No. _____

In The
Supreme Court of the United States

ROSE MARY KNICK,

Petitioner,

v.

TOWNSHIP OF SCOTT; CARL S. FERRARO, Individually and in his Official Capacity as Scott Township Code Enforcement Officer,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Court should reconsider the portion of *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 194-96 (1985), requiring property owners to exhaust state court remedies to ripen federal takings claims, as suggested by Justices of this Court? *See Arrigoni Enterprises, LLC v. Town of Durham*, 136 S. Ct. 1409 (2016) (Thomas, J., joined by Kennedy, J., dissenting from denial of certiorari); *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323, 348 (2005) (Rehnquist, C.J., joined by O'Connor, Kennedy, and Thomas, JJ., concurring in judgment).

Alternately, whether *Williamson County*'s ripeness doctrine bars review of takings claims asserting that a law causes an unconstitutional taking on its face, as the Sixth, Ninth, Tenth and now Third Circuits hold, or whether facial claims are exempt from *Williamson County*, as the First, Fourth, and Seventh Circuits hold?

LIST OF ALL PARTIES

The party to the judgment from which review is sought is Petitioner Rose Mary Knick. She was a party in all proceedings below.

Respondent is the Township of Scott, Pennsylvania.[1]

[1] The case also originally named Carl S. Ferraro, Individually and in his Official Capacity as Scott Township Code Enforcement Officer. However, the district court dismissed this defendant and that judgment was not appealed.

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PETITION FOR A WRIT OF CERTIORARI

Rose Mary Knick respectfully requests that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the Third Circuit Court of Appeals is reported at *Knick v. Township of Scott, Pa.*, 862 F.3d 310 (3d Cir. 2017), and is attached here as Appendix (App.) A. The opinion of the district court is unpublished. It is attached here as App. B.[1]

JURISDICTION

This lower court had jurisdiction over this case under 28 U.S.C. § 1331, 42 U.S.C. § 1983, and the Fifth Amendment to the United States Constitution. The Court of Appeals for the Third Circuit entered final judgment on July 6, 2017. App. C. This Court granted an extension to file the Petition for Certiorari to and including Nov. 1, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTITIONAL AND STATUTORY PROVISIONS AT ISSUE

The Fifth Amendment to the U.S. Constitution provides, "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

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[1] The district court issued a prior decision dealing with claims not at issue here. It is available at *Knick v. Scott Township*, No. 3:14-cv-2223, 2015 WL 6560647 (M.D. Pa. Oct. 29, 2015).

INTRODUCTION

This case raises important questions relating to the viability and reach of the highly criticized principle, arising from *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194-96 (1985), that property owners must unsuccessfully seek compensation in state court before suing for an unconstitutional taking in federal court.

Due to its dysfunctional impact and questionable foundation, individual Justices of this Court have strongly questioned the propriety of the "state litigation" doctrine, and argued that it should be reconsidered. *See Arrigoni Enters., LLC v. Town of Durham*, 136 S. Ct. 1409 (2016) (Thomas, J., dissenting from denial of certiorari); *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323, 349 (2005) (Rehnquist, C.J., concurring in judgment). The desire to reconsider the case is well warranted. *Williamson County* has caused more injustice and conflict in federal takings litigation than any other takings principle. Joshua D. Hawley, *The Beginning of the End?* Horne v. Department of Agriculture *and the Future of* Williamson County, 2013 Cato Sup. Ct. Rev. 245, 247 (*Williamson County* introduced "distortions and doctrinal anomalies up and down the length of takings law"). Through its interaction with claim and issue preclusion and removal jurisdiction, the state litigation ripeness rule deprives property owners of reasonable judicial access for a takings claim, impedes the orderly development of takings law, and causes a tremendous waste of judicial and litigant resources. *Wayside Church v. Van Buren County*, 847 F.3d 812, 825 (6th Cir. 2017)

(Kethledge, J., dissenting) ("[I]f anyone has undermined the adjudication of federal takings claims against states and local governments, it is the federal courts—by the application of *Williamson County*.").

Moreover, *Williamson County*'s state litigation rule is flawed at the foundation. The decision suggests an alleged taking is not complete until it is "without just compensation," a relatively unremarkable concept. But it goes on to conclude that a lack of compensation is not apparent until a state *court* confirms it. It is wrong and unprecedented to make the absence of compensation depend on what a state court does, rather than what the executive or legislative agency responsible for the taking does. *Horne v. Dep't of Agric.*, 569 U.S. 513, 133 S. Ct. 2053, 2062 n.6 (2013) ("A 'Case' or 'Controversy' exists once the government has taken private property without paying for it."); *Del-Prairie Stock Farm, Inc. v. County of Walworth*, 572 F. Supp. 2d 1031, 1033 (E.D. Wis. 2008) ("[A] concrete takings injury can occur without state litigation.").

Despite its practical and doctrinal flaws, federal courts have been forced to grapple with *Williamson County*'s state litigation rule for many years. In so doing, they have come into conflict on the application of the rule in several contexts. Most importantly, the courts are in stark and broad conflict on whether the state litigation rule applies to "facial" takings claims. This common type of takings claim asserts that a taking arises from the plain and express terms of a law, rather than through application of the law to specific properties and facts. At least three circuits have held that *Williamson County* does not apply to such facial claims. But, in this case, the Third Circuit

adopted a contrary conclusion, in conflict with circuits holding that facial claims are not subject to *Williamson County*. App. A at 21-28. The decision also conflicts with this Court's precedent.

