No. _____

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

PETITION FOR WRIT OF CERTIORARI

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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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PETITION FOR WRIT OF CERTIORARI

Bruce Peters respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The Opinion of the Seventh Circuit Court of Appeals is reported at — F.3d —, 2007 WL 2377385 (C.A. 7 (Ill.) 2007); it appears as Exhibit A to the petition. The decision of the Federal District Court for the Central District of Illinois is not reported; it appears as Exhibit B. A Magistrate Judge's Report and Recommendation, adopted by the district court, appears as Exhibit C.

JURISDICTION

The judgment of the Seventh Circuit Court of Appeals was entered on August 22, 2007. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AT ISSUE

The Fifth Amendment to the United States Constitution provides in pertinent part: "nor shall private property be taken for public use without just compensation."

STATEMENT OF THE CASE

This case challenges the idea, articulated in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194 (1985), that a private property owner must unsuccessfully pursue just compensation in state procedures in order to ripen a Fifth Amendment takings claim. This principle has generally been interpreted to require a would-be takings claimant to litigate a state law claim for just compensation in state court for ripeness purposes.

In the two decades since *Williamson County* was decided, it has become clear that there is no defensible justification for demanding a state court ruling as a ripeness predicate. Moreover, such a rule has proven to be totally incompatible with traditional quasi-jurisdictional rules—such as res judicata and the *Rooker-Feldman* doctrine—which generally bar federal review of claims rejected by state courts. Making federal takings review contingent on state court litigation also eviscerates the government's statutory ability to remove a federal takings claim. These problems—none of which were discussed in *Williamson County*—have produced significant jurisdictional confusion in the federal courts. For all these reasons,

lower federal courts[1] and commentators[2] have soundly criticized the state procedures ripeness rule.

Recognizing the severe dysfunction caused by *Williamson County*, the late Chief Justice William Rehnquist and three other Justices of this Court declared in *San Remo Hotel v. City and County of San Francisco*, 545 U.S. 323 (2005), that the Court should "reconsider" the rule that federal takings claimants "must first seek compensation in state courts" "[i]n an appropriate case." *Id.* at 352.

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[1] *Asociacion De Subscripcion Conjunta Del Seguro De Responsabilidad Obligatorio v. Flores Galarza*, 484 F.3d 1, 17 (1st Cir. 2007) (the idea "that a federal takings claim is not ripe until the plaintiff has sought compensation through state procedures has drawn substantial criticism, including from Chief Justice Rehnquist in his concurring opinion in *San Remo* "); *DLX, Inc. v. Kentucky*, 381 F.3d 511, 523 (6th Cir. 2004);*Fields v. Sarasota Manatee Airport Auth.*, 953 F.2d 1299, 1302-03 (11th Cir. 1992).

[2] *See* James W. Ely Jr., *"Poor Relation" Once More: The Supreme Court and the Vanishing Rights of Property Owners*, 2005 CATO Sup. Ct. Rev. 39-66 (Mark K. Moller ed. 2005); Thomas E. Roberts, *Ripeness and Forum Selection in Fifth Amendment Takings Litigation*, 11 J. Land Use & Envtl. L. 37, 71 (1995) ("One understandable reaction to the prong two [state compensation procedures] requirement . . . is that it perpetrates a fraud or hoax on landowners. The courts say: "Your suit is not ripe until you seek compensation from the state courts,'" but when the landowner does these things, the court says: "Ha ha, now it is too late.") Michael M. Berger, *Supreme Bait & Switch: The Ripeness Ruse in Regulatory Takings*, 3 Wash. U. J. L. & Pol'y. 99, 102 (2000) (describing the state procedures rule as applied by lower courts as "bizarre" and not "what the *Williamson County* court intended because it is inherently nonsensical and self-stultifying"); Gregory Overstreet, *Update on the Continuing and Dramatic Effect of the Ripeness Doctrine on Federal Land Use Litigation*, 20 Zoning & Plan. L. Rep. 17, 27 (1997) (state procedures requirement has "dramatic" and "absurd" application).

(Rehnquist, C. J., concurring). On at least five occasions since *San Remo*, this Court has been asked to reconsider *Williamson County*, but has declined. *See, e.g., Rockstead v. City of Crystal Lake*, 486 F.3d 963 (7th Cir. 2007), *cert denied*, —S. Ct. —, 2007 WL 2565005 (2007); *McNamara v. City of Rittman*, 473 F.3d 633 (6th Cir. 2007), *cert. denied*, — S. Ct. —, 2007 WL 1385120 (2007); *Torromeo v. Town Of Fremont, NH*, 438 F.3d 113 (1st Cir. 2006); *cert. denied*, 127 S. Ct. 257 (2006); *Hoagland v. Town of Clear Lake*, 415 F.3d 693 (7th Cir. 2005), *cert. denied*, 547 U.S. 1004 (2006); *SFW Arecibo, Ltd. v. Rodriguez*, 415 F.3d 135 (1st Cir. 2005), *cert. denied*, 546 U.S. 1075 (2005). Chief Justice Rehnquist's suggestion that the Court overrule *Williamson County* will continue to generate requests for action on that suggestion.

