No. 15-631

IN THE

Supreme Court of the United States

ARRIGONI ENTERPRISES, LLC,

Petitioner,

v.

TOWN OF DURHAM; DURHAM PLANNING AND ZONING COMMISSION; and DURHAM ZONING BOARD OF APPEALS,

Respondents.

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

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* SUPPORTING PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* SUPPORTING PETITIONER

Pursuant to Supreme Court Rule 37.2(b), the Cato Institute respectfully moves for leave to file the attached brief as *amicus curiae* in support of Petitioner. All parties were provided with a 10-day notice of intent to file this brief as required under Rule 37.2(a). Counsel for Petitioner consented to this filing. Counsel for Respondents, however, expressly withheld consent, stating in an email to counsel that Respondents "do not consent to the filing of an amicus brief by the Cato Institute."

The Cato Institute is a nonpartisan public-policy research foundation established in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help 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*.

Cato's interest here arises from its institutional mission to advance and support the liberty that the Constitution guarantees to all citizens. Cato has participated in numerous cases of constitutional significance before this and other courts and has worked in defense of the constitutionally guaranteed rights of individuals and businesses through its publications, lectures, public appearances, and other endeavors. More specifically, this case is of significant concern to *amicus* because it implicates the Fifth Amendment's

protection of property rights against uncompensated takings, regardless of their characterization.

This brief discusses the manner in which this Court's holding in *Williamson County Reg'l Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), has been applied to deny some people, like Petitioner, any remedy for a government taking of their property. It then discusses how the circuit courts are split as to whether *Williamson County*'s state-litigation rule is a mere prudential consideration or whether it is a mandatory requirement for federal courts to have subject matter jurisdiction over Takings Clause claims.

Cato has no direct interest, financial or otherwise, in the outcome of this case. Its sole interest in filing this brief is to ensure the availability of a remedy for Fifth Amendment takings.

For the foregoing reasons, the Cato Institute respectfully requests that it be allowed to participate in this case by filing the attached brief.

Respectfully submitted,

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QUESTIONS PRESENTED

This brief addresses the two questions raised by Petitioner:

1. Whether the Takings Clause state-litigation requirement—barring property owners from filing federal takings claims in federal court until they exhaust state court remedies, which comes from language in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985)—should be reconsidered and ultimately abandoned as not only unworkable but an anomaly in fundamental rights jurisprudence.

2. Alternatively, whether the state-litigation requirement is a prudential ripeness requirement that federal courts can and should waive when a federal takings claim is factually concrete without state court proceedings, as some circuit courts hold, or whether it is a rigid jurisdictional barrier to the federal courts, as other circuits hold.

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INTEREST OF THE *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public-policy research foundation established in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help 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*. This case is of significant concern to Cato because it implicates the Fifth Amendment's safeguards for protecting property rights against uncompensated takings, regardless of their characterization.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents an opportunity for this Court to rectify a significant anomaly in its jurisprudence: the blanket exclusion from federal court of numerous constitutional rights cases arising under the Takings Clause of the Fifth Amendment. Under this Court's decision in *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), a property owner's claim that a state government has taken his property without paying "just compensation," as required by the Takings Clause, cannot be

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[1] Pursuant to Rule 37.2(a), all parties received timely notice of *amicus curiae*'s intent to file this brief. Petitioner consented but Respondents did not, so a motion for leave to file is attached. In accordance with Rule 37.6, counsel certifies that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amicus* made a monetary contribution intended to fund its preparation or submission.

brought in federal court unless he has first obtained a "final decision" from the relevant state agency and sought "compensation through the procedures the State has provided for doing so." *Id.* at 186, 194. Once these state proceedings have concluded, however, res judicata bars pursuit of that same claim in federal court. *See San Remo Hotel, L.P. v. City & Cty. of S.F.*, 545 U.S. 323, 346–47 (2005) (recognizing this point).

This lack of access to federal courts emboldens local governments to take aggressive, often unconstitutional regulatory action. They know that they can delay a legal challenge by drawing out their arrival at a "final decision." Even after a "final decision" is made, in practice the sole challenges to state agency decisions must be brought in state courts, which will likely prove sympathetic to their fellow state officials. This regime 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.

This double standard cannot be justified on the ground that takings claims are "premature" before state court proceedings have run their extensive course, as was claimed in *Williamson County*, 473 U.S. at 195–97. To the contrary, the *Williamson County* rule incentivizes state agencies to prolong the administrative process in order to prevent the landowner from making a federal challenge. 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. Similarly, it is dangerously misguided to justify this systematic exclusion from federal court by looking to the supposedly superior expertise of state judges on land-use is-

sues. *See San Remo Hotel*, 545 U.S. at 347. State judges could be said to have similar superior expertise on a variety of other issues that arise in constitutional litigation, including ones relevant to other rights protected by the Bill of Rights.

