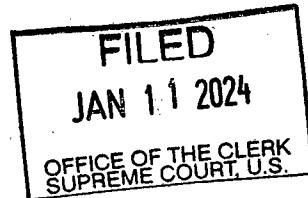


ORIGINAL



CASE NO. 23-902

IN THE SUPREME COURT OF THE UNITED STATES  
OCTOBER 2023-2024 TERM

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RICHARD DUNCAN  
Petitioner,  
vs. CITY OF MENTOR, OHIO  
Respondent

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On Petition for a Writ of Certiorari  
To the Supreme Court of Ohio

PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

### INTRODUCTION

Richard Duncan owns a 3-acre parcel in the City of Mentor, Ohio, where he proposed a houseboat to be placed on the pond which covers a large part of the area. A building permit and variances were denied by the City, so he filed an original writ of mandamus action claiming a taking of his property in the Ohio Appeals court. In addition to the Federal 5th amendment action he asserted Ohio's Article I Section 19 taking clause. After a motion to dismiss was granted, the Ohio Supreme Court affirmed, ruling that Duncan failed to exhaust his administrative remedy under ORC 2506. The justification set forth was that "If the court of common pleas had reversed the denial of permit, "no taking would have occurred".

#### I.

Whether the Ohio Supreme Courts newly established exhaustion of administrative remedy and ruling that "if the court of common pleas had reversed the denial of the permit no taking would have occurred" directly conflicts with the relevant decision(s) of this Court in First English Lutheran Church v. Los Angeles 482 U.S. 304, where this Court has mandated just compensation for temporary takings?

#### II.

Whether the Ohio Supreme Courts ruling establishing a new exhaustion of administrative remedy and its justification thereof, is erroneous because it conflicts with the case of Negin v. City of Mentor 601 F. Supp 1502 which ruled "Section 2506.01 does not empower state courts to award damages for injuries suffered as a result of erroneous administrative decisions";

therefore that common pleas court did not provide an adequate remedy at law which could have provided "complete, beneficial, and speedy relief", therefore, Duncan properly filed his original mandamus in the Ohio 11th District Court of Appeal?

III.

Whether the Ohio Supreme Courts ruling establishing a new exhaustion of administrative remedy and its justification thereof, is erroneous because it creates a situation analogous to the flawed reasoning as in Williamson County v. Hamilton Bank 473 U.S. 172 which was corrected by this Court in Knick v. Township of Scott PA, No 17-647 Docket no. 17-647?

IV.

Whether the Ohio Supreme Courts ruling establishing a new exhaustion of administrative remedy and its justification thereof, is erroneous because it apparently was adopted solely for policy considerations which potentially leads to costly remedy and court burdening litigation inconsistent with the constitutions intent of the 5th Amendment?

V.

Whether the Ohio Supreme Courts ruling establishing a new exhaustion of administrative remedy and its justification thereof, is erroneous because it results in undesirable results in that it forces Ohio litigants to forgo their concurrent jurisdiction choice of either Federal or state courts because filing in state courts results in a dead end path?

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

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## **PETITION FOR WRIT OF CERTIORARI**

Petitioner Richard Duncan petitions for a writ of certiorari to review the judgment of the Supreme Court of Ohio.

### **OPINIONS BELOW**

The Ohio Supreme Court decision for which Richard Duncan seeks issuance of the writ appears at Duncan v. City of Mentor Case 2023-0336 decided Sept 7, 2023. The Court of Appeals 11th District of Ohio is Duncan v. City of Mentor Case No 2022-L-106 decided 2/13 2023. Mentor's Zoning Board of Appeals issued a ruling on January 11th ,2022 denying any variance from Duncan's Nov 8th, 2021, submitted building permit application denial.

### **JURISDICTION**

The time for filing Petitioner's petition for a writ of certiorari was extended by Justice Kavanaugh until January 15th, 2024. The Jurisdiction of this Court is invoked under the 5th Amendment of the U.S. Constitution and many U.S. Supreme Court Cases which are in conflict with the Ohio Supreme Court's ruling.

