No. 22-1191

In The
Supreme Court of the United States

THOMAS GEARING AND DANIEL GEARING,

PETITIONERS,

V.

CITY OF HALF MOON BAY,

RESPONDENT.

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

**Amici Curiae Brief of The
Small Property Owners of San Francisco Institute,
Owners' Counsel of America,
And The Buckeye Institute
Supporting Petitioners**

MICHAEL M. BERGER*
*COUNSEL OF RECORD
MANATT, PHELPS & PHILLIPS, LLP
2049 Century Park East, Suite 1700
Los Angeles, CA 90067
(310) 312-4185
mmberger@manatt.com

Counsel for Amici Curiae
The Small Property Owners of San Francisco Institute,
Owners' Counsel of America, and The Buckeye Institute

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES
(continued)

TABLE OF AUTHORITIES
(continued)

TABLE OF AUTHORITIES
(continued)

STATUTES

TABLE OF AUTHORITIES
(continued)

OTHER AUTHORITIES

TABLE OF AUTHORITIES
(continued)

INTEREST OF THE AMICI CURIAE

The Small Property Owners of San Francisco Institute ("SPOSFI") is a California nonprofit corporation (Internal Revenue Code § 501(c)(3)) and organization of small property owners that advocates for home ownership and the rights of property owners in San Francisco. SPOSFI's members range from young families to the elderly on fixed incomes, and its membership cuts across all racial, ethnic, and socio-economic strata.[1]

SPOSFI is also involved in education, outreach and research. Through education, it helps owners better understand their rights and learn how to deal with local government; through outreach to community groups and to the public, it demonstrates how restrictive regulations harm both tenants and landlords, and through research projects, it aims to separate hyperbole from fact on the effect of rent control on housing stock. Through legal advocacy, SPOSFI seeks to protect the rights of small property owners against unfair and burdensome regulations.

Owners' Counsel of America (OCA) is a national not-for-profit organization of lawyers dedicated to the principle that the right to own and use property is "the guardian of every other right" and the basis of a free society. *See* James W. Ely, The Guardian of Every Other Right: A Constitutional History of Property Rights (3d ed. 2008). OCA's invitation-only

---

[1] No counsel for any party has authored this brief in whole or in part and no person other than the amicus has made any monetary contribution to this brief's preparation or submission. The parties were timely notified.

members work to advance, preserve, and defend private property rights in eminent domain, inverse, and regulatory taking cases. OCA member attorneys have been involved in landmark property law cases in nearly every jurisdiction nationwide, including in this Court. They have also published widely in the area of eminent domain and property rights. As lawyers on the front lines of eminent domain and property rights law, OCA brings a unique perspective to this case. OCA understands not only takings jurisprudence, but the practical application of takings law to the myriad of factual circumstances that often drive decisions and legal precedent.

The Buckeye Institute was founded in 1989 as an independent research and educational institution—a think tank—whose mission is to advance free-market public policy in the states. The Buckeye Institute's staff accomplishes the organization's mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policy solutions, and marketing those policy solutions for implementation and replication throughout the country. The Buckeye Institute is a nonpartisan, non-profit, tax-exempt organization under I.R.C. section 501(c)(3). The Buckeye Institute's Legal Center files and joins amicus briefs that are consistent with its mission and goals.

The Buckeye Institute is dedicated to protecting individual liberties, and especially those liberties guaranteed by the Constitution of the United States, against government interference. The Buckeye Institute is a leading advocate of protecting private property, and the rights associated with it,

particularly the right to compensation when private property is taken for public use.

INTRODUCTION

It took this Court 34 years to finally do away with *Williamson County Reg. Plan. Commn. v. Hamilton Bank*, 473 U.S. 172 (1985), a decision that the Court itself concluded was "not just wrong. Its reasoning was exceptionally ill founded and conflicted with much of our takings jurisprudence." *Knick v. Township of Scott*, 139 S.Ct. 2162, 2178 (2019).

Meanwhile, property owners with Fifth Amendment takings claims had suffered under the unfair rule of *Williamson County* for decades. Alone among Americans with constitutional claims, they were forbidden to bring their cases into federal courts. The injustices wrought by this regime were palpable.