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

Even if this Court chooses not to overrule *Williamson County*, it should at least clarify for the lower federal courts that the state-litigation requirement is at best a prudential ripeness rule rather than a bar to subject-matter jurisdiction. That is what this Court said in *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 733–34 (1997), and yet there exists today a circuit split as to whether the rule is prudential or jurisdictional and further disagreement as to the circumstances under which the rule can be disregarded. This judicial confusion can only be resolved by this Court, by overruling *Williamson County* or explaining precisely how its rule fits into the ripeness doctrine.

ARGUMENT

I. THIS COURT SHOULD GRANT CERTIORARI AND OVERTURN THE STATE-LITIGATION REQUIREMENT, WHICH HAS PROVEN UNWORKABLE AND WAS NOT TENABLE WHEN WRITTEN

In *Williamson County*, the Court, reasoning that a Takings Clause claim could not proceed in federal court until it was "ripe," established two conditions

that had to be met before a federal court could hear the case. First, "the government entity charged with implementing the regulations [must have] reached a final decision regarding the application of the regulation to the property at issue." 473 U.S. at 186. Second, the claimant must have sought "compensation through the procedures the State has provided for doing so." *Id.* at 194. Thus the Court decreed: "if a State provides an adequate procedure for seeking just compensation the property owner cannot claim a violation of the Just Compensation Clause until it has used that procedure and been denied just compensation." *Id.* at 195. However reasonable this state-litigation requirement appeared at the time of its adoption, it has proven to do more harm than good.

This Court has said that "[t]he obligation to follow precedent begins with necessity, and a contrary necessity marks its outer limit." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854 (1992). Thus, "the rule of stare decisis is not an 'inexorable command,' and certainly it is not such in every constitutional case." *Id.* One reason for overruling precedent is when the rule has proven unworkable in practice. *Id.* Another is when changed circumstances—or the same circumstances differently viewed—establish that the old rule cannot be justified. *Id.* at 855. This Court, and the 107 federal courts below it, need not continue to apply in the name of stare decisis a rule that promotes injustice. *See Lawrence v. Texas*, 539 U.S. 558, 577–79 (2003). The state-litigation requirement does nothing but stop people whose property has been taken from receiving the just compensation they are due under the Fifth Amendment. This Court should abandon that rule "as unsound in prin-

ciple and unworkable in practice." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546 (1985).

A. The State-Litigation Requirement Often Prevents Judicial Review of State- and Local-Government Regulatory Takings

The issues raised in this case necessitate this Court's review of *Williamson County*'s state-litigation requirement and are of great national importance. As this Court itself acknowledged in *San Remo Hotel*, 545 U.S. at 346–47, this part of *Williamson County*'s holding has had the perhaps unintended effect of denying a federal forum to virtually all litigants seeking redress against state actors for an alleged taking in violation of the Fifth Amendment. Because only this Court has the power to revise or overrule any part of *Williamson County*, the state-litigation requirement and its deleterious effects will continue until this Court revisits the doctrine.

The obstacles *Williamson County* imposes on property owners wishing to assert a federal takings claim against a state or local government entity are well-known. The requirement that property owners first get a "final decision" from the relevant state agency, *Williamson County*, 473 U.S. at 186, can lead to protracted delay. *See Res. Invs., Inc. v. United States*, 85 Fed. Cl. 447, 498 (2009) ("complicated permitting processes are rife with delays," citing cases, including *Williamson County*, showing that delays frequently range from sixteen months to eight years). *Williamson County*'s additional rule forbidding property owners from filing claims in federal court until they have fully exhausted all possible state court remedies has the effect of making it impossible ever

to file a federal claim in certain cases. *San Remo Hotel*, 545 U.S. at 346–47.

Since *Williamson County* was decided, the state-litigation requirement has generated massive and recurrent legal confusion in the lower courts. Courts and commentators alike have virtually exhausted the resources of the English language in describing the difficulties *Williamson County* imposes on lower courts and its manifest unfairness to takings plaintiffs.[2] The exhaustion requirement, whereby all state procedures have to be utilized before a case can be brought in federal court, *Williamson County*, 473 U.S. at 196, provides recalcitrant state and local officials with a pre-approved roadmap to insulate their decisions from independent review.