### **RELEVANT CONSTITUTIONAL AND STATUTORY PROVISION**

U.S. Constitution 5th Amendment, which in pertinent part, provides;

“nor shall private property be taken for public use without just compensation”

Ohio Eminent domain Constitution Article I Section 19;

“where private property shall be taken for public use, a compensation therefore shall first be made in money, or first secured by a deposit of money”

Ohio Revised Code 2506.04;

“If an appeal is taken in relation to the final order, adjudication or decision covered by Division A of Section 2506.01 of the revised code, the court may find that the order, adjudication, or decision is unconstitutional, illegal arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record. Consistent with its findings, the court may affirm, reverse or vacate or modify the order, adjudication or decision, or remand the cause to the officer or body appealed from with instruction to enter an order, adjudication or decision consistent with the findings or opinion of the court”.

### STATEMENT OF THE CASE

Richard Duncan (hereinafter called Duncan) owns a 3 plus acre parcel of property in the City of Mentor, Ohio (hereinafter called Mentor) which is to a large degree covered by a pond. Duncan applied for a permit to allow a houseboat to be placed on the pond and Mentor denied his proposal. A timely appeal to the zoning board of appeals was taken in January of 2022 by Duncan in order to satisfy his finality requirement in accordance with McDonald v. County of Yolo et al. 477 U.S. at 340. This Court has made it clear that "Our cases uniformly reflect an insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it" (see page 351).

Furthermore, the McDonald Court at page 349 and 350 stated as follows; "until a property owner has obtained a final decision..... it is impossible to tell whether the land retains any reasonable beneficial use or whether existing expectation interests have been destroyed:" (p. 349); and a court cannot determine" whether a municipality has failed to provide 'just compensation' until it knows what, if any compensation the responsible administrative body intends to provide" (p. 350). The Mentor zoning board flatly denied his variance and offered no other options as a compromise!

Due to Mentors' denials of Duncans' proposed usage of his property, Duncan felt as was stated by Lucas v. South Carolina Coastal Council 505 U.S. 1003 that Mentor or the "state, by ipse dixit, may not transform private property into public property without compensation" (see page 1031). Similarly, Duncan felt as Lucas stated that Mentor "required

his land to be left substantially in its natural state-carrying the heightened risk that his private property was being pressed into some form of public service under the guise of mitigating serious public harm" (see page 1018). Also, see Justice Brennans dissent in *San Diego Gas and Electric v. San Diego* 450 U.S. 621 (1981) at page 652 where the City's objective was to have the property remain undisturbed to preserve scenic vistas.

Duncan was aware he could have had the variance denial administratively reviewed in an Ohio Revised Code action 2506.01 but he did not as he felt if he was successful in reversing the decision that damages or just compensation could not be awarded in such common pleas court action. This was because of a District Courts ruling in *Negin v. City of Mentor*, Ohio 601 F. Supp. 1502, which is fully discussed later herein.

Duncan believed he was entitled just compensation because this Court in *First English Evangelical Lutheran Church v. Los Angeles County* 482 U.S. 304 (1987) at p. 321 held that

"where the regulation has already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective".

Duncan felt the period commenced when the City of Mentor denied his houseboat permit and ended if and when the permit denial was revoked. See also Justice Brennans dissent in *San Diego Gas and Electric* (supra) at page 654;

"As soon as private property has been taken,

whether through formal condemnation proceedings, occupancy, physical invasion or regulation, the landowner has already suffered a constitutionality violation, and the self-executing character of the constitutional provision with respect to compensation..... is triggered.

Duncan did not resort to the ORC 2506 action also because of the holding in *Patsy v. Board of Regents of the State of Florida* 457 U.S.496 which stated, “exhaustion of state administrative remedies is not a pre-requisite to an action under Section 1983”. Thus, Duncan believed his constitutional rights under the takings clause needn’t wait on an Ohio court of common pleas review; to see if they agreed with Mentor’s application of their building and zoning regulations to Duncan’s property.

Therefore, Duncan filed an original mandamus action in Ohio’s 11th District Court of Appeals basing such on this Courts ruling in *Knick v. Township of Scott*, Docket 17-647 (2019) where footnotel stated “A property owner in Ohio who has suffered a taking without compensation must seek a writ of mandamus to compel the government to initiate condemnation proceedings. See *Doner v. Zody* 130 Ohio State 3d 446”, Ohio is the only state without an inverse condemnation action.

