No. _____

In the

Supreme Court of the United States

ARRIGONI ENTERPRISES, LLC,

Petitioner,

v.

TOWN OF DURHAM; DURHAM PLANNING AND ZONING COMMISSION; and DURHAM ZONING BOARD OF APPEALS,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

RICHARD D. CARELLA
Of Counsel
Updike Kelly & Spellacy P.C.
100 Pearl Street, 17th Floor
Hartford, Connecticut 06123
Telephone: (860) 548-2600
Facsimile: (860) 548-2680
E-mail: rcarella@uks.com

J. DAVID BREEMER
Counsel of Record
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: jdb@pacificlegal.org

Counsel for Petitioner

QUESTIONS PRESENTED

1. Whether the Court should reconsider, and then overrule or modify, the portion of *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194 (1985), barring property owners from filing a federal takings claim in federal court until they exhaust state court remedies, when this rule results in numerous jurisdictional "anomalies" and has a "dramatic" negative impact on takings law, *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323, 351-52 (2005) (Rehnquist, C.J., concurring)?

2. Alternatively, whether federal courts can and should waive *Williamson County*'s state litigation requirement for prudential reasons when a federal takings claim is factually concrete without state procedures, as some circuit courts hold, or apply the requirement as a rigid jurisdictional barrier, as other circuits hold?

CORPORATE DISCLOSURE STATEMENT

Arrigoni Enterprises, LLC, has no parent company, and no publicly held company owns 10% or more of the corporation's stock.

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PETITION FOR WRIT OF CERTIORARI

Arrigoni Enterprises, LLC, (Arrigoni) respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the Second Circuit Court of Appeals issued on October 19, 2015. It is available at *Arrigoni Enterprises, LLC v. Town of Durham*, --- F. App'x ---, 2015 WL 6118204 (2d Cir. 2015). The opinion is attached here as Appendix A.

The opinion of the district court on the issues presented by this Petition issued on March 27, 2009. It is published at *Arrigoni Enterprises, LLC v. Town of Durham*, 606 F. Supp. 2d 295 (D. Conn. 2009). The opinion is attached here as Appendix B.

The district court's opinion on Arrigoni's equal protection claim—which is not at issue here—is attached as Appendix C for factual background purposes.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1331, 42 U.S.C. § 1983, and the Fifth Amendment to the United States Constitution. The Petition was timely filed, and this Court has jurisdiction to review the case under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AT ISSUE

The Takings Clause of the Fifth Amendment to the United States Constitution provides: "[N]or shall private property be taken for public use without just compensation."

INTRODUCTION AND SUMMARY OF REASONS FOR GRANTING THE PETITION

In *Williamson County*, this Court created an unprecedented and regressive procedural hurdle for property owners seeking to vindicate their Fifth Amendment right to be free from an uncompensated taking of property. In dicta, the *Williamson County* Court declared that a landowner must unsuccessfully "seek compensation through the procedures the State has provided for doing so" before claiming the government has unconstitutionally taken private property. 473 U.S. 172, 194 (1985). This has been construed to mean that property owners must litigate in state court before any Fifth Amendment takings claim is "ripe" in federal court. *See San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323, 346-47 (2005).

The state litigation ripeness doctrine has caused more dysfunction, conflict, and injustice in the area of federal property rights litigation than any other jurisdictional concept articulated by this Court. Through its interaction with pre-existing jurisdictional rules, such as claim and issue preclusion and removal

jurisdiction, the state litigation ripeness rule typically functions to deprive property owners of *any* judicial hearing (state or federal) for a Fifth Amendment takings claim. *Rockstead v. City of Crystal Lake*, 486 F.3d 963, 968 (7th Cir. 2007); Michael M. Berger, *Supreme Bait & Switch: The Ripeness Ruse in Regulatory Takings*, 3 Wash. U. J.L. & Pol'y 99, 102 (2000) ("[T]he very act of ripening a case also ends it.").

To make matters worse, the state litigation rule—and the train of jurisdictional problems following from it—is doctrinally unnecessary. When the government makes a final decision denying property use and has no mechanism or intent to provide compensation, a constitutional takings claim is fit for federal review. *Horne v. Dep't of Agric.*, 133 S. Ct. 2053, 2062 n.6 (2013) ("A 'Case' or 'Controversy' exists once the government has taken private property without paying for it."). State court remedies are irrelevant. *Del-Prairie Stock Farm, Inc. v. County of Walworth*, 572 F. Supp. 2d 1031, 1033 (E.D. Wis. 2008) ("a concrete takings injury can occur without state litigation").

For all these reasons, courts and commentators[1] have leveled "substantial criticism" at *Williamson*'s state litigation rule. *See Asociacion De Subscripcion Conjunta Del Seguro De Responsabilidad Obligatorio v. Flores Galarza*, 484 F.3d 1, 17 (1st Cir. 2007). Indeed, a decade ago, four members of this Court concluded it should be reconsidered. *San Remo*, 545 U.S. at 352 (Rehnquist, C.J., concurring). The concurring *San Remo* Justices noted that "the affirmative case for the state-litigation requirement

