

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

ROSE MARY KNICK,)
)
) Petitioner,)
)
) v.) No. 17-647
)
TOWNSHIP OF SCOTT, PENNSYLVANIA,)
)
ET AL.,)
)
) Respondents.)

Pages: 1 through 75

Place: Washington, D.C.

Date: January 16, 2019

HERITAGE REPORTING CORPORATION

Official Reporters
1220 L Street, N.W., Suite 206
Washington, D.C. 20005
(202) 628-4888
www.hrccourtreporters.com

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P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 17-647, Knick versus the Township of Scott, Pennsylvania.

Mr. Breemer.

ORAL ARGUMENT OF J. DAVID BREEMER
ON BEHALF OF THE PETITIONER

MR. BREEMER: Mr. Chief Justice, and may it please the Court:

The critical issue in this case is this: When is an invasion of property without just compensation in violation of the Just Compensation Clause so that a property owner can claim an unconstitutional taking requiring damages?

The understanding adopted well before Williamson County and Dow and other cases is that the invasion itself gives rise to a constitutionally rooted claim for compensation, unless, as in Cherokee Nation, the government recognizes the owner's entitlement to compensation and provides a process for collecting it at the time of the invasion.

1 This is the understanding that
2 controls in takings cases against the United
3 States under the Tucker Act, and there's no
4 reason why we should have a different
5 constitutional interpretation of the Just
6 Compensation Clause simply because the
7 defendant is a local government entity.

8 But, in fact, Williamson County does
9 adopt a conflicting and anomalous and mistaken
10 interpretation of the Just Compensation Clause
11 in holding that an invasion of property is not
12 without compensation and not actionable under
13 the Takings Clause until state remedies are
14 exhausted.

15 A basis for this understanding is this
16 Court's decision -- the initial basis is the
17 Great Falls Manufacturing case. This is 1884.
18 And in that case, this Court said that when a
19 property owner has their property invaded, they
20 are entitled from that moment to go seek
21 compensation on a constitutional basis. So --

22 CHIEF JUSTICE ROBERTS: Well, I mean,
23 the -- the question is whether or not to
24 overrule Williamson County. And your
25 assumption thus far has been that it turns

1 solely on when you have a complete violation of
2 the Constitution and should be able to proceed
3 at that point.

4 But do we -- is it necessarily the
5 case that the -- the same rule has to apply
6 with respect to federal proceedings and a state
7 court proceeding? I mean, maybe what we're
8 looking at is not something as grand as when
9 the constitutional violation is -- has come to
10 fruition, but, instead, simply a rule about how
11 those cases should be handled in state court as
12 opposed to federal court.

13 Williamson County has what I think of
14 as a special rule for state court proceedings
15 that requires, obviously, you to go to the
16 state court, and I'm just wondering if you can
17 address that on its own without issuing some
18 ruling about when a Takings Clause is complete
19 and -- and actionable.

20 MR. BREEMER: I don't think so because
21 the only basis for that Williamson County
22 scheme, state readiness scheme, is an
23 interpretation of the Just Compensation Clause
24 when you have a complete claim. There's no
25 other basis for that.

1 And so, if you have a complete claim,
2 as you do in the -- in claims against the
3 United States under Dow, if you have a complete
4 federal claim, well, then you have a federal
5 question and you have the option to go to
6 federal court under Section 1983. That's the
7 purpose of Section 1983, as you know.

8 So I don't see how you -- I don't
9 think the Fifth Amendment varies depending on
10 what court you're in or what you're defending,
11 and I think the Just Compensation Clause has to
12 be interpreted in the same way in both of those
13 circumstances, and there's no other basis for
14 saying, well, state courts should have it
15 first. That's -- that's the no exhaustion
16 doctrine in Monroe and other cases that this
17 Court has rejected.

18 JUSTICE KAGAN: So could --

19 JUSTICE BREYER: How does it work? I
20 mean, I -- I'm having trouble understanding.
21 We have a -- an environmental agency, a state
22 environmental agency which has some kind of a
23 rule, only so much lead can be put into the sea
24 or air or something every mile. Now there are
25 dozens of pieces of property within that area.

1 And depending upon the reasonable expectations
2 of individual property owners, it might violate
3 some, and it might not violate others. The
4 state also has a system of courts that, where
5 there's a violation, they pay. Okay?

6 So EPA, state, what are they supposed
7 to do? I mean, how do we decide which ones are
8 right and which ones are wrong? How do we
9 decide which property owners do have the
10 reasonable expectation and not? In your
11 opinion, how do we do it?

12 MR. BREEMER: Well, that, as I
13 understand your question --

14 JUSTICE BREYER: I mean, if you're
15 EPA, you are the state EPA, you go into your
16 office --

17 MR. BREEMER: I --

18 JUSTICE BREYER: -- and there's a
19 queue of people and all of them are saying our
20 property is being taken and we all have
21 different times of purchase, different
22 conditions, dah-dah, dah-dah.

23 All right. How do you decide who's
24 entitled to it?

25 MR. BREEMER: That's a merits question

1 as I -- as I understand it.