The Court should settle the matter now by using this case to reconsider the state compensation ripeness predicate. Here, Bruce Peters (Peters) filed a federal takings claim in federal court after the Village of Clifton (Village) and private parties operating at its direction physically occupied his farm with an illegal and noxious sewer system, and without any offer of compensation. Appendix (App.) at A-2–A-3. The Seventh Circuit Court of Appeals held that *Williamson County*'s state compensation rule applied to Peters' physical takings claim, and that under that rule, *id.* at A-10–A-11, Peters had to unsuccessfully seek relief in state court under a state law takings provision before his claim would ripen. *Id.* at A-14–A-15. The lower court considered, but rejected Peters' argument that it should decline to follow *Williamson County*'s state

compensation procedures ripeness rule due to its "fundamental and untenable doctrinal flaws." *Id.* at A-16.

Peters now petitions this Court to overrule the state compensation ripeness predicate or, in the alternative, to exempt physical invasion takings claims.

A. Facts

Bruce Peters owns a large parcel of land (Peters' Property) within Iroquois County, Illinois, upon which he grows corn and soy crops. App. at C-2. Peters' Property lies just beyond the city limits of the Village of Clifton, which terminates at the western edge of Peters' Property. App. at A-2.

Alexander, Cox & McTaggert, Inc. (the Corporation) owns a parcel of agricultural property within the Village limits that is immediately to the west of Peters' Property. *Id.* At some point, someone put a line of drainage tile from the Village and under the Corporation's property. *Id.* at A-3.

There is a narrow waterway on Peters' Property that begins at a low spot at the western edge of Peters' Property, adjacent to the Village limits and the Corporation's land. *Id.* The waterway flows east and empties into a drainage ditch on Peters' Property within the regulatory control of Union Drainage District No. 2 of Danforth and Ashkum, Subdistrict No. 14. App. at C-2. For much of its length, the waterway is surrounded by an undisturbed "nature preserve." *Id.* at C-2.

Old drainage tile was once buried on Peters' Property parallel to, and occasionally under, the

waterway. *Id.* No recorded easement or judgment grants the Village or anyone else the right to occupy or use the tile on Peters' Property, or the land on which it rests. App. at C-2. The Village has no legal authority to condemn Peters' Property, lying beyond the Village's jurisdiction, for tile, sewage, or drainage purposes. *Id.* at C-3. The Village is not empowered to enter property outside its jurisdiction to maintain drainage ditches; nor was such authority delegated to the Village by Union Drainage District No. 2 of Danforth and Ashkum, Subdistrict No. 14. *Id.*

In the spring of 2005, James McTaggert (McTaggert) entered Peters' Property with the knowledge, consent, and authority of the Village Board of Trustees, but without Peters' consent, for the purpose of putting the Village's sewer line on Peters' Property. App. at A-3. McTaggert dug up the ancient tile on the Property and installed larger new tile. *Id.* After McTaggert installed the new tile on Peters' Property, he connected it to the Village's existing sewer line. App. at C-3. Through that line, the Village of Clifton then drained untreated sewage, exposing Peters' property and persons on it to hazardous and infectious waste materials. App. at A-3; C-2–C-3.

In installing the sewer line, McTaggert used heavy equipment that rendered a large area of Peters' Property unusable for growing crops. *Id.* McTaggert also used various poisons on the natural area above and around the newly installed and illegal sanitary sewer line, destroying thousands of dollars worth of [Peters'] trees and destabilizing [Peters'] drainage soil banks as a result. App. at A-3, C-3.

The unauthorized installation of the new tile on Peters' Property was intended to allow commercial

development of the Corporation's property by increasing the Village and the Corporation's ability to drain water and sewage through that property. App. at A-3. The sewer outlet thus constructed on Peter's Property continues to disperse sewage and hazardous waste across his land without his consent. *Id.*

B. Procedure

1. District Court

In 2005, Peters filed suit in the United States District Court for the Central District of Illinois, bringing an action pursuant to the Fifth and Fourteenth Amendments to the United States Constitution and 42 U.S.C. §§ 1983 and 1988. App. at A-4. Peters specifically complained that the Village had unconstitutionally taken his property without just compensation, and continued to do so, by occupying his property for the Village's illegal sewage drainage system. *Id.* at A-4. Peters sought an injunction to end the health hazard posed by the Village's illegal and ongoing taking, compensatory damages, and "other further relief." *Id.*

The Village of Clifton filed a motion to dismiss. *Id.* The motion sought dismissal of Peters' complaint under Fed. R. Civ. P. 12(b)(1) for lack of jurisdiction on the ground that Peters' takings claim was not ripe. *Id.*

A Magistrate Judge subsequently issued a Report and Recommendation on the ripeness defense. App. C. The Magistrate concluded that the court lacked jurisdiction because Peters had not sought just compensation in Illinois state courts before filing the claim in federal court. *Id.* at C-12-13. The Magistrate recommended dismissal for this reason, *id.*, and the

district court accepted the Magistrate's recommendation in full. *See* App. B.

2. The Seventh Circuit's Decision

In the Seventh Circuit, Peters argued that the court should decline to apply *Williamson County*'s state procedures requirement to his physical takings claim because its fundamental flaws had been exposed in Justice Rehnquist's *San Remo* concurrence. App. at A-15. Peters further argued that, if such a requirement remains generally viable after the *San Remo* decision, it should not be applied in his case because the State of Illinois offered no adequate or certain compensatory procedure to relieve the physical occupation of his farmland by the Village. *Id.* at A-6–A-8.

