

No. 04-340

In The

Supreme Court of the United States

October Term, 2004

SAN REMO HOTEL L.P., THOMAS FIELD,
ROBERT FIELD, AND T&R INVESTMENT CORP.,

Petitioners,

v.

CITY AND COUNTY OF SAN FRANCISCO, DEPARTMENT
OF CITY PLANNING, CITY PLANNING COMMISSION,
BOARD OF PERMIT APPEALS, BOARD OF SUPERVISORS
OF THE CITY AND COUNTY OF SAN FRANCISCO,

Respondents.

On Writ Of Certiorari

To The United States Court Of Appeals For The Ninth Circuit

**BRIEF OF AMICUS CURIAE
NATIONAL ASSOCIATION OF HOME BUILDERS
IN SUPPORT OF THE PETITIONERS**

MARY V. DICRESCENZO
DUANE J. DESIDERIO
THOMAS J. WARD
THE NATIONAL ASSOCIATION
OF HOME BUILDERS
1201 15th Street, N.W.
Washington, D.C. 20005
(202) 266-8200

KENNETH B. BLEY
(Counsel of Record)
COX, CASTLE & NICHOLSON, LLP
2049 Century Park East, 28th Fl.
Los Angeles, CA 90067
(310) 284-2231

Attorneys for The National Association of Home Builders

TABLE OF CONTENTS

	Page (s)
SUMMARY OF THE ARGUMENT	2
ARGUMENT.....	3
I. COLLATERAL ESTOPPEL (ISSUE PRECLUSION) SHOULD NOT BAR FEDERAL COURT ADJUDICATION OF A FIFTH AND FOURTEENTH AMENDMENT TAKINGS CLAIM	3
II. THE PROCEDURE SET FORTH IN <i>WILLIAMSON COUNTY</i> , WHICH REQUIRES A TAKINGS CLAIMANT TO FIRST SEEK JUST COMPENSATION IN STATE COURT IN ORDER TO RIPEN A FEDERAL ACTION, SHOULD BE ELIMINATED	7
A. Landowners Bear a Staggering Burden by Being Forced to Litigate Their Takings Cases in State Court First	8
B. <i>Williamson County</i> 's State Court Element has been Resoundingly Criticized by Congress, the Courts, Academics, and Even Planners	9
C. Nothing in the Constitution <i>Requires</i> that State Court Litigation Precede Federal Adjudication on the Merits of a Takings Claim.....	13
III. CONCLUSION	16

TABLE OF AUTHORITIES

<u>Cases</u>	Page (s)
<i>Armstrong v. United States</i> , 364 U.S. 40 (1960).....	6
<i>Ashcroft v. ACLU</i> , 535 U.S. 564 (2002), <i>aff'd and remanded by</i> 124 S.Ct. 2783 (2004).....	16
<i>Balbierer v. Austin</i> , 790 F.2d 1524 (11th Cir. 1986).....	6
<i>Bender v. Williamsport Area Sch. Dist.</i> , 475 U.S. 534 (1986).....	3
<i>City of Monterey v. Del Monte Dunes at Monterey, Ltd.</i> , 526 U.S. 687 (1999).....	4
<i>City of Chicago v. Int'l Coll. of Surgeons</i> , 522 U.S. 156 (1997).....	12, 15
<i>Cumberland Farms, Inc. v. Town of Groton</i> , 808 A.2d 1107 (Conn. 2002).....	5
<i>DLX, Inc. v Commonwealth of Kentucky</i> , 381 F.3d 511 (6th Cir. 2004).....	4
<i>England v. La. State Bd. of Med. Exam'rs</i> , 375 U.S. 411 (1964).....	3, 8
<i>First English Evangelical Lutheran Church v. County of L.A.</i> , 482 U.S. 302 (1987).....	11-12
<i>Hensler v. City of Glendale</i> , 876 P.2d 1043 (Cal. 1994), <i>cert. denied</i> , 513 U.S. 1184 (1995).....	4

TABLE OF AUTHORITIES (cont.)

