No. 06-1164

In The

# Supreme Court of the United States

JOHN R. SAND & GRAVEL COMPANY,

*Petitioner*,

*v.*

UNITED STATES OF AMERICA,

*Respondent.*

On Writ of Certiorari to
The United States Court Of Appeals for the Federal Circuit

**BRIEF OF AMICUS CURIAE
NATIONAL ASSOCIATION OF HOME BUILDERS
IN SUPPORT OF THE PETITIONER**

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## INTEREST OF THE *AMICUS CURIAE*

The National Association of Home Builders ("NAHB") has received the parties' written consent to file this *amicus curiae* brief supporting Petitioner.[1] NAHB represents over 235,000 builder and associate members throughout the United States, including individuals and firms that construct and supply single-family homes, as well as apartment, condominium, multi-family, commercial and industrial builders, land developers and remodelers. It is the voice of the American shelter industry. It is, and historically has been, vitally concerned with judicial decisions regarding government regulation and taking of private property.

NAHB appeared before the Court as a petitioner in a case decided earlier this term concerning the Clean Water and Endangered Species Acts, *NAHB v. Defenders of Wildlife*, 551 U.S. ___, 127 S.Ct. 2518 (2007). It has also participated as *amicus curiae* or "of counsel" in a number of cases involving landowners aggrieved by over-zealous regulation under a wide array of statutes and regulatory programs.[2]

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[1] Letters of consent are on file with the Clerk. Pursuant to Rule 37.6 of this Court, NAHB states that its counsel authored this brief. The brief was not written in whole or part by counsel for a party, and no one other than *amicus* made a monetary contribution to its preparation.

[2] These include *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *San Diego Gas and Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987); *Pennell v.*

In particular, NAHB has frequently asked this Court to clarify procedural and jurisdictional issues so Fifth Amendment takings claims can be resolved on their merits. Too often, ripeness principles and statutes of limitations are misapplied to operate as an unfair bar, denying land owners full and fair court access on constitutional takings claims. NAHB thus offers its experience in this field and a national perspective to support the Petitioner.

## SUMMARY OF ARGUMENT

*Amicus* agrees with Petitioner that the six-year limitations provision in the Tucker Act, 28 U.S.C. § 2501, is not a prerequisite for subject matter jurisdiction in the Court of Federal Claims. The court of appeals should thus

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*City of San Jose*, 485 U.S. 1 (1988); *Yee v. City of Escondido*, 503 U.S. 519 (1992); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Babbitt v. Sweet Home Chapter of Cmtys. for a Greater Ore.*, 515 U.S. 687 (1995); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Franconia Assocs. v. United States*, 536 U.S. 129 (2002); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002); *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs*, 537 U.S. 99 (2002); *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188 (2003); *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004); *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005); *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005); *Kelo v. City of New London*, 545 U.S. 469 (2005); *S.D. Warren Co. v. Me. Bd. of Envtl. Prot.*, 126 S.Ct. 1843 (2006); and *Rapanos v. United States*, 126 S.Ct. 2208 (2006).

be reversed in holding that the statute of limitations question could be raised *sua sponte*.

Even more fundamentally, *amicus* urges that under this Court's takings precedent, particularly *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), Petitioner's physical takings claim against EPA was never ripe until compensation was sought under the Tucker Act. Hence, the statute of limitations could not have run prior to the time the physical takings claim became ripe. As ripeness is unquestionably jurisdictional, this point can be considered *sua sponte*.

*Amicus* recognizes the tautology to maintain that Petitioner's takings claim did not ripen until Petitioner filed suit to compensate for EPA's taking. But that odd result is required under the current state of the case law. The ripeness requirement articulated by *Williamson* — that a Fifth Amendment takings claim does not ripen until the aggrieved property owner pursues an available compensation remedy — has generated multiple inconsistencies within this Court's own Fifth Amendment jurisprudence. Four concurring Justices in *San Remo Hotel, L.P. v. City and County of San Francisco,* 545 U.S. 323 (2005), stated that *Williamson* "may have been mistaken," and that "[i]t is not clear that *Williamson County* was correct in demanding" that a claimant must first seek a compensation remedy through litigation as a prerequisite to ripen a Fifth Amendment takings claim. *Id.* at 340 (Rehnquist, C.J., concurring). Respectfully, NAHB encourages this Court to reconsider the compensation element of *Williamson*'s ripeness doctrine — and prospectively dispense with it.

## ARGUMENT

### I. IN RESOLVING THE STATUTE OF LIMITATIONS QUESTION, THE COURT MUST CONSIDER ITS RIPENESS DOCTRINE FOR TAKINGS CLAIMS.

