No. _____

**In the**
# Supreme Court of the United States

DOWNING/SALT POND PARTNERS, L.P.,

*Petitioner,*

v.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS, ET AL.,

*Respondents.*

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the First Circuit

## PETITION FOR WRIT OF CERTIORARI


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## QUESTIONS PRESENTED

Does the ripeness doctrine of *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194 (1985), require a property owner to litigate in state court to show a taking of property is "without just compensation," and thus, ripe for federal review, if it is already clear that the agency causing the taking has no plan or intent to compensate, and where requiring an additional step of state court litigation:

(1) divests federal courts of all jurisdiction over ripe federal takings claims,

(2) bars federal jurisdiction over traditional federal due process and equal protection property rights violations,

(3) often forecloses all judicial review (state and federal) of takings claims because defendants can remove state-court takings claims to a federal forum that cannot hear them, and

(4) is unnecessary for ripeness in this situation, and was criticized by four Justices in *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323, 350-52 (2005)?

## LIST OF ALL PARTIES

DOWNING/SALT POND PARTNERS, L.P.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS, ex rel. FRANK T. CAPRIO, General Treasurer

COASTAL RESOURCES MANAGEMENT COUNCIL

MICHAEL TIKOIAN, in his capacity as Chair of the Coastal Resources Management Council

GROVER J. FUGATE, in his capacity as Executive Director of the Coastal Resources Council

RHODE ISLAND HISTORICAL PRESERVATION AND HERITAGE COMMISSION

EDWARD F, SANDERSON, in his capacity as Executive Director of the Rhode Island Historical and Preservation Commission

## CORPORATE DISCLOSURE STATEMENT

Downing/Salt Pond Partners, L.P., has no parent corporation and no publicly held company owns 10% or more of the corporation's stock.

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## PETITION FOR WRIT OF CERTIORARI

Petitioner Downing/Salt Pond Partners, L.P., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

## OPINIONS BELOW

The opinion of the First Circuit Court of Appeals was originally issued on May 23, 2011, and corrected on June 6, 2011. It is published at 643 F.3d 16 (1st Cir. 2011). The opinion is attached here as Appendix A.

The opinion of the district court was issued on March 26, 2010. It is published at 698 F. Supp. 2d 278 (D.R.I. 2010). The opinion is attached here as Appendix B.

## JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1331, 42 U.S.C.§ 1983 and the Fifth Amendment to the United States Constitution. This Court has specific appellate jurisdiction under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS AT ISSUE

The Fifth Amendment to the United States Constitution provides, in pertinent part, "nor shall

private property be taken for public use without just compensation."

## STATEMENT OF THE CASE

This case challenges the doctrine, arising from *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194 (1985), that a private property owner must sue in state court to "ripen" a claim of a violation of the federal Takings Clause in federal court. This rule is one of the most heavily criticized in all of the Court's constitutional jurisprudence. Four justices of this Court have called it "mistaken." *San Remo Hotel v. City and County of San Francisco*, 545 U.S. 323, 350-52 (2005) (Rehnquist, C.J., concurring). Lower courts have expressed frustration and confusion with the rule.[1] Commentators from all perspectives have denounced it, each vying to come up with the most colorful way to express their disdain.[2]

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[1] *Kottschade v. City of Rochester*, 319 F.3d 1038 (8th Cir. 2003); *Del-Prairie Stock Farm, Inc. v. County of Walworth*, 572 F. Supp. 2d 1031, 1033 (E.D. Wis. 2008); *Yamagiwa v. City of Half Moon Bay*, 523 F. Supp. 2d 1036, 1110 (N.D. Cal. 2007) (expressing frustration at interaction of *Williamson County* ripeness and removal doctrine and stating " If there were 'an appropriate case' to 'reconsider' *Williamson County* . . . this is such a case.").

[2] *See* James W. Ely, Jr., *"Poor Relation" Once More: The Supreme Court and the Vanishing Rights of Property Owners*, 2005 CATO Sup. Ct. Rev. 39-66 (Mark K. Moller ed. 2005); Thomas E. Roberts, *Ripeness and Forum Selection in Fifth Amendment Takings Litigation*, 11 J. Land Use & Envtl. L. 37, 71 (1995) ("One understandable reaction to the prong two [state compensation procedures] requirement . . . is that it perpetrates a fraud or hoax on landowners. The courts say: "Your suit is not ripe until you seek compensation from the state courts," but when the landowner does these things, the court says: "Ha ha, now it is too late.") (continued...)

There is good reason for this almost universal criticism. *Williamson County*'s state compensation procedures requirement is called a "ripeness" rule, but it ripens nothing. Once a plaintiff seeks compensation in state court, the federal review promised by *Williamson County* vanishes due to res judicata principles. *DLX, Inc. v. Kentucky*, 381 F.3d 511, 520-21 (6th Cir. 2004). And while *Williamson County*'s ripeness doctrine is designed to only apply to Fifth Amendment takings claims invoking the Just Compensation Clause, 473 U.S. at 194-95, it has evolved to bar federal review of procedural due process and equal protection claims that have nothing to do with the Just Compensation Clause.