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[1] *See* Michael M. Berger, *The Ripeness Game: Why Are We Still Forced to Play?*, 30 Touro L. Rev. 297, 298 (2014) ("the ripeness rule was nonsense when first articulated and it remains nonsense today" (footnote omitted)); Joshua D. Hawley, *The Beginning of the End?* Horne v. Department of Agriculture *and the Future of* Williamson County, 2013 Cato Sup. Ct. Rev. 245, 247 (*Williamson County* introduced "distortions and doctrinal anomalies up and down the length of takings law"); 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, 673 (2004); Scott A. Keller, *Judicial Jurisdiction Stripping Masquerading as Ripeness: Eliminating the* Williamson County *State Litigation Requirement for Regulatory Takings Claims*, 85 Tex. L. Rev. 199, 240 (2006) (The "Court has stated that the Takings Clause . . . should not be 'relegated' to a status below that of other provisions of the Bill of Rights. Yet, the *Williamson County* State Litigation prong does just that." (footnotes omitted)); Michael M. Berger, *Supreme Bait & Switch*, 3 Wash. U. J.L. & Pol'y at 103 ("One understandable reaction to the prong two requirement of [*Williamson County*] is that it perpetrates a fraud or hoax on landowners."); J. David Breemer, *You Can Check Out But You Can Never Leave: The Story of* San Remo Hotel—*The Supreme Court Relegates Federal Takings Claims to State Courts Under a Rule Intended to Ripen the Claims for Federal Review*, 33 B.C. Envtl. Aff. L. Rev. 247, 283-98 (2006); Gregory Overstreet, *Update on the Continuing and Dramatic Effect of the Ripeness Doctrine on Federal Land Use Litigation*, 20 Zoning & Plan. L. Rep. 25, 27 (1997).

has yet to be made," *id.* at 351, and they denounced the many jurisdictional injustices resulting from the interaction of the state litigation requirement and other jurisdictional doctrines, including its effect of eviscerating, rather than ripening, federal court takings review. *Id.*

The situation has not improved since *San Remo*. Following recent statements from this Court that *Williamson County* does not impose jurisdictional requirements, some federal circuit courts now treat the state litigation rule as a prudential concept that may be ignored. David L. Callies, *Through a Glass Clearly: Predicting the Future in Land Use Takings Law*, 54 Washburn L.J. 43, 98 (2014) (citing cases). Yet, others continue to enforce it as a rigid jurisdictional bar. *Id.*

The result is an chaotic system for adjudicating an important constitutional right. *Del-Prairie Stock Farm*, 572 F. Supp. 2d at 1032 (the state litigation doctrine "has led to a number of serious problems."). *Williamson* seems to demand that property owners sue in state court. Yet, if they do so, the government defendant can remove the case to federal court and get it dismissed there under *Williamson County* because the plaintiff did not complete state litigation. But even this is not entirely predictable; some courts may waive the state litigation rule in a removal case and adjudicate the merits. *See generally*, J. David Breemer, *The Rebirth of Federal Takings Review? The Courts' "Prudential" Answer to* Williamson County*'s Flawed State Litigation Ripeness Requirement*, 30 Touro L. Rev. 319, 332, 343 (2014).

There is no more certainty for state court takings cases that are not removed. *Williamson County* indicates that, once such state court litigation ends, the plaintiff can come to federal court with a federal takings claim. But that is not true; claim and issue preclusion barriers arising from the very state litigation that *Williamson County* says will ripen federal review will bar a post-state court takings claim in federal court. *San Remo*, 545 U.S. at 347.

It is no answer to file a takings claim directly in federal court (to bypass state court problems), because a straightforward application of *Williamson County* will almost surely bar that claim. Still, a few circuits may let the claim slip through the state litigation barrier for prudential reasons. *See, e.g.*, *Town of Nags Head v. Toloczko*, 728 F.3d 391, 399 (4th Cir. 2013) ("In the interests of fairness and judicial economy, we will not impose further rounds of litigation on the Toloczkos.").

There is no rhyme, reason or uniformity in the *Williamson County* state litigation ripeness doctrine. Moreover, the doctrine is wrong and conflicts with this Court's recent decisions. Michael W. McConnell, Horne *and the Normalization of Takings Litigation: A Response to Professor Echeverria*, 43 Envtl. L. Rep. News & Analysis 10749 (2013) (noting that given *Horne*'s statement on when a takings "case and controversy" exists, "*Williamson County* [the state litigation doctrine] cannot be correct, at least on its own terms"). For these reasons, the Court should overrule or modify the state litigation rule. *San Remo*, 545 U.S. at 351 (Rehnquist, C.J., concurring); *Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Prot.*, 560 U.S. 702, 742 (2010) (Kennedy, J.,

concurring) ("Until *Williamson County* is reconsidered . . . .).

This case provides an appropriate vehicle for doing so. The Town made final decisions denying the developmental use of Arrigoni's property, Appendix (App.) at B-6 ("it is undisputed that . . . finality has been satisfied"), and failed to provide any mechanism for just compensation. Arrigoni challenged the land use denials on non-federal takings grounds in state court, and after this state suit failed, filed a 42 U.S.C. § 1983 action in federal court. This suit asserted in part that the Town had unconstitutionally taken Arrigoni's property. Apparently applying *Williamson County* as a jurisdictional barrier, the district court dismissed the takings claim on the ground that Arrigoni had to seek compensation for the taking in state court to ripen its claim, but failed to do so. The Second Circuit upheld this dismissal of the takings claim under *Williamson County*, while obliquely adding that the "facts [do not] merit waiver of *Williamson*'s [state litigation] requirements." App. at A-3.

