No.

IN THE

SUPREME COURT OF THE UNITED STATES

HARRY McNAMARA, *et al.*,

Petitioners,

v.

CITY OF RITTMAN,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *San Remo Hotel, L.P. v. City and County of San Francisco,* 125 S.Ct. 2491, 2507, (2005), four concurring justices believed "our decision in *Williamson County*... may have been mistaken." They wrote: It is not clear ... that *Williamson County* was correct in demanding that ... the claimant must seek compensation in state court before bringing a federal takings claim in federal court." *San Remo*, 125 S.Ct. at 2508. The court of appeals, however, has held that if Petitioners want compensation for a taking under a "continuing violation" theory, they must first seek compensation in state court including state common law tort remedies.

1. Whether a Fifth Amendment takings claimant must first seek compensation in state court under state takings law, including state common law tort remedies, as a necessary step before bringing a federal takings claim in federal court?

Petitioners filed a state court action for a monetary remedy from the city, alleging that the drilling of wells on nearby land caused "unreasonable dewatering," a cause of action under Ohio law. Petitioners did not receive monetary relief in state court, so within a year they filed suit in federal court seeking just compensation under the Fifth Amendment. The court of appeals held that the federal claim for "past violations" of the Takings Clause was time-barred, because the Fifth Amendment claim accrued when Petitioners "knew or should have known of the underlying injury." The court of appeals is in conflict with other federal circuits which have held, following "*Williamson County*

Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985), that a Fifth Amendment takings claim does not accrue until it becomes ripe, after state procedures are pursued and monetary relief is denied.

2. Whether a Fifth Amendment takings claim accrues when the claimant first knew or should have known of his injury, or after a claimant has sought and been denied compensation in state court?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The Petitioners are Harry McNamara, Dale Palmer, Carol Palmer, Thomas E. Dysinger, Dana Dysinger, Troy Pertee, Dianne Pertee, Howard Hopstetter, Carol Hopstetter, Rena Beyler, Roger Lance, Patricia Lance, Richard Rinehart, Deborah Rinehart, Jeffrey W. Nelson, Robert Hart, Marita Hart, Bill Greene, JoAnne Greene, Michael Boldman, Peggy Boldman, John Etling, Anna Mae Etling, Paul Wayts, Vermillah Wayts, Marie Winkler, POA James Winkler, Winkler Tire, Jim Winkler, Dollie Winkler, Patricia Shue, Walter Hostetler, Lucille Hostetler, John Bowman, Deb Bowman, Mary Slbaugh, Joe Slabaugh, Dan Asche, Robert Schorle, Linda Schorle, Annabelle Fisher, Marguerite Johnson, Mary M. Schorle, John Rastorfer, Ruth Rastorfer, Ronald V. Fecca, Jennifer Emch, James Hunt, Victoria Hunt, Melvin Schaffter, Gloria Shaffter, David Montgomery, Cynthia Montgomery, Dick Glessner, Keith Glanco, Diana Glanco, Carl Steiner, Carol Steiner, Steiner Farm, Herman Winkler, Lucille Winkler, Caulinbine Yost, Stephen M. Reber, Paul Glessner, Maxine Glessner, Lloyd Wiles, Alice Wiles, John Bischoff, James Bischoff, Barbara Bischoff, Olga Landis, Ralph Griffith, Louise Griffith, Bill Watts, Mary Watts, R.D. Trogdon, Shirley Trogdon, Josephine Reynolds, Rebecca Reynolds, Kaye Maibach, Edward Maibach, Arlene Maibach, Everett Pertee, Helen Lucille Pertee, Woodrow Fankhauser, Betty Fankhauser, David Pilkington, Sharon Pilkington, Donald Glessner, Ruth Glessner, Kathleen Buckingham, Frederick Sheppard, JoEtta Sheppard, Milton Township, Paul Kawczk, Charlotte Kawczk, Charles Beyner, Melzena Beyner, William Cunningham, Anna Mae Cunningham, Alvin Maibach, Lynne Maibach, Thelma Drayer, and Kathy Cook. Winkler

Tire is a sole proprietorship and Milton Township is a governmental subdivision in Ohio.

