No. 11-50

In The
Supreme Court of the United States

ALTO ELDORADO PARTNERSHIP, *et al.*,

Petitioners,

v.

THE COUNTY OF SANTA FE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

A New Mexico county ordinance forces landowners to construct and sell "affordable housing" units to low income individuals as a condition for being permitted to subdivide their property. Petitioners Alto Eldorado Partnership, *et al*. are property owners that brought a Fifth Amendment claim in federal district court under 42 U.S.C. § 1983 ("Section 1983"), seeking to have the ordinance enjoined on the grounds that it imposes an unconstitutional condition in violation of *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). Relying on the prudential ripeness rule from *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), the Tenth Circuit held that Petitioners' claim for prospective relief is unripe and that the claim has to be litigated in a state court action for retrospective just compensation. This decision effectively denies Petitioners a federal forum for their Section 1983 *Nollan* claim because state court adjudication of a just compensation claim will bar future litigation of the *Nollan* claim in federal court under this Court's decision in *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005).

The question presented is: Should this Court reconsider *Williamson County*'s prudential ripeness rule because the rule effectively precludes federal court review of Fifth Amendment takings claims against non-federal actors?

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

OTHER

IDENTITY AND INTEREST OF AMICUS CURIAE[1]

Mountain States Legal Foundation ("MSLF"), is a non-profit, public interest legal foundation organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of private property rights, individual liberties, limited and ethical government, and the free enterprise system. MSLF has members in every state in the nation, including the states under the jurisdiction of the Tenth Circuit. Many of these members own private property. Since its establishment in 1977, MSLF has represented parties before this Court seeking to preserve the Constitution's protection of individual liberties, *e.g.*, *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), and has participated as an amicus curiae to ensure that private property owners are not unjustly deprived of their property. *E.g.*, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Kelo v.*

[1] Pursuant to Supreme Court Rule 37.2, letters indicating MSLF's intent to file this amicus curiae brief were received by counsel of record for all parties at least 10 days prior to the due date of this brief. The parties have consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, MSLF affirms that no counsel for a party authored this brief in whole or in part and that no party, person, or entity other than MSLF and its members made a monetary contribution specifically for the preparation or submission of this brief.

City of New London, Conn., 545 U.S. 469 (2005); *Wilkie v. Robbins*, 551 U.S. 537 (2007).

In the instant case, the Tenth Circuit, relying on the prudential ripeness doctrine from *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), held that Petitioners, Alto Eldorado Partnership, *et al.*, are required to ripen their Fifth Amendment unconstitutional conditions claim seeking prospective relief in a state court proceeding seeking retroactive relief in the form of just compensation. *Alto Eldorado Partnership v. County of Santa Fe*, 634 F.3d 1170, 1175-77 (10th Cir. 2011). This decision effectively precludes Petitioners and other property owners from ever being able to raise their Fifth Amendment unconstitutional conditions claim in federal court. *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005); 28 U.S.C. § 1738.

As a result of the Tenth Circuit's decision and *Williamson County*'s prudential ripeness rule, private property owners have been singled out as being ineligible for federal court review whenever a non-federal government entity imposes unconstitutional conditions upon the use or enjoyment of private property. Therefore, MSLF respectfully submits this amicus curiae brief in support of the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

On February 14, 2006, the County of Santa Fe, New Mexico passed Ordinance 2006-02, Petitioners' Appendix ("Pet. App.") at G-25, which requires property owners to construct and sell certain homes at prices below market value – known as "affordable housing" – to obtain a permit to subdivide land. The Ordinance provides: "Of the total housing provided in any Major Project, no less than thirty percent (30%) shall be Affordable Housing, as defined herein. Of the total housing provided in any Minor Project, no less than sixteen percent (16%) shall be Affordable Housing, as defined herein." Pet. App. at G-6.

