No. 07-635

IN THE

Supreme Court of the United States

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

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF, AND

BRIEF OF AMICUS CURIAE JOYCE YAMAGIWA, AS TRUSTEE, IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Joyce Yamagiwa, Trustee, respectfully moves for leave to file the attached brief amicus curiae in this case.*

The consent of the attorney for the Petitioner has been obtained and filed with the Clerk of this Court. The consent of the attorney for the Respondent was requested but refused. Pursuant to Rule 37, Yamagiwa's counsel notified counsel for both Petitioner and Respondent of her intent to file this motion and Brief of Amicus Curiae more than ten days before the due date of this brief.

Yamagiwa is the plaintiff in a case now pending in the U.S. District Court for the Northern District of California in which the ripeness issue presented by the Petitioner here has been raised by the defendant, albeit in a slightly different procedural posture. There, after Yamagiwa filed suit in the California state courts, the defendant removed the matter to U.S. District Court. Then, after trial, and in post-trial briefing, the defendant asked the court to dismiss as unripe the case it had

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* Ms. Yamagiwa appears as Trustee of the Trust Created Under Trust Agreement Dated January 30, 1980 By Charles J. Keenan, III and Anne Marie Keenan, for the Benefit of Charles J. Keenan, IV, as to an Undivided 50% Interest, and Trustee Under Trust Agreement Dated January 30, 1980, By Charles J. Keenan, III and Anne Marie Keenan for the benefit of Ann Marie Keenan, as to an Undivided 50% Interest.

removed to federal court in the first place. Given the prudential nature of the ripeness rule, and the significant investment of the time of the court and the parties to try the case, the District Court refused and rendered a decision in Yamagiwa's favor. (*Yamagiwa v. City of Half Moon Bay*, No. C-05-4149-VRW; 2007 WL 4276385 (N.D. Cal. 2007).) The matter is expected to be appealed, and the issue is expected to be raised again.

Yamagiwa's case is, like this one, a physical taking case, seeking constitutional compensation. In a nutshell, public works of the defendant city inundated land which the city had earlier approved for residential housing and turned it into a wetland which could not be developed for anything. The city revoked the development permission it had earlier given. The U.S. District Court found a physical taking and ordered compensation. Judgment has not yet been entered.

The issue presented by the Petition arises in a number of different procedural contexts. It has bedeviled lower courts and litigants for years, to the point where four Justices of this Court openly called for change two years ago. The attached brief will expand on the necessity for certiorari and the need to end this diversionary issue now.

Respectfully submitted,
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BRIEF OF AMICUS CURIAE

Joyce Yamagiwa submits this Amicus Curiae Brief in support of Petitioner Bruce Peters.[1]

INTEREST OF AMICUS CURIAE

Joyce Yamagiwa, as trustee, is the owner of a 24.7 acre parcel of undeveloped land in the city of Half Moon Bay, California. The property has been planned and zoned for residential development for over 30 years. Indeed, the city approved an 83-home project for this site in 1990. Before construction could commence, however, the city imposed a series of moratoria When the moratoria were finally lifted, the city refused to allow the subdivision to proceed, finding that wetlands had developed on the property.

The city itself had constructed a stormwater drainage project both on and near the property. During construction, the city "borrowed" soil from the property (digging out the areas planned for the location of streets called for by the development) for use in a nearby municipal project. The

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[1] The parties were notified more than ten days before filing of the intent to file. Petitioner consented; Respondents did not.

No counsel for a party authored this brief in whole or in part and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae or its counsel made a monetary contribution to its preparation or submission.

combination of the excavations the city made on the property and the faulty functioning of its storm drainage system caused water to pond on the property. Eventually, enough water stayed there for a long enough period that most of the property became "wetlands," said to be an environmentally sensitive area that could not legally be developed.

Yamagiwa sued the city in state court. The city removed the case to U.S. District Court because of its federal taking and substantive due process claims. For two years, the parties litigated in federal court, ending in a two-week bench trial.

