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

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

J. DAVID BREEMER
Counsel of Record
R. S. RADFORD
Pacific Legal Foundation
3900 Lennane Drive,
Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

Counsel for Petitioner

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INTRODUCTION

In *San Remo Hotel v. City and County of San Francisco*, 545 U.S. 323 (2005), four Justices of this Court expressed a desire to find an "appropriate case" to revisit the portion of *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194 (1985), holding that a federal takings claim will not lie until the property owner "ripens" the claim by unsuccessfully seeking compensation in state procedures. *San Remo*, 545 U.S. 323, 351 (2005) (Renhquist, C.J., concurring). This case is the awaited vehicle. It involves a physical invasion of Petitioner Bruce Peters' (Peters) farm, authorized by the Village of Clifton, for the public purpose of disposing of the Village's excess sewage and to promote commercial development that would increase its revenues.[1] Peters sought an injunction and monetary compensation. The only issue addressed below was the issue of jurisdiction, and particularly, whether Peters' claim was unripe in the federal forum because he first had to litigate a state law compensation claim in state courts. In the Seventh Circuit, Peters expressly raised the issue of whether the court should follow *Williamson County's* state procedures ripeness rule in light of the heavy criticism heaped on the rule by the San Remo Justices. The lower court chose to strictly apply the rule to require dismissal of Peters' claim, compelling Peters to seek this Court's review.

In their Opposition to the Petition (Opposition), Respondents identify nothing that warrants avoidance of the important federal jurisdictional issue raised by

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[1] *See Kelo v. City of New London*, 545 U.S. 469 (2005) (economic development designed to benefit public treasury qualifies as a public use).

this case. Rather, the Opposition reinforces the need for review by highlighting a substantial debate about whether state court litigation is a proper federal jurisdictional predicate for a Fifth Amendment takings claim. Although Respondents say that this debate is unworthy of this Court's attention, four Justices of this Court have clearly stated differently, believing *Williamson County* is "mistaken" and worthy of reconsideration.

REPLY ARGUMENT

I

THE ONLY ISSUE PROPERLY BEFORE THE COURT IS THE VIABILITY OF *WILLIAMSON COUNTY'S* SECOND RIPENESS RULE

Respondents assert that the Court should not use this case to address the issue of whether *Williamson County's* state procedures takings predicate remains good law because Peters "has not [otherwise] pled a viable takings claim." Opp. at 5. The argument seems to be that Peters' claim would fail to state a Fifth Amendment takings claim if tested on non-ripeness grounds, and that *Williamson County* should not be addressed here until this occurs. *Id*., at 4-5. There is nothing to this. The Petition raised only *Williamson County* ripeness issues, and Respondents' "failure to state a claim" question, *see* Opp. at 3, is not fairly included therein; they cannot inject the issue now. U.S. Sup. Ct. R. 14.1(a); *Regents of the University of California v. Doe*, 519 U.S. 425, 432 (1997) (Court will not address issues raised by Respondent when not included in the Petition.). Moreover, as described

below, the only issue addressed and decided below was whether Peters' takings claim is barred by *Williamson County's* state procedures requirement. Consequently, that *Williamson County* issue is all that can or should be decided in this forum.

Consistent with this Court's precedent,[2] Respondents asserted, and the lower courts treated, *Williamson County's* state procedures rule as a *threshold* jurisdictional barrier that is applicable at the outset to allegations—like those here—that a property owner has suffered an unconstitutional invasion of his property. Petition for Writ of Certiorari, Appendix (App.) at A-6, 16. Thus, the issue was approached as one that must be resolved before any other challenge to the allegations could be considered. *See* App. at C-4 (district court stating: "[r]ipeness is an issue of subject matter jurisdiction, therefore the Court will address Defendant's ripeness argument first. If the case is not ripe . . . we must dismiss . . . for lack of subject matter jurisdiction"). The lower courts consequently assumed that Peters' complaint raised a federal takings claim that implicated *Williamson County*, App. at A-13-15; App. at C-5. They refused to pass on any different argument, including the "ultra vires" "failure to state a claim" contentions raised now by Respondents.[3] *See*

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[2] *See, e.g., Palazzolo v. Rhode Island,* 533 U.S. 606, 618 (2001) (ripeness is a "threshold consideration"*); Suitum v. Tahoe Reg'l Planning Agency,* 520 U.S. 725, 736, 733-34 (1997); *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 398 (1979).