An alternate means of compliance may be available, at the discretion of the County, if the developer provides alternate Affordable Housing units elsewhere within the County, makes a cash payment that is "equal to or greater value than would have been required if the Project had been constructed or created Affordable Units," or dedicates land "whose value is equal to or greater than that which would had been required if the Project had been constructed or created Affordable Units[.]" Pet. App. at G-14. There is no provision for "just compensation" to be provided to the owner of the property to be developed.

Petitioners are involved in residential development in Santa Fe County. Having already received master plan approval to develop subdivisions in Santa Fe County, Petitioners are adversely impacted by County Ordinance No. 2006-02. Thus, Petitioners

brought suit in the U.S. District Court for the District of New Mexico alleging that the Ordinance, on its face, imposes an unconstitutional condition under *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) and its application of the Takings Clause of the Fifth Amendment.[2] *See* Pet. App. at A-3, C-5.

In *Nollan*, this Court held that to uphold a condition on the development of property, there must be an "essential nexus" between a legitimate state interest and the building condition. *Nollan*, 483 U.S. at 837. Here, Petitioners argued that there is little, if any, nexus between the subdivision or development of property in the Santa Fe area and the high housing prices in the Santa Fe area. *See, e.g.*, Pet. App. at C-5. In fact, just the opposite is true: by subdividing and developing property, the supply of housing increases, thereby easing any strain on housing demand and, ultimately, causing housing prices to drop. Thus, Petitioners argued that Ordinance 2006-02 imposes an unconstitutional condition and should be enjoined. *Id*. at C-6.

Relying on *Williamson County*, the district court dismissed the case as being unripe. Pet. App. at C-74-76. The Tenth Circuit, also relying on *Williamson*

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[2] The Takings Clause of the Fifth Amendment provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V. The Takings Clause "is applied to the States through the Fourteenth Amendment." *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 481 n.10 (1987).

County, affirmed and held that a property owner alleging an unconstitutional condition and seeking prospective relief under the Fifth Amendment must first "ripen" the claim by seeking retrospective just compensation in state court. Pet. App. at A-12-13. After the Tenth Circuit denied Petitioners' petition for rehearing *en banc*, Pet. App. at F-2, Petitioners timely filed their Petition for Writ of Certiorari.

SUMMARY OF THE ARGUMENT

Throughout the history of the United States, it has been clear that state courts are not the most qualified arbiters of federal constitutional disputes. This concern ultimately led Congress to pass 42 U.S.C. § 1983 ("Section 1983"), which provides a federal cause of action for federal constitutional claims. Yet in 1985, this Court, in deciding *Williamson County*, developed a prudential ripeness rule for Fifth Amendment takings claims. Under this rule, plaintiffs cannot bring a Fifth Amendment takings claim in federal court against non-federal actors until they first seek just compensation in state court.[3]

As Justices Rehnquist, O'Connor, Kennedy and Thomas explained, the application of this prudential

[3] Federal courts have original jurisdiction over takings claims brought against the federal government. *See* 28 U.S.C. § 1491; 28 U.S.C. § 1346(a)(2). This brief does not concern such claims against the federal government.

ripeness rule has "dramatic" unintended consequences. *San Remo Hotel*, 545 U.S. at 352 (Rehnquist, C.J., concurring). Specifically, when read in light of the full faith and credit statute, 28 U.S.C. § 1738, the prudential ripeness rule ceases to be a "ripeness" rule at all, and, instead, strips federal courts of jurisdiction over Fifth Amendment takings claims against non-federal actors. Because the prudential rule stands in direct conflict with a federal statute, Section 1983, the prudential rule must yield. This case presents a perfect opportunity for this Court to reconsider *Williamson County*'s prudential rule, as Justices Rehnquist, O'Connor, Kennedy, and Thomas all desired.

REASONS FOR GRANTING THE PETITION

In *Williamson County*, this Court concluded that if a state provides an adequate procedure for seeking just compensation, the property owner cannot pursue a takings claim in federal court until it has used the state's procedure and been denied just compensation. 473 U.S. at 195. Twenty years later, the ramifications of *Williamson County*'s "prudential ripeness" principle became clear. In *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323, 347 (2005) this Court held that – far from *ripening* a federal takings claim – pursuing a Fifth Amendment takings claim in state court *precludes* a plaintiff from later bringing a related takings suit in federal court

because of the full faith and credit statute, 28 U.S.C. § 1738.

