No. 11-189

# *In the Supreme Court of the United States*

COLONY COVE PROPERTIES, LLC,
*Petitioner*,

*v.*

CITY OF CARSON, CA AND CITY OF CARSON MOBILE-HOME PARK RENTAL REVIEW BOARD,
*Respondents*.

**On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit**

**A MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* AND BRIEF OF *AMICI CURIAE* CATO INSTITUTE, NEW ENGLAND LEGAL FOUNDATION, NATIONAL FEDERATION OF INDEPENDENT BUSINESS, INSTITUTE FOR JUSTICE, GOLDWATER INSTITUTE, RICHARD EPSTEIN, AND JAMES ELY IN SUPPORT OF PETITIONER**

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## MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* SUPPORTING PETITIONER

Pursuant to Supreme Court Rule 37.2(b), the Cato Institute, New England Legal Foundation, National Federation of Independent Business, Institute for Justice, Goldwater Institute, and Professors James Ely and Richard Epstein respectfully move for leave to file the attached brief as *amici curiae* in support of Petitioner.

All parties were provided with 10-day notice of *amici*'s intent to file this brief as required under Rule 37.2(a). Counsel for the Petitioner consented to this filing. Counsel for Respondents, however, expressly withheld consent, stating in an email to *amici*'s counsel that respondents "will not consent to the filing of any amicus briefs."

The interest of the *amici* here arises from their respective missions to advance and support the rights that the Constitution guarantees to all citizens. *Amici* have participated in numerous cases of constitutional significance before this and other courts, and have worked in defense of the constitutionally guaranteed rights of independent businesses and individuals through their publications, lectures, court and public appearances, and other endeavors.

A summary of the background and activities of each individual *amicus* follows:

The Cato Institute was established in 1977 as a nonpartisan public-policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitu-

tional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, publishes the annual *Cato Supreme Court Review*, and files *amicus* briefs, including in various cases concerning property rights. This case is of central concern to Cato because it implicates the safeguards the Fifth and Fourteenth Amendments provide for the protection of property rights against uncompensated takings.

The New England Legal Foundation is a nonprofit, nonpartisan, public interest law firm, incorporated in Massachusetts in 1977 and headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others, located primarily in New England, who support NELF's mission of promoting balanced economic growth, protecting the free enterprise system, and defending economic rights. NELF regularly appears in state and federal courts, as party or counsel, in cases raising issues of general economic significance to the New England and national business communities, including *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011); *Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Prot.,* 130 S. Ct. 2592 (2010); *Watters v. Wachovia Bank, N.A.,* 550 U.S. 1 (2007); *Rapanos v. United States,* 547 U.S. 715 (2006), and others.

The National Federation of Independent Business Small Business Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The NFIB is the nation's leading small business association, representing over 300,000 members in Washington, D.C., and all 50 states. Founded in 1943 as a non-

profit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses. To fulfill its role as the voice for small business, the NFIB Legal Center frequently files *amicus* briefs in cases that will impact small businesses.

The Institute for Justice is a nonprofit, public interest law center committed to defending the essential foundations of a free society and securing the constitutional protections necessary to ensure individual liberty. A central pillar of IJ's mission is to protect property rights, both because an individual's control over his own property is a tenet of personal liberty and because property rights are inextricably linked to all other civil rights. IJ is the nation's leading legal advocate against the abuse of condemnation laws. It represents individuals in state and federal court and also files *amicus* briefs in significant cases. It frequently litigates against procedural barriers that block property owners from raising constitutional challenges to violations of property rights.

The Goldwater Institute is a tax exempt educational foundation that advances public policies that further the principles of limited government, economic freedom and individual responsibility. The integrated mission of the Scharf-Norton Center for Constitutional Litigation is to preserve individual liberty by enforcing the features of our state and federal constitutions that directly and structurally protect individual rights, including the Bill of Rights, the doctrine of separation of powers and federalism. The Goldwater Institute appeared before the U.S. Supreme Court in *McComish v. Bennett* (No. 10-239), and has filed *amicus curiae* briefings before the Court in *McDonald v. City of Chicago* (No. 08-1521) and

*Northwest Austin Municipal Utility District Number One v. Holder* (No. 08-322).

James W. Ely, Jr. is the Milton R. Underwood Professor of Law and Professor of History at Vanderbilt University specializing in property law and the constitutional rights of property owners. He has written extensively on constitutional law and the history of property rights in the United States.

