

No. 07 - 635

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In the  
**Supreme Court of the United States**

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BRUCE PETERS,  
*Petitioner,*

v.

VILLAGE OF CLIFTON, an Illinois municipal corporation;  
ALEXANDER, COX & MCTAGGERT, INC.; and JOSEPH  
MCTAGGERT,  
*Respondents.*

---

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

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**MOTION FOR LEAVE TO FILE AND  
BRIEF OF AMICUS CURIAE  
THE COALITION FOR PROPERTY RIGHTS  
IN SUPPORT OF PETITIONER BRUCE PETERS**

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THE COALITION FOR PROPERTY RIGHTS  
FOR LEAVE TO FILE BRIEF IN SUPPORT OF PETITIONER**

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Pursuant to Supreme Court Rule 37.2(a), counsel for Amicus Curiae The Coalition for Property Rights (“Coalition”) has attempted to secure written consent for the filing of the attached Brief of Amicus Curiae from counsel for the Petitioner and Respondents.<sup>1</sup> Although counsel for Petitioner granted such consent, counsel for Respondents refused to the request of Amicus for written consent pursuant to Supreme Court Rule 37.2(a).<sup>2</sup> Accordingly, counsel for Amicus Curiae hereby moves this Court pursuant to Supreme Court Rule 37.2(b) for leave to file the Brief of Amicus Curiae which is submitted herewith.

The Coalition for Property Rights is a public policy, education, and advocacy organization based in Orlando, Florida, which was founded in 2001 to give property owners and property rights a stronger voice. Its mission is to educate the public, elected officials,

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1 Pursuant to Supreme Court Rule 37.6, counsel for Amicus states that no counsel for a party authored the accompanying Brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of the accompanying Brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to the Brief's preparation or submission. Pursuant to Supreme Court Rule 37.2(a), counsel for Amicus states that Counsel of Record for all parties received notice at least ten days prior to the due date of Amicus Curiae's intention to file this Brief.

2 The written consent of Counsel for Petitioners to the submission of the all amicus curiae briefs pursuant to Supreme Court Rule 37.2(a) was lodged with the Clerk of this Court on November 30, 2007. On December 7, 2007, Amicus Coalition contacted James C. Kearns, Esq., counsel for the Respondents, and requested written consent for Amicus to submit the accompanying Brief pursuant to Supreme Court Rule 37.2(a). Counsel for the Respondents indicated by email on December 10, 2007, that he would not consent to the filing of this Brief.

Wherefore, the Coalition respectfully requests that this Court grant Amicus Curiae leave to file the accompanying Brief in support of the Petition for a Writ of Certiorari.

Respectfully submitted,  
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## QUESTIONS PRESENTED

1. Should the Court overrule *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City* to the extent it requires property owners to seek compensation in state courts to ripen a federal takings claim, where four Justices of this Court recognized in *San Remo Hotel v. City and County of San Francisco* that such a rule lacks any legitimate doctrinal basis and causes tremendous and unintended jurisdictional confusion?
2. Is a claim against a traditional physical taking—occurring without any contemporaneous provision of compensation—subject to Williamson County’s state procedures ripeness rule, where that rule was articulated in the regulatory takings context, and effectively strips the federal courts of any role in the development of physical takings law?

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**BRIEF OF AMICUS CURIAE  
THE COALITION FOR PROPERTY RIGHTS  
IN SUPPORT OF PETITIONER**

---

**INTEREST OF AMICUS CURIAE**

Amicus Curiae The Coalition For Property Rights (“Coalition”) seeks to bring to the Court’s attention its views, and those of its members, concerning the vital need for a federal forum in which individual property owners can vindicate their federally protected right to just compensation under the Fifth Amendment to the United States Constitution.<sup>1</sup>

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<sup>1</sup> Pursuant to Supreme Court Rule 37.6, counsel for Amicus states that no counsel for a party authored this Brief in whole or in part, and no counsel or party made a monetary

Central to these rights in private property is a forum in which those rights can be vindicated. But victims of excessive state and local regulations have been effectively barred from federal court in the two decades since this Court's decision in *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194 (1985). As such, property owners cannot effectively vindicate their Constitutionally guaranteed rights in local courts, which can often be the subject of electoral, political, or other pressures. Property owners should have a federal forum to protect federally guaranteed rights, and the analysis provided in the attached brief will aid this Court in the consideration of whether to grant the petition for certiorari.

#### STATEMENT OF THE CASE

Amicus Curiae adopts the Statement of the Case contained in the Brief of Petitioner Bruce Peters.

#### SUMMARY OF ARGUMENT

This Court's decision in *Williamson Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985) has been the subject of much confusion in the lower federal courts. There is sharp disagreement on whether *Williamson County* presents a mandatory ripeness rule or an optional prudential rule, whether it applies to all takings claims or only to regulatory takings claims, and whether it applies to other constitutional claims involving government harm to property. *Williamson County* also inequitably bars property owners from vindicating their federally protected rights in federal court—a burden not

now makes up federal takings litigation. This Court should overrule *Williamson County* as suggested by the four-justice concurrence in *San Remo*. See *San Remo Hotel v. City and County of San Francisco*, 545 U.S. at 348.