It is imperative that the Court reconsider *Williamson County*. This case presents a clean vehicle for doing so. The Township passed and implemented an ordinance that mandates public access to Ms. Knick's rural land, App. A at 3-4, a burden that abridges her fundamental right to exclude others and which violates this Court's physical takings precedent. *Nollan v. California Coastal Commission*, 483 U.S. 825, 831 (1987). The challenged law includes no promise of compensation or mechanism for promptly providing it. Ms. Knick accordingly challenged the constitutionality of the ordinance in state court, but was turned away on procedural grounds. So she came to federal court. The Third Circuit recognized the serious and concrete nature of Ms. Knick's claims. App. A at 3. Yet, it held that, under *Williamson County*, federal courts cannot decide the straightforward issue of whether the ordinance unconstitutionally invades private property unless Ms. Knick goes through further state court procedures. *Id.*

The Court should review this case to decide whether *Williamson County* correctly directs takings claimants to exhaust state court remedies to ripen takings review or to resolve the conflict among the courts on whether *Williamson County* applies to facial takings claims.

STATEMENT OF THE CASE

This case arises from a dispute in rural, western Pennsylvania over an ordinance mandating public and governmental access to private property containing burial grounds. Pennsylvania has never had a state law prohibiting so-called "backyard burials," the practice of burying the deceased on private property. *See* Patricia E. Salkin, *Zoning and Land Use Planning*, 39 Real Est. L.J. 526, 530 (Spring 2011). As a result, it is common to find private, family gravesites in the state. *See id.*; *see also* Craig Smith, *Home burial on legislators' radar*, TribLive, Apr. 5, 2014, http://triblive.com/state/pennsylvania/5788717-74/burial-funeral-property (noting "[t]he practice of tending to one's dead is not new, as evidenced by the number of centuries-old burial sites with time-worn tombstones on private properties throughout Western Pennsylvania"). As counsel for Respondent Scott Township explained below, the Township itself "goes back several hundred years in terms of families and burial plots. So while these may not be . . . sprawling cemeteries, you will have small plots that families have maintained for years." District Court Hearing Transcript at 5:3-6.

A. Factual Background

1. Ms. Knick's Property

Ms. Knick and her family have owned 90 acres of land in the Township since 1970. App. B at 2. The parcel is located at 49 Country Club Road, Scott Township, Pennsylvania. It is bisected by a road, and delineated on all sides by stonewalls, fences, and other markers. Signs stating "No Trespassing" exist at regular intervals on the boundary. *Id.*

Ms. Knick lives on the property in a single-family residence. *Id.* She uses much of the surrounding land as a grazing area for horses and other animals. *Id.* There is no public cemetery or public access easement on the land. Ms. Knick has never authorized the public to cross or otherwise use her land.

2. The Challenged Cemetery Access Ordinance

In September, 2008, in apparent response to a public inquiry, Scott Township officials discussed an alleged ancient burial ground on Ms. Knick's property. App. B. at 3. In 2008 and early 2009, Ms. Knick informed the Township that her title does not identify a burial ground. After additional research, she informed the Township that there is no official state registration or documentation of a cemetery. Knick also declared that she was not aware of any physical sign of a burial ground. *Id.*

In December of 2012, the Township enacted a first-of-its-kind law dealing with private cemeteries, Ordinance 12-12-20-001. App. A at 3. The Ordinance purports to regulate the existence, operation, and maintenance of cemeteries. *Id.* at 3-4.

Two of its provisions are relevant here. First, Section 5 requires that "[a]ll cemeteries . . . shall be kept open and accessible to the general public during daylight hours." App. A at 3. A "cemetery" is defined as "[a] place or area of ground, whether contained on private or public property, which has been set apart for or otherwise utilized as a burial place for deceased human beings." Ordinance 12-12-20-001 § 1(c) (Dec. 20, 2012). The Ordinance's provisions pertain to "[a]ll cemeteries, whether private or public, and

whether existing or established prior to the . . . Ordinance." *Id.* § 2.

At a district court hearing, the Township explained that the Ordinance's public access provision imposes a right-of-way into private land from the nearest public road. Transcript at 17:6-9. It also confirmed that this right of access is for the general public, and that anyone can use it, whether local or not. Transcript at 18:11-17 (the provision "does not limit who specifically should be permitted on to that property").

A different provision of the Ordinance authorizes the Township's "code enforcement" agents to "enter upon any property within the Township for the purposes of determining the existence of and location of any cemetery . . . ." App. A at 4 (quoting Ordinance 12-12-20-001 § 6).

The subject Ordinance authorizes fines of $300-$600 for every violation of its provisions, plus all court costs, including attorney fees. Each day that a violation exists is deemed a separate offense. App. A at 4.

3. Enforcement of the Ordinance Against Ms. Knick

On April 10, 2013, after enactment of the Ordinance, the Township's Code Enforcement Officer entered Ms. Knick's land without her consent. *Id.* One day later, the Township issued a Notice of Violation decreeing that the inspection of her land identified "[m]ultiple grave markers/tombstones" on the property. JA at 267. The Notice described the problem as "stones located on your property" and declared that

the alleged area constituted a "cemetery" subject to the Ordinance. *Id.*

The Notice ultimately stated that Ms. Knick was "in violation of section #5 of the ordinance which requires that all cemeteries within the Township shall be kept open and accessible to the general public during daylight hours," and directed her "to make access to the cemetery available to the public during daylight hours" as required by the ordinance. App. B at 3-4, JA at 267-68. On October 31, 2014, the Township issued a second, almost identical Notice of Violation. App. A at 5. It too commanded Ms. Knick to "make access to the cemetery available to the public."

B. State Court Procedure

On May 7, 2013, after the Township issued the first Notice of Violation, Ms. Knick filed a Complaint in the Pennsylvania Court of Common Pleas seeking Declaratory and Injunctive Relief from the Ordinance. App. A at 4. This state court complaint raised state constitutional challenges, including a takings claim. The Township then agreed to withdraw its April 11, 2013, Notice of Violation and to stay enforcement of the Ordinance.

