PACIFIC LEGAL FOUNDATION

January 11, 2019

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:

NOTICE OF SUPPLEMENTAL AUTHORITY

Petitioner (Ms. Knick) submits this notice of supplemental authority.

On January 10, 2019, the Sixth Circuit issued its decision in *Lumbard v. City of Ann Arbor*, No. 18-1258, __ F.3d__, 2019 WL 150856. Judge Kethledge, joined by Judge Cook, issued a concurring opinion reviewing and criticizing *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 192-94 (1985).

In *Lumbard*, property owners filed claims "in Michigan state courts alleging that the City's actions amounted to a taking without just compensation under the Michigan Constitution." *Lumbard*, 2019 WL 150856, at *1. The property owners attempted to preserve their federal Fifth Amendment and Section 1983 takings claims for subsequent adjudication in federal court. *Id.* After the property owners lost their state court case, they filed their federal claims in federal court. *Id.* But the Sixth Circuit held that both claims were precluded by the Full Faith and Credit Statute, 28 U.S.C. § 1738. *Id.* at *4 (citing *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005)).

In a concurring opinion, Judge Kethledge (joined by Judge Cook) explained that *Williamson County* relies on the faulty "premise" that a "lawsuit" can serve as a "state's procedure for providing 'just compensation.'" *Id.* at *5. That premise is inconsistent, he says, with the language of the Takings Clause:

> [T]he Takings Clause does not say that private property shall not "be taken for public use, without just compensation, and without remedy in state court." Instead the Clause says that private property shall not "be taken for public use, without just compensation" *period*. U.S. Const. Amend. V. And that plainly means that, if the taking has happened and the compensation has not, the property owner *already* has a

> constitutional entitlement to relief. Whether a local planning commission or the state courts have recognized that entitlement is beside the point for purposes of whether the constitutional entitlement exists. That is why pre-judgment interest on a federal takings claim runs from the date the property was taken, not from some later date on which a state court denied relief.

Id. (citation omitted).

Judge Kethledge's concurring opinion noted the "unintended consequences" caused by *Williamson County*. *Lumbard*, 2019 WL 150856, at *4. Namely, *Williamson County*'s state litigation requirement, which was created in dictum, *id.*, "turns away from federal court constitutional claimants who have every right to seek relief there. And in doing so *Williamson County* leaves those claimants without any federal forum at all." *Id*. at *5.

Judge Kethledge's concurring opinion also observes:

> [T]his case and others illustrate, *Williamson County* has left the lower federal courts with plenty to do in cases where plaintiffs seek to assert federal takings claims against state or local defendants. Rather than actually adjudicate those claims, however, we adjudicate federal-court esoterica: things like *Pullman* abstention, the scope of state jurisdictional and venue provisions, the efficacy of so-called "*England* reservations," and whether state law disfavors the adjudication of federal takings claims in violation of *Haywood v. Drown*, 556 U.S. 729, 129 S.Ct. 2108, 173 L.Ed.2d 920 (2009).

Id.

Judge Kethledge's concurrence concludes that "Congress has given us jurisdiction to hear these takings claims. Our constitutional order would be better served, I respectfully suggest, if we simply adjudicated them." *Id.*

Respectfully submitted,

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