Richard Epstein is the Laurence A. Tisch Professor of Law at New York University School of Law, the Peter and Kirsten Bedford Senior Fellow at the Hoover Institutions, and the James Parker Hall Distinguished Service Professor Emeritus and senior lecturer at the University of Chicago. He has written extensively on property rights and regulatory takings.

In this brief, *amici* discuss the manner in which this Court's holding in *Williamson County Reg'l Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), has been applied to deny some citizens, like the petitioner, any remedy for a government taking of their property. *Amici* then elaborate on how the courts below have transformed *Williamson* from a constitutional ripeness analysis to an unsubstantiated abstention doctrine squarely in conflict with the fundamental objective of 28 U.S.C. § 1983—namely, to ensure citizens a remedy in federal court when a state denies them their constitutional rights.

*Amici* have no direct interest, financial or otherwise, in the outcome of this case. Their sole interest in filing this brief is to ensure the availability of a remedy for Fifth Amendment takings.

For the foregoing reasons, *amici* respectfully request that they be allowed to participate in this case by filing the attached brief.

Respectfully submitted,

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## QUESTIONS PRESENTED

1. Should this Court overrule *Williamson County Reg'l Planning Comm. v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), which precludes numerous federal constitutional property rights claims from ever being raised in federal court?

2. Should property owners be entitled as of right to file federal constitutional takings claims in federal court in cases where state courts have proven systematically unavailing?

3. Does 42 U.S.C. § 1983 allow the filing of Takings Clause claims in federal court on the same basis as other federal constitutional rights claims?

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## INTEREST OF *AMICI CURIAE*[1]

The interest of *amici* arises from their respective missions to advance and support the constitutional rights guaranteed to all citizens. *Amici* have participated in numerous cases of constitutional significance before this and other courts, and have worked in defense of the constitutionally guaranteed rights of individuals and independent businesses through their publications, lectures, court and public appearances, and other endeavors. The background and activities of each individual *amicus* are more fully described in the Motion for Leave to File accompanying this brief.

## STATEMENT OF THE CASE

*Amici* incorporate by reference the description of facts outlined in the petition for writ of certiorari.

## REASONS FOR GRANTING THE WRIT

This case presents an opportunity to rectify a significant indefensible anomaly in this Court's jurisprudence: The blanket exclusion from federal court of numerous constitutional rights cases arising under the Takings Clause of the Fifth Amendment. Under this Court's decision in *Williamson County Regional*

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[1] Pursuant to this Court's Rule 37.2(a), a letter from Petitioner's counsel consenting to the filing of this brief has been submitted to the Clerk. Respondents' counsel withheld such consent, so *amici* submit, *supra*, a motion for leave to file this brief pursuant to Rule 37.2(b). Pursuant to Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

*Planning Commission v. Hamilton Bank of Johnson*, 473 U.S. 172 (1985), a property owner's claim that a state government has taken his property without paying "just compensation," as required by the Takings Clause, cannot be brought in federal court unless he has first obtained a "final decision" from the relevant state agency and sought "compensation through the procedures the State has provided for doing so." *Id.* at 186, 194. Once these state court proceedings have concluded, res judicata bars pursuit of that same claim in federal court. *See San Remo Hotel, L.P. v. City & Cnty. of San Francisco*, 545 U.S. 323, 346-7 (2005) (recognizing this point).

This lack of access to federal courts emboldens local governments to take aggressive, often unconstitutional regulatory action. They know that they can delay a federal court challenge by drawing out their arrival at a "final decision." Even after a "final decision" is made, in practice the sole challenges to state agency decisions must be brought in state courts, that will likely prove sympathetic to their fellow state officials. This regime effectively consigns Taking Clause claims to second-class status. No other individual constitutional rights claim is systematically excluded from federal court in the same way.

This double standard cannot be justified on the ground that Takings Clause claims are "premature" before state court proceedings have run their extensive course, as was claimed in *Williamson County*. 473 U.S. at 195-97. To the contrary, the *Williamson County* rule incentivizes state agencies to prolong the administrative process in order to prevent the landowner from making their federal challenge. Any other federal constitutional rights case initiated in federal

court is "premature" in exactly the same way, since there is always the chance that the plaintiff could have obtained redress in state court instead. Similarly, it is dangerously misguided to justify this systematic exclusion from federal court by looking to the supposedly superior expertise of state judges on land-use issues. *See San Remo,* 545 U.S. at 347. State judges could be said to have similar superior expertise on a variety of other issues that arise in constitutional litigation, including ones relevant to other rights protected by the Bill of Rights.

*Williamson County* is also an anomaly in the jurisprudence surrounding 42 U.S.C. § 1983, forbidding Takings Clause § 1983 claims in circumstances where claims asserting other constitutional rights are routinely permitted.