The state court subsequently refused to rule on Ms. Knick's claims, finding they would "not [be] in the proper posture" for a decision until the Township filed a civil enforcement action against Ms. Knick. App. A at 4-5

C. District Court Procedure

At this point, Ms. Knick turned to the federal district court. App. A at 5. She filed a complaint alleging that the Ordinance violated the Fourth Amendment and the Takings Clause of the Fifth

Amendment, as enforced through 42 U.S.C. § 1983. *Id.* The claims sought equitable relief and damages. *Id.* at 6.

On October 28, 2015, the district court granted the Township's motion to dismiss the claims in an unpublished decision. *Id.* However, the district court granted Ms. Knick leave to re-plead some of her claims, including the takings claims, with more specificity.

Ms. Knick then filed a Second Amended Complaint. *Id.* That complaint made clear that her federal takings claims consisted of facial and as-applied claims against the Ordinance's access provisions.

On September 7, 2016, the district court issued an order dismissing all of Ms. Knick's re-pled takings claims. App. B at 11-18. The Court held that the claims were unripe under *Williamson County* until Ms. Knick prosecuted a new "inverse condemnation" action in state court. *Id.* Ms. Knick timely appealed to the Third Circuit.

D. The Third Circuit Decision

At the Third Circuit, Ms. Knick argued that the district erred in dismissing her facial Fourth Amendment claims and in dismissing her facial and as-applied federal takings claims. Only the latter claims are at issue here.

In a published decision, the Third Circuit upheld the lower court's dismissal of Ms. Knick's physical takings claims for lack of ripeness under *Williamson County*. In considering the facial claim, the Third Circuit reviewed and interpreted this Court's precedent. App. A at 22-25. It concluded that this

Court's decisions allow immediate federal review of a facial claim (i.e., without state litigation) only if it asserts the now-defunct theory that a regulation "fails to substantially advance a legitimate state interest." *Id.* at 24-25. It reasoned that this was because such a claim does not invoke the principle of "just compensation." *Id.*

Building on this understanding, the Third Circuit concluded that *Williamson County* is inapplicable when a claim invokes the Public Use Clause of the Fifth Amendment or the Due Process Clause. App. A at 26 (if "the plaintiff challenges the underlying validity of the taking, perhaps for lacking a public purpose or for violating due process, then the denial of compensation is irrelevant to the existence of a ripe claim and *Williamson County*'s second prong is inapplicable."). But, the lower court ruled, basic physical and regulatory takings claims are not excepted from *Williamson County*'s state litigation requirement because they implicate the "Just Compensation Clause." *Id.* at 24, 26-27. The court accordingly affirmed a prior Third Circuit decision holding that a facial taking claim alleging a denial of all economic use of property was subject to *Williamson County*'s state court procedures ripeness doctrine. *Id.* at 24-25 (affirming *County Concrete Corp. v. Town of Roxbury*, 442 F.3d 159 (3d Cir. 2006)). It ultimately held that Ms. Knick's facial takings claims challenging the ordinance as a physical occupation of property are subject to *Williamson County*, and unripe until Knick prosecutes a (second) state court lawsuit. App. A at 27-28.

As to Ms. Knick's as-applied takings claims, the Third Circuit held that these claims were also unripe

under *Williamson County* until Ms. Knick filed and finished a state court inverse condemnation action. *Id.* at 28-32. Although the lower court concluded that it had authority, under this Court's precedent, to waive the state litigation ripeness requirement for prudential reasons, it declined to do so for Ms. Knick. *Id.*

REASONS FOR GRANTING THE PETITION

The Third Circuit's decision raises an important question as to whether the Court should reconsider and overrule *Williamson County*'s state litigation ripeness doctrine. *Arrigoni*, 136 S. Ct. 1409 (Thomas, J., dissenting from denial of certiorari). The decision also highlights and exacerbates a conflict among the circuit courts on whether typical facial takings claims—claims alleging that a law destroys the economic use of property or causes a physical invasion—are ripe without exhaustion of state court procedures.

While the Third Circuit decision applying *Williamson County*'s state litigation rule to facial physical and regulatory takings claims is consistent with the decisions of the Sixth, Ninth, and Tenth Circuits, it conflicts with decisions from the First, Fourth, and Seventh Circuits. Because of *Williamson County*'s preclusive effect on judicial review, *Arrigoni*, 136 S. Ct. at 1411 (Thomas, J., dissenting from denial of certiorari), the conflict on facial claims dramatically impacts the ability of property owners to challenge restrictive laws on a facial basis.

Finally, the Third Circuit's treatment of facial takings claims is also inconsistent with this Court's precedent. That precedent has repeatedly indicated

that facial takings claims are ripe upon enactment of the challenged law, without respect to state court procedures. *See, e.g., Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 736 n.10 (1997); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 494 (1987). The decision below holds to the contrary. For all these reasons, the Court should grant the Petition.

I.

THE DECISION BELOW RAISES THE IMPORTANT QUESTION OF WHETHER THE COURT SHOULD RECONSIDER *WILLIAMSON COUNTY*'S STATE LITIGATION RIPENESS REQUIREMENT

The Court has identified a number of tests for determining when the government causes a taking of property without just compensation. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538-42 (2005). Unfortunately, *Williamson County*'s demand for a state court lawsuit prior to the assertion of a federal takings claim takes much of the bite out of this Court's tests by destroying claims at an early stage. *San Remo Hotel*, 545 U.S. at 352 (Rehnquist. C.J., concurring); *Del-Prairie Stock Farm*, 572 F. Supp. 2d at 1032 (The state litigation doctrine "has led to a number of serious problems."). To add insult to injury, it is now clear that the state litigation rule underlying this regressive system lacks any compelling doctrinal justification. *Arrigoni*, 136 S. Ct. at 1409-10 (Thomas, J., dissenting from denial of certiorari). The Court should take this case to reconsider, and overrule, *Williamson County*'s state litigation ripeness principle.

