No. 12-123

In the Supreme Court of the United States

MARVIN D. HORNE, ET AL.,
PETITIONERS

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,
RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE CATO INSTITUTE, NATIONAL FEDERATION OF INDEPENDENT BUSINESS, CENTER FOR CONSTITUTIONAL JURISPRUDENCE, AND REASON FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR CERTIORARI

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QUESTION PRESENTED

Whether the Ninth Circuit erred in holding—contrary to the decisions of five other Circuit Courts of Appeals—that a party may not raise the Takings Clause as a defense to a "direct transfer of funds mandated by the Government," *Eastern Enterprises* v. *Apfel*, 524 U.S. 498, 521 (1998) (plurality), but instead must pay the money and then bring a separate, later claim requesting reimbursement of the money under the Tucker Act in the Court of Federal Claims.

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INTRODUCTION AND INTEREST OF *AMICI CURIAE*[*]

Amici, described in Appendix A, are advocates for individual freedom who believe that the right to keep and control one's own property is among the most fundamental rights protected by the Constitution, and that government should not make property owners suffer needless burdens in order to vindicate their rights.

This case involves one such burden. If the Ninth Circuit's decision is permitted to stand, property owners who have been wrongfully ordered to pay the Federal Government money—in proceedings the government itself initiated—will not at that time be permitted to invoke the Takings Clause in their defense. Instead, after litigating all other constitutional and statutory defenses, they will have to hand over their money to the government. They will then have to go to a different forum, the Court of Federal Claims, and file a separate suit against the government under the Tucker Act just to make their takings claims "ripe." Only then will a court decide whether the monies the property owners had to pay were unconstitutional takings. And if they were, only then will the property owners receive their money back.

This Rube Goldberg approach to adjudicating takings claims serves no valid purpose. And for that reason, a plurality of this Court squarely rejected it

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[*] Pursuant to Rule 37.2(a), *amici* provided timely notice of their intention to file this brief. All parties have consented. In accordance with Rule 37.6, no counsel for any party has authored this brief in whole or in part, and no person or entity, other than the *amici*, has made a monetary contribution to the preparation or submission of this brief.

in *Eastern Enterprises* v. *Apfel*, 524 U.S. 498 (1998). The plurality—consisting of all Justices who reached the issue—rightly recognized that having to jump through such hoops to assert a takings claim "would entail an utterly pointless set of activities." *Id.* at 521 (quotation omitted). Five courts of appeals—the First, Second, Fourth, Fifth, and D.C. Circuits—have all agreed. Pet. 16-24. Only the Ninth Circuit cannot abide this result.

Certiorari is needed not only to resolve that conflict, but also to ensure that this Court's ripeness doctrine does not impose unnecessary burdens on property owners—an issue of significant national concern. In *Williamson County Regional Planning Commission* v. *Hamilton Bank of Johnson City*, 473 U.S. 172, 194-196 (1985), this Court held that a government taking of real or tangible personal property is not ripe to challenge until a property owner has sought monetary compensation for the property that has been taken. In federal cases, that means a suit for damages in the Court of Federal Claims under the Tucker Act. *Id.* at 195. But where a taking involves *money* rather than real or tangible property, *Williamson County*'s ripeness rule makes no sense—the government does not take money, only to give it right back in the form of "compensation." The plurality in *Apfel* thus recognized an exception for takings of money. And as we explain in Part I, certiorari should be granted to prevent *Williamson County*'s ripeness rule from being expanded beyond its original scope.

As we explain in Part II, however, *Williamson County* itself has not stood the test of time. Whether a taking involves money or some other tangible property, property owners should be allowed to challenge all uncompensated takings immediately after they

occur—without having to pursue unpromised compensation first. The time, expense, and uncertainty of trying to recover compensation after-the-fact is burdensome to property owners across the country. And *Williamson County*'s premise that compensation need not be paid at the time a taking occurs is both contrary to the text and history of the Takings Clause and inconsistent with this Court's treatment of similar deprivations under the Due Process Clause. This case presents an opportunity to reconsider *Williamson County*, and to return to a much more defensible rule—dating back to Magna Carta—that government takings of private property must be accompanied by "immediate payment." Magna Carta, Cl. 28 (1215).

