No. 17-88

In The
Supreme Court of the United States

WAYSIDE CHURCH, *et al.*,

Petitioners,

v.

VAN BUREN COUNTY, MICHIGAN, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF *AMICI CURIAE*
NATIONAL FEDERATION OF INDEPENDENT BUSINESS
SMALL BUSINESS LEGAL CENTER, THE CATO
INSTITUTE, SOUTHEASTERN LEGAL FOUNDATION,
AND ILYA SOMIN IN SUPPORT OF PETITIONERS

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[1] Both the Petitioners and Respondent have lodged blanket consents to the filing of *amicus curiae* briefs with the Clerk. Pursuant to Rule 37.6, *amici* affirm that no counsel for any party authored this brief in whole or in part and that no person other than *amici*, its members, or its counsel made a monetary contribution to its preparation or submission.

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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. SLF advocates for the protection of private property interests from unconstitutional takings.

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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 in order to ripen a federal takings claim. This marked a radical departure from the historic practice. There was never, previously, any requirement that property owners had to resort to

litigation in order to ripen their takings claims. For that matter, courts played no role in the ripening of takings claims prior to the ratification of the Fourteenth Amendment, and there is no basis for assuming that, through ratification, the Reconstruction Congress imposed any sort of litigation requirement.

Williamson County's requirement to litigate in state court is anathema to the very reforms that Congress sought to effect with the Reconstruction Amendments, and the enactment of U.S.C. § 1983. The Fourteenth Amendment was intended to secure constitutional rights—especially the guarantee against uncompensated takings—for citizens of the United States, against the various states. It was necessary to curb pervasive abuses by state governments at the time. Congress enacted Section 1983 to further that goal and ensure that citizens would have a federal forum to vindicate their federal rights—precisely because there was great skepticism as to whether state courts could be trusted to adequately enforce the U.S. Constitution against their own state governments.

Not only does *Williamson County*'s requirement to litigate in state court defeat the Reconstruction Congress's goal of opening the federal courthouse doors to citizens alleging violation of federal rights, but it denies the right to litigate in federal court without any principled basis. Property owners are simply shut out from federal court without any firm doctrinal justification. Worse—in a total miscarriage of justice—some courts apply *Williamson County* to deny access to *both* federal and state courts. For all of these reasons, the time has come to reconsider *Williamson County*.

Even if this Court chooses not to overrule *Williamson County*, it should clarify that the state-litigation requirement is, at best, a prudential ripeness rule rather than a categorical bar to subject-matter jurisdiction. This is a question upon which the lower courts are intractably divided. And, as demonstrated here, there is further disagreement, even among those circuits that view the state litigation requirement as prudential, over the circumstances under which the rule can be disregarded. This confusion can only be resolved by clarifying precisely how the state litigation requirement fits into the ripeness doctrine. But, if the state litigation rule is non-jurisdictional, as said in *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 733-34 (1997), this Court should take this case to determine whether it is appropriate to apply such a prudential rule to disallow takings claims where Congress has enacted legislation—*i.e.*, Section 1983—expressly to authorize suit for vindication of civil rights protected under the Fourteenth Amendment.

ARGUMENT

I. *WILLIAMSON COUNTY*'S STATE REMEDIES REQUIREMENT IS RIPE FOR ABANDONMENT

Williamson County said that there are two steps to ripening a federal takings claim. 473 U.S. at 186-97. First, there must be a final decision making clear the extent of permissible uses of the property. *Palazzolo v. Rhode Island*, 533 U.S. 606, 620 (2001). Second, a property owner must pursue whatever procedures the state has established for landowners

to obtain just compensation.[2] *See Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 734 (1997) (characterizing this as a "prudential ripeness principle[]"). This "State Remedies" requirement would make sense if the Court had meant that the landowner must first pursue *administrative procedures* for compensation before a takings claim would be considered ripe. But, instead *Williamson County* proclaimed that, in order to ripen a federal takings claim against a state actor, the owner must first be denied just compensation in state court. 473 U.S. at 194-97.

