No.

IN THE SUPREME COURT OF THE UNITED STATES

SHIRLEY A. ROCKSTEAD and CAROL J. HENDERSON,
Petitioners,

v.

CITY OF CRYSTAL LAKE, an Illinois municipal corporation,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, as suggested by the late Chief Justice Rehnquist's concurrence in *San Remo Hotel v. County of San Francisco*, 545 U.S. 323, 348, 125 S. Ct. 2491, 2507 (2005) (joined by three other justices), the state-litigation requirement of *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), whereby a Fifth Amendment Takings claim is not ripe in federal court until the landowner first seeks and is denied compensation in state court, should be reconsidered.

2. Whether *Williamson County*'s state-litigation ripeness rule should apply to physical takings cases.

3. Whether it is futile to require petitioners to attempt to fulfill *Williamson County*'s state-litigation requirement by continuing their state court challenge of well-established state law doctrine announced by the Illinois Supreme and appellate courts that unequivocably deny petitioners a state inverse condemnation remedy.

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PETITION FOR A WRIT OF CERTIORARI

Shirley A. Rockstead and Carol J. Henderson respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.[1]

OPINIONS BELOW

The April 10, 2007 Opinion of the Court of Appeals (App., *infra*, 1a-10a) is as yet unreported in the Federal Reporter. The December 29, 2005 Opinion and Order of the district court (App., *infra*, 13a-27a) is reported at 431 F. Supp. 2d 804.

Two Orders of the Circuit Court of the Nineteenth Judicial Circuit, McHenry County, Illinois ("McHenry County Circuit Court") are relevant: the first, entitled "Order on Pending Motions" was dated July 14, 2004 (App., *infra*, 45a-56a), and the second, entitled "Order of Motion for Partial Summary Judgment," dated July 27, 2005 (App., *infra*, 29a-44a).

JURISDICTION

The judgment of the Court of Appeals was entered on October 31, 2006 (App., *infra*, 12a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The Fifth Amendment to the United States Constitution

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[1] For the convenience of the Court, petitioners note that the Petition for a Writ of Certiorari in *McNamara v. City of Rittman, Ohio* (No. 06-1481), filed in this Court on May 10, 2007 and still pending, presents closely related questions.

provides, in pertinent part: "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

28 U.S.C. § 1738 provides in pertinent part:

> The records and judicial proceedings of any court of any . . . State, Territory or Possession . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

42 U.S.C. § 1983 provides in pertinent part that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

Article I, Section 15 of the Illinois Constitution provides that:

> Private property shall not be taken or damaged for public use without just compensation as provided by law. Such compensation shall be determined by a jury as provided by law.

STATEMENT

This is a § 1983 Fifth Amendment Just Compensation action involving a physical invasion by reason of flooding induced by the respondent municipality that has permanently degraded a substantial part of petitioners' land into valueless wetlands.

This case presents important and recurring questions about the continuing validity of the "state-litigation" requirement of *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 195 (1985), *i.e.*, that a Fifth Amendment Takings claim under 42 U.S.C. § 1983 is not ripe for adjudication in federal court until the aggrieved property owner has exhausted all adequate state law compensation remedies.[2]

In his concurrence in *San Remo Hotel v. County of San Francisco*, 545 U.S. 323, 348, 125 S. Ct. 2491, 2507 (2005), joined by Justices O'Connor, Kennedy and Thomas, the late Chief Justice Rehnquist stated his belief that "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." 545 U.S. at 352, 125 S. Ct. at 2510.

Thus, petitioners seek reconsideration of *Williamson County*'s state-litigation rule. In lieu thereof, they seek to

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[2] This requirement – also called the *Williamson County* "exhaustion" requirement – is the second of a two-pronged ripeness test. The first prong – finality, *Williamson County*, 473 U.S. at 194 – is automatically satisfied because this case involves a physical invasion, as the lower federal courts have repeatedly held. *See, e.g., Forseth v. Village of Sussex*, 199 F.3d 363, 372 n.12 (7th Cir. 2000) (a physical invasion is a final decision); *Pascoag Reservoir & Dam, LLC v. Rhode Island,* 337 F.3d 87, 91 (1st Cir. 2003); and *Daniel v. County of Santa Barbara*, 288 F.3d 375, 382 (9th Cir. 2002).

exclude takings by physical invasion from that rule's operation. Finally, under the unique facts of this case, they ask that the Court clarify the so-called futility exception to the state-litigation rule and find that they need not continue their futile pursuit of state compensation remedies that are *per se* unavailable to them.

Factual and Procedural Background – By this § 1983 action, petitioners Shirley A. Rockstead and Carol J. Henderson, the co-owners of land in Crystal Lake, Illinois, seek compensation from respondent City of Crystal Lake, Illinois ("City") under the Takings Clause of the Fifth Amendment because intermittent but regularly recurring flooding caused by the City's construction of certain municipal facilities has degraded much of their land into permanently unusable and valueless wetlands.[3]

The Illinois Case – Prior to filing this case, petitioners pursued eleven fruitless years of Illinois state court litigation seeking first damages at law, and then "inverse condemnation."

Petitioners' state court case seeking damages at law and an injunction was filed in 1994 in Cook County. After two years of arguments about venue, the case was transferred to the McHenry County Circuit Court. Over the succeeding years, the City repeatedly but unsuccessfully attacked petitioners' damage claims on the grounds of municipal immunity. Then, in 2003, as the case was nearing trial, the Illinois Supreme Court changed the law on municipal immunity for flooding cases.

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[3] Petitioners each own an undivided one-quarter interest in the property as do the heirs of their two deceased sisters. The four sisters each inherited their one-quarter interest from their mother in 1974. (R. 1: Complaint, ¶ 8). The deceased sisters and their heirs did not join in petitioners' attempts to obtain damage relief or just compensation and thus were not and are not parties in the state court case or this case.

Van Meter v. Darien Park District, 207 Ill. 2d 359; 799 N.E.2d 273 (2003). As a result, in mid-2004, the McHenry County Circuit Court granted summary judgment against petitioners on their damage claim on the grounds that the City was, after all, immune from suit for damages at law. (App., *infra*, 52a).