On August 22, 2007, the Seventh Circuit issued a published decision rejecting Peters' contentions and affirming the district court. The Seventh Circuit initially held that, while a physical invasion takings claim automatically satisfies *Williamson County*'s first ripeness prong—the need for a final decision—the use of state compensation procedures was necessary to ripen the physical takings claim. App. at A-11.

The court specifically held that Peters was required to prosecute a takings claim arising under the State of Illinois' Constitution in state courts before his federal claim would mature. The court explained:

> Some of our sister circuits also have taken the view that a selfexecuting provision of a state's constitution may constitute a sufficiently reasonable, certain and adequate remedy to satisfy the Fifth Amendment and, under *Williamson County*, is likewise sufficient to

> require the plaintiff to proceed in state court before raising a federal takings claim.

App. at A-14, n.6.

Finally, the court rejected Peters' argument that no state procedures should be required because *Williamson County* is flawed:

> Mr. Peters contends that *Williamson County*'s requirements are prudential and insufficient to support the district court's decision that it lacked subject matter jurisdiction in this case. He relies largely on Chief Justice Rehnquist's concurring opinion in *San Remo Hotel, L.P. v. City & County of San Francisco*, 545 U.S. 323, 348-52, 125 S. Ct. 2491, 162 L. Ed. 2d 315 (2005), which, Mr. Peters contends, "exposed" *Williamson County*'s "fundamental and untenable doctrinal flaws." Appellant's Br. at 10 n.2.
>
> *Williamson County*'s ripeness requirements are prudential in nature. *See Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 733-34 & n.7, 117 S. Ct. 1659, 137 L. Ed. 2d 980 (1997); *Forseth*, 199 F.3d at 368 n.7. The prudential character of the *Williamson County* requirements do not, however, give the lower federal courts license to disregard them. The Supreme Court has determined, as a matter of law, when federal takings claims are ripe and has set forth a rule in *Williamson County* that this court is bound to follow. In the absence of compliance with

> *Williamson County*, the district court correctly dismissed this action.

App. at A-16.

REASONS FOR GRANTING THE WRIT

The decision below raises an important question as to whether a federal takings claimant must unsuccessfully seek just compensation in state courts, because such a doctrine has no plausible justification and produces an unpredictable and untenable jurisdictional framework. *See San Remo*, 545 U.S. at 352 (Rehnquist, C. J., concurring). If failed state compensation procedures remain a viable ripeness predicate, the decision below raises the important issue of whether physical occupation takings claims, long considered to ripen for federal review at the moment of the invasion, and not at issue in *Williamson County*, should be subject to such a rule. Both issues warrant reconsideration of *Williamson County* and the granting of this Petition.

I

THE STATE PROCEDURES REQUIREMENT LACKS ANY DOCTRINAL JUSTIFICATION AND CAUSES UNANTICIPATED AND UNACCEPTABLE JURISDICTIONAL CONFUSION

In *Williamson County*, this Court considered a claim that a land use regulation had caused a regulatory taking by depriving the property owner of economically beneficial use of land. 473 U.S. at 175,

185. The Court initially ruled that a regulatory takings claim would not ripen until there was a "final decision." *Id.* at 186-87. The Court held that the *Williamson County* plaintiff failed to meet the "final decision" test. *Id.* at 188-90. Although this effectively decided the case, the *Williamson County* Court went on to declare that ripeness also required the federal takings claimant to unsuccessfully seek just compensation though state procedures to secure federal review. 473 U.S. at 194, 197. It is this second requirement that is at issue here.

A. The Requirement That a Federal Takings Plaintiff Must Complete and Lose State Court Litigation to "Ripen" a Federal Takings Claim Has No Plausible Support

Sometimes a "[w]ould-be doctrinal rule or test finds its way into [this Court's] case law" by repetition, despite the absence of any firm doctrinal basis for that rule. *Lingle v. Chevron U.S.A.*, 544 U.S. 528, 531 (2005). As the late Chief Justice Rehnquist emphasized in *San Remo*, the notion that a federal takings litigant must sue for compensation in state court to "ripen" a federal takings claim is a prototypical example of this phenomenon. *San Remo*, 545 U.S. at 349 (Rehnquist, C. J., concurring) ("It is not clear to me 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.").

Williamson County relied primarily on the character of the Takings Clause in adopting the state

procedures ripeness concept.[3] 473 U.S. at 194. The requirement was said to arise especially from the observation that a taking is unconstitutional only when it is "without just compensation." *Id.* at 194-95. According to *Williamson County*, this "without just compensation" condition means that a claimant must be denied compensation in state procedures before a federal takings claim is complete and ripe. *Id.*

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[3] *Williamson County* also analogized to *Ruckelshaus v. Monsanto*, 467 U.S. 986 (1984), and *Parratt v. Taylor*, 451 U.S. 527 (1981). Both analogies are ill-considered. *San Remo*, 545 U.S. at 352, 349 n.1 (Rehnquist, C. J., concurring).