STATEMENT

1. Since the New Deal, the federal government has heavily controlled the supply of agricultural products, ostensibly to prevent "unreasonable fluctuations in supplies and prices." 7 U.S.C. § 602(4) (2006); see *Evans* v. *United States*, 74 Fed. Cl. 554, 558 (2006). Under the Agricultural Marketing Agreement Act of 1937 and its implementing regulations, the United States Department of Agriculture ("USDA") issues "marketing orders" that manipulate prices by imposing production quotas or restricting supply. 7 U.S.C. § 608c (2006).

A much-criticized relic of the New Deal, these marketing orders are effectively government-enforced cartels that fine farmers who attempt to sell more than their allotted quotas, and that "deploy the legal powers of the government to manipulate supply in an effort to increase grower profits." See generally Thomas M. Lenard & Michael P. Mazur, *Harvest of*

Waste: The Marketing Order Program, Regulation, May/June 1985, at 21.[1]

2. This case involves the USDA's marketing order for raisins. 14 Fed. Reg. 5136. Under that order, "handlers" of raisins must reserve a certain portion of their crop, which they may not sell on the open market. The percentage of the crop that must be reserved each year is established by the USDA, based on the recommendations of a committee of industry representatives.[2] 7 C.F.R. §§ 989.35, 989.36. The percentage is announced annually on February 15, long after farmers have spent substantial resources to cultivate and harvest that year's crop. *Id.* §§ 989.21, 989.54(d).

Once the set-aside percentage has been set, those "reserve-tonnage" raisins must be physically segregated from the rest of the farmers' crop and held "for the account" of the Committee, which effectively takes title. *Id.* §§ 989.65, 989.66(a), (b)(1), (b)(2), (g). The Committee may then decide to sell the raisins or simply give them away to anyone it chooses. *Id.* § 989.66(h), (b)(4). During the relevant crop years, 2002-2003 and 2003-2004, farmers were not compensated for their reserve-tonnage raisins at even the cost of production—in fact, in 2003-2004, *they received no compensation at all*. Pet. App. 9a.

3. Petitioners are independent farmers in Fresno and Madera Counties. During 2002-2003 and 2003-

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[1]Available at: www.cato.org/pubs/regulation/regv9n3/v9n3-4.pdf.

[2] The committee consists of forty-six industry representatives and *one* representative of the public. See 7 C.F.R. §§ 989.26, 989.29, 989.30.

2004, petitioners did not set aside the requisite reserve-tonnage raisins. They believed that the Raisin Marketing Order applied only to "handlers," and did not apply to them as "producers," as the statute defines those terms. Pet. App. 10a.

The government disagreed. It initiated an administrative enforcement action against petitioners, and the USDA ultimately found them liable for failing to give up their raisins. Pet. App. 11a, 121a, 145a. The USDA ordered petitioners to pay $438,843.53, the approximate market value of the raisins that allegedly should have been relinquished. Petitioners were also ordered to hand over $202,600 in civil penalties and $8,783.39 in unpaid assessments.

4. By statute, fines and penalties imposed for violations of a marketing order are reviewable in the federal district courts. 7 U.S.C. § 608c(14)(A)-(B), 608c(15)(A)-(B) (2006). Petitioners thus sought review of the USDA's decision, raising three claims: (1) that the requirement to give up their raisin crop, and the associated fines, violate the Takings Clause of the Fifth Amendment; (2) that the penalties imposed on them violate the Excessive Fines Clause of the Eighth Amendment; and (3) that the USDA misconstrued the Raisin Marketing Order in applying it to them. The district court granted summary judgment to the USDA. Pet. App. 55a.

5. Petitioners appealed, but the Ninth Circuit affirmed. In response to a petition for rehearing, the government argued for the first time that petitioners' takings claim would not be ripe until they complete this litigation, pay the fines, and sue for damages under the Tucker Act in the Court of Federal Claims.

The panel agreed with the government, issuing a revised opinion. Invoking *Bay View, Inc.* v. *AHTNA, Inc.*, 105 F.3d 1281 (9th Cir. 1997) and *Williamson County Regional Planning Commission* v. *Hamilton Bank*, 473 U.S. 172 (1985), the panel observed that "the Tucker Act allows parties seeking compensation from the United States to bring suit in the Court of Federal Claims." Pet. App. 15a. The panel then concluded that all takings claims—even challenges to direct transfers of money—"must be brought there in the first instance" because a takings claim is not ripe until a party has unsuccessfully sought compensation. *Ibid.* Although the panel's new opinion cited *Eastern Enterprises* v. *Apfel*, 524 U.S. 498 (1998) (plurality), it did not address *Apfel*'s conclusion that a takings defense to a direct transfer of funds is immediately ripe, without need to seek damages under the Tucker Act.[3]

REASONS FOR GRANTING THE WRIT

I. In Conflict With Five Other Circuits And A Plurality Of This Court, The Ninth Circuit Has Expanded *Williamson County*'s Ripeness Rule Beyond Its Moorings.