The statutory principle in *San Remo Hotel*, coupled with the "prudential ripeness" principle in *Williamson County*, "all but guarantees that claimants will be unable to utilize the federal courts to enforce the Fifth Amendment's just compensation guarantee." *San Remo Hotel*, 545 U.S. at 351 (Rehnquist, C.J., concurring). As a result, Chief Justice Rehnquist, joined by Justices O'Connor, Kennedy, and Thomas, argued that *Williamson County* should be reconsidered.[4] *San Remo Hotel*, 545 U.S. at 352 (Rehnquist,

[4] Importantly, *Williamson County*'s state court rule was simply dicta. The *Williamson County* Court first held that the takings claim was unripe because the plaintiff had not sought a variance, and, therefore, there was no final decision regarding the application of the regulations to the property at issue. *Williamson County*, 473 U.S. at 186-94. As the *Williamson County* Court itself conceded, the state court rule was merely "[a] second reason the taking claim is not yet ripe. . . ." *Id*. at 194. In fact, this issue was never fully briefed. This Court granted certiorari "to address the question whether Federal, State, and Local governments must pay money damages to a landowner whose property allegedly has been 'taken' temporarily by the application of government regulations." *Id*. at 185. Only the Solicitor General of the United States, in an amicus curiae brief, argued that ripeness barred the lawsuit, and the petitioner responded with but a few sentences. *See* 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 Court Under A Rule Intended To Ripen The Claims For Federal Review*, 33 B.C. Envtl. Aff. L. Rev. 247, 298 (2006). Because the *Williamson County* state court rule amounts to unbriefed dicta, its precedential value on this Court

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C.J., concurring). Specifically, Chief Justice Rehnquist 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. (Rehnquist, C.J., concurring). Because "[i]t is not obvious that either constitutional or prudential principles require claimants to utilize all state compensation procedures before they can bring a federal takings claim," *Id*. at 349 (Rehnquist, C.J., concurring), the four concurring Justices concluded that *Williamson County* "may have been mistaken." *Id*. at 348 (Rehnquist, C.J., concurring).

In support of this position, the four concurring Justices made two primary arguments: First, there is no reason why state courts are better or more qualified to resolve federal takings claims. *Id*. at 349-51 (Rehnquist, C.J. concurring). Second, "*Williamson County*'s state-litigation rule has created some real

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is, at best, limited. *Cent. Virginia Cmty. Coll. v. Katz*, 546 U.S. 356, 363 (2006) (This Court is "not bound to follow [its] dicta in a prior case in which the point now at issue was not fully debated.").

anomalies, justifying . . . revisiting the issue." *Id*. at 351 (Rehnquist, C.J., concurring). Both of these arguments remain vital today, and this case provides an excellent opportunity to address these arguments.

I. STATE COURTS ARE NOT MORE QUALIFIED THAN FEDERAL COURTS TO RESOLVE FEDERAL TAKINGS CLAIMS.

A. *Williamson County*'s Prudential Ripeness Rule Frustrates The Framers' Intent To Protect Individuals From State Court Bias.

As *San Remo Hotel* recognized, *Williamson County*'s prudential ripeness rule, coupled with the full faith and credit statute, 28 U.S.C. § 1738, effectively relegates Fifth Amendment takings claims exclusively to state court. *San Remo Hotel*, 545 U.S. at 346-47. This prohibition on Fifth Amendment takings claims in federal court frustrates the intent of the Framers.

The Framers understood that the exclusive availability of state courts to hear federal constitutional claims is insufficient to yield substantial justice to aggrieved parties:

> The reasonableness of the agency of the national courts in cases in which the State tribunals cannot be supposed to be impartial, speaks for itself. No man ought certainly to be a judge in his own cause, or in any cause in respect to which he has the least interest

> or bias. This principle has no inconsiderable weight in designating the federal courts as the proper tribunals for the determination of controversies between different States and their citizens.