<u>Cases</u>	Page (s)
<i>Kenmen Eng’g v. City of Union</i> , 314 F.3d 468 (10th Cir. 2002).....	6
<i>Kottschade v. City of Rochester</i> , 319 F.3d 1038 (8 th Cir.), <i>cert. denied</i> , 124 S.Ct. 178 (2003).....	13
<i>Keystone Bituminous Coal Ass’n v. DeBenedictis</i> , 480 U.S. 470 (1987).....	15
<i>Lucas v. S.C. Coastal Council</i> , 505 U.S. 1003 (1992).....	8
<i>Miller v. California</i> , 413 U.S. 15 (1973).....	16
<i>Monell v. Dep’t of Soc. Servs.</i> , 436 U.S. 658 (1978).....	15
<i>Mount San Jacinto Cmty. Coll. Dist. v. Superior Court</i> , 11 Cal.Rptr.3d 465 (Cal. App. 2004).....	5
<i>Owen v. City of Independence</i> , 445 U.S. 622 (1980).....	15
<i>Palazzolo v. Rhode Island</i> , 533 U.S. 606 (2001)	3
<i>Penn Central Transp. Co. v. New York City</i> , 438 U.S. 104 (1978).....	3, 14
<i>Rekhi v. Wildwood Indus., Inc.</i> , 61 F.3d 1313 (7th Cir 1995).....	6
<i>San Remo Hotel, L.P. v. San Francisco City & County</i> , 364 F.3d 1088 (2004).....	<i>passim</i>

TABLE OF AUTHORITIES (cont.)

<u>Cases</u>	Page (s)
<i>Santini v. Conn. Hazardous Waste Mgmt. Serv.</i> , 342 F.3d 118 (2d Cir. 2003), <i>cert. denied</i> , 125 S.Ct.104 (2004).....	5-6
<i>Suitum v. Tahoe Reg'l Planning Agency</i> , 520 U.S. 725 (1997).....	8
<i>Tahoe-Sierra Pres. Council, Inc. v.</i> <i>Tahoe Reg'l Planning Agency</i> , 535 U.S. 302 (2002).....	3, 6, 15
<i>Townsend v. Sain</i> , 372 U.S. 293.....	3
<i>Williamson County Reg'l Planning Comm'n v. Hamilton</i> <i>Bank</i> , 473 U.S. 172 (1985).....	<i>passim</i>
<i>Yee v. City of Escondido</i> , 503 U.S. 519 (1992).....	15
Statutes and Bills	
28 U.S.C. § 1441(a).....	12
Private Property Rights Implementation Act, H.R. 1534, § 2(e)(3) (1997).....	10
Private Property Rights Implementation Act, H.R. 2372, §2(e)(4) (2000).....	10

TABLE OF AUTHORITIES (cont.)

Page (s)

Other

13A Wright, Miller & Cooper, <i>Federal Practice and Procedure</i> , § 3532.1, <i>Ripeness, Sources of Doctrine</i> , 123 (2d ed. 1984).....	5
American Planning Ass’n, Brief <i>Amicus Curiae</i> , <i>Suitum v. Tahoe Reg’l Planning Agency</i> , U.S. No. 96-243.....	11-12
American Planning Ass’n, Brief <i>Amicus Curiae</i> , <i>Tahoe-Sierra Pres. Council v. Tahoe Reg’l Planning Agency</i> , U.S. No. 00-1167	10-11
Michael M. Berger and Gideon Kanner, <i>Shell Game! You Can’t Get There from Here: Supreme Court Ripeness Jurisprudence in Takings Cases at Long Last Reaches the Self-parody Stage</i> , 36 Urb. Law. 671 (2004)	12, 15
Peter A. Buchsbaum, <i>Should Land Use be Different? Reflections on Williamson County</i> , in <i>Taking Sides on Takings Issues: Public and Private Perspectives</i> , (A.B.A. 2002; Thomas E. Roberts, ed.).....	9
John J. Delaney and Duane J. Desiderio, <i>Who Will Clean Up the “Ripeness Mess”? A Call for Reform So Takings Plaintiffs Can Enter the Federal Courthouse</i> , 31 Urb. Law. 195 (1999)	9

TABLE OF AUTHORITIES (cont.)

	Page (s)
Robert H. Freilich, <i>The Public Interest is Vindicated: City of Monterey v. Del Monte Dunes</i> , 31 Urb. Law. 371 (1999)	9
Timothy J. Kassouni, <i>The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights</i> , 29 Cal. West. L. Rev. 1 (1992)....	9-10
Prof. Daniel R. Mandelker, Testimony before the U.S. House of Representatives, Judiciary Committee, reprinted in 31 Urb. Law. 234 (1999)	9
Gregory Overstreet, <i>Update on the Continuing and Dramatic Effect of the Ripeness Doctrine on Federal Land Use Litigation</i> , 20 Zoning & Plan. L. Rep. 17 (1997).....	9
Thomas E. Roberts, <i>Ripeness and Forum Selection in Fifth Amendment Takings Litigation</i> , 11 J. Land Use & Envtl. L. 37 (1995).....	9-10
Glenn P. Sugameli, “ <i>Takings</i> ” <i>Bills Threaten People, Property, Zoning and the Environment</i> , 31 Urb. Law. 177 (1999)	15
Gordon S. Wood, <i>The Radicalism of the American Revolution</i> 324 (First Vintage Books ed. 1993)....	16-17