The logic behind the state litigation rule is misguided. It is said to be based on the idea that a

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[2] (...continued)
Michael M. Berger, *Supreme Bait & Switch: The Ripeness Ruse in Regulatory Takings*, 3 Wash. U. J. L. & Pol'y. 99, 102 (2000) (describing the state procedures rule as applied by lower courts as "bizarre" and not "what the *Williamson County* court intended because it is inherently nonsensical and self-stultifying"); Gregory Overstreet, *Update on the Continuing and Dramatic Effect of the Ripeness Doctrine on Federal Land Use Litigation*, 20 Zoning & Plan. L. Rep. 17, 27 (1997) (state procedures requirement has "dramatic" and "absurd" application); Peter A. Buchsbaum, *Should Land Use Be Different? Reflection on* Williamson County Regional Planning Board v. Hamilton Bank*, Taking Sides on Takings Issues*, 473-74 (Roberts ed. 2002) ("[T]his underlying premise [that the government has not acted] illegally until you ask for compensation and then it is denied is, of course, untrue."); Scott A. Keller, *Judicial Jurisdiction Stripping Masquerading as Ripeness: Eliminating the Williamson County State Litigation Requirement for Regulatory Takings Claims*, 85 Tex. L. Rev. 199, 240 (2006) ("The Supreme Court has stated that the Takings Clause of the Fifth Amendment should not be 'relegated' to a status below that of other provisions of the Bill of Rights. Yet, the *Williamson County* State Litigation prong does just that.").

constitutional takings violation does not exist for federal review until just compensation is absent. But this does not explain why it takes a state court ruling to ascertain the absence of compensation. Nor is the conclusion that federal courts must wait for state courts to deny compensation compatible with the Court's characterization of the Fifth Amendment as a "self-executing" damages remedy, or the general rule that state court remedies are irrelevant to 42 U.S.C. § 1983 suits. *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.").

That state courts are available and institutionally competent to handle takings claims cannot bridge the gap. After all, this observation would relegate all federal constitutional claims arising from local policies to state courts. But this idea has no support. *Alabama Pub. Serv. Comm'n v. Southern Ry. Co.*, 341 U.S. 341, 361 (1951) (Frankfurter J., concurring) ("it was never a doctrine of equity that a federal court should exercise its judicial discretion to dismiss a suit simply because a State court could entertain it"). Moreover, the assumption that state courts are open to federal takings claims is simply not true in many cases. Instead, defendants often use their removal rights to take unripe takings claims out of state court and to federal courts, and then get the claims dismissed under *Williamson County* due to incomplete state court litigation. *See, e.g., Kunzelman v. City of Scottsdale*, No. CV-10-0056, 2011 U.S. Dist. LEXIS 89179 (D. Az. Aug. 10, 2011) (dismissing takings claim removed from state court for lack of state court litigation after several years of litigation on merits).

All of this is unnecessary. A taking of property can be held to be "without just compensation," and ripe, without state court action, when the plaintiff unsuccessfully pursues compensation at the *administrative* level. *See, e.g., Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1018, n.21 (1984). This construction fulfills *Williamson County*'s ripeness doctrine and, because it does not mandate a state court action, alleviates all the collateral jurisdictional damage caused by a state litigation ripeness rule. Of course, other jurisprudential doctrines, like the "final agency decision" ripeness requirement, may inhibit federal oversight of takings claims. *San Remo Hotel*, 545 U.S. at 346-47. But lack of state court compensation litigation alone should be no barrier when it is otherwise clear, through administrative processes, that the taking is going uncompensated. 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.").

This is the "appropriate case" to address and remedy the "state litigation" understanding of *Williamson County*. The takings claim here is against a State that has steadfastly refused to provide or recognize the plaintiff's right to compensation, even after Plaintiff Downing specifically requested that remedy at the administrative level. *See* App. 20. Why does Downing have to go to state court to prove that the State of Rhode Island's taking is without just compensation when its actions already make this clear? Further, the only issue addressed by the court

below, and the only basis for dismissal of Downing's claim from federal court, is the state litigation ripeness rule. The issue is therefore squarely and cleanly presented. It is time for the Court to tackle it. *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 531 (2005) (reconsidering a takings rule after twenty-five years of application).

## FACTS AND PROCEDURE

### A. Facts

In the early 1990s, Downing sought and secured a land use permit, called an Assent, from the Rhode Island Coastal Resources Management Council (CRMC). Appendix (App.) A-3. The Assent allowed Downing to build homes on seventy-nine lots of land it owns in Narragansett, Rhode Island. The Assent contained a number of conditions, but did not require Downing to engage in any archaeological studies or mitigation. App. A-4. Between 1992 and 2007, Downing developed twenty-six of the planned seventy-nine lots in the subdivision. App. A-3-4. It also built the infrastructure—such as roads and sewer lines—necessary to build out the remaining lots. App. A-4.

In 2007, another state agency, the Rhode Island Historic Preservation and Heritage Commission (HPHC) became interested in the site after artifacts were found in the course of the prior development. App. A-4. The HPHC concluded the undeveloped land should be preserved due to its potential archaeological value. The agency made plans to acquire the site, and encouraged the CRMC to revoke Downing's permit. *Id.*

Soon after, CRMC sent Downing a letter stating that the Assent was valid, "pending a determination on

the issues raised by the Historic Preservation And Heritage Commission." *Id*. at A-4. HPHC continued to recommend to the CRMC that it prohibit Downing's development or require Downing to agree to a "complete archaeological data recovery" project. App. A-5. This new condition would have cost Downing $6 million, thus making the entire project economically infeasible. *Id*.

Downing then engaged in informal discussions with the CRMC, but could not resolve the impasse. *Id*. On August 21, 2008, Downing formally requested that the CRMC hold a hearing on the matter. *Id*. Downing received no response. Several months later, Downing submitted a memorandum to the CRMC arguing that frustration of Downing's development permit would entitle it to just compensation. *Id.*; *see also* App. D -20 (excerpts from memorandum).

Several months after that, Downing formally notified the HPHC that it would resume construction under its existing permits absent some response or hearing from the agencies. App. A-5. Downing received no official response.

