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November 30, 2018

Honorable Scott S. Harris
Clerk of Court
Supreme Court of the United States
One First Street, N.E.
Washington, D.C. 20543

RE: *Rose Mary Knick v. Township of Scott, Pennsylvania, et al.*, No. 17-647

Dear Mr. Harris:

This letter responds to the Court's order of November 2, 2018, requesting briefs "addressing petitioner's alternative argument for vacatur, discussed at pages 12–15 and 40–42 of the transcript of oral argument and in footnote 14 of petitioner's brief on the merits." That forfeited argument posits that the Just Compensation Clause requires the specific "government entity" or "agency charged with taking property" for public use to affirmatively "provide or guarantee compensation" to the property owner. Pet. Br. 38 n.14.

Petitioner placed that argument in a footnote for good reason. It finds no support in the text or original understanding of the Fifth or Fourteenth Amendment, and it conflicts with more than a dozen precedents of this Court dating back 123 years. Overruling those precedents would render innumerable federal, state, and local laws constitutionally infirm; severely hamstring core functions of government; and flood the courts with ill-defined and undesirable protective lawsuits. All this to address a peripheral issue over which Congress has total control: the statutory subject-matter jurisdiction of lower federal courts to hear claims seeking just compensation for municipal takings. This Court regularly interprets statutes to avoid constitutional problems, but there is no warrant to reinterpret the Constitution to fix a statutory "problem" of which Congress is well aware but has opted not to revisit.

Though not a model of clarity, footnote 14 plainly *does not* argue that the Just Compensation Clause requires the government to "pay[] just compensation before or at the time of its taking." *Arrigoni Enterprises, LLC v. Town of Durham*, 136 S. Ct. 1409, 1410 (2016) (Thomas, J., dissenting from denial of certiorari). Rather, petitioner contends that a property owner may claim a constitutional violation unless the entity charged with a taking contempo-

raneously pays compensation *or* admits the fact of a taking by initiating condemnation proceedings. See Pet. Br. 38 n.14 ("If an agency charged with taking property fails to *provide or guarantee* compensation at the time of the property injury …, the alleged taking would be 'without just compensation.'" (emphasis added)); Pet. Reply Br. 13 & n.5 (making an "alternate" argument that a taking "without condemnation proceedings" is unconstitutional); Oral Arg. Tr. 12:13–15 (Alito, J.) ("I thought [petitioner's] claim … that there is a violation of the takings clause" is "not a question of when [the government] would have to pay once they've admitted there's a taking."); *id.* at 40:19–20 (Gorsuch, J.) (suggesting that "maybe it makes sense to wait [for state-court proceedings] when the state has acknowledged a duty to pay").

Petitioner therefore accepts that a direct-condemnation suit filed by a municipality in state court makes "reasonable, certain, and adequate provision for obtaining compensation" for a taking. *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1, 11 (1990) (quoting *Cherokee Nation v. Southern Kansas Ry. Co.*, 135 U.S. 641, 659 (1890)). See also Pet. Br. 36 ("[*Williamson County*'s] rationale makes some sense in a condemnation-type dispute where the government acknowledges it is taking property and that it has a resulting compensatory duty."). Yet petitioner argues that the Just Compensation Clause bars a State from requiring a property owner to file an inverse-condemnation suit against a municipality in the same court, because the court is not the one "responsible" for an alleged taking. Pet. Br. 38 n.14. Petitioner is wrong.

This Court has held uniformly since the 1890s that the government complies with the Just Compensation Clause when it permits a property owner to file an inverse-condemnation suit wherein a court will decide whether property was "taken" and award any compensation owed. *E.g.*, *Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18, 22 (1945) ("[I]t cannot be doubted that the [inverse-condemnation] remedy to obtain compensation from the Government is as comprehensive as the requirement of the Constitution."). See U.S. Br. 11–13 (collecting cases). A corollary to that holding is that a property owner who chooses not to file an inverse-condemnation action cannot state a claim under 42 U.S.C. § 1983 alleging an unconstitutional taking "without just compensation." U.S. Const. Amend. V. See Resp. Br. 22–34. That well-settled rule of constitutional law is grounded in the text and original understanding.

