PACIFIC LEGAL FOUNDATION

November 29, 2018

Chief Justice John Roberts
and Associate Justices
Supreme Court of the United States
1 First Street, N.E.
Washington, DC 20543

Re: *Knick v. Township of Scott*, No. 17-647

Dear Chief Justice and Associate Justices:

INTRODUCTION

The Court granted certiorari to reconsider the principle, articulated in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 192-94 (1985), that a property owner must exhaust state court remedies before claiming in federal court that they have suffered an unconstitutional "taking" of property. *Id.*

The Court's Order of November 2, 2018, asks for supplemental briefing on whether *Williamson County* is mistaken in concluding that a local government's invasion of property is "without just compensation" and actionable as a taking only after a state court denies compensation, rather than at the time of the invasion. The answer is "yes."

As Petitioner (Ms. Knick) previously noted,[1] when a local government invades property without condemning it or otherwise formally admitting that it is taking property and owes compensation,[2] a Takings Clause violation arises. *Horne v. Dep't of Agric.*, 569 U.S. 513, 526 n.6 (2013) ("A 'Case' or 'Controversy' exists once the government has taken private property without paying for it."); *Kirby Forest Indus. v. United States*, 467 U.S. 1, 5 (1984) (A property owner can claim a taking "on the date of the intrusion by the Government."). The government's refusal to guarantee compensation at the time of the invasion renders it "without just compensation" and immediately actionable as an unconstitutional taking. *Horne*, 569 U.S. at 526 n.6. In such a case, potential state court processes are irrelevant to the claim's accrual because the lack of compensation and potential Takings Clause violation is already apparent. *Id.* ("[W]hether an alternative [compensation] remedy exists does not affect

[1] Petitioner's Brief on the Merits at 38 n.14; Petitioner's Reply at 12; Petition for Certiorari at 21-22.

[2] It is appropriate for local government to bear the minor burden of considering and declaring whether it is taking property or owes compensation when harming property rights, since it is the party instigating, and benefitting from, the action. *Cf. Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994).

the jurisdiction of the federal court."). The state court process may supply a potential state remedy, but it has long been settled that an injured party need not pursue a state remedy to create an actionable Section 1983 claim. *See generally 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.").

Unfortunately, *Williamson County* departed from these correct and traditional principles in adopting the state exhaustion rule. The mistake has created a paradoxical, byzantine, and unfair framework for adjudicating constitutionally protected property rights—one that has no counterpart in other areas of constitutional law. The only way to correct *Williamson County*'s flawed reasoning on the timing and nature of a Takings Clause "violation" and to cure all the jurisdictional anomalies arising from the state exhaustion requirement is by abrogating that dysfunctional procedural rule. The Court should do so.

ARGUMENT

I. WITHOUT JUSTIFICATION, *WILLIAMSON COUNTY* DEPARTED FROM THE ORIGINAL AND CORRECT UNDERSTANDING OF A TAKINGS CLAUSE VIOLATION

In articulating the state exhaustion rule, the *Williamson County* Court began from the observation that the "Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation." 473 U.S. at 194. Relying on *Cherokee Nation v. S. Kan. Ry. Co.*, 135 U.S. 641 (1890), the Court then concluded that "[i]f the government has provided an adequate process for obtaining compensation, and if resort to that process 'yield[s] just compensation,' then the property owner 'has no claim against the Government' for a taking." *Id.* at 194-95 (citation omitted). This led it to adopt the principle at issue here: a "property owner cannot claim a violation of the Just Compensation Clause until it has used the [state's] procedure and been denied just compensation." *Id.* at 195.