On June 27, 2009, Downing resumed construction. App. A-6. The same day, the CRMC issued a cease and desist order. *Id*. The order was not appealable and did not specify how Downing's conduct violated its permits. *Id.*; *see also* App. C-3. Nevertheless, Downing again formally requested a hearing before the CRMC, this time to contest the cease and desist order. *Id*. at A-6. But again, it failed to receive a timely response. *Id*. Therefore, on August 24, 2009, Downing filed a complaint in federal court alleging that the State of Rhode Island, the CRMC, and the HPHC had taken its

property for public use without just compensation, in violation of the federal and state constitutions. *Id.*[3]

**B. Procedure**

In the district court, Rhode Island moved to dismiss the case on the ground that Downing's takings claims were unripe because Downing had not obtained a "final agency decision" or sought just compensation in state court, as purportedly required by *Williamson County*. App. A-7. The district court did not address the final agency decision ripeness issue, holding only that Downing's federal takings claim was unripe and had to be dismissed for failure to comply with *Williamson County*'s state action requirement. App. C-6, 22. The district court held that Downing's other (nontakings) claims were also subject to, and unripe under, the state litigation prerequisite. App. C-23-27.

On appeal, the First Circuit Court of Appeals affirmed the district court on the sole ground that Downing's failure to resort to state court litigation rendered its claim unripe in federal court.[4] The Court of Appeals reasoned that *Williamson County* held "there is no uncompensated taking," and therefore nothing to litigate in federal court, "until the state has established (a) what it has taken, and (b) its refusal to pay 'just compensation.'" App. A-9. The Court concluded that takings claimants must to go to state court to satisfy the second ripeness issue; *i.e.*, to establish a lack of compensation for the taking. App. A-9-10.

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[3] Subsequently, the CRMC held hearings on Downing's appeal of the cease and desist order. Those hearings have not yet resulted in any conclusive determination, and the order stands at this time.

[4] The First Circuit did not express any opinion on the "final agency decision" ripeness requirement.

In so doing, the First Circuit acknowledged the controversy surrounding *Williamson County*'s state procedures ripeness doctrine. It noted that "[u]nder the *Williamson County* ripeness rules a plaintiff might be precluded from ever bringing a takings claim in federal court if the substance of the federal claim is litigated in state court," *id.* at A-11, and that this Court has "refused to create an exception from ordinary preclusion rules . . . whenever "a case is forced into state court by the ripeness rule of *Williamson County*." *Id* (quoting *San Remo Hotel*, 545 U.S. at 342).

The Court of Appeals also took note of "Chief Justice Rehnquist's concurrence in *San Remo Hotel* encouraging the Court to reconsider the [state litigation] rule." *Id.* at A-11-12. The lower court stated:

> Chief Justice Rehnquist explained that since joining the *Williamson County* majority, he had come to think that "the justifications for [the] state-litigation requirement are suspect, while its impact on takings plaintiffs is dramatic" in that they are often entirely precluded from a federal forum for their federal takings claims. He acknowledged that no party or court had addressed the requirement's validity in *San Remo Hotel*, but he invited the Court to reconsider in an appropriate case in the future.

App. A-12, n.6 (quoting *San Remo*, 545 U.S. at 352). The First Circuit also acknowledged Justice Kennedy's reference to the potential reconsideration of *Williamson County* in his concurrence in *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 130 S. Ct. 2592, 2618 (2010) (Kennedy, J., concurring

in part and concurring in the judgment). *See* App. A-12, n.7.

Despite this, the First Circuit Court of Appeals emphasized that this Court has not in fact overruled or modified *Williamson County*. *Id.* at A-12. It therefore applied that decision to require Downing to utilize available state court procedures, to ripen its takings claim. *Id.* at A-3,18. Ultimately, the First Circuit held that Rhode Island provided an adequate state court inverse condemnation procedure and that Downing's failure to use it rendered its takings claims unripe. *Id.* at A-3, 25.

Downing now petitions this Court.

## REASONS FOR GRANTING THE WRIT

## THIS CASE RAISES AN IMPORTANT QUESTION AS TO WHETHER STATE COURT LITIGATION IS NECESSARY TO SHOW THAT A TAKING IS "WITHOUT JUST COMPENSATION" AND THUS RIPE, EVEN IF IT IS ALREADY CLEAR THE DEFENDANT HAS NO ADMINISTRATIVE PLAN TO COMPENSATE, AND WHERE REQUIRING STATE LITIGATION SEVERELY DAMAGES CONSTITUTIONAL PROPERTY RIGHTS JURISDICTION

### A. The "State Procedures" Requirement

Since this petition questions *Williamson County*'s ripeness doctrine, it is useful to briefly review the

pertinent portions of that decision. *Williamson County* involved a regulatory takings claim based on the adverse economic effect of a land use regulation. 473 U.S. at 174. The Court decided the case raised ripeness issues. *Id.* It initially ruled that the claimant had to obtain a final agency decision on application of the suspect land use regulations before the claim was fit for review. *Id.* at 188-90. It held that the property owner had not satisfied this requirement. Although this ruling effectively decided the case, the Court went on to articulate a second ripeness barrier. *Williamson County* specifically held that a property owner also had to unsuccessfully seek and be denied just compensation through state procedures to ripen a claim for federal review. 473 U.S. at 194, 197.

In the decades since *Williamson County*, courts have construed its "state procedures" requirement to compel a would-be federal takings plaintiff to sue for compensation in state court to ripen a federal takings claim. The "state procedures" rule has become the "state litigation" requirement. *See San Remo Hotel*, 545 U.S. at 350-52 (Rehnquist, C.J., concurring). As the following shows, this construction of *Williamson County* causes severe disfunction in court jurisdiction over federal property rights claims, without any compelling basis in *Williamson County* or other precedent, all of which justifies review.

### B. Requiring State Court Litigation Forecloses Federal Jurisdiction over Federal Property Rights Claims, Contrary to All Existing Precedent

Reading *Williamson County* to require "that a federal takings plaintiff must first litigate its claim in state court has led to a number of serious problems."

*Del-Prairie Stock Farm*, 572 F. Supp. 2d at 1033. All of these warrant review.