2 JUSTICE BREYER: I know. I don't care
3 what kind of question it is. I would like an
4 answer --

5 MR. BREEMER: And they don't --

6 JUSTICE BREYER: -- to that question.

7 (Laughter.)

8 MR. BREEMER: Okay. How do you --

9 JUSTICE BREYER: How do you decide the
10 merits?

11 MR. BREEMER: How do you decide? The
12 government -- the EPA doesn't have to decide
13 that. The -- a -- those property owners won't
14 have an actionable claim until they have a ripe
15 claim, there has been a finding --

16 JUSTICE BREYER: No, I'm not asking
17 you that.

18 MR. BREEMER: Okay.

19 JUSTICE BREYER: You are in the state
20 EPA. Mr. Smith comes in, and Mr. Jones. They
21 each say you have taken my property. The
22 conditions are different.

23 What do you tell them?

24 MR. BREEMER: They shouldn't be going
25 to the state agency in the first place.

1 JUSTICE BREYER: They don't even go to
2 the EPA?

3 MR. BREEMER: They should --

4 JUSTICE BREYER: They don't even ask?

5 MR. BREEMER: If -- if -- if their
6 property has been injured by an EPA rule, then
7 they -- and it's a final decision that injures
8 their property, then they have the right to
9 assert if that injury gets compensation --

10 JUSTICE BREYER: No, it's not a final.
11 What they -- what they have in our state --

12 MR. BREEMER: Then they don't have a
13 claim.

14 JUSTICE BREYER: Our state, if you
15 think the state EPA took a piece of your
16 property, go ask them for some money, and
17 there's a good chance they'll give it to you if
18 they think you're right.

19 MR. BREEMER: Well, there -- you --

20 JUSTICE BREYER: So what happens?

21 MR. BREEMER: You -- you can't ask for
22 money, Your Honor, until you have an
23 entitlement. And if the -- the government, the
24 EPA here, has a --

25 JUSTICE BREYER: Sure, I can. I can

1 say, Mr. Smith, give me some money.

2 MR. BREEMER: Well -- well -- well --

3 JUSTICE BREYER: I just did.

4 (Laughter.)

5 MR. BREEMER: Well, in -- then -- then
6 we're going to have a debate about whether I
7 owe you money or not. And --

8 JUSTICE BREYER: No, no, I don't care.
9 All I want is the money. And I want to know
10 how you, the official, decide whether I'm
11 right.

12 MR. BREEMER: You don't. It's not
13 your job as the official.

14 JUSTICE ALITO: Well, let me ask then
15 --

16 JUSTICE BREYER: So, in other words,
17 your proposal is of the, let's say -- let me
18 not exaggerate -- 50 million rules in state
19 agencies in the country, and let's say
20 affecting only 200 million people, that each of
21 those people is not even to ask the state
22 agency for money? It is to go to a federal
23 court somewhere? Is that your position?

24 MR. BREEMER: No, not at all.

25 JUSTICE BREYER: What is it?

1 MR. BREEMER: Because they -- those --
2 the situations you're describing, you still
3 have exhaustion and variance and waiver
4 requirements --

5 JUSTICE BREYER: I'll tell you what
6 the exhaustion in our state -- when the EPA
7 takes something of yours, in your opinion, you
8 know what you do? Go ask them for some money.
9 And if they think you're right, they'll give it
10 to you. Now what other exhaustion is there?

11 MR. BREEMER: The exhaustion I'm
12 talking about is you have to have -- we're not
13 trying to -- to abrogate all of Williamson
14 County. You still have to have a ripe claim.
15 You can't come --

16 JUSTICE BREYER: I'm not talking about
17 Williamson County --

18 MR. BREEMER: Okay.

19 JUSTICE BREYER: -- or anything else.
20 I just would like the answer to my question.

21 MR. BREEMER: The -- the answer --

22 JUSTICE BREYER: You are correct
23 that --

24 MR. BREEMER: As I understand it, the
25 answer is that the administrative agency is not

1 the right, proper place to go to --

2 JUSTICE BREYER: Where is the proper
3 place?

4 MR. BREEMER: -- to adjudicate a
5 Takings Clause claim.

6 JUSTICE BREYER: No, there's no
7 adjudication. You would just like them to give
8 you some money. So, look, the reason I'm
9 asking this, if you -- if you really -- it
10 should be obvious -- but there is no practical
11 way that I can think of to implement your rule
12 because you have to go ask somebody for money.

13 And they're going to say yes or no,
14 and they're going to say yes or no in a tough
15 case depending upon what papers you show them.
16 That's called evidence.

17 MR. BREEMER: It's -- it's --

18 JUSTICE BREYER: And then what the
19 federal court will be doing will be just what
20 they're doing now. They will be reviewing that
21 evidence in the state. And somebody's going to
22 say: You know, we have in our state a judicial
23 review system, and you're barred by res
24 judicata. In other words, we're not helping
25 you by deciding in your favor. All we're doing

1 is producing extra complication.

