No. 08-567

IN THE
Supreme Court of the United States

AGRIPOST, LLC, and AGRI-DADE, LTD.,

Petitioners,

v.

MIAMI-DADE COUNTY, FLORIDA,

Respondent.

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

AMICUS CURIAE, MICHIGAN STATE BAR - REAL PROPERTY LAW SECTION'S, BRIEF IN SUPPORT OF THE POSITION OF PETITIONER

* JOHN D. PIRICH
SUSAN K. FRIEDLAENDER
Counsel of Record
HONIGMAN MILLER SCHWARTZ AND COHN LLP
38500 Woodward Avenue, Ste. 100
Bloomfield Hills, MI 48304
(248) 566-8448/(248) 566-8449 (Fax)

Counsel for Amicus Curiae

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STATEMENT OF AMICUS CURIAE INTEREST[1]

The Real Property Law Section of the State Bar of Michigan provides education and information about current real property issues through meetings, seminars, its website, pro bono service programs, and quarterly publication of a journal. Membership in the Section is open to all members of the State Bar of Michigan. Statements made on behalf of the Section do not necessarily reflect the views of the State Bar of Michigan.

The Michigan Supreme Court has often invited the Section to submit amicus briefs in cases concerning real property issues. The Section has submitted amicus briefs in several important Michigan land use cases including *Schwartz v. City of Flint*, 426 Mich 295 (1986) (remedies available in zoning cases) *Paragon v. City of Novi*, 452 Mich 568 (1996) (ripeness of constitutional claims in zoning cases) and most recently in *Houdini v. City of Romulus*, 480 Mich 1022 (2008) (preclusive effect of a prior Zoning Board of Appeals decision in a subsequently filed action containing constitutional taking claims).

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, or its counsel, made a monetary contribution intended to fund its preparation or submission. The Petitioners have filed a blanket consent and the Respondent's consent to the filing of this brief is being lodged herewith. The parties have been given at least 10 days notice of amici's intention to file.

The Section is submitting this brief based on its strong commitment to education of real property issues and interest in the development of an extremely important area of the law to Michigan property owners. The Section believes that its expertise in state and federal land use law can assist the Court in its review of the Petition for Certiorari.

INTRODUCTION AND SUMMARY OF ARGUMENT

In 1978 this Court held in *Monell v. Department of Social Services of City of New York*, 436 U.S. 658 (1978) that the drafters of the 14th Amendment and its implementing legislation intended, in relevant part, that property owners would use 42 U.S.C. § 1983 to assert takings claims against state actors in federal court. *Id.* at 687. Between 1980 and 1987, the Court reviewed four cases that posed the question whether the 5th Amendment as applied to the states through the 14th Amendment requires that a state recognize a compensation remedy for the temporary regulatory taking of property. The Court eventually reached the issue in *First English Evangelical Lutheran Church v. Los Angeles*, 482 U.S. 304 (1987) holding that the Federal Constitution requires such a remedy. *Id.* at 318-319. During the seven year interval that the Court considered the compensation question, the Court also established requirements to ripen compensation claims. In *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), the Court held that a federal takings claim could not ripen unless the property owner first attempted to recover compensation for the taking using state judicial proceedings.

Williamson further held that the takings claim would be ripe once the owner established that the state did not provide any, or an adequate, compensation remedy. *Id.* at 196. The Court did not distinguish nor even mention its holding in *Monroe v. Pape*, 365 U.S. 167 (1961), *rev'd, in part, on other grounds, Monell*, 436 U.S. at 690 that Congress intended for § 1983 to provide a remedy supplemental to otherwise adequate state remedies that the citizen did not have to seek and the state refuse before the citizen could bring a § 1983 action in federal court. 356 U.S at 183. *Williamson* holds directly adverse to *Monroe* that a takings claimant must first seek the state remedy and not file a § 1983 action unless the state refuses to provide it. 473 U.S. at 195.

The "state litigation" requirement has outlived its original purpose to avoid the premature adjudication of constitutional questions because the Court reached the constitutional question in *First English* that the *Williamson* Court had found premature because the Bank had not utilized state procedures to obtain just compensation. Consequently, the state litigation requirement no longer serves any purpose as a ripening agent because the 14th Amendment requires state courts to provide a compensation remedy for temporary regulatory takings. For that same reason *Williamson* precludes a citizen from pleading a ripe federal takings claim as a matter of law, unless in the remote chance, the state court defies *First English* or the remedy is somehow inadequate.