*Amicus* agrees with Petitioner that 28 U.S.C. § 2501 does not impose jurisdictional requirements. However, if the court of appeals is affirmed and the limitations question may be raised *sua sponte*, then the Court should consider the effect of its ripeness doctrine on the timeliness of Petitioner's takings claim.

#### A. **Relationship Between Statute of Limitations and Ripeness.**

"[R]ipeness is peculiarly a question of timing." *Anderson v. Green*, 513 U.S. 557, 559 (1995). See also *Buckley v. Valeo*, 424 U.S. 1, 113-114 (1976); *Blanchette v. Conn. Gen. Life Ins. Corps.*, 419 U.S. 102, 139 (1974). "Ripeness is a justiciability doctrine designed 'to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements ….' " *Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 807-08 (2003) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-149 (1967)). While the undecided question in this case is whether 28 U.S.C. § 2501 goes to subject matter jurisdiction, it is well established that ripeness doctrine is "drawn from both Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *Nat'l Park Hospitality Ass'n*, 538 U.S. at 807. See also *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 732 n. 7 (1997); *Reno v. Catholic Soc. Servs.*, 509 U.S. 43, 57 n. 18 (1993). The ripeness

doctrine has been described as "arising from problems of prematurity and abstractness that may present insurmountable obstacles to the exercise of the court's jurisdiction, even though jurisdiction is technically present." *Johnson v. Sikes,* 730 F.2d 644, 648 (11th Cir. 1984).

Because ripeness is jurisdictional, it can be raised at any point in the litigation. "[E]ven in a case raising only prudential concerns, the question of ripeness may be considered on a court's own motion." *Nat'l Park Hospitality Ass'n,* 538 U.S. at 807. The circuit courts thus uniformly hold that ripeness questions can be addressed *sua sponte*.[3] In short, the Court at its own volition is free to consider the ripeness of Petitioner's physical takings claim.

Moreover, "[t]he standard rule [is] that the limitation period commences when the plaintiff has 'a complete and present' cause of action … [A] cause of action does not become 'complete and present' until the plaintiff can file suit and obtain relief." *Bay Area Laundry and Dry Cleaning Pension Trust Fund v. Ferbar Corp.,* 522 U.S. 192, 201 (1997) (citations omitted). Unless legislative text clearly indicates otherwise, it is generally *not* the case that "a statute of limitations could commence to run on one day while the right to sue ripened on a later date." *TRW Inc. v.*

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[3] See, *e.g., Toca Producers v. F.E.R.C.,* 411 F.3d 262, 265-266 n.* (D.C. Cir. 2005); *Friends of Marolt Park v. U.S. Dep't of Transp.,* 382 F.3d 1088, 1093 (10th Cir. 2004); *Atl. States Legal Found. v. EPA,* 325 F.3d 281, 284 (D.C. Cir. 2003); *Utah v. U.S. Dep't of Interior,* 210 F.3d 1193, 1196 n.1 (10th Cir. 2000); *Nationwide Mut. Ins. Co. v. Cisneros,* 52 F.3d 1351, 1361 (6th Cir. 1995); *Cheffer v. Reno,* 55 F.3d 1517, 1523-24 (11th Cir. 1995); *Suburban Trails, Inc. v. N.J. Transit Corp.,* 800 F.2d 361, 365 (3d Cir. 1986).

*Andrews*, 534 U.S. 19, 34 n. 6 (2001) (interpreting *Bay Area Laundry*). See also *Reiter v. Cooper*, 507 U.S. 258, 267 (1993) ("While it is theoretically possible for a statute to create a cause of action that accrues at one time for purposes of calculating when the statute of limitations begins to run, but at another time for the purpose of bringing suit, we will not infer such an odd result in the absence of any such indication in the statute").

There is nothing in the Tucker Act — and certainly no language in the Fifth Amendment — to support a conclusion that the six-year period in 28 U.S.C. § 2501 ran out prior to the ripening point of Petitioner's physical takings claim against the United States. However, as explained below, the court of appeals has effectively decided just that: the limitations provision at issue expired before Petitioner could even sue the United States for a physical invasion. In light of this "odd result," there is ample justification for the Court to consider the ripeness question *sua sponte*.