**BRIEF OF AMICUS CURIAE NATIONAL
ASSOCIATION OF HOME BUILDERS IN SUPPORT
OF THE PETITIONERS**

The National Association of Home Builders (“NAHB”) has received the parties’ written consent to file this brief as *amicus curiae* in support of the petitioners, and letters of consent are filed with the Clerk of the Court.¹

**THE NAHB’S INTEREST ARISES FROM ITS
MEMBERS’ CONCERNS AS TO THEIR ABILITY
TO BRING AN ACTION IN FEDERAL COURT
CLAIMING A TAKING UNDER THE FIFTH AND
FOURTEENTH AMENDMENTS**

The NAHB represents over 220,000 builder and associate members throughout the United States. Its members include people and firms that construct and supply single family homes as well as apartment, condominium, commercial and industrial builders, land developers and remodelers. It is the voice of the American shelter industry. It is, therefore, concerned with a procedure which effectively strips the federal courts of any role in the judicial review process when a takings claim is asserted.

The NAHB has appeared before the Court as an *amicus curiae* or as “of counsel” in a number of cases involving the rights and remedies of landowners who have been adversely affected by governmental actions. These include: *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); *Williamson County Reg’l Planning Comm’n v. Hamilton Bank*, 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *First*

1 No counsel for any of the parties authored any part of this brief. No person or entity other than the NAHB has made any monetary contribution to the preparation or submission of this brief.

English Evangelical Lutheran Church of Glendale v. County of L.A., 482 U.S. 304 (1987); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987)²; *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Babbitt v. Sweet Home Chapter of Commun. for a Great Or.*, 515 U.S. 697 (1995); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002); *Borden Ranch P'Ship v. United States Army Corps of Eng'rs*, 537 U.S. 99 (2002); *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188 (2003); *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 124 S.Ct. 1537 (2004); *Kelo v. City of New London*, 843 A.2d 500 (Conn. 2004), *cert. granted*, 125 S.Ct. 27 (2004); and *Lingle v. Chevron U.S.A., Inc.*, 363 F.3d 846, *cert. granted*, 125 S.Ct. 314 (2004).

SUMMARY OF THE ARGUMENT

Collateral estoppel (issue preclusion) should not apply when a landowner is required to assert a takings claim in state court in order to ripen its federal claim because it effectively denies a federal forum to a plaintiff asserting a federal claim for relief. It is not mandated by anything in *Williamson County* nor does it represent good policy.

Indeed, good policy calls for eliminating the state litigation prong of *Williamson County* all together. Landowners should be allowed to assert their federal constitutional claims in federal court in the first instance.

2 The Court's opinion cited the NAHB's brief. (483 U.S. at 840.)

ARGUMENT

I.

COLLATERAL ESTOPPEL (ISSUE PRECLUSION) SHOULD NOT BAR FEDERAL COURT ADJUDICATION OF A FIFTH AND FOURTEENTH AMENDMENT TAKINGS CLAIM

This Court has, with a few exceptions not applicable to the case at bar, characterized the jurisdiction of regulatory takings as requiring

“... ‘essentially ad hoc, factual inquiries,’ *Penn Central*, 438 U.S., at 124, designed to allow ‘careful examination and weighing of all the relevant circumstances.’ *Palazzolo*, 553 U.S., at 636 (O’CONNOR, J., concurring).” *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 322 (2002).

A takings claim alleges that governmental action requires the payment of just compensation under the mandate of the Fifth and Fourteenth Amendments. Those claims frequently turn on the facts peculiar to the case.

“How the facts are found will often dictate the decision of the federal claims. ‘It is the typical, not the rare, case in which constitutional claims turn upon the resolution of contested factual issues.’ *Townsend v. Sain*, 372 U.S. 293, 312.” *England v. La. State Bd. of Med. Exam’rs*, 375 U.S. 411, 416-417 (1964).

To the same effect, *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 542 n. 5 (1986) (“We have frequently recognized the importance of the facts and the fact finding process in constitutional adjudication.”).

If the Ninth Circuit's decision is allowed to stand, it will effectively strip the federal courts of any role in the elaboration of takings jurisprudence because of the overlap between state court interpretations of state constitutional protections against uncompensated takings on the one hand, and similar federal law on the other. *DLX, Inc. v. Commonwealth of Kentucky*, 381 F.3d 511, 521 (6th Cir. 2004). Indeed, that was the situation in the case at bar. *San Remo Hotel L.P. v. San Francisco City and County*, 364 F.3d 1088, 1094 (2004). However, there are significant differences between the manner in which facts are found in federal and state courts.