Certiorari should be granted to rein in the Ninth Circuit's overbroad reading of *Williamson County* and to firmly establish what a plurality of this Court and five circuits have recognized: When the government's

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[3] Although the Ninth Circuit did not attempt to resolve the conflict between *Apfel* and its prior decision in *Bay View*, a district court has acknowledged the conflict, but applied *Bay View* on the ground that *Apfel*'s plurality opinion is not binding. *Mead* v. *City of Cotati*, 2008 WL 4963048 (N.D. Cal. Nov. 19, 2008).

demand of money from a property owner allegedly violates the Takings Clause, the takings claim is ripe immediately—without the owner's having to pay the money and file a separate suit to get it back.

In *Williamson County*, this Court reasoned that when the government "provides an adequate procedure for seeking just compensation" for the taking of *real property*, "the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure." 473 U.S. at 195. For this reason, real-property "taking claims against the Federal Government are premature until the property owner has availed itself of the process provided by the Tucker Act," which authorizes suing the United States for damages in the Court of Federal Claims. *Ibid.* But the Ninth Circuit—alone among the courts of appeals—has taken that rule to an indefensible extreme, applying it to takings of *money*. And it has held that the Tucker Act effectively divests it of *all* jurisdiction over any takings claims against the federal government, no matter how raised, even if asserted as a *defense* in an enforcement action initiated by the government.

Neither law nor common sense supports that extreme rule. Although the Tucker Act provides an exclusive remedy for damages claims against the government, it places no statutory limit on the right of individuals to seek declaratory or injunctive relief from unconstitutional government action in district court. *Duke Power Co.* v. *Carolina Envtl Study Grp, Inc.*, 438 U.S. 59, 71 n.15 (1978). Nor does it deprive individuals (such as petitioners) whom the government seeks to fine from arguing in their own defense that the fine is unconstitutional. Those ordinary remedies should be fully available where a taking,

"rather than burdening real or physical property, requires a direct transfer of funds" to the government. *Apfel*, 524 U.S. at 521 (quotation omitted). For at least three reasons, this Court should grant review and confirm that it makes no sense to deem such claims unripe.

A. When The Government Initiates Proceedings To Take Money, It Is Pointless To Burden The Property Owner With A Separate Suit For Compensation.

The most obvious reason not to extend *Williamson County*'s ripeness rule to takings of money is that requiring a separate suit for damages in such cases is pointless, inefficient, and burdensome.

When the government takes real or other tangible property from an individual, the Fifth Amendment requires "just compensation"—*i.e.*, an exchange of tangible property for money. In that context, a suit for damages under the Tucker Act serves as a mechanism for "obtaining compensation" for the value of the land or other piece of property that the government has taken. *Williamson County*, 473 U.S. at 194. But when the government takes *money* from an individual—by imposing a fine, penalty, or other obligation to pay—there is nothing to exchange. Rather, "[e]very dollar paid pursuant to a statute would be presumed to generate a dollar of Tucker Act compensation." *In re Chateaugay Corp.*, 53 F.3d 478, 497 (2d Cir. 1995). The only "just compensation" for a taking of money is to give the money right back.

Thus, as the plurality in *Apfel* recognized, requiring a separate suit for damages to recover money taken in a prior proceeding "would entail an utterly pointless set of activities." 524 U.S. at 521 (quotation

omitted). The property owner would have to pay the money to the government in one proceeding, and then file a separate suit under the Tucker Act to get the money back—all before it could argue that the money should not have been taken in the first place.

In addition to being pointless, requiring a separate suit for damages is also costly, burdensome, and inefficient. Where, as here, the Takings Clause is raised as a defense to a fine imposed by an agency, the Ninth Circuit's rule requires related claims to be adjudicated in two entirely separate proceedings. In this case, for example, petitioners would have to litigate all of their other statutory and constitutional defenses to the agency action in district court pursuant to applicable judicial review procedures. 7 U.S.C. § 608c(15)(B) (2006). If they did not prevail, petitioners would have to pay the fine levied against them. Only after handing over their money would petitioners then be able to begin a second round of litigation in the Court of Federal Claims to get it back, this time raising their takings defense.