This state litigation requirement is supposedly grounded in the text of the Fifth Amendment's Takings Clause. *Id.* at 195, n.13. As the Court observed, "[t]he Fifth Amendment does not proscribe the taking of property; it proscribes taking without [just] compensation." *Id.* at 194. True enough. But, there was no explanation as to why the constitutional text should be construed as requiring denial of just compensation *in state court* in order to ripen a takings claim, when it could just as well be construed to recognize a ripened takings claim at the time property is taken if the owner is not afforded some contemporaneous *administrative procedure* for obtaining just compensation.

Yet the most peculiar aspect of the *Williamson County* decision is that the opinion seemed to assume that property owners could proceed to federal court after litigating their claims in state

[2] The Court concluded that Hamilton Bank's takings claim was unripe for want of a "final decision" before mentioning the supposed requirement to litigate in state court. As such, the state litigation rule was pronounced in dicta.

court—an assumption that has proven wildly inaccurate over the past three decades. 473 U.S. at 194. The reality is that *Williamson County*'s state remedies requirement results in a constitutional absurdity. The doors to the federal courts will remain closed until the property owner receives an adverse decision in state court, denying just compensation; but, the decision that—in theory—ripens the owners takings claim simultaneously bars the owner from (re)litigating the issue in federal court.

A. The State Remedies Rule Effectively Bars Property Owners From Vindicating Federal Rights in Federal Court

The federal courts were initially divided on the question of whether *Williamson County* imposed an ironclad bar—closing federal courthouse doors for all takings claimants, except those lucky enough to have a petition for certiorari granted for review by this Court. The problem is that the Full Faith and Credit Act, 28 U.S.C. § 1738, requires preclusive effect to be given to a state court judgment according to the state's issue and claim preclusion rules—which in general prohibits individuals from re-litigating issues or claims already decided in another court, or claims that could have been raised in prior litigation. *See*, *e.g.*, *Wilkinson v. Pitkin Bd. of County Comm'rs*, 142 F.3d 1319, 1324 (10th Cir. 1998); *Palomar Mobilehome Park Ass'n v. City of San Marcos*, 989 F.2d 362, 364-65 (9th Cir. 1993).

For a time, some courts assumed a special exception that would allow an avenue for property owners to ultimately have their takings claim heard in federal court. These courts relied on *England v.*

Louisiana State Bd. of Medical Examiners, wherein "the Supreme Court recognized a procedure [allowing] parties who are involuntarily litigating state-law claims in state court to 'reserve' their federal claims for later determination by a federal court." *Santini v. Connecticut Hazardous Waste Management Service*, 342 F.3d 118, 128 (2003). These courts held that a takings claim could be litigated in federal court if the claimant made a formal reservation, on the record, that—in the event of an adverse decision—the plaintiff would bring his or her federal takings claim in federal court. *See e.g.*, *Fields v. Sarasota Manatee Airport Auth.*, 953 F.2d 1299, 1305-06 (11th Cir. 1992); *Front Royal & Warren Cty. Indus. Park Corp. v. Town of Front Royal*, 135 F.3d 275, 283 (4th Cir. 1998).

Yet numerous courts refused to allow *England* reservations on the theory that *England* only applied when a case originated in federal court, and that *Williamson County* requires takings claims to originate in state court. *See e.g.*, *Peduto v. City of N. Wildwood*, 878 F.2d 725, 729 n.5 (3d Cir. 1989); *Fuller Co. v. Ramon I. Gil, Inc.*, 782 F.2d 306, 312 (1st. Cir. 1986). Other courts flatly rejected the notion that *England*'s "reservation doctrine [could be invoked] to avoid preclusion of issues actually litigated in the state forum." *See e.g.*, *Dodd v. Hood River Cty.*, 136 F.3d 1219, 1227 (9th Cir. 1998). Ultimately this Court granted certiorari in *San Remo Hotel v. City and County of San Francisco*, to resolve this conflict. 545 U.S. 323 (2005).

The *San Remo* Court unanimously held that parties could not use an *England* reservation to "negate the preclusive effect of [a] state-court judgment with respect to any and all federal issues

that might arise in … future federal litigation." *Id.* at 338. Yet even if *San Remo* had held otherwise, the *Rooker-Feldman* doctrine would prevent federal review of federal takings claims that are initially brought in state court. *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-16 (1923) (holding that district courts may not review state court decisions). Simply put, it is now clear that the federal courthouse doors are closed to takings claimants. For this reason, Chief Justice Rehnquist urged this Court to reexamine *Williamson County*'s state-litigation requirement. Joined by Justices O'Connor, Kennedy and Thomas, the Chief Justice wrote:

> I joined the opinion of the Court in *Williamson County*. But further reflection and experience lead me to think that the justifications for its state-litigation requirement are suspect, while its impact on takings plaintiffs is dramatic. … 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.