The 11th District dismissed the case stating that Duncan was required to seek the ORC 2506 action that Duncan chose not to pursue.

Upon appeal the Ohio Supreme Court affirmed stating “to be entitled to a writ of mandamus, Duncan must establish 1. a clear legal right to the requested

relief 2. a clear legal duty on the part of Mentor to provide it, and 3. the lack of an adequate remedy in the ordinary course of the law". The Ohio court claimed that Duncan had an adequate remedy in the ORC 2506 action ruling "if the court of common pleas had reversed the denial of the permit no taking would have occurred. (citing 2 earlier cases decided similarly). The Supreme Court failed to address any of Duncan's arguments as to why the appeals court was wrong!

Duncan argues herein in this writ that the Ohio Supreme Courts ruling is in error for the following 5 reasons;

1. a possible reversal of Duncan's permit denial in such an action does not erase that a taking ever occurred;
2. such a ORC 2506.01 action is not an adequate remedy in the ordinary course of the law because just compensation cannot be awarded therein;
3. such unnecessary judicial procedure of a ORC 2506 action is a similar violation like was committed in Williamson County RPC v. Hamilton Bank 473 U.S. 172 and overturned in Knick v. Township of Scott, docket No. 17 -647 (2019)."
4. Duncan feels the Ohio Supreme Court has erroneously adopted this procedure in Ohio for policy reasons only; as was similarly stated in Patsy v. Board of Regents 457 U.S. 496 contrary to the intent of the 5th Amendment.
5. Duncan feels the Ohio Supreme Court's ruling limits a litigants free choice to file its case in either Federal or State Court; thus they have concocted a

scheme which violates all of Ohio litigants rights who want to challenge a 5th amendment taking imposed by a government regulation. As noted above, Duncan's case was the 3rd case decided in such a way.

#### REASONS FOR GRANTING THE WRIT

I. THE OHIO SUPREME COURTS NEWLY ESTABLISHED EXHAUSTION OF ADMINISTRATIVE REMEDY AND RULING THAT 'IF THE COURT OF COMMON PLEAS HAD REVERSED THE DENIAL OF THE PERMIT NO TAKING WOULD HAVE OCCURRED" (IN A ORC 2506 ADMINISTRATIVE REVIEW) DIRECTLY CONFLICTS WITH THE RELEVANT DECISIONS OF THIS COURT IN FIRST ENGLISH LUTHERAN EVANGELICAL CHURCH V. LOS ANGELES COUNTY 482 U.S. 304; WHERE THIS COURT HAS MANDATED JUST COMPENSATION FOR TEMPORARY TAKINGS.

Duncan disagrees with Ohio Supreme Court (in which they cited Kerns v. Simmers 153 Ohio State 3d 103 (2018) because he believes even if the ORC 2506 court did reverse the denial of his permit, a temporary taking could have still occurred and is not nullified under the First English case(supra). Duncan will set forth several reasons why a taking cannot be erased by any court. For years under the traditional taking circumstances this Court has ruled that a government can take a private property on a temporary basis upon which just compensation is due(see U.S. v. General Motors Corp. 323 U.S. 373(1945)) However, when the case involves a more recent vintage regulatory case(as opposed to the physical or fee title taking), the First English case(supra) in 1987determined that takings

temporary in length can also occur necessitating just compensation.

The First English Court finally after 4 earlier attempts held "where a governments activities have already worked a taking of all use of the property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective". Invalidation of the ordinance without payment of fair value for the use of the property during such period would be a constitutionally insufficient remedy (see syllabus and page 314-322). Thus, under the precedent of First English (in that case the County burdened the church for over 6 years with regulations) the Ohio Courts have no legal authority or power to make a potential taking disappear, or as in the case herein to relieve Mentors' government of its harmful and wrongful act. Clearly, Duncan may be entitled to substantial just compensation from the time period the variance was denied by the Mentor zoning board of appeals until when a Court rules a taking has occurred. Duncan believes the Ohio Supreme Court's undisclosed true motive herein is to allow only invalidation (vs just compensation) as the remedy in a regulatory taking case in Ohio. This may be for convenience reasons or to lighten its load of original writ of mandamus actions. However, Justice Brennans dissent in the San Diego Gas and Electric case(*supra*) at page 655-656 stated as follows;

Invalidation unaccompanied by payment of damages would hardly compensate the landowner for any economic loss suffered during the time his property was taken. Moreover, mere invalidation would fall far short of fulfilling the fundamental purpose of the Just Compensation Clause".