Respondent is the Village of Rittman, a municipal corporation in northern Ohio.

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PETITION FOR A WRIT OF CERTIORARI

Harry McNamara, et al. ("Petitioners") respectfully petition this Court for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, App. 1a, is reported at 473 F.3d 633 (6th Cir. 2006). The opinion of the district court, App. 15a, is unpublished.

JURISDICTION

The court of appeals issued its decision on January 8, 2007; Justice Stevens extended the time to file this petition to and including May 9, 2007. App. 13a. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS

The Fifth Amendment's Due Process and Takings Clauses provide: "No person shall...be deprived of...property without due process of law; nor shall private property be taken for public use without just compensation." U.S. Const. Amend. V. They are applicable to the States through the Fourteenth Amendment, which provides in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. Amend. XIV, §1.

STATEMENT OF THE CASE

A. Rittman Takes Petitioners' Groundwater

Thirteen (13) years in litigation and Petitioners have yet to have a decision on the merits of their claims.

Petitioners are individual homeowners that own and reside in their respective homes in close proximity to each other in Wayne County, Ohio. Many of the petitioners had lived in their homes for more than 20 years prior to the events herein. Each of the petitioners supplied their home or family farm with water for all domestic uses from their individual water well. There are no sources of public water close to most petitioners so without water from their respective wells, homes and family farms would be abandoned without a source of water.

In the late 1970's, Rittman showed interest in acquiring land, miles outside its boundaries, to construct a new municipal well field. The Ohio Department of Natural Resources responded to citizen's concerns about this new well field by conducting an investigation and issuing a report that states, in part:

> Concerned about potential impacts to existing private water wells in the vicinity of the Village of Sterling, the Milton Township Trustees conducted a meeting in Sterling in June 1976. Representatives of the ODNR-Division of Water-Ground Water Resources Section (GWRS) attended this meeting and stated that pumping the well field would lower water levels in the area. They also advised the City of Rittman to attempt to minimize the effects of pumping the well field on the surrounding private wells.

(See Appendix at p. 32a).

Despite the report by the Ohio Department of Natural Resources, Rittman installed a well field consisting of three wells and began to pump 500,000 to 750,000 gallons per day. Petitioners began experiencing problems with their wells going dry thereafter and have spent thousands of dollars, per family, restoring water to their property. In a number of instances their water now is of a poorer quality and a lesser quantity than what existed prior to Rittman's well field. Petitioners conserved water because they were afraid of running out of water and, therefore, restricted the use of their property. Problems with personal hygiene as a result of a lack of water were common. Petitioners did not have the ability to sell their property. A house without a source of water cannot be sold at its fair market value, and is worth less than that same house with a source of water.

The pumping of groundwater by Rittman has continued unabated from its inception to the present thereby continuing to take petitioners' property rights in ground water and inflict damages upon petitioners.

B. Petitioners' State Actions Seeking Compensation

In 1994, a lawsuit was filed in the Wayne County Common Pleas Court alleging that this Defendant, had caused Plaintiffs unreasonable harm under the decision of *Cline v. American Aggregates* 15 Ohio St, 3d 384, 474 N. E. 2d 324 (1984). This unreasonable harm was as a result of Rittman's pumping lowering the groundwater thereby drying up petitioners' water wells. There was no inverse condemnation claim filed because at that time, Ohio had no such procedure. *Coles v. Granville*, 448 F. 3d 853 (6th Cir. 2006). Petitioners brought this damages action to be compensated for their injuries to satisfy the Supreme Court's and Sixth Circuit's requirement that plaintiffs seek and be denied compensation before bringing a Fifth Amendment Takings claim to federal court. *Williamson* and *Silver v. Franklin Township, Board of Zoning Appeal*, 966 F. 2d 1031, 1034-1035 (6th Cir. 1991). The trial court granted summary judgment to Rittman on the basis of governmental immunity under the Ohio Revised Code. The