The Just Compensation Clause is phrased in passive voice and does not prescribe who must determine the government's position on the issue whether a particular action effects a "taking" of private property that warrants compensation. The Fifth Amendment leaves that choice to Congress, whose power "to examine and determine claims for money" is "an incident of its power to pay the debts of the United States." *Ex parte Bakelite Corp.*, 279 U.S. 438, 452 (1929). See also U.S. Const. Art. I, § 8. "Congress may reserve to itself the power to decide" whether compensation lies for an alleged interference with a property interest, "may delegate that power to executive officers, or may commit it to judicial tribunals." *Bakelite*, 279 U.S. at 451. Congress has experimented with each of those options at different times.

See Resp. Br. 4–5; *Glidden Co. v. Zdanok*, 370 U.S. 530, 548–58 (1962) (opinion of Harlan, J.); *Williams v. United States*, 289 U.S. 553, 579–80 (1933); *Bakelite*, 279 U.S. at 452.

Legislative discretion to decide who determines whether government action has "taken" property for public use was firmly established at the time of the Founding. In England, the decision whether "to provide [payment] or not" for a "debt contracted … avowedly for the public uses of Government" lay "in the power of Parliament." *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 445 (1793) (Iredell, J., dissenting). The Crown had virtually unfettered authority to take private property, and Parliament would then compensate the owner at its discretion using procedures tailored to circumstance. See William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Colum. L. Rev. 782, 786 n.15 (1995).

The English model of discretionary payment of government debts also prevailed in the colonies, whose populace "considered legislative determination of claims a natural and appropriate aspect of the legislative power over appropriations." Floyd D. Shimomura, *The History of Claims Against the United States: The Evolution From a Legislative Toward a Judicial Model of Payment*, 45 La. L. Rev. 625, 633 (1985). None of the colonies recognized in 1776 a general right to compensation for property taken for public use. Cf. *Respublica v. Sparhawk*, 1 U.S. (1 Dall.) 357, 363 (Pa. 1788) (denying claim for compensation for articles seized in wartime). The uneasy status of a right to just compensation in the Founding Era was reflected in the failure of any State or Anti-Federalist group to propose a takings provision for inclusion in the Bill of Rights, see Akhil Reed Amar, The Bill of Rights: Creation and Reconstruction 78 (1998), and in the push to ratify the Eleventh Amendment in order to abrogate *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), in which this Court had taken jurisdiction over a claim against a State seeking compensation for property seized for military impressment. Cf. *Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2426 (2015) (observing that the Just Compensation Clause may have been designed specifically to indemnify owners of such property). The historical record therefore shows that, although the Fifth Amendment directed the United States to compensate property owners for takings, it was not intended to cabin Congress's discretion to determine *who* within the government would decide if a compensable taking had occurred.

The Pennsylvania General Assembly wields the same discretion. It "is not limited to specifically enumerated powers" and "may legislate in any way that is not expressly forbidden by the Pennsylvania or United States Constitution." *William Penn Sch. Dist. v. Pennsylvania Dep't of Educ.*, 170 A.3d 414, 440 n.38 (Pa. 2017). The Due Process Clause of the Fourteenth Amendment, which incorporates the Just Compensation Clause against the States, see *Chicago, B. & Q. R.R. Co. v. City of Chicago*, 166 U.S. 226, 236 (1897), provides only that "[n]o State shall …. deprive any person of … property, without due process of law." U.S. Const. Amend. XIV, § 1. That language "does not dictate to the States a particular division of authority between legislature and judiciary or between state and local governing bodies." *Wash-*

ington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 492–93 (1982) (Powell, J., dissenting). The General Assembly has exercised its discretion to assign to state courts the role of providing due process of law to a property owner alleging a taking within the meaning of the federal Constitution. See 26 Pa. C.S. § 102(a) (creating "a complete and exclusive procedure and law to govern all condemnations of property for public purposes and the assessment of damages").