San Remo Hotel, 545 U.S. at 352 (Rehnquist, C.J., concurring); *see also Kottschade v. City of Rochester*, 319 F.3d 1038, 1041 (8th Cir. 2003) (recognizing that the state litigation requirement is "anomalous," but emphasizing that it "is for the Supreme Court to [resolve] not us.").[3]

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[3] There is no reason why *stare decisis* should bar this Court from reconsidering *Williamson County*. *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 94 (1936) (Stone and Cardozo, JJ., concurring in result) ("The doctrine of stare decisis . . . has only a limited application in the field of constitutional law").

B. Manipulative Defendants Have Exploited the State Remedies Rule to Deny Property Owners Both State and Federal Judicial Forums

At the very least *Williamson County* assumed that a property owner would have the opportunity to get a decision in state court. This assumption has proven wrong. The Court did not anticipate that governmental defendants would invoke *Williamson County* as a weapon to short-circuit takings claims that are brought in state court.

In *City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156 (1997), this Court held that a takings claim, filed in state court, could be removed to federal court. *Id.* at 161. Employing that decision, governmental defendants have since removed takings cases to federal court based on federal question jurisdiction. Then—with all the *chutzpah* that can be mustered—they have sought dismissal on the ground that the federal takings claim is unripe because there has been no state court decision, as required by *Williamson County*. *See* J. David Breemer, *The Rebirth of Federal Takings Review? The Courts' "Prudential" Answer to* Williamson County's *Flawed State Litigation*

Not only are there no reliance interest that may counsel for maintaining the state litigation requirement, but the rule has proven unworkable in practice. *See Lawrence v. Texas*, 539 U.S. 558, 577-79 (2003) (*stare decisis* is not an "inexorable command" requiring continued adherence to a rule that promotes injustice). *See also* Ilya Shapiro & Nicholas Mosvick, *Stare Decisis after Citizens United: When Should Courts Overturn Precedent*, 16 Nexus: Chapman's J. L. & Pub. Pol'y 121 (2011).

Ripeness Requirement, 30 Touro L. Rev. 319, 334 n.78 (2014).

Some courts do not accept this tactic. *See*, e.g., *Yamagowa v. City of Half Moon Bay*, 523 F. Supp. 2d 1036, 1110 (N.D. Cal. 2007) (city removed case to federal court, and on the eve of trial sought remand under *Williamson County*; court rejected the argument, concluding "the City having invoked federal jurisdiction, its effort to multiply these proceedings by a remand to state court smacks of bad faith."). But many do. *See Sandy Creek Investors, Ltd. v. City of Jonestown*, 325 F.3d 623, 625 (5th Cir. 2003); *Koscielski v. City of Minneapolis*, 435 F.3d 898, 903-04 (8th Cir. 2006); *Ohad Assocs., LLC v. Twp. Of Marlboro*, Civil No. 10-2183 (AET), 2011 U.S. Dist. LEXIS 8414, at *3, 6-8 (D.N.J. Jan. 28, 2011); 8679 *Trout, LLC v. N. Tahoe Pub. Utils. Dist.*, No. 2:10-cv-01569-MCE-EFB, 2010 U.S. Dist. LEXIS 93303, at *4, 13-14 (E.D. Cal., Sept. 8, 2010); *Rau v. City of Garden Plain*, 76 F. Supp. 2d 1173, 1174-75 (D. Kan. 1999); *see also Del-Prarier Stock Farm, Inc. v. Cty. of Walworth*, 572 F. Supp. 2d 1031, 1034 (E.D. Wis. 2008). Consequently, many takings plaintiffs are unable to fulfill the *Williamson County* state remedies requirement and may be barred from filing a second suit by the statute of limitations—or otherwise forced to exhaust their legal budget on procedural games. *Cf. Martin v. Franklin Capital Corp.*, 546 U.S. 132 (2005) ("The process of removing a case to federal court and then having it remanded back to state court delays resolution of the case, imposes additional costs on both parties, and wastes judicial resources.").