A. Relevant Legal Background

1. Takings Standards

This Court has held that a person may challenge governmental action as an unconstitutional taking of private property on several different grounds. *Lingle,* 544 U.S. at 538-42. Most simply, one may assert that the government causes a *per se* taking by authorizing a "physical invasion" of property. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 432-33 (1982). One may also challenge land use and other regulations as a "regulatory taking" on the basis that they harm the use and value of private property. There are two theories for doing so. First, one may allege that a regulation deprives property of "all economically beneficial use." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992). Second, under *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978), a property owner may contend that a regulation that does not deny all economic use of property still causes a taking due to its overall, adverse economic impact. *Id.* at 124. Finally, a special unconstitutional conditions-related test allows a land use applicant to challenge development permit conditions on the basis that there is no reasonable relationship between the condition and development. *Nollan*, 483 U.S. at 831-32; *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994).

Prior to 2005, this Court recognized an additional takings test. Specifically, a property owner could establish a taking by showing that a regulation "fails to substantially advance a legitimate state interest[s]." *Lingle*, 544 U.S. at 540-44. However, in 2005, the *Lingle* decision abrogated this test. *Id.* at 545.

Takings claimants generally may raise a claim under any existing test on a facial or "as-applied" basis. In a facial challenge, the plaintiff alleges that simple "enactment of a [law] constitutes a taking." *Keystone*, 480 U.S. at 494. Such a claim does not depend on the particular nature of the claimant's property or other fact-specific circumstances; the focus is on the text of the law. *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 296-97 (1981). Conversely, in an as-applied challenge, the claimant asserts that the law results in a taking as applied to a particular set of facts. *Id.*

2. *Williamson County*

In *Williamson County*, this Court considered a claim that land use regulations resulted in a denial of valuable economic use, as applied to the property at issue. 473 U.S. at 186-90. The Court initially held that the claim was unripe because the local government had not reached a "final decision" on application of the subject regulations to the plaintiff's property. *Id.* at 192-94.

Although this final decision ruling should have ended the case, the *Williamson County* Court went on in dicta to articulate and apply a second ripeness hurdle. Specifically, the Court stated that a takings claim will not ripen until the claimant unsuccessfully "seek[s] compensation through the procedures the State has provided for doing so." *Id.* at 194. The *Williamson County* Court reasoned that the Fifth Amendment is violated only when a takings occurs "without just compensation." *Id.* at 194-96. From there, the Court concluded that a property owner must seek and be denied compensation in state court before a federal takings claim accrues. *Id.* The Court

ultimately held that the claim in *Williamson County* was not ripe because the plaintiff had not filed a state court action seeking compensation under Tennessee's inverse condemnation statute. *Id.*

Since *Williamson County*, the Court has clarified that the "state litigation" ripeness doctrine is a prudential and not jurisdictional principle. *Suitum*, 520 U.S. at 733-34.

B. The Only Function of the State Litigation Rule Is To Confuse, Delay, and Destroy Takings Claims

Although *Williamson County* presented the "state litigation" requirement as a temporary hurdle to review of takings claims in federal court, 473 U.S. at 185, it has operated as a permanent barrier. *Arrigoni*, 136 S. Ct. at 1411 (Thomas, J., dissenting from denial of cert.); *DLX, Inc. v. Kentucky*, 381 F.3d 511, 521 (6th Cir. 2004) ("The barring of the federal courthouse door to takings litigants seems an unanticipated effect of *Williamson County* . . . ."). Indeed, in practice, the rule often forecloses both federal and state court review. *Arrigoni*, 136 S. Ct. at 1411 (Thomas, J., dissenting from denial of cert.).

1. Preclusion Rules Bar Federal Review of *Williamson County*-Ripened Takings Claims and Limits Takings Suits to State Court

The most well-known problem associated with *Williamson County* arises from the tension between the state court litigation ripeness rule and the Full Faith and Credit statute.[2] The statute "obliges federal

[2] 28 U.S.C. § 1738.

courts to give the same preclusive effect to a state-court judgment as would the courts of the State rendering the judgment." *McDonald v. City of West Branch*, 466 U.S. 284, 287 (1984). While *Williamson County* says that takings claims ripen for federal review after state court litigation, the Full Faith and Credit statute bars federal courts from hearing a case after a related state court suit. *San Remo*, 545 U.S. at 336 & n.16.

Accordingly, when a plaintiff unsuccessfully litigates for compensation in state court to comply with *Williamson*, any takings claim ripened by this process is impermissible in federal court because of preclusion barriers. *See San Remo*, 545 U.S. at 346-47. *Arrigoni,* 136 S. Ct. at 1410 (Thomas, J., dissenting from denial of cert.); Michael M. Berger, *Supreme Bait & Switch: The Ripeness Ruse in Regulatory Takings*, 3 Wash. U. J.L. & Pol'y 99, 102 (2000) ("[T]he very act of ripening a case also ends it."). As the Sixth Circuit explained:

> The availability of federal courts to hear federal constitutional takings claims has often seemed illusory, because under *Williamson County* takings plaintiffs must first file in state court . . . before filing a federal claim, and because in deciding that federal claim, preclusive effect must be given to that prior state-court action under [Section 1738] according to the res judicata law of the state, including the doctrines of

> merger and bar whereby all claims which could have been brought in an earlier cause of action are precluded.

DLX, Inc., 381 F.3d at 519-20 (footnote omitted).