Petitioners then added a new claim for inverse condemnation under the Just Compensation Clause of Article I, § 15 of the Illinois Constitution.[4]

Petitioners did not advance a § 1983 Fifth Amendment takings claim.[5]

The City moved for summary judgment on the inverse

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[4] Inverse condemnation is simply a mandamus action brought by a land owner to compel a governmental body to institute proceedings under the Illinois Eminent Domain Act. *Rosenthal v. City of Crystal Lake*, 171 Ill. App. 3d 428, 437, 525 N.E.2d 1176, 1182 (2d Dist. 1988) ("[w]here there has been a taking without just compensation, the owner may bring a mandamus action against the responsible agency to compel the institution of eminent domain proceedings."); *see also* Illinois Eminent Domain Act, 735 ILCS § 5/7-101, *et seq.* (2006) (current version at 735 ILCS § 30/1-1-1, *et seq.*), esp. § 5/7-122 (now § 30/10-5-65) (allowing reimbursement of costs and fees in inverse condemnation mandamus action as part of eminent domain award).

[5] *See* Argument, *infra*, p. 26. First, the Illinois Supreme Court applies *Williamson County*'s ripeness rules to federal takings claims filed in the Illinois state courts. *Beneficial Dev. Corp. v. City of Highland Park*, 161 Ill. 2d 321, 328, 641 N.E.2d 435, 438 (1994). Second, the City could have prevented the state court consideration of the § 1983 claim pursuant to 28 U.S.C. § 1441 and *City of Chicago v. Int'l College of Surgeons*, 522 U.S. 156 (1997) by removing the case to federal court, and then obtaining a ripeness dismissal of the § 1983 claim and a remand of the state compensation claim. *Key Outdoor, Inc. v. City of Galesburg*, 327 F.3d 549 (7th Cir. 2003).

condemnation claim on the ground that in flooding cases Illinois eminent domain law allows a compensable taking only when there was a permanent inundation. The City cited three decisions that stand for that precise proposition: two from the Illinois Supreme Court and the third from the Second District Illinois Appellate Court which has appellate jurisdiction over the McHenry County Circuit Court. *People ex rel. Pratt v. Rosenfield*, 399 Ill. 247, 251, 77 N.E.2d 697 (1948) (no taking without permanent inundation); *Herget Nat'l Bank v. Kenney*, 105 Ill. 2d 405, 475 N.E.2d 863 (1985) (same); *Luperini v. County of Du Page*, 265 Ill. App. 3d 84, 637 N.E.2d 1264 (2d Dist. 1994) (same).

The City argued that these precedents – requiring "permanent surface water, either standing or running on the property" as a necessary element of a taking by flooding – were "well-settled" Illinois law. And, argued the City, petitioners had no proof to meet that requirement. (Circuit Court Record: 2/15/05 City Mot. for Partial SJ).

In response, petitioners conceded that they could show neither a permanent inundation nor standing or running water on their property. Indeed, they had never contended that the flooding of their land was permanent, but only that it was intermittent but permanently recurring and had permanently degraded much of their land into unusable valueless wetlands.[6]

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[6] *Compare, United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 129 (1985) (no requirement of permanent surface inundation or flooding to qualify as wetlands under regulations promulgated under Clean Water Act).

The regulations of the United States Army Corps of Engineers (Corps) and Environmental Protection Agency (EPA), the federal agencies charged with primary responsibility for administering of the Clean Water Act, define wetlands without any

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(App., *infra*, 35a).

On July 27, 2005, as urged by the City, the McHenry County Circuit Court granted the City's Motion for Summary Judgment on Petitioners' inverse condemnation claim, ruling that intermittent flooding did not constitute a compensable taking under Illinois law. (*Id.*, App., *infra*, 41a-42a). After citing the pertinent Illinois decisions and quoting *Luperini* at length, the Circuit Court held:

> Although this Court believes it creates a harsh result, it appears that the current state of the law in the State of Illinois requires that there must be evidence of permanent surface water on property caused by the public improvement before a finding can be made that a physical invasion tantamount to a taking has occurred. The Plaintiffs have not and cannot present such evidence in this case. (*Id.*, App., *infra*, 41a-42a).

This Case – Unlike Illinois law, federal takings law does seem to require compensation for a taking caused by

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[6](...continued)
requirement of a permanent surface inundation or flooding. 33 C.F.R. § 328.3(b) (Corps Rule); 40 C.F.R. § 230.3(t) (EPA Rule). *See also* Wetlands Research Program Technical Report Y-87-1 (on-line edition), pp. 9-10 (Jan. 1987), http://www.saj.usace.army.mil/permit/documents/87manual.pdf and *Field Indicators of Hydric Soils in the United States*, Version 6.0. G.W. Hurt and L.M. Vasilas (eds.), p. 1 (USDA, NRCS 2006) (hydric soils result from repeated periods of saturation and/or inundation for more than a few days; no permanent surface inundation required). (Copies lodged with Clerk of this Court).

intermittent flooding. *United States v. Cress*, 243 U.S. 316, 328 (1917) ("There is no difference of kind, but only of degree, between a permanent condition of continual overflow by back-water and a permanent liability to intermittent but inevitably recurring overflows; and, on principle, the right to compensation must arise in the one case as in the other.")

Thus, instead of appealing the Circuit Court's orders, petitioners accepted Illinois law as announced by the Circuit Court and instead filed this case in federal district court in Chicago seeking Just Compensation under the Fifth Amendment Takings Clause.[7] Only federal question jurisdiction under 28 U.S.C. § 1331 was invoked. (R. 1: Complaint).

In part, petitioners alleged that further resort to the Illinois court was futile because they could not meet an essential element for just compensation under Illinois law, *i.e.*, permanent flooding. (R. 1: Complaint, ¶¶ 33-34). Petitioners based that futility argument on the suggestion in *Williamson County* that exhaustion would be excused when a state compensation procedure is either "unavailable or inadequate." 473 U.S. at 196-197.[8] The Seventh and other circuit courts of

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[7] The state court case remains pending on petitioners' damage claim against the railroad and their injunctive claim against the railroad and the City. Illinois law provides a procedure for an interlocutory appeal. Illinois Supreme Court Rules 304 & 308. Of course, petitioners could also appeal once the case is finally disposed of. Illinois Supreme Court Rule 303. As the City pointed out to the District Court in this case (R. 11, p. 3), Illinois Supreme Court Rule 301 provides that "an appeal is a continuation of the proceeding."