2 That's at the root of my question.

3 And I haven't even got to the tough part, where
4 you agree they have some money but only \$3.

5 And they think they're entitled to \$40. And so
6 we have to have adjudications on that too.

7 Okay. Do you see, that's the whole
8 point. Sorry to take so long --

9 MR. BREEMER: There --

10 JUSTICE BREYER: -- but you seem not
11 to see the connection.

12 MR. BREEMER: There's -- there's no --
13 well, I -- maybe I don't. I'm sorry if I
14 misunderstand you. But there's no right to ask
15 for compensation, and there's no duty on the
16 part of the government to pay compensation
17 until there's been an invasion of private
18 property.

19 At the time of that invasion, that's
20 what creates the liability, is there's a -- the
21 government has invaded your property and hasn't
22 given you anything or any guarantee of
23 compensation.

24 JUSTICE ALITO: But let me ask --

25 CHIEF JUSTICE ROBERTS: So I suppose

1 --

2 JUSTICE ALITO: -- essentially the
3 same --

4 CHIEF JUSTICE ROBERTS: I was going to
5 say, I suppose the way this most frequently
6 comes up is through a municipal ordinance or
7 something else like the, you know, enforcement
8 of the alleged property right in this case, and
9 there's no reason to suppose that the state is
10 going to give you any money at all.

11 They pass a law that says, well, for
12 example, you -- you know, you can't build a
13 garage on this property anymore or we no longer
14 have -- allow this particular type of
15 development.

16 And I suppose if they were going to
17 give you money, they would bring an eminent
18 domain proceeding or something of that sort.
19 But I think, in most cases that would arise,
20 there's no prospect of -- of payment.

21 MR. BREEMER: That's right. That's
22 exactly right. And that's why the
23 understanding under Dow, Dickinson, and Kirby
24 is that, if there's a final injury, an invasion
25 of property, and there's no condemnation of it,

1 that itself gives rise to your claim for
2 compensation.

3 Now the government can have --

4 JUSTICE KAGAN: But why is that, Dr.
5 Breemer? I mean, suppose that there were a
6 statute of the kind that the Chief Justice was
7 talking about, an invasion of a property
8 interest, and the statute actually said, or
9 maybe the statute didn't say, but the people
10 who were in charge of administering the statute
11 made an announcement that, if the regulatory
12 invasion of property came to a certain level,
13 invaded your property interests sufficiently,
14 they would entertain a request for money.

15 Can you just go into federal court
16 even though that's a possibility?

17 MR. BREEMER: Yes, you could. Under
18 Dow, the understanding is the invasion itself
19 gives rise to the claim for compensation. And
20 so that wouldn't be sufficient because you
21 still have no entitlement. Your property's
22 been invaded. It's been harmed. It's been
23 injured. But you have no compensation, no
24 guarantee of compensation.

25 JUSTICE KAGAN: Right. I mean, I

1 think it's a -- so there are two things going
2 on here. One is a more theoretical concern.
3 One is a more practical concern.

4 The theoretical concern is, why is
5 that true? We've always understood the Takings
6 Clause to give rise to a claim when there's
7 been both an invasion of property and a refusal
8 to pay just compensation.

9 And so the theoretical problem that
10 your position has or at least the theoretical
11 question it raises is, well, you don't know
12 whether there has been a refusal of just
13 compensation because now we're in a situation
14 where it may be that the State will refuse, but
15 it may be that the State will actually give you
16 some money for the invasion.

17 So --

18 MR. BREEMER: Right.

19 JUSTICE KAGAN: So that's the
20 theoretical problem.

21 MR. BREEMER: Right.

22 JUSTICE KAGAN: And then the practical
23 problem is, in this period where you don't know
24 whether the state is going to give you money or
25 not going to give you money -- it could, it

1 couldn't -- why should you be -- this is
2 Justice Breyer's concern -- you know, everybody
3 will just flock to federal courts and the
4 federal courts won't -- won't know what to do
5 with the case.

6 MR. BREEMER: Right. I understand
7 those -- the two different concerns. The
8 problem I have is with the first premise.

9 You do know, when your property's
10 invaded by the government, it's taking the
11 benefit of invading your land and using it for
12 its purpose, and it hasn't given you
13 compensation or secured your compensation, you
14 are without just compensation at that time.

15 That's the original understanding
16 under Dow, Dickinson, Kirby, Clarke, all the
17 cases prior to Williamson County. You do know.
18 So it's not --

19 JUSTICE KAGAN: At that time just
20 exactly when the invasion occurs?

21 MR. BREEMER: Yes.

22 JUSTICE KAGAN: So, if the -- if the
23 State says we'll give you a check in a week,
24 you've been --

25 MR. BREEMER: No.

1 JUSTICE KAGAN: -- you've had a -- or
2 the State -- you know, the State says -- the
3 State says, we will decide in a week.

4 MR. BREEMER: The first one is
5 adequate under Cherokee Nation.

6 JUSTICE KAGAN: That's why I changed
7 it.

8 (Laughter.)

9 MR. BREEMER: The second one, no, see,
10 it -- it -- it's been confusing, this area, but
11 when you -- when you look at it, you have the
12 Dow is the original rule, the original rule of
13 Great Falls Manufacturing, the invasion itself,
14 when they don't condemn it, you have a claim
15 then.