This Rube Goldberg approach makes no sense. It requires courts to reach multiple potentially complex statutory and constitutional issues, while deferring a dispositive issue that may be more easily resolved. Cf., *e.g.*, *Apfel*, 524 U.S. at 538 (holding that because "the Coal Act's allocation scheme violates the Takings Clause as applied to Eastern, we need not address Eastern's due process claim"). And it requires property owners to run a gauntlet of successive, piecemeal litigation before receiving a final determination that they are entitled to keep their own money after all—no small burden for small raisin farmers such as petitioners, and an even larger burden for many other ordinary citizens.

Nor is it efficient for related issues to be resolved in two separate forums. The chief question in takings cases involving money is not how much money the government must pay to provide just compensation, as a dollar taken is a dollar owed. Instead, the question is whether a given statutory scheme or agency action effectuates a "taking" in the first place.

Making that determination often entails comprehensive analysis of a statutory scheme and its effect on property owners—the same kind of analysis district courts will typically undertake in judicial review proceedings addressing a property owner's other claims. See, *e.g.*, *Apfel*, 524 U.S. at 522-537 (examining the "economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action" to determine whether a taking has occurred). Not only is it inefficient to have two different courts, subject to the law of two different circuits, decide such overlapping issues, but it also invites confusion and further litigation over the collateral estoppel effect of portions of a prior decision. Further, it increases the difficulty of harmonizing a statutory scheme with the Constitution. If statutory and constitutional issues must be decided in separate proceedings, district courts will interpret statutes without regard to their constitutional problems; and the Court of Federal Claims will address those problems without being able to avoid them by adopting a saving construction. Contra *Hooper* v. *California*, 155 U.S. 648, 657 (1895) ("[E]very reasonable construction must be resorted to, in order to save a statute from unconstitutionality.").

The ripeness doctrine is supposed to ensure that disputes are resolved when they are most "fit[] … for judicial decision." *Abbott Labs.* v. *Gardner*, 387 U.S.

136, 149 (1967). But the Ninth Circuit's rule does not serve that purpose. It requires takings claims to be raised when they are *least* fit for review. And it does so in a manner that is "utterly pointless," as there is simply no legal or factual question to be resolved in a Tucker Act suit that cannot be resolved earlier in the district court. *Apfel*, 524 U.S. at 521.

Indeed, it is worse than that. The United States itself initiated the underlying administrative proceedings that led petitioners to assert a taking, and no one disputes that this administrative process was exhausted. Yet, despite the imminent threat to petitioners' property, the government now says cases such as this are not "ripe"—requiring a separate lawsuit and necessitating a further outlay of resources that may or may not be cost-justified in any given case, depending on the amount being taken, and may or may not be reimbursed. Ripeness is a shield that protects the government from having to litigate hypothetical disputes; it is not a sword to deprive individuals of constitutional defenses in proceedings that the government itself has initiated. *Nat'l Park Hospitality Ass'n* v. *Dep't of the Interior*, 538 U.S. 803, 808 (2003) (deeming controversy ripe when "factual components [are] fleshed out … in a fashion that harms or threatens to harm" a party). The government's invocation of ripeness in this context can only be described as Kafkaesque, and it finds no support in Article III of the Constitution. Review is warranted.

B. Obligating A Property Owner To Make An Unjustified Monetary Payment Is Inherently A Taking "Without Just Compensation."

Despite the pointless burden of requiring a property owner to seek compensation before challenging a

taking of money, the Ninth Circuit has justified it on the ground that "the government is not prohibited from taking private property … so long as it pays compensation" eventually. *Bay View*, 105 F.3d at 1284-1285. Under this theory, the Fifth Amendment's prohibition on taking property "without just compensation" is not violated unless and until the government fails to pay compensation through the Tucker Act at some later date, and no takings claim is ripe until that occurs.