[8] The language of *Williamson County* in which the circuits found this "futility" exception was as follows: "Respondent has not shown that the inverse condemnation procedure is unavailable or

(continued...)

appeals have labeled this a "futility" exception to *Williamson County*'s exhaustion requirement. *See, e.g., Daniels v. Area Plan Comm'n of Allen County*, 306 F.3d 445, 456 (7th Cir. 2002); *Manufactured Home Cmtys., Inc. v. City of San Jose*, 420 F.3d 1022, 1035 (9th Cir. 2005); and *Pascoag Reservoir & Dam, LLC v. Rhode Island*, 337 F.3d at 93.[9]

The City then reversed course. Whereas it had argued to the McHenry County Circuit Court that the requirement of permanent inundation was "well-settled" Illinois law, it argued to the district court that petitioners should have appealed the Circuit Court's ruling since maybe it was not quite so well-settled after all:

> If [petitioners] were to appeal this decision, the appellate court could disagree with the trial court's factual or legal conclusions and hold that [petitioners] are entitled to compensation under the current law. Or, [petitioners] could persuade the appellate court that the current law is indeed "harsh" and needs to be overruled, enabling

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[8](...continued)
inadequate and until it has utilized that procedure, its taking claim is premature." 473 U.S. at 196-197. *See also* Concurrence of Justice Brennan. 473 U.S. at 201.

[9] This Court has considered futility only in connection with the finality prong of *Williamson County. Palazzolo v. Rhode Island*, 533 U.S. 606, 624 (2001) (repeated applications to other state agencies would be futile and were not required to meet finality prong); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 734 (1997) (only finality prong at issue); *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340 (1986) (scaled-down development applications might be approved and therefore not futile to require them to reach a final decision).

> [petitioners] to be compensated. Either way, the appellate court could provide [petitioners] with just compensation, rendering this federal case unnecessary. (R. 11: City's Mot. to Dis., p. 4).

On those grounds, the district court dismissed this case on the grounds of lack of *Williamson County* ripeness, ruling that petitioners should have appealed the McHenry County Circuit Court's dismissal of their state inverse condemnation claim to the Illinois appellate courts.

First, the district court held that the *Williamson County* exhaustion requirement includes state court appellate procedures that must be exhausted before any § 1983 claim will be ripe in federal court. (App., *infra*, 19a-20a).

Second, even though Illinois law is so clearly against petitioners' position, the district court refused to accept the Illinois rule of law, long-standing and carefully applied by the state trial court to petitioners' land, that permanent flooding was a required prerequisite to an inverse condemnation claim under Illinois law. Thus, the district court rejected petitioners' argument that their state court appeal was inadequate and therefore futile. In the district court's view, flooding is "a question of degree," and the McHenry County Circuit Court's ruling turned on an interpretation of facts and law. Thus, the district court suggested, an Illinois appellate court might distinguish this case from the controlling Illinois decisions that require permanent flooding. Further, the district court saw no indication that the Illinois appellate court had "dug in its heels" on the requirement of permanent flooding. Therefore, said the district court, petitioners must appeal and that they "may lose on the merits, is neither here nor there." (App., *infra*, 25a) (citations and internal quotation marks omitted).

Although not briefed by the parties, the district court also alluded to what has become known as the "*Williamson*

trap," *i.e.*, that under the preclusive "full faith and credit" effect of 28 U.S.C. § 1738, Petitioners' failure to raise their federal takings claim in state court will bar them from ever raising it in federal court. Citing *San Remo Hotel*, 545 U.S. at 345-46, 125 S. Ct. at 2506, the District Court stated the matter as follows:

> A party cannot avoid the full faith and credit clause by reserving federal claims for litigation in federal court. The *San Remo* decision affirms that despite the preclusive effect that a state court decision may have on a future federal case, plaintiffs must still first seek compensation in state courts.

This Appeal – Petitioners timely appealed to the Seventh Circuit. They moved for an early argument and expedited consideration so that they could promptly return to state court, if necessary, and fully protect their rights and pursue any further appellate remedies, albeit inadequate, on their Illinois takings claim and protect by whatever means necessary their federal takings claim. (*See* Appellant's May 1, 2006 Motion to Schedule Oral Argument for July 11 or 12 and for Accelerated Consideration of Appeal).

The case was argued on October 31, 2006, and that afternoon the Court of Appeals entered an order that "[j]udgment is affirmed, opinion to follow." (App., *infra*, 12a).

The Opinion and Judgment of affirmance were entered on April 10, 2007. Also committing petitioners to the state court by requiring an appeal of the Circuit Court's no inverse condemnation without permanent flooding ruling, the panel relied on a slightly different incarnation of the district court's conclusion that the Illinois state appellate court might well reconsider its hard and fast rule that only permanent flooding amounts to a taking:

> Intermittent flooding . . . [which transforms] an owner's property into permanent wetlands is hard to distinguish from permanent flooding. . . . (App., *infra*, 6a).
>
> We see a glimmering of recognition of this point in *Luperini* [the controlling Illinois appellate precedent] (*Id.*).
>
> The Supreme Court of Illinois has not weighed in on the issue since . . . 1948, more than half a century ago. It is premature to conclude that if faced with a case such as this it would deny relief on the basis of a mechanical application of the "temporary accumulations" doctrine. (App., *infra*, at 7a).

In sum, like the district court, the Seventh Circuit simply refused to accept the long-standing "permanent flooding" rule adopted by the Illinois appellate courts and applied by the McHenry County Circuit Court to petitioners' land. Thus, in strict conformance with *Williamson County*'s state-litigation requirement, the Court ruled that petitioners must pursue the state inverse condemnation to its inevitable unhappy conclusion in the Illinois appellate courts on the chance that this long-established rule of Illinois inverse condemnation law might not be "mechanically appli[ed]." (*Id.*).