This reasoning is flawed for many reasons. The conclusion that a property invasion is actionable as a Takings Clause violation only after a state proceeding, rather than at the time of the invasion, conflicts with original understandings of the Takings Clause, Section 1983, and related precedent. Further, the conclusion is irreconcilable with the principle that a citizen may raise a constitutional claim under Section 1983 without regard for potential state remedies. Moreover, as explained in Petitioner's brief, the logic underlying *Williamson County*'s state remedies requirement is derived from *condemnation-like* disputes where the government admits a taking. Petitioner's Brief on the Merits at 36. Such cases have little to say about the accrual of a takings

controversy when the government invades land without admitting a duty to compensate and a property owner sues under Section 1983 to establish that an unconstitutional taking exists. *Id.*

A. An Actionable Takings Claim Accrues as Soon as the Government Invades Property Without Admitting a Taking or Guaranteeing Compensation

1. Condemnation and Inverse Condemnation

Local governments can typically take private property with or without using formal condemnation procedures. *See Kirby*, 467 U.S. at 4-5; 40 U.S.C. § 3114(a). When it uses condemnation procedures, it does so by filing a complaint declaring the intent to take property and pay for it. *Kirby*, 467 U.S at 4-5. The owner's right to compensation vests that time, although a court will later determine the final amount of compensation to be paid. When the owner receives that sum, the government obtains title to the property it has taken.[3] *Danforth v. United States*, 308 U.S. 271, 284-85 (1939).

A government entity may, however, carry out a taking by invading property without filing a complaint in condemnation or other declaration that admits the owner's entitlement to compensation.[4] To secure compensation in this instance under the Constitution, the owner must establish in court that the government's acts are in fact a taking.[5] *First English Evangelical Lutheran Church of Glendale v. Los Angeles Cty.*, 482 U.S 304, 315-16 (1987). The question here is: does such a takings claim accrue against a local government under Section 1983 (or otherwise) at the time it invades property without condemning it or acknowledging a right of compensation, or later, after a state court denies a state law remedy? Both the historical jurisprudence in takings law and general rules regarding state remedies confirm the former understanding as the correct rule.

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[3] In some jurisdictions, a condemnor can enter and possess private property more quickly by depositing an amount it estimates to be "just compensation" for the property it seeks to take with its condemnation complaint. The court later determines the final amount of compensation the government owes. *Kirby*, 467 U.S at 4-5.

[4] In Pennsylvania, a would-be condemnor must judicially file a "Declaration of Taking" describing the property it seeks to take and the method by which it will pay compensation. 26 Pa. Cons. Stat. § 302.

[5] A federal takings claim in this situation is similar to (and sometimes called) an "inverse condemnation" action because the purpose is to prove that the government's action is tantamount to a taking and condemnation of property, even though there was no formal condemnation process.

2. The Traditional Claim Accrual Rule

For more than 100 years before *Williamson County*, it was understood that an invasion of property occurring without the issuance of some formal compensatory guarantee (like a condemnation complaint or a compensation provision in an ordinance)[6] was *immediately actionable* in federal court as an unconstitutional taking. *See Monell v. Dep't of Social Services of City of New York*, 436 U.S. 658, 687 n.47 (1978) (After enactment of Section 1983, "the federal courts found no obstacle to awards of damages against municipalities for common-law takings.").

For example, in the early case of *Pumpelly v. Green Bay & Miss. Canal Co.*, 80 U.S. (13 Wall.) 166 (1871), a state authorized the defendant to build a dam that caused private property to flood. *Id.* at 175-76. The state did not use a condemnation process and the statute authorizing the dam contained no provision for compensation. *Id.* at 176. An aggrieved landowner immediately sued in federal court, claiming the flooding was a taking requiring compensation. This Court adjudicated the claim and substantially upheld it without any concern that it was premature. *Id.* at 178-80.

The 1913 case of *Home Tel. & Tel. Co. v. City of Los Angeles*, 227 U.S. 278 (1913), comes closer to the issue here. There, "a California corporation furnishing telephone service" sued in federal court "to prevent the putting into effect of a city ordinance establishing telephone rates." *Id.* at 280. The company claimed the ordinance resulted in "confiscation of the property of the corporation." *Id.* at 281. In its defense, the city argued that the federal court lacked jurisdiction to hear the federal constitutional claim until the plaintiff pursued claims in state courts. The Court rejected this view. *Id.* at 284-86.

