No. 08-567

In the
Supreme Court of the United States

AGRIPOST, LLC, a Florida Limited Liability Company (successor by merger to Agripost, Inc.), and AGRI-DADE, Ltd., a Florida limited partnership,

Petitioners,

v.

MIAMI-DADE COUNTY, FLORIDA, a political subdivision of the State of Florida,

Respondent.

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

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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INTEREST AND IDENTITY OF AMICUS CURIAE[1]

Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt corporation organized for the purpose of litigating matters affecting the public interest in private property, individual liberty, and economic freedom. Founded 35 years ago, PLF is the largest and most experienced legal organization of its kind. PLF maintains its headquarters office in Sacramento, California, and has regional offices in Bellevue, Washington, and Stuart, Florida. The Foundation is supported primarily by donations from individuals interested in the preservation of traditional individual liberties.

PLF attorneys have considerable experience litigating, as lead counsel and amicus curiae, in defense of constitutionally protected property rights. PLF attorneys have regularly appeared before this Court as lead counsel on behalf of landowners whose ability to use their property was unlawfully curtailed. *See Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *Rapanos v. United States,* 547 U.S. 715

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amicus Curiae's intention to file this brief.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

(2006). PLF also routinely participates in important property rights cases as amicus curiae. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

The instant petition raises a significant question as to the circumstances under which a property owner can obtain just compensation in federal courts for regulations that prevent the use of, and thereby take, private property. In particular, the petition asks whether this Court should reconsider *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194-95 (1985), to the extent it demands that a property owner engage in state court litigation in order to ripen federal jurisdiction over a Fifth Amendment takings claim. PLF attorneys have a wealth of experience on this issue. PLF attorneys have acted as lead counsel in many federal cases questioning the correctness of *Williamson County*'s state litigation requirement. *See, e.g., Braun v. Ann Arbor Charter Twp.*, 519 F.3d 564 (6th Cir. 2008) (*petition for certiorari filed,* No. 08-250); *Peters v. Village of Clifton*, 498 F.3d 727 (7th Cir. 2007), *cert. denied,* 128 S. Ct. 1472 (2008).

PLF attorneys also have published numerous law review articles addressing the impact of *Williamson County* on federal constitutional protection for private property. J. David Breemer, *You Can Check Out But You Can Never Leave: The Story of The San Remo Hotel—The Supreme Court Relegates Takings Claims to State Courts Under a Rule Intended to Ripen the Claims for Federal Review,* 33 B.C. Envtl. Aff. L. Rev. 247 (2006); J. David Breemer, *Overcoming* Williamson County*'s State Procedures Rule: How the* England *Reservation, Issue Preclusion Exceptions, and the Inadequacy Exception Open the Federal Courthouse*

Door to Ripe Takings Claims, 18 J. Land Use & Envtl. L. 209 (2003); James S. Burling, *When Is A Claim Against the Government Ripe? Takings, Equal Protection, Due Process and First Amendment Challenges*, ALI-ABA Continuing Legal Education: Inverse Condemnation Related, Vol. 35 (2004).

PLF believes its experience in litigating and publishing on matters pertaining to federal jurisdiction over federal takings claims will assist this Court in deciding whether to grant the petition in this case.

INTRODUCTION

This case challenges the doctrine, arising from *Williamson County*, 473 U.S. at 194, that a private property owner must unsuccessfully pursue just compensation in state court in order to ripen a Fifth Amendment takings claim and, potentially, other constitutional claims. In the decades since *Williamson County*, the justifications for demanding a state court denial of compensation for ripeness have wilted. *San Remo Hotel v. City and County of San Francisco*, 545 U.S. 323, 350-52 (2005) (Rehnquist, C.J., concurring). Moreover, the "go to state court first" rule has proven to be incompatible with traditional rules of justiciability, such as res judicata, which generally bars federal review of claims previously rejected by state courts. The state court litigation ripeness predicate also undermines the government's statutory right to remove a federal takings claim. As a whole, *Williamson County* often banishes property owners with federal takings and due process claims from federal courts, without any indication this was intended, and without any coherent doctrinal justification. For all these reasons, lower

courts and commentators have expressed deep frustration with *Williamson County*. *See Asociacion De Subscripcion Conjunta Del Seguro De Responsabilidad Obligatorio v. Flores Galarza*, 484 F.3d 1, 17 (1st Cir. 2007); *DLX, Inc. v. Kentucky*, 381 F.3d 511 (6th Cir. 2004); *Fields v. Sarasota Manatee Airport Auth.*, 953 F.2d 1299 (11th Cir. 1992); James W. Ely, Jr., *"Poor Relation" Once More: The Supreme Court and the Vanishing Rights of Property Owners*, 2005 CATO Sup. Ct. Rev. 39 (Mark K. Moller ed. 2005); Thomas E. Roberts, *Ripeness and Forum Selection in Fifth Amendment Takings Litigation*, 11 J. Land Use & Envtl. L. 37 (1995); Gregory Overstreet, *Update on the Continuing and Dramatic Effect of the Ripeness Doctrine on Federal Land Use Litigation*, 20 Zoning & Plan. L. Rep. 17 (1997).

