PACIFIC LEGAL FOUNDATION

December 6, 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
Petitioner's Supplemental Reply Brief

Dear Chief Justice and Associate Justices:

INTRODUCTION

Respondent Township of Scott (Township) fails to rebut Petitioner's (Ms. Knick) argument that *Williamson County* is flawed because it departed from the original and correct understanding on the timing of an actionable claim for a violation of the Takings Clause. A property injury is actionable as a Takings Clause violation, under 42 U.S.C. § 1983 and in federal court, as soon as a local government injures property, unless it acknowledges liability or pledges compensation at that time. *United States v. Great Falls Mfg. Co.*, 112 U.S. 645, 656 (1884); *Mosher v. City of Phoenix*, 287 U.S. 29 (1932); *United States v. Dow*, 357 U.S. 17, 22 (1958). *Williamson County* was wrong in concluding that one may not seek compensation for an unconstitutional taking until state remedies are used.

In objection, the Township and the Solicitor General rely largely on Tucker Act cases involving takings claims against the United States in the Court of Federal Claims. But these cases do not undercut Ms. Knick's argument; they confirm it. Tucker Act jurisprudence holds that a person whose property is invaded by the United States without condemnation proceedings may immediately assert a claim for damages grounded in the Takings Clause. *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 5 (1984). "[I]f the United States has entered into possession of the property[,] . . . [i]t is that event which gives rise to the claim for compensation." *Dow*, 357 U.S. at 22. It is *Williamson County*'s state exhaustion rule, not Ms. Knick's position, that is inconsistent with Takings Clause litigation against the United States.

ARGUMENT

I. The Township Fails to Identify Support for *Williamson County*

The Solicitor General asserts that Ms. Knick advocates "a rule that the government *violates the Takings Clause whenever it does not admit to a taking*," SG Suppl. Brief

at 5 (emphasis added). This is misleading. The issue the parties are addressing is this: when is an injury to property "without just compensation," such that a property owner may *assert* a Takings Clause violation requiring damages under Section 1983? Again, under traditional rules, an *actionable* claim of a Takings Clause violation arises at the time of an invasion unless the government condemns property or otherwise assures payment. But the ultimate issue of whether a constitutional infraction exists depends on whether the government's uncompensated actions are indeed a "taking," not on whether it failed to admit liability beforehand.

The Township and Solicitor General also contend that Ms. Knick's position would require the government to engage in difficult pre-action inquiries into whether it will cause a taking. Township Suppl. Brief at 8; SG Suppl. Brief at 5. This is a straw-man argument. A local government can always invade property without pledging compensation or admitting liability. Moreover, the omission can be purposeful or due to an unwillingness to consider the issue. Moving forward without takings consideration simply creates a risk that a property owner will shoulder the burden of filing a lawsuit to establish that the government's action is in fact unconstitutional. There is nothing strange or concerning about this. Local governments must choose to weigh or ignore many constitutional concerns when implementing local rules, all of which affect the risk of a Section 1983 lawsuit. *See United States v. Dickinson*, 331 U.S. 745, 747 (1947) ("The Government could, of course, have taken appropriate proceedings, to condemn [easements] as early as it chose," but it did not, inviting the property owner to sue for damages.).[1]

The opposition suggests that *Williams v. Parker*, 188 U.S. 491 (1903), and *Hays v. Port of Seattle*, 251 U.S. 233 (1920), contradict Ms. Knick's position on the accrual of a takings claim, while buttressing *Williamson County*.[2] They do no such thing.

In *Williams*, Massachusetts passed a statute limiting building heights. The law *acknowledged that it caused a taking* and that owners were entitled to receive damages through an existing city process designed to pay owners subject to road condemnation. 188 U.S at 491-92. The Court found that it was constitutional to

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[1] Ms. Knick's position does not change the federal government's takings obligations or the timing of a claim against it. *Kirby*, 467 U.S. at 4-5; *Dow*, 357 U.S. at 22-23; *Dickinson*, 331 U.S. at 747-48.

[2] Notably, a state inverse condemnation action cannot be characterized as a local government's "promise to pay." Such an action is a way for an owner to allege and *prove a taking* requiring compensation, not an action to "recover" an existing debt. *See* 26 Pa. Cons. Stat. § 502(c)(2)-(3). At best, state inverse condemnation procedures reflect a governmental "promise" to pay if a state court *orders it* after finding a taking. That is no different than in other contexts where a state provides a potential state remedy for an injury, and such state remedial options are not a valid reason to deny a property owner resort to a federal Section 1983 avenue for relief. *Monroe v. Pape*, 365 U.S. 167, 183 (1961).

require the owners to collect compensation through the local scheme. *Id.* at 502. Although the city denied liability for the effects of the statute, the state supreme court held that the state could and had lawfully imposed the duty to compensate on the city. *Id.* at 503; *see also*, *Attorney General v. Williams*, 55 N.E. 77 (Mass. 1899). *Williams* is simply *Cherokee Nation* with a local government defendant. It is therefore consistent with Ms. Knick's argument that Takings Clause plaintiffs must use a state collection process only when a local government acknowledges its duty to compensate at the time of invading property. Petitioner's Brief on the Merits at 36; *Joslin Mfg. Co. v. City of Providence*, 262 U.S. 668, 677-78 (1923).

