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, *Respondent.*

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

Instead of addressing the serious legal issues presented by this case, Respondent's Brief in Opposition tries to overwhelm the Court with a fogbank of factual minutiae that sound more like a jury argument than an appellate brief. Petitioner Agripost has sought only one thing during fifteen years of litigation: a federal trial of its federal constitutional claims, the same as other constitutionally aggrieved plaintiffs. That is why it initially filed its 5th Amendment claims in U.S. District Court. The way it was thereafter shuttled between state and federal courts demonstrates the urgent need for rectification of this procedural morass.

This is a 42 U.S.C. § 1983 case, although you couldn't tell it from Miami-Dade's brief. The Court has been clear about the scope of that statute: It provides a ***federal*** remedy in ***federal*** court to protect citizens against unconstitutional local government actions impairing their ***federal*** rights. (E.g., *Mitchum v. Foster*, 407 U.S. 225, 239 [1972]; *Burnett v. Grattan*, 468 U.S. 42, 50, 55 [1984]; *Felder v. Casey*, 487 U.S. 131, 141 [1988].) To accomplish that, Congress "thr[e]w open the doors of the United States courts" to those deprived of constitutional rights "to provide these individuals ***immediate access to the***

federal courts . . . " (*Patsy v. Florida Board of Regents*, 457 U.S. 496, 504 [1982]; emphasis added.)

The contrary rule applied below to keep Agripost from the federal courts was created in *Williamson County Reg. Plan. Agency v. Hamilton Bank*, 473 U.S. 172 (1985). That rule — applied only in 5th Amendment property takings cases — requires prior trial in state court in order to "ripen" the federal issues for federal court litigation, and is thus contrary to all of the cases cited above. (Compare *Monroe v. Pape*, 365 U.S. 167, 183 [1961] ["It is no answer that the state has a law which if enforced would give relief."].)

Williamson County also, as recognized recently by four Justices (*San Remo Hotel v. City & County of San Francisco*, 545 U.S. 323, 351 [2005] [Rehnquist, C.J., concurring on behalf of himself and Justices O'Connor, Kennedy, and Thomas]) is not doctrinally true to the 5th Amendment. Review here is mandated in order to settle the core constitutional issue of a 5th Amendment plaintiff's right to choose trial of a federally protected right in a federal forum.

Miami-Dade's discussion of what "facts" were or were not litigated or decided in various state court proceedings is eyewash. (See *post*,

pp. 10-12.) The simple fact is this: If the erroneous rule of *Williamson County* had not been in existence, then the case initially filed by Agripost in U.S. District Court would have proceeded to decision there, instead of consuming a king's ransom in judicial and private resources in a fruitless back-and-forth shuttle between the two court systems. That is why it is critical to review the jurisprudential underpinnings of *Williamson County* as urged in the *San Remo* concurring opinion. Contrary to Miami-Dade's assertions, Agripost has never sought a "second bite" (Br. in Opp., p. 18) nor a rule *requiring* all takings claims to be brought in federal court (Br. in Opp., p. 34). It simply asked that it be allowed to choose its forum, like any other plaintiff where there is concurrent jurisdiction. (Compare, e.g., *Bell v. Hood*, 327 U.S. 678, 681 [1946].)

The problem is exacerbated in this case by the 11th Circuit's settled procedure on how to reconcile *Williamson County*'s insistence on ripening regulatory taking cases via state court litigation with the general obligation of federal courts to adjudicate cases within their jurisdiction. The 11th Circuit told property owners like Agripost to go to state court, reserve their federal issues for later trial in federal court and then return to federal court if necessary. (See Pet. App., p. 10 [collecting 11th Circuit cases].) Following the 11th Circuit's

command — which promised an eventual U.S. District Court trial — led to the series of state and federal appearances Roman numeralized by Miami-Dade up to *Agripost X.* (Presumably, this Petition represents *Agripost XI.*) That needless glut of opinions proves the point: This case should have proceeded in U.S. District Court when initially filed. It is time to discard the *Williamson County* rule that is capable of producing such anomalous, if not bizarre, results.