Knick was seen by the legal community as righting that palpable wrong. This is typical:

> "[*Knick*] put a long-overdue end to a *badly misguided precedent* that had barred most takings cases from federal court" … "[*Knick*] eliminated an *egregious double standard* that barred numerous [Fifth Amendment] takings cases from federal court."[2]

But some courts, led by the 9th Circuit Court of Appeals, seem bent on reinstating the world before

---

[2] Ilya Somin, Knick v. Township of Scott: *Ending a Catch-22 That Barred Takings Cases From Federal Court*, 2019 Cato Supreme Court Rev. 153, 187 (2019) (emphasis added).

Knick, i.e., a world in which property owners are routinely shunted to state court to litigate their federal constitutional claims. That cannot have been this Court's intent when it said it was providing a "*federal forum* for claims of unconstitutional treatment at the hands of state officials." *Knick*, 139 S.Ct. at 2167 (emphasis added).

This case is the most recent illustration of the 9th Circuit's firm intent to continue diverting property rights cases to state court. The practice directly thumbs its nose at this Court's clear decision in *Knick*. It must be stopped now, before it spreads.

This case provides the Court with the opportunity to make clear that it will not tolerate such tactics from lower courts. SPOSFI, OCA, and the Buckeye Institute pray that the Court take this opportunity to stabilize this area of constitutional law.

SUMMARY OF ARGUMENT

Knick was a revolutionary decision. Virtually everyone has recognized that. It should result in property owners being able to file Fifth Amendment takings cases in federal court and litigate their federal issues there. That, after all, was the point of overruling the *Williamson County* rule that forbade such action.

Some lower courts have responded to *Knick*'s opening of the federal courthouse doors by seeking ways to keep them shut. The weapon of choice, as exemplified by this case, is the abstention doctrine.

Using the abstention doctrine in this context is abusive of property owners as well as the proper

functioning of the federal judicial system. It is the ultimate sign of disrespect for this Court. For the good of the judicial system, and the protection of the constitutional rights of property owners this Court intended in *Knick*, misuse of the abstention doctrine to bypass *Knick* needs to be ended.

ARGUMENT

I
DO NOT ALLOW LOWER COURTS TO UNDERMINE THIS COURT'S HISTORIC DECISION IN *KNICK v. TOWNSHIP OF SCOTT.*

In *Knick*, this Court took the courageous step of overruling a decision only 34 years old and doing so in terms so remarkably harsh they are rarely seen in the pages of this Court's official reports. *Knick* concluded that, when it decided *Williamson County*, "the Court was simply confused" (139 S.Ct. at 2174), and devised a rule that placed an "unjustifiable burden" on property owners (139 S.Ct. at 2167), based on "poor reasoning" (139 S.Ct. at 2174), "shaky foundations" (139 S.Ct. at 2178), and a "mistaken view of the Fifth Amendment" (139 S.Ct. at 2167) that "proved to be unworkable in practice" (139 S.Ct. at 2178). In sum, *Williamson County* was "not just wrong. Its reasoning was exceptionally ill founded and conflicted with much of our takings jurisprudence" (139 S.Ct. at 2178).

Plainly, when it used such unforgiving terminology the Court intended to bury the rules and practices that had built up under *Williamson County*'s holding that Fifth Amendment takings

claims *must* be handled in state court and *could not* be litigated in federal court.

And yet some courts, firmly led by the 9th Circuit, think they have discovered an "end around" *Knick*. Once property owners have filed suit in federal court, as this Court concluded they have the right to do, the federal court can simply "abstain" from the exercise of jurisdiction and shunt the case over to state court—just the way it worked under the *Williamson County* rule that this Court thought it had interred. That cannot be right, on either a moral or legal plane.

A.
Knick Revolutionized Land Use Practice in Both State and Federal Courts.

There is no way to underplay the impact of *Knick* on regulatory takings law. It took a key page in the litigational playbook (*Williamson County*), tore it out, and put it in the judicial shredder.

