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 JUSTICE AND FREEDOM FUND AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

Justice and Freedom Fund ("JFF"), as *amicus curiae*, respectfully urges this Court to reverse the decision of the Third Circuit.

Justice and Freedom Fund is a California non-profit, tax-exempt corporation formed on September 24, 1998 to preserve and defend the constitutional liberties guaranteed to American citizens, through education, legal advocacy, and other means. JFF's founder is James L. Hirsen, professor of law at Trinity Law School and Biola University in Southern California and author of New York Times bestseller, *Tales from the Left Coast*, and *Hollywood Nation*. Mr. Hirsen is a frequent media commentator who has taught law school courses on constitutional law. Co-counsel Deborah J. Dewart is the author of *Death of a Christian Nation* (2010) and holds a degree in theology (M.A.R., Westminster Seminary, Escondido, CA). JFF has made numerous appearances in this Court as *amicus curiae*.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985) has created a nightmarish maze that traps takings claimants and ultimately slams the federal courthouse door in their

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[1] The parties have consented to the filing of this brief. *Amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to its preparation or submission.

faces. In navigating the complex interplay among procedural rules—including removal, res judicata, and collateral estoppel—the befuddled claimant is like a dog chasing its own tail but never catching it. Meanwhile the ripened claim, like a rotten tomato, falls to the ground.

The Township of Scott has passed an Ordinance that imposes crushing financial burdens on Petitioner no matter how she responds. Ordinance 12-12-20-001 (Dec. 20, 2012). She has three choices—none of them good and all of them expensive. If she does nothing and fails to comply, the Township will impose draconian fines in addition to attorney fees and costs associated with an enforcement action. These fines range from $300 to $600 *per day*, plus attorney fees and other court costs. *Knick v. Township of Scott, Pa.*, 862 F.3d 310, 315 (3d Cir. 2017). If instead Petitioner elects to comply with the Ordinance, she must foot the bill to improve and maintain her property to ensure public access, and she must sacrifice her privacy by allowing strangers to enter her property at any time during daylight hours. Ordinance 12-12-20-001 § 5. The third and final option is litigation, but that choice entails significant time and cost (e.g., attorneys, appraisers) with no guarantee she will prevail and/or recover any portion of her expense from the Township, particularly in light of *Williamson County*'s mandate that she exhaust her options in state court first, and only then—maybe—set foot in federal court.

The procedures available for obtaining just compensation are "[un]reasonable, [un]certain, and [in]adequate]." *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 124-125 (1974). The government

unreasonably imposes the entire burden on Petitioner to initiate an inverse condemnation action *after* the government has confiscated her property. The many burdens on the landowner are only exceeded by the uncertainty that an award of compensation will be adequate to cover them—improvements to ensure public access, perhaps a fence and signage to identify the "cemetery" boundary lines, ongoing maintenance, repairs, insurance, and real estate taxes—not to mention the threat to property value. In addition to financial burdens, a property owner may find it difficult to discern whether an individual is a bona fide cemetery visitor or an intruder intending to do harm.

These overwhelming burdens should be enough to doom the Ordinance and *Williamson County*'s ripeness doctrine. But there is more. *Williamson County*'s procedural trap virtually guarantees that takings claimants will be shut out of federal court, contrary to congressional intent to provide a federal forum to vindicate claims that a state or local government has infringed rights under the federal constitution. Courts have honored this principle in cases involving other portions of the Bill of Rights—e.g., the First, Fourth, and Fourteenth Amendments—while Fifth Amendment takings claimants are forced to litigate in state court. Property owners' lack of access to federal courts encourages local governments to be aggressive, resulting in unconstitutional regulatory action. *Williamson County* has created an unwarranted inequality that has no basis in law or logic: It is *solely* Fifth Amendment property rights that are demoted to an inexplicable inferior status. This unfortunate precedent deserves to be buried in Knick's cemetery.