This case accordingly presents the court with a straightforward opportunity to reconsider whether takings claimants pressing otherwise final and ripe takings claims must exhaust state court remedies before going to federal court. Alternatively, the Court could and should clarify whether and when courts may waive *Williamson County*'s state litigation requirement, an issue on which the lower federal courts are in conflict and confusion. Unless this Court acts, federal courts will continue to issue conflicting and inconsistent rulings on *Williamson County*, property owners will have no idea where or how they can litigate a federal takings claim, and legitimate

claims will be lost in *Williamson*'s procedural black hole.[2]

STATEMENT OF THE CASE

A. The Property

Arrigoni Enterprises, LLC, is a small, family owned company organized under the laws of the State of Connecticut. App. at C-2. The company owns a 9.1 acre parcel of undeveloped land along Mountain Road in Durham, Connecticut. This land has been in the Arrigoni family since 1955. It is sloped, wooded, and consists largely of rock. *Id.* at B-1 - B-2. Because of its topography, the parcel cannot be developed without some excavation and rock crushing. Under the Town's code, the property is zoned within a Design Development District (DDD), a classification allowing certain light industrial uses with a special exception permit. *Id*. at B-2.

Arrigoni's parcel is surrounded by parcels that have been developed, many through excavation activity. App. at C-9. For example, across the street lies a parcel in the DDD zone that was developed for light industrial buildings with excavation and rock crushing. The property is also bordered by the Tilcon Quarry, an active quarry operation that excavates an average of a million cubic yards of rock per year. *Id*.

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[2] *See* Berger, *The Ripeness Game: Why Are We Still Forced to Play?*, 30 Touro L. Rev. at 317 ("Until the Supreme Court steps in, there will be no uniformity."); Callies, *supra,* at 103 ("clarification" on *Williamson County* "would be useful").

B. Arrigoni's Attempts to Obtain Development Approvals

1. The Town Denies a 2005 Rezoning Request

In 2005, Arrigoni began seeking approval to build three light industrial buildings on its own property. App. at B-2. It intended to use one of the buildings to house its own business, and to rent the other two buildings to compatible businesses. This plan was permissible under the DDD zoning, but required excavation and rock crushing (like any development of the land). Although Arrigoni had watched its neighbor crush rock in the DDD zone, it applied to move its property to an HID zone because rock processing is clearly allowed in that zone. The Town denied this request. *Id.*

2. The Town Requires, and Then Denies, Special Permits

Concluding it should have the same right to excavate in the DDD zone as its across-the-street neighbor, Arrigoni next applied to the Town Planning Commission for a special permit to construct the buildings on its property and to carry out necessary excavation. *Id.* As a part of that application, Arrigoni submitted a site development plan which complied with all relevant zoning requirements and which contemplated removal and processing of approximately 70,000 cubic yards of rock and gravel. App. at B-3.

The Commission subsequently ordered Arrigoni to apply for a second special permit (the Excavation Permit) to secure approval of the excavation, crushing, and removal associated with the site preparation. Although this was the first time the Town had ever

forced a development applicant to seek a separate excavation permit, Arrigoni complied. *Id.*

On December 21, 2005, the Town Commission denied both of Arrigoni's permits, concluding that the required rock crushing and processing was prohibited in the DDD zone. *Id.* In reaching this decision, the Commission did not explain how Arrigoni could make any economic use of its property when rock crushing and processing is required for development but the Town construes its code to prohibit it.

C. The State Court Suit and Subsequent Variance Denial

Arrigoni challenged denial of the development and excavation permits in the Connecticut Superior Court. *Id.* at B-3. It primarily alleged that the permit denials were illegal, arbitrary, and an abuse of discretion. But the complaint also alleged that the Town violated Arrigoni's federal and state constitutional rights to due process, equal protection, and just compensation. As a remedy for the alleged constitutional takings violation, Arrigoni sought declaratory relief and a declaration of just compensation.

On February 15, 2007, the state court upheld the permit denials as non-arbitrary. *Arrigoni Enterprises, LLC v. Durham Planning & Zoning Comm'n*, Nos. CV064004729, CV064004728, 2007 WL 706651 (Super. Ct. Conn. Feb. 15, 2007). The court never addressed Arrigoni's takings claims. Arrigoni sought certification of its case to the Connecticut Appellate Court, but was denied on May 23, 2007. App. at B-3 - B-4.

Arrigoni went back to the Town and applied for a variance from the regulatory ban on rock processing in the DDD zone. *Id.* at B-4. On August 9, 2007, the Board of Zoning Appeals denied the variance, in part on the ground that its regulations categorically barred rock crushing. *Id.*

D. The Federal Suit and Appeal

Having previously tried the state court system, Arrigoni filed a complaint against the Town in the Federal District Court. It alleged that the Town's permit denials violated Arrigoni's constitutional rights, as protected under 42 U.S.C. § 1983, including its federal right to just compensation for a taking.

The Town moved to dismiss Arrigoni's takings claim as unripe under *Williamson County*'s state litigation ripeness requirement. 473 U.S. at 173, 195. In a published opinion, the district court granted the motion. *See* App. B. The district court specifically held that it lacked jurisdiction over the takings claim because Arrigoni had not pursued monetary compensation in a state inverse condemnation action distinct from its unsuccessful state court administrative appeal. App. at B-9.[3]

Arrigoni appealed. In a summary order of October 18, 2015, the Second Circuit upheld the dismissal of the takings claim under *Williamson County* "for the reasons relied on by the District Court in its well-reasoned opinion." App. at A-3. Without

[3] In related proceedings, the district court also rejected Arrigoni's substantive due process claim and a void for vagueness due process claim. It submitted Arrigoni's equal protection claim to a jury, which found for the Town. None of these claims are at issue here.

elaboration, the Second Circuit noted that it was "not convinced that these facts merit waiver of *Williamson*'s requirements." *Id.* Arrigoni now petitions this Court for certiorari of the decision below.