More particularly, an action brought under 42 U.S.C. § 1983 – the mechanism used by the plaintiffs here (364 F.3d at 1093) – requires that factual issues regarding the government's *liability* for a taking must be determined by a jury:

“[W]e hold that the issue whether a landowner has been deprived of all economically viable use of his property is a predominantly fact question. As our implied acknowledgement of the procedure in *Williamson County, supra*, suggests, in actions at law otherwise within the purview of the Seventh Amendment, this question is for the jury.” *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 720-721 (1999).

On the other hand, a landowner who brings an inverse condemnation action in the State of California has a right to a jury trial “but that right is limited to the question of damages.” *Hensler v. City of Glendale*, 876 P.2d 1043, 1052 (Cal. 1994), *cert. denied*, 513 U.S. 1184 (1995). More specifically,

“In both eminent domain and inverse condemnation proceedings, the issue of just compensation is to be tried to the jury. All other questions of fact, or of mixed fact and law, are to be tried ... without reference to a

jury. Consistent with this rule, the court, rather than the jury, typically decides questions concerning the *preconditions to recovery* of a particular compensation, even if the determination turns on contested issues of fact.” *Mount San Jacinto Cmty. Coll. Dist. v. Superior Court*, 11 Cal.Rptr.3d 465, 469 (Cal. App. 2004) [internal quotation marks and citations omitted; italics in the original].

See also, *Cumberland Farms, Inc. v. Town of Groton*, 808 A.2d 1107, 1123-24 (Conn. 2002) (landowner had no right to a jury trial on issues of liability in inverse condemnation case). Thus, while *Del Monte Dunes* held that takings claimants have a Seventh Amendment right to a jury trial in the federal courts, the states do not extend a similar right.

Moreover, the resemblance between the state procedure element mandated by *Williamson County*, and abstention, is obvious. Both would defer (or even outright relinquish) federal court jurisdiction in favor of state court adjudication:

“Ripeness becomes closely mingled with abstention doctrines when deference rests on the prospect of some future state court proceeding rather than an ongoing litigation.” 13A Wright, Miller & Cooper, *Federal Practice and Procedure*, § 3532.1, *Ripeness, Sources of Doctrine*, 123 (2d ed. 1984).

The Second Circuit relied on the resemblance between ripeness and abstention in *Santini v. Conn. Hazardous Waste Mgmt. Serv.*, 342 F.3d 118, 128-129 (2d Cir. 2003), *cert. denied*, 125 S.Ct.104 (2004). *Santini* held that a landowner who was, after all, involuntarily in state court litigating a takings claim, could preserve his right to have a federal court adjudicate his federal takings claim by filing a reservation – similar to that called for in *England*. *Santini* was based on the evident unfairness of first forcing

a landowner into state court in order to ripen his federal claim, and then holding that the act of ripening the federal claim also barred it. (342 F.3d at 130.)

The plaintiffs in the case at bar made use of a *Santini* reservation because they “specifically reserved their federal claims for adjudication in federal court, pursuant to *England* ...” (*San Remo*, 364 F.3d at 1093.) However, the Ninth Circuit just as specifically rejected the use of that procedure. (*id.* at 1095.)

In light of the procedure set forth by this Court in *Williamson County*, the position taken by the Second Circuit states the better policy. *Santini* requires the takings claimant to first seek compensation in state court but, having done so, then allows a full and free adjudication of that claim – including factual determinations – under federal law in a federal court.

Finally, there is simply no jurisdictional bar to the reservation procedure used by the plaintiffs here and endorsed by the Second Circuit. Neither res judicata (claim preclusion) nor collateral estoppel (issue preclusion) is jurisdictional; each of them is an affirmative defense which may be waived. *Kenmen Eng’g v. City of Union*, 314 F.3d 468, 479 (10th Cir. 2002) (res judicata); and *Rekhi v. Wildwood Indus., Inc.*, 61 F.3d 1313, 1317 (7th Cir 1995) (collateral estoppel). Moreover, whether or not the preclusion doctrines may be triggered in any case is a matter of judicial discretion.³ In fact, all of the Circuits which have considered the question, including the Ninth Circuit in the case at bar (364 F.3d at 1094), have held that an appropriate reservation “will suffice to defeat claim preclusion in a subsequent federal action.” *DLX, Inc.*, *supra*, 381 F.3d at 523 n. 9.

³ See, e.g., *Balbierer v. Austin*, 790 F.2d 1524, 1526 (11th Cir. 1986) (“We note at the outset that application of collateral estoppel in a particular case is a matter of trial court discretion ... but that this court [on appeal] exercises plenary review over the rules governing collateral estoppel”).