### 1. The State Litigation Ripeness Rule Strips Federal Courts of Congressionally Granted Jurisdiction over Takings Claims

The most well-known problem arising from *Williamson County*'s state procedures requirement is its practical effect in foreclosing federal jurisdiction over ripe taking claims. The problem arises from the interaction of a state court ripeness rule and the Full Faith and Credit Act, 28 U.S.C § 1738. The Act requires, of course, that federal courts apply res judicata rules barring relitigation of any claim or issue that was or could have been litigated in a prior suit. *See Allen v. McCurry*, 449 U.S. 90, 94 (1980) (describing res judicata at the federal court level).

This produces a catch-22 for takings plaintiffs who are required to litigate in state court in order to supposedly ripen their federal takings claim for federal review.

As one court explained:

> *Williamson* and its progeny place Plaintiffs in a precarious situation. Plaintiffs must seek redress from the State court before their federal taking claims ripen, and failure to do so will result in dismissal by the federal court. However, once having gone through the State court system, plaintiffs who then try to have their federal claims adjudicated in a federal forum face, in many cases, potential preclusion defenses. This appears to preclude completely litigants such as those

> in the case at bar from bringing federal taking claims in a federal forum.

*W.J.F. Realty Corp. v. Town of Southampton*, 220 F. Supp. 2d 140, 146 (E.D.N.Y. 2002); *see also DLX, Inc.*, 381 F.3d at 520-21.

Thus, unsuccessful state court compensation litigation has no ripening effect; it only ensures the federal court cannot hear the ripe takings claim. *See id.; see also Rockstead v. City of Crystal Lake*, 486 F.3d 963, 968 (7th Cir. 2007).

In the 2005 *San Remo Hotel* decision, this Court rejected judicial efforts to except state court-ripened takings claims from the res judicata barrier. 545 U.S. at 338, 344-45. In so doing, four justices criticized *Williamson County*, *id.* at 348-52 (Rehnquist, C.J., concurring), but the Court did not alter or modify that decision. As a consequence, *Williamson County* continues to advertise a state court path to ripen takings claims for federal review, even though this path leads nowhere. It only destroys federal jurisdiction over such claims.[5]

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[5] After *San Remo*, federal courts—often in the same circuit—continue to issue explicitly contradictory instructions on the availability of federal jurisdiction over takings claims. *Compare Braun v. Ann Arbor Charter Twp.*, 519 F.3d 564, 569 (6th Cir. 2008) ("in order for a plaintiff to bring a takings claim in federal court, he or she must first pursue available remedies in state court"), *with Trafalgar Corp. v. Miami County Bd. of Comm'rs*, 519 F.3d 285, 287 (6th Cir. 2008) (because "the issue of just compensation under the Takings clause . . . was directly decided in a previous state court action, it cannot be re-litigated in federal district court").

The loss of federal review over federal takings claims occurring under the state litigation doctrine is a radical reformation of the post-Civil War constitutional framework. Since the late 19th century, it has been hornbook law that federal courts are and should be open to vindicate all federal constitutional rights. Felix Frankfurter & James M. Landis, *The Business of the Supreme Court: A Study in the Federal Judicial System* 65 (1928) (after passage of 28 U.S.C. § 1331, federal courts "became the primary and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States"); *Patsy v. Bd. of Regents of Fla.*, 457 U.S. 496, 503 (1982) (The "very purpose of § 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.'") (quoting *Mitchum v. Foster*, 407 U.S. 225, 242 (1972) (quoting *Ex parte Virginia*, 100 U.S. 339, 346 (1880)); *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 543 (1972) ("The Congress that enacted the predecessor of § 1983 . . . seems clearly to have intended to provide a federal judicial forum for the redress of wrongful deprivations of property by persons acting under color of state law.").

Indeed, it has been so settled that federal courts are available to remedy constitutional wrongs arising from local action that this Court has repeatedly held, over the last century, that existing state court remedies do not delay federal review of a constitutional violation. *Home Tele. & Tele. Co. v. City of Los Angeles*, 227 U.S. 278, 285 (1913) (rejecting a contention that the federal courts had no power to hear a deprivation of property claim under the Fourteenth Amendment

until the state courts had passed on the issue, in part because it would "cause the state courts to become the primary source for applying and enforcing the Constitution of the United States in all cases covered by the Fourteenth Amendment"); *Steffel v. Thompson*, 415 U.S. 452, 472-73 (1974) (In Section 1983 cases, "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.").

The state litigation ripeness doctrine turns this regime on its head in every way possible in the takings context. Contrary to precedent, it demands use of state court remedies prior to federal constitutional review. *See* John F. Preis, *Alternative State Remedies in Constitutional Torts*, 40 Conn. L. Rev. 723 (Feb. 2008) (demands that civil rights plaintiffs rely on state remedies, including in takings cases, are a "marked change in past practice"). Then that demand—in interaction with res judicata—functions to strip federal courts of oversight of federal Takings Clause rights, again contrary to traditional jurisprudence. *See, e.g.*, *Ballard Fish & Oyster Co. v. Glaser Constr. Co.*, 424 F.2d 473, 475 (4th Cir. 1970) (a federal takings claim raises a "federal question" appropriate for federal judicial review without respect to state law remedies).

Perhaps the most disturbing aspect of this revolution in constitutional law is that it is occurring without any serious review from any responsible institution. *San Remo*, 545 U.S. at 349 (Rehnquist, C.J., concurring). It is Congress that has the power to limit federal court jurisdiction, *Sheldon v. Sill*, 49 U.S. 441, 449 (1850) ("Congress may withhold from any court of its creation jurisdiction of any of the

enumerated controversies."), but it has not done so.[6] For its part, this Court has not yet provided any persuasive justification for why federal courts cannot hear ripe federal constitutional takings claims. Certainly, *Williamson County* itself does not supply a justification. *Dodd v. Hood River County*, 59 F.3d 852, 861 (9th Cir. 1995) ("We disagree . . . with the suggestion that *Williamson County* is a thinly-veiled attempt by the Court to eliminate the federal forum for Fifth Amendment taking plaintiffs . . . ."), *DLX*, 381 F.3d at 518 n.3 (*Williamson County* "clearly contemplates that a takings plaintiff who loses her claim in state court will have a day in federal court"); *id.* at 521 ("The barring of the federal courthouse door to takings litigants seems an unanticipated effect of *Williamson County*").