Recognizing the indefensible nature of these anomalies, four Justices have already called for the overruling of *Williamson County* "in an appropriate case." *San Remo*, 545 U.S. at 352 (Rehnquist, C.J., concurring). Today, that case has arrived.

Even if this Court chooses not to overrule *Williamson County,* it should at minimum allow plaintiffs to file Takings Clause cases in federal court whenever the state does not provide "reasonable, certain and adequate provision for obtaining compensation." *Williamson County*, 473 U.S. at 194. The present case offers a vivid example of such an extreme situation because California law does not allow inverse condemnation actions in cases challenging rent control ordinances.

## ARGUMENT

### I. CERTIORARI SHOULD BE GRANTED BECAUSE THE ISSUES PRESENTED ARE OF GREAT NATIONAL IMPORTANCE AND CAN ONLY BE RESOLVED BY THIS COURT.

Undoubtedly, the issues presented here, which necessitate this Court's review of the state-litigation requirement established for federal takings claims in *Williamson County*, are of great national importance. As the Court itself acknowledged in *San Remo Hotel,* 545 U.S. at 346-7, this part of *Williamson County*'s holding has had the effect—whether intended or not—of denying a federal forum to virtually all litigants seeking redress against state actors for an alleged taking in violation of the Fifth Amendment. Since only this Court has the power either to revise or overrule any portion of *Williamson County,* that alone is sufficient to justify granting certiorari.

The obstacles *Williamson County* imposes against property owners wishing to assert a federal takings claim against a state or local government entity are well-known. The requirement that property owners first get a "final decision" from the relevant state agency, *Williamson County*, 473 U.S. at 186, can lead to protracted delay. *See Resource Investments, Inc. v. U.S.*, 85 Fed. Cl. 447, 498 (Ct. Claims 2009) ("complicated permitting processes are rife with delays," citing cases, including *Williamson County*, showing that delays of sixteen months to eight years are not extraordinary). The rule forbidding property owners from filing claims in federal court until they have fully exhausted all possible state court remedies has the effect of making it impossible to ever file a federal claim. *San Remo*, 545 U.S. at 346-47.

Since *Williamson County* was decided, the state-litigation requirement has generated massive and recurrent legal confusion at both district and circuit court levels. Courts and commentators alike have virtually exhausted the resources of the English language in describing the difficulties *Williamson County* imposes on lower courts and its manifest unfairness to takings plaintiffs.[2] In *Williamson County,* the Court, reasoning that such a claim could not proceed in federal court until it was "ripe," established two conditions that had to be met before a federal court could hear the matter. First, "the government entity charged with implementing the regulations [had to have] reached a final decision regarding the application of the regulation to the property at issue." 473 U.S. at 186. Second, the claimant had to have sought "compensation through the procedures the State has provided for doing so." *Id.* at 194. Thus the Court decreed: "if a State provides an adequate procedure for seeking just compensation the property owner cannot claim a violation of the Just Compensation Clause until it has use that procedure and been denied just compensation." *Id.* at 195. The Court

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[2] *See* 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, 702-703 (2004) (collecting descriptions such as "unfortunate," "ill-considered," "unclear and inexact," "bewildering," "worse than mere chaos," "misleading," "deceptive," "source of intense confusion," "inherently nonsensical," "shocking," "absurd,"' "unjust," "self-stultifying," "pernicious," "revolutionary," "draconian," "riddled with obfuscation and inconsistency," containing an "Alice in Wonderland quality" and creating "a procedural morass," "labyrinth," "havoc," "mess," "trap," "quagmire," "Kafkaesque maze," "a fraud or hoax on landowners," "a weapon of mass obstruction," "a Catch-22 for takings plaintiffs").

also adopted an exhaustion requirement, whereby all state procedures had to be utilized before a case could be brought in federal court. *Id.* at 196. In so doing, it failed to recognize that its pronouncement provided recalcitrant state and local officials with a pre-approved roadmap to insulate their decisions from disinterested review.

By way of example, the property owner in *Williamson County* was instructed that it should have utilized the inverse condemnation procedure available under Tennessee law to ripen its takings claim. *Id.* This ignored the fact that inverse condemnation claims never succeed where direct challenges to the regulations have failed. In similar fashion, the *Williamson County* rule requires individual applicants to seek variances just after their zoning applications are denied, *see id.* at 191, even though the standards for obtaining variances are higher than those for the original zoning applications, and are never granted in absence of changed circumstances. *See*, *e.g.*, William Maker, Jr., *What Do Grapes And Federal Lawsuits Have In Common? Both Must Be Ripe*, 74 Alb. L. Rev. 819, 834 (2010-2011) ("Not only are the standards for a use variance different from the standards for site plan approval, they are much more stringent.").

