No. 17-647

IN THE

Supreme Court of the United States

ROSE MARY KNICK,

Petitioner,

v.

TOWNSHIP OF SCOTT, PENNSYLVANIA, ET AL.,

Respondents.

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

BRIEF OF THE CATO INSTITUTE, NFIB SMALL BUSINESS LEGAL CENTER, SOUTHEASTERN LEGAL FOUNDATION, BEACON CENTER OF TENNESSEE, REASON FOUNDATION, AND PROFESSOR ILYA SOMIN AS *AMICI CURIAE* SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the Takings Clause state-litigation requirement established by *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), should be abandoned as an unnecessary, unworkable anomaly in fundamental-rights jurisprudence.

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INTEREST OF THE *AMICI CURIAE*[1]

The **Cato Institute** is a nonpartisan public-policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies works to restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and produces the annual *Cato Supreme Court Review*.

The **National Federation of Independent Business Small Business Legal Center** (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The NFIB is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitols. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. To fulfill its role as the voice for small business, the NFIB Legal Center frequently files *amicus* briefs in cases that affect small businesses.

Southeastern Legal Foundation (SLF) is a national nonprofit, public-interest law firm and policy center that advocates constitutional individual liberties, limited government, and free enterprise in

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[1] Rule 37 statement: All parties received timely notice of *amici*'s intent to file this brief. All parties lodged blanket consents with the Clerk. No counsel for any party authored any part of this brief; no person or entity other than *amici* made a monetary contribution intended to fund its preparation or submission.

the courts of law and public opinion. For 40 years, SLF has advocated for the protection of private property interests from unconstitutional takings.

The **Beacon Center of Tennessee** is a nonprofit organization based in Nashville that advocates for free-market policy solutions within Tennessee. Property rights and constitutional limits on government mandates are central to its goals.

Reason Foundation is a national, nonpartisan, and nonprofit public policy think tank, founded in 1978. Reason's mission is to advance a free society by applying and promoting libertarian principles and policies—including free markets, individual liberty, and the rule of law. Reason advances its mission by publishing *Reason* magazine, as well as commentary on its websites, and by issuing policy research reports; Reason selectively participates as *amicus curiae* in cases raising significant constitutional issues.

Ilya Somin is a Professor of Law at George Mason University. Professor Somin has written extensively about property and takings, and is the author of *The Grasping Hand:* Kelo v. City of New London *and the Limits of Eminent Domain*, and co-editor of *Eminent Domain: A Comparative Perspective*.

This case is of significant concern to *amici* because *Williamson County*'s unfounded and unworkable state litigation requirement relegates fundamental constitutional rights to second-class status and prevents property owners from invoking the Fifth Amendment's protection against uncompensated takings in federal courts.

INTRODUCTION AND SUMMARY OF ARGUMENT

Thirty years ago, in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), this Court pronounced a new and unfounded rule that a property owner must sue in state court to ripen a federal takings claim. This radical departure from historical practice has effectively shut property owners out of federal courts without any firm doctrinal justification.

Before *Williamson County*, there was no requirement that property owners must first resort to litigation to ripen their takings claims. And before the Fourteenth Amendment, judicial proceedings played no role in ripening takings claims. There is no basis for assuming that, through ratification, the Reconstruction Congress imposed any sort of litigation requirement on property owners seeking to ripen claims against state actors. Instead, only traditional ripeness requirements were contemplated.

The regime created by *Williamson County*'s aberrant state-litigation requirement effectively consigns Takings Clause claims to second-class status. No other individual constitutional rights claim is systematically excluded from federal court in the same way. By undermining vital access to federal courts, *Williamson County*'s state-litigation requirement is anathematic to the reforms that Congress sought to effect with the Reconstruction Amendments and enactment of U.S.C. § 1983. To curb pervasive abuse by state governments, the Fourteenth Amendment secured federal rights for all U.S. citizens. Access to federal courts is vital to uniform protection of constitutional rights, and Congress enacted § 1983 to

ensure that citizens would have a federal forum to vindicate their federal rights—precisely because there was concern that state courts could not be trusted to adequately enforce the federal Constitution against the coordinate branches of state government.

Williamson County cannot be justified on the ground that takings claims are "premature" before state court proceedings have run their extensive course, as claimed in the decision. 473 U.S. at 195–97. Any other constitutional rights case initiated in federal court is "premature" in exactly the same way—because there is always the chance that the plaintiff could have obtained redress in state court instead.

It is also dangerous to justify this systematic exclusion from federal court by looking to the supposedly superior expertise of state judges on land-use issues. *See San Remo Hotel v. San Francisco*, 545 U.S. 323, 347 (2005). State judges could be said to have similar expertise on a variety of other issues that arise in constitutional litigation, including ones relevant to other rights protected by the Bill of Rights. After all, they understand local sensibilities, histories, and other particularities that might be just as relevant in the context of obscenity, reasonable expectations of privacy, and other cases.