I.

JUDICIAL DECISIONS — INCLUDING SPECIFICALLY THOSE FROM THIS COURT — ARE IN CONFLICT ABOUT WHAT JUDICIAL SYSTEM A PROPERTY OWNER MUST (OR EVEN MAY) USE TO PURSUE 5TH AMENDMENT TAKINGS CLAIMS.

If the author of Miami-Dade's Brief in Opposition truly believes that the Court's decisions in *Williamson County*, *San Remo Hotel*, and *City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997) present "neither conflict nor confusion" (Br. in Opp., p. 27) then he is one of a miniscule minority. Even commentators who believe that regulatory taking cases should be tried in state courts acknowledge the internal inconsistency

in this jurisprudence. (E.g., Thomas E. Roberts, *Ripeness and Forum Selection in Fifth Amendment Takings Litigation*, 11 J. Land Use & Envtl. L. 37, 71 ["misleading"; "a fraud and a hoax on landowners"] [1995].)

A recent illustration of the problems caused for lower courts and litigants appears in the opinion of an obviously frustrated trial court in *Del-Prairie Stock Farm, Inc. v. County of Walworth*, 572 F.Supp.2d 1031 (E.D. Wis. 2008). The procedural posture clearly shows the confused nature of the law. Suit was filed in state court, thus complying with *Williamson County*. The defendant then removed the case to federal court, as allowed by *City of Chicago*. That's when things really got strange. Having removed the case to federal court by claiming federal jurisdiction, the defendant then sought to have it dismissed on the ground that the federal court *lacked* jurisdiction because the case was not ripe for federal litigation under *Williamson County* because it had not been tried in state court — the very court from which the defendant had removed the case, thereby preventing its adjudication. That the law countenances such a farcical series of maneuvers should be an embarrassment to the

system. It surely highlights a problem that cries out for reasoned resolution.[1]

In its analysis, the *Del-Prairie* court concluded that *Williamson County* created a "true 'Catch 22' conundrum" for property owners because of its holding that regulatory taking cases must be ripened by trial in state court. The upshot of that is that once ripened, such a case (as shown below) is subject to arguments of claim or issue preclusion. (572 F.Supp.2d at 1033; quoting with approval.) The opinion also notes that "*Williamson County* and *City of Chicago* are in direct conflict." (*Id.*; quoting with approval.)

In sum, *Del Prairie* concludes:

> ". . . the *Williamson County* Court appears to have mischaracterized the state litigation requirement as a ripeness rule when, in actuality, it strips federal courts of jurisdiction over federal takings claims." (*Id.*)

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[1] *Del-Prairie* is not the only case in which governmental defendants have sought to twist *Williamson County* and removal jurisdiction in this bizarre fashion. (See e.g., *Sandy Creek Investors, Ltd. v. City of Jonestown*, 325 F.3d 623, 626 [5th Cir. 2003]; *Reahard v. Lee County*, 30 F.3d 1412, 1414, 1418 [11th Cir. 1994].)

Miami-Dade supports its argument with an assertion that "*Williamson County* was properly decided." (Br. in Opp., p. 28.) That section of the brief, however, merely reasserts the conclusions from *Williamson County*, ignores completely the overwhelming judgment of legal commentators, as well as the analysis of *Williamson County* in the Petition (see Pet., pp. 8-22), and ignores the critique in the four-Justice concurring opinion in *San Remo* which called attention to some of *Williamson County*'s doctrinal flaws and urged review by the Court when a direct challenge was made to *Williamson County* (a challenge missing from *San Remo*). Contrary to Miami-Dade's assertion (Br. in Opp., p. 28) arguments about the underlying validity of *Williamson County* were not even discussed, let alone decided, in *San Remo*. That issue had not been raised by either of the parties, but only by amici, and was not dealt with by the Court. Miami-Dade's discussion of *Williamson County* has already been responded to in the Petition.