II. THERE IS NO DOCTRINAL BASIS FOR THE STATE REMEDIES RULE

Ironically, "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." *Santini*, 342 F.3d at 130. This is absurd. If a takings claim only ripens with a state court decision denying just compensation, then this rule renders the protections of the Fourteenth Amendment illusionary and unenforceable in practice because there is no available remedy at that point. *See Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat) 304, 330-31, 347-48 (1816) (ruling that the lower federal courts must be authorized to hear cases concerning "all subjects within the purview of the constitution."). Such a rule contravenes the very purpose of the Fourteenth Amendment in affording protections for federal rights against the states, and the fundamental premise of our constitutional system. *See* Sir William Blackstone, 1 William Blackstone, Commentaries on the Laws of England 137 (1765-1769) ("A third subordinate right of every Englishman is that of applying to the courts of justice for redress of injuries.") (alteration of original).

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

This Court holds that the requirements for Article III standing are satisfied once a litigant shows that there is a *live case or controversy* concerning a question of federal law. *See Warth v. Seldin*, 422 U.S. 490, 500 (1975) (emphasizing that

standing "in no way depends on the merits…"). But, *Williamson County* assumes that special ripeness rules apply in the context of a takings claim.[4] Specifically, the opinion construed the words of the Takings Clause as imposing a requirement to pursue "just compensation" in state court in order to ripen a takings claim against a state actor.

Yet if the text of the Fifth Amendment was understood as requiring individuals to seek compensation in court, 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 *against the states*. For that matter, its prohibition was originally directed only *against the federal government*. *See Barron v. City of Baltimore*, 32 U.S. 243, 250-51 (1833).

And there is no reason to think that the Fourteenth Amendment imposed any special ripening requirement. The incorporation doctrine should not change the procedural requirements for getting into federal court. If anything, the incorporation doctrine should make it easier to get into federal court because the entire point of incorporation in the Fourteenth Amendment is to use the instrumentalities of federal government to

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[4] And worse, some courts extend *Williamson County*'s state litigation requirement to due process claims. *See*, *e.g.*, *Kurtz v. Verizon New York, Inc.*, 758 F.3d 506, 515 (2d Cir. 2014) *cert. denied* (2015); *B. Willis, C.P.A., Inc. v. BNSF Ry. Corp.*, 531 F.3d 1282, 1299 n. 19 (10th Cir. 2008); *Greenfield Mills, Inc. v. Macklin*, 361 F.3d 934, 961 (7th Cir. 2004).

protect those incorporated rights.[5] Akhil Reed Amar, The Bill of Rights: Creation and Reconstruction 290 (1998) ("[E]xtension of the Bill of Rights against the states has, in general, dramatically strengthened the Bill, not weakened it, in both legal doctrine and popular conscience."). Thus any special ripening requirement would have to be derived from the text of the Fifth Amendment; however, that would necessarily make that requirement equally applicable to claims against the United States. *C.f.*, 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. Thus it cannot be that the Takings Clause entails any sort of

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[5] The incorporation doctrine makes constitutional guarantees in the Bill of Rights applicable against the states. *McDonald v. City of Chicago*, 561 U.S. 742, 765 (2010). But as applied to the states through the Fourteenth Amendment these constitutional protections may be even more robust. *See* Kurt T. Lash, *Commentaries on Akhil Reed 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); James Ely, The Guardian of Every Other Right, 83-105 (3d Ed., 2008) (explaining takings law in the nineteenth century).

requirement to ripen takings claims in court. *See Monongahela Navigation Co. v. United States*, 13 S. Ct. 37 (1893) (emphasizing that the issue of whether just compensation has been denied is a "judicial… question."); *see also Hunter's Lessee*, 14 U.S. at 330-31.