Finally, while *stare decisis* is integral to stability and predictability in a legal system, it is not an "inexorable command." *Lawrence v. Texas*, 539 U.S. 558, 577 (2003). This Court need not continue down the wrong path once its flaws are revealed. Precedential weight is at its lowest in constitutional decisions, partly because mistakes here cannot be corrected except through constitutional amendment, which this Court has recognized is highly unlikely. By

the Court's standards for when it is appropriate, even necessary, to reconsider precedent, *Williamson County*'s state-litigation requirement should be abandoned. It is poorly reasoned, unworkable, and has not fostered cognizable reliance interests.

Recognizing the indefensible nature of the anomalies created by *Williamson County*, four justices have already called for overruling the decision "in an appropriate case." *San Remo Hotel*, 545 U.S. at 352 (Rehnquist, C.J., concurring). That appropriate case has now arrived.

ARGUMENT

I. THERE IS NO DOCTRINAL BASIS FOR *WILLIAMSON COUNTY*'S STATE-LITIGATION REQUIREMENT

Williamson County Regional Planning Commission v. Hamilton Bank pronounced special ripening rules that apply in review of a regulatory takings claim. 473 U.S. 172 (1985). These rules require more than the traditional cognizable injury to recognize a ripened constitutional claim

This requirement might make sense if the Court had meant that the landowner must first pursue *administrative procedures* for compensation. But instead, in a major break from historical practice, *Williamson County* proclaimed that to ripen a federal takings claim against a state actor, the owner must first be denied just compensation in state court. *Id.* at 194–97. This second ripening requirement was pronounced in dicta, as the Court had already concluded that Hamilton Bank's takings claim was unripe for want of a "final decision" before mentioning the supposed threshold requirement to litigate in state

court. Nonetheless, the lower courts have applied *Williamson County's* state-litigation requirement as a near iron bar on access to federal courts over the past 33 years. *See, e.g., Arrigoni Enterprises, LLC v. Town of Durham, Conn.*, 136 S. Ct. 1409, 1412 (2016) (Thomas J., dissenting) (observing that many courts treat the state litigation rule as a jurisdictional bar).

The doors to the federal courts remain closed until the property owner receives an adverse decision in state court denying just compensation. While that decision—in theory—ripens the owner's takings claim, it simultaneously bars the owner from (re)litigating the issue in federal court. *Santini v. Conn. Hazardous Waste Management Service*, 342 F.3d 118, 130 (2nd Cir. 2003) (noting irony in that "the very procedure that [*Williamson County*] require[s] [plaintiffs] to follow before bringing a Fifth Amendment takings claim . . . also preclude[s] [them] from ever bringing a Fifth Amendment takings claim."). *Williamson County*'s state-litigation requirement results in a constitutional absurdity.

A. *Williamson County* Pronounced a New and Unfounded Ripeness Rule for Takings Claims

Until *Williamson County*, there was never a suggestion that courts played any role in consummating the constitutional violation in a takings case. Although the requirement to ripen a federal takings claim through state litigation is supposedly grounded in the text of the Fifth Amendment, this rule defies the most straightforward construction of the Takings Clause and contravenes historic precedent. Courts had long understood the Takings Clause as recognizing a fully justiciable claim once it had been

alleged that: (a) private property had been "taken" pursuant to executive or legislative action, and; (b) without affording a contemporaneous administrative avenue for obtaining the compensation guaranteed by the Constitution.[2]

The courts played no role in ripening takings claims in the nineteenth century. For example, in *Cherokee Nation v. S. Kan. Ry. Co.*, a tribe sought compensation for land taken for construction of a railway, pursuant to an act of Congress. 135 U.S. 641 (1890). That claim was understood as properly raised because a Commission established by the executive branch determined that the Cherokee Nation was entitled to receive only a total of $7,352.94 (representing two separate awards)—a figure that the

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[2] *Williamson County* said that its state litigation requirement was "analogous" to this Court's conclusion, in *Parratt v. Taylor*, that there was no claim for violation of the Due Process Clause in a state's failure to provide a predeprivation process for review of "a random and unauthorized act by a state employee." 473 U.S. at 194 (citing *Parratt v. Taylor*, 451 U.S. 527 (1981)). *Parratt* held that "the Constitution does not require predeprivation process [under those circumstances] because it would be impossible or impracticable . . . [and, concluded] the Constitution is satisfied by the provision of meaningful postdeprivation process." *Id*. But *Parratt* is off-point. For one, the conclusion that an individual has an adequate opportunity "for determination of rights and liabilities" in a postdeprivation hearing does not necessarily dictate that their right to judicial review in a federal court is predicated upon a requirement to litigate that right in state court. 451 U.S at 541. Yet, even if that were the case, *Parratt* would be inapposite because the constitutional injury crystalizes in an inverse condemnation case with state action taking private property without affording an *administrative process* for securing just compensation. The availability of an avenue for judicial review in state court is simply beside the point where Congress has authorized lawsuits in federal court under U.S.C. § 1983.

tribe maintained was insufficient to fully compensate for what had been taken. 135 U.S. at 667–68; *see also Monongahela Navigation Co. v. United States*, 148 U.S. 312, 327 (1893) (recognizing an immediately justiciable claim where private property was taken by an act of Congress through legislation limiting the amount of compensation that the executive branch was authorized to pay below fair market value).