In the post-trial briefing, the city suddenly asked the trial court to hold that the case that the city had itself removed to federal court because of the presence of federal constitutional issues was not really ripe for federal litigation. Its theory was that *Williamson County Reg. Plan. Commn. v. Hamilton Bank*, 473 U.S. 172 (1985) mandated remand of the case to state court. The District Court refused, concluding that *Williamson County* ripeness is prudential, and that it would not be prudential to waste two years of the court's time and the parties' effort and expense only to begin anew on the same issues in a different courthouse. The court held that the city had taken Yamagiwa's property and owed compensation. (*Yamagiwa v. City of Half Moon Bay*, 2007 WL 4276385.)

It is anticipated that the city will appeal and that the *Williamson County* issue will be raised again. Yamagiwa has a strong interest in having this Court hold either (1) *Williamson County*'s state

court litigation requirement was wrongly decided and should be overruled, or (2) if *Williamson County* remains a valid test for *regulatory* takings, it has no application to *physical* takings.

SUMMARY OF ARGUMENT

Williamson County has caused confusion and turmoil since it was decided. Its conclusion that a takings claim could be "ripened" for litigation in the federal courts by filing a claim based on the same facts under parallel state constitutional provisions and losing the ensuing action in the state courts has served as nothing but a costly, inefficient, and elaborate trap for property owners. Lower courts and commentators have vied with each other to come up with suitably critical descriptions of it that they could conjure. Some lower federal courts sought ways to construe around the evident res judicata problems created by trying to "ripen" a case by losing it in state court.

It is unfortunate that the issue was not squarely presented to the Court in *San Remo Hotel v. City & County of San Francisco*, 545 U.S. 323 (2005). The application of the *Williamson County* rule in that case evidently struck such a responsive chord with the Court that four Justices joined in a concurring opinion authored by the late Chief Justice urging that the *Williamson County* state court litigation rule be examined and rejected at an early opportunity. It is time for the Court to do just that.

ARGUMENT

I. THE *SAN REMO* CONCURRENCE WAS CORRECT: IT IS TIME TO END THE CONFUSION AND THE UNFAIRNESS CAUSED BY *WILLIAMSON COUNTY*

Precedent is not cast aside lightly. Nor should it be. However, as important to the law as *stare decisis* is, even this Court's decisions are not carved on stone tablets.[2] History has shown that when the scholarly community has been critical of its decisions,[3] when application of a precedent has produced a rule which "stands only as a trap for the unwary,"[4] when necessary to clarify the implications of earlier decisions in light of more recent history,[5] when decisions of this Court are "if not directly" conflicting, "are so in principle,"[6] or when "the answer suggested by our prior opinion is

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[2] See *Lingle v. Chevron U.S.A.*, 544 U.S. 528, 531, 548 (2005) (overruling a relatively recent takings law precedent which proved to be doctrinally anomalous) ("Today we correct course.").

[3] *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 48 (1977).

[4] *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977).

[5] *S.E.C. v. United Benefit Life Ins. Co.*, 387 U.S. 202, 207 (1967).

[6] *Funk v. United States*, 290 U.S. 371, 374 (1933).

not free of ambiguity,"[7] the Court has reconsidered prior decisions.[8] This is such a time in history.

That the *Williamson County* rule fits the Court's list of reasons to reexamine precedent was made evident in *San Remo Hotel*. The late Chief Justice's concurring opinion (joined by Justices O'Connor, Kennedy and Thomas) noted that "*Williamson County*'s state-litigation rule has created some real anomalies . . . all but guarantee[ing] that claimants will be unable to utilize the federal courts to enforce the Fifth Amendment's just compensation guarantee." (545 U.S. at 351.) Acknowledging that other litigants are not subjected to such a rule, the concurring opinion questioned "why federal takings claims in particular should be singled out to be confined to state court . . . ." (545 U.S. at 351.) The opinion concludes that "the justifications for [*Williamson County*'s] state litigation requirement are suspect, while its impact on takings plaintiffs is dramatic" and urges the Court to "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.)