Williamson County held flatly that a property owner with a Fifth Amendment claim "*cannot* bring a federal takings claim in federal court." (139 S.Ct. at 2167 (emphasis added)). *Knick* directly overruled that. (139 S.Ct. at 2179.)

The decision overruling *Williamson County* needs to be enforced by the lower courts if it is to have any meaning and impact so that no more people will be injured by *Williamson County*'s "mistaken view of the Fifth Amendment." (139 S.Ct. at 2167.)

Commentators immediately noticed the importance of the *Knick* decision and its potential for significant impact on Fifth Amendment takings suits against overreaching municipal governments:

> "[*Knick*] marks a *sea change* in the U.S. Supreme Court's interpretation of the Fifth Amendment and promises to have a significant impact on the development of takings law and litigation practices nationwide" … "[*Knick*] *reset the game board* for takings litigation."[3]
>
> "[*Knick*] corrected one of the most egregious and inexplicable blunders of [the Court's] 230-year history."[4]
>
> "[*Knick*] jettison[ed] the Court's long-standing rule that a taking claim against a local government must be filed, at least in the first instance, in state court" … "major victory achieved by property rights advocates."[5]
>
> "The case … *redefined* the Fifth Amendment's protections" … "The *Knick*

---

[3] Brian T. Hodges, Knick v. Township of Scott, PA: *How a Graveyard Dispute Resurrected the Fifth Amendment's Takings Clause*, 60 Santa Clara L. Rev. 1, 3, 27 (2020) (emphasis added).

[4] R.S. Radford, Knick *and the Elephant in the Courtroom: Who Cares Least About Property Rights?* 7 Tex. A&M J. Prop. L. 577, 578 (2021).

[5] John Echeverria, Knick v. Township of Scott: *A Procedural Boost for Takings Claimants*, 51:3, ABA Trends 7, 11 (2020).

> decision has already left incredible consequences on Fifth Amendment jurisprudence ranging from *ensuring federal court access* for takings plaintiffs to preventing gamesmanship by government defendants" and "ended the doctrinal paradox that has frustrated landowners for over thirty years."[6]
>
> "In Knick …, the United States Supreme Court *dramatically changed the landscape* of ripeness concerns in takings claims under the federal constitution…."[7]
>
> "[*Knick*] [is] an important milestone in takings jurisprudence."[8]
>
> "[*Knick*] [is] a significant departure from the pre-existing process for pursuing a claim for a regulatory taking in federal court."[9]

---

[6] Gatlin Squires, Knick v. Township of Scott: *Knick Knack Paddy Whack, Give the Takings Clause A Bone*, 73 Okla. L. Rev. 795, 803, 810, 814 (2021) (emphasis added).

[7] John Martinez, Government Takings § 5:5 (Sept. 2022 update).

[8] Ilya Somin & Shelley Ross Saxer, *Overturning A Catch-22 in the Knick of Time:* Knick v. Township of Scott *and the Doctrine of Precedent*, 47 Fordham Urb. L.J. 545, 546 (2020).

[9] Jason ("Jay") Talerman, *Recent Developments in Regulatory Takings*, Boston B.J., Fall 2019, at 10, 11.

> "[*Knick*] [is the] most significant property rights case of the last decade."[10]

A decision so widely viewed as revolutionizing the very nature of constitutional takings litigation by changing the core concept of where such cases may be brought needs to be enforced as written. Lower courts should not be in the business of seeking ways to evade it.

B.
An Abstention Order Is the Functional Equivalent of the Discarded *Williamson County* Rule.

How does an abstention order differ from the discarded *Williamson County* rule? In brief, it doesn't. *Williamson County* held that regulatory takings cases could not be filed in federal court until they had first been litigated and lost in state court. That, according to *Williamson County*, would "ripen" the case for federal litigation. As the Court eventually recognized, however, that would in fact end the litigation through *res judicata* (or claim preclusion, depending on your age and when you went to law school). Abstention would accomplish the same thing: litigation in state court, followed by a losing battle over *res judicata* if the plaintiff sought to return to federal court thereafter.