The Federalist No. 80, at 502-03 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961).

Typically, state court local biases were discussed by the Framers in the context of favoring an in-state citizen or corporation in a dispute against an out-of-state citizen or corporation. *Lumbermen's Mut. Cas. Co. v. Elbert*, 348 U.S. 48, 54 (1954). However, in Takings Clause cases, the concern for local biases is even greater for two reasons. First, if a plaintiff in a Fifth Amendment takings case prevails against the state, the state will be required to pay "just compensation," impacting the state fisc. Because state courts are typically funded by the state treasury, a natural incentive exists to be biased in favor of the state and its political subdivisions at the expense of the aggrieved plaintiff. As Chief Justice John Marshall explained, "[i]t would be hazarding too much to assert that the judicatures of the States will be exempt from the prejudices by which the legislatures and people are influenced, and will constitute perfectly impartial tribunals. In many States the judges are dependent for office and for salary on the will of the legislature." *Cohens v. Virginia*, 19 U.S. 264, 386-87 (1821). Federal courts, on the other hand, are funded by entirely separate sources, thus, have no undue incentive to find in favor of a state or its political subdivisions in

Fifth Amendment takings claims. Therefore, to give substance to Hamilton's self-evident principle that "[n]o man ought certainly to be a judge in his own cause, or in any cause in respect to which he has the least interest or bias," *The Federalist* No. 80, at 502, federal courts must be available to hear suits against states or their political subdivisions premised on the Takings Clause of the Fifth Amendment.

Secondly, "federal judges appointed for life are more likely to enforce the constitutional rights of unpopular minorities than elected state judges." *England v. Louisiana State Bd. of Med. Examiners*, 375 U.S. 411, 427 (1964) (Douglas, J., concurring). Indeed, in states that hold elections for judges, a judge may be subject to undue pressure to preserve tax revenues, rather than dole out "just compensation." Therefore, the availability of state courts, presided over by elected state judges, is not an adequate substitute for the availability of federal courts to remedy infringements of federal constitutional rights, such as those Petitioners seek to have vindicated.

B. In Passing Section 1983, Congress Agreed With The Framers That State Courts Should Not Be The Exclusive Forum For Protecting Federal Constitutional Rights.

The concerns expressed by the Framers were similar to the concerns that led to the enactment of Section 1983. Section 1983 was enacted during an era

when a fierce battle was raging between states and the federal government over recognition and enforcement of constitutional rights. Ultimately the federal government prevailed and statutes were enacted that broadly expanded the purview of federal courts. In 1871, "President Grant sent a dramatic message to Congress describing the breakdown of law and order in the Southern states" due, in part, to the Ku Klux Klan, and its sympathizers. *Briscoe v. LaHue*, 460 U.S. 325, 337 (1983) (citing Cong. Globe, 42d Cong., 1st Sess. 236, 244 (1871)). Indeed:

> "While murder is stalking abroad in disguise, while whippings and lynchings and banishing have been visited upon unoffending American citizens, the local administrations have been found inadequate or unwilling to apply the proper corrective. Combinations, darker than the night that hides them, conspiracies, wicked as the worst of felons could devise, have gone unwhipped of justice. Immunity is given to crime, and the records of public tribunals are searched in vain for any evidence of effective redress."

Wilson v. Garcia, 471 U.S. 261, 276 (1985) (quoting Cong. Globe, 42d Cong., 1st Sess., 374 (1871) (remarks of Rep. Lowe)). Congress became particularly concerned with southern state courts' unwillingness to enforce the laws protecting the recently-freed slaves. *Patsy v. Bd. of Regents of State of Fla.*, 457 U.S. 496, 505 (1982) (citing Cong. Globe, 42d Cong., 1st Sess, 321 (remarks of Rep. Stoughton) ("The State authorities and local courts are unable or unwilling to

check the evil or punish the criminals")); *id.* at 374 (remarks of Rep. Lowe) ("the local administrations have been found inadequate or unwilling to apply the proper corrective").