**B. Ripeness Principles for Takings Claims.**

"There are two independent prudential hurdles" to ripen a regulatory takings claim. *Suitum*, 520 U.S. at 733-34. These were established in *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985). First, takings claims are not ripe "until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question." 473 U.S. at 191. This "finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury …." *Id.* at 193. This Court has never considered whether finality is

necessary to ripen a physical takings claim of the sort Petitioner brings. However, all of the courts of appeals reaching the issue have concluded that a separate finality inquiry is *not* necessary when the taking occurs by physical invasion.[4]

Second, *Williamson* held that a takings claim "is not yet ripe" if the property owner failed to seek an award of just compensation through available procedures. *Id.* at 194. The Court divined this "compensation procedures" element of ripeness because "[t]he Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation." *Ibid.* "[B]ecause the Fifth Amendment proscribes takings *without just compensation*, no constitutional violation occurs until just compensation has been denied." *Id.* at 184 n. 13 (original emphasis). As Judge Posner recently wrote, "the Constitution is not violated until the government refuses to compensate the owner." *Rockstead v. City of Crystal Lake*, 486 F. 3d. 963, 965 (7th Cir. 2007), *cert. pet.* filed June 25, 2007 (No. 06-1716). Unlike rulings with regard to finality (*supra* n. 4), circuits addressing the issue have decided that *Williamson*'s

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[4] See *Asociación de Subscripción Conjunto del Seguro de Responsabilidad Obligatorio v. Galarza*, 484 F.3d 1, 15 (1st Cir. 2007) ("[T]he finality prong of *Williamson County* is inapplicable to physical takings"); *Greenfield Mills, Inc. v. Macklin*, 361 F.3d 934, 958 (7th Cir. 2004) ("[A] physical invasion constitutes a 'final decision' and thus satisfies *Williamson County*'s first requirement"); *McKenzie v. City of White Hall*, 112 F.3d 313, 316 (8th Cir. 1997) ("A physical taking is by definition a final decision for the purpose of satisfying *Williamson*'s first requirement"); *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 864 F.2d 1475, 1478 (9th Cir. 1989) ("*Williamson County*'s final decision requirement is inapplicable in cases of physical invasion").

compensation procedures element is indeed a necessary prerequisite to ripen a physical takings claim.[5]

This Court has recognized that a *regulatory* takings challenge "does not mature until ripeness requirements have been satisfied, under principles we have discussed; until this point an inverse condemnation[6] claim alleging a regulatory taking cannot be maintained." *Palazzolo v. Rhode Island*, 533 U.S. 606, 628 (2001). The same must hold true for *physical* takings. Under *Williamson* and the current governing case law, a Fifth Amendment claim based on government invasion cannot mature, and thus the applicable limitations period cannot expire, until the affected property owner has satisfied the compensation procedures element.

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[5] *Greenfield Mills*, *supra* n. 4, 361 F.3d at 958 (physical takings claim "is subject only to *Williamson*'s exhaustion requirement."); *Pascoag Reservoir & Dam LLC v. Rhode Island*, 337 F.3d 87, 91-92 (1st Cir. 2003) ("the state action requirement remains in physical taking cases: '[C]ompensation must first be sought from the state if adequate procedures are available'."); *McKenzie*, *supra* n. 4, 112 F.3d at 317 ("As for the second *Williamson* requirement, the plaintiff must seek compensation from the state before proceeding to federal court if adequate state procedures are available, even in a physical taking case."); *Sinaloa Lake Owners Ass'n*, *supra* n. 4, 864 F.2d at 1479 ("Even in physical taking cases, compensation must first be sought from the state if adequate procedures are available.").

[6] Inverse condemnation occurs when the "government [defendant] takes the land at issue without initiating condemnation proceedings," such as by regulation or unconsented physical occupation. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 712 (1999).

### C. Petitioner's Physical Takings Claim did not Ripen Until it Sought Compensation Under the Tucker Act.

The following passage from *Williamson* is particularly relevant:

> [W]e have held that taking claims against the Federal Government are premature until the property owner has availed itself of the process provided by the Tucker Act, 28 U.S.C. § 1491.

*Williamson*, 473 U.S. at 194 (citing, *inter alia*, *Monsanto v. Ruckleshaus*, 467 U.S. 986, 1016-1020 [1984]).[7] See also *Preseault v. I.C.C.*, 494 U.S. 1, 16-17 (1989) (failure to use Tucker Act remedy rendered premature a takings claim against an Interstate Commerce Commission order converting abandoned rail lines to recreational trail use).

*Williamson* thus contemplated the precise scenario presented in the case at bench. Here, the physical takings claim against the United States did not ripen (thus, the Court of Federal Claims lacked subject matter jurisdiction) until Petitioner "availed itself of the process provided by the Tucker Act" *in that court.* Under *Williamson*, the very act of filing the Tucker Act suit ripened Petitioner's claim for just compensation against EPA.

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[7] *Monsanto* held that that a takings claim was not ripe because the applicant for a pesticide registration did not seek a Tucker Act compensation remedy from EPA, to redress any monetary damage that might arise under the Federal Insecticide, Fungicide, and Rodenticide Act. 467 U.S. at 1019-20.