[3] In arguing that Peters' allegations would fail to state a viable claim due to purported "ultra vires" allegations, Respondents do not accurately summarize the proceedings below. Peters' (continued...)

App. at A-4, n.1 (noting, without otherwise addressing, that "Mr. Peters claims that . . . both the Village and the private defendants were acting under color of state law for purposes of liability under 42 U.S.C. § 1983"). This was likely because such arguments were considered secondary and irrelevant to the *Williamson County* issue.

In light of this posture, the only issues this Court need address are the same *Williamson County* questions raised by the Petition and passed on by the lower court. *See First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 312 (1987); *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 397-98 (1971) (Court will not consider issue not passed upon by the Court of Appeals.). Indeed, in *First English*, the Court rejected an argument, quite like the one here, that this Court had to independently test the legal sufficiency of a takings complaint before addressing the issue of whether damages was a proper remedy. The Court explained:

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[3] (...continued)
complaint alleged the taking he suffered was conducted under color of state law and authorized by the Township. He characterized the taking as "illegal" in the sense of being outside statutory authority, but did not allege the taking was constitutionally "illegitimate" in the sense of being for a private use. In the district court, no one discussed "ultra vires" takings. In the Seventh Circuit, Peters briefly contended that an injunction under the Fifth Amendment may be available if the taking was "ultra vires," while independently pressing his claim for just compensation. Respondents argued that any issue along these lines was waived. The Seventh Circuit refused to pass on the issue, deciding the case solely under *Williamson County*.

> We reject appellee's suggestion that, regardless of the state court's treatment of the question, we must independently evaluate the adequacy of the complaint and resolve the takings claim on the merits before we can reach the remedial question. However "cryptic"—to use appellee's description—the allegations with respect to the taking were, the California courts deemed them sufficient to present the issue. We accordingly have no occasion to decide whether the ordinance at issue actually denied appellant all use of its property or whether the county might avoid the conclusion that a compensable taking had occurred by establishing that the denial of all use was insulated as a part of the State's authority to enact safety regulations. [Citations omitted.] These questions, of course, remain open for decision on the remand we direct today.

First English, 482 U.S. at 312-13.

These considerations apply here. Whether or not Respondent believes Peters' allegations fail to state a viable Fifth Amendment taking claim, the federal courts "deemed them sufficient to present the issue" of whether the claim is ripe under *Williamson County's* state compensation procedures rule. That issue was then directly addressed and its resolution formed the only basis for dismissal of Peters' complaint. While there may be other potential arguments available to Respondents—including the disputed contention that Peters does not state a viable claim because he

challenges ultra vires action[4]—this Court has no occasion to decide them before considering *Williamson County*. *Id; see also, J. Truett Payne Co., Inc. v. Chrysler Motors Corp*., 451 U.S. 557 (1981) (declining to address liability issue where Court of Appeals bypassed issue and "went directly to issue of damages"). Such "questions, of course, remain open for decision on . . . remand" should the Court grant the Petition and vacate the lower court opinion, but they are not at issue here. *First English*, 482 U.S. at 313.

II

RESPONDENTS FAIL TO IDENTIFY ANY JUSTIFICATION FOR RETAINING *WILLIAMSON COUNTY'S* STATE COMPENSATION RIPENESS PREDICATE

On the cental issue presented by the Petition—whether the Court should overrule *Williamson County's* state procedures rule—Respondents strive to find some precedential basis that might save the rule. The effort fails.

A. Early Decisions Like *Cherokee Nation* Do Not Supply a Doctrinal Basis for *Williamson County*, but Instead Highlight Its Novelty

Respondents initially point to two early decisions, *Cherokee Nation v. Southern Kan. Ry. Co.*, 135 U.S.

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[4] Peters disagrees on the merits with Respondents' argument that an "illegal" taking (one outside statutory authority), conducted under color of state law for a public use cannot be challenged under the Takings Clause. But this is not the proper forum for that debate; if the case is remanded, Respondents can take it up in district court.