Moreover, the courts played no role in the ripening of takings claims in the 19th century. *See e.g.*, *Cherokee Nation v. S. Kan. Ry. Co.*, 135 U.S. 641, 667-68 (1890) (case proceeded to federal court after the Cherokee Nation refused to accept an offer of compensation deemed adequate by the executive branch). Prior to *Williamson County*, the courts understood takings claims to be properly raised if (a) the owner's property had been taken by legislative or executive action, (b) without affording a contemporaneous administrative avenue for obtaining the compensation guaranteed by the Constitution. *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) (explaining that, prior to the Civil War, courts recognized actionable claims in challenge to legislative enactments purportedly authorizing takings in the absence of any statutorily defined administrative procedure for obtaining compensation). This was true both with regard to claims asserting a violation of the Fifth Amendment, and equivalent claims raised under the takings clauses of the states. *See e.g.*, *Kennedy v. Indianapolis*, 103 U.S. 599, 601 (1880) (recognizing a "controversy" as to whether just compensation had been paid under Indiana's Takings Clause); *Pumpelly v. Green Bay & Miss. Canal Co.*, 80 U.S.

166, 176-77 (1871) (assuming a ripened controversy when interpreting Wisconsin's Takings Clause).

B. The Fourteenth Amendment and Section 1983 Conferred Federal Protections for Property Rights—Including the Right to a Federal Judicial Forum—on the Same Terms as Other Fundamental Rights, to Protect Political Minorities

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 truly strange if one of the three rights explicitly listed in the text was not ensured any means of protection in federal court. Indeed, it would be inconceivable that either life or liberty would be left unprotected, without the opportunity for aggrieved individuals to vindicate their rights in federal court. And the same must be true for property, which the Fourteenth Amendment protects on equal terms.

To be sure, the need to protect property rights against abusive state and local governments was one of the main purposes behind the enactment of the Fourteenth Amendment. Advocates of the Amendment feared that southern state governments would threaten the property rights of African-Americans and other political minorities, including whites who had supported the Union against the Confederacy during the Civil War. Amar, *supra* 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) (explaining that minorities suffer disproportionately in the absence of strong property

right protections). The right to private property was thus a central component of the "civil rights" that the framers of the Fourteenth Amendment sought to protect.[6] "Equality 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).

And the need to seek redress in a federal judicial forum was viewed as especially important for vindication of these rights. Indeed, the Reconstruction Congress was not concerned only with the possibility of abuse at the hands of the legislature and executive branches of state government. *See Patsy v. Bd. of Regents*, 457 U.S. 496, 503 (1982). The concern was that abuses may be pervasive and systemic—throughout all coordinate branches of state government. *Mitchum v. Foster*, 407 U.S. 225, 242 (1972); *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 for African-Americans recently freed from

[6] On the centrality of property rights in nineteenth century conceptions of civil rights, *see*, *e.g.*, Harold Hyman & William Wiecek, Equal Justice Under Law: Constitutional Development, 1835-75, at 395-97 (1982); Mark A. Graber, Transforming Free Speech: The Ambiguous Legacy of Civil Libertarianism (1991).

slavery.[7] *See Mitchum v. Foster*, 407 U.S. 225, 242 (1972); Ilya Somin, *Stop the Beach Renourishment and the Problem of Judicial Takings*, 6 Duke J. Const. L. & Pub. Pol'y 92, 101-03 (2011) (observing that state court judges are sometimes influenced by political pressure—especially those who are elected, or appointed by a politically motivated coalition). Thus, in the face of continued abuses, in which state courts were complicit, the Reconstruction Congress 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) (noting that "[t]he debates over the 1871 Act are replete with hostile comments directed as state judicial systems."). With this historical backdrop, there is simply no reason to assume that Congress would have wanted to exclude takings claimants from vindicating their federal rights in federal courts. *Cf. San Remo Hotel*, 545 U.S. at 349 (Rehnquist, C.J., concurring) (suggesting that owners should be allowed to initiate takings suits in federal court against state actors under Section 1983).

[7] The original Constitution likewise presumes the possibility of institutional bias in state courts. S*ee Hunter's Lessee*, 14 U.S. at 346-47. And, in fact, "state prejudices" and "state interests" are particularly likely to exert a pernicious effect when state courts are asked to compel state and local governments to pay compensation for a regulatory taking.