REASONS FOR GRANTING THE PETITION

I

THIS CASE RAISES AN IMPORTANT ISSUE AS TO WHETHER THE COURT SHOULD RECONSIDER *WILLIAMSON COUNTY*'S UNWORKABLE DEMAND THAT PROPERTY OWNERS EXHAUST STATE COURT PROCEDURES TO RIPEN FEDERAL TAKINGS CLAIMS

A. The Origin and Logic of the State Litigation Requirement

In *Williamson County*, this Court considered whether a 42 U.S.C. § 1983 regulatory takings claim arising from the partial denial of a development plan was ripe for federal adjudication. The Court initially held the landowner's takings claim unripe because the local government had not reached a "final decision" on application of its regulations to the subject property.[4] 473 U.S. at 192-94.

Although the final decision ruling in *Williamson County* should have ended the case, the Court went on

[4] This ripeness requirement is not at issue here, as it was neither argued or addressed below, and it is clear the Town has made final decisions. App. at B-6 ("it is undisputed that the first prong of the *Williamson* test as to finality has been satisfied").

in "dicta"[5] to articulate a second ripeness hurdle to the plaintiff's takings claim. Specifically, the Court stated that a takings claimant must unsuccessfully "seek compensation through the procedures the State has provided for doing so" before resorting to federal court. *Id.* at 194. The *Williamson County* Court reasoned that, because the Fifth Amendment only prohibits takings occurring "without just compensation," no actionable violation of the Takings Clause can occur until a claimant is denied just compensation. *Id.* at 194-96. From there, the Court concluded that a property owner must seek and be denied compensation through state procedures before a federal takings claim ripens for federal review. *Id.* The Court ultimately observed that the takings claim in *Williamson County* was unripe in federal court under this rule because the plaintiff had not filed a state court action seeking compensation under Tennessee's inverse condemnation statute. *Id.*

This Court has since clarified that the state litigation rule does not apply in state court. *San Remo*, 545 U.S. at 346. A plaintiff can file a federal takings claim there without prior litigation. *Id.*

B. The State Litigation Rule Operates to Destroy, Not Ripen, Takings Cases

There is no doubt the state-court litigation requirement was conceived as a temporary hurdle to federal takings review. *Williamson County*, 473 U.S. at 185 (concluding a takings claim is "premature" before state litigation); *DLX, Inc. v. Kentucky*, 381 F.3d 511, 519-20 (6th Cir. 2004). If a landowner unsuccessfully seeks compensation under state law in

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[5] *Stop the Beach*, 560 U.S. at 742 (Kennedy, J., concurring).

state court, *Williamson County* declares, the owner has a right to a federal hearing on a federal takings claim. But the rule does not function that way in practice. *See San Remo*, 545 U.S. at 351 (Rehnquist, C.J., concurring in the judgment); Keller, *supra*, at 239. To the contrary, the requirement typically interacts with other jurisdictional doctrines—such as claim and issue preclusion and removal—to confuse, delay, and bar judicial review of otherwise ripe federal takings claims. *See Sansotta v. Town of Nags Head*, 724 F.3d 533, 544-45 (4th Cir. 2013); *DLX, Inc.*, 381 F.3d at 519-20. This justifies reconsideration of *Williamson County*.

1. *Williamson County* Defeats Federal Takings Review and Relegates Plaintiffs to State Courts

It is now widely recognized that the state litigation "ripeness" concept actually *removes* Fifth Amendment takings claims from judicial review, rather than maturing them for adjudication. *DLX*, 381 F.3d at 521 ("The barring of the federal courthouse door to takings litigants seems an unanticipated effect of *Williamson County*."). This result arises from *Williamson County*'s interaction with claim and issue preclusion barriers grounded in the federal full-faith-and-credit statute, 28 U.S.C. § 1738. *San Remo*, 545 U.S. at 346-47. That law "obliges federal courts to give the same preclusive effect to a state-court judgment as would the courts of the State rendering the judgment." *McDonald v. City of West Branch*, 466 U.S. 284, 287 (1984). This means federal courts cannot review claims or issues that were or could have been litigated in a prior state court action. *San Remo*, 545 U.S. at 336 & n.16.

The understanding that prior state litigation involving the same parties will trigger preclusion barriers at the federal level squarely conflicts with *Williamson County*'s declaration that federal courts are open to takings claims after the plaintiff fails in state court. As one district court explained,

> *Williamson* [*County*] 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 . . . 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); *see also*, *DLX, Inc.*, 381 F.3d at 519-20 ("The availability of federal courts to hear federal constitutional takings claims has often seemed illusory, because under *Williamson County* takings plaintiffs must first file in state court . . . before filing a federal claim, and because in deciding that federal claim, preclusive effect must be given to that prior state-court action under [Section 1738] according to the res judicata law of the state, including the doctrines of merger and bar whereby all claims

which could have been brought in an earlier cause of action are precluded." (footnote omitted)).[6]

Thus, in practice, *Williamson County*, does not "ripen" anything. Compliance with the state litigation requirement completely forecloses federal takings review. *See San Remo*, 545 U.S. at 346-47. Notably, a property owner cannot evade the preclusion barrier at the federal level by prosecuting state court litigation (for ripeness purposes) that does not include a federal takings claim because federal preclusion bars any takings claim that "could have" been brought in a prior [state] suit, as well as those actually litigated there. *DLX, Inc.*, 381 F.3d at 519-20.