Unlike in *Williamson County*, *Monsanto* did not involve a federal claim for just compensation; it involved a claim for injunctive and declaratory relief. As a brief amicus curiae cited in Justice Rehnquist's *San Remo* concurrence explains, *Monsanto*'s rejection of injunctive relief is inapposite to the (*Williamson County*) issue of whether federal claims for just compensation are premature prior to state court litigation:

> [T]he [Monsanto] company's request for equitable relief was not merely premature, it was not available at all. In other words, there was nothing the company could do to 'ripen' its claims for equitable relief; that claim simply had no merit, period.

San Remo, Brief for Elizabeth J. Nuemont, et. al. as Amici Curiae, at 12.

Parratt v. Taylor, 451 U.S. 527, is equally inapposite because it is a procedural due process decision arising (unlike in the typical takings case) from a random and unauthorized deprivation of property. *Id.* at 541. Since *Williamson County*, this Court has strictly limited *Parratt* to random deprivations where pre-deprivation process is impossible. *Zinermon v. Burch*, 494 U.S. 113, 129-30 (1990). For this and other reasons, *Parratt* has nothing to say about when authorized takings become ripe. *San Remo*, 545 U.S. at 349 n.1 (citing Brief for Defenders of Property Rights et al. as Amici Curiae 9-12; Brief for Elizabeth J. Neumont et al. as Amici Curiae 10-14).

This logic is fatally flawed. The problem is not the starting point—that an unconstitutional taking exists only if the taking is "without just compensation." This is obvious and noncontroversial. But the subsequent conclusion that state *court* procedures are necessary for compensation to be absent is illogical and baseless.

The Takings Clause requires just compensation to be paid for a taking, not that a property owner be given a right to litigate for years in state court. *First English Evangelical Lutheran Church of Glendale v. Los Angeles*, 482 U.S. 304, 315 (1987) ("[G]overnment action that works a taking of property rights necessarily implicates the 'constitutional obligation to pay just compensation.'"). And there is nothing in the text of the Takings Clause indicating that a taking is "without just compensation" only when a state *court* says so. *See* Peter A. Buchsbaum, *Should Land Use Be Different? Reflection on Williamson County Regional Planning Board v. Hamilton Bank, Takings Sides on Takings Issues*, 473-74 (Roberts ed. 2002) ("[T]his underlying premise [that the government has not acted] illegally until you ask for compensation and then it is denied is, of course, untrue."). Thomas E. Roberts, *supra* at 72 ("The language of the Fifth Amendment does not dictate this [state procedures] rule."); Michael M. Berger & Gideon Kanner, *Shell Game! You Can't Get There from Here: Supreme Court Ripeness Jurisprudence in Takings Cases at Long Last Reaches the Self-Parody Stage*, 36 Urb. Law. 671, 695-96 (2004) (The Fifth Amendment "does not say 'nor shall private property be taken for public use without just compensation as finally determined by suing the municipal defendant in state court.'").

Instead, it is far more natural to read "without just compensation" to refer to the presence or absence of compensation *at the time the government engages in the taking,* rather than after a state court rules. Timothy V. Kassouni, *The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights*, 29 Cal. W. L. Rev. 1, 43 (1992) ("[I]t makes little sense to require property owners to seek just compensation from the courts, as opposed to the governmental entity which imposed the regulation."); Berger & Kanner, *Shell Game!*, *supra*, at 694 ("There is nothing in either logic or the language of the Fifth Amendment that requires municipal nonpayment [of compensation] to be certified by a state court before it is complete.").

And, in fact, this Court has repeatedly held that it is the time of the taking that determines the right to just compensation. For instance, in *United States v. Dickinson*, the Court declared: "[T]he land was taken when it was taken and an obligation to pay for it then arose." 331 U.S. 745, 751 (1947). Then, in the 1980 case of *United States v. Clarke*, the Court repeated that "the usual rule is that the time of the invasion constitutes the act of taking and '[i]t is that event which gives rise to the claim for compensation.'" 445 U.S. 253, 258 (1980) (quoting *United States v. Dow*, 357 U.S. 17, 22 (1958)). Only one year before *Williamson County* was decided, this Court affirmed that a property "owner has a right to bring an 'inverse condemnation' suit to recover the value of the land *on the date of the intrusion* by the Government." *Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1, 5 (1984) (emphasis added).

If the duty to pay just compensation accrues at the time of a taking, the issue of whether the taking is "without just compensation" should also be ascertained at that point, and a federal takings claim ripened then. *Williamson County* ignores this established doctrine in concluding that post-taking state court litigation is necessary to render a takings claim complete and actionable. *San Remo*, Brief Amicus Curiae of Elizabeth J,. Neumont, at 8 ("*Williamson County* deviated sharply from the traditional understanding of [the Just Compensation] Clause" in "asserting that a property owner's monetary claim under the Just Compensation Clause does not accrue 'until just compensation has been denied by the state judicial system.'").

Not only is there no textual or precedential foundation for requiring a federal takings plaintiff to ask the state courts for compensation prior to raising a federal claim, such a rule makes no logical sense in most takings cases. These cases are typically directed at a local government, not the state. Why does a property owner challenging an invasion of property by a city or county, one without any contemporaneous provision of compensation, have to ask the *state* for compensation before the property owner can sue the local government in federal court? After all, (1) the state typically "assumes no liability" for takings caused by local governments, *Caldwell v. Commissioners of Highways of Towns of Scott, Mahomet, and Sangamon*, 94 N.E. 490, 493 (Ill. 1911); and (2) local governments are generally subject to constitutional suit in federal court in their own right under 42 U.S.C. § 1983. *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 690-92 (1978).