Recognizing *Williamson County*'s infirmities, the late Chief Justice William Rehnquist and three other Justices of this Court declared in *San Remo* that "[i]n an appropriate case" this Court should "reconsider" the rule that federal takings claimants "must first seek compensation in state courts." 545 U.S. at 352 (Rehnquist, C.J., concurring). This Court should now act on the *San Remo* concurrence by granting the Petition for Certiorari for the purpose of reconsidering the state litigation ripeness rule.

REASONS FOR GRANTING THE WRIT

I

THE CASE RAISES AN IMPORTANT ISSUE AS TO WHETHER *WILLIAMSON COUNTY*'S STATE LITIGATION REQUIREMENT SHOULD BE OVERRULED DUE TO ITS REGRESSIVE EFFECT ON FEDERAL JURISDICTION OVER PROPERTY RIGHTS CLAIMS

In *Williamson County*, this Court considered whether a takings claim based on the economic effect of a land use regulation was ripe. 473 U.S. at 174. The Court initially ruled that the claimant lacked a ripe claim because there was no "final agency decision" on application of the suspect land use regulations. *Id.* at 188-90. Although this effectively decided the case, the *Williamson County* Court went on to articulate a second, more novel ripeness barrier. In particular, the Court ruled, for the first time, that a federal takings claim seeking compensation would not ripen until the claimant unsuccessfully sought and was denied just compensation through a state's compensation procedures. 473 U.S. at 194, 197. It is this requirement that is at issue here.

As the following shows, the state litigation ripeness requirement has turned out to be far more that a mere ripeness hurdle to federal takings review. Due to its interaction with preexisting limits on federal jurisdiction, the state litigation requirement functions as a rule that strips federal courts of original and removal jurisdiction over federal takings claims, and creates gross confusion on jurisdiction over due process claims.

A. The State Compensation Requirement Wreaks Havoc on the Jurisdictional Framework Governing Federal Takings Claims

1. The State Compensation Ripeness Rule Conflicts with Res Judicata Principles, So That a "Ripe" Takings Claim Is Precluded from Federal Court

Everything in *Williamson County* suggests that the state litigation rule was designed to allow federal judicial review of a federal takings after state court litigation failed to secure just compensation for the aggrieved property owner. 473 U.S. at 194-96. Yet, in practice, a property owner's compliance with the state litigation rule has no ripening effect; instead, it *bars* federal review because state litigation triggers res judicata principles when the owner attempts to invoke federal review.

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 . . . .

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

The Seventh Circuit made similar observations:

> 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 v. City of Crystal Lake, 486 F.3d 963, 968 (7th Cir. 2007).

This res judicata problem is particularly vexing to courts and litigants because *Williamson County* did not anticipate it, or account for its effect in banishing federal takings claims to state court. *DLX*, 381 F.3d at 521 ("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."). Faced with the disconnect between *Williamson County*'s ripeness intent, and its actual effect in triggering preclusion, some courts have tried to craft res judicata exceptions that would allow "ripened" takings claims in federal court. *See DLX*, 381 F.3d at 519-21 (describing method to reserve federal claims); *Fields v. Sarasota Manatee Airport Auth.*, 953 F.2d at 1303-06 (same).

In the 2005 *San Remo Hotel* decision, this Court rejected court-created exceptions to res judicata in the takings context. 545 U.S. at 338, 344-45. Yet, *San Remo* did not alter *Williamson County* or its instruction that unsuccessful state court compensation procedures will "ripen" federal review of takings claims. As a result, this Court's jurisprudence continues to offer takings litigants and federal courts two conflicting sets of rules. On the one hand, *Williamson County* says that unsuccessful pursuit of a just compensation claim in state court will render a federal takings claim "complete" and ready for federal review. 473 U.S. at 194-96. On the other hand, *San Remo* and other cases strictly construing the Full Faith and Credit Act declare that prosecution of claims in state court will entirely preclude subsequent federal review. 545 U.S. at 344-45. Not surprisingly, federal courts also continue to issue inherently contradictory precedent on the availability of jurisdiction over a federal takings claim. *Compare Braun*, 519 F.3d at 569 ("in order for a plaintiff to bring a takings claim in federal court, he or she must first pursue available remedies in state court"), *with Trafalgar Corp. v. Miami County Bd. of Comm'rs*, 519 F.3d 285, 287 (6th Cir. 2008) (because "the issue of just compensation under the Takings clause . . . was directly decided in a previous state court action, it cannot be re-litigated in federal district court").