Likewise, in *Causby v. United States*, this Court said that "[i]f there is a taking, the claim is 'founded upon the Constitution' and within the jurisdiction of the Court of Claims to hear and determine" because the claimant had suffered injury to his property rights without administrative compensation. 328 U.S. 256, 267 (1946);[3] *see also Pumpelly v. Green Bay & Miss. Canal Co.*, 80 U.S. 166, 176–77 (1871) (assuming a ripened controversy when interpreting Wisconsin's Takings Clause).

Similarly, ordinary justiciability rules applied for equivalent claims raised under the takings clauses of state constitutions. This is important because our

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[3] *Williamson County* cited *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1019, 1016–20 (1984), for the proposition that a "takings claim[] against the Federal Government [is] premature until the property owner has availed itself of the process provided by the Tucker Act." 473 U.S. 194–95. But *Monsanto Co.* did not suggest that to ripen a claim for just compensation one must first litigate that claim in federal court, because that would make no sense. *Monsanto Co.* merely affirmed that Congress has designated a specific venue for bringing constitutional claims for uncompensated takings in the Court of Federal Claims. The fact that Congress has designated a specific forum for seeking compensation when the United States has taken property does not imply any limitation on the right to pursue a claim for just compensation in federal court *against state actors*.

federal takings jurisprudence was largely shaped during the 19th century by decisions drawing on state cases; most of the states had adopted analogous takings clauses—often with wording nearly identical to the text of the Fifth Amendment. *See id.* at 178–81 (taking guidance from Connecticut, Missouri, Massachusetts, Wisconsin, and other states); *Monongahela Navigation Co.*, 148 U.S. at 325, 327, 329 (looking to opinions construing analogous state claims); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1057–60 (1992) (Blackmun, J., dissenting) (referring to historic practice in the states). It is therefore highly relevant that state courts recognized actionable takings claims in challenges to legislative enactments purportedly authorizing appropriations in the absence of any statutorily defined administrative procedure for obtaining compensation. *See* Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52 Vand. L. Rev. 57, 60–61 (1999) (examining both antebellum and reconstruction era case law).

For example, in *Callender v. Marsh*, Chief Justice Parker of the Massachusetts Supreme Judicial Court explained that a plaintiff may invoke the Commonwealth's takings clause "in an action for possession, or of trespass" against state agents, where the legislature has acted to occupy private property for public use "without means provided to indemnify the owner… because such a statute would be directly contrary the [Constitution.]" This was consistent with the approach courts took through the Civil War, wherein a claim was recognized as properly presented in court where an "owner[] complain[ed] of [a] government-sanctioned seizure of [] property" through a common law tort action. Brauneis, 52 Vand. L. Rev.

at 57. During this era, state-based takings clauses were invoked primarily in response to an affirmative defense–that is, when the defendant(s) argued that they had acted consistent with validly enacted law. *Id.* Therefore, the state-based takings clause was invoked as a countermeasure, with the plaintiff owner arguing "that the legislation on which defendants relied was void, because it purported to authorize acts that amounted to takings of private property, but did not provide for just compensation." *Id.*

In *Kennedy v. Indianapolis*, this Court recognized a justiciable "controversy" in a quiet title action in which a landowner claimed that he never received compensation for the taking of his land, as required under Indiana's Takings Clause. 103 U.S. 599, 601 (1880). The land was taken for construction of a canal and a commission concluded that no compensation was owed because of the economic benefits that would accrue to the owner's residuary parcel upon completion of the project. *Kennedy v. Indianapolis*, 14 F. Cas. 314, 315 (C.C.D. Ind. 1878) (observing that "the commissioners appointed reported that the benefits which he would receive from the construction of the canal equaled any damages that his property might sustain"). But those benefits never materialized because the project was abandoned. On those facts, Chief Justice Morrison Waite held that the state failed to pay just compensation for the property in question. *Kennedy*, 103 U.S. at 604–06. There was no suggestion that the owner should have pressed a claim for compensation in Indiana state court as a predicate for invoking the Takings Clause. It was understood that the constitutional issue was properly presented.

The remedy for a takings violation changed in many states during the late nineteenth century. Brauneis, 52 Vand. L. Rev. at 57. Under the "new framework for owner-initiated just compensation litigation" state courts recognized "that a right of action for just compensation was either implied or explicit in just compensation provisions themselves." *Id*. Such a claim was actionable in court at the time property was taken if the authorities failed to provide an administrative procedure for obtaining just compensation or if the compensation awarded by the executive authority was alleged to be insufficient to satisfy the constitutional demand. And this is precisely the approach that this Court endorsed in recognizing inverse condemnation claims wherein a state or federal government is alleged to have taken private property through legislative or executive action without providing an administrative means for acquiring compensation. *See Pumpelly*, 80 U.S. 166, at 176–77 (emphasizing that, because "it does not appear that any statute made provision for compensation to the plaintiff, or those similarly injured, for damages to their lands[,]" the "only question" was whether the plaintiff's property had been taken). The claim was understood as ripe at the moment alleged constitutional injury crystalized. *See Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227, 241 (1937) ("Where there is such a concrete case admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged, the judicial function may be appropriately exercised."); *see also* Gene R. Nichol, Jr., *Ripeness and the Constitution*, 54 U. Chi. L. Rev. 153, 169 (1987) (observing that the ripeness inquiry often speaks to the substance of the underlying claim,

and suggesting that *Williamson County's* ripeness determination was correct only to the extent that it properly characterized the constitutional injury).