Thus while the common pleas courts ruling in a ORC 2506 action may lead to Mentor ceasing to enforce its regulations, the courts role is not complete as it needs to address both stages of taking litigation; 1. whether a taking did occur? and 2. does just compensation need be awarded for a temporary taking?

Perhaps the Ohio Supreme Court is erroneously thinking that the ORC 2506.01 action is a continuation of the governments finality procedure as mandated by the case of McDonald v. Yolo County(supra) which needs to be addressed first prior to a taking action being filed. They may liken this court to being a super zoning board of appeals of Mentor! Such reasoning would be erroneous as the ORC 2506 action is judicial in nature and not administrative and it has limited powers as specified in its language. For example, that court could not give back rights to Duncan in return or make conditions on the allowance of his houseboat. Mentor was given plenty of chances to compromise with Duncan but flatly refused to do so! Mentor was the only body empowered to decide what was best for their city and neighborhood.

Even assuming the Ohio common pleas court somehow had the authority to wipe out a potential taking finding, this Supreme Court has stated that State Courts should be restrained from interfering with individuals' basic constitutional rights. In Patsy v. Board of Regents (supra) this Court on page 502-3 emphasized that exhaustion of administrative remedies by States should not be judicially imposed as follows;

“During that time the Federal Government was clearly established as a guarantor of the basic

federal rights of individuals against incursions by state power. As we recognized in Mitchum the very purpose of Section 1983 was to interpose the federal courts between the states and the people, as guardians of the people's federal rights- to protect the people from unconstitutional action under color of state law, whether that action be executive, legislative, or judicial.

The Ohio Supreme Courts specific ruling that if the court "had reversed the denial of the permit no taking would have occurred" can also be seen to be erroneous from examining the recent Supreme Court case of Knick v. Township of Scott, Docket 17-647. On page 11 of its ruling, it stated;

"A later payment of compensation may remedy the constitutional violation that occurred at the time of the taking, but that does not mean the violation never took place. The violation is the only reason compensation was owed in the first place. A bank robber might give the loot back, but he still robbed the bank."

Likewise, as herein in Duncan's case, the Ohio Supreme Court cannot nullify that a taking ever took place by merely reversing the denial of the permit.

**II. THE OHIO SUPREME COURT RULING  
ESTABLISHING A NEW EXHAUSTION  
OF ADMINISTRATIVE REMEDY AND ITS  
JUSTIFICATION THEREOF, IS ERRONEOUS  
BECAUSE IT CONFLICTS WITH THE CASE OF  
NEGIN V. CITY OF MENTOR, OHIO 601 F. SUPP  
1502 WHICH RULED "SECTION 2506.01 DOES  
NOT EMPOWER STATE COURTS TO AWARD  
DAMAGES FOR INJURIES SUFFERED AS A**

RESULT OF ERRONEOUS ADMINISTRATIVE DECISIONS", THEREFORE THAT COMMON PLEAS COURT DIDN'T PROVIDE AN ADEQUATE REMEDY AT LAW WHICH COULD HAVE PROVIDED "COMPLETE, BENEFICIAL, AND SPEEDY RELIEF; THEREFORE DUNCAN PROPERLY FILED HIS ORIGINAL MANDAMUS IN OHIO'S 11TH DISTRICT COURT OF APPEALS.

The language of ORC 2506.01 states that it can be utilized to decide whether an administrative bodies decision was "unconstitutional, illegal, arbitrary, capricious, unreasonable or unsupported by the preponderance of substantial, reliable and probative evidence on the whole record (ORC 2506.04)." Thus, the common pleas court could make any of the above findings and reverse the administrative order being reviewed as a remedial measure or remedy.

However, nowhere in the language of ORC 2506 does it specify what the Ohio Supreme Court ruled that; "if the court of common pleas had reversed Mentor's denial of the permit" that a taking would be erased as if it never happened. Furthermore, the case of Negin vs. City of Mentor Ohio 601 F. Supp 1502 ruled that;

"Section 2506.01 does not empower state courts to award damages for injuries as a result of erroneous administrative decisions".