16 And then Cherokee Nation created an
17 exception for the government. Well, if you
18 secure compensation, then you --

19 JUSTICE KAGAN: Right. But I'm -- I'm
20 suggesting -- I'm suggesting the government
21 doesn't know yet. You have -- you know,
22 governments are slow. They have to have time
23 to review the situation, to review the evidence
24 that you're going to give them.

25 It doesn't know yet. It's trying to

1 figure out whether you should get compensation
2 or not. What happens?

3 MR. BREEMER: Well --

4 JUSTICE KAGAN: Do you have a claim, a
5 constitutional claim at that moment?

6 MR. BREEMER: If the -- yes, if the
7 government is fast enough to go into your
8 property and declare it to be public access, at
9 that time, and take the benefit of it, without
10 condemning it or providing compensation, yes,
11 you have -- even if it thinks it might decide
12 later, yes, you have a compensation --

13 JUSTICE BREYER: That's not the easy
14 case I'm thinking of. Imagine I'm your client.
15 Forget I'm a judge. That's not too difficult.

16 (Laughter.)

17 JUSTICE BREYER: I'm your client. I
18 am the local agency. You are my lawyer. I
19 say: Lawyer, friend, I have a regulation here.
20 It's going to affect a lot of people. It might
21 take some land or right and with others it
22 won't. Okay? Tell me what to do. I would
23 like to pay the right ones and not the wrong
24 ones. Tell me what to do. You are my lawyer.
25 Advise me.

1 MR. BREEMER: What I would say to you
2 is this, is that if the -- if you enact an
3 ordinance that concretely harms and injures
4 private property, those --

5 JUSTICE BREYER: It does some and not
6 others, and so I want to know what I'm supposed
7 to do. And not only some but not others, but I
8 don't know the land values of any of them.

9 MR. BREEMER: If you do not know what
10 to do, then you go ahead and you enact the
11 ordinance. And a property owner may bear the
12 burden of bringing an expensive lawsuit under
13 Section 1983 or otherwise to prove that it is a
14 taking, if it's ripe.

15 JUSTICE BREYER: What -- where is the
16 --

17 MR. BREEMER: They may do that, just
18 like in any other context, they may do that.
19 Just like in the free speech, the seizure, the
20 due process, if you make a final enactment that
21 harms somebody, there's a risk that they may
22 file a Section 1983 lawsuit, but that's the
23 price that was paid by the Congress when they
24 enacted Section 1983.

25 JUSTICE SOTOMAYOR: Can I -- can I

1 stop because I'm confused, because there seems
2 to be a very different theory that goes on with
3 the federal government. May I continue, Chief?

4 CHIEF JUSTICE ROBERTS: Sure.

5 JUSTICE SOTOMAYOR: All right. The
6 federal government is permitted to pass a
7 regulation to take property and to rely on the
8 Tucker Act to have the claimant go into federal
9 court and ask for compensation.

10 There's no entitlement for you to stop
11 the litigation or to say there's been a taking
12 until the process of the Tucker Act is
13 completed. And then, if you win, you get
14 money. And, if you lose, you don't.

15 You're saying for the State it's
16 different. It can't act to pass a regulation
17 that may potentially -- we don't know yet --
18 take money. It can't take property in an
19 emergency, let's say, without ending up
20 immediately, according to you, in federal
21 court, unlike the federal government, where you
22 can't stop that from happening because you get
23 potential compensation in the Tucker Act.

24 It seems to me that both the State and
25 the federal government should be entitled to

1 say to a landowner: I will pay you if I've
2 taken something from you, and I will pay you in
3 this way, whether it's an administrative rule
4 that says this is going to happen and you have
5 a right of review in the agency, and you seem
6 to say that you have to exhaust that right of
7 review in the agency to get the final no, is
8 that correct? Just an answer, yes or no, to
9 that.

10 An agency does something. There's an
11 administrative process before it's a final
12 decision.

13 MR. BREEMER: That is a ripeness rule
14 and, yes, that ripeness rule will continue to
15 apply, but, for compensation purposes, it
16 doesn't.

17 JUSTICE SOTOMAYOR: All right. So
18 what's the difference between that and a state
19 saying, instead of going through the agency,
20 we're going to pick a decisionmaker, a judge,
21 who's more independent, more impartial, more
22 fair than an agency can be. And if you think
23 you've been harmed and are entitled to
24 compensation, go there.

25 What's -- what -- where is the

1 difference? That's what the federal government
2 does. Why are, A, we treating states
3 differently?

4 MR. BREEMER: Right. And that's the
5 question I --

6 JUSTICE SOTOMAYOR: And, B, why is
7 administrative exhaustion, ripeness okay, but
8 not the same thing if someone goes into state
9 court to get a final decision?

10 MR. BREEMER: And I'm going to answer
11 --

12 JUSTICE SOTOMAYOR: And, by the way,
13 that state court final decision will end up in
14 federal court. If we did our job, which I hope
15 we would do, we have review of final state
16 court decisions. So it's going to get into
17 federal court if it's a serious error on the
18 state court's part.

19 MR. BREEMER: I think I'm going to
20 answer really quickly because I'm losing time.
21 I think there's a misconception about how the
22 Tucker Act process works.