Hays is not a takings case. It is a Contracts Clause case. 251 U.S. at 234-37. *Hays* did conclude that the Due Process Clause was satisfied by a post-deprivation, state remedial scheme allowing the contractor to seek any damages caused by a statute. *Id.* at 238. But subsequent decisions from this Court have repudiated this conclusion. *See Zinermon v. Burch*, 494 U.S. 113, 125-26 (1990) (plaintiffs need not exhaust post-deprivation state remedies to challenge an authorized deprivation of property).

II. Takings Litigation in the Court of Federal Claims Confirms Ms. Knick's Position

The Township and Solicitor General suggest that Ms. Knick's position conflicts with takings litigation against the United States under the Tucker Act in the Court of Federal Claims. This too is wrong.

When the United States causes injury to property without condemning it, a property owner can sue in the Court of Federal Claims to establish a taking warranting damages. This is a result of the Tucker Act, which waives the United States' sovereign immunity from most damages suits in the Court of Federal Claims only, leaving that immunity intact in the federal district courts. *United States v. Mitchell*, 463 U.S. 206, 215-19 (1983).

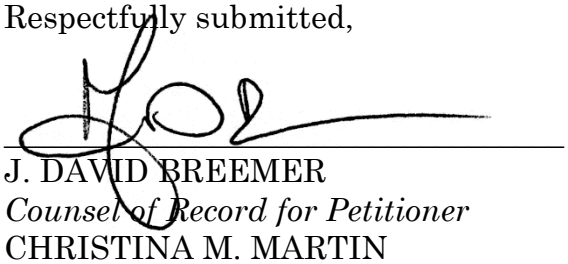
Significantly, a suit alleging a compensable taking in the Court of Federal Claims is viable as soon as government invades a property interest without condemning it or proving a statutory compensation guarantee. *Kirby*, 467 U.S. at 5; *Dow*, 357 U.S. at 22. The claimant need not sue in another court to "ripen" the takings suit. As the Court stated long ago in *Great Falls Mfg. Co.*, 112 U.S. at 656:

> [Given] the want of formal proceedings for its condemnation to public use, the claimant was entitled, at the beginning of the work [harming his property] . . . to regard the action of the government as a taking under its sovereign right of eminent domain, [and] demand just compensation.

The Tucker Act process is a reasonable post-taking method for remedying an unconstitutional taking precisely because a claim may immediately follow a property injury. *Id.* *Williamson County*'s state exhaustion rule for claims against a local government is, of course, quite different and far more burdensome. If the United States had declared a public easement on Ms. Knick's land, she would have an immediate right to sue for takings damages in the designated federal forum. *Ladd v. United States*, 630 F.3d 1015, 1023-24 (Fed. Cir. 2010). But, under *Williamson County*, local government is subject to a different Takings Clause. A property owner harmed by local action *cannot* immediately seek damages for a Takings Clause violation in the federal district courts which Congress has—through Section 1983—specifically designated for constitutional damages claims against local government.[3]

Williamson County is irreconcilable with the traditional view that a Takings Clause claim accrues (and is actionable in federal court) the moment government injures property without securing compensation. The Solicitor General ultimately concurs. SG Suppl. Brief at 6. *Williamson County* is also irreconcilable with the original understanding of Section 1983 as a law opening federal courts to unconstitutional takings suits, *Monell v. Dep't of Soc. Servs. of City of New York,* 436 U.S. 658, 687, 687 n.47 (1978), and with exhaustion of remedies doctrine. The Court should restore those correct principles in takings law, allowing Ms. Knick to federally litigate her Section 1983 claim that the Township unconstitutionally took her right to exclude strangers from her farmland.

Respectfully submitted,



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[3] Under *Williamson County*'s logic, a claim of a Takings Clause violation cannot arise at the time of a property injury even in *state court*. *54 Marion Avenue, LLC v. City of Saratoga Springs*, 162 A.D.3d 1341, 1343-44 (N.Y. App. Div. 2018) (holding a Section 1983 takings claim unripe for lack of state law inverse condemnation litigation).