In short, there is simply no textual, jurisprudential, or logical reason for construing the Just Compensation Clause to require state court litigation before a federal takings claim can be adjudicated. Moreover, when this concept was sanctioned in *Williamson County,* it was entirely unnecessary to the outcome of that case and approved without direct briefing. *See* 473 U.S. at 188-90 (deciding that the takings claims were unripe for lack of a final decision prior to articulating the state procedures requirement). The state procedures requirement was "mistaken," *San Remo*, 545 U.S. at 348 (Rehnquist, C. J., concurring), and a rule that is "not correct when it was decided and . . . not correct today . . . ought not to remain binding precedent." *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

B. The State Compensation Requirement Creates a Contradictory and Unpredictable Jurisdictional Framework

The mistaken state procedures ripeness requirement is particularly objectionable because it is unworkable in practice. Indeed, in combination with other, more established jurisdictional doctrines, such as res judicata and removal, the state procedures rule has created a completely dysfunctional jurisdictional regime.

1. The State Compensation Procedures Predicate Conflicts with Res Judicata Principles That Bar Federal Relitigation of Failed State Court Claims

The most long-standing (quasi) jurisdictional problem arising from *Williamson County*'s notion that a federal takings claim ripens upon completed state procedures is caused by the interaction of such a rule with res judicata principles. *Williamson County* indicates that failed state court litigation will open the federal courthouse door to a federal takings claim. 473 U.S. at 194-96. On the other hand, res judicata and collateral estoppel principles—applied in federal courts under the aegis of the Full Faith and Credit Act—generally hold that cases previously adjudicated in state courts cannot be re-tried in the federal courts. *See Allen v. McCurry*, 449 U.S. 90, 94 (1980).

The result is that compliance with *Williamson County*'s state procedures requirement often does not have the advertised ripening effect, but instead completely terminates the takings claim. As one court explained:

> *Williamson* and its progeny place Plaintiffs in a precarious situation. Plaintiffs must seek redress from the State court before their federal taking claims ripen, and failure to do so will result in dismissal by the federal court. However, once having gone through the State court system, plaintiffs who then try to have their federal claims adjudicated in a federal forum face, in many cases, potential preclusion defenses. This appears to preclude completely litigants such as those in the case

> at bar from bringing federal taking claims in a federal forum, providing a federal forum only by way of the United States Supreme Court review of a State court judgment.

W.J.F. Realty Corp. v. Town of Southampton, 220 F. Supp. 2d 140,146 (E.D. N.Y. 2002).

This "precarious situation" is compounded by the fact that *Williamson County* appears not to have anticipated either the application of res judicata or its result in preventing claims ripened by state procedures from being heard in the federal courts:

> The barring of the federal courthouse door to takings litigants seems an unanticipated effect of *Williamson County*, and one which is unique to the takings context, as other § 1983 plaintiffs do not have the requirement of filing prior state-court actions.

DLX, 381 F.3d at 519-21.

As described by the Seventh Circuit:

> Although the *Williamson* line of cases that requires the property owner to seek compensation in the state courts speaks in terms of "exhaustion" of remedies, that is a misnomer. For if . . . the property owner goes through the entire state proceeding, and he loses, he cannot maintain a federal suit. The failure to complain of the taking under federal as well as state law is a case of "splitting" a claim, thus barring by virtue of the doctrine of res judicata a subsequent suit under federal law.

Rockstead, 486 F.3d at 968.

Federal courts have long struggled with this tension between the ripeness or exhaustion purpose of *Williamson County*'s state compensation requirement and res judicata principles. *See Wilkinson v. Pitkin County Board of County Commissioners*, 142 F.3d 1319, 1325 n.4 (10th Cir. 1998) ("It is difficult to reconcile the ripeness requirement of *Williamson* with the laws of res judicata and collateral estoppel."). Some courts have opted for a strict application of res judicata, a course that negates federal review of takings claims despite the plaintiff's complete compliance with *Williamson County*. *Id.*; *see also, Palomar Mobilehome Park Ass'n. v. City of San Marcos*, 989 F.2d 362, 364-65 (9th Cir. 1993). Other courts, emphasizing that *Williamson County*'s ripeness rules hold out the promise of federal review, have attempted to neutralize res judicata so as to ensure that compliance with *Williamson County* indeed renders takings claims fit for federal review. *See, e.g., DLX*, 381 F.3d at 519-21; *Fields v. Sarasota Manatee Airport Authority*, 953 F.2d at 1303-06.

In *San Remo*, this Court rejected the courts' attempts to craft res judicata exceptions that would allow takings claims in federal court after compliance with *Williamson County*. 545 U.S. at 338, 344-45. Yet, in so doing, *San Remo* did *not* alter *Williamson County* or its instruction that unsuccessful state court compensation procedures will ripen federal review. As a result, the current jurisdictional regime continues to offer takings plaintiffs and federal courts two contradictory rules. On the one hand, *Williamson County* says that unsuccessful pursuit of a just compensation claim in state court ripens federal review of a federal takings claim. 473 U.S. at 194-96. On the

other hand, as construed by *San Remo*, the Full Faith and Credit Act declares that prosecution of just compensation claims in state court entirely precludes subsequent federal review of a takings claim. 545 U.S. at 344-45.