B. There Is No Textual Basis for the State-Litigation Requirement

The state-litigation rule is illogical for other reasons as well. First, if the text of the Fifth Amendment really is to be understood as requiring individuals to seek compensation in court in order to ripen a takings claim, that requirement would seemingly apply equally to claims against both state and federal actors. Indeed, there is no basis for assuming a different standard for ripening takings claims against state or local entities than against the United States. The Fifth Amendment certainly imposes no requirement to pursue judicial remedies solely *against the states*. For that matter, the prohibition against uncompensated takings was originally directed only *against the federal government*. *See Barron v. City of Baltimore*, 32 U.S. 243, 250–51 (1833).

And for the reasons discussed further in Section II, there is no cause to believe that the Fourteenth Amendment imposed any special ripening requirement. The incorporation doctrine does not change the procedural requirements for getting into federal court. If anything, incorporation should ease access because the entire point of incorporating the Fourteenth Amendment was to use the federal government—including federal courts—to protect those incorporated rights.[4] Therefore, any special

[4] The Bill of Rights' constitutional guarantees may be even more robust as applied to the states through the Fourteenth

ripening requirement would have to be derived from the actual text of the Fifth Amendment; but that would necessarily make the requirement equally applicable to claims against the United States. *Cf.* John D. Echeverria, Stop the Beach Renourishment*: Why the Judiciary is Different*, 35 Vt. L. Rev. 475, 489 (2010) ("If the judicial branch of state government is subject to the Takings Clause, which applies to the states via incorporation through the Fourteenth Amendment, then the judicial branch of the federal government must also be subject to the Takings Clause.").

Yet it would be nonsensical to say that to ripen a takings claim against the federal government, a property owner must litigate a claim for just compensation. Such a rule would be circular. It is simply wrong to infer that the Takings Clause entails a requirement to ripen takings claims in court. *See Monongahela Navigation Co.*, 148 U.S. 312 (emphasizing that the issue of whether just compensation was denied is a "judicial question.").

The constitutional text provides merely that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V. And while there is ample room to dispute what sort of government conduct constitutes a "taking" and what precisely constitutes "just compensation" in a specific

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Amendment. *See* Kurt T. Lash, *Commentaries on Akhil Amar's* The Bill of Rights: Creation and Reconstruction, 33 U. Rich. L. Rev. 485, 489–98 (1999) (affirming that "the meaning of the Bill of Rights shifted from an expression of federalism to one of individual liberty" through adoption of the Fourteenth Amendment, and arguing that incorporated rights must be understood according to their public meaning in 1868); *see also*, James Ely, *The Guardian of Every Other Right*, 83–105 (3d Ed., 2008) (discussing takings law in the nineteenth century).

case, there is no basis for inferring procedural hurdles that were not originally understood to be included in the plain language of the text. Simply put, if a takings claim against the federal government ripens at the time compensation is denied by the executive and legislative branches, the same principle applies to takings claims against state or local governments. Accordingly, there is no basis for applying anything other than traditional ripeness requirements in U.S.C. § 1983 claims for just compensation.

II. THE RECONSTRUCTION CONGRESS AND FOURTEENTH AMENDMENT CONFERRED FEDERAL PROTECTIONS FOR PROPERTY RIGHTS—INCLUDING ACCESS TO FEDERAL COURTS—ON THE SAME TERMS AS OTHER FUNDAMENTAL RIGHTS

The Fourteenth Amendment prohibits state actions that deprive individuals of "life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. It would be strange if one of those three received less protection in federal court due to procedural hurdles. Individuals can straightforwardly vindicate their rights to life and liberty in federal court. The same must be true for property, which the Fourteenth Amendment protects on equal terms.

The Framers of the Fourteenth Amendment sought to apply the Bill of Rights against the states because of a long history of abusive practices by state governments, including state courts. *See generally*, Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (1998). Advocates feared that southern state governments threatened the property rights of African Americans and other political minorities,

including whites who had supported the Union against the Confederacy during the Civil War. *Id.* at 268–69; *see also* Ilya Somin, *The Civil Rights Implications of Eminent Domain Abuse*, Testimony before the U.S. Comm'n on Civil Rights, 5–11 (Aug. 12, 2011), http://bit.ly/2jBpR10 (discussing the relevant history). As the Court has recognized, "[e]quality in the enjoyment of property rights was regarded by the framers of that Amendment as an essential precondition to the realization of other basic civil liberties which the Amendment was intended to guarantee." *Shelly v. Kraemer*, 334 U.S. 1, 10 (1948).

The Reconstruction Congress also enacted U.S.C. § 1983 to ensure that the federal courthouse doors would be open for any individual seeking vindication of federal rights. *See Briscoe v. Lahue*, 460 U.S. 325, 363–64 (1983) ("The debates over the 1871 Act are replete with hostile comments directed at state judicial systems.").