In *San Remo Hotel*, this Court refused to correct this situation by creating an exception from federal preclusion rules for takings cases ripened in state court under *Williamson County*. As a result, far from maturing takings claims for federal review, the state litigation doctrine works to totally deprive federal courts of jurisdiction over the Takings Clause. 545 U.S. at 349-52 (Rehnquist, C.J., concurring). It strips property owners of their ability (exercised for the previous century) to protect their property in federal court under Section 1983 and prevents federal courts from participating in the review and development of Fifth Amendment takings law. *Arrigoni*, 136 S. Ct. at 1410 (Thomas, J., dissenting from denial of cert.) (after *San Remo*, the state litigation rule "dooms plaintiffs' efforts to obtain federal review of a federal constitutional claim"). This cannot be reconciled with Congressional intent to provide citizens with a federal forum for federal civil rights violations. *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 543 (1972) (Congress "intended to provide a federal judicial forum for the redress of wrongful deprivations of property by persons acting under color of state law."); *Mitchum v. Foster*, 407 U.S. 225, 242 (1972) ("The very purpose of [42 U.S.C.] § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights . . . .").

Indeed, this Court has considered the availability of a federal forum to be so important that it has long allowed constitutional plaintiffs to invoke federal

protection regardless of state remedies. *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."). Only takings plaintiffs are different, thanks to *Williamson County*. In creating a state court exhaustion barrier to federal review of takings claims, *Williamson County* radically departs from core premises of the modern judicial system. John F. Preis, *Alternative State Remedies in Constitutional Torts*, 40 Conn. L. Rev. 723, 726 (Feb. 2008) (*Williamson County* represents "a marked change from past practice.").

2. *Williamson County*'s Interaction with Removal Often Prevents State Court Review

Despite all this, one might think that *Williamson County* at least leaves takings plaintiffs with a state court avenue for their claims. *San Remo Hotel*, 545 U.S. at 346; Frederic Bloom & Christopher Serkin, *Suing Courts*, 79 U. Chi. L. Rev. 553, 605 (2012) ("State courts thus get first bite at these [takings] actions under *Williamson County*—and they get the only bite under *San Remo*."). But the state court option is often also illusory due to another problem with the state litigation ripeness doctrine: its conflict with the principle that a government defendant may remove certain cases from state court to federal court. *See* 28 U.S.C. § 1441; *Arrigoni*, 136 S. Ct. at 1411 (Thomas, J., dissenting from denial of cert.).

Given that *Williamson County* frustrates initial federal court review and creates a preclusion bar to post-state court review, plaintiffs generally must file their federal takings claim in state court or not at all.

Rockstead v. City of Crystal Lake, 486 F.3d 963, 968 (7th Cir. 2007). But doing so subjects the entire complaint to prompt removal to the federal court on the basis that it raises a "federal question." *See, e.g.*, *Sansotta v. Town of Nags Head*, 724 F.3d 533, 545 (4th Cir. 2013). Removal prevents state court litigation, and renders the removed claim unripe in the new federal forum under *Williamson County*. Thus, a federal court facing a removed takings claim will typically dismiss the claim because state procedures were not exhausted. *Id.*; *Arrigoni*, 136 S. Ct. at 1411 (Thomas, J., dissenting from denial of cert.); *Koscielski v. City of Minneapolis*, 435 F.3d 898, 903 (8th Cir. 2006) (approving of the dismissal of a removed takings claim for lack of finished state court procedures).

The combined effect of these "anomalies" is to leave many federal takings plaintiffs without any access to the courts. *Arrigoni*, 136 S. Ct. at 1411 (Thomas, J., dissenting from denial of certiorari). They can't go to federal court due to *Williamson County* and many cannot go through state court due to the removal/ripeness game. Ultimately, plaintiffs may have to choose to forego their constitutional rights under the Takings Clause—in order to secure prompt review in some court under a non-takings theory—or try and brave the unpredictable and draining *Williamson County* maze.

What a mess. The Constitution requires a "reasonable, certain and adequate provision for obtaining compensation." *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 124-25 (1974) (quoting *Cherokee Nation v. Southern Kansas R. Co.*, 135 U.S. 641, 659 (1890)). But this is exactly what *Williamson*

County's state litigation rule prevents. It creates a chaotic and unworkable system for adjudicating federal takings claims, *Wayside Church*, 847 F.3d at 825 (Kethledge, J., dissenting) (application of *Williamson County* "has undermined the adjudication of federal takings claims against states and local governments"), one that cries out for this Court's intervention. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 63 (1996) (reconsideration of precedent justified "when governing decisions are unworkable"); 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) ("[T]he *Williamson County* State Litigation prong should be reconsidered and eliminated.").

C. *Williamson County*'s State Litigation Requirement Is Doctrinally Flawed and Entirely Unnecessary

The problems flowing from *Williamson County*'s state litigation doctrine are especially troubling because the doctrine is incorrect. *Arrigoni*, 136 S. Ct. at 1410 (Thomas, J., dissenting from denial of certiorari); Michael W. McConnell, Horne *and the Normalization of Takings Litigation: A Response to Professor Echeverria*, 43 Envtl. L. Rep. News & Analysis 10749 (2013) (noting that the state litigation concept in "*Williamson County* . . . cannot be correct, at least on its own terms"). As noted above, *Williamson County* declares that a taking is not "without just compensation" and complete until a state *court* confirms lack of compensation. 473 U.S. at 196. This makes no sense.

In almost all takings cases, the state court is not the government body taking property, nor does it bear compensatory liability for a taking. These qualities fall on the shoulders of the executive or legislative agency responsible for invading private property. *See generally*, *Monell v. New York City Dep't of Social Services*, 436 U.S. 658, 690-92 (1978); *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."). It is the acts and omissions of the body taking the property that should determine if the taking is uncompensated. *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."). If a local or state entity makes a final decision regulating or invading property without offering or guaranteeing compensation, the taking is "without just compensation" and crystalized. *Horne*, 133 S. Ct. at 2062 n.6 (A takings "'Case' or 'Controversy' exists once the government has taken private property without paying for it.").