But the worst irony of *Williamson County's* exhaustion requirement is that the plaintiff who satisfies it has, in effect, lost the right to proceed in federal court. This is because regulatory takings claims, once litigated in state court, cannot be re-litigated in federal court. Some supposed combination of general principles of res judicata, issue preclusion, the federal full faith and credit statute, 28 U.S.C. § 1738, or possibly the *Rooker-Feldman* doctrine, doom any effort to

obtain federal judicial review of a federal constitutional claim once it has been litigated in state court. *See San Remo*, 545 U.S. at 351 (Rehnquist, C.J., concurring).[3] Precisely this anomalous state of affairs led the late Chief Justice Rehnquist to urge this Court to re-examine *Williamson County's* state-litigation requirement. Joined by Justices O'Connor, Kennedy, and Thomas, the Chief Justice wrote:

> I joined the opinion of the Court in *Williamson County*. But further reflection and experience lead me to think that the justifications for its state-litigation requirement are suspect, while its impact on takings plaintiffs is dramatic. . . . I believe the Court should 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. *See also Kottschade v. City of Rochester*, 319 F.3d 1038, 1041 (8th Cir. 2003) (recognizing that the "requirement that all state remedies be exhausted, and the barriers to federal jurisdiction presented by res judicata and collateral estoppel that may follow from this requirement, may be anomalous" but "is for the Supreme Court to [resolve], not us"). *Colony Cove* is the appropriate case for that review.

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[3] Chief Justice Rehnquist also noted that this effect of *Williamson County* was not limited to making the federal court unavailable for a federal takings claim. He pointed out that some state courts have applied the state-litigation requirement to refuse to allow plaintiffs to litigate federal claims even in state court. *See San Remo,* 545 U.S. at 351, n. 2 (Rehnquist, C.J., concurring).

## II. THE EXCLUSION OF TAKINGS CASES FROM FEDERAL COURT IS AN INDEFENSIBLE CONSTITUTIONAL ANOMALY.

None of the proffered justifications for excluding takings cases, and only takings cases, from federal court withstand scrutiny. The anomaly created by *Williamson County* should be eliminated, so that Takings Clause rights can be enforced in federal court akin to other constitutional rights. Even if the Court does not overrule *Williamson County*, it should insist that federal courts hear takings claims for which suitable remedies are not available in state court.

### A. Federal Judicial Review of Constitutional Claims Is Vital to the Uniform Protection of Individual Rights.

In its landmark 1816 decision, *Martin v. Hunter's Lessee,* 14 U.S. (1 Wheat.) 304 (1816), this Court outlined two crucial reasons it is imperative that federal judicial review be made available for all constitutional claims: the need for uniformity, and the danger that state courts will fail to vindicate federal rights against their own state. Justice Joseph Story stressed "the importance, and even necessity of *uniformity* of decisions throughout the whole United States, upon all subjects within the purview of the constitution." *Id*. at 347-48 (Story, J.) (emphasis in original). If 50 different state judiciaries address takings claims with only the remote possibility of federal review, that uniformity is unlikely to arise:

> Judges of equal learning and integrity, in different states, might differently interpret a statute, or a treaty of the United States, or even the constitution itself: If there were no revising authority to control these jarring and

> discordant judgments, and harmonize them into uniformity, the laws, the treaties, and the constitution of the United States would be different in different states, and might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two states. The public mischiefs that would attend such a state of things would be truly deplorable.

*Id.* at 348.

Justice Story's concern has proved prescient in takings cases. States differ greatly in the extent of protection they provide for regulatory takings claims. *See, e.g.,* Kirk Emerson & Charles R. Wise, *Statutory Approaches to Regulatory Takings: State Property Rights Legislation Issues and Implications for Public Administration*, 57 PUB. ADMIN. REV. 411 (1997) (describing diverse state standards); Gerald Bowden & Lewis G. Feldman, *Take It or Leave It: Uncertain Regulatory Taking Standards and Remedies Threaten California's Open Space Planning*, 15 U.C.D. L. REV. 371, 376-87 (1981) (highlighting decreased predictability in regulatory takings law due to divergent decisions from federal and state courts).

While *Martin's* holding directly addressed the need for federal appellate review of state decisions on federal issues, the same concern necessitates an avenue for aggrieved parties to file federal constitutional claims at the trial level as well, where the only institutional alternative denies any federal review at all, except in the rare Supreme Court case.