23 The Tucker Act and Section 1983 aren't
24 substantially different. They both give
25 jurisdiction in a federal court. The

1 difference is in how the Just Compensation
2 Clause is interpreted.

3 Under the Tucker Act, you have an
4 immediate claim for compensation, as soon as
5 the United States invades your private
6 property, in the designated federal court.
7 Under Williamson County, you do not have a
8 federal, Fifth Amendment claim. It's
9 interpreted differently. You have no complete
10 compensation entitlement until after state
11 remedies.

12 So the issue is not this court or that
13 court or this agency. It's how are we going to
14 interpret the Fifth Amendment? If it's
15 complete at the time of the invasion, you have
16 a federal question.

17 And you may go to state court. It may
18 go to federal court. But it doesn't matter.
19 And you -- yes, you have state remedies, but
20 you have state remedies everywhere, and it's
21 never been a requirement that you have a state
22 remedies exhaustion requirement if you already
23 have a complete federal question under
24 Section 1983, which you do here.

25 Thank you.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel.

3 General Francisco.

4 ORAL ARGUMENT OF GEN. NOEL G. FRANCISCO
5 FOR THE UNITED STATES, AS AMICUS CURIAE

6 GENERAL FRANCISCO: Mr. Chief Justice,
7 and may it please the Court:

8 I'd like to make two basic points that
9 I think are responsive to much of the colloquy
10 that we've been having.

11 First, we think that Williamson
12 County's premise was correct, that the
13 government doesn't violate the Takings Clause
14 if it provides a mechanism for awarding
15 compensation after the fact.

16 But that doesn't justify Williamson
17 County's conclusion that a Section 1983 action
18 is not available to redress the deprivation of
19 the right to just compensation.

20 We think it's available to redress all
21 constitutional rights, including that one. And
22 the right to just compensation is one that
23 vests the moment the property is taken. That's
24 why a property owner is entitled to interest
25 dating back to the moment of a taking.

1 So a property owner, under
2 Section 1983, is quite literally deprived of
3 that right to compensation from the moment of
4 the taking until they get paid. In this --

5 JUSTICE KAGAN: But this, General, is
6 -- is -- this is what you argued the first
7 time, that a property owner is deprived of a
8 constitutional right even before the
9 constitutional violation has taken place, is
10 that correct?

11 GENERAL FRANCISCO: That's correct,
12 Your Honor, and, frankly --

13 JUSTICE KAGAN: It -- it seems like a
14 sentence that you don't even -- you can't even
15 say without stumbling over it.

16 GENERAL FRANCISCO: I -- I -- I very
17 much disagree because, frankly, everybody here
18 agrees that these property owners can enforce
19 their constitutional right to just compensation
20 under the Fifth Amendment right now in a state
21 inverse condemnation action.

22 The only question is whether they have
23 to enforce that constitutional right in state
24 court first. And there's simply nothing in the
25 Fifth Amendment that says you have to go to

1 state court before you go to federal court.

2 I think it's helpful to think --

3 JUSTICE KAGAN: Is there any other
4 area in our law generally where somebody can go
5 to court under 1983, under anything else, and
6 say I've been deprived of a constitutional
7 right before a constitutional violation has
8 occurred?

9 GENERAL FRANCISCO: Yes, Your Honor,
10 the Tucker Act, and that was going to be my
11 next point.

12 I think it's useful to think of
13 Section 1983 in this context as similar to a
14 Tucker Act -- a Tucker Act claim. It doesn't
15 redress the violation of a Fifth Amendment
16 right, but it does provide you with a mechanism
17 to enforce your Fifth Amendment right to just
18 compensation.

19 After all, the entire reason why a
20 property owner is entitled to interest dating
21 back to the moment of the taking is because
22 they're entitled to be compensated for the
23 entire period of their deprivation, the period
24 in which they have neither the property nor the
25 money.

1 JUSTICE GORSUCH: Well, but -- well,
2 but that right there seems to give the lie to
3 your argument. You just talked about the
4 deprivation of their property from the moment
5 it was taken.

6 GENERAL FRANCISCO: Yes.

7 JUSTICE GORSUCH: That would suggest
8 that that's when the injury arises for
9 constitutional purposes and all purposes.
10 Again, I'm -- I'm with Justice Kagan, I can't
11 think of another area in the law where we have
12 this kind of artificial distinction that you're
13 proposing.

14 GENERAL FRANCISCO: Well, I think
15 you're right that there's not another area of
16 the law where you have this distinction. I
17 think where I push back is that it's an
18 artificial distinction and, if I could explain,
19 because for most constitutional rights, there
20 is simply no difference between a deprivation
21 and a violation. The government violates --
22 deprives you of your First Amendment rights,
23 for example, only when it violates the First
24 Amendment.

25 But the Takings Clause is uniquely

1 different because the right to just
2 compensation vests only when the government
3 acts lawfully. It's the government's lawful
4 taking of your property that triggers that
5 right, constitutional right, to just
6 compensation. And it's a right that vests the
7 moment the government lawfully takes your
8 property.