The *Williamson* Court may not have anticipated the evolution of the state litigation requirement into a judicially created exception to federal court adjudication

of claims asserted under § 1983. The Court, therefore, did not examine whether it had the judicial power to bar federal court jurisdiction over cases, which in *Monell* the Court had held that Congress intended would be litigated in a §1983 action in federal court.

Twenty years have passed since *Williamson* and during that time the lower federal courts' role in § 1983 takings actions has been reduced to routinely dismissing such claims, as either unripe if the owner has not pursued state litigation, or barred under preclusion doctrines if the owner has pursued state litigation. The lower federal courts essentially have been excluded from making substantive decisions in regulatory takings cases, which has impeded a cohesive development of federal takings law.

The Court should examine for the sake of the many citizens denied a federal forum contrary to congressional intent whether the Court's original reasons for imposing the state litigation requirement remain a doctrinally sound justification for the elimination of federal court adjudication of those claims. Upon such examination, the Court should find that neither the text nor history of the 14th Amendment; the legislation implementing compensation remedies under the 14th Amendment; the Court's precedents regarding the purpose of the amendment and legislation; the legislation creating federal question jurisdiction under 28 U.S.C. § 1331 or jurisdiction over civil rights claims under 28 U.S.C. § 1343(3); and the history of litigating takings claims against state actors in federal court, provide any doctrinal basis or judicial authority for the practical

elimination of federal district court jurisdiction to hear takings claims either under § 1983 or in cases otherwise arising under federal law.

The Court, therefore, should either limit or overrule *Williamson,* because the state litigation ripeness requirement that originated in the case has outlived its purpose of avoiding premature adjudication of federal taking claims and instead has deprived citizens of rights that Congress intended to confer to enforce the provisions of the 14th Amendment to the United States Constitution.

ARGUMENT

I.

THE JUSTIFICATION FOR THE STATE LITIGATION RIPENESS REQUIREMENT HAS OUTLIVED ITS PURPOSE AND SERVES ONLY TO EXTINGUISH RATHER THAN RIPEN A TAKINGS CLAIM

The question presented in *Williamson County Regional Planning Comm'n v. Hamilton Bank,* 473 U.S. 172 (1985), which the Court had been unable to answer previously in *Agins v. Tiburon,* 447 U.S. 255 (1980) and *San Diego Gas & Electric Co. v. San Diego,* 450 U.S. 621 (1981) was "whether Federal, State, and Local governments must pay money damages to a landowner whose property allegedly has been 'taken' temporarily by the application of government regulations." *Id.* at 185. In *Agins, supra,* the California Supreme Court had held that landowners could not sue

the government in inverse condemnation as a remedy for the application of a confiscatory zoning ordinance, but could only seek relief through mandamus or a declaratory judgment action invalidating the ordinance. *Agins*, 447 U.S. at 259. In *Williamson*, the Respondent Bank had tried a taking claim under § 1983 in federal district court and the jury awarded it compensation for a taking. The 6th Circuit upheld the jury's verdict and rejected the argument that no damage remedy should exist for regulatory takings. The Petitioner County asked this Court to rule, as had the California Supreme Court, that even if a regulation has the same effect as an eminent domain taking, the Court should analyze the taking as arising under the Due Process rather than the Just Compensation Clause, and hold that deprivations under the Due Process Clause do not require compensation. 473 U.S. at 185.

The Court never reached the question presented by the Petitioner, but reversed on other grounds because the Bank's takings claim had not been ripe for adjudication, not only because the Bank had failed to get a final determination from the planning agency regarding the number of residential units that it could build, but also because the Bank filed its taking claim without first seeking and being denied compensation through the State of Tennessee's condemnation statute, which included an option to sue in inverse condemnation if the government occupied private property without invoking the statutory procedure. *Id.* at 194, n.13.