"Comity" is not the answer. If comity alone justifies granting state courts exclusive jurisdiction over federal takings claims, federal courts should be barred under the same rationale from hearing any federal

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[6] The limitation of federal jurisdiction over constitutional takings claims arising from the state litigation ripeness doctrine usurps Congress' power to limit the scope of the federal courts' jurisdiction; *see* U.S. Const. art. III, cl. 1 ("The judicial Power of the United States, shall be vested . . . in such inferior Courts as the Congress may from time to time ordain and establish."); *Sheldon v. Sill*, 49 U.S. at 449 ("Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies."). Congress has given the federal courts jurisdiction over issues of federal law, 28 U.S.C. § 1331, and over constitutional civil rights disputes arising under color of state law. 42 U.S.C. § 1983. Fifth Amendment takings claims qualify for federal review under a plain reading of both statutes. And yet, the court-created state litigation ripeness doctrine has erased the federal courts' congressionally granted jurisdiction over these claims.

constitutional violation arising from local rules and actions. But the post-Civil War framework trends the opposite direction. Comity supports the right of federal courts to adjudicate federal claims without waiting for state bodies to act. Daniel J. Meltzer, *The Supreme Court's Judicial Passivity*, 2002 Sup. Ct. Rev. 343, 359 ("The notion that a federal remedy for violation of a federal constitutional right should be withheld when state law supplies a remedy is in tension with both the constitutional understanding set forth nearly a century ago in *Home Telephone & Telegraph Co. v City of Los Angeles*, and with at least four decades of constitutional tort litigation . . . . Those decisions recognized that federal constitutional rights (*Home Telephone*) and federal remedies for violation of those rights (*Monroe*) do not depend upon what state law provides."). There is no doctrinal precedent or logic allowing comity to now rise up against all past practice to negate the right of federal relief for takings of property, while federal protection remains intact for other constitutional violations. Why are takings claimants singled out?

No one has a satisfactory answer because there is no good explanation. Takings claimants have become pariahs in the federal courts, and those courts stripped of their congressionally granted jurisdiction over constitutional takings claims through *an accident* (unintended interplay between *Williamson County* and res judicata), not through any coherent doctrinal reasoning. This Court should reevaluate *Williamson County*. *San Remo*, 545 U.S. at 349-50 (Rehnquist, C.J., concurring).

### 2. The State Litigation Rule Now Destroys Federal Review of Basic Procedural Due Process and Equal Protection Claims

The federal jurisdictional mess caused by *Williamson County*'s state litigation ripeness doctrine is no longer "just" a takings problem. Federal courts have extended the doctrine—and all its anomalies—to traditional procedural due process claims (lack of an opportunity to be heard) and equal protection (discrimination) property claims.

Some circuits have extended the state litigation ripeness doctrine to other claims by direct means. *See*, *e.g.*, *River Park, Inc. v. Country Club Estates, Ltd.*, 23 F.3d 164, 167 (7th Cir. 1994). ("[A] property owner may not avoid *Williamson* by applying the label 'substantive due process' to the claim. . . . So too with the label 'procedural due process.' Labels do not matter. A person contending that state or local regulation of the use of land has gone overboard must repair to state court."); *Covington Court Ltd. v. Vill. of Oak Brook*, 77 F.3d 177, 179 (7th Cir. 1996) ("due process challenges are premature if the plaintiff has not exhausted possible state remedies by which to attack the zoning regulation or other state action").

Others, including the court below, have accomplished the same extension by concluding that any property-based due process or equal protection claim in the same complaint as a taking claim is subject to *Williamson County*. *See*, *e.g., Deniz v. Municipality of Guaynabo,* 285 F.3d 142, 149 (1st Cir. 2002); *Braun*, 519 F.3d at 572-73; *Bateman v. City of West Bountiful*, 89 F.3d 704, 709 (10th Cir. 1996) ("The Tenth Circuit repeatedly has held that the [second] ripeness

requirement of *Williamson* applies to due process and equal protection claims that rest upon the same facts as a concomitant takings claim.").

Either way, due process and equal protection claims are regularly subject to a state litigation ripeness rule. This has serious consequences. Due to the aforementioned res judicata trap, any due process and equal protection claim "ripened" by state court litigation is just as precluded from federal courts as "ripe" takings claims. *Wilkinson v. Pitkin County Bd. of County Comm'rs*, 142 F.3d 1319, 1322-23 (10th Cir. 1998); *Rainey Bros. Constr. Co., Inc. v. Memphis & Shelby County Bd. of Adjustment*, 967 F. Supp. 998, 1004 (W.D. Tenn. 1997); *see also Del-Prairie Stock Farm*, 572 F. Supp. 2d at 1034 ("[T]he *Williamson County* state litigation requirement is unavoidable, and because it has not been satisfied, I have no jurisdiction over plaintiff's federal claims."). Thus, because of the state litigation construction of *Williamson County*, property owners are losing their ability to invoke well-settled constitutional protections against a lack of an adequate hearing, and irrational discrimination, in federal court. Again, no one has identified a plausible doctrinal justification for this development.