9 JUSTICE KAVANAUGH: An implicit
10 premise of your argument and Petitioner's
11 argument for overruling Williamson County, I
12 think, is that the state courts aren't as good
13 as the federal courts.

14 Why is that, in your view?

15 GENERAL FRANCISCO: Sure, Your Honor.
16 And I -- and to -- to -- respectfully, it's not
17 my judgment that state courts aren't as good.

18 JUSTICE KAVANAUGH: But the
19 argument --

20 GENERAL FRANCISCO: It's the
21 Reconstruction era Congress's judgment that
22 state courts could not be fully entrusted --

23 JUSTICE KAVANAUGH: That's --

24 GENERAL FRANCISCO: -- to enforce
25 federal constitutional rights.

1 JUSTICE KAVANAUGH: That's why I said
2 a premise of the argument for overruling
3 because we need --

4 GENERAL FRANCISCO: Yes.

5 JUSTICE KAVANAUGH: -- more than just
6 that it's wrong, right? There must be
7 something more, and --

8 GENERAL FRANCISCO: Sure.

9 JUSTICE KAVANAUGH: -- I think the
10 implicit premise is that the state courts
11 aren't good enough in protecting rights. Is
12 that because they're not quick enough? Because
13 they're not awarding enough money? Because
14 they're not competent enough? What is the
15 implicit premise of their --

16 GENERAL FRANCISCO: Well, Your -- Your
17 Honor, I don't have any particular criticism --
18 criticism of state courts today, but
19 Section 1983 was predicated on the
20 Reconstruction era Congress's judgment that
21 state courts could not be fully entrusted to
22 enforce federal constitutional rights.

23 And that's why they created a dual
24 system where every individual would have a
25 right to access --

1 JUSTICE KAVANAUGH: Didn't Williamson
2 -- I'm sorry to interrupt. Didn't Williamson
3 County -- County necessarily reject that
4 interpretation of 1983?

5 GENERAL FRANCISCO: I think so, but I
6 want to go straight --

7 JUSTICE KAVANAUGH: And -- and
8 isn't --

9 GENERAL FRANCISCO: -- to your stare
10 decisis --

11 JUSTICE KAVANAUGH: And isn't that
12 statutory stare decisis, which is a higher --

13 GENERAL FRANCISCO: It -- it is
14 statutory stare decisis, Your Honor, but I
15 still think that there are special
16 justifications for overturning it, principally
17 this Court has never actually explained
18 Williamson County's rationale, and as a result,
19 I think it has had the unintended consequence
20 of closing the federal courthouse doors to an
21 entire category of takings claimants, and
22 that's something I don't think Williamson
23 County envisioned when it issued its decision.

24 JUSTICE KAVANAUGH: Can I just get
25 more on what are the problems in state courts?

1 State courts are not doing a good job because?

2 GENERAL FRANCISCO: Again, Your Honor,
3 I am not here to take the position that today
4 state courts are not capable of resolving
5 takings claims. We do not have that criticism
6 today of state courts.

7 But Section 1983 fundamentally
8 reflects the Reconstruction era Congress's
9 judgment. And there's no basis for thinking
10 that the Reconstruction era Congress believed
11 that the right to just compensation is the one
12 area where we could trust state courts above
13 all others.

14 If, frankly, you think that that
15 judgment was wrong and it's -- and it's
16 available to this Court to go counter to it, I
17 think that you should probably overrule Patsy
18 as well, which rejected a state law exhaustion
19 requirement precisely because Section 1983 was
20 meant to provide a mechanism for accessing
21 federal court.

22 And, here, we think that property
23 owners, just like all other litigants who are
24 raising federal constitutional rights, should
25 have a federal avenue to redress those

1 constitutional rights.

2 JUSTICE KAVANAUGH: If we -- if we
3 agreed with your 1331 argument, is there any
4 practical difference in how things would
5 transpire?

6 GENERAL FRANCISCO: I think for the
7 most part -- and that --

8 JUSTICE KAVANAUGH: Between that and
9 your 1983 argument?

10 GENERAL FRANCISCO: Yeah. And that
11 was the point I was going to pivot to next. I
12 think that you can effectively reach the same
13 result under our International College of
14 Surgeons Section 1331 argument, because, under
15 International College of Surgeons, this Court
16 made clear that if a state cause of action
17 pleads a federal takings claim as such, then
18 that federal takings claim presents a
19 substantial federal question that arises under
20 the Constitution for purposes of 1331.

21 And, yes, Justice Kavanaugh, I do
22 believe you can effectively reach the same
23 result through our International College of
24 Surgeons argument, and that does not require
25 you to overturn Williamson County.

1 So we think there are essentially two
2 ways that you could go at this problem here.
3 One is to take on Williamson County directly
4 and overturn it. And we do believe it was
5 wrongly decided. But the other way is to
6 effectively reach the same result under our
7 International College of Surgeons argument.

8 In -- in either event, we do think
9 that the property owners here, like all other
10 constitutional litigants, should be given a --
11 a means to access federal courts.

12 JUSTICE BREYER: There's a big
13 difference. The -- the difference is that if a
14 state provides a speedy and fair remedy where
15 they're going to pay the money, there is no
16 constitutional violation.