641 (1890), and *Joslin Mfg. Co. v. City of Providence*, 262 U.S. 668 (1923), as a legitimate "underlying basis for the *Williamson County*" state procedures predicate. Opp. at 5. They are nothing of the sort. *Cherokee Nation* and *Joslin Mfg.* considered whether a property invasion could be enjoined as a violation of the Takings Clause, in part because it occurred without immediate payment of compensation. *Cherokee Nation*, 135 U.S. at 651. The Court held that all the Takings Clause demanded was a certain post-taking compensation provision, that such provisions existed, and that there was no constitutional infraction. *Cherokee Nation*, 135 U.S. at 659.

These decisions bear no similarity to *Williamson County*. Unlike *Williamson County*, they did not treat post-taking compensation procedures as a *ripeness* predicate that must be pursued before the Fifth Amendment takings claim can be raised. To the contrary, they reviewed such takings claims *on the merits*. *Cherokee Nation*, 135 U.S. at 656-61. Moreover, neither *Cherokee Nation or Joslin Mfg.* identify *state court* as a required post-taking compensation procedure; they contemplated a *federal* trial on damages, pursuant to the statutes causing the taking. Indeed, the federal takings litigation in *Cherokee Nation* occurred (without controversy) in *federal* court. *See id.*

All *Cherokee Nation* and *Joslin Mfg.* stand for is the uncontested proposition that damages do not have to be in the owner's hands prior to the taking.[5]

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[5] Contrary to Respondents' beliefs, Opp. at 11, Peters is not demanding that money had to be handed to him at the moment of the invasion. He simply contends that he can pursue the (continued...)

Cherokee Nation, 135 U.S. at 659. It takes a giant leap in logic to get from this basic idea to *Williamson County's* conclusion that a claimant cannot seek compensation under the "self-executing" federal Compensation Clause until he uses state law compensation procedures in state court. This leap is not explained by Respondents' early decisions; instead, they just beg the question of how *Williamson County's* state compensation rule became law.

B. The Tucker Act Procedure for Just Compensation Suits Against the Federal Government Does Not Justify a "Go to State Court" Ripeness Requirement

Respondents fall back on one of *Williamson County's* own explanations for the state procedures requirement; namely, an analogy to Tucker Act takings suits against the United States in the Court of Federal Claims. Opp. at 7-8. In so doing, Respondents fail to note that the *San Remo* concurrence criticized this basis for *Williamson County*. *See San Remo*, 545 U.S. at 349, n.1 (Rehnquist, C.J.) (concurring). Nor do they refute the able attack on the Tucker Act/*Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016 (1984), justification leveled by amicus curiae Elizabeth J. Neumont, with which the *San Remo* concurrence agreed. *San Remo*, 545 U.S. at 349, n.1 (Rehnquist, C.J.).

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[5] (...continued)
compensation provision promised by the federal Just Compensation Clause at the time of the taking without having to use state procedures.

Respondents do make much of *Preseault v. ICC*, 494 U.S. 1 (1990), *see* Opp. 8 n.2, but *Preseault* says nothing to support *Williamson County's* "go to state court first" rule. To the contrary, *Preseault* is just another inapposite case applying the rule that "[e]quitable relief is not available to enjoin an alleged taking of private property for public use . . . when a suit for compensation can be brought against the sovereign subsequent to the taking." *Ruckelshaus*, 467 U.S. at 1016. As in *Monsanto*, the *Preseault* plaintiffs sought only injunctive relief, claiming the statutory authority for an ICC Order was "unconstitutional on its face because it takes private property without just compensation." *Preseault*, 494 U.S. at 10. *Preseault* did not hold that relief unripe, but categorically not available, because a suit for compensation could be brought against the federal government in the court of claims subsequent to the taking. *Id*. at 12.

Preseault did repeat the unfortunate line from *Williamson County* that "taking claims against the Federal Government are premature until the property owner has availed itself of the process provided by the Tucker Act." *Id*. at 11 (quoting *Williamson County*, 473 U.S. at 195). But for the reasons set forth in the Neumont Amici Brief at 11-12, that notion is nonsensical, and no amount of repetition can make it otherwise. *Cf. Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 531 (2005) ("On occasion, a would-be doctrinal rule or test finds its way into our case law through simple repetition of a phrase—however fortuitously coined."); ("Today we correct course."), *id*. at 548.