**A. Federal Courts are Divided Over Whether *Williamson County*'s State-Litigation Requirement Is A Prudential Rule Or Is Based in Article III**

Many Circuit Courts of Appeals consider *Williamson County*'s state procedures rule to be "prudential," meaning that it can be waived by the government defendant or that the Court could simply decline to apply it in appropriate circumstances. See, e.g., *Peters v. Village of Clifton*, 498 F.3d 727, 734 (7th Cir. 2007) ("*Williamson County*'s ripeness requirements are prudential in nature"); see also *Asociación de Suscripción Conjunta Del Seguro De Responsabilidad Obligatorio v. Flores Galarza*, 484 F.3d 1, 6 (1st Cir. 2007) ("For multiple reasons, the *Williamson County* prudential ripeness concerns are inapposite here"); *Washlefske v. Winston*, 234 F.3d 179, 182 (4th Cir. 2000); *Beverly Boulevard LLC v. City of West Hollywood*, 238 Fed.Appx. 210 (9th Cir. 2007) ("*Williamson* sets forth a prudential rule, and we may therefore assume without deciding that the takings claims are ripe in order to reject them on the merits.") (citing *Weinberg v. Whatcom County*, 241 F.3d 746, 752 n.4 (9th Cir. 2001)). Other Courts have decided that *Williamson County* is a matter of

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done simply."

*Half Moon Bay, et al.*, (N.D. Cal Docket No. C 05-4149 VRW), the defendant city removed the plaintiff landowner's case to federal district court under 28 U.S.C. § 1331 due to the presence of a Fifth Amendment takings claim in the Complaint. See *Yamagiwa* at ¶ 368. After significant discovery, including 47 depositions, nine experts, and a bench trial, but prior to the verdict, the defendant city moved the district court to remand the case to state court based on *Williamson County*. See *id.* at ¶ 367. Holding that *Williamson County* was merely a prudential doctrine measuring whether the issues were "fit for judicial decision," *id.* at ¶ 364, the district court deemed the prudential requirements satisfied and proceeded to judgment. The result: A \$36,750,000 judgment for the property owner. Had the Half Moon Bay case been in the Northern District of Iowa instead of the Northern District of California, the Court would have been compelled to dismiss the case or, at best, remand it to state court, permitting the City to "take its chips off the table because it didn't like the dealer's hand." *Id.* at ¶ 368.

Given the inequity of these differing rules for vindicating Fifth Amendment rights caused by the circuit split, this Court will surely be assailed with petitions to resolve this important question—a question which would not need resolving if *Williamson County* were overruled.

**B. Even Courts Agreeing That *Williamson County* Is Prudential Cannot Agree When to Apply It.**

clause cannot be said to exhaust the Fifth Amendment's substantive protection of property rights from government imposition."'). Some circuits have continued to analyze the different challenges (takings, substantive due process, equal protection, etc.) separately without discussion of *Williamson County*. See, e.g., *Villas of Lake Jackson, Ltd. v. Leon County*, 121 F.3d 610, 611 (11th Cir. 1997) (determining that there is no independent "substantive due process taking" cause of action and separately analyzing the plaintiff's takings, substantive due process, and equal protection claims).

Some circuits have explicitly limited *Williamson County* to takings claims. See, e.g., *County Concrete Corp. v. Town of Roxbury*, 442 F.3d 159, 169 (3d Cir. 2006) ("[G]iven that the 'exhaustion of just compensation procedures' requirement only exists due to the 'special nature of the Just Compensation Clause,' it is inapplicable to appellants' facial [substantive due process] and [equal protection] claims" (citations omitted)). Others have held that *Williamson County* applies to substantive due process and takings claims but not equal protection claims. See, e.g., *Forseth v. Vill. of Sussex*, 199 F.3d 363, 370-71 (7th Cir. 2000). See *Ochoa Realty Corp. v. Faria*, 815 F.2d 812, 817 n.4 (1st Cir. 1987). And still others extend *Williamson County* to takings, substantive due process, and equal protection claims. See *Dougherty v. Town of No. Hempstead Bd. of Zoning App.*, 282 F.3d 83, 88 (2d Cir. 2002).

These inconsistent approaches to takings

courts are unlikely to agree. Leaving aside the courts holding that *Williamson County* is a mandatory Article III doctrine, even the “prudential” courts have developed sharp disagreements. The First Circuit, for example, has determined that *Williamson County*’s procedures does not include litigation at all:

In our view, such procedures do not include litigation of a state takings claim or any general remedial cause of action under state law. Rather, the Supreme Court must have had in mind only those procedures specifically designed by the state to avoid constitutional injury in the first instance by providing a means for a plaintiff to obtain compensation for the government's taking of property. *Flores Galarza*, 484 F.3d at 17.