In response thereto, and pursuant to Section 5 of the Fourteenth Amendment, Congress enacted the Civil Rights Act of 1871. 17 Stat. 13 (1871). Section 1 of that Act, in its current form, provides:

> 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, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983.

The purpose of this statute is obvious:

> It is 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.

Monroe v. Pape, 365 U.S. 167, 180 (1961) *overruled on other grounds by Monell v. Dep't of Soc. Services of City of New York*, 436 U.S. 658, 663 (1978). As this Court has similarly explained, Congress's intent in enacting Section 1983 was 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 these individuals immediate access to the federal courts. . . ." *Patsy*, 457 U.S. at 504 (internal quotation marks and citations omitted); *see also Mitchum v. Foster*, 407 U.S. 225, 242 (1972) ("The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights").[5]

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[5] Section 1983, which provides a federal cause of action for constitutional violations, was one of a series of statutes enacted between 1863 and 1875 intended to expand the purview of federal courts. First, in 1863, Congress required the removal to federal court of all criminal and civil suits brought against federal

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To effectuate this intent, this Court has held that Section 1983 applies broadly: "Although the legislation was enacted because of the conditions that existed in the South at that time, it is cast in general language" and is applicable generally "to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice." *Monroe*, 365 U.S. at 174, 183.

C. *Williamson County*'s Prudential Ripeness Rule Cannot Be Justified By State Courts' Relative Familiarity With Local Land-Use Decisions.

In *San Remo Hotel*, this Court held that a Fifth Amendment takings claim in state court *precludes* a

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officers for acts committed during the rebellion. 12 Stat. 756 (1863). Next, in 1867, Congress enacted the Habeas Corpus Act, which gave federal district courts the authority to review judgments of state courts when those judgments resulted in imprisonment allegedly in violation of the Constitution. 14 Stat. 385 (1867) (now codified at 28 U.S.C. § 2241(c)(3)). Then, in 1870, Congress enacted the Civil Rights Act, and, in so doing, gave federal courts jurisdiction over all causes of action arising from the Act. 16 Stat. 142. Finally, in 1875, Congress "for the first time with any permanence vested in the federal courts an original general federal-question jurisdiction over any claim which 'arises under the Constitution, laws or treaties of the United States.'" *Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 398 (1959) (quoting 18 Stat. 470 (1875)). These statutes, all of which were enacted during the same era, confirm Congress's intent to expand the power of federal courts, and, specifically, to provide a federal forum for alleged violations of the Constitution.

plaintiff from later bringing a similar takings suit in federal court because of the full faith and credit statute, 28 U.S.C. § 1738. *San Remo Hotel*, 545 U.S. at 347. The four concurring Justices, however, doubted that state courts were a superior forum to redress federal constitutional claims. Notably, they questioned why the Court 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 Equal Protection Clause." *Id.* at 350 (Rehnquist, C.J., concurring). This concern is well founded.

In the First Amendment context, it could be argued that state courts are more familiar with the complexities of local time, place, and manner restrictions on speech. Yet this Court has not carved out an exception to federal jurisdiction specifically in the First Amendment context. *Id*. at 351 (Rehnquist, C.J. concurring) (citing *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986); *Young v. American Mini Theaters, Inc.*, 427 U.S. 50 (1976)). More generally speaking, it could be argued that state courts are more familiar with virtually any municipal or state law. But no one would realistically claim that federal courts should be prohibited from hearing a federal constitutional claim simply because the claim involves issues of concern to a state or municipality. Indeed, federal courts are more, not less, qualified than state courts to resolve

federal constitutional issues. *See, e.g.*, Burt Neuborne, *The Myth Of Parity*, 90 Harv. L. Rev. 1105 (1977). Thus, *Williamson County*'s prudential ripeness rule cannot be justified by state courts' relative familiarity with local land-use decisions.