This theory is questionable even as applied to real or physical property (see *infra* Part II), but it is wholly implausible as applied to government-imposed fines or takings of money. As the Second Circuit has explained, "where the challenged statute requires a person or entity to pay money to the government, it must be presumed that Congress had no intention of providing compensation for the deprivation through the Tucker Act." *Chateaugay*, 53 F.3d at 493. This is "[c]ommon sense," as paying compensation for a monetary taking "would tend to nullify" the very government action that effectuated it. *Ibid.*; see also *Wash. Legal Found.* v. *Tex. Equal Access to Justice Found.*, 270 F.3d 180, 194 (5th Cir. 2001) (holding that, when the government takes money, "it would defy logic, to say the least, to presume the availability of a just compensation remedy").

Although it may be reasonable to assume that the government will pay money after it takes someone's land, it is absurd to assume that the government will return a fine after it has imposed one. As the plurality in *Apfel* recognized, "it cannot be said that monetary relief against the Government is an available remedy" for a monetary taking simply because the

Tucker Act authorizes suits for damages against the government. 524 U.S. at 521.

Williamson County does not contradict this logic. The Court there concluded that a property owner has no valid takings claim "[i]f the government has provided an adequate process for obtaining compensation, *and if resort to that process yields just compensation*." 473 U.S. at 194 (quotation omitted, emphasis added). But in contrast to that case, where it was possible that Tennessee's inverse condemnation process would yield just compensation for the land taken, there is no reasonable possibility that resort to the Tucker Act would prompt the government to willingly return a fine.[4] To be sure, the government can be *compelled* to return a fine if the court in a Tucker Act suit ultimately deems the fine unconstitutional. But that conclusion does not *ripen* a constitutional issue; it merely *resolves* one—the exact same one that arises in a suit for declaratory or injunctive relief.

Simply put, a taking in the form of a fine or other monetary payment is inherently a taking "without just compensation." Unlike takings of real or tangible personal property, there is no reasonable possibility that "compensation" for a monetary taking will be forthcoming. Thus, there is no reason to consider the takings claim unripe when a monetary payment to the government is ordered. This Court's intervention is needed to make that clear.

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[4] To the extent that the government does experience a change of heart, it can of course moot any takings claim for declaratory or injunctive relief by rescinding the fine. There is no need for a separate suit under the Tucker Act.

C. Property Owners Should Not Have To Suffer A Violation Of Their Constitutional Rights Before Being Allowed To Raise Them.

For takings of real or physical property, the Tucker Act may avoid constitutional injury by making genuine *compensation* available. But for takings that require the payment of money—an inherently uncompensated taking—the Tucker Act becomes something very different: It is just a means of recovering *damages* for a constitutional injury that has already occurred. Ripeness principles, however, have never required an individual to suffer a constitutional injury before bringing suit. It is enough to establish a realistic *threat* of injury.

As this Court explained long ago, one "does not have to await the consummation of threatened injury to obtain preventive relief." *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 288 (1936). Rather, "[i]f the injury is certainly impending, that is enough." *Ibid.* In no other context must an individual suffer an imminent violation of his constitutional rights before he is permitted to assert them. See, *e.g.*, *Steffel* v. *Thompson*, 415 U.S. 452, 462-463 (1974) (permitting First Amendment challenge to criminal statute before prosecution); *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520 (1993) (Free Exercise Clause); *McDonald* v. *City of Chicago*, 130 S. Ct. 3020, 3026-3027 (2010) (Second Amendment); *Albertson* v. *Subversive Activities Control Bd.*, 382 U.S. 70, 73-76 (1965) (Fifth Amendment right against self-incrimination); *Pierce* v. *Soc'y of Sisters*, 268 U.S. 510, 536 (1925) (substantive due process); *Duke Power*, 438 U.S. at 67-68, 81-82 (procedural due process).

That is particularly true where an individual asserts his constitutional rights as a *defense* in an enforcement action brought by the government. This posture involves none of the usual concerns about the justiciability of pre-enforcement review; enforcement has already commenced. It is thus highly anomalous to forbid an individual from raising a constitutional defense in proceedings that seek to impose a fine. Indeed, "[d]ue process requires that there be an opportunity to present every available defense." *Lindsey* v. *Normet*, 405 U.S. 56, 66 (1972) (quotation omitted).

When the government commences an enforcement action to impose a monetary penalty and one objects to that penalty on First Amendment grounds, for example, it would be unthinkable to require that the penalty be paid simply because one can sue for damages later. See *United States* v. *United Foods, Inc.*, 533 U.S. 405 (2001) (addressing First Amendment challenge to marketing order that imposed assessments on handlers of mushrooms, where challenge was raised as defense to enforcement action). There is no reason to treat the Takings Clause any differently.