In the following decades, this Court issued a series of decisions further confirming that a claim to establish a compensable taking arises when the government occupies or harms property without acknowledging a duty to pay compensation.[7] Some of these

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[6] *Sweet v. Rechel*, 159 U.S. 380, 402 (1895) ("adequate provision is made when the statute, authorizing a public municipal corporation to take private property for public uses, directs the regular ascertainment, without improper delay and in some legal mode, of the damages sustained by the owner"); *Joslin Mfg. Co. v. City of Providence*, 262 U.S. 668, 677-78 (1923) ("[T]he taking of property for public use by a state or one of its municipalities need not be accompanied or preceded by payment, but [] the requirement of just compensation is satisfied when the public faith and credit are pledged to a reasonably prompt ascertainment and payment, and there is adequate provision for enforcing the pledge.").

[7] Early state court decisions are in accord. *See Gardner v. Vill. of Newburgh*, 2 Johns. Ch. 162, 164, 166 (N.Y. Ch. 1816) (Absent a provision for compensation, the plaintiff "would be entitled to his action at law for the interruption of his right."); *Eaton v. Boston, C. & M.R.R.*, 51 N.H. 504, 516 (1872).

decisions involve claims against a local government in federal court. *See, e.g.*, *Cuyahoga River Power Co. v. City of Akron*, 240 U.S. 462, 463 (1916) (holding that a federal court had jurisdiction over a claim that a city ordinance unconstitutionally took private property and the city "does not intend to institute any [condemnation] proceedings against the plaintiff"); *Mosher v. City of Phoenix*, 287 U.S. 29 (1932) (same). Others involve takings claims against the United States. *Jacobs v. United States*, 290 U.S. 13, 16 (1933) (adjudicating a flooding inverse condemnation takings claim). In all the decisions, the courts believed that a claim for just compensation accrued the moment the government invaded property without a contemporaneous guarantee of compensation.

More recent cases from this Court directly establish this understanding. *See 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."); *United States v. Clarke*, 445 U.S. 253, 258 (1980) ("[T]he usual rule is that the time of the invasion constitutes the act of taking and '[i]t is that event which gives rise to the claim for compensation . . . .'") (quoting *United States v. Dow*, 357 U.S. 17, 22 (1958)); *Kirby*, 467 U.S. at 5 (A property "owner has a right to bring an 'inverse condemnation' suit to recover the value of the land on the date of the intrusion."). Just a few years before *Williamson County*, Justice Brennan's influential dissenting opinion in *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981), emphasized that a property owner suffers a constitutional "violation" as "soon as private property [is] taken," including by physical invasion. *Id.* at 654 (Brennan, J., dissenting).

Williamson County did not distinguish, much less overrule, any of this precedent in concluding that a Takings Clause violation does not arise when a local government harms property without a pledge of compensation, but only after a state court denies a remedy for its action. *Williamson County*'s state exhaustion rule was accordingly a radical and unjustified departure from early, prior understandings. *Monell*, 436 U.S. at 687 & n.47.[8] Further, no post-*Williamson* precedent makes the case for jettisoning the long line of cases recognizing the accrual of a takings claim at the time of a property invasion. Instead, it tends to affirm that view. *See First English*, 482 U.S. at 315-16 (a property owner has a right to bring an inverse condemnation claim under the Fifth Amendment at the time of the taking).

[8] *Monell* confirms that, under the original understanding of both the Fourteenth Amendment and Section 1983, local governments should be subject to damages claims in federal court for taking property without compensation. 436 U.S. at 687, *id.* at 687 n.4.

Of course, *Williamson County* did point to *Ruckelshaus v. Monsanto*, 467 U.S. 986 (1984), and *Parratt v. Taylor*, 451 U.S. 527 (1981), as an alleged basis for departing from traditional takings claim accrual standards. But, as Chief Justice Rehnquist noted in *San Remo Hotel*, those two cases say nothing about whether a takings claim seeking compensation from a local government requires use of a state remedy. *San Remo Hotel, L.P. v. City & Cty. of San Francisco*, 545 U.S. 323, 349 n.1 (2005) (Rehnquist, C.J., concurring).[9]