ARGUMENT

I. THE ORDINANCE—ON ITS FACE—UNQUESTIONABLY CONSTITUTES A "TAKING" OF PETITIONER'S PROPERTY.

The Township's public access mandate, removing Petitioner's right to exclude others from her property, "is perhaps the most serious form of invasion . . . taking not mere a single strand from the bundle of property rights . . . [but] chop[ping] through the bundle, taking a slice of every thread." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982) (internal citations and quotation marks omitted). The Township has "by *ipse dixit*" recast Petitioner's private property as public property; this action is "the very kind of thing that the Takings Clause of the Fifth Amendment was meant to prevent." *Webb's Fabulous Pharms. v. Beckwith*, 449 U.S. 155, 164 (1980) (a "taking" occurred when the government retained the interest earned on funds deposited with it).

To complicate the analysis, courts have used the term "facial" for two distinct types of taking. In some cases, "the enactment of a challenged law inherently constitutes a taking of property." Timothy Sandefur, *Article: The Timing of Facial Challenges*, 43 Akron L. Rev. 51, 62 (2010). Under other circumstances, an oppressive law is "void on its face." *Id*. at 61. In the first instance, the remedy is compensation, but in the second, invalidation. This case potentially fits either mold. On its face, the Ordinance creates a public easement in Petitioner's land (Section A) requiring "just compensation" (Section B) but it simultaneously imposes draconian burdens on her privacy and finances sufficient to warrant invalidity (Section C). Either way,

there is indisputably a Fifth Amendment "taking" that is ripe for review—just like any other constitutional infringement.

A. The "mere enactment" of the Ordinance is a "taking" of Petitioner's property that mandates "just compensation."

Two relevant provisions of the Ordinance set off constitutional alarms. The "inspection" provision creates the right for public officials to enter private property at any time to determine the existence and location of burial sites. *Knick*, 862 F.3d at 315. Ordinance 12-12-20-001 § 6. No prior notice to the owner is required, even though the property may be a private residence. If the land contains burial sites, the "public access" provision requires the owner to make that portion of the property "open and accessible to the general public during daylight hours." Ordinance 12-12-20-001 § 5. Both provisions set off constitutional alarms, but only the "public access" mandate is before this Court.

At the very least, even if the Ordinance is a valid exercise of police power, "just compensation" must be paid. This permanent physical invasion of Petitioner's land is *per se* a Fifth Amendment taking. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005). This would be true even if the invasion "occup[ied] only relatively insubstantial amounts of space and d[id] not seriously interfere with [Petitioner's] use of the rest of [her] land." *Loretto*, 458 U.S. at 430. Here, the Ordinance imposes ongoing burdens and intrudes daily on Petitioner's privacy. This physical invasion extends far beyond "a regulation that merely restricts the use of property" (*id.*) or "some public program adjusting the

benefits and burdens of economic life to promote the common good" (*Lingle*, 544 U.S. at 538) and is "functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner" (*id*.).

This Court has long recognized that a "public access" mandate, granting the public "a permanent and continuous right to pass to and fro," constitutes a Fifth Amendment taking. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 833 (1987). The Township inflicts "a special kind of injury" by requiring Petitioner to allow "*stranger[s]* [to] directly invade[] and occup[y] [her] property." *Loretto*, 458 U.S. at 436. *See Nollan*, 483 U.S. at 831 ("[h]ad California required the Nollans to make an easement across their beachfront available to the public on a permanent basis. . .no doubt there would have been a taking"); *Dolan v. Tigard*, 512 U.S. 374, 384 (1994) ("had the city simply required petitioner to dedicate a strip of land. . .for public use. . .a taking would have occurred"); *Kaiser Aetna v. United States*, 444 U.S. 164, 178 (1979) (public right of access to privately improved pond). These cases all implicate interference with an owner's the right to exclude, "universally held to be a fundamental element of the property right." *Id*. at 180. In *Kaiser*, the plaintiffs had voluntarily modified their property, but "just compensation" was required before the government could demand public access. In Knick's case, the constitutional injury is even more glaring because the burial sites have been on her property for decades and she was not even aware of them. The government's mandatory interference with the right to exclude is a factor that distinguishes these cases from regulations that do not constitute a taking, e.g., *Yee v.*

City of Escondido, 503 U.S. 519, 527 (1992) (mobile home rent control ordinance); *FCC v. Florida Power Corp.*, 480 U.S. 245, 252 (1987) (FCC review of rents charged for utility pole space).

B. The Ordinance violates the Takings Clause by disturbing Petitioner's occupancy without adequate provision for just compensation.