Moreover, the Panel suggested that, by asserting that they had no remedy under Illinois inverse condemnation law, petitioners "[shot] themselves in the foot" and would find that sentence quoted against them by the respondent City once litigation resumed in state court. (App., *infra*, 7a-8a). The Court made nothing of the fact that the respondent City argued in the McHenry County Circuit Court that the permanent

flooding rule was settled, but then reversed course in the district court and argued that the rule might somehow be subject to question. And, more importantly, the Court of Appeals made no mention of the fact that, as petitioners will now show, continued pursuit of their inverse condemnation claim in state court would extinguish, not ripen, petitioners' right to later file their Fifth Amendment takings claim in federal court.

REASONS FOR GRANTING THE PETITION

Concurring in *San Remo,* the late Chief Justice Rehnquist, joined by Justices O'Connor, Kennedy, and Thomas, recommended that "in an appropriate case," 545 U.S. at 352, 125 S. Ct. at 2510, this Court should reconsider the exhaustion prong of *Williamson County*, because it "may have been mistaken." 545 U.S. at 348, 125 S. Ct. at 2507.

This is that case. *Williamson County*'s "justifications for its state-litigation requirement are suspect [and] its impact on takings plaintiffs is dramatic." *Id.* Therefore, that requirement should be overruled. In any event, there are no legitimate prudential or constitutional reasons for the blind application of this state-litigation requirement to cases, like this one, involving only physical takings. Finally, if the rule is to remain in place and if it must include physical takings case, petitioners have fully met their burdens by pursuing a futile state claim in the state trial court.

1. *Williamson County* Should Be Reconsidered Because, When Coupled With The Full Faith And Credit Statute, It Extinguishes, Not Ripens, The Right To Bring A Fifth Amendment Takings Action In Federal Court.

Petitioners do not blithely ask this Court to overturn one of its holdings, but note instead that "when governing decisions

are unworkable or are badly reasoned, 'this Court has never felt constrained to follow precedent.'" *Vieth v. Jubelirer*, 541 U.S. 267, 306 (2004) (quoting *Payne v. Tennessee,* 501 U.S. 808, 827 (1991) (quoting *Smith v. Allwright*, 321 U.S. 649, 665 (1944))).

Stare decisis "is at its weakest" when a prior decision involved the interpretation of the United States Constitution because that interpretation can be altered only by constitutional amendment or by this Court. *Agostini v. Felton*, 521 U.S. 203, 217 (1997).

Furthermore, stare decisis is of substantially less force when a precedent is "outdated, ill-founded, unworkable, or otherwise legitimately vulnerable to serious reconsideration." *Vasquez v. Hillery*, 474 U.S. 254, 266 (1986); *see also Teague v. Lane*, 489 U.S. 288, 333 (1989) (Brennan, J., dissenting) (quoting *Vasquez*).

Since the issue presented involves at bottom an interpretation of the Just Compensation Clause of the Fifth Amendment, the stare decisis effect of *Williamson County* has less force. The polite puzzlement of the lower federal courts and their struggles to apply *Williamson County*, and the firestorm of scholarly criticism (*see* Note 10, *infra*, p. 15), suggest that the exhaustion rule is "outdated, ill-founded, [and] unworkable." But surely Chief Justice Rehnquist's *San Remo* concurrence demonstrates that *Williamson County*'s state-litigation requirement is legitimately vulnerable to serious reconsideration.

Thus, Petitioners respectfully submit that reconsideration of *Williamson County*'s exhaustion requirement is fully warranted.

a. The Interaction Of *Williamson County*'s Exhaustion Requirement With 28 U.S.C. § 1738 Extinguishes, Not Ripens, A Federal

Court Section 1983 Fifth Amendment Takings Claim.

As Chief Justice Rehnquist's *San Remo* concurrence noted: the exhaustion prong of "*Williamson County* all but guarantees that claimants will be unable to utilize the federal courts to enforce the Fifth Amendment's just compensation clause." 545 U.S. at 351, 125 S. Ct. at 2509.

This is the "catch-22," the "*Williamson* trap," referred to by the district court, (App., *infra*, 26a), that has provoked an outpouring of scholarly comment[10] most critical, some

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[10] Stephen E. Abraham, *Williamson County Fifteen Years Later: When Is a Takings Claim (Ever) Ripe?*, 36 Real Prop. Prob. & Tr. J. 101 (2001); 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 (2004); Michael M. Berger, *Supreme Bait & Switch: The Ripeness Ruse in Regulatory Takings*, 3 Wash. U.J.L. & Pol'y 99, 102 (2000); Michael M. Berger, *Vindicating the Rights of Private Land Development in the Courts*, 32 Urb. Law. 941 (2000); Brian W. Blaesser, *Closing the Federal Courthouse Door on Property Owners: The Ripeness and Abstention Doctrines in Section 1983 Land Use Cases*, 2 Hofstra Prop. L.J. 73 (1988); J. David Breemer, *Overcoming Williamson County's Troubling State Procedures Rule: How The England Reservation, Issue Preclusion Exceptions, and the Inadequacy Exception Open the Federal Courthouse Door to Ripe Takings Claims*, 18 J. Land Use & Envtl. L. 209, 210 (2003); John J. Delaney & Duane J. Desiderio, *Survey of Federal Land Use Takings Cases 1990-1998*, 31 Urb. Law. 202 (1999); John J. Delaney & 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. 195, 246 (1999); Robert H. Freilich, Adrienne H. Wyker & Leslie Eriksen Harris, *Federalism at the Millennium: A Review of U.S. Supreme Court Cases Affecting State and Local Government*, 31 Urb. Law. 683

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surprisingly harsh, and that has perplexed the lower federal