B. *Williamson County*'s Rule Conflicts with Precedent Holding That Section 1983 Claims Do Not Require Exhaustion of State Remedies

The logic underlying *Williamson County* is not only inconsistent with early and traditional views about the timing of a takings claim, it conflicts with settled jurisprudence holding that plaintiffs need not exhaust state remedies to bring constitutional claims in federal court under Section 1983. *See generally Patsy v. Fla. Bd. of Regents*, 457 U.S. 496, 500 (1982) (listing prior cases rejecting state exhaustion requirements). There should be little doubt that *Williamson County*'s requirement is a state remedies rule, notwithstanding the other characterizations, including "ripeness," sometimes ascribed to it. *Williamson County* requires a would-be Fifth Amendment takings claimant to go to state court and use a state law process to try and get compensation. Only if the state court fails to supply a state law remedy is a Fifth Amendment takings claim justiciable in federal court. That is a quintessential exhaustion doctrine. *See Monroe*, 365 U.S. at 183.

At the time of *Williamson County*, this Court had rejected this type of exhaustion barrier to federal Section 1983 cases on many occasions. *Patsy*, 457 U.S. at 500. Some of its "no-exhaustion" cases reject use of administrative remedies, *id.* at 516, while others reject the need for plaintiffs to exhaust state judicial remedies. *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, recognizing the paramount role Congress has assigned to the federal courts to protect constitutional rights."); *Monroe*, 365 U.S. at 183 ("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.").

Strangely, *Williamson County* acknowledged and distinguished no-exhaustion precedent when discussing the "final decision" ripeness requirement (not at issue

[9] *Monsanto* did not involve a takings claim seeking just compensation, and *Parratt* is a procedural due process case involving an unauthorized property deprivation. Neither involved claims against a local government.

here), 473 U.S. at 192, but ignored it when articulating the state exhaustion requirement challenged here. *Id.* at 194-96. Perhaps this is because there is simply no good way to reconcile its ruling with no-exhaustion case law. Henry Paul Monaghan, *State Law Wrongs, State Law Remedies, and the Fourteenth Amendment*, 86 Colum. L. Rev. 979, 989 (1986) ("No authority supports use of ripeness doctrine to bar federal judicial consideration of an otherwise sufficiently focused controversy simply because corrective state judicial process had not been invoked.").

In ignoring no-exhaustion case law, *Williamson County* put takings claimants in an entirely different and inferior class than other constitutional plaintiffs when it comes to federal judicial protection. The general no-exhaustion rule allows citizens to raise Due Process, First Amendment, Fourth Amendment, and other claims in federal court without exhausting state remedies. *Zinermon v. Burch*, 494 U.S. 113, 125-26 (1990). Conversely, *Williamson County* requires property owners to seek a state law compensation remedy through all levels of state judicial review before raising a takings claim in federal court. Sadly, if the *Williamson County* Court had given proper weight to the Court's no-exhaustion precedent, it might not only have concluded that its state remedies rule is unsupportable, but that adopting it would create an unforeseen res judicata barrier to later federal review that would defeat *Williamson County*'s own "ripening" intent. *Patsy*, 457 U.S. at 514 (refusing to require use of state remedies in part because doing so might have preclusive "res judicata and collateral estoppel effect" on subsequent federal litigation).[10]

Williamson County was never correct. It adopted the state exhaustion requirement in conflict with the traditional and long-accepted rule that a Section 1983 claim is actionable at the time a local defendant causes injury, not after a state remedy fails. *Horne*, 569 U.S. at 526 n.6; *Monroe*, 365 U.S. at 183 (permitting a Section 1983 plaintiff to challenge an unreasonable seizure of property without utilizing state judicial remedies); *Urbanizadora Versalles, Inc. v. Rivera Rios*, 701 F.2d 993, 997-99 (1st Cir. 1983) (holding in a takings case that "there is no requirement of exhaustion of administrative remedies"); *Foster v. City of Detroit*, 405 F.2d 138, 144 (6th Cir. 1968) (same); John F. Preis, *Alternative State Remedies in Constitutional Torts*, 40 Conn. L. Rev. 723, 726 (Feb. 2008) (*Williamson County* represents "a marked change from past practice.").