The ultimate result of the interaction between *Williamson*'s state litigation rule and preclusion rules is that a property owner *must raise a federal takings claim in state court or not at all*. This outcome is contrary to the Congressional mandate of Section 1983 on federal court jurisdiction and a century of this Court's precedents. Long ago, this Court held that the right and duty of federal courts to protect constitutional property rights was so essential and immediate that federal review could not be barred or forestalled by the availability of a state court suit. *See Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 344-50 (1816) (defending primacy of federal review of constitutional issues to avoid state court bias and to ensure uniformity of constitutional decision-making); *Home Telephone & Telegraph Co. v.*

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[6] *126th Ave. Landfill, Inc. v. Pinellas Cnty.*, 459 F. App'x 896, 900 (11th Cir. 2012) (*Williamson County* "requires that state courts get the first shot, and the subsequent application of the Full Faith and Credit statute may mean that future plaintiffs are ultimately precluded from then proceeding to federal court.").

City of Los Angeles, 227 U.S. 278, 284-85 (1913) (rejecting a contention that the federal courts had no power to hear a due process property claim until state courts passed on the issue, because it 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 [Fourteenth] Amendment"). More recently, the Court has repeatedly confirmed the importance and availability of federal courts in constitutional disputes. *See Lynch v. Household Fin. Corp.,* 405 U.S. 538, 543 (1972) ("The Congress that enacted the predecessor of [Section] 1983 . . . seems clearly to have intended to provide a federal judicial forum for the redress of wrongful deprivations of property by persons acting under color of state law."*)*; *Mitchum v. Foster*, 407 U.S. 225, 242 (1972) ("The very purpose of [42 U.S.C.] § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law . . . .").

Williamson County's evisceration of federal review over federal takings claims radically alters the post-Civil War constitutional system. John F. Preis, *Alternative State Remedies in Constitutional Torts*, 40 Conn. L. Rev. 723, 726 (Feb. 2008) (*Williamson County* represents "a marked change from past practice"); *Hawley*, *supra*, at 247 ("*Williamson County* decisively broke with this understanding of the Takings Clause and converted the 'adequate compensation' inquiry—formerly about whether the government had acted lawfully or not—into a jurisdictional test. The effect was to introduce distortions and doctrinal anomalies up and down the length of takings law.").

It is true that the *San Remo* decision upheld the application of preclusion principles in *Williamson* cases, even though this results in a loss of federal jurisdiction over many takings claims. But *San Remo* did not make the federal takings jurisdictional problem arising from *Williamson County* disappear, nor did it provide any persuasive justification for withdrawing the Takings Clause from federal courts. *San Remo*, 545 U.S. at 351 (Rehnquist, C.J., concurring in the judgment). Certainly, there is no indication in *Williamson County* that the Court designed it to cede exclusive jurisdiction over federal takings claims to state courts. But that is what has happened under *Williamson County*'s state litigation rule.

2. The State Litigation Rule Inhibits State Court Takings Review

Although the *San Remo* Court was aware of *Williamson County*'s troubling redaction of federal taking jurisdiction, it declined to correct it at that time because (1) the *San Remo* Court was not presented with the question of correcting *Williamson County* and (2) some Justices believed that takings claimants could at least get a merits hearing in state courts. *San Remo Hotel, L.P.*, 545 U.S. at 347. The first point is clearly not a problem here. But more importantly for present purposes, the second premise regarding state court availability is simply wrong. *Williamson County's* state litigation doctrine badly distorts, and often thwarts, state court takings adjudication through its interaction with 28 U.S.C. § 1441, the federal removal statute.

The removal statute gives defendants the right to remove "federal question" cases, such as a Fifth Amendment takings case, from state to federal court

within thirty days of the filing of a state court complaint. *Sansotta*, 724 F.3d at 545. When this right of removal is asserted in a takings case filed in state court under *Williamson County / San Remo*, the takings plaintiff will lose the state court forum—the supposedly available forum—and will also often be barred in federal court after removal because state litigation remains incomplete.[7] *See, e.g.*, *Del-Prairie Stock Farm*, 572 F. Supp. 2d at 1034; *Seiler v. Charter Twp. of Northville,* 53 F. Supp. 2d 957, 962 (E.D. Mich. 1999); *8679 Trout, LLC v. N. Tahoe Pub. Utils. Dist.*, No. 2:10-cv-01569, 2010 WL 3521952, at *5-6 (E.D. Cal. Sept. 8, 2010) ("Although the claim was ripe when it was originally filed in state court, it became unripe the moment that Defendants removed it.").

The problem is that when a government defendant removes a takings case to federal court, a claim that was fully ripe in state court instantly becomes unripe due to *Williamson County*. *Id.*; *Doak Homes, Inc. v. City of Tukwila*, No. C07-1148MJP, 2008 WL 191205, at *4 (W.D. Wash. Jan. 18, 2008) ("Defendants' decision to remove this case from state court effectively denied [the plaintiff] an opportunity to utilize [the state's] procedure for reimbursement, and brought a takings claim to this [federal] Court that was not ripe for review."). Thus, government defendants can thwart the state court takings review that post-*San Remo* ripeness doctrine promises and ultimately, destroy a properly filed takings claim, by removing it to a federal

[7] Notably, property owners cannot avoid asserting a Fifth Amendment claim in state court if they want to raise one at all. If they file a state court case based only on state law to avoid removal, they will be forever barred from raising a Fifth Amendment takings claim in a separate proceeding by preclusion and merger of claims principles. *Rockstead*, 486 F.3d at 968.

forum where it is unripe under *Williamson County*'s state litigation requirement. Despite the irony and injustice of this system, federal courts often feel constrained to dismiss removed takings claims under *Williamson* precisely because removal rendered the state procedures inchoate. *See, e.g.*, *Koscielski v. City of Minneapolis,* 435 F.3d 898, 903 (8th Cir. 2006) (dismissing a removed takings claim for lack of finished state court procedures); *8679 Trout, LLC*, 2010 WL 3521952, at *5-6 (same); *CBS Outdoor, Inc. v. Village of Itasca*, No. 08 C 4616, 2009 WL 3187250 (N.D. Ill. Sept. 30, 2009) (same).[8]