The court of appeals' ruling that the statute of limitations began to run in 1994, when EPA built the fence that cut off access to Petitioners' plant,[8] cannot be reconciled with *Williamson*, which requires resort to federal compensation procedures to yield jurisdictional ripeness. Accordingly, the date of the physical appropriation — that is, EPA's fence construction — might be pertinent for *remedial purposes* to determine the amount of compensation that is ultimately due. But the government's invasion did not itself ripen the physical takings claim for *jurisdictional purposes*, which only occurred later when Petitioner invoked the Tucker Act's compensation procedures. See *First English Evangelical Lutheran Church of Glendale v. Los Angeles*, 482 U.S. 304, 320 n. 10 (1987) ("Though, as a matter of law, an illegitimate taking might not occur until the government refuses to pay, the interference that effects a taking might begin much earlier, and compensation is measured from that time").

And, of course, if the physical takings claim was not ripe until Petitioner sought compensation through the Tucker Act, the statute of limitations could not have expired *before* then because the Court of Federal Claims did not have jurisdiction *until* then. Cf. *Hacienda Valley Mobile Home Estates v. City of Morgan Hill*, 353 F.3d 651, 655 (9th Cir. 2003) (in resolving facial takings claims "the court must perform a two-step analysis. First, it must determine whether the claim is ripe under *Williamson County*. Then the court must determine whether the claim

[8] "We conclude … that the claim accrued not later than February of 1994 when the government constructed the fence that cut of JRS & G's access to its plant area. That date was more than six years before JRS & G filed its complaint on May 20, 2002." *John R. Sand & Gravel Co.v. United States*, 457 F.3d 1345, 1356 (Fed. Cir. 2006).

is barred by a statute of limitations."); *City of New Pulaski Co. v. Mayor and City Council of Baltimore*, 217 F.3d 840, 843 (4th Cir. 2000) ("[A] takings claim is not ripe and the statute of limitations does not begin to run, unless the property owner has exhausted any available … compensation procedures.").

To conclude, the court of appeals erred in ruling that the six-year limitation provision in 28 U.S.C. § 2501 ran out against Petitioner, because this Court's current precedent would not render the physical takings claim ripe until compensation was sought under the Tucker Act.

## II. THE COURT SHOULD DISPENSE WITH *WILLIAMSON*'S COMPENSATION PROCEDURES ELEMENT.

*Amicus* fully recognizes the *reductio ad absurdum* to maintain that a property owner must bring a Tucker Act suit as a prerequisite to ripen a Tucker Act suit.[9] But that is the outcome that *Williamson* dictates. With respect, the problem lies within the compensation procedures requirement. It is inherently flawed. The Court should reconsider this prudential element of the ripeness inquiry and retire it, from this point forward.

The Tucker Act provides jurisdiction over cases such as the present one, seeking monetary relief from the federal

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[9] See Michael Berger, *Anarchy Reigns Supreme*, 29 Wash. U. J. Urb. & Contemp. L. 39, 57-58 (1985) (the discussion in *Williamson*, 473 U.S. at 194 (*supra* p. 9), that federal takings claims are premature until the Tucker Act remedy is sought in the Court of Federal Claims, is "bewildering" and "mystifying").

government in excess of $10,000.[10] The result that *Williamson* demands in this case is problematic, but difficulties with the compensation procedures element are far more common in takings suits against counties, townships, and other non-federal government entities. In such suits, virtually every court of appeals has interpreted *Williamson* to mean that a Fifth Amendment takings claim is not ripe — it does not exist — until a property owner has filed suit for inverse condemnation in state court and has been denied compensation. The justification behind these cases is that the government has not denied compensation until the property owner has litigated and lost his takings claim in court.[11]

This Court's avowed basis for the compensation procedures element is that "no constitutional violation

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[10] 28 U.S.C. § 1491(a). For suits seeking monetary relief from the federal government up to and including $10,000, the United States district courts also possess jurisdiction. 28 U.S.C. § 1346(a)(2).

[11] *Deniz v. Mun. of Guaynabo*, 285 F.3d 142, 146 (1st Cir. 2002); *Southview Assocs., Ltd. v. Bongartz*, 980 F.2d 84, 99-100 (2d Cir. 1992), *cert denied*, 507 U.S. 987 (1993); *County Concrete Corp. v. Town of Roxbury*, 442 F.3d 159, 168 (3d Cir. 2006); *Henry v. Jefferson County Planning Comm'n*, 34 Fed. Appx. 92, 96 (4th Cir. 2002); *Samaad v. City of Dallas*, 940 F.2d 925, 933-36 (5th Cir. 1991); *Peters v. Fair*, 427 F.3d 1035, 1038 (6th Cir. 2005); *Forseth v. Vill. of Sussex*, 199 F.3d 363, 368-73 (7th Cir. 2000); *Kottschade v. City of Rochester*, 319 F.3d 1038, 1041(8th Cir.), *cert. denied*, 540 U.S. 825 (2003); *Sinclair Oil Corp. v. County of Santa Barbara*, 96 F.3d 401, 405-07 (9th Cir. 1996), *cert. denied*, 523 U.S. 1059 (1998); *Bateman v. City of W. Bountiful*, 89 F.3d 704, 708-09 (10th Cir. 1996); *Agripost, Inc. v. Miami-Dade County*, 195 F.3d 1225, 1234 (11th Cir. 1999), *cert denied*, 531 U.S. 815 (2000).