The only conclusion, therefore, that is consistent with the intent of the Framers, Section 1983, and the four concurring Justices in *San Remo*, is that federal court is the proper forum to redress federal constitutional violations.

II. *WILLIAMSON COUNTY*'S PRUDENTIAL RIPENESS RULE CREATES LEGAL ANOMALIES WITH "DRAMATIC" CONSEQUENCES.

The four concurring Justices also lamented that *Williamson County*'s prudential ripeness rule creates legal anomalies. *San Remo Hotel*, 545 U.S. at 351-52 (Rehnquist, C.J., concurring). The Tenth Circuit's decision highlights the "dramatic" consequences of these legal anomalies.

A. *Williamson County*'s Prudential Ripeness Rule Creates A Legal Anomaly By Undermining Congress's Intent To Make Federal Courts Available For Violations Of Federal Constitutional Rights.

This case pits the prudential ripeness rule from *Williamson County* against the language and intent of a federal statute, Section 1983. In such a situation,

federal legislation must prevail over a judicially developed prudential rule.

1. *Williamson County*'s state court rule is prudential; it is not based on the text of the Fifth Amendment.

While some limits on the federal judicial power are derived from the text of Article III of the Constitution, others are "judicially self-imposed limits on the exercise of federal jurisdiction." *United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 551 (1996) (internal quotation omitted). The distinction is important because prudential limits are malleable and may be abrogated by statute. *Bennett v. Spear*, 520 U.S. 154, 162 (1997). Here, *Williamson County*'s state court rule is a "prudential," rule because the text of the Constitution does not mandate – or even imply – that property owners are required to pursue Fifth Amendment takings claims in state court. *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 733-34 (1997).

In *Williamson County*, this Court noted that "[t]he Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation." *Williamson County*, 473 U.S. at 194. Importantly, the Fifth Amendment does not explain *when* a property owner is "without just compensation." In *Williamson County*, as justification for the state court requirement, this Court concluded that a property owner is "without just compensation" only

after a state court has denied just compensation for a taking. *Id*. at 194-95. But there is no textual support in the Constitution for this conclusion. In fact, this Court has repeatedly held to the contrary: a property owner is "without just compensation" the moment the taking has occurred. *See United States v. Clarke*, 445 U.S. 253, 258 (1980) ("the usual rule is that the time of the invasion constitutes the act of taking, and '[i]t is that event which gives rise to the claim for compensation. . . .'" (quoting *United States v. Dow*, 357 U.S. 17, 22 (1958)); *United States v. Dickinson*, 331 U.S. 745, 751 (1947) ("the land was taken when it was taken and an obligation to pay for it then arose").

Because the text of the Fifth Amendment does not compel the conclusion that a property owner is "without just compensation" only after being denied just compensation in state court, the rule in *Williamson County* is merely a prudential rule that can be modified as needed to comport with the intent of Congress.

2. Because *Williamson County*'s prudential ripeness rule is in direct conflict with Section 1983, *Williamson County*'s prudential ripeness rule must yield.

As this Court has explained, federal courts "are not free to disregard" federal statutes, even if the purpose is laudable. *San Remo Hotel*, 545 U.S. at 338. Nor may courts "create exceptions" to federal

statutes "whenever courts deem them appropriate." *Id*. at 344. To do so, a court would "flagrantly offend[ ] fundamental principles of separation of powers, and arrogate[ ] to itself prerogatives reserved to the representatives of the people." *Dickerson v. United States*, 530 U.S. 428, 454 (2000) (Scalia, J., dissenting); *see also Alabama v. N. Carolina*, ___ U.S. ___, 130 S. Ct. 2295, 2312 (2010) ("We do not – we cannot – add provisions to a federal statute."). By relegating Fifth Amendment takings claims to state courts, *Williamson County*'s prudential ripeness rule, when read in light of 28 U.S.C. § 1738, effectively negates Congress's intent in enacting Section 1983. *See* Section I(B), *supra* (discussing Congress's intent in enacting Section 1983).