III

THE CASE PRESENTS A FUNDAMENTAL AND IMPORTANT DISAGREEMENT ABOUT WHEN A PROPERTY OWNER CAN INVOKE THE "SELF-EXECUTING" FEDERAL JUST COMPENSATION PROVISION

At bottom, Respondent's Opposition rests on faith in the basic rule of *Williamson County*, *see* Opp. at 9, 11-12. In this way, the Opposition highlights the important disagreement on the timing of a suit under the federal Just Compensation Clause raised by this case. Respondents believe that

> [w]hether there has been a taking without just compensation therefore depends on whether, *at the time of the taking*, the plaintiff has a remedy under state law which is sufficiently reasonable, certain and adequate to secure just compensation . . . . Because of the express "just compensation" prerequisite, the State's action is not " 'complete' until the State fails to provide adequate compensation for the taking.' Opp. at 12 (quoting *Williamson County*, 473 U.S. at 195) (italics in original, underline added).

Respondents try to favorably contrast the above position with the idea (which they wrongly attribute to Peters) that money damages should be handed over at the time of the taking. However, this is not the right comparison, because it is not Peters' position. As Respondents eventually acknowledge, Opp. at 18, Peters contends that when private property is invaded,

the property owner has an immediate right to invoke the self-executing just compensation remedy promised by the Takings Clause, and because this is a federal question, he may do so in federal court. When Peters stated that "the issue of whether the taking is 'without just compensation' should also be ascertained at" the time of the taking, he meant that the federal Just Compensation Clause becomes actionable in federal (or state) court at that point.

This case accordingly offers diametrically opposed positions on the proper timing of a claim for compensation under the Fifth Amendment, and thus, on whether *Williamson County* was correct in demanding state court compensation proceedings as a initial predicate. While the Village defends the idea that state court and state law must come first, Peters contends that the federal Just Compensation Clause provides an actionable federal remedy at the time of the taking. The bulk of this Court's jurisprudence supports Peters' position. *See, e.g, First English*, 482 U.S. at 315 ("[A] landowner is entitled to bring an action in inverse condemnation as a result of 'the self-executing character of the constitutional provision with respect to compensation. . . .') (quoting *United States v. Clarke*, 445 U.S. 253, 257 (1980)); *Armstrong v. United States*, 364 U.S. 40, 49 (1960) (a property invasion triggers the federal "constitutional obligation to pay just compensation"); *Jacobs v. United States*, 290 U.S. 13, 16 (1933) (the right to sue for just compensation "rested upon the Fifth Amendment. Statutory recognition was not necessary. A promise to pay was not necessary. Such a promise was implied because of the duty to pay imposed by the Amendment. The suits were thus founded upon the Constitution of the United States."). Against this precedent stands

Williamson County's state compensation predicate. This case thus cleanly sets the stage for the reevaluation of the state procedures rule urged by the *San Remo* concurrence. *See San Remo*, 545 U.S.at 352 (Rehnquist, C.J., concurring) ("[T]he 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.").

Respondents lament that it would be a "burden" if *Williamson* were altered along the lines suggested by Peters because they would have to "weigh the risk of a federal lawsuit against a possible [] need for the taking of the property." Opp. at 18. If it can be called a "burden" for the government to weigh and potentially face a claim under the Just Compensation Clause when it takes property, it is one imposed by the Constitution. Moreover, the possibility of having to answer in federal court for just compensation is no different than the "burden" local governments already face in answering for damages when they unreasonably seize property or engage in any other conduct violative of the United States Constitution. The Just Compensation Clause is a part of the Constitution, too, and like other provisions, it is designed to condition and constrain the exercise of official power. *Williamson County* provides no legitimate reason why this federal constraint should await state law litigation in state court, particularly where this creates "some real [jurisdictional] anomalies, justifying our revisiting the issue." *San Remo*, 545 at 351 (Rehnquist, C.J., concurring).

CONCLUSION

The Court should grant the Petition.

DATED: February, 2008.

Respectfully submitted,

J. DAVID BREEMER
Counsel of Record
R.S. RADFORD
Pacific Legal Foundation
3900 Lennane Drive,
Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

Counsel for Petitioner