For example, the property owner in *Williamson County* was instructed that it should have utilized the inverse-condemnation procedure available under state law to ripen its takings claim. *Id.* This advice ignored the fact that inverse-condemnation claims never succeed where direct challenges to regulations have failed. In similar fashion, the *Williamson Coun-*

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[2] *See* Michael M. Berger & Gideon Kanner, *Shell Game! You Can't Get There from Here: Supreme Court Ripeness Jurisprudence in Takings Cases at Long Last Reaches the Self-parody Stage*, 36 URB. LAW. 671, 702–03 (2004) (collecting descriptions such as "unfortunate," "ill-considered," "unclear and inexact," "bewildering," "worse than mere chaos," "misleading," "deceptive," "source of intense confusion," "inherently nonsensical," "shocking," "absurd,"' "unjust," "self-stultifying," "pernicious," "revolutionary," "draconian," "riddled with obfuscation and inconsistency," containing an "Alice in Wonderland quality" and creating "a procedural morass," "labyrinth," "havoc," "mess," "trap," "quagmire," "Kafkaesque maze," "a fraud or hoax on landowners," "a weapon of mass obstruction," "a Catch-22 for takings plaintiffs").

ty rule requires individual applicants to seek variances right after their zoning applications are denied, *see id*. at 191, even though the standards for obtaining variances are higher than those for the original zoning applications and are never granted in the absence of changed circumstances. *See, e.g.*, William Maker, Jr., *What Do Grapes and Federal Lawsuits Have in Common? Both Must Be Ripe*, 74 ALB. L. REV. 819, 834 (2010–2011) ("Not only are the standards for a use variance different from the standards for site plan approval, they are much more stringent.").

But the worst irony of *Williamson County*'s exhaustion requirement is that the plaintiff who satisfies it has, in effect, lost the right to proceed in federal court, because regulatory takings claims—once litigated in state court—cannot be re-litigated in federal court. Some combination of general principles of res judicata, issue preclusion, the federal full-faith-and-credit statute, 28 U.S.C. § 1738, or possibly the *Rooker-Feldman* doctrine, doom any effort to obtain federal judicial review of a federal constitutional claim once it has been litigated in state court. *See San Remo Hotel*, 545 U.S. at 351 (Rehnquist, C.J., concurring).[3] Precisely this anomalous state of affairs led Chief Justice Rehnquist to urge this Court to reexamine *Williamson County*'s state-litigation requirement. Joined by Justices O'Connor, Kennedy, and Thomas, the Chief Justice wrote:

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[3] Chief Justice Rehnquist also observed that this effect of *Williamson County* was not limited to making the federal court unavailable for takings claims. He noted that some state courts have applied the state-litigation requirement to refuse to allow plaintiffs to litigate federal claims even in state court. *See San Remo Hotel*, 545 U.S. at 351 n.2 (Rehnquist, C.J., concurring).

> 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.

Id. at 352. *See also Kottschade v. City of Rochester*, 319 F.3d 1038, 1041 (8th Cir. 2003) (recognizing that the "requirement that all state remedies be exhausted, and the barriers to federal jurisdiction presented by res judicata and collateral estoppel that may follow from this requirement, may be anomalous," but saying that it "is for the Supreme Court to [resolve], not us"). *Arrigoni* is the appropriate case for that resolution.

B. Federal Judicial Review of Federal Constitutional Claims Is Vital to the Uniform Protection of Fundamental Rights

In its landmark 1816 decision, *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816), this Court outlined two crucial reasons why it is imperative that federal judicial review be made available for all constitutional claims: (1) the need for uniformity, and (2) the danger that state courts will fail to vindicate federal rights against their own state. Justice Joseph Story stressed "the importance, and even necessity of *uniformity* of decisions throughout the whole United States, upon all subjects within the purview of the

constitution." *Id.* at 347–48 (Story, J.) (emphasis in original). If 50 different state judiciaries address takings claims with only the remote possibility of federal review, that uniformity is unlikely to arise:

> Judges of equal learning and integrity, in different states, might differently interpret a statute, or a treaty of the United States, or even the constitution itself: If there were no revising authority to control these jarring and discordant judgments, and harmonize them into uniformity, the laws, the treaties, and the constitution of the United States would be different in different states, and might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two states. The public mischiefs that would attend such a state of things would be truly deplorable.

Id. at 348.

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) (describing diverse state standards); Gerald Bowden & Lewis G. Feldman, *Take It or Leave It: Uncertain Regulatory Taking Standards and Remedies Threaten California's Open Space Planning*, 15 U.C. DAVIS L. REV. 371, 376–87 (1981) (highlighting decreased predictability in regulatory takings law due to divergent decisions from federal and state courts).