“[C]onsiderations of fairness and justice” must support any takings analysis. *Tahoe-Sierra*, 535 U.S. at 333. See also, *Armstrong v. United States*, 364 U.S. 40, 49 (1960)(the Fifth Amendment bars “forcing some people alone to bear the public burden which, in all fairness, should be borne by the public as a whole.”) It is neither fair nor just to tell a property owner, “Go to state court before you come to federal court,” and then after she pursues that procedure, say “Sorry. You can’t get into federal court because the state court already decided your case.” The Ninth Circuit’s decision should be reversed.

II.

THE PROCEDURE SET FORTH IN *WILLIAMSON COUNTY*, WHICH REQUIRES A TAKINGS CLAIMANT TO FIRST SEEK JUST COMPENSATION IN STATE COURT IN ORDER TO RIPEN A FEDERAL ACTION, SHOULD BE ELIMINATED

The requirement that a landowner first assert a takings claim in state court rests on *prudential* ripeness principles. Thus, *Williamson County* does not present a jurisdictional bar to a federal court determination of whether a taking has occurred and, if so, what just compensation should be awarded. In *Suitum*, this Court stated:

“The only issue presented is whether Suitum’s claim of regulatory taking of her land in violation of the Fifth and Fourteenth Amendments is ready for judicial review under *prudential ripeness principles*. There are *two independent prudential hurdles* to a regulatory takings claim brought against a state entity in federal court. *Williamson County* ... explained that a plaintiff must demonstrate that she has both received a ‘final decision regarding the application of the [challenged] regulations to the property at issue’ from ‘the government entity charged with implementing

the regulations,’ *id.* at 186, and sought ‘compensation through the procedures the State has provided for doing so,’ *id.*, at 194.” *Suitum v. Tahoe Reg’l Planning Agency*, 520 U.S. 725, 733-734 (1997) emphasis supplied; [footnote omitted].

Similarly, in *Lucas v. SC. Coastal Council*, 505 U.S. 1003, 1012-1013 (1992), this Court held that the landowner had “properly alleged Article III injury in fact” and proceeded to a determination on the merits. It did so even though a permit procedure had been implemented while state court litigation was ongoing, because this Court did not think it fair to apply the prudential requirement of finality set forth in *Williamson County*.

A. Landowners Bear a Staggering Burden by Being Forced to Litigate Their Takings Cases in State Court First.

The cost to the landowner of having to detour through state court litigation should give this Court pause. The plaintiffs in the case at bar initially filed their § 1983 action in federal court in May 1993. (*San Remo*, 364 F.3d at 1093.) They will have a decision on *jurisdiction* by mid-2005. Twelve years, and still counting, with no decision by a federal court *on the merits* in sight.

Unfortunately, the resemblance to abstention is also apparent in terms of the time necessary to obtain federal resolution. Forty years ago, Justice Douglas voiced his unhappiness with the delay resulting from abstention, noting that eight and ten year periods between initiation and resolution of a lawsuit were not unheard of. *England, supra*, 375 U.S. at 425-429 (Douglas, J., concurring). As a result, although not raised by the parties, he argued that it was time for this Court, *sua sponte*, to reevaluate the abstention doctrine. (*id.* at 423.)

Professor Daniel R. Mandelker, one of the leading academics of the land use bar and typically an advocate on behalf of local government on land use issues, in his

testimony to Congress, referred to a survey of federal district court cases involving takings claims between 1990 and 1997 and found that 81% of them were decided on procedural grounds and never reached the merits. Testimony of Daniel R. Mandelker Before the Judiciary Committee, U.S. House of Representatives, reproduced at 31 Urb. Law. 234, 236-237 (1999) (“Mandelker Testimony”).

That same survey also determined that litigation which did result in an opinion on the merits by a Court of Appeals took, on the average, 9.6 years. John J. Delaney & Duane J. Desiderio, *Who Will Clean Up the “Ripeness Mess”? A Call for Reform So Takings Plaintiffs Can Enter the Federal Courthouse*, 31 Urb. Law. 195, 205 (1999).

B. Williamson County’s State Court Element has been Resoundingly Criticized by Congress, the Courts, Academics, and Even Planners.

Put simply, *Williamson County’s* state court procedure is a disaster. Commentators have derided the problems spawned by *Williamson County* as “worse than mere chaos,”⁴ “absurd,”⁵ “nonsense,”⁶ “riddled with

⁴ Robert H. Freilich, *The Public Interest is Vindicated: City of Monterey v. Del Monte Dunes*, 31 Urb. Law 371, 387 (1999).

⁵ Gregory Overstreet, *Update on the Continuing and Dramatic Effect of the Ripeness Doctrine on Federal Land Use Litigation*, 20 Zoning & Plan. L. Rep. 17, 27 (1997).