Thus, property owners lack any reasonable access to the courts in a jurisdictional regime dominated by *Williamson County*. They cannot go directly to federal court, unlike other classes of constitutional plaintiffs, due to *Williamson County*'s state litigation rule. They cannot count on state court because of the potential for removal, and they cannot count on federal court review after removal due (again) to *Williamson County*. This

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[8] In some removed takings cases, federal courts will remand the claim to the state tribunal, rather than dismiss it. *See, e.g.*, *Del-Prairie Stock Farm*, 572 F. Supp. 2d at 1034; *Doney v. Pacific Cnty.*, No. C07-5123RJB, 2007 WL 1381515, at *4-6 (W.D. Wash. May 9, 2007). This result is hardly better than dismissal. The takings plaintiff did exactly what the *Williamson County* doctrine says he must do to litigate a takings claim: file it in state court. But instead of receiving a hearing, the plaintiff is whip-sawed from state to federal court and back again, with litigant and judicial resources wasted along the way, and the takings claim no closer to adjudication than when first filed. *Cf. Martin v. Franklin Capital Corp.*, 546 U.S. 132, 140 (2005) ("The process of removing a case to federal court and then having it remanded back to state court delays resolution of the case, imposes additional costs on both parties, and wastes judicial resources."); Breemer, *The Rebirth of Federal Takings Review?*, *supra*, at 333.

cannot be what the Court envisioned when it issued *Williamson County*. In fact, *Williamson County* affirmed that takings plaintiffs are entitled to a "'reasonable, certain and adequate provision for obtaining compensation.' " *Williamson County*, 473 U.S. at 194 (quoting *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 124-25 (1974)). This is exactly what *Williamson County*'s state litigation doctrine takes away.

This case provides one example of the hurdles takings plaintiffs face under *Williamson County*. Arrigoni filed a complaint against the Town in state court. The complaint included a state constitutional takings claim for declaratory relief (as allowed by state law),[9] App. at B-3, a claim which would have made a federal court takings suit unnecessary. When the state courts refused to address the state takings issue, Arrigoni turned to the federal courts, filing a federal takings claim there. But the Second Circuit held that Arrigoni's takings claim will not be ripe until it goes back to the state courts and files (and loses) a new state court inverse condemnation suit (assuming the statute of limitations allows it). Ten years after the Town decided to deny development of Arrigoni's land, Arrigoni is still seeking a hearing on the merits of its takings claim. And none of this is because its case is factually premature; the parties agree the City made final decisions and it has not offered compensation. App. at B-6 ("it is undisputed that the first prong of the *Williamson* test as to finality has been satisfied"). The federal court can decide if a taking occurred, but *Williamson*'s strange regime stands in the way.

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[9] *Rural Water Co., Inc. v. Zoning Bd. of Appeals*, 947 A.2d 944, 950-51 (Conn. 2008).

Williamson County's state litigation ripeness doctrine serves no purpose except to make it almost impossible for federal courts to apply the Takings Clause and for takings plaintiffs to vindicate their constitutional rights. Gideon Kanner, *"[Un]equal Justice Under Law": The Invidiously Disparate Treatment of American Property Owners in Taking Cases*, 40 Loy. L.A. L. Rev. 1065, 1077-78 (2007). Certainly, exhausting state remedies does nothing for takings ripeness when (as here), a property restriction allegedly causing a taking is final and the government agency responsible for the taking has no mechanism to provide compensation. *See* Henry Paul Monaghan, *State Law Wrongs, State Law Remedies, and the Fourteenth Amendment*, 86 Colum. L. Rev. 979, 989 (1986) ("No authority supports use of ripeness doctrine to bar federal judicial consideration of an otherwise sufficiently focused controversy simply because corrective state judicial process had not been invoked."). *Williamson County* forces takings claimants to ride the state litigation merry-go-round anyway, making a mockery of the concept of access to the courts. *Contra Sackett v. E.P.A*, 132 S. Ct. 1367, 1375 (2012) (Alito, J., concurring) (affirming right to judicially challenge concretely felt land use restrictions).

The Court should take this case to reconsider and then overrule the state litigation doctrine. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 63 (1996) (reconsideration justified "when governing decisions are unworkable"); Keller, *supra*, at 240 ("Chief Justice Rehnquist was correct—the *Williamson County* State Litigation prong should be reconsidered and eliminated").

II

THIS CASE PRESENTS THE IMPORTANT ISSUE OF WHETHER AND WHEN COURTS MAY WAIVE *WILLIAMSON COUNTY*'S STATE LITIGATION RULE FOR PRUDENTIAL REASONS, AN ISSUE ON WHICH FEDERAL COURTS ARE IN CONFLICT AND CONFUSION

Perhaps the most telling condemnation of *Williamson County*'s unworkable character comes from the lower courts' repeated and varied attempts to loosen the state litigation doctrine. Unfortunately, these attempts have done little to stabilize takings litigation.

Most recently, some courts have decided to treat *Williamson County*'s state litigation rule as a prudential concept that can be waived. But not all have adopted this approach. The lower courts are in conflict on whether the state litigation rule is a constitutionally-based bar to jurisdiction or a judicially created prudential rule, and, where *Williamson County* is prudential, on whether it can be waived.