Surely, both government counsel who seek abstention orders and the courts like those below

---

[10] David L. Callies & Ellen R. Ashford, Knick *in Perspective: Restoring Regulatory Takings Remedy in Hawaii*, 42 U. Haw. L. Rev. 136 (2019).

who grant them are aware that they are simply substituting one way of precluding federal litigation for another. The name may have been changed, but the outcome is the same: no federal litigation—contrary to the Court's intention to provide a federal forum for this type of litigation.

The obviousness of this connection has been noted by commentators. *See* David A. Dana*, Not Just a Procedural Case: The Substantive Implications of Knick for State Property Law and Federal Takings Doctrine*, 47 Fordham Urb. L.J. 591, 614 (2020); Alicia Gonzalez and Susan L. Trevarthen, *Deciding Where to Take Your Takings Case Post-Knick*, 49 Stetson L. Rev. 539, 566 (2020).

Substituting abstention for *Williamson County* is a shell game and no more. It is a ploy that should not distract this Court for a moment.

C.
There is No Basis For Routine Abstention in Land Use Cases.

Justice Frankfurter was a master of understatement. When he characterized the facts in *Railroad Commission v. Pullman Co*., 312 U.S. 496 (1941) as "touch[ing] a sensitive area of social policy," 312 U.S. at 498, he wasn't just "whistling 'Dixie'," so to speak. If anyone has forgotten, the case involved preempting black porters from serving on some trains in deference to white conductors. Few issues in American law, for many decades both before and after *Pullman* have involved more "sensitive area[s] of social policy" than race relations. That the Court might have wanted to

allow state courts an opportunity to work their way out of that sticky racial situation before making a federal case out of it was understandable.

But the 9th Circuit has taken that concept and blown it out of all proportion, applying an understandable desire to avoid stepping into the middle of a racial quagmire if at all possible to evading all run-of-the-mill land use cases. In ordering abstention here, the 9th Circuit explained its generalized theory this way:

> "[T]his Court has consistently held that 'land use planning is a sensitive area of social policy that meets the first requirement for *Pullman* abstention.' [Citation.]" (App. A, p. 11.)

The idea that *all* land use cases *always* involve "sensitive area[s] of social policy" seems to be a 9th Circuit invention. It is, with respect, simply a dodge for evading the obligation to analyze the federal constitutional issues involved in these cases. Others disagree with the 9th Circuit. *E.g.*, *Palmer v. Jackson*, 617 F.2d 424, 428 (5th Cir. 1980).

To be sure, there may be a case in which the exercise of discretion shows the matter should be considered by a state court. But surely not all of them, and just as surely those would be the exceptions. More than half-a-century ago, this Court explained that a state's power of eminent domain (which is central to regulatory taking cases like this) was not so sacred that abstention would be routinely warranted:

> "It is suggested, however, that abstention is justified on grounds of avoiding the hazard of friction in federal-state relations *any time* a District Court is called on to adjudicate a case involving the State's power of eminent domain …. *But the fact that a case concerns a State's power of eminent domain no more justifies abstention than the fact that it involves any other issue related to sovereignty. Surely eminent domain is no more mystically involved with 'sovereign prerogative' than a State's power to regulate fishing in its waters, its power to regulate intrastate trucking rates, a city's power to issue certain bonds without a referendum, and a host of other governmental activities carried on by the States and their subdivisions which have been brought into question in the Federal District Courts despite suggestions that those courts should have stayed their hand pending prior state court determination of state law*." *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 192 (1959) (emphasis added; citations omitted).

The 9th Circuit's position does violence to settled concepts of federal jurisdiction that require courts to decide cases when their jurisdiction is properly invoked, *e.g.*, *Bell v. Hood*, 327 U.S. 678, 681-682 (1946), and to use the abstention concept sparingly, and not as a simple means to "escape from [the] duty…" of adjudication, *Zwickler v. Koota*, 389 U.S.

241, 248 (1967). *See* R.S. Radford & Jennifer Fry Thompson, *The Accidental Abstention Doctrine: After Thirty Years, the Case for Diverting Federal Takings Claims to State Court Under Williamson County Has Yet to Be Made*, 67 Baylor L. Rev. 567, 599 (2015).