Second, Justice Story emphasized that federal review is essential because state courts might be unduly partial to the interests of their own states:

> The constitution has presumed . . . that state attachments, state prejudices, state jealousies, and state interests, might some times obstruct, or control, or be supposed to obstruct or control, the regular administration of justice. Hence, in controversies between states; between citizens of different states; between citizens claiming grants under different states; between a state and its citizens, or foreigners, and between citizens and foreigners, it enables the parties, under the authority of congress, to have the controversies heard, tried, and determined before the national tribunals.

*Id.* at 346-47.

Such "state prejudices" and "state interests" are particularly likely to exert a pernicious effect when state courts are asked in regulatory takings cases to require state and local governments to pay compensation for violations of the Takings Clause. State judges, many of whom are elected, often have close connections to the political leaders who control state policy. *See* Ilya Somin, Stop the Beach Renourishment *and the Problem of Judicial Takings*, 6 DUKE J. CON. L. & PUB. POL'Y 91, 99-100 (2011). While conscientious judges will surely try to rule impartially, their political and institutional loyalties could easily influence their decisions, consciously or not. Moreover, state officials might deliberately seek judges more inclined to undercut federal claims that threaten state government interests. *Id.* at 99. Where such dangers are present, a federal forum is essential for ensuring the protection of constitutional rights.

### B. *Williamson County* Consigns Takings Clause Claims to Second-Class Status Relative to Other Constitutional Rights.

No other constitutional right receives the same shoddy treatment the Takings Clause sustained in *Williamson County*. Plaintiffs alleging state-government violations of virtually any other constitutional right can assert their claims in federal court without first seeking redress in state court. This is true of rights guaranteed in the First Amendment, Second Amendment, and throughout the Bill of Rights. *See, e.g., McDonald v. City of Chicago,* 130 S.Ct. 3020 (2010) (Second Amendment); *Thomas v. Chicago Park District*, 534 U.S. 316 (2002) (First Amendment); *Hudson v. McMillian*, 503 U.S. 1 (1992) (Eighth Amendment). This same rationale famously applies to rights protected under the Fourteenth Amendment, including unenumerated rights. *See, e.g., Brown v. Board of Educ.,* 347 U.S. 54 (1954); *Roe v. Wade*, 410 U.S. 113 (1973).

No other type of federal constitutional right is systematically barred from federal court, forcing litigants to file claims in the courts of the very state governments who may have violated their rights to begin with. The result is an indefensible double standard. As this Court has emphasized, there is "no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation." *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994).

### C. There Is No Justification for Barring Takings Clause Claims from Federal Court in Situations Where Other Constitutional Rights Claims Are Permitted.

The Court has suggested two justifications for its anomalous treatment of Takings Clause claims. The first is that a plaintiff's claim that his property has been taken without compensation is "premature" before he has exhausted state "procedures" for obtaining such compensation. *Williamson County*, 473 U.S. at 195-97; *cf. Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 736 n.7 (1997) (referring to this rule as a "prudential ripeness requirement"). The second is that state courts likely have greater familiarity with takings issues than federal courts do. *See San Remo,* 545 U.S. at 347 (claiming that "state courts undoubtedly have more experience than federal courts do in resolving the complex factual, technical, and legal questions related to zoning and land-use regulations.").

These rationales cannot withstand scrutiny. If applied to suits asserting violations of other rights, both would lead to the exclusion of numerous cases that are routinely heard by federal courts.

#### 1. Raising a Takings Clause claim for compensation in federal court is no more "premature" than federal consideration of other constitutional claims.

Under *Williamson County,* a federal claim that a state government has taken property without compensation in violation of the Takings Clause is "premature" until the owner has tried to obtain compensation "through the procedures the state has provided for doing so," including litigation in state court. *Wil-*

*liamson County*, 473 U.S. at 194. This reasoning is flawed because it can be used to justify denial of a federal venue for any other constitutional rights claim—in all such cases, potential federal plaintiffs could be required to seek relief in state court instead.

For example, under *Williamson County*'s reasoning, a claim that a state statute that infringed on a plaintiff's First Amendment right to free speech could be "premature" until she has asked a state court to invalidate the state statute or executive action that gave rise to the free speech violation. Yet no one suggests that such claims must reach a "final decision" in state court before any federal court can step in. Even if a state court claim might potentially remedy the violation of federal rights, a violation giving rise to a federal cause of action has still occurred. Similarly, the possibility that a state court might remedy a Takings Clause violation by providing compensation does not negate the brute fact of the violation.