"[C]ourts have always been recognized as a coequal part of the State's sovereign decision-making apparatus." *Fed. Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742, 762 n.27 (1982). Neither the Fifth nor Fourteenth Amendment hobbles that apparatus by barring a State from assigning to courts the determination whether government action caused a compensable taking. See *Sailors v. Bd. of Educ.*, 387 U.S. 105, 109 (1967) (emphasizing a State's "vast leeway in the management of its internal affairs"). One consequence of that assignment is "that issues actually decided in valid state-court judgments may well deprive plaintiffs of the 'right' to have their federal claims relitigated in federal court." *San Remo Hotel, L.P. v. City & County of San Francisco*, 545 U.S. 323, 342 (2005). But that consequence stems not from the Constitution but from a statute, 28 U.S.C. § 1738, that Congress is free to amend if it would like federal courts to re-adjudicate takings actions against municipalities. See Resp. Br. 46–47.

Nor does the Fifth or Fourteenth Amendment limit a State's choice of decisionmaker to a body at the same level of government as the entity charged with a taking. A municipality is merely a "subordinate governmental instrumentalit[y] created by the State to assist in the carrying out of state governmental functions." *Reynolds v. Sims*, 377 U.S. 533, 575 (1964). Accord *Commonwealth v. Moir*, 49 A. 351, 352 (Pa. 1901). That derivative relationship with the "State," U.S. Const. Amend. XIV, § 1, is the reason a local government owes compensation for a taking in the first place. Just as a State may assign responsibility for payment of compensation to any arm of government, see *Williams v. Parker*, 188 U.S. 491, 503–04 (1903), so may it delegate to a state court the task of investigating whether *any* governmental body, be it a statewide agency or a political subdivision, has effected a taking of property. It would impermissibly intrude upon state sovereignty to require a State to establish "local" courts in order to provide independent arbiters of municipal takings issues. See U.S. Const. Amend. X.

It was not until the Civil War that the political branches concluded that "the investigation and adjudication of claims [for money against the United States], in their nature belong to the judicial department." Message of President Abraham Lincoln, Cong. Globe, 37th Cong., 2d Sess., App. 2 (Dec. 3, 1861). Around that time, Congress established the Court of Claims and gave it the power to decide when the United States has "taken" property and, if so, how much compensation it owes. See Resp. Br. 4–5. Many States already had given their own courts comparable responsibilities, see *id.* at 5, and, during the debates over ratification of the Fourteenth Amendment, there seems to have been no objection to the idea that an inverse-condemnation remedy satisfied "due process of law." U.S. Const. Amend. XIV, § 1.

Federal takings litigation proliferated in the late 19th century once the Fourteenth Amendment took effect and this Court ruled that the United States could take property within State limits. See *Kohl v. United States*, 91 U.S. (1 Otto) 367, 372–74 (1875), overruling *Pollard v. Hagan*, 44 U.S. (3 How.) 212, 223 (1845). The Court first confronted cases in which the fact of a taking was not disputed but a court was to resolve a dispute over compensation. In *Cherokee Nation v. Southern Kansas Railway Co.*, 135 U.S. 641 (1890), this Court distilled the mandate of the Just Compensation Clause into the extant formulation that "the owner is entitled to reasonable, certain, and adequate provision for obtaining compensation." *Id.* at 659. The Court then deemed that mandate fulfilled because the owner could sue to recover compensation, notwithstanding that the condemnor could "enter upon the property … and proceed with the construction of [a] road" before judgment was entered.[1] *Ibid.* A court, rather than the "agency charged with taking property," Pet. Br. 38 n.14, would "guarantee," *ibid.*, that the property owner received the full measure of compensation promised by the Clause.