It is unsurprising, then, that this Court has often reached the merits of Takings Clause defenses without noting any ripeness problem. See *Bennis* v. *Michigan*, 516 U.S. 442, 452-453 (1996) (takings claim raised as defense to asset forfeiture action); *FCC* v. *Fla. Power Corp.*, 480 U.S. 245 (1987) (takings claim addressed in response to FCC rate-setting order); *Kaiser Aetna* v. *United States*, 444 U.S. 164 (1979); (takings claim addressed in suit by federal government over public access to marina); *Goldblatt* v. *Town of Hempstead, N.Y.*, 369 U.S. 590, 594 (1962) (takings

defense raised in action to enjoin defendant from operating a sand and gravel pit without a permit). This Court's review is needed to confirm that the same ripeness rules that govern other constitutional claims govern claims for takings, particularly where those claims are asserted as a *defense* to imminent government action.

II. *Williamson County* Should Be Overruled Because Its Premises Have Become Untenable.

As we have explained, certiorari is warranted to confirm that *Williamson County* should not be cut loose from its original moorings and extended to takings of money. But this case also presents an opportunity to consider whether *Williamson County*'s ripeness rule should be overruled in its entirety.

As Chief Justice Rehnquist once observed, *Williamson County* has perverse consequences for claims against state and local governments. It forces litigants to bring their federal takings claims in state court, after which litigants end up being precluded from pursuing those claims in federal court. *San Remo Hotel, L.P.* v. *City & Cnty of S.F., Cal.*, 545 U.S. 323, 351 (2005) (Rehnquist, C.J., joined by Kennedy, Thomas, and O'Connor, J.J., concurring). As a result, "*Williamson County* all but guarantees that claimants will be unable to utilize the federal courts to enforce the Fifth Amendment's just compensation guarantee." *Ibid.* Despite having joined the majority in *Williamson County*, Chief Justice Rehnquist indicated that "further reflection and experience" have rendered that decision "suspect." *Id.* at 352.

More than suspect, reflection and experience have shown *Williamson County* worthy of abandonment. As explained below, the decision not only lacks sup-

port in the text, structure, history, and purpose of the Takings Clause; it also imposes significant practical burdens on property owners—burdens that confirm the unjust nature of the ripeness rule it laid down. See *Payne* v. *Tennessee*, 501 U.S. 808, 827 (1991) (explaining that precedents may be overruled when they "are unworkable or are badly reasoned").

A. The Text And History Of The Takings Clause Do Not Permit The Government To Defer Compensation Until After A Taking Occurs.

At its very core, *Williamson County*'s holding rests on a mistaken premise—that the Fifth Amendment does not require actual compensation at the time of a taking; instead, "all that is required" is a "process" by which an aggrieved property owner might (or might not) obtain compensation later on. 473 U.S. at 194. In other words, the government may take first and ask questions later. And the onus is on the property owner to avail herself of state or federal "process" in hopes of ultimately receiving something in return.

In assuming that no compensation is required at the time of a taking, *Williamson County* purported to rely on the "nature of the constitutional right" protected by the Takings Clause. But the text of the Takings Clause suggests nothing of the sort. See *San Remo Hotel*, 545 U.S. at 349 (Rehnquist, C.J., concurring) (noting that, although "*Williamson County* purported to interpret the Fifth Amendment," its interpretation is "not obvious"); *Wilkie* v. *Robbins*, 551 U.S. 537, 583 (2007) (Ginsburg, J. dissenting) ("Correlative to the right to be compensated for a taking is the right to refuse to submit to a taking where no compensation is in the offing.").

The Takings Clause provides: "[N]or shall private property be taken for public use, *without* just compensation." The most natural reading of this language is that compensation is a prerequisite that the government must satisfy when it effects a taking—not something to be made available later. Far from merely establishing a post-taking damages remedy requiring lengthy court proceedings, the text of the Takings Clause suggests no temporal separation between the taking and the payment of compensation. And it certainly does not compel the conclusion that compensation may always be paid at some indefinite later time.

This understanding of the Takings Clause, moreover, comports with how it was understood for a century after the Bill of Rights was enacted. As one early court explained: "as an original question, it seems clear that the proper interpretation of the Constitution requires that the owner should receive his just compensation *before* entry upon his property." *Md. & Wash. Ry. Co.* v. *Hiller*, 8 App. D.C. 289, 294 (C.A.D.C. 1896) (emphasis added); see also Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52 Vand. L. Rev. 57, 60 (1999) (concluding that "for most of the nineteenth century, just compensation clauses were generally understood not to create remedial duties, but to impose legislative disabilities").