So even assuming that the Ohio Supreme Court did rule a taking could have occurred in a ORC2506 action, such a procedure has no authority to complete the just compensation stage of the5th Amendment clause.

Therefore, contrary to what the Ohio Supreme

Court ruled in its 11th paragraph in its order, Duncan did not have "an adequate legal remedy" in the ordinary course of law which precluded his writ of mandamus action. If there is a taking herein, Duncan must be awarded some compensation by a court empowered to grant it. The most the common pleas court could do is to persuade Mentor's to stop enforcing its ruling which would constitute the period end date that Duncan would be entitled to just compensation for his temporary taking under First English. Thus, the most the common pleas court can do under ORC 2506 is to prevent a permanent taking by Mentor and to turn it into a temporary taking. Thus, the third element of Ohio's writ of mandamus law was met by Duncan as the Ohio court of common pleas cannot provide "complete, beneficial and speedy relief". A subsequent judicial action would have to be filed in order for Duncan to recover his due just compensation (also see State, ex rel. Fenske v. McGovern (1984), 11 Ohio St. 3d 129, paragraph 2 of the syllabus "writ should not be denied due to the availability of a declaratory judgment action where the action would require ancillary relief in the nature of a mandatory injunction to be complete".

III. THE OHIO SUPREME COURTS RULING  
ESTABLISHING A NEW EXHAUSTION  
OF ADMINISTRATIVE REMEDY AND ITS  
JUSTIFICATION THEREOF, IS ERRONEOUS  
BECAUSE IT CREATES A SITUATION  
ANALOGOUS TO THE FLAWED REASONING AS  
IN WILLIAMSON COUNTY V. HAMILTON BANK  
473 U.S. 172 WHICH WAS CORRECTED BY THIS  
COURT IN KNICK V. TOWNSHIP OF SCOTT PA  
DOCKET NO. 17-647.

In this case the Ohio Supreme Court has

erroneously established an extra administrative remedy requirement that Duncan needed to pursue prior to or in lieu of his "taking without just compensation cause of action" being heard in the typical inverse condemnation action (Ohio is the only state that demands such must be done in a writ of mandamus). Duncan believes this concocted scheme potentially leads to multiple issues as discussed herein and in the next or 4th question for review. Duncan believes this invented erroneous procedure can lead to similar problems which arose in the case of Williamson County (supra) which this Court overruled itself in Knick v. Township of Scott (supra). At page 12 of Knick v. Township of Scott this Court stated as follows;

"Williamson County effectively established an exhaustion requirement for Section 1983 takings claims when it held that a property owner must pursue state procedures for obtaining compensation before bringing a federal suit".

However, this Court found after many years that such requirement resulted in an unanticipated bar or preclusion trap of San Remo Hotel L.P. v. City and County of San Francisco 545 U.S. 323.

Likewise, Duncan believes in this case similar problems exist. The Ohio Supreme Court stated "Duncan could have appealed the zoning board's decision to the court of common pleas.....if the court of common pleas had reversed the denial of the permit "no taking would have occurred" (page 5 paragraph 11). Thus, the logic of this court is that Duncan's taking claim is premature and is capable of being mooted or nullified. However, in the case of Knick v. Township of Scott (supra) this Court stated that a taking claim

cannot be premature until the litigant has availed of the exhaustion procedure. This Court stated;

“Williamson County also relied on Monsanto when it analogized its new state litigation requirement to federal takings practice, stating that ‘takings claims against the Federal Government are premature until the property owner has availed itself of the process provided by the Tucker Act’. 473 U.S. at 195. But the court was simply confused. A claim for just compensation brought under the Tucker Act is not a prerequisite to a Fifth Amendment takings claim- it is a Fifth Amendment takings claim. A party who loses a Tucker Act suit has nowhere else to go to seek compensation for an alleged taking” (at page 13).