If a court may decide on the government's behalf the question what compensation is "just," there is no principled reason why a court cannot decide on the government's behalf the predicate question whether compensation is owed at all. Indeed, in a series of rulings between 1895 and 1920, this Court established that an inverse-condemnation action is a constitutionally permissible means by which the government may secure a property owner's right to recover just compensation for a taking, even if the particular governmental entity whose action is at issue disputes that a taking occurred. See *Hays v. Port of Seattle*, 251 U.S. 233, 238 (1920); *Crozier v. Krupp*, 224 U.S. 290, 305–07 (1912); *Williams*, 188 U.S. at 502–03; *Sweet v. Rechel*, 159 U.S. 380, 404 (1895). This Court has never called those precedents into doubt.

On the contrary, this Court has repeatedly reaffirmed those holdings over the ensuing century. See U.S. Br. 11–13. Most notably, the availability of a certain and adequate inverse-condemnation remedy has shielded against Fifth Amendment challenge several federal statutes whose application could have led to takings of property. See *Preseault*, 494 U.S. at 11–17; *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1019 (1984); *Hodel v. Virginia Surface Mining & Reclamation, Inc.*, 452 U.S. 264, 297 n.40 (1981); *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 94 n.39 (1978); *Reg'l Rail Reorganization Act Cases*, 419 U.S. 102, 148–49 (1974). Cf. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 127–29 & n.6 (1982) (rejecting a

[1] That holding of *Cherokee Nation* underlies the constitutionality of "[m]ost federal condemnation[s]" and a substantial share of the direct condemnations effected under state law. U.S. Dep't of Justice, "Anatomy of a Condemnation Case," available at https://www.justice.gov/enrd/anatomy-condemnation-case (last visited Nov. 26, 2018). By law, a condemnor is permitted to take property before just compensation is even ascertained by the court. See 26 Pa. C.S. § 307; 40 U.S.C. § 3114; *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 4–5 (1984). Such "quick takes" are often the only practicable option for utilities and other entities vested with time-limited condemnation authority.

constitutional-avoidance rationale for a narrow reading of a statute that could cause takings because property owners could file inverse-condemnation actions); *Dames & Moore v. Regan*, 453 U.S. 654, 688–89 (1981) (upholding an executive order against a Fifth Amendment challenge because any taking could be remedied through an inverse-condemnation action). Congress, state legislatures, and boards of supervisors across the country have relied on those precedents to enact countless statutes and ordinances whose application might result in takings in one or more instances. See U.S. Br. 15–16. Petitioner would have this Court overrule all those precedents and, at a single stroke, render all those legislative enactments constitutionally suspect. The federal courts then would be flooded not only with suits like petitioner's that seek damages for alleged violations of the Just Compensation Clause, but also suits that seek to enjoin applications of generally applicable state and local land-use regulations.[2]

Over time, as this Court regularly reaffirmed the rule that an inverse-condemnation suit secures a property owner's constitutional right to recover just compensation, it has come to view the question as one of procedural due process. See, *e.g.*, *Reg'l Rail Reorganization Act Cases*, 419 U.S. at 156. Even though that rule was established more than a century ago, it fits comfortably within modern due-process jurisprudence. This Court's "general approach for testing challenged state procedures under a due process claim," *Parham v. J.R.*, 442 U.S. 584, 599 (1979), is to consider the three factors set forth in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976): the individual's interest, the comparative risk of an erroneous deprivation with and without additional procedural safeguards, and the government's interest. See, *e.g.*, *Nelson v. Colorado*, 137 S. Ct. 1249, 1255–58 (2017). Those factors confirm that inverse-condemnation actions provide sufficient due process if private property is taken for public use. Cf. Resp. Br. 32–33 (listing other constitutional rights for which postdeprivation process is adequate).