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[10](...continued)
(1999); Barry Friedman, *Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts*, 104 Colum. L. Rev. 1211 (2004); Gideon Kanner, *Hunting the Snark, Not the Quark: Has the U.S. Supreme Court Been Competent in Its Effort to Formulate Coherent Regulatory Takings Law?*, 30 Urb. Law. 307 (1998); Timothy V. Kassouni, *The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights*, 29 Cal. W. L. Rev. 1, 22-24 (1992); Max Kidalov & Richard H. Seamon, *The Missing Pieces of the Debate Over Federal Property Rights Legislation*, 27 Hastings Const. L.Q. 1, 5 (1999) ("The U.S. Supreme Court has developed rules that make it almost impossible for federal courts to remedy violations of the Just Compensation Clause by local land-use agencies."); Kathryn E. Kovacs, *Accepting the Relegation of Takings Claims to State Courts: The Federal Courts' Misguided Attempts to Avoid Preclusion Under Williamson County*, 26 Ecology L.Q. 1, 2 (1999); Madeline J. Meacham, *The Williamson Trap*, 32 Urb. Law. 239 (2000); Gregory Overstreet, *The Ripeness Doctrine of the Taking Clause: A Survey of Decisions Showing Just How Far Federal Courts Will Go To Avoid Adjudicating Land Use Cases*, 10 J. Land Use & Envtl. L. 91, 92 n.3 (1994); Thomas E. Roberts, *Procedural Implications of Williamson County/First English in Regulatory Takings Litigation: Reservations, Removal, Diversity, Supplemental Jurisdiction, Rooker-Feldman, and Res Judicata*, 31 Envtl. L. Rep. 10353 (2001); Thomas E. Roberts, *Ripeness and Forum Selection in Fifth Amendment Takings Litigation*, 11 J. Land Use & Envtl. L. 37 (1995); Ronald H. Rosenberg, *The Non-Impact of the United States Supreme Court Regulatory Takings Cases on the State Courts: Does the Supreme Court Really Matter?*, 6 Fordham Envtl. L.J. 523 (1995); Stewart E. Sterk, *The Demise of Federal Takings Litigation*, 48 Wm. and Mary L. Rev. 251 (2006); and George A. Yuhas, *The Ever-Shrinking Scope of Federal Court Takings Litigation*, 32 Urb. Law. 465 (2000).

courts.[11]

On its face, the state-litigation prong of *Williamson County* seems to mean that once such state compensation remedies are unsuccessful, the concomitant federal claim, having been thereby "ripened," can then be asserted (or re-asserted) in federal court. *Williamson County*'s use of the adjective "premature" to describe the federal claim suggests as much,[12] 473 U.S. at 185-86, 194-95, 197 & 200. The Seventh and Eighth Circuits have so concluded. *Forseth v. Village of Sussex*, 199 F.3d at 373. ("Should Plaintiffs sufficiently pursue their case in state court only to be denied relief, they may then seek relief in federal court on their federal substantive due process and takings claims."); *Watson v. City of Chicago*, 2000 U.S. Dist. LEXIS 5947 (N.D. Ill. 2000) (same, following *Forseth*); *Kottschade v. City of Rochester,* 319 F.3d 1038, 1042 (8th Cir. 2003) ("This action is without prejudice to the right of the plaintiff, if he files a state-court case and loses, to file a new action in a federal court and make whatever arguments he wishes with respect to the effect of the prior state-court adjudication.").

The fact is, however, that due to the preclusive effect of the full faith and credit statute, 28 U.S.C. § 1738 – encompassing, as it does, the doctrines of res judicata (issue preclusion) and collateral estoppel (claim preclusion) – the process of "ripening" the federal claim actually bars a federal

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[11] *See, e.g., DLX, Inc. v. Kentucky*, 381 F.3d 511, 518 (6th Cir 2004) (referring to this dilemma as "[t]he catch-22 of the "*Williamson* trap"); *Franco v. District of Columbia,* 2006 U.S. Dist. LEXIS 73534, at *18 (D.D.C. Oct. 10, 2006).

[12] Premature: happening, arriving, existing, or performed before the proper, usual, or intended time. *Merriam-Webster's Collegiate Dictionary* (11th ed. 2003).

court from hearing it.[13] *San Remo*, 545 U.S. at 336, 125 S. Ct. at 2500 (quoting *Allen v. McCurry*, 449 U.S. 90, 94-96 (1980)). And, as Chief Justice Rehnquist's concurrence in *San Remo* recognizes, there is likely nothing a claimant can do to avoid that effect. 545 U.S. at 351, 125 S. Ct. at 2509. The reasons are simple:

San Remo held that, if state law so provides, any issues that form a part of a federal Just Compensation claim and were previously decided in a state court case cannot be relitigated in a federal court even though the state court may have resolved those issues as part of deciding state law Just Compensation claims. *San Remo*, 545 U.S. at 347, 125 S. Ct. at 2507. More precisely, if state law bars relitigation of an already-decided issue in state courts, § 1738 gives that bar rule full faith and credit and bars relitigation of that issue in federal court. Simply stated, § 1738 requires a federal court to honor the issue preclusion rules of state law.

The courts of Illinois reflect this fundamental principle of the law of judgments, whether coined as a matter of res judicata or collateral estoppel, and bar relitigation of issues already decided in an earlier case. *Torcasso v. Standard Outdoor Sales, Inc.*, 157 Ill. 2d 484, 490, 626 N.E.2d 225, 228 (1993) ("res judicata extends . . . to every matter that was actually determined in the prior suit . . . ."); *Du Page Forklift Serv. v. Material Handling Servs.*, 195 Ill. 2d 71, 78, 744 N.E.2d 845, 849 (2001) ("once a court has decided an issue of fact or law necessary to its judgment, that decision is conclusive

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[13] The full faith and credit statute arises from Article IV, § 1 of the United States Constitution that provides: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

in a subsequent suit based on a different cause of action involving a party to the prior litigation.").

Thus, if an issue that forms a part of a Fifth Amendment Just Compensation claim is decided in a state court proceeding, it is barred from relitigation in the subsequent federal court takings case promised by *Williamson County*. *San Remo*, 545 U.S. at 347, 125 S. Ct. at 2507.

This has two permutations: first, if a claimant *does* assert a Fifth Amendment Takings claim in his required state court proceeding and loses, or, second, if an element of such a federal claim coincides with an element of state compensation law and is lost, the matter is concluded: the claimant is barred from relitigating that claim or element in federal court if he or she would be barred from relitigating either in a subsequent state court action.