C. There is No Principled Basis for Excluding Property Rights from the General Rule that Federal Rights may be Vindicated in Federal Court

Williamson County's state litigation requirement stands an anomaly. No other constitutional right is systematically barred from federal court. *See* Gideon Kanner, *"[Un]equal Justice Under Law": The Invidiously Disparate Treatment of American Property Owners in Takings Cases*, 40 Loy. L.A. L.Rev. 1065, 1077-78 (2007). Indeed, in no other context is an individual forced to file a federal claim with the very state government that may have violated his or her rights. As such, *Williamson County*'s state litigation requirement markedly conflicts with the general rule that there must be an available federal forum for individuals seeking vindication of federal rights. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (affirming the English rule that "where there is a legal right, there is also a legal remedy"); *St. Joseph Stock Yards Co.*, 298 U.S. at 84 (Brandis J., concurring). Accordingly, the Court should take this case to make clear that takings claims should be treated the same as all other constitutional claims under the Bill of Rights.

As Justice Joseph Story explained, an important reason why federal courts have 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." *Hunter's Lessee*, 14 U.S. at 3347-48 (emphasis in

original).[8] Thus, any posited exception—closing the federal courthouse doors—is a grave matter, which can only be justified by some compelling rationale of the highest order. *See* Douglas E. Edlin, *A Constitutional Right to Judicial Review: Access to Courts and Ouster Clauses in England and the United States*, 57 Am. J. Comp. L. 67, 92 (2002). But as emphasized by Chief Justice Rehnquist's concurrence in *San Remo*, there is no principled basis for singling out takings claims for relegation to state courts—let alone a compelling justification. 545 U.S. at 351 (Rehnquist, C.J., concurring) (arguing there is no basis for "hand[ing] authority over federal takings claims to state courts… while allowing plaintiffs to proceed in cases involving, for example, challenges to municipal land-use regulations based on the First Amendment.").[9]

If we were to extend *Williamson County*'s logic to other rights—protected on equal terms in the Bill of Rights—the result would be that litigants would face the same insurmountable barriers to getting into federal court. For example, one could not state a

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[8] Justice Story's concern has proven prescient in takings cases. States differ greatly in the extent of protection they provide for regulatory takings claims. *See* Kirk Emerson & Charles R. Wise, *Statutory Approaches to Regulatory Takings: State Property Rights Legislation Issues and Implications for Public Administration*, 57 Pub. Admin. Rev. 411 (1997).

[9] *Williamson County*'s rationale is seriously flawed insofar as it assumes that that state courts have some greater expertise in Takings Clause claims. Such logic would just as well relegate other constitutional claims to state court. For example, Establishment Clause claims often hinge upon community 'perceptions,' which state court judges might understand better. *See Capitol Sqaure v. Pinette*, 515 U.S. 753, 777 (1995) (O'Connor, J., concurring).

ripened claim for a violation of the First Amendment until after a state court had ruled that censorship was legal—at which point the claim would be barred for the reasons outlined in Part I, *supra*. Likewise, one could not ask a federal judge to invalidate a state law purporting to compel incriminating statements in violation of the Fifth Amendment, or to authorize warrantless searches in violation of the Fourth Amendment, unless and until a state court had upheld the enactment—at which point the only potential for federal review would be in a petition for certiorari to this Court.

The right to vindicate federally secured rights is held sacrosanct in all other contexts.[10] 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 the text of the Constitution. Indeed, there is no constitutional protection in the absence of a judicial forum that may provide a remedy after a constitutional injury has ripened.

[10] It would be inconceivable to require individuals, seeking vindication of Fourteenth Amendment rights, to sue in state court if Texas should reinstitute a poll tax, or if Louisiana should deny equal apportionment of legislative districts. By that same measure, this Court would never tolerate a requirement to seek redress in state court for an alleged violation of the Equal Protection Clause if, for example, Georgia should prohibit Muslims from holding public office, or if Mississippi should impose heightened sentencing requirements on African-Americans, or if officials in Tennessee should refuse to issue marriage licenses to same sex couples.