**2. State courts have no greater expertise with Takings Clause issues than on many other constitutional rights claims.**

The "expertise" rationale for *Williamson County*'s rule fares no better. It may be true that state judges know more than federal judges about "complex factual, technical, and legal questions related to zoning and land-use regulations." But the same can be said of issues that arise in many cases involving other constitutional rights. *See* Ilya Somin, *Federalism and Property Rights*, 2011 U. Chi. Legal Forum 1, 28-31 (giving numerous examples). This possibility has never been sufficient grounds for denying a plaintiff access to federal review.

For example, some Establishment Clause claims require a determination of whether a "reasonable observer . . . aware of the history and context of the community and forum in which [the conduct occurred]" would view the practice as communicating a message of government endorsement or disapproval of religion. *Capitol Square v. Pinette*, 515 U.S. 753, 777 (1995) (O'Connor, J., concurring). State judges likely have a more detailed knowledge of their community's perceptions than federal judges. Yet these supposed facts, whether true or false, do not prevent aggrieved parties from bringing Establishment Clause claims in federal court.

Similarly, this Court has ruled that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). Whether any given speech is likely to incite "imminent lawless action" may well depend on variations in local conditions. Although state judges may be best informed about such conditions, free speech claims are not thereby consigned to state courts.

As Chief Justice Rehnquist noted in *San Remo,* "the Court has not explained why we should hand authority over federal takings claims to state courts, based simply on their relative familiarity with local land-use decisions and proceedings, while allowing plaintiffs to proceed directly to federal court in cases involving, for example, challenges to municipal land-use regulations based on the First Amendment or the

Equal Protection Clause." 545 U.S. at 350-51 (Rehnquist, C.J., concurring).

Moreover, there is no reason to assume that state judges necessarily have greater knowledge of Takings Clause and other property rights issues than federal judges. They may have greater knowledge of local conditions and regulations, but the latter may have greater knowledge of relevant federal jurisprudence. Somin, Stop the Beach Renourishment at 102-03.

## III. EVEN IF THIS COURT DECLINES TO OVERRULE *WILLIAMSON COUNTY*, IT SHOULD STILL ALLOW FEDERAL COURT FILINGS IN CASES WHERE STATE COURT PROCEEDINGS ARE FUTILE

Even if the Court does not overrule *Williamson County,* it should allow federal adjudication of cases where state proceedings would be futile because there is no available state remedy. *Williamson County* applies only in situations where the state has established a "reasonable, certain and adequate provision for obtaining compensation." 473 U.S. at 194. The procedures available to these plaintiffs fall far short of that standard when the state, in cases like the present one, does not allow inverse condemnation actions intended to obtain compensation. *See Kavanau v. Santa Monica Rent Control Bd.*, 941 P.2d 851 (Cal. 1997) (holding that there is no inverse condemnation action under California law in cases challenging rent-control ordinances). A federal claim cannot possibly be dismissed as "premature" if there is no chance whatsoever of success in state court.

There is also a fundamental injustice in tolerating the violation of a constitutional right that does not elicit any remedy in either a state or federal proceed-

ing. It goes against the bedrock principle "that every right, when withheld, must have a remedy, and every injury its proper redress.'" *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (quotation omitted). "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." *Id.*

## IV. THE NINTH CIRCUIT'S DECISION HIGHLIGHTS THE CONFLICT BETWEEN *WILLIAMSON COUNTY* AND 42 U.S.C. § 1983

*Williamson County* contravenes the fundamental policy objectives of 42 U.S.C. § 1983, a statute enacted as part of the Civil Rights Act of 1871. As the Supreme Court has long recognized, Section 1983

> interpose[s] the federal courts between the States and the people, as guardians of the people's federal rights, 'whether that action be executive, legislative, or judicial' [and] open[s] the federal courts to private citizens, offering a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and the laws of the Nation.

*Mitchum v. Foster*, 407 U.S. 225, 238-39, 242 (1972). In other words, the statute's purpose is to protect federal constitutional and statutory rights against infringement by state and local governments. Moreover, Section 1983's plain language and legislative history make clear that *federal* courts must make civil remedies available to plaintiffs who are deprived of their federal rights "under color of" state law. 42 U.S.C. § 1983; *see also* 28 U.S.C. § 1331 ("The district

courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."). Accordingly, *Williamson County*'s requirement that *federal* takings claims—claims that Fifth Amendment rights have been violated—be relegated to *state* courts cannot be reconciled with the plain language and well-understood purpose of Section 1983.