Miami-Dade's discussion of *City of Chicago* (Br. in Opp., pp. 30-32) fails to deal with the nub of that case which, as *Del-Prairie* noted, is "in direct conflict" with *Williamson County*. The Court allowed removal in *City of Chicago* on the erroneous assumption that the property owner could have brought the case initially in federal court. (28 U.S.C. § 1441[a].) Plainly, it

could not. Nor, contrary to Miami-Dade's argument (Br. in Opp., p. 30-31), was the removal related solely to other federal claims in the state court complaint there. First, ripeness is determined by the complaint's allegations which, there as here, included a takings claim. (*City of Chicago*, 522 U.S. at 160.) Second, the same ripeness rules have been applied to due process and equal protection claims. (See Kathryn E. Kovacs, *Accepting the Relegation of Takings Claims to State Courts*, 26 Ecology L.Q. 1, 19 [1999] [collecting exemplars].)

San Remo all but acknowledged the need for a thoroughgoing *Williamson County* review. At oral argument, Justice O'Connor directly asked counsel for the property owner whether he had challenged *Williamson County*. When he said he had not, she responded "Maybe you should have." (Tr. [May 28, 2005].) What that comment foretold was the four-Justice concurring opinion that was eventually filed.[2]

The late Chief Justice's concurring opinion noted that "*Williamson County*'s state-litigation

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[2] The reason that Agripost's former counsel believed that "*San Remo* . . . is certain to have a significant impact on the instant case" (see Br. in Opp., pp. 10, 32) is that he (like most observers) believed that the Court would deal with the validity of *Williamson County*. As the Court knows, it did not.

rule has created some real anomalies . . . all but guarantee[ing] that claimants will be unable to utilize the federal courts to enforce the Fifth Amendment's just compensation guarantee." (*San Remo*, 545 U.S. at 351.) Acknowledging that other litigants are not subjected to such a rule, the concurring opinion questioned "why federal takings claims in particular should be singled out to be confined to state court . . . ." (*Id.*) The opinion concludes that "the justifications for [*Williamson County*'s] state litigation requirement are suspect, while its impact on takings plaintiffs is dramatic" and urges the Court to "reconsider whether plaintiffs asserting a Fifth Amendment takings claim based on the final decision of a state or local government entity must first seek compensation in state courts." (*Id.* at 352.)

Unlike the *San Remo* petitioners, Agripost has directly challenged *Williamson County* here. Miami-Dade's argument that Agripost waived the argument by not asking the lower courts to overrule *Williamson County* (Br. in Opp., p. 33) simply misunderstands the hierarchical nature of the system. *Williamson County* was a decision of this Court. No lower court had the jurisdiction to overrule it. (See *Kottschade v. City of Rochester*, 319 F.3d 1038, 1041 [8th Cir.], *cert. den.*, No. 02-1848 [2002] [continuing validity of *Williamson County* "is for the Supreme Court to say, not us."]; *Del-*

Prairie, 572 F.Supp.2d at 1034 [responding to commentators' suggestion that *Williamson County*'s state court litigation requirement be set aside: "As a district court judge, however, I am not authorized to do this."].)

It is time. As shown in the Petition, the scholarly community has harshly criticized *Williamson County*'s ripeness test, lower courts found the rule so unsatisfying that they sought ways around it, and the rule has clearly operated as a trap for property owners with takings claims. This is simply unworthy of any aspect of constitutional jurisprudence.

II.

THE 11TH CIRCUIT'S *FIELDS* RULE, IMPLEMENTING *WILLIAMSON COUNTY* BY REQUIRING STATE COURT LITIGATION OF STATE ISSUES BUT PROMISING EVENTUAL FEDERAL COURT LITIGATION, SHOULD ALLOW THIS CASE TO PROCEED FREE OF *WILLIAMSON COUNTY*.