The *Mathews* inquiry here proceeds from the "presuppos[ition]" that any government interference with property rights is "otherwise proper." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 543 (2005) (citation and emphasis omitted). See Resp. Br. 2–4, 22–23. Petitioner does not allege that permitting reasonable access to gravesites is not a "public use," U.S. Const. Amend. V, such that respondent Township of Scott's cemetery ordinance could be invalidated even if the township had tendered her the full sum (if any) such an "easement" would

[2] States are not amenable to suit under Section 1983 for violations of the Just Compensation Clause, but that statute authorizes prospective relief against state officers acting in their official capacities. See *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 n.10 (1989). Were this Court to adopt the argument on which supplemental briefing was ordered, state officers would be haled into federal court routinely by property owners seeking to enjoin implementation of state laws that allegedly effected takings, even if the State had waived immunity to inverse-condemnation claims. While States would not pay compensation in those Section 1983 actions, their laws could be invalidated, and they could be charged attorney's fees. See 42 U.S.C. § 1988(b); *Hutto v. Finley*, 437 U.S. 678, 692 (1978).

fetch on the market. Her interest therefore boils down to "maintaining the use of money," *City of Los Angeles v. David*, 538 U.S. 715, 717 (2003)—rather than use of property of which she has been validly deprived—while a state court decides whether a taking occurred and, if necessary, what compensation is owed. Delay in receipt of funds is not ordinarily a "serious harm" because "any loss in the time value of the money can be compensated by an interest payment." *Id.* at 718. See 26 Pa. C.S. § 713. Cf. *United States v. $8,850*, 461 U.S. 555, 565 n.14 (1983) (noting that the deprivation of nonmonetary interests protected by the Due Process Clause of the Fifth Amendment "may well be more grievous" than the deprivation of funds).

The second *Mathews* factor, "concern for accuracy," *Los Angeles*, 538 U.S. at 718, is not a concern here because a just-compensation claim, by definition, presumes that the government made "an accurate decision" to take property. *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 195 n.14 (1985) (citation omitted). See *Lingle*, 544 U.S. at 543.

The third *Mathews* factor, the governmental interest, carries the day. "[R]egulation of land use is perhaps the quintessential state activity." *Mississippi*, 456 U.S. at 767 n.30. Such regulation is "ubiquitous," *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 324 (2002), and it can effect takings because this Court has "expanded the protection of the Takings Clause, holding that compensation [i]s also required for a 'regulatory taking'—a restriction on the use of property that [goes] 'too far.'" *Horne*, 135 S. Ct. at 2427 (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (Holmes, J.)). The challenge from a due-process perspective is that it is extraordinarily difficult to assess ex ante if a given regulation will go "too far." See *Eastern Enters. v. Apfel*, 524 U.S. 498, 541 (1998) (Kennedy, J., concurring in the judgment and dissenting in part) ("Cases attempting to decide when a regulation becomes a taking are among the most litigated and perplexing in current law."). "In view of the nearly infinite variety of ways in which government actions or regulations can affect property interests," the question whether a regulation effects a taking ordinarily "turn[s] on situation-specific factual inquiries," *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23, 31–32 (2012), conducted "with respect to specific property," *Hodel*, 452 U.S. at 295. Absent evidence from the property owner, the government often cannot adequately assess factors central to that inquiry, like "the property owner's distinct investment-backed expectations," *Arkansas Game*, 568 U.S. at 38, or "the economic impact of the regulation on the claimant," *Murr v. Wisconsin*, 137 S. Ct. 1933, 1943 (2017). Moreover, in some cases, it is impossible for a government official to know at the outset whether a taking will ensue because the duration of the interference informs that question. See *Arkansas Game*, 568 U.S. at 38.

Faced with this indeterminacy, the only practical way for government officials simultaneously to uphold their oaths to support the Constitution, fulfill their duties to protect the public fisc, and faithfully implement land-use regulations is to rely on the availability of inverse-condemnation suits to comply with the Just Compensation Clause. Cf. *McKesson Corp.*

v. Div. of Alcoholic Beverages & Tobacco, 496 U.S. 18, 50 (1990) (holding that States' "legitimate interest in sound fiscal planning" is "sufficiently weighty to allow" them to "provid[e] post-deprivation relief" for unlawful taxation in the form of a refund suit filed by the taxpayer). Many land-use regulations "impact property values in some tangential way—often in completely unanticipated ways." *Tahoe-Sierra*, 535 U.S. at 324. But local officials in particular lack the time and resources to investigate the effect that a regulation might have on property values of each tract within their jurisdiction; perform title searches for all potentially affected properties; appraise each property with and without the regulation; predict for each property which of this Court's doctrinal frameworks will dictate whether property is "taken"; gather property-specific evidence pertinent to that framework; and protectively condemn any interest in land that a court could reasonably find to have been "taken." A holding that the Constitution required all those steps to precede regulation would "convert[] municipal governance into a hazardous slalom through constitutional obstacles that often are unknown and unknowable." *Owen v. City of Independence*, 445 U.S. 622, 665 (1980) (Powell, J., dissenting).[3]