First, the plain language of Section 1983 broadly encompasses all federal rights:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of *any rights, privileges, or immunities secured by the Constitution and laws*, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

(Emphasis added.) Thus, the statute provides no basis to cordon off property rights, including those under the Takings Clause, from all other constitutional rights for which an aggrieved plaintiff has an immediate right to sue in federal court.

Second, as the Supreme Court has acknowledged, Section 1983's legislative history shows that the statute was intended to create a federal cause of action for "every person" whose constitutional rights were violated by state or local governments—and to vest in the federal courts original jurisdiction over those claims. *See, e.g.*, *Patsy v. Bd. of Regents*, 457 U.S. 496, 504 (1982) (stating that Congress intended Section 1983 to "throw open the doors of the United

States courts" to individuals who were threatened with, or who had suffered, the deprivation of constitutional rights and to provide individuals who had been deprived of their federal rights with "*immediate access to the federal courts notwithstanding any state law to the contrary*") (emphasis added).

The impetus for the legislation was a message President Grant sent to Congress on March 23, 1871:

> A condition of affairs now exists in some States of the Union rendering life *and property* insecure. . . . The proof that such a condition of affairs exists in some localities is now before the Senate. . . . I urgently recommend such legislation as in the judgment of Congress shall effectually secure life, liberty, *and property*, and the enforcement of law in all parts of the United States.

*Monroe v. Pape*, 365 U.S. 167, 180 (1961) (emphasis added), *overruled on other grounds by Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978).

*Patsy* and *Monroe* also refer to statements several members of Congress made when the Act was under consideration. Without exception, they underscore Congress' intent to provide a federal court remedy for state and local government violations of constitutional rights, including property rights. Two members of Congress spoke specifically about the importance of providing direct access to federal courts:

> Senator Edmunds, who introduced the bill in the Senate, stated in his closing remarks that . . . the Supreme Court decided . . . that it was the solemn duty of Congress under the Constitution to secure to the individual, in spite of

> the State, or with its aid, as the case may be, precisely the rights that the Constitution gave him, and that *there should be no intermediate authority to arrest or oppose the direct performance of this duty by Congress*.

*Patsy*, 457 U.S. at 504 (emphasis added). Rep. Elliott stated that the critical issue was whether "the Government of the United States [has] the right, under the Constitution, to protect a citizen in the exercise of his vested rights as an American citizen by . . . *the assertion of immediate jurisdiction through its courts*, without the appeal or agency of the State in which the citizen is domiciled." *Id.* (emphasis added). *Patsy* also notes that "a major factor motivating the expansion of federal jurisdiction through [Section 1983] was the belief of the 1871 Congress that the state authorities had been unable or unwilling to protect the constitutional rights of individuals or to punish those who violated those rights." *Id.* at 505.

Other members expressed Congress' dominant concern: that states were unable to protect the people's constitutional rights. As Senator Osborn put it,

> That the State courts in the several States have been unable to enforce the criminal laws of their respective States or to suppress the disorders existing, and in fact that the preservation of life *and property* in many sections of the country is beyond the power of the State government, is a sufficient reason why Congress should . . . enact the laws necessary for the protection of citizens of the United States.

*Monroe*, 365 U.S. at 176 (emphasis added). Senator Kerr added that "[t]his section gives to any person who may have been injured in any of his rights, privi-

leges, or immunities of person *or property*, a civil action for damages against the wrongdoer in the Federal courts." *Id.* at 178-79 (emphasis added). And Representative Lowe said,

> records of the (state) tribunals are searched in vain for evidence of effective redress (of federally secured rights) . . . . What less than this (the Civil Rights Act of 1871) will afford an adequate remedy? The Federal Government cannot serve a writ of mandamus upon State Executives or upon State courts to compel them to protect the rights, privileges and immunities of citizens . . . . The case has arisen . . . when the Federal Government must resort to its own agencies to carry its own authority into execution.

*Mitchum*, 407 U.S. at 240. Rep. Beatty of Ohio said,

> certain States have denied to persons within their jurisdiction the equal protection of the laws. . . . . [M]en were murdered, houses were burned, women were outraged, men were scourged, and officers of the law shot down; and the State made no successful effort to bring the guilty to punishment or afford protection or redress to the outraged and innocent. The State, from lack of power or inclination, practically denied the equal protection of the law to these persons.