court of appeals affirmed the trial court, holding that Rittman was immune from liability. *McNamara v. Rittman*, 125 Ohio App. 3d 33, 707 N.E. 2d 967 (1998). The Ohio Supreme Court accepted a discretionary appeal, *McNamara v. Rittman*, 82 Ohio St. 3d 1414, 694 N.E. 2d 76 (1998) and the case was briefed and argued but was subsequently dismissed, as improvidently granted. *McNamara v. Rittman*, 85 Ohio St.3d 1206, 707 N.E. 2d 943 (1999).

C. District Court Dismisses Federal Claims

Petitioners filed their complaint in U.S. District Court complaint, pursuant to 42 U.S.C. § 1983, in 2000, seeking compensation under the Fifth Amendment Takings Clause. They also asserted a claim for the violation of their procedural due process rights. Rittman moved for summary judgment arguing that: 1. there was no taking; 2. the claims were barred by the statute of limitations; 3. *res judicata* and collateral estoppel barred plaintiffs' claims and 4. the federal courts should abstain from exercising jurisdiction. The trial court issued its decision holding that plaintiffs had a constitutionally protected property interest but that their claims were barred by the statute of limitations.

D. Court of Appeals Affirms

The Court of Appeals, after oral arguments, certified the following question to the Ohio Supreme Court:

> Does an Ohio homeowner have a property interest in so much of the groundwater located beneath the land owner's property as is necessary to the use and enjoyment of the owner's home?

The Ohio Supreme Court agreed to answer the question, pursuant to Rule XVIII of the Rules of Practice of the Ohio Supreme Court, since it "may be determinative of the proceeding." The Ohio Supreme Court answered the question affirmatively and held that "Ohio landowners have a property interest in the groundwater underlying their land and that governmental interference with that right can

constitute an unconstitutional taking." *McNamara v. Rittman*, 107 Ohio St. 3d 243, 838 N.E. 2d 640 (2005).

Petitioners argued that *Williamson* required them to seek compensation through state procedures in order to ripen their federal claims. In Ohio, at that time, the only state procedure was to seek compensation through a state common law tort claim under *Cline v. American Aggregates*, supra. There were no other state common law claims, such as trespass or nuisance, that would have established liability and there was no statutory claim available. Petitioners used that state procedure and when the Ohio Supreme Court rejected compensation, *McNamara v. Rittman*, 85 Ohio St.3d 1206, 707 N.E. 2d 943 (1999), petitioners had timely filed their federal takings claim. The Court of Appeals held that petitioners' claim for taking of their property interest in groundwater was ripe at the latest in 1994. The court reasoned that because Ohio had no inverse condemnation procedure when petitioners filed their state suit, there were no "reasonable, certain and adequate procedures" for obtaining compensation for a takings claim. Thus, Petitioners could have brought their suit directly to federal court. The Court of Appeals did not expressly rule on petitioners' argument that they were required to seek compensation through a state common law tort remedy but implicitly overruled it by holding that petitioners' claims were immediately ripe in 1994 without resort to Ohio compensation procedures. According to the court of appeals below, petitioners' claims were immediately ripe in 1994, which is when their claim accrued. Thus, their complaint was barred by the statute of limitations.

Petitioners also argued that since Rittman's pumping was ongoing and had continued from its inception to the present, that there was a continuing taking of their property rights. As to this claim, the Court of Appeals held that now, in 2006, Ohio did have a reasonable and certain procedure to obtain compensation, these claims were not ripe under *Williamson* and petitioners must return to state court to obtain compensation. Therefore, the court below

invoked *Williamson* to hold that some of petitioners' claims were ripe in 1994 and therefore outside the statute of limitations and to hold that the remainder of petitioners' claims were not yet ripe and must return to state court.