⁶ Peter A. Buchsbaum, *Should Land Use be Different? Reflections on Williamson County*, in *Taking Sides on Takings Issues: Public and Private Perspectives* 480 (A.B.A. 2002; Thomas E. Roberts, ed.).

obfuscation and inconsistency,”⁷ a “Kafkaesque maze,”⁸ and “a fraud or hoax on landowners,”⁹ just to name a few.

On two occasions, the House of Representatives passed bills (by substantial margins) that would have dispensed with *Williamson County*’s state court procedure element.¹⁰ In reaching that conclusion, the House Judiciary Committee received testimony from Professor Mandelker who declared that his review of lower federal court decisions showed a “wholesale abdication of federal jurisdiction in law suits where issues are raised concerning the constitutional validity of land use regulation,” because “federal judges have distorted the Supreme Court’s ripeness precedents to achieve [the] undeserved and unwarranted result [of] avoiding the vast majority of takings claims on their merits.” Mandelker Testimony, 31 Urb. Law. at 236-237. His conclusion, and testimony, was that the “state court first” requirement should be eliminated.

⁷ Mandelker Testimony, 31 Urb. Law. at 236.

⁸ Timothy J. Kassouni, *The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights*, 29 Cal. West. L. Rev. 1, 51 (1992).

⁹ Thomas E. Roberts, *Ripeness and Forum Selection in Fifth Amendment Takings Litigation*, 11 J. Land Use & Envtl. L. 37, 71 (1995).

¹⁰ See H.R. 1534, 105th Cong., Private Property Rights Implementation Act of 1997 (passed House on Oct. 22, 1997, by vote of 248-178) (§2(e)(3): “[A] final decision shall not require the party seeking redress to exhaust judicial remedies provided by any State”); H.R. 2372, 106th Cong., Private Property Rights Implementation Act of 2000 (passed House on Mar. 16, 2000, by vote of 226-182) (§2(e)(4): “[A] case is ripe for adjudication even if the party seeking redress does not exhaust judicial remedies provided by any State”). Both bills are available at the Library of Congress’s “Thomas” website, <http://thomas.loc.gov/> (last visited Jan. 20, 2005).

Even the American Planning Association (“APA”),¹¹ which submitted an *amicus curiae* brief on behalf of the Tahoe Regional Planning Agency in *Suitum* (No. 96-243), believed that the ripeness requirement set forth in *Williamson County* was wrong; the heading to its fifth argument in that brief states:

“THE COURT SHOULD ELIMINATE THE SECOND PRONG OF THE RIPENESS DOCTRINE REQUIRING THE LANDOWNER TO HAVE SOUGHT AND BEEN DENIED JUST COMPENSATION THROUGH AVAILABLE STATE PROCEDURES AND ALLOW LANDOWNERS WITH REGULATORY TAKINGS CLAIMS TO PURSUE THEIR FEDERAL REMEDY IN FEDERAL COURT.” APA *Suitum Amicus Br.* at 23.

The brief goes on to explain why the APA took the position it did:

“*Amicus curiae* submits that the rule the takings plaintiffs must first sue in state court for compensation under the federal constitution is incorrect. When this Court first adopted the ripeness rules, there was no remedy for compensation in federal courts. Indeed, this Court adopted ripeness rules to avoid deciding whether a federal compensation remedy is available. In the absence of a federal compensation remedy, it perhaps made sense

¹¹ The APA has described itself as “the oldest and largest organization devoted to advancing state and local land use planning,” and its constituents are “those charged with addressing the public’s interest in how land is used and with drafting regulations to ensure that the impacts of adverse land use are minimized.” APA *Amicus Br.*, *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, (No. 00-1167) at 1.

to require takings plaintiffs to seek a state compensation remedy first.

“This situation has now changed. In 1987, in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U. S. 302 (1987), this Court held that a remedy for compensation in takings cases is available under the federal constitution. Federal courts should not require takings plaintiffs to go to court to seek compensation before taking advantage of this federal remedy.” APA *Suitum Amicus Br.* at 25-26.

Aside from the serious policy implications that arise from the state court procedures element, commentators have noted that *Williamson County*'s second element is difficult, if not impossible, to reconcile with the holding in *City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156 (1997).¹² The upshot of *College of Surgeons* is that a municipal defendant, sued by a landowner for a taking and other constitutional violations, may remove that case to federal court. (522 U.S. at 164-66). Yet the pertinent federal statute allows removal from state court *only* if the plaintiff could have filed the case in federal court in the first instance. See 28 U.S.C. § 1441(a). How can that be? How can it be that a takings plaintiff must file his case in state court first (as *Williamson County* purportedly requires), but then a municipal defendant has the option to game the system and control jurisdiction by removing to federal court (under *College of Surgeons*)? Yet, that plaintiff apparently could not have filed in federal court initially, so the removal

¹² The *Williamson County/College of Surgeons* conundrum is fully explained in Michael M. Berger and 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, 676-682 (2004).

statute should presumably not apply (but *College of Surgeons* holds removal is appropriate in these circumstances). It hurts just to think through this problem.