Conversely, under the usual rules of res judicata, if a just compensation claimant *does not* assert a federal Just Compensation claim in the state court action required by *Williamson County*, relitigation of that claim in federal court is barred. If state law so provides, § 1738 requires a federal court to honor the res judicata rule barring litigation of a claim that *could have been, but was not*, advanced in state court. *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 85 (1984) (state-court judgments have res judicata claim-preclusive effects in § 1983 actions, barring constitutional claims not brought in prior state-court contract action). This is precisely the rule in Illinois. *Torcasso*, 157 Ill. 2d at 490, 626 N.E.2d at 228 ("[R]es judicata extends not only to every matter that was actually determined in the prior suit but to every other matter that *might have been raised* and determined in it.") (emphasis added).

Therefore, a federal takings claim not brought in the state court action cannot be considered in a subsequent federal court action. Several federal circuits have so held. *Wilkinson*

v. Pitkin County 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); *Peduto v. City of N. Wildwood*, 878 F.2d 725, 729 (3d Cir. 1989).

The effect of the interaction of *Williamson County*'s exhaustion rule with § 1738 is simply to bar federal court consideration of § 1983 Just Compensation claims in almost all conceivable situations. *Williamson County* treats that claim as premature for federal court adjudication, but once the process of ripening the claim is complete, § 1738 extinguishes it. A claimant cannot litigate a federal Just Compensation claim in federal court, whether that claim or an essential part of it *was* or *was not* litigated in state court.

This is the "dramatic effect" on takings plaintiffs suggested by the late Chief Justice's *San Remo* concurrence, 545 U.S. at 348, 125 S. Ct. at 2507. It is the "catch-22," "The *Williamson* trap," described by the lower courts and commentators.

There's the rub that brings petitioners to this Court.

b. The Justifications for *Williamson County*'s State-Litigation Requirement Are Suspect.

It is difficult to reconcile the counter-intuitive interaction of *Williamson County*'s state-litigation requirement and § 1738 with the "concepts of 'fairness and justice' that underlie the Takings Clause." *Palazzolo v. Rhode Island*, 533 U.S. at 633 (internal citations omitted). Though those concepts may be "less than fully determinate," *id.*, and though they may relate largely to the protecting citizens from the unjust and unfair imposition of public obligations on the few, *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978), surely the procedural route toward the vindication of this important Constitutional right should be just and fair as well. One thing is for sure: citizens should not confront a "catch-22" or a "trap"

as to where, how and when they invoke judicial remedies to vindicate a constitutional right. Moreover, the reasons underlying any rule that excludes citizens from the federal courts should have reasoned support in law and policy and should at least be defensible. Petitioners respectfully submit that *Williamson County* fails those tests. In the late Chief Justice's words, the "justifications for [*Williamson County*'s] state-litigation requirement are suspect." 545 U.S. at 352, 125 S. Ct. at 2509-10.

The Basis for the State-Litigation Requirement – Is It Constitutional or Prudential? – Williamson County suggested that the state-litigation requirement stemmed from the Fifth Amendment: "The nature of the constitutional right . . . requires that a property owner utilize procedures for obtaining compensation before bringing a § 1983 action." *Williamson County*, 473 U.S. at 194-95 & n.13. The rationale is that the Fifth Amendment does not prevent takings but only takings without compensation, so that the Takings Clause is not violated until a claimant has "unsuccessfully attempted to obtain just compensation through the procedures provided by the State." *Id.*

While that concept recurs in this Court's more recent takings cases, *see City of Monterey v. Del Monte Dunes,* 526 U.S. 687, 714 (1999), it is directly contrary on its face to the line of this Court's decisions *in physical takings cases* that the constitutional violation occurs at the time of the taking. In *United States v. Dickinson*, an intermittent flooding case, the Court stated that "the land was taken when it was taken and an obligation to pay for it then arose." 331 U.S. 745, 751 (1947). *United States v. Dow*, a physical taking case, held that "if the United States has entered into possession of the property prior to the acquisition of title, it is the former event which constitutes the act of taking." 357 U.S. 17, 22 (1958). *United States v. Clarke*, another physical taking case, quoted *Dow* and

held that "[w]hen a taking occurs by physical invasion . . . the usual rule is that the time of the invasion constitutes the act of taking, and '[it] is that event which gives rise to the claim for compensation and fixes the date as of which the land is to be valued.'" 445 U.S. 253, 258 (1980) (alteration of quotation in original).

Thus, if *Williamson County*'s state-litigation requirement is constitutionally based on the Takings Clause, it is incongruent, if not downright contradictory to the rule, at least in physical takings cases, that the constitutional takings claim accrues or arises or occurs at the time of the taking.[14]

Perhaps because of this incongruity, at least one decision of this Court has referred to the state-litigation rule as merely a "prudential requirement." *Suitum v. Tahoe Reg'l Planning Agency,* 520 U.S. 725, 733-734 (1997). Indeed, *San Remo* uses the same rubric as well. 545 U.S. at 342, 125 S. Ct. at 2504.

But, an incongruity lurks here too. "Ripeness is a justiciability doctrine designed 'to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.'" *Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 807-808 (2003) (quoting *Abbott Laboratories v. Gardner*, 387 U.S. at 148-149; *accord, Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 732-733 (1998). But, a *prudential* ripeness rule requires the evaluation of "both the fitness of the issues for judicial decision and the hardship to

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[14] Petitioners respectfully submit that, for this reason alone, if *Williamson County* is to survive, it should exclude physical takings cases.

the parties of withholding court consideration." *Suitum*, 520 U.S. at 743 (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967); *accord*, *Texas v. United States*, 523 U.S. 296, 301 (1998).

Thus, if *Williamson County*'s state-litigation rule is prudential, then an evaluation of the fitness of the issues for judicial decision and the hardship on the parties seems to be required, especially if the concepts underlying the Fifth Amendment's Takings Clause are "justice and fairness."