Requiring state court litigation in such a case adds nothing to the factual or legal sufficiency of a takings claim. *Id.* ("whether an alternative remedy exists does not affect the jurisdiction of the federal court"); *Del Prairie Stock Farm*, 572 F. Supp. 2d at 1033 ("a concrete takings injury can occur without state litigation"); 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."). It simply imposes an unnecessary and jurisdictionally disastrous exhaustion of state remedies rule. Gideon Kanner, *"[Un]equal Justice Under Law": The Invidiously Disparate Treatment of American Property Owners in Taking Cases,* 40 Loy. L.A. L. Rev. 1065, 1077-78 (2007).

This case provides an example of how *Williamson County* prevents adjudication of claims already fit for review. There is no dispute here that the Township formally and finally enacted an ordinance that, on its plain terms, authorizes the public and the Township to physically occupy Ms. Knick's land, a quintessential physical taking. It is clear that the Township enforced these provisions against Ms. Knick, informing her that failure to open her land to the public violates the ordinance and commanding her to provide public access. App. A at 3-5. Finally, the Township has not paid or offered compensation to Ms. Knick, and neither the challenged Ordinance nor any other Township law contains a provision guaranteeing compensation. The Township actions against Ms. Knick are "without just compensation" and a claim for a Fifth Amendment violation is present. *Horne*, 133 S. Ct. at 2062 n.6.

Yet, *Williamson County* (supposedly) demands that courts ignore the violation of Ms. Knick's constitutional rights until she takes the time-consuming and expensive step of prosecuting a state court suit. While this requirement cannot make the takings issue more concrete, it causes delay, wastes Ms. Knick's and court resources, and may ultimately prevent any hearing. All of this is occurring under a

doctrine without a compelling basis in the Constitution's "without just compensation" language or in the Court's historical precedent. *Arrigoni*, 136 S. Ct. at 1411 (Thomas, J., dissenting from denial of cert.); *Home Telephone & Telegraph Co. v. City of Los Angeles*, 227 U.S. 278 (1913) (rejecting a contention that the federal courts could not hear a property rights claim under the Fourteenth Amendment until the state courts had passed on the issue).

This Court should take this case to reconsider and overrule *Williamson County*'s state litigation ripeness requirement. *San Remo Hotel*, 545 U.S. at 352 ("I believe the Court should reconsider whether plaintiffs asserting a Fifth Amendment takings claim based on the final decision of a state or local government entity must first seek compensation in state courts.") (Rehnquist, J. concurring). To be sure, *stare decisis* must be considered. However, this principle is weakest in the realm of constitutional interpretation. *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989). Moreover, stare decisis cannot immunize a particular procedural remedy "once [the procedural rule] is proved to be unworkable in practice; the mischievous consequences to litigants and courts alike from the perpetuation of an unworkable rule are too great." *Swift & Co., Inc. v. Wickham*, 382 U.S. 111, 116 (1965). For this reason, this Court is willing to reconsider judicial decisions that are cumbersome in operation. *See, e.g.*, *Montejo v. Louisiana*, 556 U.S. 778, 792 (2009) ("[T]he fact that a decision has proved 'unworkable' is a traditional ground for overruling it." (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991))). *Williamson County*'s state litigation requirement clearly qualifies as an unworkable constitutional and procedural rule. As a result, *stare*

decisis does not inhibit the Court from reconsidering *Williamson County*.

II.

THERE IS DEEP CONFLICT IN THE LOWER COURTS ON THE ISSUE OF WHETHER *WILLIAMSON COUNTY*'S STATE LITIGATION DOCTRINE APPLIES TO FACIAL TAKINGS CLAIMS

Given *Williamson County*'s dramatic effects, it is not surprising that federal courts have sought exceptions to the state litigation doctrine. Yet, in so doing, they have come into conflict. *Arrigoni*, 136 S. Ct. at 1412 (Thomas, J., dissenting from denial of cert.). This case concerns the most important and intractable federal conflict: whether *Williamson County* bars facial takings claims.

Here, the Third Circuit joined a handful of other circuits in holding that *Williamson County* applies to, and bars, facial physical and regulatory takings claims. This solidifies a conflict with other circuits that have declared *Williamson County* inapplicable to facial takings claims. The Court's review is necessary to resolve the conflict. *See* Michael M. Berger, *The Ripeness Game: Why Are We Still Forced to Play?*, 30 Touro L. Rev. 297, 317 (2014) ("Until the Supreme Court steps in, there will be no uniformity.").

A. The First, Fourth, and Seventh Circuits Exempt Facial Claims from *Williamson County*

A number of circuit courts have concluded "that, *Williamson County* notwithstanding, takings plaintiffs remain free to raise facial Fifth Amendment challenges in federal courts in the first instance."

Katherine Mims Crocker, *Justifying a Prudential Solution to the* Williamson County *Ripeness Puzzle*, 49 Ga. L. Rev. 163, 186 (2014). The First Circuit is in this camp. In *Philip Morris, Inc. v. Reilly*, 312 F.3d 24 (1st Cir. 2002), that court held that a physical takings facial claim was ripe for federal adjudication on the merits without respect to state remedies. *Id.* at 30; *see also id.* 54 n.27 (Lipez, J., dissenting) (agreeing that the facial claims were ripe). The same circuit confirmed this view a few years later in *Asociacion De Subscripcion Conjunta Del Seguro De Responsabilidad Obligatorio v. Flores Galarza*, 484 F.3d 1 (1st Cir. 2007). There, the First Circuit again considered a facial physical takings claim and it again held that since the plaintiff "is making a facial statutory challenge, its takings claim need not be brought first to a Commonwealth body, either administrative or judicial." *Id.* at 14 (citing *Suitum*, 520 U.S. at 736 n.10).