Reams of articles will be written on this dilemma, and everyone involved—municipalities, property owners, and the federal judiciary—will spend years scratching their heads on whether, and how, *Williamson County* and *College of Surgeons* can be reconciled. The Eighth Circuit described the situation as an “anomalous ... gap in Supreme Court jurisprudence.” *Kottschade v. City of Rochester*, 319 F.3d 1038, 1041 (8th Cir.), *cert. denied*, 124 S.Ct. 178 (2003).

In the end, landowners who want to assert a takings claim deserve to know whether, and under what circumstances, they can access a federal forum for their constitutional grievances. Respectfully, the only way to have those questions completely and fairly answered is for this Court to now re-consider *Williamson County*'s state court detour procedure and tackle it head-on.¹³

C. Nothing in the Constitution Requires that State Court Litigation Precede Federal Adjudication on the Merits of a Takings Claim.

It must be noted that just compensation can only be awarded after a taking has been found. That does not represent a problem when a governmental entity has taken

¹³ As a practical matter, the only realistic opportunity the Court will have to directly address the state court procedures element from *Williamson County* is in a case postured such as the one at bar. In the current jurisprudential climate, it would border on malpractice for an attorney to direct his client to file a takings claim in federal court initially. This is especially so in light of the *Kottschade* case, where the property owner filed initially in federal court but the Eighth Circuit required him to repair to state court. As the Eighth Circuit concluded, resolution of the *Williamson County/College of Surgeons* conundrum “is for the Supreme Court to say, not us.” (319 F.3d at 1038.)

possession of land, whether by a physical invasion or by formal condemnation proceedings, because there is no question that a taking has occurred. The only issue left in such a situation is to decide the amount of just compensation to which the landowner is entitled. However, things are not so simple when a landowner alleges that a *regulatory* taking has occurred. In that case, the first issue is whether a taking has occurred at all. This Court's discussion in *Williamson County* on the state compensation procedure ripeness issue focused entirely on the recovery of just compensation; it says not a word about whether a regulatory taking had actually occurred. (473 U.S. at 194-196.)

However, the resulting detour through the state courts means that the issue of whether a regulatory taking has occurred must be litigated by the landowner in the state court proceeding.¹⁴ As it now stands, based on this Court's statement in *Williamson County* that the Fifth Amendment proscribes only taking without just compensation (473 U.S. at 194), there is no federal jurisdiction to determine whether

¹⁴ And yet another puzzle arises. A state inverse condemnation lawsuit begins by determining whether the government is liable for a taking in the first place. In that suit, the state trial court must review the validity and assess the propriety of the municipality's underlying conduct. Yet, in *Williamson County*, this Court held that "[e]xhaustion of review procedures is not required" of § 1983 takings claimants; they do not have to exhaust "administrative and judicial procedures by which an injured party may seek review of an adverse decision" (473 U.S. at 194 n. 13; 193). But *that* is an integral part of a state inverse condemnation action – the taking claimant seeks review of an adverse land use decision. Indeed, applying the polestar test from *Penn Central* and conducting an "ad hoc" inquiry into the facts necessarily entails review of the underlying government action. How could the factors from *Penn Central* – the character of the government's action, the economic impact of the regulation, and the property owner's investment-backed expectations (see 438 U.S. at 124) – be considered by a state court *unless* it reviewed the underlying land use decision?

a taking has occurred in an as-applied context where facts are of paramount importance. At the same time, a facial attack – which presents only a question of law – claiming a taking can be brought directly in a federal court. *Yee v. City of Escondido*, 503 U.S. 519, 533-534 (1992).¹⁵

Of course, the NAHB recognizes that, for takings purposes, the Constitution is infringed only when just compensation is not paid after a taking has occurred. But, nothing in the Constitution requires that a state court must issue some kind of certification that one of its municipalities owes a landowner for a taking. “You can read the Fifth Amendment forward, backward, upside-down or sideways, and you will not find that requirement anywhere.” Berger and Kanner, *Shell Game!*, *supra*, 36 Urb. Law. at 696. A federal court is as well-equipped as a state court to interpret the Fifth Amendment, determine that a municipality has committed a taking, and order the payment of just compensation to avoid a constitutional infraction.¹⁶

Finally, doomsday cries that federal court review will unduly interfere with local prerogatives ring hollow. E.g., Glenn P. Sugameli, “*Takings*” *Bills Threaten People, Property, Zoning and the Environment*, 31 Urb. Law. 177 (1999). Federal courts decide matter of local concern all of the time in a variety of parochial contexts. Consider, as one

¹⁵ The Court has remarked on the “uphill battle” facing a takings plaintiff who brings a facial challenge. *Tahoe-Sierra*, 535 U.S. at 321, quoting from *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 495 (1987).