[10] Pennsylvania courts frequently hold that administrative proceedings create res judicata barriers. *See, e.g.*, *J.S. v. Bethlehem Area Sch. Dist.*, 794 A.2d 936, 941-42 (Pa. Commnw. Ct. 2002).

C. Ms. Knick's Claims Illustrate the Propriety of the Original Understanding of a Takings Violation and the Illogical Nature of *Williamson County*'s Rule

The facts of this case aptly illustrate why *Williamson County*'s state exhaustion doctrine is wrong and prior, contrary understandings are correct. There is no dispute that the Township enacted an Ordinance that expressly authorizes the public and the Township to occupy Ms. Knick's land—a classic physical taking. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 831, 842 (1987). The Township enforced the law against Ms. Knick, informing her that failure to open her land to the public violates the Ordinance and that she is required to immediately provide access, on pain of fines. App. A at 3-5. Though the Township has the power under state law to condemn and pay for an easement by filing a "declaration of taking" in court, 2d Class Township Code, Act of May 1, 1993, Pub. L. No. 103, No. 69, art. 34 § 3401; 26 Pa. Cons. Stat. § 302, it did not invoke that power against Ms. Knick. Nor does its Ordinance contain any provision guaranteeing compensation or acknowledging a duty to pay it. None of the notices to Ms. Knick contain an offer of compensation or acknowledge that the Township intends to take her property. The Township has denied or refused to admit that it is taking Ms. Knick's land from the inception of this dispute. Or. Arg. Tr. 39. Its imposition of an access easement on Ms. Knick's farmland is "without just compensation" and actionable as a Takings Clause and Section 1983 violation under any reasonable and traditional understanding of those concepts. *Horne*, 569 U.S. at 526 n.6.

Yet, *Williamson County* demands that federal courts ignore the uncompensated taking of Ms. Knick's right to exclude trespassers until she takes the time-consuming and expensive step of seeking a state law remedy in state court.[11] This requirement cannot make the invasion of Ms. Knick's land any more concrete, nor can it be squared with precedent exempting constitutional claimants from exhaustion requirements. It only causes delay, wastes Ms. Knick's and court resources, and (due to res judicata barriers arising from state litigation) would ultimately prevent Ms. Knick from bringing her Fifth Amendment takings claim in federal court, contrary to the intent of Section 1983 and *Williamson County*. *See Patsy*, 457 U.S. at 504 (By enacting Section 1983, Congress intended to "'throw open the doors of the United States courts,'" to those suffering a deprivation of constitutional rights and to provide "immediate access to the federal courts notwithstanding any provision of state law to

[11] In many states, the state inverse condemnation process is far more complicated and burdensome than a Section 1983 action. Brief Amicus Curiae of Ohio Farm Bureau Federation at 11-14. For instance, in California, a property owner cannot raise an inverse condemnation claim until she first unsuccessfully prosecutes a writ of mandamus action to invalidate the offending government act. Section 1983 does not impose such a hurdle to takings litigation. *Williamson County*, 473 U.S. at 193.

the contrary." (citation omitted)); *see also* Petitioner's Brief on the Merits at 27.

II. THERE IS NO WAY TO CORRECT *WILLIAMSON COUNTY*'S MISTAKEN AND DYSFUNCTIONAL PROCEDURAL RULE EXCEPT BY ABROGATION

Williamson County's logically flawed and unsupported decision to make a takings violation contingent on state remedies created a deeply confused and unjust framework for litigating Fifth Amendment takings claims. Due to its interaction with res judicata rules, the state exhaustion rule entirely prevents people like Ms. Knick from challenging a local invasion of land as a "taking" in federal court under 42 U.S.C. § 1983, contrary to the purposes of *Williamson County* and Section 1983. In addition, *Williamson County*'s doctrine inhibits takings litigation in state courts, by allowing the government to remove state court takings complaints to federal court—where they are then "unripe" under *Williamson County*. Petitioner's Brief on the Merits at 23-30. Finally, *Williamson County* also harms property owners' ability to raise claims under the Due Process and Equal Protection clauses in federal court, leaving those claims (and property owners in general) in an inferior, "state court only" status when it comes to judicial access. *See* Brief Amicus Curiae of National Association of Home Builders at 1-15.