Yet, the state litigation ripeness doctrine churns on, and is steadily creating a two-tiered system, one in which landowners are not allowed to go to federal courts to challenge local actions that impede their constitutional rights, and another in which non-property owners are free to do so. Gideon Kanner, *Hunting the Snark, Not the Quark: Has the U.S. Supreme Court Been Competent in Its Effort to Formulate Coherent Regulatory Takings Law?*, 30 Urb. Law. 307, 332-33 (1998) (asserting that the

intersection of *Williamson County* and preclusion shows "constitutional rights of landowners as not quite deserving of a full measure of judicial protection, on par with other constitutional rights"). To make matters worse, this is happening surreptitiously, as nothing in *Williamson County* or this Court's other jurisprudence warns that all federal constitutional property rights claims are no longer worthy of federal review and can never be ripe. Even the most astute lawyer will not discover the full scope of *Williamson County* barriers until it is too late; that is, until a federal court has dismissed property claims under some *Williamson County*-inspired theory of non-review. *See Lohman Props., LLC v. City of Las Cruces*, No. CIV08-0875, 2008 U.S. Dist. LEXIS 108712, at *8 (D.N.M. Dec. 8, 2008) ("That the Plaintiffs' § 1983 [takings] claim is not justiciable, however, is not intuitively obvious. The Court was not aware of the particular doctrine . . . While established, the doctrine seems to be rather obscure.").

The Court should review this unworkable and inequitable ripeness doctrine.

### C. The State Litigation Requirement Interacts with a Defendant's Removal Rights To Bar Even *State* Court Review of Takings Claims

The havoc wreaked by *Williamson County* does not end at the federal level. Even the state court forum is often not open to property rights claimants as a practical matter, due to the effects of the state litigation requirement.

The state court problem stems from the interaction of the state litigation ripeness rule with the federal question removal doctrine. Title 28 U.S.C.

§ 1441(b) allows a defendant to take a federal question out of state court and have it transferred to the federal court, *Caterpillar, Inc. v Williams*, 482 U.S. 386, 392, (1987); *Harper v. AutoAlliance Int'l, Inc.*, 392 F.3d 195, 210 (6th Cir. 2004). Meanwhile, the state litigation ripeness rule holds that federal takings issues cannot be heard in federal courts.

The clash produces bizarre results that negate the state court forum for takings claims in many instances. When a plaintiff files a takings complaint in state court, in compliance with a state litigation ripeness requirement, defendants can and will remove the complaint to federal court on the ground that the takings claim is a federal question. But then, once in the federal forum, the same defendant will turn around and argue that the takings claim must be dismissed under *Williamson County* because the plaintiff had to exhaust state court litigation before the claim could be in federal court. *See*, *e.g.*, *Simmons v. Sabine River Auth.*, No. 2:10 CV1846, 2011 U.S. Dist. LEXIS 73133 (July 7, 2011); *see also Yamagiwa* , 523 F. Supp. 2d at 1108 (the City "removed the case, thereby electing to proceed in the federal forum. [] Nonetheless, over two years and what must be millions of dollars in litigation expenses later, the City now argues that, because Yamagiwa was never actually denied compensation by a state court, her federal takings claim is unripe."). Government defendants regularly use this removal-ripeness game to obtain dismissal of state court-filed takings claims.[7]

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[7] *See, e. g., Kunzelman*, 2011 LEXIS 89179; *Koscielski v. City of Minneapolis*, 393 F. Supp. 2d 811, 817-818 (D. Minn. 2005); *Hendrix v. Plambeck*, No. 1:08-cv-99, 2010 U.S. Dist. LEXIS 92140, at *17-*19 (S.D. Ind. Sept. 2, 2010); *AM Rodriguez Assocs.*

(continued...)

Accordingly, in practice, the state litigation ripeness requirement often denies private property owners *any* forum for a constitutional takings claim. *Id.* The plaintiff can't file in federal court as an original matter, and cannot litigate in state court because a defendant will remove the case and get it dismissed for lack of state litigation.

It is true that sometimes federal courts will remand a federal takings claim back to state court after it is removed, rather than dismissing it. *Folowell v. City of Sulphur Springs*, No. 4:10cv664, 2011 U.S. Dist. LEXIS 20445 (E.D. Tex. Mar. 1, 2011); *Oakland 40, LLC v. City of S. Lyon*, No. 10-14456, 2011 U.S. Dist. LEXIS 53158 (E.D. Mich. May 18, 2011). But this is of no solace to a plaintiff who properly filed the claim in state court (the only forum supposedly available to it), only to be dragged to federal court anyway, then yanked back to state court, his resources now drained and the merits still far off. *Williamson County* did not intend to allow the government to whipsaw the takings claimant between state and federal and state court, avoiding the merits, and winning by financial attrition. But this is what happens in the post-*Williamson County* world of takings litigation.

Importantly, the would-be federal takings plaintiff has no way to escape this state litigation/ removal trap. He must raise the federal claim in a state court action, if it is to be raised anywhere, because withholding it

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[7] (...continued)
*v. City Council*, No. 1:08-cv-214, 2009 U.S. Dist. LEXIS 110998 (W.D. Mich. Nov. 30, 2009); *Thomas v. Shelby County*, No. 06-2433, 2006 U.S. Dist. LEXIS 94365, at *10-*11 (W.D. Tenn. Dec. 11, 2006).

will trigger res judicata rules that prevent the claim from being filed later. *Rockstead*, 486 F.3d at 968. And yet, raising the claim in state court subjects it to the aforementioned removal gambit. You're damned if you do file a claim in state court and damned if you don't. In this way, a constitutional clause that is supposed to be "self-executing," *United States v. Clarke*, 445 U.S. 253, 257 (1980), is actually self-defeating when held to incorporate a state litigation ripeness prong.