A. The Requirement To Pursue State Compensation Remedies Before Filing A Federal Takings Claim Under § 1983 Conflicts With The Court's Holding In *Monroe* That Congress Intended § 1983 To Supplement State Remedies

The Court gave several reasons for the state litigation ripeness requirement. First, it reasoned that because the 5th Amendment does not proscribe the taking of property for a public use, but only proscribes takings without the payment of just compensation, the government does not violate any constitutional right until it has denied the payment of just compensation. "The nature of the constitutional right therefore requires that a property owner utilize procedures for obtaining compensation before bringing a ***§ 1983 action***." *Id.* at 194, n. 13. (Emphasis added). The Court further reasoned that because the Constitution does not require pre-deprivation compensation "[i]f the government has provided an adequate process for obtaining compensation, and if resort to that process 'yield[s] just compensation,' then the property owner ***has no claim*** against the Government for a taking." *Id.* at 194-195. (Emphasis added). The Court concluded, therefore, that "if a State has an adequate procedure of seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." *Id.* at 195. The Court held that because the Bank had not demonstrated the inadequacy or unavailability of the Tennessee eminent domain procedures as a source of compensation, its taking claim was premature until it used that procedure and the state denied compensation. *Id.* at 196 -197.

The Court in significant part justified the state litigation requirement by analogizing to *Parratt v. Taylor*, 451 US 527 (1981), *overruled, in relevant part, Daniels v. Williams*, 474 U.S. 327 (1986). The *Williamson* Court reasoned by analogy to *Parratt* that because the 5th Amendment does not require pre-deprivation compensation "and is instead satisfied by a reasonable and adequate provision for obtaining compensation after the taking, the State's action here is not 'complete' until the State fails to provide adequate compensation for the taking." 473 U.S. at 195. In *Daniels*, *supra*, the Court reversed *Parratt* to the extent that it suggested that the mere lack of due care by state officials could state a violation of the due process clause. 474 U.S. 330–331. The *Daniels* Court expressed the concern that according due process protection for the random and unauthorized acts of prison officials served only to trivialize the intent of the due process clause. 474 U.S. at 330. Moreover, the Court held that it had traditionally applied the due process clause to "deliberate decisions of government officials to deprive a person of life, liberty or property." *Id.* at 331.

Parratt did not provide a sound analogy because land use litigation concerns the deliberate decisions of government officials who use regulation as a shortcut around paying compensation for imposing burdens on some landowners for the public's benefit. No relevant comparison exists between the deliberate regulatory

regime that for example prevented Mr. and Mrs. Suitum from building their retirement home in the Tahoe preservation area and Mrs. Suitum's later struggle for compensation, with a prisoner's loss of a hobby kit due to the negligent and random acts of prison personnel. *See generally, Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997). This is not to disparage prisoner rights, but to highlight the unwarranted trivialization of land use cases especially in light of this Court's long tradition of recognizing the historically important values incident to the protection of the type of property interests usually at stake in land use cases. *See e.g., Lynch v. Household Finance Corp.*, 405 U.S. 538 (1972) ("Property does not have rights. People have rights.... In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property.... That rights in property are basic civil rights has long been recognized.") *Id.* at 552.

Moreover, *Williamson* neglected to explicitly distinguish its earlier holding in *Monroe, supra*, that citizens did not need to seek and be denied state remedies before filing a §1983 action. *Monroe* held, "[i]t is no answer that the state has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, *and the latter need not be first sought and refused before the federal one is invoked.* Hence the fact that Illinois by its Constitution and laws outlaws unreasonable searches and seizures is no barrier to the present suit in the federal court." 365 U.S. at 183. (Emphasis added) The Court also made no effort to harmonize the two internally inconsistent prongs of its ripeness holding, which required no exhaustion of state judicial remedies to satisfy the "final decision rule,"

but did require such exhaustion to satisfy the second prong of the ripeness rule. The Court reasoned that the "final decision" rule, which required no pursuit of state judicial remedies or administrative review before filing a takings claim, was consistent with *Patsy v. Florida Board of Regents*, 457 U.S. 496 (1982), which held consistent with *Monroe* that a litigant did not need to exhaust state administrative remedies before invoking § 1983. The Court, however, then required exhaustion of state judicial remedies under the second prong of the test without explaining how that holding was consistent with *Patsy* and the final decision rule.

The Court's analogy to *Parratt* would be more defensible if the Court had held that if the government takes private property without instituting eminent domain procedures, the availability of a post-taking inverse condemnation procedure vitiates the *due process* violation, but not the takings clause violation. The Court's holding that there is no federal constitutional violation as long as the state recognizes a just compensation remedy as discussed immediately below has in effect eliminated federal regulatory takings claims.