The Takings Clause is not "a mere remedy." *Arrigoni Enters., LLC v. Town of Durham*, 136 S. Ct. 1409, 1409 (2016) (Thomas, J., dissenting from denial of certiorari). It is not an afterthought, allowing the government to run roughshod over private property rights, violating the Fifth Amendment and leaving the distraught landowner with the task of initiating litigation. Instead, it "places a condition" on the government's exercise of power to take private property in. *First English Evangelical Lutheran Church of Glendale v. Los Angeles*, 482 U.S. 304, 314 (1987). Regardless of whether the government takes possession of "an entire parcel or merely a part thereof," as in this case, "it has a categorical duty to compensate" the landowner. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002). This principle dates back to an early holding of this Court that the government must compensate the owner of private property it uses in a manner that inflicts "irreparable and permanent injury to any extent." *Pumpelly v. Green Bay Co*., 80 U.S. (13 Wall.) 166, 177-178 (1871).

Williamson County refers back to early precedent suggesting that provisions for obtaining compensation need only be "reasonable, certain, and adequate" at the time of the taking. *Williamson County*, 473 U.S. at 194,

citing *Regional Rail*, 419 U.S. at 124-125 (quoting *Cherokee Nation v. Southern Kansas R. Co.*, 135 U.S. 641, 659 (1890)). *Cherokee Nation* merits a closer look. The Constitution "does not provide or require that compensation shall be *actually paid in advance* of the occupancy of the land to be taken. But the owner is entitled to reasonable, certain and adequate provision for obtaining compensation *before his occupancy is disturbed*." *Id*. (emphasis added). The provisions at issue in *Cherokee Nation* met this standard because there was a detailed scheme for payment of compensation, and if the landowner appealed, an amount equal to double the award had to be paid to the court and held until the matter was resolved. *Id*. at 643-646. Land was taken in *Cherokee Nation* to construct a railroad, but construction could not commence until "full compensation shall be made to such occupants for all property to be taken or damage done by reason of the construction of such railway." *Id*. at 644. In contrast to this carefully drafted statutory protection for property owners, the Ordinance disturbed occupancy the moment it was passed, as evidenced by the violation notices Petitioner received. Thus, "[i]n effect, *Williamson County* forces a property owner to shoulder the burden of securing compensation *after* the local government effects a taking." *Arrigoni*, 136 S. Ct. at 1409 (Thomas, J., dissenting from denial of certiorari).

In *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323, 337 (2005), Justice Rehnquist expressed reservations about requiring takings claimants "to utilize all *state* compensation procedures before they can bring a *federal* takings claim." *Id*. at 349 (Rehnquist, J., concurring) (emphasis added). To

support its *state* court exhaustion prong, *Williamson County* cites two cases that have nothing to do with *state* procedures for just compensation—reasonable or otherwise. Instead, both involve exhaustion of *federal* statutory remedies. In *Regional Rail*, 419 U.S. at 124-125, this Court found that the Tucker Act, 28 § U.S.C. 1491, provided adequate procedures to compensate the railroads, and Congress did not withdraw that Act's grant of jurisdiction when it enacted the Regional Railroad Reorganization Act, 45 U.S.C.S. §§ 701 et seq., to reorganize railroads into a single viable system operated by a private for-profit corporation set up by the government. Similarly, in *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984), a case holding that trade secrets are protectable property under the Takings Clause, the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136 et seq., did not withdraw the availability of Tucker Act remedies, but required litigants to exhaust the statutory procedures available under *federal* law. Yet *Williamson County* cites both of these cases as support for its requirement to exhaust *state* court remedies before pursuing a *federal* takings claim in *federal* court. *Williamson County*, 473 U.S. at 194. The logic here is not apparent.