That duty is a "virtually unflagging obligation [on the courts] to exercise their jurisdiction." *Deakins v. Monaghan*, 484 U.S. 193, 203 (1988). Abstention, by contrast, is a "narrow exception" limited to "extraordinary" circumstances. *Deakins*, 484 U.S. at 203; *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 (1983).

For the 9th Circuit to defy that "unflagging obligation" and "consistently," to use its term, hold that an entire field of the law—i.e., all cases having anything to do with "land use planning"—*ipso facto* meets the requirements for abstention (App. P. 11) cannot be reconciled with this Court's limitation of abstention to "extraordinary" cases.

> "Limiting the litigant to review here [on certiorari after the state court trial] would deny him the benefit of a federal trial court's role in constructing a record and making fact findings. How the facts are found will often dictate the decision of federal claims …. Thus in cases where, but for the application of the abstention doctrine, the primary fact determination would have been by the District Court, a litigant may not be unwillingly deprived of that determination." (*England*, 375 U.S. at 416-17.)

In sum, the same reasons that led the Court to its decision in *Knick* lead to the conclusion that the abstention doctrine should not be used as a standard governmental ploy to evade *Knick*. In any event, the 9th Circuit's blanket idea that land use cases *always* provide the basis for abstention is plainly wrong and needs to be overturned.

D.
Section 1983 Was Intended to Interpose the Federal Courts Between Citizens and Local Government and is Thus a Poor Subject for Abstention.

It should not be overlooked that this case was brought under 42 U.S.C. § 1983. As this Court has repeatedly stressed, a section 1983 case is a "species of tort liability,"[11] specifically, a statutorily created "constitutional tort"[12] that sweeps within its ambit

---

[11] *Heck v. Humphrey*, 512 U.S. 477, 483 (1994); *Wyatt v. Cole*, 504 U.S. 158, 163 (1992); *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 305 (1986); *Smith v. Wade*, 461 U.S. 30, 34 (1983); *Owen v. City of Independence*, 445 U.S. 622, 635 (1980); *Carey v. Piphus*, 435 U.S. 247, 253 (1978).

[12] *Jefferson v. City of Tarrant*, 522 U.S. 75, 78 (1997); *Richardson v. McNight*, 521 U.S. 399, 401 (1997); *McMillian v. Monroe County*, 520 U.S.781, 784 (1997); *Johnson v. Jones*, 515 U.S. 304, 307 (1995); *Collins v. City of Harker Heights*, 503 U.S. 115, 121 (1992); *City of St. Louis v. Praprotnik*, 485 U.S. 112, 121 (1988); *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 307 (1986); *Pembaur v. City of Cincinnati*, 475 U.S. 469, 477 (1986); *Polk County v. Dodson*, 454 U.S. 312, 326 (1981); *Monell v. Department of Social Services*, 436 U.S. 658, 691 (1978).

all manner of governmental actions that defy Bill of Rights protections. Properly so. Section 1983 was intended to provide "a *uniquely federal* remedy,"[13] with "broad and sweeping protection,"[14] "read against the background of tort liability that makes a man responsible for the natural consequences of his actions,"[15] so that individuals in a wide variety of factual situations are able to obtain a *federal* remedy when their *federally* protected rights are abridged.[16]

While read against the general common law tort background, "[t]he coverage of the statute [§ 1983] is … broader,"[17] and must be broadly and liberally construed to achieve its goals.[18] "[T]he central purpose of the Reconstruction-Era laws is to provide compensatory relief to those deprived of their federal rights by state actors,"[19] by "interpos[ing] the federal courts between the States and the people, as guardians of the people's federal rights."[20]

As this Court put it in *Mitchum*, quoted above,

---

[13] *Mitchum v. Foster*, 407 U.S. 225, 239 (1972) (emphasis added).

[14] *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 543 (1972).

[15] *Monroe v. Pape*, 365 U.S. 167, 187 (1961), overruled in part, to expand government liability, in *Monell*, 436 U.S. 658.