B. The Court's Decision in *First English* Renders It Impossible To Ripen A Federal Takings Claim Under *Williamson* Because The Interplay of The Decisions Extinguish Any Basis For Federal *Jurisdiction*

Oddly enough, it is this Court's decision in *First English*, *supra*, that makes it virtually impossible to ripen a federal takings claim under *Williamson*. In *First English*, this Court answered the questions that were not ripe for review in *Williamson* and held that (1) regulatory taking claims arose under the Just Compensation clause, which provides a self-executing compensation remedy, and not the Due Process Clause; and (2) the 5th Amendment as applied to the states though the 14th Amendment prohibits a state from denying a landowner just compensation for the temporary regulatory taking of land. 482 U.S. at 316-320. The *First English* plaintiff presented a ripe claim under *Williamson* because it had filed an inverse condemnation claim in a state court, which had dismissed the claim as failing to state a cause of action under California law. *See Id.* at 312 n. 6.

It is reasonable to assume that after *First English* most if not all states began recognizing compensation remedies for temporary regulatory takings. Consequently, in cases filed post *First English*, there is no longer any federal takings claim that can be ripened because as long as the state recognizes a compensation remedy, which it *must*, *Williamson* holds that the landowner has no federal cause of action for a taking as a matter of law. *See* 473 U.S. at 194-195. It is not clear however that even if a state compensation remedy exists

that under *Monroe* a citizen should still be barred from asserting the federal right to compensation in a supplementary federal action.

It is also not clear that even if a state recognizes a just compensation remedy that a landowner cannot allege a constitutional violation when the government deliberately uses its regulatory power to get public benefits at the expense of a single landowner and then refuses to remove the regulation or pay compensation and denies any liability. *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 717 (1999). ("When the government repudiates [the duty to pay just compensation] either by denying just compensation in fact or refusing to provide procedures through which compensation may be sought, it violates the Constitution."). In *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), the Court characterized a regulatory taking as an attempt to "to improve the public condition . . . by a shorter cut than the constitutional way of paying for the change" *Id.* at 416. The Court further held that the straight and narrow constitutional path required "an exercise of ***eminent domain and compensation***." *Id.* at 413 (Emphasis added)

Moreover, there are "important legal and practical differences between an inverse condemnation suit and a condemnation proceeding." *United States v. Clarke*, 445 U.S. 253, 258 (1980) (Plain meaning of "condemn" in statute did not authorize city to take Indian land without instituting eminent domain procedures). *Accord*, 526 U.S. at 711-712. The existence of an inverse condemnation remedy and the rationale for such actions suggest that an uncompensated regulatory taking, for

which the government denies liability, can violate the constitution, even if the owner can sue the government to establish liability for a taking. The *Clarke* Court observed that an owner's right to file an inverse condemnation action is based on the theory that if the owner has the right to enjoin the government from taking the property without first instituting a formal condemnation action, the owner also has the right to waive the proceeding and instead sue the government to demand compensation. 445 U.S. at 255, n. 2. If it were always true that the taking of private property for a public use does not alone violate the constitution, then the owner would have no right to enjoin a lawful act and seek damages for a lawful act.

In the post *First English* era, therefore, the ripeness issue that led the Court to impose the state court litigation requirement no longer exists and neither does any federal cause of action for a taking under the 14th Amendment as long as the Court continues to hold that there is no federal constitutional violation that can be redressed under federal law if a state recognizes a compensation remedy for a temporary regulatory taking.

II. *WILLIAMSON'S* STATE LITIGATION REQUIREMENT WHICH IS NO LONGER JUSTIFIED BY ANY RIPENESS CONCERN IS CONTRARY TO LEGISLATIVE ENACTMENTS MEANT TO AUTHORIZE FEDERAL *DISTRICT COURT JURISDICTION IN TAKINGS CASES*

The real issue now posed by *Williamson* is whether this Court can consistent with precedent and the separation of powers doctrine eliminate federal court jurisdiction over claims that federal courts had entertained for nearly 90 years before *Williamson.*

In *San Remo Hotel L.P. v. San Francisco*, 545 U.S. 323, 345 (2005) (Rehnquist, J., concurring) , this Court remarked, "it is entirely unclear why [the plaintiffs'] preference for a federal forum should matter for constitutional or statutory purposes." 545 U.S. at 344. It matters first because Congress enlarged federal court jurisdiction to protect individual rights against state action by the adoption of the 14th Amendment, the implementing legislation, which includes § 1983, and the federal question jurisdictional statute. *See Zwickler v. Koota*, 389 U.S. 241, 245-250 (1967). Second, the Court observed in *Monroe* that one reason for the passage of § 1983 was

> "to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the 14th Amendment might be denied by the state agencies." 365 U.S. at 180.