Because of the lack of guidance on the basis of the *Williamson County* state-litigation rule, neither the district court nor the Court of Appeals herein gave either factor any consideration. Surely, petitioners' claim of a permanent physical taking – here by intermittent but recurring flooding – is fit for review. Physical takings cases "are relatively rare, easily identified and usually represent a greater affront to individual property rights." *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 324 (2002). And, "[w]hether a permanent physical occupation has occurred presents relatively few problems of proof." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 437 (1982).[15]

So there is no difficult balancing required in

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[15] And this case does not fall within the class of intermittent flooding cases alluded to in *Tahoe-Sierra*, 535 U.S. at 436, because the flooding here has so saturated petitioners' land that it has been permanently degraded to wetlands even though inundations of the surface come and go. Indeed, as in *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1012 (1992), petitioners have made no claim of a temporary taking in the courts below. Therefore, because a temporary taking issue is not presented, this case can be decided "on the permanent taking theory that both the trial court and the State Supreme Court had addressed." *Tahoe-Sierra*, 535 U.S. at 330.

determining the existence or extent of the alleged taking. Instead, a *per se* rule of compensation applies: "When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner . . . regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof." *Tahoe-Sierra*, 535 U.S. at 322 (citation omitted).

Moreover, the hardship to petitioners from not hearing this case is manifest. Each year, petitioners' inheritance degrades even more. With the law's delay, the City has masterfully frustrated petitioners' efforts to gain Just Compensation. With all the insolence of office, the City piled up a mound of dirt and hid the drainage pipe that first cut off the drainage and inexorably flooded petitioners' land. Taking arms, petitioners sought damages at law in the state court and failed. They sought constitutional compensation under the Illinois Constitution but failed because of a quirk in Illinois law. Then, they are told that until they seek to change that rule by recourse to the Illinois appellate courts, their Fifth Amendment Just Compensation claim cannot be heard by the federal courts. If *Williamson County*'s state-litigation rule is prudential, surely these hardships weigh somewhere in the balance.

Of the many categories of § 1983 plaintiffs, why must only Takings Claimants exhaust state remedies? – This result is the more puzzling because of the different rule for most other § 1983 actions. As the late Chief Justice Rehnquist's *San Remo* concurrence points out, "it is not obvious that either constitutional or prudential principles require claimants to utilize all state compensation procedures before they can bring a federal takings claim." 545 U.S. at 349, 125 S. Ct. at 2508. His concurrence cites *Patsy v. Bd. of Regents of Florida*, 457 U.S. 496 (1982) for the proposition that a § 1983 plaintiff is not required to exhaust state administrative remedies. In virtually all other § 1983 situations, this is a firmly established principle.

"Ordinarily, plaintiffs pursuing civil rights claims under 42 U.S.C. § 1983 need not exhaust administrative remedies before filing suit in court." *Porter v. Nussle*, 534 U.S. 516, 523 (2002). Beginning with *McNeese v. Board of Education*, 373 U.S. 668, 671-673 (1963), this Court has on numerous occasions rejected the argument that a § 1983 action should be dismissed where the plaintiff has not exhausted state administrative remedies. *See Barry v. Barchi*, 443 U.S. 55, 63 n.10 (1979); *Gibson v. Berryhill*, 411 U.S. 564, 574 (1973); *Carter v. Stanton*, 405 U.S. 669, 671 (1972); *Wilwording v. Swenson*, 404 U.S. 249, 251 (1971); *Houghton v. Shafer*, 392 U.S. 639, 640 (1968); *King v. Smith*, 392 U.S. 309, 312 n.4 (1968); *Damico v. California*, 389 U.S. 416 (1967).

Indeed, as *Steffel v. Thompson* held, "[w]hen federal claims are premised on [§ 1983] – as they are here – we have not required exhaustion of state judicial or administrative remedies, recognizing the paramount role Congress has assigned to the federal courts to protect constitutional rights." 415 U.S. 452, 472-473 (1974). Moreover, from the time of *Monroe v. Pape*, 365 U.S. 167 (1961) *overruled on other grounds, Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658 (1978), a § 1983 claimant has not been required to exhaust state judicial remedies.

This Court has not explained why only takings claimants must exhaust state remedies before seeking the protection of the federal court. But, *Williamson County*'s state-litigation rule does just that. Thus, yet another incongruity, since it seems hard to reconcile the state-litigation rule with this Court's explanation that "the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should [not] be relegated to the status of a poor relation . . . ." *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994). This difference justifies a reasoned

consideration by this Court.[16]

The state courts do not have any greater expertise in resolving challenges to land use regulations – The late Chief Justice's concurrence adequately questions *San Remo's* reliance on the principle of comity on tax matters reflected in *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100 (1981) as a justification for the state-litigation rule. As he explained, there is no comparable history of comity in the area of land use regulations. 545 U.S. at 349, 125 S. Ct. at 2508. Petitioners need add nothing more and only stress his point that the federal courts routinely are involved in challenges to municipal land use regulations under the First Amendment and Equal Protection Clause. 545 U.S. at 350-51, 125 S. Ct. at 2509 (citing cases).

Defendants can arguably prevent a plaintiff from

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[16] The late Chief Justice's concurrence notes the arguments of two *amici* therein that two cases *Williamson County* cites – *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 2862 (1984) and *Parratt v. Taylor*, 451 U.S. 527 (1981) – provide[] limited support" for the state-litigation rule. 545 U.S. at 349 n.1, 125 S. Ct. at 2508.

Length limitations prevent an extended discussion of that point in this Petition. However, one thing seems clear: *Williamson County* was wrong in stating that *Monsanto* "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." *Williamson County*, 473 U.S. at 195. Simply as a matter of facial logic, this cannot be. For, it is the Tucker Act that provides the judicial remedy for a claimant to sue the Federal Government in the U.S. Court of Claims for an alleged taking. Thus, it is a tautology to describe *Monsanto* as saying that a claimant must pursue all remedies under the Tucker Act before suing under the Tucker Act. But that is what *Williamson County* says, a mischaracterization that at least facially undercuts the force of *Williamson County*'s state-litigation requirement.

asserting a § 1983 federal takings claim in state court – As the late Chief Justice's *San Remo* concurrence noted, some state courts "themselves apply the state-litigation requirement from *Williamson County*" and refuse to entertain a federal takings claim until all state law compensation has been denied. 545 U.S. at 351 n.2, 125 S. Ct. at 2509. Indeed, the Illinois Supreme Court has adopted *Williamson County's* ripeness rule in that context. *Beneficial Dev. Corp. v. City of Highland Park*, 161 Ill. 2d 321, 328, 641 N.E.2d 435, 438 (1994). Hence, petitioners herein did not advance a § 1983 takings claim in their state court action because it was not ripe there either.