17 And I can't think of a difference with
18 that. And the trouble with that is that once
19 you say that, of course, they have to have some
20 procedure for deciding whether there's a --
21 such a payment has been made or will in three
22 days be made.

23 And once you say that, you're back
24 where you started because it's going to be a
25 state administrative procedure, possibly

1 reviewable in state court, and then res
2 judicata may apply to that and, God knows,
3 we've accomplished nothing.

4 Now that is what's bothering me, but
5 you'll have an answer, which is why I ask you.

6 GENERAL FRANCISCO: Yes, Your Honor,
7 because I think that your criticism is not
8 unique to takings litigation. I think states
9 can always provide an administrative remedy to
10 redress constitutional claims.

11 But, in Patsy, this Court made clear
12 that you do not require litigants to exhaust
13 state remedies precisely because Section 1983
14 was predicated on the notion that litigants
15 should have a choice between federal and state
16 court because the Reconstruction era Congress
17 did not believe that state courts could be
18 fully entrusted to --

19 JUSTICE BREYER: I see that. There is
20 this difference. But the Constitution itself
21 says that this violation isn't complete unless
22 they -- as long as they pay you. And that
23 isn't true of other state court -- I mean of
24 other -- of other constitutional, you know, and
25 there are loads of cases that say that.

1 GENERAL FRANCISCO: And I --

2 JUSTICE BREYER: That's -- that's --

3 GENERAL FRANCISCO: Right. Yeah.

4 JUSTICE BREYER: All right. So what
5 do you -- what do you --

6 GENERAL FRANCISCO: A couple of
7 responses --

8 JUSTICE BREYER: Yeah.

9 GENERAL FRANCISCO: -- Your Honor.
10 My first response is that the right to
11 just compensation, regardless of whether
12 there's a violation, is one that vests
13 immediately. That's why, when you're suing the
14 federal government for a takings claim, you can
15 march into the claims court and -- and demand
16 just compensation in a ripe cause of action.
17 And it's also why these litigants can march
18 into state court tomorrow with a ripe cause of
19 action under the Fifth Amendment and demand
20 just compensation.

21 So I do think that there's a
22 meaningful difference between the Takings
23 Clause and other constitutional provisions in
24 that regard and that, here, the right to just
25 compensation vests before there's a violation.

1 So I think it's -- it's helpful to think of
2 1983 and, frankly, to think of state inverse
3 condemnation actions as similar to a Tucker Act
4 claim. They're all --

5 JUSTICE KAGAN: General?

6 GENERAL FRANCISCO: Yeah.

7 JUSTICE KAGAN: You've expressed some
8 concerns about this Court's adopting
9 Mr. Breemer's argument. What -- what exactly
10 are those concerns?

11 GENERAL FRANCISCO: So, at least as we
12 understand that argument, Mr. Breemer's
13 argument is that there's a constitutional
14 violation if the state takes property but
15 doesn't admit that it's a taking at the front
16 end.

17 Well, we -- we think that that's
18 contrary to the Tucker Act, and it would
19 effectively require federal government
20 officials to determine on the front end whether
21 their action constitutes a taking before they
22 proceed, since, after all -- may I finish, Your
23 Honor?

24 CHIEF JUSTICE ROBERTS: Uh-huh.

25 GENERAL FRANCISCO: Since, after all,

1 federal government officials are duty bound not
2 to violate the Constitution.

3 We don't think that's required because
4 the Tucker Act constitutes an implicit promise
5 to pay in the event that there is a taking.
6 But it doesn't change the fact that we think a
7 Section 1983 action is available.

8 CHIEF JUSTICE ROBERTS: Thank you,
9 General.

10 GENERAL FRANCISCO: Thank you, Your
11 Honor.

12 CHIEF JUSTICE ROBERTS: Ms. Sachs?

13 ORAL ARGUMENT OF TERESA FICKEN SACHS
14 ON BEHALF OF THE RESPONDENTS

15 MS. FICKEN SACHS: Mr. Chief Justice,
16 and may it please the Court:

17 The Williamson County decision, which
18 is at issue here, needs some context that I
19 think will answer some of the questions we've
20 been hearing, because the presentation of
21 Williamson County as something that completely
22 changed an existing landscape is simply not
23 true.

24 And I think it all -- this -- this
25 point will also answer the question about the

1 justification for the rule. The big change in
2 this area, the sea change was the Monell
3 decision when this Court decided that
4 municipalities could be sued under
5 Section 1983.

6 Before that, none of this was an issue
7 because a takings claim against a municipality
8 would be that claim in state court for
9 compensation.

10 In Williamson County, this Court first
11 time had to address sort of the marrying of two
12 long-standing doctrines for the first time.
13 One was a claim under Section 1983 relying upon
14 a deprivation of constitutional rights, a
15 required element of Section 1983. The other
16 long-standing doctrine is that the Fifth
17 Amendment is not violated, a property owner is
18 not deprived of any rights under the Fifth
19 Amendment where the government has provided a
20 reasonable, certain, and adequate means to
21 recover just compensation.