As those in the trenches can attest, land use controversies can sometimes ignite passion and prejudice equal to the most contentious civil rights battles in other arenas. *See e.g., Dews v. Sunnydale,* 109 F. Supp 2d 526 (ND Tx. 2000) (one acre lot minimum had discriminatory impact based on race) In these highly charged situations, if the owner chooses to seek a judicial remedy, the owner may prefer a federal forum as in *Dews, supra,* rather than appearing before an elected judge who may be vulnerable to political pressures, from which a federal judge is immune.

Second, Justice Rehnquist observed in his *San Remo* concurrence that the Court had not claimed that any "longstanding principle of comity toward state courts in handling federal taking claims existed at the time *Williamson County* was decided or that one has since developed." 545 U.S. at 350. *Fair Assessment In Real Estate Assoc., Inc. v. McNary,* 454 U.S. 100 (1981) in fact, provides more support for finding that *Williamson* erroneously required the exhaustion of state judicial remedies before invoking a § 1983 remedy in federal court than as support for eliminating federal jurisdiction over takings claims. The *Fair Assessment* Court acknowledged that the text of § 1983 contains no requirement to exhaust state remedies before resort to a federal forum. *Id.* at 104. *Fair Assessment* also acknowledges that the Court held in *Monroe, supra,* and a long line of cases that § 1983 "authorize[d] immediate resort to a federal court whenever state actions allegedly infringed constitutional rights." *See Id.* at 105. The Court contrasted the latter line of authority with the competing line of cases predating and applying the Tax Injunction Act, 28 U.S.C. § 1341 to limit federal

jurisdiction in challenges to state tax systems. *Id.* at 101-102. There is no legislation comparable to § 1341 competing with § 1983 in land use cases. The Court had a valid doctrinal basis to find that Congress intended limiting § 1983 in the special tax context. Moreover, there is no line of authority finding that federal courts should not exercise jurisdiction in land use or takings cases. Contrarily, the Court has a long history of finding that the federal district courts have, and normally should exercise, their jurisdiction in taking cases against state actors.

A. The Lower Federal Courts Had Exercised Jurisdiction Over State Action Takings Claims For Approximately 90 Years Before *Williamson* Curtailed That Jurisdiction

The history of federal jurisdiction over state law takings claims began in 1897 when this Court held in *Chicago B. & Q. R. Co v. City of Chicago*, 166 U.S. 226 (1897), that the 14th Amendment incorporated the 5th Amendment's guaranty of just compensation. The Court determined that it had jurisdiction under the 14th Amendment to review the railroad company's challenge to state eminent domain proceedings and legislation. The Court held that the due process clause of the 14th Amendment requires that the state compensate or secure compensation "to the owner of private property taken for public use under [state authority]." *Id.* at 235.

Following *Chicago B. & Q.*, the Court found in two cases that inverse condemnation claims based on the application of city ordinances arose under the district court's federal question jurisdiction. In *Cuyahoga River*

Power Co. v. City of Akron, 240 U.S. 462 (1916), the federal district court dismissed the power company's takings claim for lack of jurisdiction. The company had alleged that the city passed an ordinance that would take the company's water power without any intention of instituting condemnation procedures or paying just compensation although the ordinance directed the city's attorney to file a condemnation proceeding. The district court found that it had no jurisdiction because it had concluded that if the company had any rights in the water that the city could only take them by paying for them under state condemnation procedures. *Id.* at 463. This Court unimpressed with the possible availability of a state compensation remedy for the alleged taking, reversed finding that the district court did not carefully read the company's complaint in which it had alleged that the city planned to take its water rights without instituting eminent proceedings and without the payment of just compensation. *Id.* at 463-464. The Court directed the district court to hear the case concluding,

> "[w]hether the plaintiff has any rights that the city is bound to respect can be decided only by taking jurisdiction of the case; and the same is true of other questions raised. Therefore it will be necessary for the District Court to deal with the merits, and to that end the decree must be reversed."

Id. at 464.