Williamson County accordingly functions as a trap, commanding would-be federal takings plaintiffs to take steps to secure federal review that actually permanently bar such review due to res judicata.[4] Nothing in *Williamson County* supports such a doctrine. *Dodd v. Hood River County*, 59 F.3d 852, 861 (9th Cir. 1995) ("We disagree . . . with the suggestion that *Williamson County* is a thinly-veiled attempt by the Court to eliminate the federal forum for Fifth Amendment taking plaintiffs . . . ."); Daniel Mandelker, et al., *Federal Land Use Law* 4A-23 (1998) ("The Supreme Court could hardly have intended the ripeness rules to become a trap for federal litigants."). Since *San Remo* repudiated a loosening of res judicata

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[4] A similar problem can occur through a conflict between *Williamson County* and the *Rooker-Feldman* doctrine. The *Rooker-Feldman* doctrine prevents federal courts from entertaining suits "complaining of injuries caused by state court judgments and inviting district court review and rejection of those judgments." *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280, 281 (2005). This doctrine sits uneasily with the principle that takings claimants must lose in state court on a compensation claim before they can challenge lack of compensation in federal court. Some courts have held that compliance with *Williamson County* indeed triggers *Rooker-Feldman* and prevents, rather than matures, federal review. *See, e.g., Johnson v. City of Shorewood*, 360 F.3d 810, 818-19 (8th Cir. 2000). Thus, "[t]he catch-22 of the 'Williamson trap' discussed . . . with respect to res judicata is also evident with respect to the *Rooker-Feldman* doctrine." *DLX*, 381 F.3d at 518 n.3.

in the takings context, the only way to correct the jurisdictional confusion caused by *Williamson County*'s state procedures requirement is to directly reconsider it.

2. The State Procedures Requirement Conflicts with Removal Jurisdiction, and Defendants May Be Financially Punished When They Attempt Removal of a Federal Takings Claim Prior to State Procedures

Williamson County's state litigation ripeness requirement creates just as much jurisdictional confusion and absurdities when a government defendant attempts to remove a federal takings claim as it does when a plaintiff attempts to file a claim after failed state court litigation. The removal problem arises from two realities: (1) *Williamson County*'s ripeness predicates are typically considered to be a jurisdictional hurdle, *see, e.g.*, *Bigelow v. Michigan Dep't of Natural Res.*, 970 F.2d 154, 157 (6th Cir. 1992) ("If a claim is unripe, federal courts lack subject matter jurisdiction and the complaint must be dismissed.") and (2) a defendant must demonstrate jurisdiction in order to remove a federal claim from state court. 28 U.S.C. § 1441(b) (removal depends on "original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States"). Thus, if a federal takings plaintiff cannot secure federal jurisdiction before a state court denies a just compensation claim, then defendants logically also cannot remove a federal takings claim when filed in state court, though it has the appearance of a federal issue. *See City of Chicago v. Int'l College of Surgeons*,

522 U.S. 156, 163 (1997) ("The propriety of removal thus depends on whether the case originally could have been filed in federal court.") (citation omitted).

Many courts have indeed concluded that lack of compliance with *Williamson County* bars removal of a Fifth Amendment takings claim. *Moore v. Covington County Comm'n*, 2007 WL 1771384, *3 (M.D. Ala. 2007) ("Because the defendants removed this case to federal court before the plaintiffs could pursue their claims in state court, this court lacks jurisdiction" and "defendants have not met their burden of establishing federal question jurisdiction."); *Doney v. Pacific County*, 2007 WL 1381515, *4 (W.D. Wash. 2007) ("[B]ecause Plaintiffs have not adjudicated an inverse condemnation claim in state court, the federal takings claim is not yet ripe and should accordingly be remanded to state court" and removal denied.).

Since defendants have only 30 days to remove—a much shorter period than the time it takes to obtain a state court denial of compensation—holding federal takings jurisdiction subject to a state's denial of compensation means that takings removal should never occur. Amazing as it seems, a takings claim with the appearance of a classic federal question—one arising under the Constitution no less—often does not function as a federal question for either defendants or plaintiffs due to the effect of *Williamson County*'s required state compensation procedures. *See Carrollton Properties, Ltd. v. City of Carrollton, Texas*, 2006 WL 2559535, *2 (E.D. Tex. 2006) (denying removal upon concluding that "[p]laintiffs have not unsuccessfully pursued just compensation in state court, thus the claim is not ripe, and it is not a federal question"). Moreover, financial penalties await

defendants who attempt to remove a takings claim on federal question grounds prior to compliance with *Williamson County*. *See* 28 U.S.C. § 1447(c). ("An order remanding the case [for lack of jurisdiction] may require payment of just costs and . . . attorney fees, incurred as a result of the removal"); *see, e.g., Quivira Village, LLC v. City of Lake Quivera, Kansas*, 2004 WL 1701070, *2 (D. Kan. 2004) (awarding fees for wrongful removal of takings claim because the defendant "was on notice that the federal claims were not ripe").