A. Access to Federal Courts Is Essential to Ensuring Uniform Protection of Property Against State Governments

One of the main purposes of "incorporating" the Bill of Rights against state governments was to ensure that residents of all states enjoy at least a minimum level of protection for their basic constitutional rights. And access to federal courts is essential to ensure a uniform national baseline of protection for constitutional rights, including those protected by the Takings Clause.

As Justice Story explained in the canonical case of *Martin v. Hunter's Lessee*, one of the most important reasons why the Court has ultimate jurisdiction over

federal constitutional issues is "the importance, and even necessity of uniformity of decisions throughout the whole United States, upon all subjects within the purview of the constitution." 14 U.S. (1 Wheat.) 304, 347–48 (1816) (Story, J.). The Court in *Martin* also emphasized the danger of undermining uniformity by giving free reign to possible state court bias in favor of their own state governments:

> The Constitution has presumed . . . that State attachments, State prejudices, State jealousies, and State interests might sometimes obstruct or control, or be supposed to obstruct or control, the regular administration of justice.

Id. at 347.

Potential bias by state courts in takings cases is more than just a theoretical problem, given the reality that many state judges are elected and have close ties to state parties and political leaders who adopt policies that result in regulatory takings. *See* Ilya Somin, *Stop the Beach Renourishment and the Problem of Judicial Takings*, 6 Duke J. Const. L. & Pol'y 91, 99–100 (2011) (discussing this fact and its implications for takings jurisprudence). While conscientious judges will surely try to rule impartially, their political and institutional loyalties could easily influence their decisions, consciously or not. Moreover, state officials might deliberately seek judges more inclined to rebuff federal claims that threaten state government interests. *Id.* at 99. Such dangers make a federal forum for ensuring the protection of constitutional rights essential.

The right to private property was a central component of the "civil rights" that the Fourteenth

Amendment's framers sought to protect.[5] As Representative John Bingham, a leading framer of the Fourteenth Amendment, emphasized, the Takings Clause must be applied against the states in order to protect "citizens of the United States, whose property, by State legislation, has been wrested from them, under confiscation." Amar, *The Bill of Rights*, at 268. State governments are not entitled to special protection against takings claims. To the contrary, the protection of Takings Clause rights, and constitutional property rights generally against state governments, was a major motivating force behind adopting the Fourteenth Amendment in the first place.

But the Reconstruction Congress was not concerned only with the possibility of abuse at the hands of the legislative and executive branches of state government. *See Patsy v. Bd. of Regents*, 457 U.S. 496, 507 (1982). There were also fears that abuses may be pervasive and systemic, infecting every branch of state government. Cf. *Stop the Beach Renourishment v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 713–14 (2010) (affirming that the Takings Clause applies on equal terms to all branches of state government). Indeed, there was special skepticism as to whether state courts could be trusted to vindicate federal rights against abuse—especially, but not exclusively, for African Americans recently freed from slavery. *See Mitchum v.*

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[5] On the centrality of property rights in 19th century conceptions of civil rights, *see*, *e.g.*, Harold Hyman & William Wiecek, *Equal Justice Under Law: Constitutional Development, 1835-75*, 395–97 (1982) (describing the right to property as one of the main elements of civil rights as conceived in the 1860s); Mark A. Graber, *Transforming Free Speech: The Ambiguous Legacy of Civil Libertarianism* (1991) (describing how most 19th-century jurists viewed property as a fundamental right).

Foster, 407 U.S. 225, 242 (1972). Facing continued abuses in which state courts were complicit, the Reconstruction Congress thus enacted 42 U.S.C. § 1983 to ensure that the federal courthouse doors would be open for any individual seeking vindication of federal rights. *Id.* Against this historical backdrop, there is simply no reason to assume that Congress intended to exclude takings claimants from vindicating their federal rights in federal courts. *Cf. San Remo Hotel*, 545 U.S. at 349 (2005) (Rehnquist, C.J., concurring) (suggesting that owners should be allowed to initiate takings suits in federal court against state actors under Section 1983).

B. *Williamson County*'s State-Litigation Requirement Consigns Takings Claims to Second-Class Status Compared to Other Fundamental Rights

The Fourteenth Amendment and § 1983 conferred federal protections for property rights on the same terms as other fundamental rights. Yet no other constitutional right gets the same harsh treatment as the Takings Clause did in *Williamson County*. Plaintiffs alleging state violations of virtually any other constitutional right can go straight to federal court. *See, e.g.*, *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (Second Amendment); *Thomas v. Chicago Park Dist.*, 534 U.S. 316 (2002) (First Amendment); *Hudson v. McMillian*, 503 U.S. 1 (1992) (Eighth Amendment). The same rationale applies to rights protected by the Fourteenth Amendment, including unenumerated rights. *See, e.g.*, *Roe v. Wade*, 410 U.S. 113 (1973); *Brown v. Bd. of Educ.*, 347 U.S. 54 (1954).

When it comes to the right to be free from uncompensated government takings, plaintiffs are

turned away from the federal courthouse, forced instead to litigate in the courts of the very state that committed the violation. The result is an indefensible double standard. As the Court has emphasized, there is "no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation." *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994).