REASONS FOR GRANTING THE WRIT

I. WILLIAMSON'S STATE-LITIGATION RULE HAS CREATED CONFLICTS AND CONFUSION AND SHOULD BE RECONSIDERED.

A. The Generality of the State-Litigation Rule.

Williamson set forth two rules on ripening Fifth Amendment Takings claims. The first rule was to assure that government had reached a final decision. Herein there is a physical taking so the consideration underlying that rule is not present. *Forseth v. Village of Sussex*, 199 F. 3d 363, fn. 12 (7th Cir. 2000), *Asociacion De Subscripcion Conjunta Del Seguro De Responsabilidad Obligatorio v. Galarza,* 479 F.3d 63 (1st Cir. 2007).

The second rule on ripeness is at issue, " [I]f the government has provided an adequate process for obtaining compensation, and if resort to that process 'yields[s] just compensation,' then the property owner 'has no claim against * * * the Government' for a taking." Id. at 194. This second rule on ripeness has been termed "the state litigation rule", *San Remo Hotel v. City and County of San Francisco*, 545 U.S. 323 (2005), (concurring op. Ch. Justice Rehnquist, p. 349).

What is lacking in this rule is some definition. Does the phrase "adequate process for obtaining compensation" in state court require the filing of : a state takings claim; an inverse condemnation claim; a state common law tort claim; a Federal takings claim; or all of these in state court? This lack of definition allowed the Sixth Circuit to avoid the merits of petitioners' claims. Petitioners filed a state common law tort claim seeking compensation for their damages to comply with the state litigation rule of *Williamson.* Had petitioners been successful in reaching

the merits of their state common law tort claim, they would have been awarded compensation for their injury in the form of damages, which would have satisfied the Fifth Amendment. *Cline v. American Aggregates*, 64 Ohio App. 3rd 503, 582 N.E. 2d 1 (Ohio App. 1989). However the Court of Appeals below ignored petitioners' state common law tort claim and instead held that petitioners' takings claims were immediately ripe under *Williamson*, without resort to state compensation procedures, and therefore the statute of limitations ran on petitioners' takings claim while petitioners were seeking compensation through their state common law tort.

The lack of definition with the resulting inconsistencies in how this state litigation rule is applied should lead this Court to reexamine *Williamson.*

B. The Procedure That a Plaintiff Must Follow to Ripen a Federal Takings Claim Under *Williamson* Varies Among the Circuits.

Regardless of whether a state procedure for obtaining compensation for a takings has ever been judicially recognized, that procedure must be undertaken to comply with *Williamson* in a number of the circuits. However there is a distinction among those circuits that require pursuit of an inverse condemnation claim but not a state law takings claim. Some circuits require pursuit of a state common law tort remedy to satisfy *Williamson* but other circuits are not clear that this is a requirement. In two circuits, state court can be avoided under diversity jurisdiction by filing the state procedure in federal court. This maze has prompted courts to hold that the state litigation rule "has created a Catch-22 for takings plaintiffs." *Santini v. Connecticut Hazardous Waste Management Serv.*, 342 F. 3d 118, 127 (2nd Cir. 2003) and "has drawn substantial criticism" *Asociacion De Subscripcion Conjunta Del Seguro De Responsabilidad Obligatorio v. Galarza,* supra at 80.

The First Circuit has held that compliance with the state litigation rule does "not include litigation of a state [law] takings claim or general remedial cause of action under State law", but only includes those procedures specifically designed to avoid constitutional injury. *Asociacion De Subscripcion Conjunta Del Seguro De Responsabilidad Obligatorio v. Galarza*, supra at (1st Cir. 2007).