These are significant problems that cannot be corrected by tinkering with *Williamson County* at the margin. Courts have already tried that approach and it has failed. *See, e.g.*, *Santini v. Conn. Hazardous Waste Mgmt. Serv.*, 342 F.3d 118 (2d Cir. 2003), *abrogated by San Remo Hotel*, 545 U.S. at 326, 346-47. *Williamson County* must be tackled at the core because it is flawed at the core. A state remedial requirement for federal review is incompatible with other doctrines, like res judicata, issue preclusion, removal, state statutes of limitation,[12] and the *Rooker-Feldman* doctrine,[13] and works only to prevent people like Ms. Knick from securing reasonable and prompt judicial access when their property is taken. *Id.* at 350-52 (Rehnquist, C.J., concurring). Though accidental, the side-effects of *Williamson County*'s doctrine are too damaging to accept, particularly since the "ripeness" rule driving it all lacks any basis in traditional constitutional doctrine.

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[12] *Board of Regents of University of State of N.Y. v. Tomanio*, 446 U.S. 478 (1980) (use of administrative procedures does not toll the applicable state limitations period, causing a Section 1983 claim to expire).

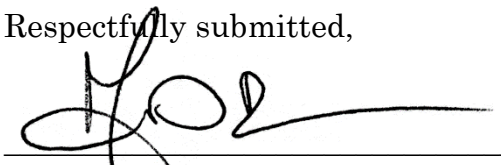
[13] The doctrine refers to *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), and *D.C. Court of Appeals v. Feldma*n, 460 U.S. 462 (1983), both of which bar federal courts from reviewing certain state court judgments.

The only way to fix *Williamson County* (and to avoid creating new problems) is to abrogate the state exhaustion requirement. This solution would return the law to a pre-*Williamson County* regime that recognizes (1) federal takings claims accrue when a local government invades property by legislation or a final administrative decision without admitting it is taking property or pledging compensation, *cf. Joslin Mfg. Co.*, 262 U.S. at 677-78, and (2) state remedies need not be utilized.

In light of *Williamson County*'s procedural nature, this abrogation solution is a proper and unremarkable application of stare decisis principles. *Alleyne v. United States*, 570 U.S. 99, 119 (2013) (Sotomayor, J., concurring) (Stare decisis concerns are weaker for "procedural rules . . . that do not govern primary conduct and do not implicate the reliance interests of private parties."). Indeed, stare decisis has little sway when the Court faces an unworkable and incorrect procedural rule, like the one here. *Id.* at 120; *Payne v. Tenn.*, 501 U.S. 808, 828 (1991). "[O]nce [a procedural rule] is proved to be unworkable in practice; the mischievous consequences to litigants and courts alike from the perpetuation of an unworkable rule are too great" to allow its retention. *Swift & Co., Inc. v. Wickham*, 382 U.S. 111, 116 (1965).

Abrogating *Williamson County*'s state exhaustion rule will restore stability and fairness to takings litigation and put takings claimants on par with other constitutional claimants with respect to federal protection of their rights under Section 1983. But, given the reduced force of stare decisis in procedural disputes, *Alleyne*, 570 U.S. at 120-21 (Sotomayor, J., concurring), such a step would say nothing about the propriety of overruling other precedent involving substantive rights and more "legitimate reliance interest[s]." *United States v. Ross*, 456 U.S. 798, 824 (1982). Moreover, given the amount of resources federal courts already invest in resolving disputes over the reach of *Williamson County*, its partial abrogation[14] would not substantially increase those courts' takings workload; it would simply shift the focus.

Respectfully submitted,



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[14] Abrogating *Williamson County*'s state exhaustion requirement would not impact the traditional, "final decision" ripeness rule for takings claims, a rule that will continue to shield federal courts from speculative takings cases. 473 U.S at 186-92.