The Court has suggested two justifications for its anomalous treatment of takings claims: that a plaintiff's claim that his property has been taken is "premature" before he has exhausted state compensation "procedures," *Williamson County*, 473 U.S. at 195–97, and that state courts have greater familiarity with takings issues than federal courts do. *See San Remo Hotel*, 545 U.S. at 347 ("[S]tate courts undoubtedly have more experience than federal courts do in resolving the complex factual, technical, and legal questions related to zoning and land-use regulations."). If applied to violations of other rights, these rationales would lead to the exclusion of numerous cases that federal courts routinely hear.

1. Federal courts' consideration of takings claims is no more "premature" than their consideration of other constitutional claims.

The logic of *Williamson* County—that a claim for an uncompensated taking is "premature" until an owner attempts to obtain compensation "through the procedures the state has provided for doing so"—could be used to justify denial of a federal venue for almost any other constitutional rights claim. 473 U.S. at 194.

Under *Williamson County*'s reasoning, a claim that a state statute infringes on a plaintiff's First Amendment right to free speech could be "premature" until she has asked a state court to invalidate the statute that gave rise to the violation. Yet no one suggests that First Amendment plaintiffs must first attempt to litigate in state courts before any federal court can step in. For example, Andrew Cilek, who is currently waiting for a decision from this Court, challenged Minnesota's prohibition on wearing any political badge, button, or insignia in or around a polling place on First Amendment grounds without first "ripening" his federal constitutional claims in state court. *See Minn. Majority v. Mansky*, 849 F. 3d 749 (8th Cir. 2017).

This same holds true for other violations of constitutional rights. When Otis McDonald challenged Chicago's handgun ban and arcane registration requirements, he was not turned away from the federal courthouse on the ground that he first needed to go through the Illinois state courts to ensure that Chicago had no qualms about abridging the right of its residents to keep and bear arms. *See McDonald*, 561 U.S. 742. The constitutional injury giving rise to his claim was complete when attempts to lawfully register and possess a firearm were denied. Similarly, prisoners in California initiating suit in federal court alleging that overcrowding and lack of medical care in the state prison system violated their Eighth Amendment right to be free from cruel and unusual punishment were not required to first initiate proceedings in state court to define their injuries and ripen any federal constitutional claims. *See Brown v. Plata*, 563 U.S. 493 (2011).

Even if a state-court claim might potentially remedy the violation of federal rights, a violation giving rise to a federal cause of action has still occurred. That a state court might remedy a Takings Clause violation by providing compensation does not negate the fact that a violation has occurred. That violation is complete when the government takes the property without paying just compensation.

2. State courts have no greater expertise on takings claims than on numerous other constitutional claims that federal courts routinely hear.

The "expertise" rationale for *Williamson County*'s rule fares no better. State judges may sometimes know more than federal judges about "complex factual, technical, and legal questions related to zoning and land-use regulations," but the same can be said of issues that arise in many cases involving other constitutional rights. *See* Ilya Somin, *Federalism and Property Rights*, 2011 U. Chi. Legal Forum 1, 28–31 (giving numerous examples). This possibility has never been sufficient to deny a plaintiff access to review of constitutional claims in federal court.

For example, some Establishment Clause claims require a determination of whether a "reasonable observer . . . aware of the history and context of the community and forum in which [the conduct occurred]" would view the practice as communicating a message of government endorsement or disapproval of religion. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 777 (1995) (O'Connor, J., concurring). State judges may have more detailed knowledge of their community's perceptions than federal judges, but that

does not stop aggrieved parties from bringing Establishment Clause cases to federal court.[6]

This Court has also ruled that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). Whether any given speech is likely to incite "imminent lawless action" may well depend on variations in local conditions. Although state judges may be best informed about such conditions, free-speech claims are not consigned to state courts.

As Chief Justice Rehnquist noted in *San Remo Hotel*, "the Court has not explained why we should hand authority over federal takings claims to state courts, based simply on their relative familiarity with local land-use decisions and proceedings, while allowing plaintiffs to proceed directly to federal court in cases involving, for example, challenges to municipal land-use regulations based on the First Amendment or the Equal Protection Clause." 545 U.S. at 350–51 (Rehnquist, C.J., concurring).

Furthermore, there is no reason to assume that state judges necessarily have greater knowledge of Takings Clause and other property-rights issues than federal judges do. They may have greater knowledge of local conditions and regulations, while federal judges may have greater knowledge of relevant federal

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[6] Of course, federal district judges also live in the communities where they preside—they don't exist in some federal ether—and, as leading citizens, may even better perceive local goings-on.

jurisprudence. Somin, *Stop the Beach Renourishment*, *supra*, at 102–03. Ultimately, this rationale does not provide a principled reason to prevent federal courts from hearing this single type of constitutional claim.

III. *STARE DECISIS* SHOULD NOT PREVENT THE COURT FROM OVERTURNING *WILLIAMSON COUNTY'S* STATE-LITIGATION REQUIREMENT

Like any complex issue, proper treatment of precedent requires balancing competing goals. Thomas R. Lee, *Stare Decisis in the Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 Vand. L. Rev. 647, 652 (1999). This Court's standards for overruling erroneous precedent require abandoning *Williamson County*'s state-litigation requirement.