This is the case for which the *San Remo* concurrence was searching. It is time to reexamine the *Williamson County* rule and, upon such examination, to align the rights of property owners

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[7] *McDaniel v. Sanchez*, 452 U.S. 130, 136 (1981).

[8] *Continental*, 433 U.S. at 48-49.

with those of others seeking to enforce guarantees from the Bill of Rights.

A. The Scholarly Community Has Harshly Criticized *Williamson County*'s "Ripeness" Test

Almost from its inception, *Williamson County*'s ripeness rule — applied as requiring a property owner claiming a regulatory taking to seek compensation in state court before a Fifth Amendment Claim would be ripe for federal court litigation — has been questioned by legal scholars. Even those who favor its result, agree that its wording and its application are, at best, confusing and perhaps much worse.

Indeed, legal scholars seem to have engaged in some sort of competition to discern who could devise the harshest way to describe the impact of *Williamson County* on litigants. Scholarly descriptions run the gamut and include "unpleasant,"[9] "ironic,"[10] "ill-considered,"[11]

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[9] Thomas E. Roberts, *Fifth Amendment Taking Claims in Federal Court: The State Compensation Requirement and Principles of Res Judicata*, 24 Urb. Law. 479, 480 (1992).

[10] 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, 20 (1999).

[11] Thomas E. Roberts, *Facial Takings Claims Under* Agins-Nectow: *A Procedural Loose End*, 24 U. Hawaii L. Rev. 623, 635 (2002).

"dramatic,"[12] "shocking" and "absurd"[13] "worse than mere chaos,"[14] "inherently nonsensical" and "self-stultifying,"[15] "riddled with obfuscation and inconsistency,"[16] "surprising,"[17] "misleading,"[18] "bewildering,"[19] "unclear and inexact,"[20] "paradoxical,"[21] "nonsense" and "an anomaly,"[22]

[12] Gregory Overstreet, *Update on the Continuing and Dramatic Effect of the Ripeness Doctrine on Federal Land Use Litigation*, 20 Zoning & Plan. L. Rep. 17 (1997).

[13] *Id.* at 27.

[14] Robert H. Freilich & Joseph M. Divebliss, *The Public Interest is Vindicated*: City of Monterey v. Del Monte Dunes, 31 Urb. Law. 371, 387 (1999).

[15] *Id.*

[16] Testimony of Prof. Daniel R. Mandelker, reproduced at 31 Urb. Law. 232, 236 (1999).

[17] Thomas E. Roberts, *Ripeness and Forum Selection in Fifth Amendment Takings Litigation*, 11 J. Land Use & Envt'l L. 37, 67 (1995).

[18] *Id.* at 71.

[19] Stephen E. Abraham, Williamson County *Fifteen Years Later: When Is a Takings Claim (Ever) Ripe?* 36 Real Prop., Probate & Trust J. 101, 126 (2001).

[20] Robert Meltz, Dwight H. Merriam & Richard M. Frank, The Takings Issue 67 (1999).

[21] Gregory M. Stein, *Regulatory Takings and Ripeness in the Federal Courts*, 48 Vand. L. Rev. 1, 22 (1995).

[22] Peter A. Buchsbaum, *Should Land Use Be Different? Reflections on* Williamson County Reg'l Planning Bd. v. Hamilton Bank in Taking Sides on Takings Issues 471, 472, 480 (Thomas E. Roberts, ed. 2002).

"most confusing,"[23] and containing an "*Alice in Wonderland* quality."[24]

While it is true that the scholarly community does not constitute some sort of super reviewing body able to disavow the Court's opinions, the sheer volume and intensity of criticism should give the Court pause. More than that, the criticism comes not only from those who oppose the rule, but from commentators who believe that regulatory taking litigation belongs in state court — precisely where *Williamson County* puts it. However, even they agree that the analysis and application of *Williamson County*, with its clear promise of a federal litigational forum after a state litigation loss is theoretically wrong, factually incorrect, and cruel to property owners seeing constitutional protection of their rights. Such scholarly unanimity shows the need for reconsideration.