It seems no answer (as the Opinion for the Court in *San Remo* says) that *Williamson County* "does not preclude" state courts' consideration of a claimant's Fifth Amendment Just Compensation claim simultaneously with, and in the alternative, to a state law claim. *San Remo*, 545 U.S. at 346, 125 S. Ct. at 2506. As the Chief Justice pointed out, that is so only if ripeness is prudential rather than constitutional, the considerably difficult problem discussed above, Argument, *supra*, pp. 21-24, that neither *Williamson County* nor *San Remo* answers. 545 U.S. at 351 n.2, 125 S. Ct. at 2509. In any event, on the grounds of failure to exhaust state remedies, state courts are still refusing to hear § 1983 claims appended to state court cases. *See, e.g., Leeper Elec. Servs. v. City of Carmel*, 847 N.E.2d 227 (Ind. App. 2006); *but see City of Marion v. Howard*, 832 N.E.2d 528, 533 (Ind. App. 2005).

In another curious twist, however, the resolution of that problem is beside the point because by invoking the removal jurisdiction of the federal court, a takings defendant can prevent a state court from considering such a federal claim in all events. It seems a fair reading of *City of Chicago v. Int'l College of Surgeons*, 522 U.S. 156 (1997), that if a compensation claimant includes a federal Fifth Amendment Just Compensation claim in his or her state court case, a state court takings defendant can

remove that case to federal court under 28 U.S.C. § 1441. Once there, it is obvious that a defendant can obtain both a dismissal of the federal takings claim for lack of ripeness, and remand of the rest of the case back to state court. This is the necessary result of the interaction of *Int'l College of Surgeons* removal rule with *Williamson County's* ripeness rule.

And, this is no theoretical exercise. In *Key Outdoor, Inc. v. City of Galesburg,* 327 F.3d 549 (7th Cir. 2003), the defendant City removed such a state court case that advanced a federal and state takings claims. The Seventh Circuit ruled that once removed the federal claim was properly dismissed as unripe, and that the state law compensation claim should be remanded to the state court.[17]

It is difficult to understand why a defendant can remove to federal court an unripe federal claim that a plaintiff could not file in federal court in the first instance. But, more seriously, this difference in treatment gives takings defendants a relatively

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[17] Equally as puzzling is the possibility that a state court will consider only a federal takings claim without reference to what compensation state law might provide or whether state law remedies had been exhausted. This is precisely what happened in *Lucas v. South Carolina Coastal Council,* 404 S.E.2d 895 (S.C. 1991) (Hartwell, J., dissenting) ("Having determined that [there was] a taking under the Constitution of the United States, it is not necessary to examine whether it constitutes a taking under the South Carolina Constitution."), *rev'd on other grounds,* 505 U.S. 1003 (1992). This further reveals the frailty in the logic of both the state-litigation rule and *San Remo's* suggestion that nothing prevents a state court from hearing a federal takings claim along with state law claims. In fact, it seems a state court can simply ignore any state law claim and instead proceed to decide the § 1983 federal takings claim that *Williamson County* says is not ripe for decision. Thus, *Williamson County*'s state-litigation rule, pointless in reasoning, is pointless as well in effect.

easy way to prevent a state court from considering a federal takings claim at all. This is yet another *Williamson County* anomaly.

In finding the challenge in *Williamson County* to be premature, this Court somewhat cryptically noted that the landowner had "not shown that the inverse condemnation procedure [was] unavailable or inadequate." 473 U.S. at 196-197. The Seventh Circuit has characterized this as a "limited exception to its exhaustion requirement based on the futility of seeking state court relief." *Daniels v. The Area Plan Commission of Allen County,* 306 F.3d 445, 456 (7th Cir. 2002). Other Circuits have recognized this rule as well. *DLX, Inc. v. Kentucky*, 381 F.3d 511, 525 (6th Cir. 2004); *Pascoag Reservoir & Dam, LLC v. Rhode Island,* 337 F.3d 87, 92 (1st Cir. 2003); *Del Monte Dunes v. Monterey*, 920 F.2d 1496, 1501 (9th Cir. 1990); *Manufactured Home Cmtys., Inc. v. City of San Jose*, 420 F.3d 1022, 1035 (9th Cir. 2005); and *Naegele Outdoor Advertising v. Durham*, 844 F.2d 172, 175 (4th Cir. 1988). *See also Fourth Quarter Props. IV v. City of Concord*, 127 Fed. Appx. 648, 651 (4th Cir. 2005).

2. Once the Federal Courts Accept Illinois Law, As They Are Required To Do, It Is Clear That Further Resort To The Illinois Courts Would Be Futile.

The district court and Seventh Circuit simply refused to accept long-standing Illinois law that inverse condemnation under the Illinois Constitution and Illinois condemnation statute is only triggered by permanent flooding. This was error.

At bottom, petitioners' state law inverse condemnation claim required the interpretation and application of the Just Compensation Clause of the Illinois Constitution, Illinois Const. Art. I, § 15, which was the central focus of the controlling Illinois decisions. *People ex rel. Pratt v. Rosenfield*,

399 Ill. 247, 251, 77 N.E.2d 697 (1948), and *Luperini v. County of Du Page*, 265 Ill. App. 3d 84, 637 N.E.2d 1264 (2d Dist. 1994).

The district court's and Seventh Circuit's refusal to follow these controlling state law decisions clearly announcing rules of Illinois state constitutional and statutory law simply does not comport with the requirement that the lower federal courts must follow state law as announced by the state courts. 28 U.S.C. § 1652 (Rule of Decision Act). The decisions of higher and intermediate state courts are definitive on such matters of state law even if the federal court thinks they are wrong. *West v. AT&T*, 311 U.S. 223, 237 (1940); *Johnson v. Fankell*, 520 U.S. 911, 916 (1997) (a federal court cannot construe a state statute differently than the highest court of the state). *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

In fact, Illinois law absolutely bars petitioners from pursuing inverse condemnation. This is the classic case of futility – petitioners should not be forced to pursue a remedy that is unavailable as a matter of clearly announced state law. This Court should so rule.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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