The Ohio Supreme Court herein is similarly confused as was in the Monsanto Court, because Duncan’s taking claim for just compensation which he filed in the Ohio Appellate Court need not be first addressed in a ORC 2506 action, IT IS A FIFTH AMENDMENT TAKINGS CLAIM! The City of Mentor has already decided the crucial issue that they will not give back anything to Duncan in just compensation when they denied the permit and the variances in January of 2022. Duncan doesn’t deny that Mentor has the police power and eminent domain power to interfere with Duncan’s private property, but if and when they do so, the Constitution of the U.S. and the State of Ohio demand that Mentor must contemporaneously provide just compensation and it is due at that time. The Constitutions do not say to first ask the common pleas court to perhaps review and modify it! It also doesn’t say to ask Mentor to reconsider its decision. The Fifth Amendment clause was designed to protect individuals from government

interference by triggering a direct judicial filing to seek compensation which is just. Duncan fears getting any type of ruling in an ORC 2506 action will lead to res judicata or collateral estoppel issues or bars (like in San Remo), if he thereafter tries to file his writ of mandamus for a taking in Ohio or a Federal USC Section 1983 action.

IV. THE OHIO SUPREME COURTS RULING  
ESTABLISHING A NEW EXHAUSTION  
OF ADMINISTRATIVE REMEDY AND ITS  
JUSTIFICATION THEREOF, IS ERRONEOUS  
BECAUSE IT APPARENTLY WAS ADOPTED  
SOLELY FOR POLICY CONSIDERATIONS  
WHICH POTENTIALLY LEADS TO COSTLY  
REMEDY AND COURT BURDENING LITIGATION  
INCONSISTENT WITH THE CONSTITUTIONS  
INTENT OF THE 5TH AMENDMENT.

Duncan believes the Ohio Supreme Court adopted the procedure for solely policy considerations. Specifically, Duncan believes the Court does not wish to entertain in Ohio the issue of awarding just compensation for regulatory takings. However, in *Patsy vs Board of Regents* 457 U.S. 496, this Court stated on page 513 as follows; "As we noted earlier, policy considerations alone cannot justify judicially imposed exhaustion unless exhaustion is consistent with congressional intent". This Court on page 514 listed several issues which could arise such as tolling requirements or time limitations or res judicata or collateral estoppel as follows;

"These and similar questions might be answered swiftly and surely by legislation, but would create costly, remedy-delaying, and court burdening litigation if answered incrementally by the

judiciary in the context of diverse constitutional claims relating to thousands of different state agencies.”

The error committed by the Ohio Supreme Court here is that if the zoning board of appeals committed a taking in its final decision, they hope the ORC 2506 court will reverse Duncan’s permit denial and dissipate that the taking ever happened and eliminate any need for just compensation. However, such reason is clearly inconsistent with the constitutions intent, that which is to restore litigants of the value of their property which was lost during the period from the enforcement of the wrongful interference until it is rescinded(as described in First English).Furthermore, as was argued in the earlier question, even if Duncan was able to get a ruling stating there was a taking by the court of common pleas court in a ORC 2506 action, he would not be able to get just compensation from that court as stated by the Negin v. City of Mentor case. That is also inconsistent with the constitutional intent of the 5th amendment. As argued in the 3rd question for review, if Duncan then had to refile his writ of mandamus all sorts of preclusion and res judicata issues could arise such as did in the San Remo Hotel Case(supra).

In conclusion, the Ohio Supreme Courts ruling based on policy considerations directly violates the 5th Amendments constitutional intent as it precludes a taking trial and the chance to obtain just compensation. It is clear that the writ of mandamus action like Duncan did file is the proper procedure to eliminate multiple issues.

## V. THE OHIO SUPREME COURTS RULING ESTABLISHING A NEW EXHAUSTION

OF ADMINISTRATIVE REMEDY AND ITS JUSTIFICATION THEREOF, IS ERRONEOUS BECAUSE IT RESULTS IN UNDESIRABLE RESULTS IN THAT IT FORCES OHIO LITIGANTS TO FOR GO THEIR CONCURRENT JURISDICTION CHOICE OF EITHER FEDERAL OR STATE COURTS BECAUSE FILING IN STATE COURTS RESULTS IN A DEAD-END PATH.