III. THE COURT SHOULD REPUDIATE *WILLIAMSON COUNTY*

This case presents an ideal vehicle for this Court to reconsider and repudiate *Williamson County*'s state litigation requirement because it demonstrates the systemic confusion that the decision has spawned throughout the nation. The lower courts are intractably divided as to the question of whether *Williamson County*'s state litigation requirement is prudential, which is itself an issue worthy of certiorari.[11] *See* J. David Breemer, *The Rebirth of Federal Takings Review? The Courts' "Prudential" Answer to Williamson County's Flawed State Litigation Ripeness Requirement*, 30 Touro L. Rev. 319, 340-42 (2014). And, as demonstrated here, the lower courts take divergent views even among those jurisdictions that hold the state litigation requirement to be prudential. *Wayside Church v. Van Buren Cty.*, 847 F.3d 812, 822 (6th Cir. 2017)

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[11] Compare *Suitum*, 520 U.S. at 733-34 (suggesting that *Williamson County*'s ripeness requirements were "two independent prudential hurdles" to federal review); *Sansotta v. Town of Nagshead*, 724 F.3d 533, 545 (4th Cir. 2013) (affirming that the state litigation requirement "involves only prudential considerations"); *Rosedale Missionary Baptist Church v. New Orleans City*, 641 F.3d 86, 88-89 (5th Cir. 2011) ("the Supreme Court has … explicitly held that *Williamson County*'s ripeness requirements are merely prudential, not jurisdictional"); *Wilkins v. Daniels*, 744 F.3d 409, 418 (6th Cir. 2014) (same); with *Downing / Salt Pond Partners, L.P. v. Rhode Island*, 643 F.3d 16, 20 (1st. Cir. 2011) ("In *Williamson County*, the Supreme Court held that the nature of a regulatory takings claim gives rise to two ripeness requirements which plaintiffs bear the burden of proving they have met before a federal court has jurisdiction over a takings claim."); *Dahlen v. Shelter House*, 598 F.3d 1007 (8th Cir. 2010) (same); *Busse v. Lee Cty.*, 317 F.App'x 968 (11th Cir. 2009) (same).

(strictly applying the state litigation rule without weighing "prudential" considerations).

The Sixth Circuit's callous application of the state litigation requirement underscores the need for clarification as to when the state litigation requirement should be set aside. Compare *Guggenheim v. City of Goleta*, 638 F.3d 1111, 1118 (9th Cir. 2010) (choosing not to apply the state litigation requirement because the property owners had already litigated in state court prior to a change in the law precipitating their federal case) and *Town of Nagshead v. Tolockzo*, 728 F.3d 291, 399 (4th Cir. 2013) (holding that *Williamson County* should be disregarded "to avoid 'piecemeal litigation or otherwise unfair procedures'") with *Peters v. Clifton*, 498 F.3d 727, 734 (7th Cir. 2007) ("The prudential character of the *Williamson County* requirements do[es] not . . . give the lower federal courts license to disregard them.").

But more significantly, the Sixth Circuit's strict application of a supposedly "prudential" ripeness rule raises an even more fundamental issue. This Court should grant certiorari to resolve the question of whether it is constitutional for a court to apply a "prudential" ripeness rule to bar individuals from pursuing materialized constitutional claims for which they have standing, where Congress has enacted legislation to expressly authorize suit in federal court. *See San Remo*, 545 U.S. at 349 (citing *Patsy*, 457 U.S. at 516).

Where, as in this case, a litigant has suffered a constitutional injury, Section 1983 authorizes suit in federal court. Indeed, if the state litigation requirement is understood as "prudential" then the

constitutional injury must be understood as fully consummated at the time property is taken—at least where the owner has been denied an *administrative* avenue for pursuing just compensation. Accordingly, those courts applying *Williamson County* as a "prudential" bar—closing the federal courthouse doors for takings claimants—are assuming that the federal courts retain *discretion* to refuse to hear claims that Congress unequivocally authorized. This presents all the more reason to rethink *Williamson County*'s state litigation requirement because it conflicts with the otherwise generally accepted rule that federal courts must hear Section 1983 claims for deprivation of rights secured under the Fourteenth Amendment. *See Wayside Church*, 847 F.3d at 823 (Kethledge, J., dissenting) ("[T]he federal courts indisputably have jurisdiction over this case, *see* 28 U.S.C. § 1331, and the federal courts 'have a strict duty to exercise the jurisdiction that is conferred upon them by Congress.') (quoting *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716, (1996)); *Cohens v. Virginia*, 6 Wheat. 264 (1821) (federal courts "have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not"). And again, this deviation from the general rule is without any justification rooted in the constitutional (or statutory) text.

CONCLUSION

For the foregoing reasons, the Court should grant certiorari and ultimately reverse the decision below.

Respectfully submitted,

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