When a prudential rule is in conflict with a federal statute, this Court has held that the prudential rule must yield. In *Bennett v. Spear*, 520 U.S. 154 (1997), this Court examined whether the citizen-suit provision of the Endangered Species Act ("ESA"), 16 U.S.C. § 1540(g), negated the judicially created prudential standing rule that requires plaintiffs to be in the "zone of interest" of a statute. *Id*. at 161. This Court explained that "Congress legislates against the background of our prudential standing doctrine, which applies unless it is expressly negated." *Id*. at 164. This Court then held that the language "any person" in the ESA effectively negated the prudential "zone of interest" rule, thus the "zone of interest" rule yielded to the federal statute. *Id*. at 165-66.

When Congress enacted Section 1983, it used similar language. Section 1983 establishes a federal cause of action for "any citizen of the United States or other person" who is deprived of a constitutional right. 42 U.S.C. § 1983. Indeed, as demonstrated above, Congress intended Section 1983 to provide universal access to federal courts to remedy federal constitutional violations. Thus, *Williamson County*'s prudential ripeness rule must yield to Section 1983.

3. *Allen v. McCurry* does not alter the conclusion that *Williamson County*'s prudential ripeness rule must yield to Section 1983.

Notwithstanding Section 1983, this Court held, in *Allen v. McCurry*, 449 U.S. 90, 91, 96-104 (1980), that Mr. McCurry was not entitled to re-litigate his Fourth Amendment claim in federal court after having originally litigated the issue in his state criminal trial. *See also San Remo Hotel*, 545 U.S. at 343 (discussing the holding in *Allen*). *Allen*, however, is distinguishable in one crucial aspect: it was a criminal case initiated by the state in state court.

Allen was initiated by the state in state court because Mr. McCurry was accused of possession of heroin, and assault with the intent to kill. *Allen*, 449 U.S. at 92. Congress has recognized that prosecution of these types of crimes is reserved to the states. *See, e.g.*, Act For The Protection Of Foreign Officials And Official Guests Of The United States, Pub. L. No.

92-539 (1972) ("The Congress recognizes that from the beginning of our history as a nation, the police power to investigate, prosecute, and punish common crimes such as murder, kidnap[p]ing, and assault has resided in the several States, and that such power should remain with the States."). Indeed, the power to enforce the criminal law is reserved to the States under constitutional principles of federalism. *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993) ("The States possess primary authority for defining and enforcing the criminal law. In criminal trials they also hold the initial responsibility for vindicating constitutional rights." (internal quotation omitted)). In other words, the commencement of Mr. McCurry's criminal case in state, rather than federal, court is consistent with the intent of Congress and the Constitution itself. Naturally, 28 U.S.C. § 1738 would then bar relitigation of the same issues in federal court.

In the context of Fifth Amendment takings litigation, however, litigants are required to initiate their suit in state court pursuant to the judicially created prudential ripeness doctrine. While congressional and constitutional doctrines, such as those in *Allen*, may trump Section 1983's federal court guarantee, this Court should clarify that a judicially created prudential rule cannot trump the expressed intent of Congress, as evinced in Section 1983. Otherwise, *Williamson County*'s prudential ripeness rule will continue to undermine Section 1983 and impose "dramatic" consequences on property owners that Section 1983 was intended to avoid.

B. Under *Williamson County*'s Prudential "Ripeness" Rule, A Fifth Amendment Takings Claim Can Never Become Ripe For Federal Court Review, Thereby Creating A Legal Anomaly.

Williamson County's prudential ripeness rule creates a legal anomaly because a Fifth Amendment takings claim can never become ripe for federal court review. Ripeness "is a justiciability doctrine designed 'to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies. . . .'" *Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 807-08 (2003) (quoting *Abbott Laboratories v. Gardner,* 387 U.S. 136, 148-49 (1967); *see also* Erwin Chemerinsky, *Constitutional Law* § 2.6.1 (3d ed. 2006) (ripeness focuses on *when* a case is ready to be reviewed).