Consequently, due process allows the government to require a property owner to affirmatively demonstrate entitlement to compensation in an inverse-condemnation suit. "No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." *Yakus v. United States*, 321 U.S. 414, 444 (1945). See, *e.g.*, Fed. R. Civ. P. 12(h)(1) (requiring a party to raise a Due Process Clause objection to personal jurisdiction); Fed. R. Civ. P. 38(d) (requiring a party to demand a jury trial to which she is entitled by the Seventh Amendment); Fed. R. Crim. P. 52(b) (limiting judicial review of untimely constitutional claims to "plain error"); *Wainwright v. Sykes*, 433 U.S. 72, 86

[3] This Court follows a more "categorical" approach to takings questions in a few narrow classes of cases. See *Arkansas Game*, 568 U.S. at 31–32 (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982), and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992)). But the boundaries of those classes are themselves blurred. See, *e.g.*, Resp. Br. 48 & n.8; *Murr*, 137 S. Ct. at 1943. A rule that the Just Compensation Clause is satisfied by the availability of an inverse-condemnation action if an ad hoc analysis applies, but not if a categorical rule applies, would be "particularly undesirable" because those blurred lines would govern "the question of jurisdiction." *Grupo Dataflux v. Atlas Global Grp., L.P.*, 541 U.S. 567, 582 (2004). Under such a regime, a federal court would have subject-matter jurisdiction to consider only a subset of possible arguments for why compensation was owed. See *Yee v. City of Escondido*, 503 U.S. 519, 534–35 (1992) (characterizing physical- and regulatory-takings theories as "separate *arguments* in support of a single claim" rather than "separate *claims*"). That limitation inevitably would lead to piecemeal federal and state litigation of different facets of the same claim. In any case, many of the same onerous requirements (conducting field research on properties, poring over title records, evaluating legal defenses, and filing condemnation suits) also would apply to categorical takings caused by generally applicable laws.

(1977) (holding that the Self-Incrimination Clause requires a voluntariness hearing only if the defendant timely objects to the use of a confession). Consistent with that principle, the Just Compensation Clause permits the government to "shift[] to the landowner the burden to discover the encroachment [on private property] and to take affirmative action to recover just compensation" by invoking the jurisdiction of a court. *United States v. Clarke*, 445 U.S. 253, 257 (1980). The owner is "the party more likely to have information relevant to the facts" bearing on the issue whether a taking occurred, so it is "entirely sensible" for her to carry that burden. *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers' Pension Trust*, 508 U.S. 602, 626 (1993). In any event, "the locus of the burden of persuasion is normally not an issue of federal constitutional moment" in civil cases. *Lavine v. Milne*, 424 U.S. 577, 585 (1976).