The Second Circuit requires resort to state law takings claims, even if there has never been recognition of those claims, to satisfy the state litigation rule. *Southview Associates v. Bongartz*, 980 F.2d 84 (2nd Cir. 1992), *cert. denied*, 507 U.S. 987 (1993); *Villager Pond v. Darien*, 56 F.3d 375 (2nd Cir. 1995), *cert. denied*, 519 U.S. 808 (1996). (Remedy potentially available).

The Fourth Circuit allows the state litigation rule to be avoided completely by pleading a physical taking as a Fourth Amendment seizure. *Presley v. City of Charlottesville*, 464 F.3d 480 (2006).

The Fifth Circuit has held that resort to all state procedures, even a state nuisance claim, in state court is required to satisfy the state litigation rule. *Samaad v. City of Dallas*, 940 F. 2d 925 (5th Cir. 1991). But a state taking claim can initially be brought in federal court if there is diversity jurisdiction. *Vulcan Materials Co. v. City of Tehuacana*, 238 F.3d 382 (5th Cir. 2001).

The Seventh Circuit has held that resort to state procedures is required and is not futile even when the settled common law makes the result unlikely to be favorable. *Rockstead v. City of Crystal Lake*, 2006 U.S. App. LEXIS 32553 (7th Cir. 2006).

The Eighth Circuit generally requires pursuit of state procedures for compensation to satisfy the state litigation rule. *McKenzie v. City of Whitehall*, 112 F.3d 313 (8th Cir. 1997).

The Ninth Circuit has held that only state law remedies need be sought to satisfy the state litigation rule,

but any Fifth Amendment taking does not have to put forth in state court. *Dodd v. Hood River County*, 59 F.3d 852 (9th Cir. 1995), *later proceedings* 136 F. 3d 1219, *cert. denied* 525 U.S. 923 (1996).

The Tenth Circuit has held that failure to utilize a state's inverse condemnation procedure prevents a Federal takings claim from ripening. *S.K. Finance v. Ca Plata County*, 126 F.3d 1272 (10th Cir. 1997). However, the Court specifically held that under diversity jurisdiction a district court had jurisdiction to determine a state law inverse condemnation claim. *Id.*, at 1276.

In *Franco v. District of Columbia*, 456 F. Supp. 2d 35 (D.C. 2006), the Court held that in order for a takings claimant to ripen his claim under the state litigation rule, he would have to file in state court for contractual remedies that may be available to provide compensation.

C. *Williamson* Must be Reconsidered.

The decision below shows the problems with the generality of the state-litigation rule of *Williamson*. "It may seem 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 because it was prematurely filed in federal court. But this is the nature of the federal-state interplay after *Williamson****". *McNamara v. Rittman*, supra, at p. 640. If petitioners were not required to comply with the state litigation rule of *Williamson*, then this bit of perversity would cease to exist and not trap litigants in its maze of complexity and uncertainty. Petitioners could file directly in federal court and have their Fifth Amendment rights adjudicated by the federal judiciary.

If petitioners were located in the First Circuit, then since there is no procedure to specifically avoid a constitutional injury in Ohio, *Coles v. Granville*, supra, they could go directly to district court to have their continuing violations claim heard. In the Second Circuit, petitioners would have to litigate all claims, such as state

tort claims seeking damages, to satisfy the state litigation rule. In the Fourth Circuit, petitioners could plead their claims as seizures of property under the Fourth Amendment thereby avoiding the state litigation rule completely and come directly to district court. In the Fifth Circuit, petitioners would be required to file all claims, including state law claims seeking damages, in state court to comply with the state litigation rule unless jurisdiction is based on diversity then petitioners could avoid state court and bring their state law claims in district court. In the Sixth Circuit, under the holding herein, petitioners were required to file in state court for a writ of mandamus ordering the government to institute an inverse condemnation claim, but would not be required to file a claim for damages under state tort law to satisfy the state litigation rule. In the Seventh Circuit, petitioners would be required to litigate all of their claims in state court to satisfy the state litigation rule. In the Ninth Circuit, petitioners would be required to litigate all state law remedies to ripen their claims under the state-litigation rule. In the Tenth Circuit, petitioners would have to invoke an inverse condemnation procedure in state court to satisfy the state court litigation rule unless jurisdiction were based on diversity, then state inverse condemnation procedure could be brought directly to district court thereby bypassing state court.