In *Williamson County*, this Court created a ripeness rule. To be sure, *Williamson County* held that the plaintiff's claims in federal court were "premature" and "not yet ripe" because the plaintiff had not yet brought suit in state court. *Williamson County*, 473 U.S. at 185, 194, 196. Likewise, this Court provided that "the property owner cannot claim a violation of the Just Compensation Clause *until* it has used the [state procedure] and been denied just compensation." *Id*. at 195 (emphasis added). Thus, *Williamson County*'s prudential ripeness rule implies that after a plaintiff litigates a takings claim for just compensation in state court, his Fifth Amendment

takings claim will become ripe for review by a federal court.

However, once a property owner files suit in state court to ripen his Fifth Amendment takings claim, he is precluded from later filing his Fifth Amendment takings claim in federal court because of the full faith and credit statute, 28 U.S.C. § 1738. The consequences of such an unintentional anomaly are "dramatic" because the prudential "ripeness" rule is, in actuality, a jurisdiction-stripping preclusion rule that relegates Fifth Amendment takings claimants to state court. As the full faith and credit statute was not analyzed in *Williamson County* when this Court announced its prudential ripeness rule, the four concurring Justices in *San Remo Hotel* rightly contended that *Williamson County* was wrongly decided. *San Remo Hotel*, 545 U.S. at 348-52 (Rehnquist, C.J., concurring).

C. *Williamson County*'s Prudential Ripeness Rule, As Applied By The Tenth Circuit, Creates A Legal Anomaly By Requiring Property Owners Seeking Prospective Relief For An Unconstitutional Condition To, Instead, Seek Retrospective Relief For Just Compensation.

This case presents an excellent opportunity to reconsider *Williamson County*'s prudential ripeness rule, as the four concurring Justices in *San Remo Hotel* desired, because the rule has created yet another anomaly in this case. Petitioners filed suit seeking

prospective relief under the principles in *Nollan*, 483 U.S. 825 and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), to have Ordinance 2006-02 invalidated for imposing an unconstitutional condition. In *Nollan* and *Dolan*, the issue was whether a condition that would have amounted to a taking was a proper exercise of government power. *See Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 547 (2005) (describing the nature of the issue in these cases). If the condition is an improper exercise of government power, the correct remedy is to strike down the condition to, prospectively, prevent an unconstitutional taking. *Nollan*, 483 U.S. at 837; *Dolan*, 512 U.S. at 385 ("the government may not require a person to give up a constitutional right . . . in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property"). In contrast, retrospective just compensation is the proper remedy only "in the event of *otherwise proper* interference amounting to a taking." *First English Evangelical Lutheran Church of Glendale v. Los Angeles County, Cal.*, 482 U.S. 304, 315 (1987) (emphasis added). Indeed, no amount of compensation can justify a taking that results from an improper use of government power. *See Nollan*, 483 U.S. at 837 (unless the condition reflects a "legitimate state interest[,]" the condition "is not a valid regulation of land use but an out-and-out plan of extortion." (internal quotation omitted)).

The Tenth Circuit, applying *Williamson County*'s prudential ripeness rule, held that Petitioners could

not argue that Ordinance 2006-02 is an improper exercise of government power or that the Ordinance should be adjudged unconstitutional. Pet. App. at A-12-13. Instead, the Tenth Circuit held that *Williamson County* mandates that Petitioners seek retrospective just compensation in state court. *Id*. Thus, under the Tenth Circuit's decision, a person wishing to challenge an unconstitutional condition must file suit in state court and seek just compensation, even though the challenged condition was an improper exercise of government power. Accordingly, this case presents an excellent opportunity to address the anomalies and "dramatic" consequences created by *Williamson County*'s prudential ripeness rule.

CONCLUSION

For the foregoing reasons, MSLF respectfully submits that this Court should grant the Petition.

Respectfully submitted,

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