Although *Martin* directly addressed the need for federal appellate review of state decisions on federal issues, the same concern also necessitates an avenue for aggrieved parties to file federal constitutional claims in federal district courts. When Takings Clause claimants must file in state court and appeal unfavorable decisions up through the state-court system, there cannot be any federal review at all, except in the rare Supreme Court case.

In *Martin*, Justice Story also emphasized that federal review is essential because state courts might be unduly partial to the interests of their own states:

> The constitution has presumed . . . that state attachments, state prejudices, state jealousies, and state interests, might some times obstruct, or control, or be supposed to obstruct or control, the regular administration of justice. Hence, in controversies between states; between citizens of different states; between citizens claiming grants under different states; between a state and its citizens, or foreigners, and between citizens and foreigners, it enables the parties, under the authority of congress, to have the controversies heard, tried, and determined before the national tribunals.

Id. at 346–47.

Such "state prejudices" and "state interests" are particularly likely to exert a pernicious effect when state courts are asked in regulatory takings cases to require state and local governments to pay compensation for violations of the Takings Clause. State judges, many of whom are elected, often have close con-

nections to the political leaders who control state policy. *See* Ilya Somin, Stop the Beach Renourishment *and the Problem of Judicial Takings*, 6 DUKE J. CON. L. & PUB. POL'Y 91, 99–100 (2011). 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. Where such dangers are present, a federal forum is essential for ensuring the protection of constitutional rights.

C. The State-Litigation Requirement Unjustifiably Consigns Takings Clause Claims to Second-Class Status when Compared with Other Fundamental Rights

No other constitutional right receives the same belittling treatment the Takings Clause sustained in *Williamson County*. Plaintiffs alleging state government violations of virtually any other constitutional right can assert their claims in federal court without first seeking redress in state court. This is true of rights guaranteed in the First Amendment, Second Amendment, and throughout the Bill of Rights. *See, e.g.*, *McDonald v. City of Chi.*, 561 U.S. 742 (2010) (Second Amendment); *Thomas v. Chi. Park Dist.*, 534 U.S. 316 (2002) (First Amendment); *Hudson v. McMillian*, 503 U.S. 1 (1992) (Eighth Amendment). This same rationale famously applies to rights protected under the Fourteenth Amendment, including unenumerated rights. *See, e.g.*, *Brown v. Bd. of Educ.*, 347 U.S. 54 (1954); *Roe v. Wade*, 410 U.S. 113 (1973).

No other type of federal constitutional right is systematically barred from federal court, forcing liti-

gants to file claims in the courts of the very state governments that may have violated their rights to begin with. The result is an indefensible double standard. As this 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).[4]

The Court has suggested two justifications for its anomalous treatment of Takings Clause claims. The first is that a plaintiff's claim that his property has been taken is "premature" before he has exhausted state "procedures" for obtaining compensation. *Williamson County*, 473 U.S. at 195–97; *cf. Suitum*, 520 U.S. at 733 n.7 (referring to this rule as a "prudential ripeness requirement"). The second is 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.").

These rationales cannot withstand scrutiny. If applied to suits asserting violations of other rights, both would lead to the exclusion of numerous cases that are routinely heard by federal courts.

1. Federal Court Consideration of Takings Clause Claims Is No More "Premature" than Federal Court Consideration of Other Constitutional Claims

[4] *Dolan* is one of those rare cases in which this Court granted certiorari from a state supreme court regulatory takings ruling.

Under *Williamson County*, a federal claim that a state government has taken property without compensation in violation of the Takings Clause is "premature" until the owner has tried to obtain compensation "through the procedures the state has provided for doing so," including litigation in state court. *Williamson County*, 473 U.S. at 194. This reasoning is flawed because it can be used to justify denial of a federal venue for any other constitutional rights claim—in all such cases, potential federal plaintiffs could be required to seek relief in state court instead.

For example, under *Williamson County*'s reasoning, a claim that a state statute that infringed 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 free speech violation. Yet no one suggests that such claims must reach a "final decision" in state court before any federal court can step in. 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. Similarly, the possibility that a state court might remedy a Takings Clause violation by providing compensation does not negate the brute fact of the violation, which is complete when the government takes the property without just compensation regardless of whether a state court could later remedy it.

2. State Courts Have No Greater Expertise with Takings Clause Claims than They Have with Numerous Other Constitutional Claims that Federal Courts Routinely Hear

The "expertise" rationale for *Williamson County*'s rule fares no better. Maybe state judges 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 federal review.