A. Courts Are Split on Whether *Williamson*'s State Litigation Requirement Is a Strict, Jurisdictional Rule or a Flexible, Prudential Doctrine

Several of this Court's takings cases have stated, without elaboration, that *Williamson County* is not a jurisdictional doctrine. *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 734 (1997); *Stop the Beach Renourishment, Inc.*, 560 U.S. at 728-29. Most recently, the Court cryptically stated that *Williamson County*'s exhaustion of alternative remedies doctrine "is not, strictly speaking, jurisdictional." *Horne*, 133 S. Ct. at 2062. Lower courts have wrestled with these pronouncements and are now split on whether *Williamson County* imposed a jurisdictional or prudential requirements. Callies, *supra*, at 98. The question matters because, if the state litigation ripeness rule is prudential, courts may have the power to decline to apply the state litigation requirement.

1. The First, Eighth, and Eleventh Circuits Apply the State Litigation Rule as a Jurisdictional Barrier

Despite seemingly contrary statements from this Court, the First, Eighth and Eleventh Circuits continue to treat *Williamson County*'s state litigation rule as a jurisdictional rule, such that a plaintiff's failure to comply deprives federal courts of power over takings claims. *Marek v. Rhode Island*, 702 F.3d 650, 653-54 (1st Cir. 2012) ("It follows inexorably that the plaintiff would have had to pursue this procedure fully in a state court before a federal court could exercise jurisdiction over his takings claim."); *Downing/Salt*

Pond Partners, L.P. v. Rhode Island & Providence Plantations, 643 F.3d 16, 20 (1st Cir. 2011).

The Eighth Circuit specifically rejected the argument that *Williamson*'s state litigation rule is prudential, stating "we have held that *Williamson County* is jurisdictional." *Snaza v. City of Saint Paul*, 548 F.3d 1178, 1182 (8th Cir. 2008); *see also*, *Dahlen v. Shelter House*, 598 F.3d 1007, 1010 (8th Cir. 2010) ("Failure to satisfy this [state litigation] requirement alone means that their claim is not ripe and that federal courts lack jurisdiction to entertain their claim.").

The Eleventh Circuit is in accord with the First and Eighth. *Busse v. Lee County*, 317 F. App'x 968, 972 (11th Cir. 2009) ("because he has not alleged that he sought and was denied compensation through available state procedures . . . [w]e . . . conclude that the district court did not err in finding that it lacked subject matter jurisdiction over Busse's Takings Clause claim.").

2. The Fourth, Fifth, Sixth, and Ninth Circuits Consider the State Litigation Requirement to Be Prudential

The Fourth, Fifth, Sixth, and Ninth Circuits have rejected the jurisdictional understanding of *Williamson County*'s state litigation requirement, in conflict with the First, Eighth and Eleventh Circuits. These courts consider the requirement to be a prudential rule only.

The Fourth Circuit's decision in *Sansotta* provides a leading example. There, the Fourth Circuit held that "*Williamson County* is a prudential rather than a jurisdictional rule" and that federal courts "may

determine that in some instances, the rule should not apply and [they] still have the power to decide the case." *Sansotta*, 724 F.3d at 545; *see also*, *Toloczko*, 728 F.3d at 399 (following *Sansotta*).

The Fifth Circuit also treats *Williamson County* as a prudential doctrine. *Rosedale Missionary Baptist Church v. New Orleans City*, 641 F.3d 86, 88-89 (5th Cir. 2011). The Sixth and the Ninth Circuits are in agreement. *See Wilkins v. Daniels*,744 F.3d 409 (6th Cir. 2014); *Guggenheim v. City of Goleta*, 638 F.3d 1111, 1118 (9th Cir. 2010).

3. The Third, Seventh, and Tenth Circuits Appear to Recognize *Williamson County*'s Prudential Nature, but Nonetheless Apply the State Litigation Rule as a Jurisdictional Barrier

The law in the remaining circuits is unclear. The Third Circuit understands *Williamson County* to impose prudential *and* jurisdictional (constitutional) requirements. *County Concrete Corp. v. Township of Roxbury*, 442 F.3d 159, 164 (3d Cir. 2006) ("The ripeness doctrine serves 'to determine whether a party has brought an action prematurely and counsels abstention until such time as a dispute is sufficiently concrete to satisfy the constitutional and prudential requirements of the doctrine.'" (citation omitted)).

The Seventh Circuit's decisions vacillate between the prudential and jurisdictional view. *Compare Peters v. Village of Clifton*, 498 F.3d 727, 734 (7th Cir. 2007) (prudential view), *with Everson v. City of Weyauwega*, 573 F. App'x 599, 600 (7th Cir. 2014); *Hendrix v. Plambeck*, 420 F. App'x 589, 591-92 (7th Cir. 2011) (applying a strict, jurisdictional approach). The Tenth Circuit has charted a similarly inconsistent path. *Compare Alto Eldorado Partnership v. County of Santa Fe*, 634 F.3d 1170, 1179 (10th Cir. 2011) (prudential), *with Gose v. City of Douglas*, 561 F. App'x 723, 725 (10th Cir. 2014) (absence of state litigation is a "jurisdictional defect").

4. The Second Circuit's Decision Exacerbates the Confusion

The Second Circuit previously classified *Williamson County* as a jurisdictional rule, *Murphy v. New Milford Zoning Comm'n*, 402 F.3d 342, 347 (2d Cir. 2005) (Takings ripeness is a "jurisdictional inquiry"). But on at least one occasion, and without overruling prior decisions, it endorsed the prudential view. *Sherman v. Town of Chester*, 752 F.3d 554, 561 (2d Cir. 2014).