Thus, it seems, the First Circuit is willing to hear takings claims so long as all administrative avenues of relief have been cut off. Not so in the Seventh Circuit. While explicitly recognizing *Williamson County* as a prudential doctrine, the Court below in this case explained that it was not “free to disregard” the requirements and that “this court is bound to follow” them. *Peters*, 498 F.3d at 734; *see also id.* at (rejecting *Flores Galarza*, 484 F.3d at 17). Evidently the rule in the Seventh Circuit is that *Williamson* is a prudential doctrine, but prudence has no place in its application. The Northern District of California has taken a “middle of the road” approach, deeming

presently condemned to procedural purgatory, never getting a full and fair adjudication of their claims. These procedural hurdles also have a “chilling effect”—it might be worth the expense and rigors of litigation for a \$36 million claim, but not for a \$100,000 claim. The Coalition often finds itself standing beside small property owners who are outnumbered and outgunned by government lawyers and “community advocates” pushing for greater regulation. The Court should remove the *Williamson County* entry barriers, and allow federal courts to act as guardians of these federally protected rights.

Once the underlying taking is complete and compensation is not paid, a federal takings claim is ripe. Any attempt to avoid this straight-forward reading of the Fifth Amendment leads to the chaos and jurisprudential train-wreck evident in the past 22 years. This Court should solve the problem by accepting the late-Chief Justice’s invitation to overrule *Williamson County* and permit property owners to file their federal takings claims in federal court.

Rather, they must challenge the decision with an administrative writ under California Code of Civil Procedure §§ 1085 or 1094.5. Assuming that the permit was wrongly denied, the state trial courts will order the local agency to grant the permit, ending any permanent takings claim. *See Landgate, Inc. v. California Coastal Com'n*, 17 Cal.4th 1006, 1013-14; 73 Cal.Rptr.2d 841 (Cal. 1998). Under this Court's decisions, property owners should be able to bring a temporary takings claim for the several years during which the owners had no use of their properties. But California has decided that litigation over the validity of the government's action is merely a "normal part of the regulatory process" and thus exempt from any takings claim. *Id.* at 1031. As such, it is virtually impossible for a landowner to obtain compensation for a taking of private property. At most, property owners may get the use of their property back, but only after years of expensive litigation and with no compensation for the intervening loss.

Resort to federal court is also important given the life tenure of federal judges. Unlike many elected state judges<sup>5</sup> who may be "too little independent" as recognized in Federalist 81, life-tenured federal judges may decide cases free from local pressures. In the recent *Yamagiwa* decision from the Northern District of California, the Court found a taking and awarded \$36.75 million for the taking of private property—an amount within the range of both the City's and plaintiff's experts. But

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5 California's Superior Court (trial) judges run in non-partisan elections.



**CONCLUSION**

For the foregoing reasons, this Court should grant Mr. Peters' petition for a writ of certiorari.

Respectfully submitted,  
DOWNEY BRAND LLP

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Respondents.

### AFFIDAVIT OF SERVICE

I, Patricia Billotte, of lawful age, being duly sworn, upon my oath state that I did, on the 17 day of DECEMBER, 2007, send out from Omaha, NE 3 package(s) containing 3 copies of the Motion For Leave To File And Brief of Amicus Curiae The Coalition for Property Rights In Support of Petitioner Bruce Peters in the above entitled case. All parties required to be served have been served by third-party commercial carrier for delivery within 3 calendar days. Packages were plainly addressed to the following:

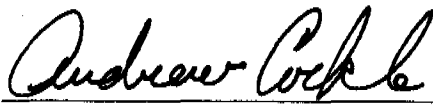
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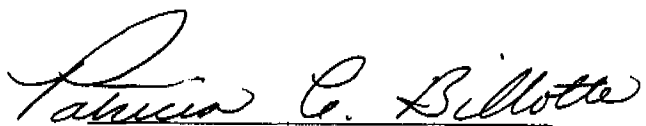
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Subscribed and sworn to before me this 17 day of DECEMBER, 2007.  
I am duly authorized under the laws of the State of Nebraska  
to administer oaths.

ANDREW COCKLE  
General Notary  
State of Nebraska  
My Commission Expires Apr 9, 2010

  
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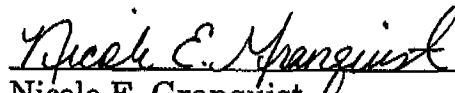
**CERTIFICATE OF COMPLIANCE**

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As required by Supreme Court Rule 33.1(h), I certify that the Brief Amicus Curiae of The Coalition for Property Rights contains 3661 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 13, 2007.

  
Nicole E. Granquist  
Counsel of Record for Amicus  
The Coalition for Property Rights