It is clear law that Federal and State 5th Amendments claims can be pursued in the Federal or the State court systems. Due to the finality ruling in McDonald v. Yolo County, regulatory takings cases must first obtain a final decision from the government agency that is enforcing an interference alleged by the private property owner. Now due to the Ohio Supreme Courts' ruling in this case, prior to filing a takings claim, after an adverse ruling from the government agency; you must first of all file a ORC 2506 action too see if the state common pleas Judge will reverse the denial of the permit. If it does reverse the denial in your favor, Ohio's high court now says the taking disappears as if it never occurred. As was discussed earlier, because Ohio is the only state in the nation to not have an inverse condemnation action (see Doner vs Zody, *supra*) a writ of mandamus is thus needed to seek an Ohio regulatory taking case. But now a catch 22 situation exists because as the Ohio Supreme Court ruled, the 3rd element of a writ of mandamus can never be met (due to the ORC2506 being wrongfully ruled an adequate remedy)

Consequently, in Ohio future regulatory takings litigants, after the finality decision, have no chance to ever recover just compensation on a takings claim. Therefore, they have no other option but to avoid the

state courts to avert this dead-end path. The only chance now left is to file a Section 1983 case in Federal Court and hope that the courts will not redirect the case back to state court as occurred in Williamson County v. Hamilton Bank 473 U.S. 172.

Such would clearly be wrong as this Court in the case of *Patsy v. Florida Board of Regents* 457 U.S. 496 detailed at length at page 503 to 506 that the "Federal Government was clearly established as a guarantor of the basic federal rights of individuals against incursions by state power". Consequently, such an Ohio Supreme Court ruling is wrong because it forces litigants to forgo a free choice on what concurrent court system they wish to file therein.

## CONCLUSION

In Justice Brennans dissent at page 660 in San Diego Gas and Electric v. San Diego 450U.S. 621(1981) he stated as follows;

"It should be noted that the Constitution does not embody any specific procedure or form of remedy that the States must adopt; The Fifth Amendment expresses a principle of fairness and not a technical rule of procedure enshrining old or new niceties regarding-causes of actions-when they are born, whether they proliferate, and when they die..... The States should be free to experiment in the implementation of this rule, provided that their chosen procedures and remedies comport with the fundamental constitutional command. ....

The only constitutional requirement is that the landowner must be able meaningfully to challenge a regulation that allegedly effects a taking and recover just compensation if it does so. **EMPHASIS ADDED.** He may not be forced to resort to piecemeal litigation or otherwise unfair procedures in order to receive his due. See U.S. vs. Dickinson, 331 U.S. at 748.

From reviewing Duncan's (5) questions for review herein, it is clear the Ohio Supreme Court's ruling in Duncan's case devises a method by which the just compensation clause is circumvented and violated and is fraught with potential issues.

Thus as was emphasized in this Courts decision in North Dakota Board of Pharmacy v. Snyders Drug Stores, Inc. 414 U.S. 156; is that a takings claim

involves a two stage process (2 steps). At page 163 this Court stated "the federal constitutional question embraces not only a taking but a taking on payment on payment of just compensation".

Historically, despite this clear law, governments have unsuccessfully tried to; argue that a police power regulation could not constitute a taking, and that; even if regulations have been held to commit a taking, invalidation is the only remedy and not the payment of money or just compensation.

However, ultimately all of such arguments have failed.

Now herein this case the Ohio Supreme Court has cleverly and in an innovative fashion has chosen to take another" bite at the apple" by devising a scheme in order to continue governments' attempt to deny just compensation to private property owners. From reviewing the 5 above presented questions it is clear that the Ohio Supreme Court wishes to do this by directing all potential regulatory takings claims in Ohio to the ORC 2506 procedure; and if it appears a reversal of the administrative boards' is justified(if a taking has or may have occurred),they (by way of this Judge made law) nullify that a taking ever occurred in order to avoid payment of the constitution's required just compensation. On page 5 paragraph 11 of the Ohio Supreme Courts decision they erroneously claim Duncan "had the ability to obtain complete relief, ie. to avoid the alleged taking and any need for appropriation proceedings".

However, as this writ has proven such violates this Courts interpretation of the Constitution and

needs to be overruled because takings committed need to be remedied by compensation and not merely an invalidation of the injurious regulation(s) under a cleverly devised method.

Duncan respectfully requests this Honorable Court to review this case and to reverse their ruling.

Respectfully submitted,

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