¹⁶ “[A] case containing claims that local administrative action violates federal law ... is within the jurisdiction of federal district courts.” *College of Surgeons*, 522 U.S. at 163. There is nothing groundbreaking about that point. Section 1983 states that those acting “under color of state law” must pay when they commit actions that infringe the federal constitution – and that includes municipalities. See *Owen v. City of Independence*, 445 U.S. 622, 636-637 (1980); *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658 (1978).

example, the standards for determining whether speech is obscene and therefore loses First Amendment protections. From the Nixon Administration up through the current Bush Administration, it has been well-established that whether an artistic or literary work is obscene is determined by “contemporary community standards” and definitions under the “applicable state law.” *Miller v. California*, 413 U.S. 15, 24 (1973). See also *Ashcroft v. ACLU*, 535 U.S. 564 (2002), *aff’d and remanded by* 124 S.Ct. 2783 (2004) (whether on-line materials are harmful to minors will depend in part on “local community standards”). There has never been a requirement that a state court must first determine what those “local community standards” are, as a ripening prerequisite to federal court adjudication of a First Amendment claim.

This would be a much simpler judicial world if this Court were to review its holding in *Williamson County* and make clear that a landowner could, if it wished, go directly to federal court to have a determination made whether, first, a taking had occurred and then, second, what just compensation should be awarded.

III.

CONCLUSION

According to the dean of historians of the American Revolution, an independent judiciary is embedded as an essential part of the constitutional scheme to preserve property rights:

“Placing legal boundaries around issues such as property rights ... had the effect of isolating these issues from popular tampering, partisan debate, and the clashes of interest-group politics. Some things, including the power to define property and interpret constitutions, became matters not of political interest to be determined by legislatures but of the ‘fixed principles’ of law to be determined by judges.” Gordon S. Wood, *The Radicalism*

of the American Revolution 324-25 (First Vintage Books ed. 1993).

Slamming the doors of the federal courthouse shut on land owners – to the extent that virtually none of the lower federal courts interpret the Just Compensation Clause or adjudicate the merits of takings claim – cannot be countenanced under the Founders’ vision.

Accordingly, the NAHB contends that both good policy and this Court’s prior opinions require that neither res judicata nor collateral estoppel apply when a landowner is forced to begin litigation in state court in order to ripen a federal takings claim. The *Santini* reservation used by the Second Circuit would at least allow a federal court to adjudicate the federal takings claim.

The NAHB further contends that it is time for this Court to reconsider – and to abandon – the requirement that a landowner first seek compensation through state litigation procedures before its federal takings claim is ripe for adjudication in federal court.

In short, the requirement of initial state court litigation should have no preclusive effect whatsoever on subsequent takings litigation in federal court or, better yet, the requirement should be entirely eliminated.

Dated: January 24, 2005

Respectfully submitted,

MARY V. DICRESCENZO
DUANE J. DESIDERIO
THOMAS J. WARD
THE NATIONAL ASSOCIATION
OF HOME BUILDERS
1201 15th Street, N.W.
Washington, D.C. 20005
(202) 266-8200

KENNETH B. BLEY
(Counsel of Record)
COX, CASTLE & NICHOLSON, LLP
2049 Century Park East, 28th Fl.
Los Angeles, CA 90067
(310) 284-2231

Attorneys for The National Association of Home Builders

46366\1124310v3

Filename: 1.21.05_SanRemoFINAL.DOC
Directory: Q:\DUANE\San Remo
Template: C:\Documents and Settings\lroxbury\Application
Data\Microsoft\Templates\Normal.dot
Title: NAHB Amuicus Brief on the Merits
Subject: PL
Author: KBBLEY
Keywords: KBBLEY/10219/862626v3
Comments: /

Creation Date: 1/21/2005 10:53:00 AM
Change Number: 2
Last Saved On: 1/21/2005 10:53:00 AM
Last Saved By: Lavon Roxbury
Total Editing Time: 0 Minutes
Last Printed On: 1/21/2005 10:54:00 AM

As of Last Complete Printing

Number of Pages: 26
Number of Words: 4,712 (approx.)
Number of Characters: 26,865 (approx.)