Some federal courts, wrongly assuming that a Fifth Amendment takings claim must be removable as a federal issue, have allowed permissive removal. But this only delays the *Williamson County* ripeness issue, and gives rise to yet another Kafkaesque jurisdictional nightmare, one where a takings plaintiff is dragged by a defendant into a federal forum closed to the plaintiff, forced to litigate there (perhaps for years), only to be kicked back on appeal to the state court where it all started due to lack of *Williamson County* ripeness. *See Sandy Creek Investors, Ltd. v. City of Jonestown, Tex.*, 325 F.3d 623, 625-26 (5th Cir. 2003) (removal allowed, landowner wins on merits in trial court, but on appeal, Fifth Circuit remands case to state court where initially filed due to lack of compliance with *Williamson County*); *Reahard v. Lee County*, 30 F.3d 1412, 1418 (11th Cir. 1994) (remanding removed takings claim back to state court after five years of federal litigation, including on the merits, and two circuit court appellate opinions, based on lack of state court compensation proceedings).

Williamson County's state procedures requirement has created a truly unintelligible and unfair federal jurisdictional framework, turning it into a scheme that

confuses courts and waylays litigants who in good faith do what the law says is required for federal jurisdiction, only to find out that the law is the opposite of what it seems. Due to res judicata and *Rooker-Feldman*, compliance with *Williamson County* usually has no ripening effect and instead effectively ends the federal takings claim. *San Remo*, 545 U.S. at 350-51 (Rehnquist, C. J., concurring). This in turn deprives the plaintiffs of their Seventh Amendment right to a jury trial. *See City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 694 (1999). On the other hand, government defendants are deprived of their statutory ability to remove constitutional takings claims to a federal forum and financially punished if they try.

The impact of the state procedures requirement on takings jurisdiction goes beyond "dramatic," *San Remo*, 545 U.S. at 352 (Rehnquist, C. J., concurring); it is pernicious, particularly because it lacks any remotely plausible justification. This Court should take this case to overrule *Williamson County*'s state litigation requirement, and in this way, provide courts and litigants with a coherent, predictable, and just set of jurisdictional rules. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 63 (1996) ("[W]hen governing decisions are unworkable or are badly reasoned, 'this Court has never felt constrained to follow precedent.'").

II

THE DECISION BELOW RAISES AN IMPORTANT ISSUE AS TO WHETHER THE STATE COMPENSATION PROCEDURES REQUIREMENT—DESIGNED TO APPLY IN THE REGULATORY TAKINGS CONTEXT—ALSO APPLIES TO BAR TRADITIONAL PHYSICAL TAKINGS CLAIMS FROM FEDERAL COURTS

If *Williamson County* is to be left intact, the decision of the Seventh Circuit raises an important issue as to whether the state compensation ripeness requirement applies to physical invasion takings claims. *Williamson County* articulated both of its ripeness requirements—the final decision and state compensation procedures rules—in the context of a regulatory takings claim. *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. at 733-34. (*Williamson County* identified "two independent prudential hurdles to a *regulatory* takings claim brought against a state entity in federal court.") (emphasis added). Nevertheless, the court below held that Peters' physical takings claim was subject to the state procedures requirement, App. at A-11, and barred from federal court for that reason. *Id.* at A-14–A-15. This understanding effectively closes the federal courts to the most established Fifth Amendment takings claims—those arising from a direct physical invasion of property—despite the long history of federal review of these constitutional claims, and without a legitimate doctrinal basis. This situation warrants this Court's review.

A. Applying the Regulatory Takings State Procedures Requirement to Physical Takings Claims Ends the Federal Courts' Historic and Legitimate Role in Fifth Amendment Physical Takings Law

1. Physical Taking Claims Have Historically Raised Constitutional Questions Worthy of Federal Scrutiny

Federal "jurisprudence involving condemnations and physical takings is as old as the Republic . . ." *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 322 (2002). This jurisprudence has "long considered a physical intrusion by government to be a property restriction of an unusually serious character for purposes of the [Fifth Amendment's] Takings Clause." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982). More particularly, this Court has construed physical takings claims to raise important individual rights issues arising directly under the Constitution. *See Kaiser Aetna v. United States*, 444 U.S. 164, 180 (1979) (recognizing the right to exclude others as a fundamental and constitutionally protected property right).

Indeed, it was a concern that states might leave physical takings uncompensated which precipitated this Court's (at the time, revolutionary) decision to subject the states to the Fifth Amendment by incorporating it into the Fourteenth Amendment. *Chicago, B. & Q.R. Co. v. Chicago*, 166 U.S. 226, 230, 235 (1897). After this event, the federal courts' involvement in federal takings litigation appeared

settled. *See, e.g.*, *Raymond v. Chicago Union Traction Co.*, 207 U.S. 20 (1907) (A claim that a states' enforcement of a confiscatory tax reassessment violated the Fourteenth Amendment constitutes a Federal question beyond all controversy."'). Accordingly, for most of this nation's history, federal courts have had a significant and non-controversial role in the development of physical takings law. *See Western Union Telegraph Co. v. Pennsylvania R. Co.*, 195 U.S. 540, 570 (1904) (holding on writ of certiorari to the Third Circuit Court of Appeals that a right-of-way "cannot be appropriated in whole or in part except upon the payment of compensation"); *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945); *Kaiser Aetna*, 444 U.S. at 176-80 (holding on writ of certiorari to the Ninth Circuit that the government's demand for public access over a private pond was a compensable physical taking where the servitude deprived the landowner of the essential right to exclude others).