Williamson County does another end-run around the Constitution when it asserts that the state court exhaustion requirement "is analogous to th[is] Court's holding in *Parratt v. Taylor*, 451 U.S. 527 (1981)." *Williamson County*, 473 U.S. at 195.[2] This purported

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[2] *Daniels v. Williams*, 474 U.S. 327, 330-331 (1986) overruled *Parratt* to the extent *Parratt* held that a state official's mere lack of care deprives an individual of life, liberty, or property under the Fourteenth Amendment.

analogy is flawed. In *Parratt*, an inmate sued for violation of due process when state prison officials negligently failed to deliver hobby materials he had ordered by mail. Mere deprivation of property was not a constitutional violation per se—there had to be a lack of due process, and adequate post-deprivation remedies were available in this situation. What *Williamson County* overlooks is *Parratt*'s caution that ordinarily "pre-deprivation notice and hearing . . . serve as a check on the possibility that a wrongful deprivation would occur" (citing cases, including *Fuentes v. Shevin*, 407 U.S. 67 (1972) (striking down prejudgment replevin statute)). *Parratt*, 451 U.S. at 538. *Post*-deprivation procedures may suffice in cases where quick state action is necessary or where meaningful pre-deprivation process is impossible or impractical. *Id*. at 539; *see, e.g*., *North American Cold Storage Co*. *v. Chicago*, 211 U.S. 306 (1908) (seizure and destruction of unwholesome food to protect public health); *Ewing v. Mytinger & Casselberry, Inc*., 339 U.S. 594 (1950) (seizure and destruction of drugs). It is obviously impractical to provide *pre*-deprivation process for an official's unforeseeable carelessness in delivering prison mail. But there is no immediate need for state action with respect to burial sites that have been in places for decades, and it is neither impossible nor impractical to provide an orderly procedure before the government confiscates an interest in real property.

C. The Ordinance is so oppressive that the Township should have been required to exercise the power of eminent domain.

There is "a point at which the police power ceases and leaves only that of eminent domain." *Block v. Hirsh*, 256 U.S. 135, 156 (1921); *see also Martin v. District of Columbia*, 205 U.S. 135, 139 (1907) ("constitutional rights . . . are matters of degree"). The Ordinance compels Petitioner "to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). The massive potential burden is limited only by the imagination. The Ordinance prohibits charging a fee for access, so the entire financial burden falls on the landowner, beginning with litigation and other costs associated with seeking compensation from the Township. The requirement that aggrieved property owners file inverse condemnation proceedings *after* their occupancy has been disturbed is only the beginning. There are likely costs associated with clearing a path or roadway to make the "cemetery" accessible. The owner may need to construct a fence, and perhaps one or more signs, to identify the location of the graves. If a visitor is injured, the landowner is vulnerable to litigation and must bear the ongoing costs of insurance, repairs, and maintenance. The landowner must pay real property tax on the entire property, including the portion now dedicated to public use.

This case stands in contrast to this Court's decision in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978), holding that New York City's historic landmark designation law did not constitute a taking.

Penn Central, unlike this case, did not implicate a "public access" obligation or other physical invasion. But as Justice Rehnquist observed in dissent, the landowner would likely discover that "the landmark designation imposes upon him a substantial cost, with little or no offsetting benefit except for the honor of the designation." *Id*. at 139 (Rehnquist, J., dissenting). In this case, Petitioner suffers a daily, permanent physical invasion of occupancy coupled with ongoing and unpredictable financial burdens.

Williamson County acknowledges the possibility that the government's desired result may be "so unduly oppressive" that it can only be accomplished through eminent domain, but the question was "not properly presented" and therefore "must be left for another day." *Williamson County*, 473 U.S. at 185. That day has now come. The Ordinance here is "unduly oppressive." The "cemetery" portion of Knick's property, which she must open and maintain for daily public access, has now become *public* property. The macabre result of this legislative transformation is that the only time her "private cemetery" is actually *private* is during nighttime hours!

D. *Williamson County*'s exhaustion requirement has created a tangled web that ensnares aggrieved landowners and allows the government to evade its Fifth Amendment responsibility to compensate them.

The state court exhaustion requirement created by *Williamson County* dicta has facilitated gamesmanship where Fifth Amendment claims are bounced like rubber balls between state and federal courts,

ultimately tossing the aggrieved landowner out of the game. This expulsion upends the federal forum Congress intended to preserve for 42 U.S.C.S. § 1983 litigants. In a key ruling confirming the *absence* of a state exhaustion requirement for § 1983 litigants, this Court anticipated the type of entanglements *Williamson County* has spawned, including res judicata, collateral estoppel, and availability of interim relief. *Patsy v. Florida Board of Regents*, 457 U.S. 496, 514 (1982). In *Patsy*, this Court observed that the "difficult questions concerning the design and scope of an exhaustion requirement" could be addressed efficiently by legislation but "if answered incrementally by the judiciary," the result would be "costly, remedy-delaying, and court-burdening litigation." *Id*. at 513-514. That is precisely what has happened—here and in numerous other cases.