Similarly, in *Mosher v. Phoenix*, 287 U.S. 29 (1932), the district court dismissed and the court of appeals affirmed the dismissal of a taking claim for lack of

jurisdiction. The question was whether the plaintiff's complaint seeking to restrain the city from taking her land for a street improvement that an Arizona court had previously held the city did not have the authority to effect under a state statute contained a substantial federal question. The plaintiff had also alleged that not only was the action unauthorized under state law, but also that the city was attempting to take the property without compensation and without due process or "any process of law" in violation of the 14th Amendment. *Id.* at 31. The Court relying on *Cuyahoga, supra,* held that the plaintiff's allegations that "the city acting under color of state authority was violating the asserted private right secured by the Federal Constitution, presented a substantial federal question, and that it was error for the District Court to refuse jurisdiction." *Id.* at 32.

Before this Court partially overruled *Monroe, supra,* to hold that municipalities were persons who could be sued for damages under § 1983, there was a split of authority, but some federal district courts held that a landowner could sue a municipality to collect just compensation for an alleged uncompensated taking in federal court directly under the 14th Amendment. *See e.g., Gordon v. City of Warren,* 579 F. 2d 386, 390-391 (6th Cir. 1978) (Court held that 6th Circuit recognized a direct action against municipalities for just compensation under the 14th Amendment).

Following *Monnell, supra,* landowners began using § 1983 to claim damages for de facto or regulatory takings in federal court. In *Monell,* this Court found that the legislature likely intended that § 1983 serve as

"the vehicle by which Congress provided redress for takings, since that section provided the only civil remedy for Fourteenth Amendment violations and that Amendment unequivocally prohibited uncompensated takings." 436 U.S. at 687. The Court based its finding in relevant part on statements made by Representative Bingham, who drafted Section 1 of the 14th Amendment, with the specific intent to avoid decisions such as *Barron v. Baltimore,* 32 U.S. 243, 247 (1833), in which this Court held that a citizen had no recourse under the federal constitution against a city that took the citizen's property without just compensation because the 5th Amendment did not apply to state actors.

The federal district courts, therefore, have traditionally exercised jurisdiction in taking cases against state actors and the legislature intended that federal district courts would have jurisdiction over takings claims against municipalities in § 1983 actions.

B. The Court Had Never Before *Williamson* Applied Any Blanket Rules Against Exercising Jurisdiction Over Takings Claims

Moreover, the Court has not devised any abstention rules that apply solely to eminent domain actions *See e.g., County of Alleghany v. Frank Mashuda Co.,* 360 U.S. 185 (1959) (Court rejected a blanket rule to abstain in diversity cases that implicated the state's power of eminent domain finding federal courts had been "adjudicating cases involving issues of state eminent domain law for many years," without it becoming a hazard to federal-state relations.) *Id.* at 192. A greater potential of such hazards exist in a diversity case that

poses no questions of federal law than in cases raising regulatory takings claims, which are a creature of federal law. This Court of course traces the regulatory takings doctrine to *Pennsylvania Coal, supra.*

Despite the long history of federal court jurisdiction in federal taking cases asserted under the 14th Amendment, following *Williamson*, federal district courts began summarily dismissing regulatory taking claims as (1) unripe if the plaintiff had not yet litigated a state inverse condemnation claim; *See e.g., Seiler v. Northville Township*, 53 F. Supp. 2d 957 (E.D. Mich. 1999); or (2) barred from re-litigation under claim or issue preclusion principles if the plaintiff had pursued compensation in a state court inverse condemnation action; *See e.g., Wilkinson v. Pitkin County*, 142 F. 3d 1319, 1324 (10th Cir. 1998). As discussed, post *First English, Williamson* dictates that a landowner cannot state a federal takings claim as a matter of law because the 14th Amendment requires that all the states recognize compensation claims for temporary regulatory takings. Under *Williamson's* analogy to *Parratt*, The recognition of the state remedy extinguishes the federal claim.