The result petitioners received in this case is dependent on where they lived. These inconsistencies in what is required to satisfy the state-litigation rule should lead this Court to re-examine *Williamson*.

II. THE STATUTE OF LIMITATIONS ON A TAKINGS CLAIM DOES NOT BEGIN TO RUN UNTIL THE CLAIM IS RIPE UNDER *WILLIAMSON*.

A. *Williamson* Presents Claimants with a Statute of Limitations Dilemma.

Williamson ripening rules presents claimants with resulting uncertainties concerning when the statute of limitations begins to run. A party has to guess as to what remedies need be pursued through state procedures before a federal takings claim is ripe. These uncertainties are worsened by the split in the circuits as to what is required to satisfy the state litigation rule. If a party files in district court and the claim is not ripe then one must return to state court and hope that the statute of limitations has not expired on any state procedure. If the statute of limitations has expired on the state procedures, then the federal takings claim can never ripen. *Liberty Mutual Ins. Co v. Brown*, 380 F. 3d 793, 799 (5th Cir. 2004), *Pascoag Reservoir & Dam LLC v. Rhode Island*, 337 F. 3d 87, 94 (1st Cir. 2003) If a party files in state court when the claim is already ripe under *Williamson,* then the statute of limitations can expire on the federal takings claim while the claimant is pursuing remedies in state court, as shown by the decision petitioners received in the court of appeals.

B. A Takings Claim Accrues Only After the *Williamson* Requirements Are Satisfied.

Accrual of a claim under 42 U.S.C. 1983 for purposes of commencing the statute of limitations occurs when "'the plaintiff has a complete and present cause of action *** that is, when the plaintiff can file suit and obtain relief.'" *Wallace v. Kato,* 127 S. Ct. 1091, 166 L. Ed 2d 973 *(2007)*, (quoting from *Bay Area Laundry and Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal.*, 522 U.S. 192, 201 (1997). *Williamson's* language and its resulting effect is that until its rules for ripening are met a plaintiff cannot file suit nor obtain relief on his Federal takings claim. Therefore a takings claim brought pursuant to §1983 does not accrue for purposes of commencing the statute of limitations, until the plaintiff satisfies the *Williamson* requirements. A majority of the circuits agree.

For example, in a takings case concerning statutory rent control ordinances, the Ninth Circuit addressed this exact point. The Court held that "a plaintiff cannot bring a

section 1983 action in federal court until the state court denies just compensation. A claim under section 1983 is not ripe- and a cause of action under section 1983 does not accrue – until that point." *Levald v. City of Palm Desert*, 998 F. 2d 680, 687 (9th Cir. 1993). Similarly, Judge, now Justice, Kennedy made this point when he wrote "In suits for wrongful deprivation of property under 42 U.S.C. § 1983, the same considerations that render a claim premature prevent accrual of a claim for limitations purposes ..." *Norco Construction v. King County*, 801 F. 2d 1143, 1146 (9th Cir. 1986). The Seventh Circuit and Eleventh Circuit agreed with the reasoning of *Norco*. *Biddison v. City of Chicago*, 921 F. 2d 724 (7th Cir. 1991) (holding "His federal claim will ripen, and the statute of limitations will begin to run, if and when Biddison is denied just compensation by the state courts." *Id.*, at 729); and *Corn v. City of Lauderdale Lakes*, 904 F. 2d 585 (11th Cir. 1990) (explaining that the accrual of a section 1983 claim for a takings does not occur until it is ripe. *Id.* at 588).