Property owners asserting takings claims are faced with an unjustifiable dilemma. When seeking a remedy in a state court, they face the threat that government defendants will remove the action to federal court, where their claims can be dismissed because the state litigation was aborted. Even when a landowner abides by the *Williamson County* requisite and seeks judicial review at the state level, if the state court result is unfavorable, federal courts are still unavailable due to the quagmire of procedural barriers created by *Williamson County*. This is exactly what happened to Knick when she challenged the Ordinance in state court as a violation of her property rights. After that court refused to provide a forum for her suit she turned to the federal court for redress but was told that her complaint could not be heard because of the

requirement that she must sue in state court—the very forum where Knick had begun her quest for justice.

In short, *Williamson County*'s ripeness doctrine "creates a class of constitutional pariahs who may never litigate their federal constitutional claims in federal court." Berger, Michael M., *Supreme Bait & Switch: The Ripeness Ruse in Regulatory Takings*, 3 Wash. U. J.L. & Pol'y 99, 127 (2000).

II. *WILLIAMSON COUNTY*'S SECOND PRONG CONFLICTS WITH DECADES OF THIS COURT'S PRECEDENT AND RENDERS THE TAKINGS CLAUSE INFERIOR TO OTHER PROVISIONS IN THE BILL OF RIGHTS.

This Court has jurisdiction and the aggrieved landowner has Article III standing as soon as the government has taken private property without paying for it. *Horne v. Dep't of Agric.*, 569 U.S. 513, 526 n. 6 (2013). At this point there is a "case" or "controversy" regardless of "whether an alternate remedy exists." *Id*. In *Horne*, this Court recognized that the "prudential ripeness" requirement, wherein "the Government has both taken property *and* denied just compensation," "is not, strictly speaking, jurisdictional." *Id*. at 526; *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot*., 560 U.S. 702, 729, and n. 10 (2010). This Court has also repeatedly affirmed that "a federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging." *Lexmark Int'l, Inc. v. Static Control Components, Inc*., 134 S. Ct. 1377, 1386 (2014) (internal citations and quotation marks omitted).

There is no reason to require Petitioner to waste resources on an inverse condemnation action under Pennsylvania state law before presenting her claim in federal court. The moment the Ordinance became law, the constitutional violation was complete, as evidenced by the two Notices of Violation she received. Petitioner has the same right to proceed as any other person deprived of rights under the U.S. Constitution.

A. Congressional intent to guarantee a federal forum for the vindication of federal constitutional rights is evident in § 1983 and predecessor statutes dating back to the Civil Rights Act of 1871.

Williamson County's state exhaustion prong undermines the fundamental principles behind 42 U.S.C. § 1983. The federal government's role as "a guarantor of the basic federal rights of individuals against incursions by state power" was firmly established during the post-Civil War era when Congress enacted the Civil Rights Act of 1871, the predecessor to 42 U.S.C. § 1983. *Patsy*, 457 U.S. at 503. "Section 1983 opened the federal courts to private citizens, offering them a uniquely *federal* remedy" when states trampled their rights under the U.S. Constitution. *Mitchum v. Foster*, 407 U.S. 225, 239 (1972) (emphasis added). This early civil rights legislation was enacted not only for those who were previously enslaved, "but also to all people where, under color of State law, they or any of them may be deprived of rights to which they are entitled under the Constitution by reason and virtue of their national citizenship." *Id*. at 239 n. 30, quoting Representative Shellabarger, Cong. Globe, 42d Cong., 1st Sess.,

App. 68 (1871). The "very purpose of § 1983" was to protect the people from *state* intrusions on their *federal* constitutional rights. *Mitchum*, 407 U.S. at 242, quoting *Ex parte Virginia*, 100 U.S. 339, 346 (1880). "*Williamson County* stands this doctrine on its head by asserting that state courts not only *may* . . . but indeed *must* be interposed" between the people and the federal courts charged with guarding their rights. Berger, *Supreme Bait & Switch*, 3 Wash. U. J.L. & Pol'y at 126-127.