In *Home Tel. & Tel. Co. v. City of Los Angeles*, 227 U.S. 278 (1913), this Court seemed to directly sanction the federal courts' role. That decision specifically rejected a contention that the federal courts had no power to hear a deprivation of property claim under the Fourteenth Amendment until the state courts had passed on the issue. A principal reason for this decision was that the asserted limit on federal review would "cause the state courts to become the primary source for applying and enforcing the Constitution of the United States in all cases covered by the 14th amendment." *Id.* at 285. Yet, what was unacceptable in *Home Tel. & Tel. Co.* will become reality in the physical takings context if those types of takings

claims must be litigated in state courts for federal ripeness.

2. Applying the Regulatory Takings State Procedures Requirement to Physical Takings Ends Federal Involvement in That Important Area of Constitutional Law

When physical takings claims are subject to the state compensation litigation requirement, they cannot be filed in federal court before or after compliance with that requirement; federal courts are accordingly divested of any role in the development of physical takings law. *See, e.g.*, *Rockstead*, 486 F.3d at 967. This can be quickly demonstrated by reference to the case at hand.

If, as the lower court held, Peters' physical takings claim must be "ripened" by state court litigation, that claim cannot be invoked in the federal court in the first instance. App. A-14–A-15; *see also*, *Rockstead*, 486 F.3d at 965. Nor can it be invoked if Peters followed the lower court's direction to prosecute takings litigation in state court, as that action would initiate res judicata. *Id.* at 967. Thus, construing *Williamson County*'s regulatory takings ripeness requirements to apply to all takings effectively ends federal review of physical occupations of private property—intrusions long subject to searching federal oversight.

> No other important right is dealt with in such a shabby manner. One might have thought that all the provisions of the Bill of Rights were entitled to protection in the federal courts. Unfortunately, that will not be the case unless the Court . . . decides to pursue

> [Chief Justice] Rehnquist's invitation and modifies the *Williamson County* ripeness test.

James W. Ely, Jr., *supra,* at 68-69.

This Court should grant the petition to consider the important issue of whether federal courts are to have no role in the enforcement of the Constitution of the United States whenever it is claimed that a government has caused a physical taking.

B. Applying the State Compensation Rule to Physical Takings Conflicts with This Court's Clear Demarcation Between Regulatory and Physical Takings

The de facto relegation of physical takings claims to state courts through the state compensation rule is especially suspect because it arises from a scheme meant for regulatory takings.

On many occasions, this Court has emphasized that physical takings are different from regulatory takings. *See Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. at 321-23; *Brown v. Legal Foundation of Washington*, 538 U.S. 216, 233-34 (2003). The distinction is not merely theoretical; rather, this Court has declared that it determines the precedent to be applied in any particular takings case:

> The longstanding distinctions 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.

Tahoe-Sierra, 535 U.S. at 323.

This demarcation extends to ripeness issues. For instance, as the lower court recognized, *Williamson County*'s "final decision" ripeness predicate for regulatory takings does not apply to physical takings claims. App. at A-11. The basis for such a distinction is that a physical takings claim typically targets a governmental action easily identified as an infringement on private property, while a taking by oppressive regulation may become apparent only after extended administrative decision-making. *Pascoag Reservoir & Dam, LLC v. Rhode Island*, 337 F.3d 87, 91 (1st Cir. 2003) ("In a physical taking case, the final decision requirement is relieved or assumed because "'[w]here there has been a physical invasion, the taking occurs at once, and nothing the [governmental actor] can do or say after that point will change that fact.'") (quoting *Hall v. City of Santa Barbara*, 833 F.2d 1270, 1281 n.28 (9th Cir. 1987)).

The same sort of observations might justify an exemption for physical takings claims when it comes to requiring state compensation procedures as a ripeness condition. *Kruse v. Village of Chagrin Falls, Ohio*, 74 F.3d 694, 700-01 (6th Cir. 1996). This is so particularly where it has been traditionally understood that a physical taking is identifiable and triggers a right to just compensation at the time of the invasion. *United States v. Clarke*, 445 U.S. at 258 (the time of the invasion constitutes the act of taking and "'gives rise to the claim for compensation'"). At the least, there is no obvious reason why physical takings should be treated differently than regulatory takings in every

aspect of the law except the state compensation procedures requirement.

In assuming that Peters' physical occupation claim was subject to the state compensation procedures rule articulated as part of regulatory takings law, the Seventh Circuit decision conflicts with this Court's demarcation between regulatory and physical takings doctrine. This Court should grant the petition to clarify that physical takings, legally and historically distinct from regulatory takings, are not subject to regulatory takings ripeness barriers which entirely bar federal involvement in physical takings law.

CONCLUSION

The petition for writ of certiorari should be granted.

DATED: November, 2007.

Respectfully submitted,

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