B. Lower Courts Found The *Williamson County* Rule So Unsatisfying That They Sought Ways Around It

Federal Courts of Appeals agreed with the scholarly unhappiness with *Williamson County* and the way they perceived its rule to operate. They

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[23] Jan G. Laitos, Law of Property Rights Protection, p. 10-20 (1999).

[24] Steven J. Eagle, *The Development of Property Rights in America and the Property Rights Movement*, 1 Geo. J.L. & Pub. Pol'y 77, 111 (2002).

termed it "odd,"[25] "unfortunate,"[26] "anomalous,"[27] "draconian" and "revolutionary,"[28] "ironic and unfair."[29]

In consequence, some courts sought to devise rules to fulfill what they thought was the promise of *Williamson County*, i.e., that after landowners had ripened their federal claims by filing *and losing* parallel constitutional claims under state law in state court, they could litigate their Fifth Amendment claims in federal court. (E.g., *Santini*, 342 F.3d at 130; *Fields*, 953 F.2d at 1307.)

Ultimately, this Court held that such exceptions to the Full Faith and Credit Act could not stand. (*San Remo*, 545 U.S. at 342-345.) Nonetheless, the fact that federal courts of appeals found it necessary to create such exceptions due to their view of the role of federal courts as the protectors of individual rights, demonstrates the concerns that those courts had about the unfairness inherent in the workings of *Williamson County*.

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[25] *Fields v. Sarasota-Manatee Airport Auth.*, 953 F.2d 1299, 1307, n. 8 (11th Cir. 1992).

[26] *Id.* at 1306, n. 5.

[27] *Kottschade v. City of Rochester*, 319 F.3d 1038, 1041 (8th Cir. 2003).

[28] *Dodd v. Hood River County*, 59 F.3d 852, 861 (9th Cir. 1995).

[29] *Santini v. Connecticut Hazardous Waste Management Service*, 342 F.3d 118, 130 (2d Cir. 2003).

C. *Williamson County* Has Plainly Operated as a Trap For Property Owners With Takings Claims

Both courts and commentators agree that litigants who attempt to follow *Williamson County* fall into the kind of "trap" described by this Court in *Complete Auto Transit,* 430 U.S. at 279,[30] a trap that should be eliminated from American jurisprudence. Regardless of the Court's rejection of Circuit Court efforts to avoid springing such a trap in *San Remo*, the existence of the trap cannot be gainsaid. *Williamson County* remains on the books, along with *San Remo*'s affirmation of the impact of state court litigation. The trap remains.

D. This Court Created At Least Confusion — If Not Outright Conflict — When It Added Both *City of Chicago* and *San Remo* To Its Jurisprudence

Twelve years after *Williamson County*, the Court decided *City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997). There, as

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[30] E.g., *Santini*, 342 F.3d at 127 ("a Catch-22 for takings plaintiffs"); Buchsbaum, *supra*, at 482 ("procedural morass"); Eagle, *supra*, at 109 ("labyrinth," "havoc"); David A. Dana & Thomas W. Merrill, Property Takings 264 (2002) ("trap"); Timothy V. Kassouni, *The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights*, 29 Cal. West. L. Rev. 1, 51 (1992) ("Kafkaesque maze").

in Yamagiwa's case, the property owner sued a city in state court, alleging both federal and state causes of action. The City of Chicago promptly removed the case to U.S. District Court.

This Court held that removal was proper. In spite of the facts that (1) 28 U.S.C. § 1441(a) allows removal only when the plaintiff could have brought suit in federal court in the first instance and (2) the *Williamson County* rule precluded the plaintiff from so doing, the Court held that "a case containing claims that local administrative action violates federal law . . . is within the jurisdiction of federal district courts." (522 U.S. at 528-529.)

Thus, after *City of Chicago*, the law apparently forbade property owners from seeking Fifth Amendment relief in federal court while allowing their municipal adversaries to invoke federal jurisdiction at their pleasure.

The lower federal courts have obviously been confused by the juxtaposition of these cases. Some, as noted in the Petition, have refused to permit removal, going so far as to dismiss removed cases on appeal after trial and judgment. Others, like the court in Yamagiwa's case, have allowed removal.