Here, if Downing went to state court to litigate its federal takings claim, there is a real risk the state would remove that claim to the federal court where it cannot be heard. *Ciampi v. Zuczek, C.A.*, 598 F. Supp. 2d 257, 260, n.1. (D.R.I. 2009) (court refuses to hear removed takings claim); *Frustaci v. City of S. Portland*, No. 00-179, 2000 U.S. Dist. LEXIS 13635 (Me. Sept. 11, 2000) (federal takings claim removed from state court and dismissed for lack of state court litigation); *Anderson v. Chamberlain*, 134 F. Supp. 2d 156 (D. Mass. 2001) (federal nature of takings claim justified initial removal but state litigation ripeness rule required subsequent refusal to hear the claim). It cannot be a correct system that hides the jurisdictional ball to the point a constitutional plaintiff can often get no judicial review at all. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803) ("It cannot be presumed that any clause in the Constitution is intended to be without effect.").

Chief Justice Rehnquist was understating the case when he wrote that the impact of the state litigation requirement on takings jurisdiction is "dramatic." *San Remo*, 545 U.S. at 352 (Rehnquist, C. J., concurring). It is overwhelming. It is revolutionary. And it is wrong. This Court should take this case to consider

whether *Williamson County* imposes a state litigation requirement. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 63 (1996) (reconsideration justified "when governing decisions are unworkable or are badly reasoned.'" (citations omitted)).

### D. The State Litigation Rule Is Doctrinally Unnecessary, and Not Mandated by *Williamson County*

The chaos caused by the state litigation ripeness rule is particularly objectionable, and worthy of review, because the rule itself is not justified by ripeness doctrine.

#### 1. State Litigation Is Not Needed To Fulfill the Core Purpose of *Williamson County*'s Ripeness Doctrine

*Williamson County*'s core premise is that the Constitution does not prohibit takings, but only takings that occur "without just compensation." 473 U.S. at 194. According to *Williamson County*, this means that a federal constitutional takings violation does not exist until a claimant seeks just compensation through an appropriate governmental mechanism, if one is available. *Id.* The point is to ensure that the taking is indeed "without just compensation" and "complete" *Id.*, n.13 ("because the Fifth Amendment proscribes takings without just compensation, no violation occurs until compensation has been denied. The nature of the constitutional right therefore requires that a property owner utilize procedures for obtaining compensation before bringing a § 1983 action"); *id.* at 195 ("the State's action is not 'complete' . . . until the State fails to provide adequate compensation").

This "no takings violation exists until it is clear the taking is uncompensated" reasoning is unobjectionable. But what is objectionable is the subsequent conclusion that state judicial process is necessary to demonstrate that a taking is uncompensated. Indeed, this conclusion reflects a major and unnecessary leap in logic, one that fails to account for administrative just compensation procedures. As the following shows, processes at the administrative level are better positioned—both from a logical and doctrinal perspective—to show whether a taking is without compensation and thus ripe, that is state court litigation.

Consider where liability for a taking ultimately rests. In the typical Section 1983 takings suit, property owners sue the local government, or state agency, that caused the taking, not a state court. *See generally Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658, 690-92 (1978). By the same token, a state court will not pay if a taking is found; the local or state body causing the taking will. *Caldwell v. Comm'rs of Highways of Towns of Scott, Mahomet, and Sangamon*, 94 N.E. 490, 473 (Ill. 1911) (the state typically "assumes no liability" for takings caused by local governments).

Since compensatory liability rests with the agency causing the taking, that agency's compensatory procedures and intent best illustrate whether the taking is "without just compensation." If the offending entity has no administrative plan or provision for compensation, the taking it caused is "without just compensation." The takings claim is ripe under the rationale of *Williamson County*, without a state court suit. *See* Timothy V. Kassouni, *The Ripeness Doctrine and the Judicial Relegation of Constitutionally*

*Protected Property Rights*, 29 Cal. W. L. Rev. 1, 43 (1992) ("[I]t makes little sense to require property owners to seek just compensation from the *courts*, as opposed to the governmental entity which imposed the regulation."); Michael M. Berger and Gideon Kanner, *Shell Game! You Can't Get There from Here: Supreme Court Ripeness Jurisprudence in Takings Cases at Long Last Reaches the Self-parody Stage*, 36 Urb. Law. 671, 694 (2004) ("There is nothing in . . . the language of the Fifth Amendment that requires municipal nonpayment [of compensation] to be certified by a state court before it is complete.")

This Court's Fifth Amendment damages jurisprudence confirms that the defendant's compensation plans and procedures (or lack thereof) at the time of the taking, not a state court decision, provide an appropriate focus for the "without just compensation" issue. It is settled that the constitutional right to compensation accrues at the time of the taking. *United States v. Clarke*, 445 U.S. at 258 ("[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 Forest Indus., Inc. v. United States*, 467 U.S. 1, 5 (1984) (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 by the Government."). At the same time, the defendant incurs a compensatory "obligation" at the time of the taking. *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.").

If a defendant owes compensation at the time of the taking, and a property owner acquires a federal

right to that relief at the same time, there is no apparent need to wait for a state court ruling to decide if the taking was uncompensated. Rather, one should look at the defendant's acts and procedures at the time of the taking. *See id.*; *see also* Michael Wells, "*Available State Remedies" and the Fourteenth Amendment: Comments on Florida Prepaid v. College Savings Bank*, 22 Loy. L.A. L. Rev. 1665, 1667 (2000) ("A central principle of constitutional law, established in *Home Telephone & Telegraph Co. v. City of Los Angeles*, is that the constitutional violation is complete when officials act, even if their conduct is not authorized by state law.").

Finally, this Court has made clear that a regulatory taking normally becomes "final" in the administrative process. *Palazzolo v. Rhode Island*, 533 U.S. 606, 608-610 (2001). It would be anomalous to recognize that a taking comes into being at the administrative level, and yet defer the just compensation issue—even if the agency has no provision for compensation—until subsequent state court process. *See*, *e.g.*, *Zinermon v. Burch*, 494 U.S. 113, 125 (1990) ("[T]he Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions . . . the constitutional violation actionable under § 1983 is complete when the wrongful action is taken.") (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986)).