Typically, "*stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). However, even as adhering to precedent increases judicial economy, preserves the legitimacy of the Court, and allows individuals to resolve their disputes outside of court based on settled expectations, blind adherence to precedent does violence to the same lofty ideals that purportedly undergird *stare decisis*. *See* Lee, *Stare Decisis*, at 652–54. As Justice Thurgood Marshall explained, *stare decisis* "contributes to the integrity of our constitutional system of government, both in appearance and in fact," by illustrating "that bedrock principles are founded in the law rather than in the

proclivities of individuals." *Vasquez v. Hillery*, 474 U.S. 254, 265–66 (1986). But the legitimacy of the Court—and belief in the integrity of its decisions—is undermined when "an important constitutional decision with plainly inadequate rational support *must* be left in place for the sole reason that it once attracted five votes." *Payne*, 501 U.S. at 834 (Scalia, J., concurring). Stability is important, but so is "assuring accurate judicial decisions that faithfully apply correct principles of law." *Lee*, *Stare Decisis* at 654.

A. *Stare Decisis* Is at Its Lowest Ebb When Constitutional Rights Are At Stake, And Judges Have a Duty to Correct Constitutional Misinterpretations

Stare decisis "keep[s] the scale of justice even and steady." 1 Wm. Blackstone, Commentaries 69 (Univ. of Chicago Press 1979) (1765). But for all of its rich history, it is neither an "inexorable command" to be blindly followed, *Lawrence v. Texas*, 539 U.S. 558, 577 (2003), nor a "mechanical formula of adherence." *Helvering v. Hallock*, 309 U.S. 106, 119 (1940). This is especially true in constitutional cases. *Citizens United v. FEC*, 558 U.S. 310, 377 (2010) (Roberts, C.J., concurring). In contrast to common-law or statutory cases where "stability may trump perfect correctness" due to "the importance of preserving settled expectations," "in constitutional cases, the value of correct reasoning may trump stability given the difficulty of making changes to a constitutional precedent." Bryan A. Garner *et al.*, *The Law of Judicial Precedent* 352 (2016). Stated simply, "*stare decisis* does not require [this Court] to approve routine constitutional violations." *Arizona v. Gant*, 556 U.S. 332, 351 (2009).

Eighty years ago, Justices Stone and Cardozo observed that "[t]he doctrine of *stare decisis* . . . has only a limited application in the field of constitutional law." *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 94 (1936) (Stone and Cardozo, JJ., concurring in result). In contrast to cases involving statutory interpretation, this Court has acknowledged that its interest in adhering to *stare decisis* "is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions." *Agostini v. Felton*, 521 U.S. 203, 235 (1997); *see also*, *Patterson v. MacLean Credit Union*, 491 U.S. 164, 175 n.1 (1989) (The doctrine of *stare decisis* carries less weight "in constitutional cases" because "Congress lacks th[e] option [of changing a constitutional precedent by legislation], and an incorrect or outdated precedent may be overturned only by our own reconsideration or by constitutional amendment.").

Judges also have a duty to correct previous misinterpretations, particularly in constitutional cases. Historically, the common law consistently recognized as a core principle underlying *stare decisis* that "the function of a judge [is] not to make, but to declare the law." 1 Edward Coke, *The Second Part of the Institutes of the Laws of England* 51 (E. & R. Brooke 1797) (1642). Since judges did not make the law, judicial precedent, while important as an explanatory tool, was not to be followed if it conflicted with the substance of the law itself. *See Jones v. Randall*, 98 Eng. Rep. 706, 707 (1774) ("But precedent, though it be evidence of law, is not law in itself; much less the whole of law."). That understanding of how judges "make" law and apply *stare decisis* has been adopted and adapted to the modern realities of

judging. *See, e.g., James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 549 (1991) (Scalia, J., concurring in the judgment) (although "judges in a real sense 'make' law . . . they make it *as judges make it*, which is to say *as though* they were 'finding' it—discerning what the law is, rather than decreeing what it is today *changed* to, or what it will tomorrow be.").

This notion of the proper role of *stare decisis*—as a helpful guide but less than ironclad rule—is important because, as the Court has humbly acknowledged, "[a]ll judges make mistakes." *Dietz v. Bouldin*, 136 S. Ct. 1885, 1896 (2016). Attempts by judges to discern the law may occasionally miss their mark. Accordingly, the Constitution itself—not prior judicial decisions—must be the conclusive source of constitutional law. This general approach to judicial decision-making, and a willingness to correct mistakes, was already at work in America before ratification of the Constitution. As the Pennsylvania Supreme Court said in 1786:

> A Court is not bound to give the like judgment, which had been given by a former Court, unless they are of opinion that the first judgment was according to law; for any Court may err; and if a Judge conceives, that a judgment given by a former Court is erroneous, he ought not in conscience to give the like judgment, he being sworn to judge according to law. Acting otherwise would have this consequence; because one man has been wronged by a judicial determination, therefore every man, having a like cause, ought to be wronged also.

Kerlin's Lessee v. Bull, 1 U.S. (1 Dall.) 175, 178 (1786).