Additionally, it is far from obvious that property owners are disadvantaged by a doctrine that gives them six years to decide whether and when to file an inverse-condemnation suit or challenge the government's authority to take property, see 42 Pa. C.S. § 5527(a)(2); 28 U.S.C. §§ 2401(a), 2501, rather than being forced to defend immediately against a condemnation action filed at a time of the government's choosing, see 26 Pa. C.S. § 305(c)(13) (giving owners 30 days to file objections); Fed. R. Civ. P. 71.1(e)(2) (giving owners 21 days to answer). The pace of direct-condemnation proceedings, coupled with their strict waiver rules, see 26 Pa. C.S. § 306(b); Fed. R. Civ. P. 71.1(e)(3), will result in many property owners' forfeiting "public use" and other challenges to exercises of regulatory power. And, whereas property owners are entitled to recover all reasonable costs of litigation in a successful inverse-condemnation action, see 26 Pa. C.S. § 709; 42 U.S.C. § 4654(c), the same is not true of defendant property owners in direct condemnations, see 26 Pa. C.S. § 710(a) (capping reimbursement for compensation disputes at "$4,000 per property, regardless of right, title or interest"); 42 U.S.C. § 4654(a) (permitting reimbursement of costs only if "the proceeding is abandoned by the United States" or "the final judgment is that the [government] cannot acquire the real property by condemnation"). For some property owners, those litigation costs are unavoidable and will erode, if not surpass, any award of compensation.[4] See, *e.g.*, *Sklar v. Dep't of Health*, 798 A.2d 268, 277 (Pa. Commw. Ct. 2002) (holding that a small business must be represented by counsel in state court). Lastly, in many cases, the true economic impact of a government regulation or physical invasion of property cannot be known "until the situation becomes stabilized." *United States v. Dickinson*, 331 U.S. 745, 749 (1947). Even when the fact of a taking is obvious, then, requiring the government to immediately prosecute di-

[4] Costs of other litigation also would be a substantial concern for property owners. To avoid paying attorney's fees, a government might respond to an adverse ruling in this case by preemptively filing a mass action against owners potentially affected by a regulation and praying for a declaratory judgment that their property was not taken. See 42 Pa. C.S. §§ 7532, 7540(a); 28 U.S.C. § 2201(a).

rect condemnations is likely to reduce awards of just compensation and force property owners into "piecemeal … litigation" while the full extent of property damage is revealed. *Ibid.*

Finally, it is worth recalling that petitioner's only quarrel with *Williamson County* is that it recognizes limits on the subject-matter jurisdiction of lower federal courts to hear claims for just compensation. But those limits are statutory, not constitutional, and Congress has discretion to lift them. See Resp. Br. 45–47; U.S. Br. 30 n.9. Any claim that property was "taken" within the meaning of the Fifth Amendment, even one arising under state law, "necessarily raises *questions* of substantive federal law," *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 493 (1983) (emphasis added), and thus may be decided by a lower federal court if Congress so permits. See U.S. Const. Art. III; *Glidden*, 370 U.S. at 551. Yet Congress has opted to limit those courts to deciding claims of constitutional *violations*. See Resp. Br. 28–34 (discussing 42 U.S.C. § 1983); *id.* at 43–44 (discussing 28 U.S.C. § 1331). Congress's unwillingness to lift that limit does not provide "special justification," *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984), for redefining what constitutes a violation of the Just Compensation Clause.

* * *

This Court "is one of review, not of first view," *Hernandez v. Mesa*, 137 S. Ct. 2003, 2007 (2017) (internal quotation marks and citation omitted), and its practice is "to avoid deciding constitutional issues needlessly." *Christopher v. Harbury*, 536 U.S. 403, 417 (2002). Those principles of judicial restraint counsel the Court to decide the straightforward statutory issue fully briefed by petitioner—namely, whether a violation of the Constitution is an element of her Section 1983 claim—and to avoid the momentous constitutional issue neither aired nor decided in the courts below, limited to a footnote in petitioner's brief, and definitively resolved against her more than a century ago. We have explained herein why petitioner's forfeited argument is wrong as a matter of law and have identified some of the collateral damage that would ensue if this Court overhauled its constitutional jurisprudence as she proposes. But dislodging bedrock precedent also poses serious risks to other local governments and States across the country, many of which undoubtedly would have directed the Court to additional "relevant matter," S. Ct. R. 37.1, had the question been fairly presented. Cf. Br. of Nat'l Gov'rs Ass'n et al. 35–36 (declining to address footnote 14 due to forfeiture). For these reasons, "the present case[] should be decided as [it was] briefed and argued" the first time. *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 616 (2013) (Roberts, C.J., concurring).

Respectfully submitted,

Teresa Ficken Sachs
Counsel for Respondents

cc: Counsel of record (via email)