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 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 do, but these supposed facts do not stop aggrieved parties from bringing Establishment Clause cases to federal court.[5]

Similarly, this Court has 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

[5] Of course, federal district judges also live in the communities where they exercise jurisdiction—they do not simply exist in some federal ether—and, as leading citizens, may be even more keenly perceptive of local goings-on.

"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 thereby 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, but on the other hand federal judges may have greater knowledge of relevant federal jurisprudence. Somin, *Stop the Beach Renourishment* at 102–03. Ultimately, this rationale is not a rational reason to prevent federal courts from hearing this single type of constitutional claim.

II. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CIRCUIT SPLIT THAT CURRENTLY EXISTS AND CLARIFY THAT THE STATE-LITIGATION REQUIREMENT IS MERELY PRUDENTIAL (SUCH THAT FEDERAL COURTS MAY WAIVE IT IN APPROPRIATE CASES)

As Chief Justice Rehnquist recognized in his *San Remo Hotel* concurrence, the decisions of this Court have not conclusively stated whether the state-

litigation requirement is jurisdictional or prudential. *See* 545 U.S. at 349 (Rehnquist, C.J., concurring). In *Williamson County* itself, the Court seemed to place the requirement on the same ground as the rule that the government must have issued a final decision applying the regulations to the property. *See* 473 U.S. at 194 (providing a "second reason" that the claim was not yet ripe). In *Suitum*, however, this Court said that *Williamson County*'s regulatory takings ripeness requirements were "two independent prudential hurdles" to federal court review. 520 U.S. at 733–34.

In line with this Court's characterization of the state-litigation requirement in *Suitum*, several federal circuit courts treat the requirement as merely prudential. *See, e.g.*, *Sansotta v. Town of Nags Head*, 724 F.3d 533, 545 (4th Cir. 2013) (stating that the state-litigation requirement "involves only prudential considerations" and concluding that the court could "determine that in some instances, the rule should not apply and [the court would] still have the power to decide the case"); *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) ("*Williamson County* ripeness is a prudential doctrine"); *Guggenheim v. City of Goleta*, 638 F.3d 1111, 1118 (9th Cir. 2010) ("under *Suitum* this ripeness requirement now appears to be prudential rather than jurisdictional").

Although some of the circuits follow *Suitum*'s characterization of the state-litigation requirement as merely prudential, they disagree about what that means for property owners. For instance, in *Guggen-*

heim, the Ninth Circuit decided not to apply the state-litigation requirement because it would rule against the property owners on the merits and because the property owners had already litigated in state court prior to a change in the law precipitating their federal court case. 638 F.3d at 1118. The Seventh Circuit, however, has said that "[t]he prudential character of the *Williamson County* requirements do[es] not . . . give the lower federal courts license to disregard them." *Peters v. Clifton*, 498 F.3d 727, 734 (7th Cir. 2007).[6]

There is further division among the prudential-understanding courts regarding when the state-litigation requirement may be disregarded. While the Ninth Circuit declined to apply the rule in *Guggenheim* because it would be a waste of time and resources, *see* 638 F.3d at 1118, the Fourth Circuit has said that it should be disregarded "to avoid 'piecemeal litigation or otherwise unfair procedures.'" *Town of Nags Head v. Tolockzo*, 728 F.3d 391, 399 (4th Cir. 2013) (quoting *San Remo Hotel*, 545 U.S. at 346).

Then there are the circuit courts that consider the state-litigation requirement to be a constitutional bar to federal court jurisdiction under the ripeness doctrine. *See, e.g.*, *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 na-

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[6] Although the Seventh Circuit said in *Peters* that "*Williamson County*'s ripeness requirements are prudential in nature," 498 F.3d at 734, that court's continued strict application of the state-litigation rule makes it seem more jurisdictional than prudential. *See, e.g.*, *SGB Fin. Servs. v. Consol. City of Indianapolis-Marion Cty.*, 235 F.3d 1036, 1037 (7th Cir. 2000) (*Williamson County* "held that a takings claim does not accrue until available state remedies have been tried and proven futile").

ture of a federal 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); *Busse v. Lee Cty.*, 317 F. App'x 968 (11th Cir. 2009).

This case presents an opportunity for this Court to clarify that the state-litigation rule is at most a prudential ripeness requirement, as it said in *Suitum*. From there, this Court can and should also provide guidance to the federal district and circuit courts as to when the rule can—and should—be disregarded.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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