While it would be unwise for any court to decide *every* legal issue anew, when past errors reach the very core of our constitutional system, it is incumbent upon the Court to correct course. As Blackstone wrote, "if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was bad law, but that it was not law." 1 Commentaries 69–70. Accordingly, "when fidelity to any particular precedent does more to damage this constitutional ideal than to advance it, [this Court] must be more willing to depart from that precedent." *Citizens United*, 558 U.S. at 378 (Roberts, C.J., concurring).

B. The Considerations the Court Weighs in Deciding Whether to Overrule Precedent Support Overturning *Williamson County*'s State-Litigation Requirement

The Court has stated that it will "overrule an erroneously decided precedent . . . if: (1) its foundations have been ero[ded] by subsequent decisions; (2) it has been subject to 'substantial and continuing' criticism; and (3) it has not induced 'individual or societal reliance' that counsels against overturning" it. *Lawrence*, 539 U.S. at 587–88. An additional factor that the Court considers is whether the original decision was "well reasoned." *Montejo v. Louisiana*, 556 U.S. 778, 793 (2009). All four of these factors weigh in favor of overruling *Williamson County*'s state-litigation requirement.

The rule's "foundations have been eroded" by subsequent decisions, as it is at odds with the way the Court has treated other rights protected by the Bill of Rights. It is routine for federal courts to hear claims of constitutional rights violations without requiring the claims be litigated in state court, and without creating

a Catch-22 situation under which the actions required to ripen a claim for federal court simultaneously make it impossible to bring one. *See San Remo Hotel*, 545 U.S. at 349 (Rehnquist, C.J., concurring) ("*Williamson County* all but guarantees that claimants will be unable to utilize the federal courts to enforce the Fifth Amendment's just compensation guarantee"). Even challenges to state and local land-use regulations based on provisions of the Bill of Rights other than the Takings Clause can proceed in federal court without first running the gauntlet of state litigation. *See, e.g., Renton v. Playtime Theatres, Inc.,* 475 U.S. 41 (1986) (First Amendment challenge to restrictions on locations of adult businesses).

There is no doubt that *Williamson County* has been subjected to "substantial and ongoing criticism." In a concurring opinion in *San Remo Hotel*, four justices, including two currently sitting, noted that *Williamson County* has severe flaws, is inconsistent with the Court's treatment of other constitutional rights, and "has created some real anomalies, justifying our revisiting the issue." 545 U.S. at 349 (Rehnquist, C.J., concurring). *Williamson County* has also been severely criticized by scholars and legal commentators.[7]

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[7] See, e.g., R.S. Radford & Jennifer Fry Thompson, *The Accidental Abstention Doctrine: After Thirty Years, the Case for Diverting Federal Takings Claims to State Court Under* Williamson County *has Yet to be Made,* 67 Baylor L. Rev. 567 (2015); Joshua D. Hawley, *The Beginning of the End?* Horne v. Department of Agriculture *and the Future of* Williamson County, 2012–2013 Cato Sup. Ct. Rev. 245; J. David Breemer, *Overcoming* Williamson County*'s Troubling State Procedures Rule*, 18 J. Land Use & Envtl. L. 209 (2003); Peter A. Buchsbaum, *Should Land Use Be Different? Reflections on* Williamson County Regional Planning Board v. Hamilton Bank, in *Taking Sides on Takings*

Williamson County has not induced "individual or societal reliance that counsels against overturning it." If an uncompensated restriction on property rights is constitutionally valid, the government should be able to defend it in federal court. Constitutionally valid policies do not require the protection of the *Williamson County* doctrine, and such protection is not extended against any other types of constitutional claims. By contrast, *Williamson County*'s state-litigation requirement undermines the reliance interests of property owners who reasonably assume that they will have an opportunity to protect themselves against uncompensated takings in federal court. Instead, they are deprived of the ability to vindicate their rights by *Williamson County*'s Kafkaesque rules.

Finally, *Williamson County*—a gross anomaly in our constitutional system—is an almost paradigmatic example of a decision that is not "well reasoned." What, other than unworkable and poorly reasoned, would a system that denies property owners with federal claims access to federal courts be called? First, owners are turned away and sent to state court to ripen their claims; then, when they return, the doors to the federal courthouse are closed because their constitutional claims have already been decided by the state. *Williamson County* fails to "explain why federal takings claims in particular should be singled out to be confined to state court." *San Remo Hotel*, 545 U.S. at 351 (Rehnquist, C.J., concurring). The chief justice

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Issues: The Public & Private Perspective 471, 473–74 (Thomas E. Roberts, ed. 2002); Michael M. Berger, *Supreme Bait & Switch: The Ripeness Ruse in Regulatory Takings*, 3 Wash. U.J.L. & Pol'y 99, 102 (2000).

was right, and the Court should feel no qualms in overturning the state-litigation requirement.

CONCLUSION

The ability to vindicate federally secured rights is held sacrosanct in all other contexts. Yet, without any real explanation, *Williamson County* has relegated the right to receive "just compensation" for the taking of one's property to the status of an unprotected right—despite its explicit protection in constitutional text. The Court should reverse the decision below and finally overturn *Williamson County's* unfounded and unworkable state-litigation requirement.

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