[16] *Burnett v. Grattan*, 468 U.S. 42, 50, 55 (1984).

[17] *Kalina v. Fletcher*, 522 U.S. 118, 123 (1997).

[18] *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 105 (1989); *Lake Country Estates v. Tahoe Reg. Plan. Agency*, 440 U.S. 391, 399-400 (1979).

[19] *Felder v. Casey*, 487 U.S. 131, 141 (1988).

[20] *Mitchum*, 407 U.S. at 243.

the purpose of section 1983 is to "interpose" the federal courts between the states and the people. It would thus seem a particularly ill-suited subject for abstention, which would force the plaintiffs to seek protection of their federal rights solely from state courts.

The Court aptly summarized the law in *Zwickler*:

> In *Turner v. City of Memphis*, 369 U.S. 350 [] (per curiam), we vacated an abstention order which had been granted on the sole ground that a declaratory judgment action ought to have been brought in the state court before the federal court was called upon to consider the constitutionality of a statute alleged to be violative of the Fourteenth Amendment. In *McNeese v. Board of Education*, 373 U.S. 668 [], we again emphasized that abstention cannot be ordered simply to give state courts the first opportunity to vindicate the federal claim. After examining the purposes of the Civil Rights Act, under which that action was brought, we concluded that '(w)e would defeat those purposes if we held that assertion of a federal claim in a federal court must await an attempt to vindicate the same claim in a state court.' 373 U.S., at 672, 83 S.Ct., at 1436. For the 'recognition of the role of state courts as the final expositors of state law implies no disregard for the primacy of the federal judiciary in deciding questions of federal law.' *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411, 415-416 []. *Zwickler*, 389 U.S. at, 251-52.

II
THE COURT SHOULD EXERCISE ITS SUPERVISORY POWER TO REIN IN THIS BACK-DOOR REINSTATEMENT OF *WILLIAMSON COUNTY*

Although not routinely invoked, this Court possesses and sometimes uses its power to supervise the actions of lower courts in order to ensure the smooth functioning of the judicial system. *See United States v. Hale*, 422 U.S. 171, 181 (1975) (noting "our supervisory authority over the lower federal courts"); *Elkins v. United States*, 364 U.S. 206, 208 (1960) (the Court granted certiorari "to consider a question of importance in the administration of federal justice"); *Hanna v. Plumer*, 380 U.S. 460, 463 (1965) (certiorari granted because of "threat to the goal of uniformity of federal procedure posed by the decision below"). Justice Stevens put it succinctly: "As the Court of last resort in the federal system, we have supervisory authority and therefore must occasionally perform a pure error-correcting function in federal litigation." *Floria v. Rodriguez*, 469 U.S. 1, 7 (1984) (dissenting).

Stern, Gressman, Shapiro & Geller put it thus: "On the Supreme Court rests the prime responsibility for the proper functioning of the federal judiciary. The grant of certiorari in cases involving federal jurisdiction, practice, and procedure reflects that responsibility." Supreme Court Practice § 4.I.15 at 275 (10th ed. 2019).

The 9th Circuit's conclusion that it may avoid exercising jurisdiction over land use cases with federal constitutional issues as a routine matter that

covers *all* such cases is an affront to this Court's cases like *Zwickler* holding that the concept is to be used only sparingly. More than that, in the specific context here, it is an insult to *Knick*, which left no doubt that property owners should be able to exercise their right to seek redress from federal courts.

In the exercise of its supervisory power over lower federal courts, this Court needs to rein in the 9th Circuit's abusive use of the abstention doctrine.

CONCLUSION

Certiorari should be granted.

Respectfully Submitted,

MICHAEL M. BERGER*
*COUNSEL OF RECORD
MANATT, PHELPS & PHILLIPS, LLP
2049 Century Park East, Suite 1700
Los Angeles, CA 90067
(310) 312-4000
mmberger@manatt.com
Counsel for Amici Curiae
The Small Property Owners
of San Francisco Institute,
Owners' Counsel of America,
and The Buckeye Institute