This case aptly demonstrates that state litigation is not always necessary to show a takings claim is uncompensated. Here, Downing told the defendant state agency that its actions were effecting a taking for which compensation is owed. But the agency made no plan to compensate; instead, it continues to reject and resist the claim. "Just compensation has been denied,"

and therefore, the constitutional violation is actionable. 473 U.S. at 194, n.13. The possibility of state court litigation is immaterial. Again, the defendant is a state. There is no reason to require Downing to go to a state court to show that the state will not compensate for the taking it has caused (and thus, that the claim is ripe), when the state's actions already make that crystal clear. *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967) (case ripe as soon as issues are "fit for review").

The Court should take the case to clarify that state court litigation is not needed to ensure a taking is uncompensated and complete for judicial review, the fundamental goal of *Williamson County*'s ripeness doctrine, when it is apparent the defendant is aware of the compensation claim but has no intent to compensate.

### 2. *Williamson County* Provides No Basis for Requiring the Additional Step of State Court Litigation

Nothing in *Williamson County* prevents the Court from concluding that *Williamson County* does not always demand state litigation to ripen the "without just compensation" prong of a takings claim. Certainly, *Williamson County* never explicitly says that state court litigation is required. It refers to a takings claimant's need to use compensation "procedures," 473 U.S. at 194, n.13, if and when they are available. But *Williamson County* does not specify that such procedures must always be court procedures. Nor does it ever say that administrative procedures cannot suffice.

Finally, none of the authority cited in *Williamson County* leads to the conclusion that state litigation is

necessary for takings ripeness. The *Williamson County* Court pointed to two cases, *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, and *Parratt v. Taylor*, 451 U.S. 527 (1981), in articulating its state procedures ripeness doctrine. But neither of these decisions compels a state litigation rule for takings claims. *San Remo*, 545 U.S. at 352, 349 n.1 (Rehnquist, C. J., concurring).

*Monsanto* did not even involve a federal claim for just compensation; it involved a claim for injunctive and declaratory relief. 467 U.S. at 998. The *Monsanto* Court held that a takings claimant suing the federal government could not seek equitable relief in federal district court. *Id.* at 1016. Instead, the claimant had to file a suit for just compensation in the Court of Federal Claims. *Id.*

This holding implies nothing about the ripeness of federal claims for just compensation. As a brief amicus curiae cited in the *San Remo* concurrence explains: "[T]he [Monsanto] company's request for equitable relief was not merely premature, it was not available at all. In other words, there was nothing the company could do to 'ripen' its claims for equitable relief; that claim simply had no merit, period." *San Remo*, Brief for Elizabeth J. Nuemont, *et. al.*, as Amici Curiae, at 12.

Moreover, in holding that Monsanto could and should file for monetary compensation in the Court of Federal Claims, *Monsanto*, 467 U.S. at 1016-17, the Court did not hold or imply that Monsanto had to go to a different court first for preliminary compensatory procedures—what *Monsanto* would have to hold to support a state litigation ripeness requirement. What *Monsanto* says is that the plaintiff can sue immediately for compensation as soon as it has used any

available non-judicial compensation procedures. *Id.* at 1018 ("claimant [must] first seek satisfaction through the statutory procedure"). Far from compelling a state litigation rule, *Monsanto* instead supports the more doctrinally and logically sound understanding that a taking will be considered "without just compensation" and actionable when it is apparent the defendant has no compensation options at the administrative level at the time of the taking. *Id.* at 1018, n.21 ("Exhaustion of the statutory remedy is necessary to determine the extent of the taking that has occurred. To the extent that the operation of the statute [which allegedly caused the taking] provides compensation, no taking has occurred.").

*Parratt* also is unsupportive of the state litigation ripeness doctrine. In *Parratt*, this Court held that a prisoner claiming a federal due process violation arising from a negligent loss of property could not state a claim until he used an adequate postdeprivation remedy provided by the State of Nebraska. 451 U.S. at 541. The *Parratt* Court declared that a state's action is not 'complete in the sense of causing a constitutional injury unless or until the state fails to provide an adequate postdeprivation for the property loss. *Hudson v. Palmer*, 468 U.S. 517, 532, n.12 (1984).

*Parratt* is of very narrow application. Specifically, *Parratt's* postdeprivation remedial requirement applies only when a due process claim arises from "a random and unauthorized act"; that is, an act that makes it impossible for the government to anticipate or grant predeprivation process. *Parratt*, 451 U.S. at 541. Conversely, *Parratt* does not apply where a deprivation of property arises from an official policy or from an administrative context in which predeprivation process could have been afforded. In other words, the *Parratt*

line of cases rejects an exhaustion of state court remedies requirement for federal due process claims alleging a nonrandom deprivation of property. *Zinermon*, 494 U.S. at 128-30.

The limitation of *Parratt* renders the case inapposite to regulatory takings claims. After all, to assert such a claim, the property owner must have lost a property right through a process in which the government fully considered the issue, used its discretion and made a final, informed decision. *Palazzolo*, 533 U.S. at 620 ("a landowner may not establish a taking before a land-use authority has the opportunity, using its own reasonable procedures, to decide and explain the reach of a challenged regulation"). In short, takings claims, like that alleged here, presume official agency action, *see id.*, and this characteristic precludes any analogy to *Parratt's* random deprivation exhaustion rule.

The state litigation understanding of *Williamson County* is "unsupported and mistaken," *San Remo*, 545 U.S. at 348 (Rehnquist, C. J., concurring), and a rule that is "not correct when it was decided and . . . not correct today . . . ought not to remain binding precedent." *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

## CONCLUSION

For the foregoing reasons, the Court should grant the Petition.

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