A judicially crafted exhaustion requirement is irreconcilable with this time-honored role of the federal courts. This Court has repeatedly confirmed that exhaustion of state remedies is not a prerequisite to filing a § 1983 action. The issue was squarely presented—and exhaustion unequivocally rejected—in *Patsy*, 457 U.S. at 498. Even before *Patsy*, this Court already had, on "numerous occasions . . . rejected the argument that a § 1983 action should be dismissed where the plaintiff has not exhausted state administrative remedies" (*id*. at 500), "recognizing the paramount role Congress has assigned to the federal courts" (*Steffel v. Thompson*, 415 U.S. 452, 472-473 (1974)). The availability of state relief is irrelevant, because "[t]he federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." *Monroe v. Pape*, 365 U.S. 167, 183 (1961) (overruled in *Monell v. Dep't of Soc. Servs*., 436 U.S. 658 (1977) insofar as it held that local governments are wholly immune from suit). This conclusion is bolstered by the inclusion of a limited exhaustion requirement in the Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997 *et seq*., for adult prisoners filing § 1983 actions. *See* 42 U.S.C.

§ 1997e. "A judicially imposed exhaustion requirement . . . would usurp policy judgments that Congress has reserved for itself." *Patsy*, 457 U.S. at 508.

Moreover, if Takings Clause plaintiffs are left "at the mercy of state courts," then these courts "get to define the contours of federal law and are *de facto* free to trump the federal courts' interpretation of federal law." Berger, *Supreme Bait & Switch*, 3 Wash. U. J.L. & Pol'y at 128. This scenario "makes hash out of the federal supremacy clause" (U.S. Const., Art. VI, § 2). *Id*. *Williamson County* allows state courts to deny access to the federal judiciary to vindicate federal rights—precisely the result § 1983 was enacted to avoid. *Id*.

B. The state exhaustion requirement creates an unwarranted inequality between the Fifth Amendment and parallel provisions of the Bill of Rights.

Williamson County has contributed to the creation of "a legal regime of invidiously unequal treatment of people in their capacity as property owners, particularly—and perversely—when the government seeks to take their property from them." 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, 1067 (2007). As this Court recognized decades ago, "the dichotomy between personal liberties and property rights is a false one." *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972). The right to property, whether a welfare check or real estate, is no less "personal" than the right to speak or travel. "Congress recognized these rights in 1871 when it enacted the

predecessor of §§ 1983 and 1343 (3)." *Id*. It is people who have the right to enjoy property—property itself does not have rights.

Commentators have noticed the growing inequality over the years. Crocker, Katherine Mims, *Justifying a Prudential Solution to the* Williamson County *Ripeness Puzzle*, 49 Ga. L. Rev. 163, 205 (2014) ("There is little reason to believe that the Takings Clause should be an outlier among these basic liberties—or that the Supreme Court meant to make it one.") Kanner, *[Un]equal Justice*, 40 Loy. L.A. L. Rev. at 1070 (federal courts "stand ever ready to adjudicate . . . local controversies over regulations of land" when federal constitutional rights *other than* the Takings Clause are infringed). Sandefur, *The Timing of Facial Challenges*, 43 Akron L. Rev. at 62-63 (noting inequalities between facial takings challenges and other facial challenges in computing the statute of limitations); Berger, *Supreme Bait & Switch,* 3 Wash. U. J.L. & Pol'y at 124 n. 104 ("Why should one facial invalidity under the Bill of Rights be shielded by limitations, but not the other?").[3] Even convicted criminals sometimes receive relief in federal court without exhausting state court post-conviction remedies. Kanner, *[Un]equal Justice*, 40 Loy. L.A. L. Rev. at 1078.

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[3] This commentator cites *National Advertising Co. v. City of Raleigh*, 947 F.2d 1158, 1160 (4th Cir. 1991), where the Fourth Circuit dismissed the Fifth Amendment claim as barred by the statute of limitations—but not the First Amendment claims. Berger, *Supreme Bait & Switch*, 3 Wash. U. J.L. & Pol'y at 124 n. 105.