The Fourth Circuit follows the same approach. In *Clayland Farm Enterprises, LLC v. Talbot County, Md.*, 672 F. App'x 240 (4th Cir. 2016), that circuit held that *Williamson County* did not prevent immediate federal review of "a regulatory takings claim that the moratorium [on development] is facially unconstitutional." *Id.* at 243. In so doing, the court stated: "[w]hen an ordinance on its face is alleged to have effected a taking . . . the claim accrues when the ordinance interferes in a clear, concrete fashion with the property's primary use. . . . Facial takings challenges to a regulation are 'generally ripe the moment the challenged regulation or ordinance is passed . . . .'" *Id.* at 244 (quoting *Suitum*, 520 U.S. at 736 n.10). This decision built on a prior Fourth Circuit opinion which also concluded that *Williamson County*

"does not apply to facial [takings] challenges to the validity of a state regulation." *Holliday Amusement Co. v. South Carolina*, 493 F.3d 404, 407 (4th Cir. 2007).

To the same effect are decisions from the Seventh Circuit. In *Peters v. Village of Clifton*, 498 F.3d 727 (7th Cir. 2007), a physical takings case, the Seventh Circuit observed that facial takings claims are exempt from *Williamson County*'s state litigation rule. *Id.* at 732. Then, in *Muscarello v. Ogle County Bd. of Com'rs*, 610 F.3d 416, 422 (7th Cir. 2010), the same court confirmed a circuit exception "to the exhaustion requirement" for "pre-enforcement facial challenges." In the 2017 decision of *International Union of Operating Engineers Local 139 v. Schimel*, 863 F.3d 674, 678 (7th Cir. 2017), the Seventh Circuit re-confirmed and applied a *Williamson* exception for a "pre-enforcement facial challenge."

While the issue is not as developed in the Fifth and Eleventh Circuits, decisions from those jurisdictions also declare that *Williamson County* does not pertain to facial takings claims. *See Opulent Life Church v. City of Holly Springs, Miss.*, 697 F.3d 279, 287 (5th Cir. 2012) ("The Supreme Court has held *Williamson County* to be inapplicable to facial challenges." (citing *Yee v. City of Escondido*, 503 U.S. 519, 533-34 (1992)); *Temple B'Nai Zion, Inc. v. City of Sunny Isles Beach, Fla.*, 727 F.3d 1349, 1359 n.6 (11th Cir. 2013) ("*Williamson County*'s finality principles do not apply to facial claims that a given regulation is constitutionally infirm.").

B. The Third Circuit Joins the Sixth, Ninth, and Tenth Circuits in Applying *Williamson County* to Facial Takings Claims

In tension with the First, Fourth, and Seventh circuits, decisions from the Sixth, Ninth, and Tenth circuit hold that *Williamson County* applies to facial physical and regulatory takings claims. In *Wilkins v. Daniels*, 744 F.3d 409, 417 (6th Cir. 2014), for instance, the Sixth Circuit considered a physical takings claim similar to that here. The court concluded that *Williamson County*'s "second requirement—that plaintiffs must seek just compensation through state procedures—does [apply]." *Id.* at 417.

The Ninth Circuit's decisions are in accord. In the early decision of *Sinclair Oil Corp. v. County of Santa Barbara*, 96 F.3d 401 (9th Cir. 1996), the Ninth Circuit held that "the just compensation ripeness requirement" applies to facial takings "claims premised upon the denial of a property's economically viable use." *Id.* at 407. Later, in *Ventura Mobilehome Communities Owners Ass'n v. City of San Buenaventura*, 371 F.3d 1046, 1052-54 (9th Cir. 2004), the Ninth Circuit affirmed that all facial takings claims other than those under the now-defunct "substantially advances" test are subject to *Williamson County*. Similarly, in *Surf and Sand, LLC v. City of Capitola*, 377 F. App'x 662, 664 (9th Cir. 2010), the court held that a "facial challenge to the Conversion Ordinance as a public regulatory taking was not ripe [as] Plaintiff had not sought compensation from the state as required by *Williamson County*."

The Tenth Circuit has also squarely considered the facial ripeness issue. In *Alto Eldorado Partnership v. County of Santa Fe*, 634 F.3d 1170 (10th Cir. 2011), the court considered a facial takings claim arising under *Nollan*, 483 U.S. 825, and *Dolan*, 512 U.S. 374, and levied against development permit conditions. The Tenth Circuit concluded that *Williamson County*'s state litigation principle applied to this and all facial takings claims, except those arising under the defunct "substantially advances" test. 634 F.3d at 1175-76. In so doing, the Tenth Circuit attempted to distinguish decisions from other circuits declaring that facial takings claims are not bound by *Williamson County*, including several discussed above. *Id.*

In the decision below, the Third Circuit sided with the Sixth, Ninth, and Tenth Circuits in holding that *Williamson County*'s state litigation requirement applies to basic facial takings claims, like the physical takings claim asserted by Ms. Knick. The lower court held that the only facial claims exception to *Williamson County* is for claims that do not assert a taking without just compensation at all; i.e., claims arising under the Public Use Clause of the Fifth Amendment or Due Process Clause.

The decision below thus conflicts with the decisions of the First, Fourth and Seventh Circuits and exacerbates the ongoing conflict among the courts on whether *Williamson County* applies to facial takings claims resting on modern takings tests. The split has substantial practical import. In *Williamson County*-free circuits like the First and Seventh, a property owner with a facial physical takings claim receives a prompt hearing on the merits of her

complaint. In contrast, in the Third and other circuits applying *Williamson County*, the same property owner will be kicked between federal and state courts without a hearing, with resources wasted and justice delayed or denied. David Zhou, Comment, *Rethinking the Facial Takings Claim*, 120 Yale L.J. 967, 973 (2011) ("[R]elaxed ripeness rule means that federal courts will actually have to reach the merits of some takings claims characterized as 'facial.'").