In fact, that understanding dates as far back as Magna Carta, which provided that "[n]o constable or other royal official shall take corn or other movable goods from any man without *immediate payment*." Magna Carta, Cl. 28 (1215) (emphasis added).

B. There Is No Reason To Treat The Takings Clause Differently From The Due Process Clause.

Not only is belated compensation unsupported by the language of the Takings Clause; it is also discordant with this Court's treatment of analogous language in the Due Process Clause. Just as property may not be taken "without just compensation," it also may not be taken "without due process of law." Accord *Baker* v. *McCollan*, 443 U.S. 137, 145 (1979) ("The Fourteenth Amendment does not protect against all deprivations of liberty. It protects only against deprivations of liberty accomplished 'without due process of law.'"). Yet, unlike the Takings Clause, "the Court usually has held that the [Due Process Clause] requires some kind of a hearing *before* the State deprives a person of liberty or property." *Zinermon* v. *Burch*, 494 U.S. 113, 128 (1990) (citing cases).

Why treat due process as a prerequisite to government action while treating compensation as an afterthought? *Williamson County* sidestepped this question by analogizing to *Parratt* v. *Taylor*, 451 U.S. 527 (1981), a due process case in which the Court had held that a deprivation of property was justified by "the provision of meaningful postdeprivation process." 473 U.S. at 195. Since *Williamson County*, however, this Court has made clear that *Parratt* applies only to situations where the government is *unable* to provide pre-deprivation process. *Zinermon*, 494 U.S. at 132. "In situations where the State feasibly can provide a predeprivation hearing before taking property, it generally must do so regardless of the adequacy of a postdeprivation tort remedy to compensate for the

taking." *Ibid.* The same rule should apply to the Takings Clause.

C. Deferring Compensation Until After A Taking Imposes Significant Burdens On Property Owners.

Williamson County's final effort to justify belated compensation was to suggest that, unlike in due process cases, "the Court has [n]ever recognized any interest served by pretaking compensation that could not be equally well served by post-taking compensation." 473 U.S. at 195 n.14. Real-world experience in the years since *Williamson County*, however, strongly belies that suggestion. For several reasons, property owners suffer substantial burdens in their efforts to recover compensation. And for many property owners, justice delayed will be justice denied.

First, obtaining compensation can take a very long time. In one recent case, for example, a Tucker Act claim filed by two ranchers in 1991 took "almost twenty years of litigation," culminating in a recent decision that the claim was *still* not ripe because the ranchers had not exhausted all administrative remedies. *Estate of Hage* v. *United States*, 2012 WL 3043001, at *3-5 (Fed. Cir. July 26, 2012). Even if more litigation eventually results in compensation, however, it will be too late: Both ranchers have since died. See Sandra Chereb, *Wayne Hage, Nevada Rancher and Sagebrush Rebel, Dies*, The Associated Press (June 6, 2006).[5] A twenty-year delay may be atypical, but substantial delay in recovering compen-

[5] Available at: www.propertyrightsresearch.org/2006/articles06/wayne_hage.htm

sation is *not*. *E.g.*, *Bowles* v. *United States*, 31 Fed. Cl. 37, 52 (1994) (noting "long delay").

Second, it is often very costly for a property owner to litigate compensation. For example, when Minnesota took from David Luse five acres that he and his wife had owned for twenty years, he had to spend $100,000 in attorney and appraisal fees before eventually receiving $845,000 in compensation. Dan Browning, *MnDOT's Tactics Squeeze Landowners*, Minneapolis Star Tribune (Sept. 20, 2003).[6] Another Minnesotan had to spend over $50,000 to secure just compensation. *Ibid.*; see also *Holman* v. *City of Warrenton*, 242 F. Supp. 2d 791, 808 (D. Or. 2002) (describing inverse condemnation process as "time-consuming and expensive"). Making matters worse, such costs of litigation are often uncompensated. See Abraham Bell & Gideon Parchomovsky, *Taking Compensation Private*, 59 Stan. L. Rev. 871, 890 & n.108 (2007) (noting that only sixteen states have enacted statutes awarding full or partial reimbursement in eminent domain litigation).