Williamson County accordingly operates as a jurisdictional dead-end, rather than a takings ripeness prerequisite, as it commands would-be federal takings plaintiffs to take state litigation steps that permanently bar federal review. This was not by design. *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."). As the *San Remo* concurrence urged, it is time for the Court to reconsider *Williamson County*'s state litigation ripeness requirement in light of its effect in creating the res judicata trap and other jurisdictional anomalies. *San Remo*, 545 U.S. at 348-52 (Rehnquist, C.J., concurring).

2. The State Procedures Requirement Confounds Removal Jurisdiction in the Takings Context

The state litigation rule does not cause chaos and unfairness only in the context of original federal jurisdiction over takings claims. It also has torn removal jurisdiction from its traditional moorings. Typically, a government defendant can remove a complaint raising a constitutional claim to federal court. *See* 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"). But takings defendants do not have a recourse to this usual rule. Since compliance with the state court litigation ripeness requirement is considered a threshold jurisdictional barrier to federal takings claims, *see 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."), takings defendants cannot remove a federal takings claim when it is filed in state court because it is unripe.

Many district courts considering takings removal have indeed concluded that a plaintiff's lack of compliance with *Williamson County* bars a defendant from removing a Fifth Amendment takings claim. *Moore v. Covington County Comm'n*, 2007 WL 1771384, at *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."); *Doney v. Pacific County*, 2007 WL 1381515, at *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."); *Carrollton Properties, Ltd. v. City of Carrollton*, 2006 WL 2559535, at *2 (E.D. Tex. 2006) (denying removal because "[p]laintiffs have not unsuccessfully pursued just compensation in state court, thus the claim is not ripe, and it is not a federal question").

Other federal courts have failed to recognize that *Williamson County* precludes removal of a federal takings claim that is "unripe" under *Williamson County*'s state litigation requirement. When this happens, the takings plaintiff is subjected to an unjust, Kafkaesque process in which he is dragged by a defendant into a federal forum supposedly off-limits to a takings complaint, forced to litigate there (perhaps for years), only to be told on appeal—after resources are drained—that the claim has to go back to state court where it all started because *Williamson County* was not satisfied. *See Sandy Creek Investors, Ltd. v. City of Jonestown*, 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).

After two decades, it is clear that *Williamson County*'s state litigation rule does not operate as a ripeness predicate. It is a jurisdictional trick played upon both plaintiffs and defendants that totally closes the federal courts to Fifth Amendment claims without ever saying so, and without any sound doctrinal basis for such a result. *San Remo*, 545 U.S. at 350-51 (Rehnquist, C.J., concurring). Given the serious and well-documented jurisdictional chaos arising from *Williamson County*'s state litigation ripeness rule, this Court should end the *Williamson County* regime. Although precedent is not to be lightly overturned, when a rule—such as the state litigation predicate—is unworkable, this Court will abandon it. *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."'" (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (quoting *Smith v. Allwright*, 321 U.S. 649, 665 (1944))).

B. The State Procedures Requirement Has Caused Similar Confusion in the Area of Federal Jurisdiction over Due Process Claims

While *Williamson County* articulated and applied the state litigation rule only to a Fifth Amendment takings claim seeking just compensation, 473 U.S. at 196 (applying only the "final decision" prong to a due process claim), its pernicious jurisdictional effects have not been limited to that context. Rather, because some federal circuit courts have extended the state litigation requirement to federal due process claims arising from land use disputes, they have infected due process doctrine with the same jurisdictional confusion and unfairness that has damaged federal takings law.