This Court should grant the Petition to resolve the conflict.

III.

THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISIONS IN APPYING *WILLIAMSON COUNTY* TO FACIAL TAKINGS CLAIMS

The Third Circuit's treatment of facial takings claims conflicts not only with other circuit decisions, but also with this Court's takings precedent.

A. This Court's Precedent Exempts Facial Claims from *Williamson County*'s State Litigation Ripeness Doctrine

Notably, the decision at the heart of this case—*Williamson County*—did not involve a facial takings claim. It dealt solely with an as-applied claim alleging that application of a land use regulation to the particular property in that case stripped away its economic value. *Williamson County*, 473 U.S. at 176-84. Consistent with this reality, this Court's subsequent decisions recognize the potential applicability of a state litigation ripeness requirement in an *as-applied* taking case, but have never considered, much less applied, the concept in a *facial*

case. *See, e.g.*, *Keystone*, 480 U.S. at 494 (reviewing a post-*Williamson County* facial takings case filed in federal court without concern for state remedies).

Instead, this Court's post-*Williamson County* jurisprudence repeatedly states and/or demonstrates that facial takings claims ripen upon enactment of the challenged law, without regard for state procedures. *Peters v. Village of Clifton*, 498 F.3d at 732 ("[T]he Supreme Court has held that many facial challenges to legislative action authorizing a taking can be litigated immediately in federal court."); *Opulent Life Church*, 697 F.3d at 287 ("The Supreme Court has held *Williamson County* to be inapplicable to facial challenges.").

In *Suitum*, the Court observed that facial takings challenges "are generally ripe the moment the challenged regulation or ordinance is passed." 520 U.S. at 736 n.10. In *San Remo*, it stated that the plaintiffs were "never required to ripen" their facial takings claims in state court, but "could have raised [them] directly in federal court." 545 U.S. at 345-46. The Court has put these statements into practice by affording merits review to many facial takings claims that arise in federal courts without prior state court litigation. *See, e.g.*, *Hodel*, 452 U.S at 273; *Keystone*, 480 U.S. at 494.

There is a logical reason for the Court's distinction between facial and as-applied takings claims with respect to *Williamson County*'s state litigation rule: facial claimants may seek to invalidate a law that textually takes property without a compensation

guarantee, not just secure after-the-fact damages.[3] 545 U.S. at 345-46. This makes it unnecessary to require use of post-taking, state compensation procedures. *Id.*

B. The Decision Below Is Inconsistent with This Court's Jurisprudence

In tension with this Court's decisions, the decision below finds no difference between as-applied and facial takings claims when it comes to the application of *Williamson County*. The decision below holds that all takings claims are unreviewable without prior state ligation. More precisely, under the Third Circuit decision, both facial physical takings claims, such as the one Ms. Knick asserts, and "denial of all economically beneficial use" regulatory takings claims are subject to *Williamson County* and unripe without state court litigation. Ultimately, the lower court concluded that this Court has only allowed facial takings claims based on the abrogated "substantial

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[3] The invalidation remedy is possible in facial takings cases because, when the text of a law causes an immediate taking in all or almost all applications, the law's validity is conditioned upon a concurrent mechanism for compensating affected owners. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1018 n.21 (1984) ("To the extent that the operation of the statute provides compensation, no taking has occurred . . . ."); *Arrigoni*, 136 at 1410 (Thomas, J., dissenting from denial of certiorari) (Constitution places a just compensation condition on the exercise of the power to take property). Without a compensation guarantee in the statute, it is unlawful and the claimant may seek declaratory relief or other non-monetary remedies to invalidate the offending law. *See, e.g.*, *Keystone*, 480 U.S. at 494 (injunctive and declaratory relief); *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 71 n.15 (1978) (declaratory relief).

advances" takings test to proceed without state litigation.

This view is irreconcilable with the history of facial takings litigation in this Court. The Court has reviewed facial takings cases arising under every extant takings standard (i.e., non-"substantially advances" claims), without concern for exhaustion of state remedies. *F.C.C. v. Florida Power Corp.*, 480 U.S. 245 (1987) (facial physical takings claim); *Hodel*, 452 U.S at 273 (denial of economic use takings claim); *Connolly v. Pension Ben. Guar. Corp.*, 475 U.S. 211, 224-25 (1986) (facial "*Penn Central*" regulatory takings claim). These cases confirm the Court's explicit statements in other cases that state remedies are inapplicable to facial takings claims.

The decision below, and other decisions like it, badly stray from this precedent in holding that facial claims cannot be resolved until the claimant sues in state court. Indeed, under the lower court's reasoning, few of the Court's facial takings cases were properly before the Court. The Court should clarify that this view is wrong and thereby resolve the conflict about whether facial takings claims can be adjudicated free from *Williamson County*'s state litigation requirement.

In sum, *Williamson County* can and should be reconsidered from the ground up because of clear and persistent evidence it is unworkable and wrongly decided. This case is a proper vehicle for doing so. However, if the Court is not inclined to take that step here, it should grant review to resolve the festering conflict on whether *Williamson County* applies to facial takings claims. Without this Court's intervention, *Williamson County* will continue to drag

property owners through a Kafkaesque litigation process, federal courts will continue to issue confused and conflicting rulings, and important takings controversies will disappear in *Williamson County*'s procedural black hole without a hearing.

CONCLUSION

The Court should grant the Petition for Writ of Certiorari.

DATED: October, 2017.

Respectfully submitted,

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