In a thoughtful examination of *Williamson County* and *City of Chicago*, the Eighth Circuit Court of Appeals believed that they disclosed an "anomalous . . . gap in Supreme Court jurisprudence," but declined to resolve the evident conflict because finding a resolution "is for the Supreme Court to say, not us." (*Kottschade*, 319 F.3d at 1041.)

Then came *San Remo Hotel v. City & County of San Francisco*, 545 U.S. 323 (2005). Although *San Remo* presented ripeness issues, the property owner did not challenge the soundness of *Williamson County* in this Court. Thus, as the underlying merits had been decided in the California courts, the issue became one of res judicata and the Full Faith and Credit Act. The Court applied both in concluding that the state court decision was binding.

Two things stand out in *San Remo*. First, as *Williamson County*'s validity had not been drawn in issue, the Court's opinion simply assumed its continuing validity without any discussion. Second, as discussed in the Petition, four Justices signed a separate concurring opinion authored by the late Chief Justice calling the validity of the state court litigation requirement of *Williamson County* into serious question. They called for its review by the Court when the opportunity arose.

In the certiorari context, the point is that ripeness jurisprudence is not only confused, the confusion is apparent in decisions of this Court which, as the Eighth Circuit pointed out, is the only Court that can resolve the anomaly. It is time to do so, and this case provides an appropriate opportunity to bring some sense into this doctrine.

II. A RULE DEVELOPED WHOLLY IN THE CONTEXT OF REGULATORY TAKINGS SHOULD NOT APPLY TO PHYSICAL TAKINGS

Assuming, *arguendo*, that the Court decides to retain *Williamson County* as the rule in regulatory taking cases, it ought to grant certiorari to consider whether to apply it to physical taking cases. The question of the relationship of the law of regulatory and physical takings was thoroughly argued in *Tahoe-Sierra Preservation Council v. Tahoe Reg. Plan. Agency*, 535 U.S. 302 (2002). There, the plaintiffs in a regulatory taking case sought to have the Court apply settled doctrines developed in physical taking cases. The Court refused showing, in the process, that importing the peculiar regulatory ripeness rules into physical taking cases like this one and Yamagiwa would be improper:

> "This longstanding distinction between acquisitions of property for public use, on the one hand, and regulations prohibiting private uses, on the other, makes it inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a 'regulatory taking,' and vice versa. For the same reason that we do not ask whether a physical appropriation advances a substantial government interest or whether it deprives the owner of all economically valuable use, we do not apply our precedent from the physical takings context to regulatory takings claims. . . . [P]hysical

appropriations are relatively rare, easily identified, and usually represent a greater affront to individual property rights." (*Tahoe-Sierra*, 535 U.S. at 323.)

For all the reasons the Court maintained the distinction between regulatory and physical takings in *Tahoe-Sierra*, it ought to do so here and refuse to extend *Williamson County* to physical taking cases (assuming that it chooses to retain the *Williamson County* state litigation rule at all).

CONCLUSION

The Petition for Certiorari should be granted.

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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 Amicus Curiae Brief, and Brief of Amicus Curiae Joyce Yamagiwa, As Trustee, In Support of Petitioner 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:

SEE ATTACHED

To be filed for:

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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.

20242

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

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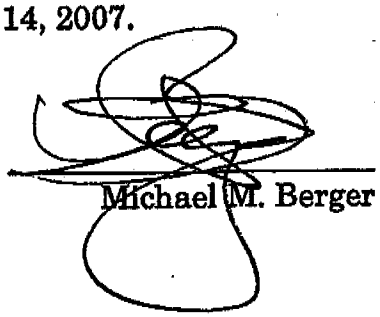
WORD COUNT CERTIFCATE
UNDER RULE 33.1

As required by Supreme Court Rule 33.1(h), I certify that the Brief of the Amicus Curiae contains 2,915 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

As required by Supreme Court Rule 37.5, I certify that the Motion for Leave to File Amicus Curiae Brief contains 450 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 14, 2007.



Michael M. Berger