1. Some Courts Have Extended *Williamson County* to Procedural Due Process Claims, Barring Those Claims from Federal Courts

The Sixth, Seventh and Tenth Circuits have concluded that the state litigation rule applicable to federal takings claims also applies to procedural due process claims arising from land use disputes. *Braun v. Ann Arbor Charter Twp.*, 519 F.3d at 572-73; *Greenfield Mills, Inc. v. Macklin*, 361 F.3d 934, 961-62 (7th Cir. 2004); *Forseth v. Village of Sussex*, 199 F.3d 363, 368 (7th Cir. 2000); *Bateman v. City of West Bountiful*, 89 F.3d 704, 709 (10th Cir. 1996) ("The Tenth Circuit repeatedly has held that the [second] ripeness requirement of *Williamson* applies to due process and equal protection claims that rest upon the same facts as a concomitant takings claim."); *Miller v. Campbell County*, 945 F.2d 348, 352-53 (10th Cir. 1991); *Rocky Mountain Materials & Asphalt, Inc. v. Board of County*

Comm'rs, 972 F.2d 309, 311 (10th Cir. 1992); *J. B. Ranch, Inc. v. Grand County*, 958 F.2d 306, 309-10 (10th Cir. 1992).

In extending *Williamson County* to the due process arena, the foregoing decisions have effectively wiped out the constitutional guarantee of procedural due process in federal courts for permit-seeking real property owners. After all, if, as those courts hold, federal review of a land use procedural due process claim is contingent on completed state litigation under *Williamson County*, that litigation will trigger res judicata, rather than ripeness, over the procedural due process claim when raised in federal court. *See Wilkinson v. Pitkin County Bd. of County Comm'rs*, 142 F.3d 1319, 1322-23 (10th Cir. 1998); *Rainey Bros. Constr. Co., Inc. v. Memphis and Shelby County Bd. of Adjustment*, 967 F. Supp. 998, 1004 (W.D. Tenn. 1997). In short, holding a procedural due process claim subject to *Williamson County*'s state litigation rule results in the unprecedented abdication of federal jurisdiction over an explicit federal constitutional provision: the procedural component of the Due Process Clause. Nothing in this Court's precedent supports this. *See, e.g, Zinermon v. Burch*, 494 U.S. 113, 128-36 (1990) (holding that a procedural due process claimant challenging a nonrandom deprivation of property need not exhaust adequate state court remedies).

2. *Williamson County* Also Damages Jurisdiction over Substantive Due Process Claims

In addition to extending *Williamson County*'s state litigation takings rule to procedural due process claims, some courts have applied it to substantive due process property rights claims. *River Park, Inc. v. City of Highland Park*, 23 F.3d 164, 167 (7th Cir. 1994); *Macri v. King County*,126 F.3d 1125, 1128-30 (9th Cir. 1997); *Montgomery v. Carter County*, 226 F.3d 758, 669-70 (6th Cir. 2000); *Bickerstaff Clay Products Co., Inc. v. Harris County*, 89 F.3d 1481, 1490-91 (11th Cir. 1996). Sometimes, the expansion of *Williamson County* to the substantive due process context is direct. *River Park*, 23 F.3d at 167. Other times, courts first conclude that substantive due process claims are subsumed in the explicit protections of the Takings Clause; this ruling then triggers application of the state litigation rule. *Macri*, 126 F.3d at 1128-30. Neither approach enjoys support in this Court's law. *See Williamson County*, 473 U.S. at 197-99 (applying the final decision ripeness rule, but *not* the state litigation rule, to a due process claim); *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 542-44 (2005) (distinguishing takings and due process doctrine): *Crown Point Dev., Inc. v. City of Sun Valley*, 506 F.3d 851, 856 (9th Cir. 2007) ("We now explicitly hold that the Fifth Amendment does not invariably preempt a claim that land use action lacks any substantial relation to the public health, safety, or general welfare.").

Nevertheless, the reality is that, in some circuits, property owners who seek to challenge arbitrary property regulation under substantive due process precedent will find their claims barred by *Williamson*

County's state litigation requirements, despite its origin in takings concepts. The result is the closing off of the federal courthouse doors to land use substantive due process claims, even as other classes of litigants have full recourse to substantive due process guarantees.

Thus, under the guise of "ripeness," *Williamson County*'s state litigation rule has deprived federal courts of federal question jurisdiction over takings claims and procedural and substantive due process claims that arise under the Fifth and Fourteenth Amendments to the Constitution. This is inconsistent with Congress' intent to afford federal jurisdiction over federal questions, *see* 28 U.S.C. § 1331, and this Court's precedent vindicating that jurisdiction. *Home Tel. & Tel. Co. v. City of Los Angeles*, 227 U.S. 278, 285 (1913) (rejecting a contention that the federal courts lacked jurisdiction over a deprivation of property claim under the Fourteenth Amendment until the state courts passed on the issue because this 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."). It is time to reassess *Williamson County*'s state litigation requirement.

CONCLUSION

For the foregoing reasons, the Court should grant the Petition.

DATED: November, 2008.

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