In short, the Takings Clause, "as much a part of the Bill of Rights as the First Amendment or the Fourth Amendment," has unquestionably been "relegated to the status of a poor relation." *Dolan*, 512 U.S. at 392; *Arrigoni Enters.,* 136 S. Ct. at 1411 (Thomas, J., dissenting from denial of certiorari). This Court should correct the inequality by eliminating the second prong of *Williamson County*'s ripeness doctrine.

C. Federal courts routinely adjudicate violations of other constitutional rights, including those that implicate land use, with no state exhaustion requirement.

The inferior status of Takings Clause claims is inexplicable. "[This] Court has not explained why . . . we should hand authority over federal takings claims to state courts, . . . 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. . . ." *San Remo Hotel,* 545 U.S. at 350-351 (Rehnquist, C.J., concurring). "Federal court protection is . . . routinely provided in land use cases involving other aspects of the Bill of Rights." Berger, *Supreme Bait & Switch*, 3 Wash. U. J.L. & Pol'y at 124. These cases typically do not even mention a state court exhaustion requirement:

- First Amendment - Establishment Clause: *Larkin v. Grendel's Den, Inc*., 459 U.S. 116 (1982) (schools and churches granted "veto" power to prevent issuance of liquor licenses within 500 feet of their properties).

- First Amendment - Free Expression and Religion: *Renton v. Playtime Theatres, Inc.,* 475 U.S. 41 (1986) (adult theatre); *Young v. American Mini Theatres, Inc.,* 427 U.S. 50 (1976) (adult establishment); *Barnes v. Glen Theatre*, 501 U.S. 560 (1991) (nude dancing); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (church building permit); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (church inspection and zoning approval).

- First Amendment - Signage Restrictions: *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015) (municipal sign code); *Desert Outdoor Advertising, Inc. v. City of Moreno Valley*, 103 F.3d 814 (9th Cir. 1996) (on-site and off-site sign restrictions); *Melrose, Inc. v. City of Pittsburgh*, 613 F.3d 380 (3d Cir. 2010) (building signs); *Brown v. Town of Cary*, 706 F.3d 284 (4th Cir. 2013) (sign restrictions on private residence).

- Fourteenth Amendment - Equal Protection Clause: *Cleburne v. Cleburne Living Center, Inc.,* 473 U.S. 432 (1985) (group home); *Village of Belle Terre v. Boraas,* 416 U.S. 1 (1974) (single family homes).

The result is the same in contexts not involving land use. Federal courts conform to congressional intent to provide a federal forum for § 1983 actions, either openly rejecting or declining to mention any obligation to file in state court first. For example:

- First Amendment - Establishment Clause (public schools): *Wallace v. Jaffree*, 472 U.S. 38 (1985) (moment of silence); *Abingdon School*

Dist. v. Schemp, 374 U.S. 203 (1963) (Bible reading).

- Fourth Amendment – Search Warrant: *Monroe v. Pape*, 365 U.S. at 183 ("It is no answer that the State has a law which if enforced would give relief.")

- Fourteenth Amendment – Racial Discrimination in Education: *McNeese v. Bd. of Educ.*, 373 U.S. 668, 671 (1963) ("[R]elief under the Civil Rights Act may not be defeated because relief was not first sought under state law which provided a remedy.")

These cases, challenging state and local laws that implicate "parallel features of the Bill of Rights," are commonly initiated in federal court and the rights at issue are "routinely protected" there through 42 U.S.C. § 1983. Berger, *Supreme Bait & Switch*, 3 Wash. U. J.L. & Pol'y at 125. "*Why are property owners required to go first to state court in order to ripen their federal taking claims*?" *Id*. (emphasis added). As Justice Rehnquist observed, many of these cases involve land use. Some cases do have their genesis in state court but come to this Court on appeal. Plaintiffs have a choice as they begin their journey for justice; they may select either a federal or a state forum to initiate the action. When cases come before this Court from state supreme courts, it is not because they were denied a federal forum but because they chose to file in state court. *See, e.g., Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981) (billboards) (California Supreme Court); *R.A.V. v. City of St. Paul, Minnesota*, 505 U.S. 377 (1992) (cross burning) (Minnesota Supreme Court).

CONCLUSION

This Court should reverse the Third Circuit ruling against Petitioner and eliminate the procedural nightmare created by the second prong of *Williamson County*'s ripeness requirement.

Respectfully submitted,

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