Miami-Dade's lengthy presentation seeks to take advantage of "facts" supposedly "found" in earlier proceedings in state forums, although done without full trial and without discovery. That presentation has been strongly contradicted (R25-78; 25-813-881; R35-10-11)

and should not distract from the central legal issue here. A full trial, after complete discovery, would present a jury with a very different picture.[3]

Miami-Dade's ploy ignores both the error and unfairness in *Williamson County*, and the impact of the 11th Circuit's carefully conceived procedure for handling *Williamson County* cases. (See Pet. App., p. 10, describing this as the "settled law in this Circuit." The procedure was to have the federal case "ripened" in state court (which, after all, is all that *Williamson County* said it was doing [e.g., 473 U.S. at 185 ["claim is premature"]; *Id.* at 186 ["claim is not ripe"]; *Id.* at 194 ["not yet ripe"]; *Id.* at 197 ["claim is premature"].) During that ripening process, the landowner would file written notice

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[3] The "facts" were largely determined in the state administrative review proceedings, which were determined on a cold record, without testimony and without discovery. Those initial "factual" determinations then formed the basis for all subsequent judicial decisions. (See, e.g., Pet. App. p. 15, n. 7, showing that a purportedly "de novo" ruling was based on the administrative conclusion that Agripost had already been "determined to have violated" its permit. No trial in any of the subsequent proceedings ever looked beyond that initial administrative conclusion. That prevented any fair litigation of Agripost's taking claim.

with the state court that the federal claims were reserved for federal court litigation. (Which Agripost did here. [Pet. App., p. 66 — Florida Court of Appeal acknowledged the reservation had been made].)[4] If satisfactory relief did not result, then the landowner could return to federal court. The importance of a full federal trial of factual issues has been underscored by the Court. (*England v. Louisiana Medical Examiners*, 375 U.S. 411, 416-417 [1963] [quoted at Pet., p. 4, n. 1.)

It was only because of the 11th Circuit's system, with its promise of eventual federal trial, that Agripost complied and went to state court (rather than seeking appellate relief). Compliance with that Circuit determination should not undermine Agripost's position here.

Thus, if the Court determines in this case that *Williamson County* needs to be overruled so that property owners with 5th Amendment claims can be treated the same as other civil rights plaintiffs under 42 U.S.C. § 1983, such a new rule needs to be applied to wipe Agripost's slate clean. As the Court explained in *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 96, 97-98 (1993), a new rule of constitutional

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[4] Thus, notwithstanding what may have been inartful expression by counsel (Br. in Opp., pp. 8-9), the state courts understood the reservation. (See also R25-37.)

interpretation adopted by the Court "must be given full retroactive effect by all courts adjudicating federal law. . . . [and] its rule should apply retroactively to the litigants then before the Court."

At the same time that overruling of *Williamson County* merits full retroactivity, the same cannot be said of *San Remo* in light of the 11th Circuit's settled procedure. When *San Remo* applied the full faith and credit statute to a 9th Circuit case, it established no new law for that Circuit, as the 9th Circuit had already shown that it would apply claim preclusion in takings cases already tried in state courts. (*Dodd v. Hood River County*, 136 F.3d 1219 [9th Cir. 1998].) Here, however, *San Remo* ***does*** present new law for the 11th Circuit. As the court below acknowledged, it had repeatedly held that return to federal court for trial on the merits could legally be reserved. (Pet. App., p. 10.) The decision in *Harper* thus argues against applying *San Remo* to Agripost.

Agripost is a litigational victim of a system deliberately constructed by the 11th Circuit to deal with applications of this Court's *Williamson County* decision. These things seem clear: (1) *Williamson County* needs to be reviewed and (as to its state court litigation prong) disapproved; (2) because Agripost was following the direct orders of the 11th Circuit in

submitting to state court jurisdiction — but without submitting its federal claims there — it should not suffer the loss of the federal forum it legitimately chose to litigate its federal claims.

CONCLUSION

The Brief in Opposition demonstrates the central point of the Petition: the decision in *Williamson County* created a system that puts parties and courts to needless litigation. *San Remo* could not resolve the issue because the validity of *Williamson County* was not put in play by the parties. Its continuing vitality would have to await another day. That day is here.

To resolve the *Williamson County* conundrum once and for all, and to devise a fair resolution to the 11th Circuit's manner of dealing with *Williamson County*, Agripost prays that certiorari be granted.

Respectfully submitted,

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