Yet, despite the wholesale dismissal of taking claims in federal courts when filed by the landowner, the Petitioner has fully briefed the jurisdictional anomaly posed by *City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997), a case in which this Court upheld the removal of a land use case to federal court with no mention of *Williamson*, which, as the Petitioner observed, might be explained by the litigants' failure to mention it. This case has had a harsh impact on

Michigan landowners because Michigan municipal attorneys often remove takings cases seeking just compensation to federal court only to then file a motion for summary judgment asking the court to dismiss the plaintiff's federal claims as unripe under *Williamson* for failure to pursue state judicial remedies. *See for example, Seiler*, 53 F. Supp. at 962. In *Seiler*, the plaintiff had filed his complaint in state court in which he had asserted an inverse condemnation claim and also sought relief under § 1983 action. The district court reasoned that the government had the right to remove the case despite the fact that the court further found that any delay arose from the plaintiff filing unripe federal claims in state court rather than from the Township removing claims that the Township believed to be unripe. *Id.*

III. *WILLIAMSON* HAS PREVENTED THE EFFICIENT DEVELOPMENT OF FEDERAL TAKINGS LAW.

Simply because a state recognizes a compensation remedy should not foreclose either a plaintiff, or for that matter, a defendant from getting a federal court adjudication of the antecedent question of whether the regulation even effects a taking under this Court's regulatory taking jurisprudence. Under *Williamson*, the development of federal regulatory takings law has been left to either this Court, the Federal Court of Claims or state courts struggling to apply this Court's precedents. The Court asserted in *San Remo* that it was "hardly a radical notion to recognize that a significant number of plaintiffs will necessarily litigate

their federal takings claims in state court ." 545 U.S. at 346-347. The Court reasoned that there is little case precedent from federal district courts in takings cases because of the application of the "final decision" rule before *Williamson. Id.* First, if the Court had not added the state litigation requirement in *Williamson*, a plaintiff could have ripened a case dismissed as unripe for lack of a final decision without facing preclusion issues. The state litigation requirement that began with *Williamson*, is the "but for" cause of the lack of precedents from federal district courts. Moreover, the fact that most of the cases in the Court's taking jurisprudence came to the Court on writs of certiorari from state courts has no statistical significance without knowing the number of petitions the Court received from federal and state petitioners in the relevant period. It could be that the Court mostly chooses state cases over federal cases. Moreover, for the last 20 years, *Williamson* has relegated most land use plaintiffs to state court so it is logical that most of the cases would come from state court.

The "radical notion" is the doctrinally suspect elimination of federal district court jurisdiction to hear and try the substantive issues in takings cases and the inefficiency that the lack of jurisdiction has caused in the development of a cohesive body of federal takings law.

CONCLUSION

This Court held in 1978 in *Monell* that Congress intended that landowners use § 1983 to file takings claims against state actors in federal court. Seven years later in *Williamson*, the Court created an exhaustion rule for filing such claims in federal court without reference to the long line of cases finding that Congress intended that citizens should have direct access to federal court under § 1983. *Williamson* held that if the state recognizes a remedy for temporary regulatory takings, then no federal cause of action exists that could be asserted under federal law regardless of the forum. The Court's decision in *First English* two years after *Williamson* ironically bars landowners from ever filing the § 1983 actions that *Monell* found only 11 years earlier Congress intended that citizens could file against state actors in takings cases. *First English* held that state courts must recognize a just compensation remedy for such takings. *First English* and *Williamson* therefore combine to eliminate federal causes of action for regulatory takings. Contrary to *Monroe, Williamson* has displaced § 1983 as a supplemental remedy to state law.

Moreover, the separation of powers doctrine limits this Court's power to amend the jurisdictional statutes and § 1983 through the application of judicial doctrines that should only be applied to avoid premature adjudication of, rather than adjudication of all state action takings claims. Landowners have suffered resort to piecemeal litigation for the last 20 years based on the questionable reasoning of *Williamson* when no principled basis grounded in this Court's precedents or

any federal statute require the limitation on federal court review of state action takings claims. Moreover, *Williamson* has also prevented the efficient development of a cohesive body of federal law in takings cases by eliminating the lower federal courts' jurisdiction to decide substantive issues of federal takings law.

The Real Property Section of the State Bar of Michigan therefore urges the Court to grant Agripost's petition and either limit the holding of *Williamson* to its facts or overrule it to the extent that it has barred citizens from filing taking cases based on federal law in federal or even state courts.

Respectfully submitted,

SUSAN K. FRIEDLAENDER
HONIGMAN MILLER SCHWARTZ
AND COHN LLP
38500 Woodward Avenue, Ste. 100
Bloomfield Hills, MI 48304
(248) 566-8448/(248) 566-8449 (Fax)
Counsel for Amicus Curiae