occurs until just compensation has been denied." *Williamson*, 473 U.S. at 184 n. 13. Surely, if *Williamson* is correct in requiring litigation to pursue compensation procedures, its application must not randomly depend on which level of government committed the taking. How could it be, that litigation against a state or local agency is necessary to ripen a takings claim but litigation against a federal agency is not required — if the declared reason for the procedure element depends on a court's denial of compensation? If *Williamson* is good law and its ripeness rule indeed entails exhaustion of litigation, then neither the level of government that has taken the property nor the court system in which suit must be pursued, should matter.

In 2005, former Chief Justice Rehnquist wrote a concurrence joined by three other Justices, stating that *Williamson*'s compensation procedures element has "created some real anomalies, justifying our revisiting the issue." *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323, 342 (2005) (Rehnquist, C.J., concurring). This concurrence stated "our decision in *Williamson* … may have been mistaken," because "[it] is not clear … that *Williamson* … was correct in demanding that … [a takings] claimant must seek compensation in state court before bringing a federal takings claim in federal court." *Id.* at 340. The confusion, inconsistencies, and "real anomalies" created by *Williamson* have gone on long enough. Lower courts, property owners, and government defendants all require clarification from this Court due to the following problems generated by *Williamson*:

**A. Different Rule for Federal vs. State Takings.**

If the court of appeals is upheld, a special exception to *Williamson* will have been created for federal government

takings. If the Court affirms that Petitioner's action is time-barred under 28 U.S.C. § 2501, it would be tantamount to ruling that takings claims against the United States are immediately ripe upon a final federal agency decision (or, in the case of physical takings, upon the invasion by a federal agency). The compensation procedures element would be rendered inapplicable in the context of federal government takings. In contrast, takings claims against local government will not ripen until after a state court denies compensation. But the Takings Clause provides no basis to vary ripeness requirements on the fortuity of whether the government "taker" is federal or state. *Supra* at 13. Does this Court intend to establish different ripeness requirements for federal, as compared to state, takings?

### B. Discord on Simultaneous vs. Subsequent Takings Claims.

Tension is pronounced between *San Remo* and *Williamson.* *San Remo* held that takings plaintiffs can "simultaneously" bring federal and state takings claims in state court. *San Remo,* 545 U.S. at 338. Yet *Williamson* made clear that exhaustion of state compensation procedures is a necessary first step to ripen federal takings claims: "*until* [a plaintiff] has utilized [state] procedures, its takings claim is *premature.*" *Williamson,* 473 U.S. at 197 (emphasis supplied). Moreover, every court of appeals interpreting *Williamson* (*supra* note 11) has decided that that initial exhaustion of state court compensation procedures is a ripening prerequisite for federal takings claims.[12] How can *San Remo* and *Williamson* be

[12] Scholars agree. See, *e.g.*, Steven J. Eagle, Regulatory Takings 1062 (2d ed. 2001) ("the 'ripeness' metaphor is one that promises ultimate vindication."); Thomas E. Roberts, *Ripeness and Forum Selection in Fifth Amendment Takings Litigation,* 11

harmonized, if at all? How can a Fifth Amendment claim be brought simultaneously with a state takings claim in state court (*San Remo*), when that federal claim is not ripe until after state litigation is exhausted and the state court denies compensation (*Williamson*)?

**C. Anomaly with Removal Jurisdiction.**

In *City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156 (1997), the Court allowed a municipal defendant to remove a federal takings claim from state to federal court, because "a case containing claims that local administrative action violates federal law … is within the jurisdiction of the federal district courts." *Id.* at 163. Under the federal removal statute, a case can be removed from state to federal court only if it could have been brought in federal court *originally*. 28 U.S.C. § 1441(a). But under *Williamson*, federal courts do not have original jurisdiction over federal takings claims because they are not ripe until the property owner brings state litigation and loses. The Eighth Circuit believes that the ironic synergy between *College of Surgeons* and *Williamson* has created an "anomalous gap … in Supreme Court jurisprudence." *Kottschade v. City of Rochester*, 319 F.3d 1038, 1041 (8th Cir.), *cert. denied*, 540 U.S. 825 (2003). Does this Court intend a ripeness doctrine that prevents federal courts from deciding federal takings claims if they are initially filed in that forum by a plaintiff, but allows federal adjudication over such claims *only* when municipal defendants exercise their removal option to federal court?