Even if full compensation is eventually paid, it can be extremely burdensome for a cash-strapped property owner—particularly one who loses a home or business—to await that day. One small business owner who lost his shop in West Virginia, for example, "worried about being able to find a new property at the drop of a hat" because he did not have enough money to pay up-front a second rent, remodel a new shop, and cover the lost revenue from the 30 days his business would have to close for the move. Jillian Swords, *Eminent Domain Leaves Businesses Home-*

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[6] Available at: www.startribune.com/local/11574556.html

less, The Appalachian (Feb. 12, 2008).[7] Similarly, an elderly couple in North Carolina was left homeless when their farm was taken to expand a landfill. Lynnette Taylor, *Eminent Domain Case Leaves Surry County Family Homeless*, WITN (Nov. 17, 2007).[8] They stayed on the farm, only to be ordered to pay rent on their own property to the state.

Such burdens are also likely to be felt by the most vulnerable, as eminent domain disproportionately targets "ethnic or racial minorities" and those who "have completed significantly less education, live on significantly less income, and live at or below the federal poverty line." Dick M. Carpenter II & John K. Ross, *Victimizing the Vulnerable* 2 (2007).[9] The costs, delays, and complications of seeking compensation are thus often imposed on those least equipped to bear them, and on those least able to await belated compensation.

Third, takings accompanied by no more than a vague prospect of future compensation are extremely demoralizing to property owners. Just as "predeprivation process may serve the purpose of making an individual feel that the government has dealt with him fairly," predeprivation compensation does the same. *Williamson County*, 473 U.S. at 195 n.14. As Professor Michelman famously observed, "demoralization costs" should not be neglected in the

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[7] Available at: www.theappalachianonline.com/community/3251-eminent-domain-leaves-businesses-homeless

[8] Available at: www.witn.com/home/headlines/11533181.html

[9] Available at: www.ij.org/images/pdf_folder/other_pubs/Victimizing_the_Vulnerable.pdf

takings calculus. Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1214 (1967). And those costs are quite significant here.

For all of these reasons, it is no longer tenable to maintain that there is no "interest served by pretaking compensation that could not be equally well served by post-taking compensation." *Williamson County*, 473 U.S. at 195 n.14. It is critical that the Court confirm that the *Williamson County* ripeness rule does not apply to a "direct transfer of funds mandated by the Government," *Apfel*, 524 U.S. at 521—and in so doing, the Court should take this opportunity to consider whether *Williamson County* should be overruled outright.

CONCLUSION

Williamson County is unsupportable as a matter of constitutional text, structure, history, and purpose. Moreover, it is unworkable in practice and imposes unwarranted burdens on property owners, particularly those of limited means. The Court should therefore take this opportunity to overrule it. At a minimum, however, *Williamson County* should not be cut loose from its original rationale, which is limited to real property and certainly ought not apply where the government has imposed a fine.

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APPENDIX A: LIST OF *AMICI*

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 constitutional 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 Constitution provides for the protection of property rights against wrongful takings.

The *National Federation of Independent Business* (NFIB) is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses. NFIB represents about 350,000 member businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business.

The *National Federation of Independent Business Small Business Legal Center* (NFIB 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 on issues of public interest affecting small 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 *Center for Constitutional Jurisprudence* is the public interest law arm of the Claremont Institute, the mission of which is to restore the principles of the American Founding to their rightful and preeminent authority in our national life, including the proposition expressed in the Fifth Amendment that private property can be taken only for public use, and then only upon payment of just compensation. In addition to providing counsel for parties at all levels of state and federal courts, the Center has participated as *amicus curiae* before this Court in several cases of constitutional significance, including *Kelo* v. *City of New London, Connecticut*, 545 U.S. 469 (2005), and *Rapanos* v. *United States*, 547 U.S. 715 (2006).

The *Reason Foundation* is a national, nonpartisan, and nonprofit public policy think tank, founded in 1978. Reason's mission is to advance a free society by developing, applying, and promoting libertarian principles and policies—including free markets, individual liberty, and the rule of law. Reason supports dynamic market-based public policies that allow and encourage individuals and voluntary institutions to flourish. Reason advances its mission by publishing *Reason* magazine, as well as commentary on its websites, *www.reason.com* and *www.reason.tv*, and by issuing policy research reports. To further Reason's commitment to "Free Minds and Free Markets," Reason selectively participates as amicus curiae in cases raising significant constitutional issues.