Williamson provides "If the government has provided an adequate process for obtaining compensation, and if resort to that process yields just compensation, then the property owner has no claim against *** the Government for a taking. *Id*, at 194. Chief Justice Rehnquist, in his concurrence in *San Remo*, stated "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." (emphasis added). The state procedures that must be resorted to are not limited to inverse condemnation but can include those that will provide compensation. A state common law tort remedy is such a procedure.

Physical takings, as opposed to regulatory takings, consist of conduct that is likely to give rise to a state common law tort remedy, such as trespass, waste, nuisance, or a variation of one of these such as the dewatering claim of petitioners under *Cline v. American Aggregates*, supra. This difference between physical and regulatory takings affects the interpretation of the state-litigation rule. In

regulatory takings, compensation procedures through state law would typically include state takings claims brought under state constitutions, and inverse condemnation claims seeking to enforce either state or federal constitutional rights. In physical takings, compensation procedures through state law would typically include those mentioned for regulatory takings but would also include a state common law tort remedy. *Williamson* demands that compensation be sought through state procedures before turning to district court. One of those procedures, for a physical taking, would be a state common law tort remedy.

A state common law tort remedy was sufficient to provide procedural due process when there was an allegation of destruction of personal property. *Hudson v. Palmer*, 468 U.S. 517 (1984). There, the inquiry was whether "several common law remedies available to respondent would provide adequate compensation for his property loss." *Id.* at 534-535. Since state common law tort remedies can provide constitutionally adequate compensation for a property loss under the Fourteenth Amendment, those same considerations mandate that those same tort remedies can provide compensation for a taking of property without just compensation under the Fifth Amendment.

Petitioners went to state court to seek compensation for their takings claim to meet the requirements of *Williamson.* Had they been successful in state court then they would have received damages for the taking of their property and no resort to federal court would have been necessary. This is the teaching of *Williamson.*

C. The Court of Appeals Decision Creates a Split in the Circuits that Requires This Court to Review.

The Court of Appeals below held petitioners' claims for takings accrued for purposes of commencing the statute of limitations when they knew about their injury. *McNamara v. Rittman*, supra at 637. This holding is contrary to the holdings of the Seventh, Ninth and Eleventh

Circuits, supra that the claim accrues and the statute of limitations begins to run when the ripeness requirements of *Williamson* are met. In this case that would have been in 1999 when the Ohio Supreme Court dismissed petitioners appeal as improvidently granted. Petitioners filed their complaint in district court in 2000, which was within the statue of limitations. *LRL Properties v. Portage Metro Housing Auth.*, 55 F. 3d 1097, 1105 (6th Cir. 1995, reh. en banc denied 1995 U.S. App. LEXIS 16558 (1995).

The Court of Appeals decision that petitioners claims were ripe and accrued in 1994 when they knew of their injury without regard to the effort to ripen their claim in state court not only creates a split in the circuits but disregards the teachings of *Williamson.* It has also ensnared petitioners in one of *Williamson's* traps. While petitioners were pursuing their state law procedures to ripen their claims under the state-litigation rule, the statute of limitations had already begun to run on the federal takings claim. Clearly an unjust and inequitable paradox.

CONCLUSION

Enforcing a person's constitutional rights should not require navigating through a maze of rules trying to divine the correct route with insufficient guidance. The state litigation rule of *Williamson* has proved unworkable because of differing interpretations given to it by the various circuits with the result being that a claimant's takings rights are determined by where they reside and not by the Constitution. This rule should be re-examined.

If *Williamson* continues then claimants should not be caught in the trap proceeding to state court to ripen their federal takings claim but having the statute of limitations expire on their federal claim while they are proceeding in state court. Conversely, if claimants go to federal court, believing that their claims are ripe under *Williamson*, and receive a decision that they must return to state court then be faced with the statute of limitations having run on their

state remedies and never be able to ripen their federal claims.

Respectfully Submitted,

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