Here, the district court's opinion did not clarify whether *Williamson County*'s state litigation is an issue of subject matter jurisdiction or a prudential doctrine, though the order reads like a jurisdictional decision. The Second Circuit affirmed the district court's decision, but also indicated that it could waive *Williamson County* under certain facts. This position accords with a prudential understanding. *See Stop the Beach Renourishment, Inc.*, 560 U.S. at 728-29 (waiving improperly presented arguments under *Williamson* because they were "not jurisdictional"). In

thus applying *Williamson* mechanically, while seeming to recognize that the state litigation requirement could be waived under some undetermined set of circumstances, the decision below highlights the confusion among lower courts on whether *Williamson County*'s state litigation rule is "merely prudential, not jurisdictional." *Rosedale Missionary Baptist Church*, 641 F.3d at 88-89.

B. Courts Adopting the Prudential View Are in Conflict on Whether *Williamson County* Can be Waived

There is also conflict among the courts adopting the prudential understanding of *Williamson County* on whether (and when) federal courts may employ that understanding to ignore the state litigation requirement.

For example, the Seventh Circuit held that the "prudential character of the *Williamson County* requirements do *not* . . . give the lower federal courts license to disregard them." *Peters*, 498 F.3d at 734 (emphasis added). This directly conflicts with the decisions of the Fourth Circuit, which hold that courts may "determine that in some instances, the [state litigation] rule should not apply," *Sansotta*, 724 F.3d at 545.

The Ninth Circuit sides with the Fourth Circuit and against the Seventh on the waiver-of-state litigation issue. *MHC Fin. Ltd. P'ship v. City of San Rafael*, 714 F.3d 1118, 1130 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 900 (2014) ("'In this case, we assume without deciding that the claim is ripe, and exercise our discretion not to impose the prudential

requirement of exhaustion in state court.'" (quoting *Guggenheim*, 638 F.3d at 1118)).[10]

The enforcement of *Williamson County* in the lower courts is, in short, a mess. The state litigation doctrine has no clear boundaries and no certain outcome. No plaintiff can rationally map out a federal takings case. Whether one files in federal or state court, a takings claim may be quickly kicked out—either under *Williamson County* in the first case or removal, then *Williamson County*, in the second. Or none of this might happen, depending on whether the particular court views *Williamson County* as a discretionary, prudential rule. Since the courts are in conflict on both the prudential and waiver issue, no one can predict how it will go.

In this context, it is no surprise that landowners are increasingly foregoing their Takings Clause rights in favor of more justiciable (though less protective) due

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[10] There is also no consensus among the courts within the prudential group on what circumstances justify a waiver of *Williamson County*'s state court exhaustion doctrine. Some emphasize the need to avoid "piecemeal litigation." *Toloczko*, 728 F.3d at 393. Others rely on concerns over wasting litigation resources. *Guggenheim*, 638 F.3d at 1118 (declining to apply *Williamson*'s state litigation rule because "it would be a waste of the parties' and the courts' resources to bounce the case through more rounds of litigation"). Another group considers removal of a case from state court to warrant automatic waiver of *Williamson County*'s state exhaustion rule due to fairness or hardship concerns. *Sansotta*, 724 F.3d at 545-46; *Sherman*, 752 F.3d at 561; *Athanasiou v. Town of Westhampton*, 30 F. Supp. 3d 84, 89 (D. Mass. 2014).

process or equal protection claims.[11] It's just too hard, expensive, time consuming and unfruitful to file a takings claim in the *Williamson County* era. Thus, the state litigation doctrine is slowly swallowing the Takings Clause.

This case provides a cleanly postured opportunity to resolve the confusion on whether courts must apply *Williamson County* or whether they may waive it when faced with a clear controversy. Here, the Town finally denied Arrigoni's development applications, App. at B-6, and has neither paid nor offered compensation during the ten years of administrative and judicial process this case has consumed. Arrigoni's takings claim should be fit for review. *Horne*, 133 S. Ct. at 2062 n.6 ("A 'Case' or 'Controversy' exists once the government has taken private property without paying for it . . . whether an alternative remedy exists does not affect the jurisdiction of the federal court."). Requiring state litigation for ripeness is unnecessary and inefficient in this case, yet the court below demanded it.

If the Court is disinclined to overrule the *Williamson County* state litigation rule outright, the Court should take the case to clarify that courts may decline to apply *Williamson County*'s state litigation doctrine for prudential reasons (and that doing so is

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[11] *Dibbs v. Hillsborough County*, No. 15-10152, --- F. App'x ---, 2015 WL 5449225 (11th Cir. Sept. 17, 2015) (due process and equal protection claims against denial of development proposals); *Brandywine Estates LP v. Lucas County*, No. 3:15-cv-00884, 2015 WL 5255002 (N.D. Ohio Sept. 9, 2015) (landowner challenges a physical taking of land under the Due Process Clause); *Lewis v. Carrano*, 844 F. Supp. 2d 325 (E.D.N.Y. 2012) (delay in land use permitting challenged only under the Due Process Clause).

the most efficient and proper course) when a takings claim is otherwise fit for review. *Horne*, 133 S. Ct. at 2062.

CONCLUSION

The petition for writ of certiorari should be granted.

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Respectfully submitted,

RICHARD D. CARELLA
Of Counsel
Updike Kelly & Spellacy P.C.
100 Pearl Street, 17th Floor
Hartford, Connecticut 06123
Telephone: (860) 548-2600
Facsimile: (860) 548-2680
E-mail: rcarella@uks.com

J. DAVID BREEMER
Counsel of Record
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: jdb@pacificlegal.org

Counsel for Petitioner