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J. Land Use & Envtl. L. 37, 67 (1995) (*Williamson*'s "language … suggests that the state law is merely preparatory to a federal suit"); Madeline J. Meacham, *The Williamson Trap*, 32 Urb. Law. 239, 249 (2000) ("language … of *Williamson* suggests that a federal claim will survive after disposition in the state court").

Moreover, municipal defendants have been permitted to remove federal takings cases from state to federal court, and once in federal court, argue that the claims should be dismissed for lack of a prior state ripening suit. See, *e.g.*, *Koscielski v. City of Minneapolis*, 435 F.3d 898, 903-904 (8th Cir. 2006); *Sandy Creek Investors, Ltd. v. City of Jonestown*, 325 F.3d 623, 626 (5th Cir. 2003). Does this Court intend a ripeness regime that allows municipal defendants to whipsaw takings plaintiffs by removing them to federal court, and then bouncing them back to state court? How could that result possibly serve interests of judicial economy?

**D. Federal Court Blockade on Takings Claims.**

The interplay between *Williamson*'s compensation procedures element and the preclusion doctrines of res judicata (claim preclusion) and collateral estoppel (issue preclusion) has been well documented, and described as a "trap" that ensnares takings plaintiffs.[13] The problem is that once a takings claim is litigated in state court, claim or issue preclusion will *always* bar adjudication of the Bill of

[13]The scholarship on this topic is legion. See, *e.g.*, J. David Breemer, *You Can Check Out But You Can Never Leave: The Story of San Remo Hotel, The Supreme Court Relegates Federal Takings Claims to State Courts*, 33 B.C. Envtl. Aff. L. Rev. 247 (2006); Scott Keller, *Judicial Jurisdiction Stripping Masquerading as Ripeness: Eliminating the Williamson County State Litigation Requirements for Regulatory Takings Claims*, 85 Tex. L. Rev. 199 (2006); Madeline J. Meacham, *The Williamson Trap*, 32 Urb. Law. 239 (2000); Test. of Prof. Daniel Mandelker on H.R. 1534, Before the H. Comm. on the Judiciary, Subcomm. on Courts and Intellectual Property, *reprinted in* 31 Urb. Law. 371 (1999).

Rights provision protecting property rights in federal court. A case survey has confirmed that the merits of Fifth Amendment claims are largely undecided by federal judges. See John J. Delaney and Duane J. Desiderio, *Who Will Clean Up the "Ripeness Mess"? A Call for Reform so Takings Plaintiffs Can Enter the Federal Courthouse*, 31 Urb. Law. 203-205 (1999) (surveying all land-use takings cases with a federal court decision from 1990-1998). The Sixth Circuit appreciates the severity of the problem: "[The] interaction of *Williamson County*'s ripeness requirements and the doctrine of claim preclusion could possibly operate to keep every regulatory takings claimant out of federal court." *DLX, Inc. v. Kentucky*, 381 F.3d 511, 521 (6th Cir. 2004).

As the Tenth Circuit has observed, "[i]t is difficult to reconcile the [compensation procedures] ripeness requirement of *Williamson*" with issue and claim preclusion. *Wilkinson v. Pitkin County Bd. of Comm'rs*, 142 F.3d 1319, 1325 n. 4 (10th Cir. 1998). Accordingly, the only opportunities for federal court interpretations of the Takings Clause occur when either: (1) the United States is sued, and the matter goes to the Court of Federal Claims; or (2) this Court grants *certiorari* to review a decision from a state court of last resort. Does this Court intend to relegate the Fifth Amendment to the "status of a poor relation" (*Dolan v. City of Tigard*, 512 U.S. 374, 392 [1994]), by effectively barring the lower federal courts from adjudicating the merits of claims arising under the Takings Clause?

## III. *WILLIAMSON* WILL CONTINUE TO GENERATE UNFAIR AND ARBITRARY RESULTS UNLESS THIS COURT INTERVENES.

"[C]onsiderations of fairness and justice" are at the heart of the Takings Clause. *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 333 (2002). The plain truth is that *Williamson*'s compensation procedures element typically achieves results that are neither fair nor just, but arbitrary and irrational.