*Patsy*, 457 U.S. at 505. *Patsy* also noted that juries complicated issues in state courts: "Of primary importance to the exhaustion question was the mistrust that the 1871 Congress held for the factfinding processes of state institutions." *Id.* at 506. It quoted the testimony of Justice Thomas Settle of the North

Carolina Supreme Court, before the House Judiciary Committee ("The defect lies not so much with the courts as with the juries"); and noted that "[t]his Congress believed that federal courts would be less susceptible to local prejudice and to the existing defects in the factfinding processes of the state courts." *Id.* The House Judiciary Committee also investigated and made findings regarding the inability of state authorities to protect constitutional rights. *Id.* at 505.

Based on the foregoing, "[i]t [was] clear from the floor debates surrounding the Act that Congress not only intended to create a federal forum for such actions, but that both the supporters and the opponents of the amendment *expected* the federal courts to be the *primary* forum in which the newly created cause of action would be litigated." Bryce M. Baird, *Federal Court Abstention in Civil Rights Cases: Chief Justice Rehnquist and the New Doctrine of Civil Rights Abstention*, 42 BUFFALO L. REV. 501, 506-07, 510 (1994) ("Congress intended, and fully expected, that the federal courts would be the primary guarantors of federal rights"). And the Supreme Court ultimately concluded,

> The Civil Rights Act of 1871 . . . [was a] crucial ingredient[ ] in the basic alteration of our federal system . . . . During that time, the Federal Government was clearly established as a guarantor of the basic federal rights of individuals against incursions by state power. [I]n passing [Section 1983], Congress assigned to the federal courts a paramount role in protecting constitutional rights.

*Patsy*, 457 U.S. at 503.

Despite Section 1983's plain language and evident purpose to protect constitutional rights by providing immediate access to federal courts for plaintiffs whose federal rights have been violated, these plaintiffs have been shut out because *Williamson County* eviscerated Section 1983 and read *Patsy* so narrowly as to eliminate it from the law. *Williamson County*, 473 U.S. at 192 (drawing a distinction between exhaustion and finality to avoid applying *Patsy*). Cases like *Colony Cove* cry out for an appropriate federal remedy to the deficiencies of state law. The *Colony Cove* plaintiffs cannot obtain an appropriate remedy in California state court. Under its Byzantine procedures, California refuses to recognize or allow any remedy offering just compensation for the takings it has perpetrated against the plaintiffs. It adds to that basic denial the procedural indignity of forcing plaintiffs to seek redress from the same officials whom they charged with violating their rights. *See, e.g.*, *Carson Harbor Village Ltd. v. City of Carson*, 353 F.3d 824, 827 (9th Cir. 2004).

California's institutional arrangements are an affront to Section 1983's core premise: to protect plaintiffs from having to appeal to the same state officials whose decisions caused their original injury. *See Monroe*, 365 U.S. at 180. Congress was "*abundantly clear* that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies." *Id.* (emphasis added). This federal court remedy was crafted as a substitute for state remedies, irrespective

of their availability. *Allen v. McCurry*, 449 U.S. 90, 110 (1980) ("Congress passed [Section 1983] in order to substitute a federal forum for the ineffective, although plainly available, state remedies"); *Galland v. City of Clovis*, 16 P.3d 130, 161 (Cal. 2001) (Brown, J., dissenting) ("The thrust of [the Court's] decisions is that, far from relegating plaintiffs to the same corrupt system that inflicted their injury, section 1983 exists to give plaintiffs an adjudicative alternative that will ensure protection of their rights"); *Felder v. Casey*, 487 U.S. 131, 147 (1988) ("there is simply no reason to suppose that Congress . . . contemplated that those who sought to vindicate their federal rights . . . could be required to seek redress in the first instance from the very state officials whose hostility to those rights precipitated their injuries").

*Williamson County* cannot be reconciled with the plain language or legislative history of Section 1983. It also stands in stark contrast to the Court's decisions regarding civil rights other than property rights.[4] We respectfully ask the Court to take this opportunity to bring consistency to its Section 1983 jurisprudence by overturning *Williamson County*.

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[4]*See, e.g., Camreta v. Greene*, 131 S. Ct. 2020 (2011) (§ 1983 allows plaintiffs to seek money damages from government officials who violated their constitutional or statutory rights); *Skinner v. Switzer*, 131 S. Ct. 1289 (2011) (post-conviction claim for DNA testing may be properly pursued in § 1983 action); *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246 (2009) (§ 1983 equal protection claims may be brought in federal court against individuals as well as state entities); *Wilkinson v. Dotson*, 544 U.S. 74 (2006) (allowing § 1983 challenges to conditions of confinement under Eighth Amendment without exhausting state remedies).

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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