *Palazzolo v. Rhode Island*, 533 U.S. 606, 629 (2001) (rejecting the proposition that "any new regulation, once enacted, becomes a background principle of property law which cannot be challenged by those who acquire title after the enactment").

Nothing inhibits review of Ms. Knick's takings claims except *Williamson County*'s state compensation requirement. Since that requirement was never correct in this context and is unworkable, it should be overruled, leaving Ms. Knick free to prove in federal court that the Township caused a taking and owes her compensation.

CONCLUSION

The Court should vacate the decision below and remand for further proceedings.

DATED: August, 2018.

Respectfully submitted,

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