Two petitions for *certiorari* pending before this Court provide egregious illustrations of the "damned if you do, damned if you don't" dilemma confronting property owners as a result of *Williamson.* The first is *McNamara v. City of Rittman*, 473 F.3d 633, 637-40 (6th Cir. 2007), *cert. pet.* filed May 9, 2007 (No. 06-1481). In January 1994, the plaintiffs filed a state court action seeking damages for "unreasonable dewatering," a claim recognized by Ohio law, from water shortages caused by the city's well-drilling activity. In 1998, the Ohio intermediate appellate court affirmed dismissal of the dewatering claim on sovereign immunity grounds; in 1999, the Ohio Supreme Court dismissed plaintiffs' appeal as improvidently granted. 473 F.3d at 635. Plaintiffs could not assert state law takings theories in the state dewatering action, simply because the Sixth Circuit determined they were *not available* under Ohio law at the time the state suit was filed.[14]

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[14] "Ohio does not have an inverse condemnation or other direct, statutory cause of action for plaintiffs seeking just compensation for a taking." *McNamara*, 473 F.3d at 638. While Ohio does not allow a direct compensation remedy for a takings plaintiff through inverse condemnation, roughly six-months *after* the McNamara plaintiffs filed their state dewatering complaint, the

Subsequently, after exhausting the potential dewatering remedy in state court and not receiving a damages award there, in 2000 plaintiffs filed a federal court complaint for a Fifth Amendment taking. The Sixth Circuit refused to review the merits, dismissing the federal takings claim through a bizarre assemblage of statute of limitations and *Williamson* ripeness theories. The court decided that the applicable two-year statute of limitations under Ohio law rendered plaintiffs' 2000 federal takings case *too late* to redress "past violations" by the city. It ruled that the federal action was time-barred because the takings claim became "ripe for review in 1994" when the Ohio Supreme Court first recognized a mandamus action (*supra* n. 14) — *after* the state dewatering suit was filed. *McNamara*, 473 F.3d at 639. Then, with regard to Fifth Amendment takings arising from "continuing violations" of the city's on-going dewatering, the Sixth Circuit found the federal action *too early* because it was not preceded by an Ohio mandamus suit purportedly required by *Williamson.*[15] *Id.* at 639-40.

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Ohio Supreme Court first announced the availability of a "'mandamus action to force appropriation proceedings' "— that is, a suit whereby a landowner can force government into eminent domain proceedings to affirmatively condemn the property at issue. *Ibid.* (citing *Levin v. City of Sheffield Lake*, 637 N.E.2d 319, 323-34 (Ohio 1994).

[15] Surely there are constitutional problems with a state law doctrine that does not simply require the land owner to seek just compensation from government, but forces the land owner into eminent domain proceedings to compel government to *actually take title* to the property at issue. The Court is aware that eminent domain cases create their own storm of controversy. See, *e.g.*, *Kelo v. City of New London*, 545 U.S. 469 (2005);

The court paid lip service to the Catch-22 situation it created for the plaintiffs, but nonetheless avoided federal adjudication on the Bill of Rights claim. It blamed *Williamson* for the result:

> It may seem a bit perverse that one takings claim (past violations) be barred by statute of limitations because it was delinquently filed in federal court, and yet a similar claim (continuing violations) be barred by ripeness because it was prematurely filed in federal court. But this is the nature of the federal-state interplay after *Williamson*, a dance made more awkward when actions, as here, both pre- and post-date the Ohio Supreme Court's decision [creating a mandamus remedy].

*McNamara*, 473 F.3d at 640. Thus, the takings plaintiffs were shut out of federal court.

Another petition, where hapless property owners find themselves trapped by *Williamson*, is pending in *Rockstead v. City of Crystal Lake*, 486 F.3d 963 (7th Cir. 2007) (Posner, J.), *cert. pet.* filed June 25, 2007 (No. 06-1716). Here, the takings claimants own a parcel adjacent to stormwater detention ponds and wastewater treatment facilities owned by the city. The city's management of these features caused flooding on plaintiffs' property, thereby converting "productive farmland into valueless wetlands." *Id.* at 965. Since 1948, Illinois case law has held that an inverse condemnation suit will *not* lie for damages from "intermittent flooding," and the plaintiffs thus lost their case at the state trial level. *Ibid* (citing

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*MiPro Homes, L.L.C. v. Mt. Laurel Twp.*, 910 A.2d 617 (N.J. 2006), *cert. pet.* filed Apr. 6, 2007 (No. 06-1345).

*People ex rel. Pratt v. Rosenfeld*, 77 N.E.2d 697, 699-700 (Ill. 1948)).

The Rocksteads did not pursue further appeals in the Illinois courts because they saw "no point in continuing in state court because the outcome is foreordained by state law." *Ibid.* So, they filed a Fifth Amendment takings suit in federal court. But the Seventh Circuit deemed the suit unripe under *Williamson*. Judge Posner decided that further pursuit of state appeals could still provide a light at the end of the tunnel because judges "can—and do—change common law doctrines." *Id.* at 966. The Seventh Circuit saw a "glimmering of recognition" provided by a single 1994 state intermediate appellate decision that Illinois law could, after all of these years, change course to recognize an inverse condemnation claim due to intermittent flooding. *Id.* at 967 (citing *Luperini v. County of DuPage*, 637 N.E.2d 1264 (Ill. App. 1994)). Judge Posner thus concluded that the Rocksteads' federal takings claim was properly dismissed by the district court because they did not pursue state litigation to its ultimate appellate conclusion, as *Williamson* purportedly mandates. *Rockstead*, 486 F.3d at 965-66.

The *Rockstead* decision demonstrates just how extremely unfair *Williamson* works in practice. At least in the Seventh Circuit, takings plaintiffs are now expected to predict whether future state court opinions might possibly reverse earlier, long-standing precedent. And they need to be lucky, so that the stars align for a grant of *certiorari* from a state supreme court under its own procedural rules to accept review. For, if a takings plaintiff does not pursue litigation and appeals at all levels of the state system, they will never have the merits of their Fifth Amendment claim decided by *any* court. As Judge Posner stated, if "the

property owner goes through the entire state proceeding, and he loses, he cannot maintain a federal suit" due to *res judicata* and the doctrine against claim splitting. *Id.* at 968. In other words, [t]he litigation in state court is the end of the road" for property owners bringing Fifth Amendment claims. *Id.*

If this is what the Court thinks *Williamson* means – that federal courts are barred from deciding the merits of cases arising under the Takings Clause, unless the suit is against the United States – then it needs to announce that radical notion once and for all, in clear and unmistakable terms.

When particular takings principles prove over time that they make little sense, this Court has not hesitated to clarify the law even by overruling earlier cases. In *Lingle v. Chevron*, 544 U.S. 528, 531 (2005), the Court recognized that "[o]n occasion, a would-be doctrinal rule or test finds its way into our case law through simple repetition of a phrase — however fortuitously coined." *Lingle* went on to hold that the "substantially advances a legitimate government interest" test first announced in *Agins v. City of Tiburon* (1980), was no longer "an appropriate test for determining whether a regulation effects a Fifth Amendment taking." *Lingle*, 544 U.S. at. 532. *Williamson* should be subject to the same kind of thorough examination. The compensation procedures element of the ripeness doctrine requires serious attention and reconsideration by this Court.

## CONCLUSION

It is a droll understatement to say that *Williamson*'s compensation procedures element is "confusing" and

"controversial." Rarely has a legal doctrine been the object of so much enthusiastic invective:

> [T]he Supreme Court's decision in (and lower court applications of) *Williamson County* were described by courts and commentators as "odd," "unpleasant," "unfortunate," "ironic," "ill-considered," "unclear and inexact," "surprising," "bewildering," "worse than mere chaos," "dramatic," "misleading," "deceptive," an "anomaly," "paradoxical," "most confusing," a "source of intense confusion," "inherently nonsensical," "shocking," "absurd," "unjust," "self-stultifying," "pernicious," "revolutionary," "nonsense," "draconian," "riddled with obfuscation and inconsistency," "containing an Alice in Wonderland quality," and thereby creating "a procedural morass," a "labyrinth," "conflict of decision," a "result [that] makes no sense," "doctrinal confusion," "havoc," "a "mess," "a "trap," a "quagmire," a "Kafkaesque maze," a "fraud or hoax on landowners," a "weapon of mass obstruction," and "a Catch-22 for takings plaintiffs."

Michael Berger and 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 (Fall 2004) (citations omitted). On three occasions, the House of Representatives passed bill language to dispense with the compensation procedures element for takings claim ripeness.[16]

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[16] *See* H.R. 1534, The Private Property Rights Implementation Act of 1997, 105th Cong., 1st Sess. (1997) (passed by 248-178 vote on Oct. 22, 1997); H.R. 2372, Private Property Rights Implementation Act of 2000, 106th Cong., 2d. Sess. (2000)

*Williamson* is a like a virus. It mutates and infects a variety of dormant issues, such as statute of limitations provisions (and, likewise, principles of res judicata, collateral estoppel, concurrent jurisdiction, and removal jurisdiction, to name some others). Great clarity will be afforded to all of takings law if only this Court would heed Chief Justice Rehnquist's *San Remo* concurrence, and reconsider the propriety and validity of the compensation procedures element for jurisdictional ripeness.

For the foregoing reasons, the court of appeals should be reversed. And, *Williamson*'s compensation procedures requirement should be excised from this Court's body of Fifth Amendment jurisprudence.

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(passed by 226-182 vote on March 16, 2000); H.R. 4772, Private Property Rights Implementation Act of 2006, 109th Cong., 2d Sess. (2006) (passed by 231-181 vote on Sept. 29, 2006).