22 And that is not dependent -- this
23 Court has never made it dependent upon whether
24 or not the government admitted to the taking.
25 So, in that respect, we agree with the

1 Solicitor General's position.

2 There were -- there are at least 10
3 cases over --

4 JUSTICE ALITO: You are merging -- you
5 -- you are merging the executive branch of the
6 state government with the judicial branch of
7 the state government. So -- and maybe that's
8 right, but this is the situation that is
9 troubling to me.

10 The -- a municipality enacts a
11 regulation, and the property owner says: Wow,
12 this regulation goes so far it completely
13 deprives my property of any value. This is a
14 taking of my property.

15 And goes to the municipality and says:
16 You have effectively taken my property. Will
17 you pay me just compensation?

18 And the municipality, speaking for the
19 executive branch of the Commonwealth of
20 Pennsylvania or whatever state is involved,
21 says: Absolutely not. We're not going to pay
22 you one penny.

23 Now, of course, if you want to take us
24 to court, we're going to fight you tooth and
25 nail all the way through the state court

1 system, and if in the end you get a judgment
2 that says that there was a taking and you're
3 entitled to a certain amount of just
4 compensation, we're going to pay that.

5 Now you're saying that there has been
6 no violation of the Takings Clause until the
7 end of that state court litigation, right?

8 MS. FICKEN SACHS: We are saying there
9 has been no constitutional violation until
10 there is a -- a failure to provide the process
11 for recovering just compensation.

12 So where the state provides that
13 process, and in the -- I think following up on
14 Your Honor's example, it's what Pennsylvania
15 does, and there's no constitutional reason a
16 state can't do what Pennsylvania does, the
17 responsibility for adjudicating whether or not
18 a taking has occurred at all and what
19 compensation is due can be delegated to the
20 state courts. That's perfectly appropriate.

21 And it certainly makes perfect sense
22 in the regulatory situation like we're facing
23 here, I think for the very reason that Justice
24 Breyer posited that this Court has recognized
25 many times.

1 Regulatory enactments pose the most
2 difficult issues for this Court as to when they
3 are and are not a taking. Even for this Court,
4 there are so many different ways property
5 rights could be affected, there are so many
6 different properties that could be affected,
7 they're very individual.

8 JUSTICE ALITO: All right. If you're
9 a lawyer advising a municipality about a
10 proposed regulation that might cause property
11 owners to litigate the question of whether
12 there was a regulatory taking and demand just
13 compensation, would you not try to determine
14 whether those might be valid and, therefore,
15 how much money your municipality might be out
16 of if they went ahead with that regulation?

17 You would just plow ahead with the
18 regulation and say: Well, you know, we don't
19 really know, and we don't really care, and if
20 at the end of this litigation process it ends
21 up costing us \$20 million, so be it.

22 Is that what you would do?

23 MS. FICKEN SACHS: Your Honor, what I
24 would -- what I would advise the municipality
25 is that they can rely upon this Court's

1 decisions going back to the Hayes case and all
2 the way back to Cherokee Nation, that if a
3 regulatory taking turns out in some
4 unanticipated way, a reg -- I'm sorry, a
5 regulation turns out in some unanticipated way
6 to effect a taking, the enactment is,
7 nevertheless, constitutional because the state
8 already has a process in place that is complete
9 and thorough and will provide the compensation.

10 And if the property owner does go to
11 state court on something that the state or the
12 municipality did not think was a taking and the
13 court says it is, the court will assign
14 compensation and the municipality will pay.

15 JUSTICE ALITO: You're really telling
16 me that you would -- you're telling me you
17 would not tell the municipality: You ought to
18 think about the budgetary consequences of what
19 you're doing?

20 MS. FICKEN SACHS: Well, Your Honor, I
21 think that -- I -- I assume that every
22 municipality certainly in these days has to
23 think about the budgetary consequences of what
24 they're doing, but I think your question is, in
25 enacting a regulation, do they have to assume

1 that it's going to be unconstitutional if they
2 don't pay upfront, because that's the argument.

3 JUSTICE BREYER: Is there -- is -- is
4 there some kind of middle position here? I
5 mean, it's an unusual provision. It provides
6 for compensation. And so, if the state's going
7 to give the compensation, no problem. And
8 there has to be some method of finding out
9 whether there is or is not compensation owed.

10 But hasn't the court said something
11 like the state system has to be fair to do that
12 thing it promises to do, and what about adding
13 speedy? I mean, I think what people are
14 worried about is that, that they're tied up
15 forever in the state courts and then they can't
16 even get to federal court.

17 But could you say where the state
18 doesn't have a speedy, fair system for
19 determining whether there's compensation or
20 not, then you can go into federal court? That
21 would be totally practical but not -- but not
22 beyond the words of the Constitution in this
23 area.

24 MS. FICKEN SACHS: And I think that is
25 already inherent, Your Honor. And -- and we

1 agree in the Section 1983 test because there
2 has to be that reasonable, certain, adequate
3 process.

4 And this Court has --

5 CHIEF JUSTICE ROBERTS: Well, what
6 counts as --

7 MS. FICKEN SACHS: I'm sorry.

8 CHIEF JUSTICE ROBERTS: What counts as
9 speedy in the Pennsylvania court system?

10 JUSTICE BREYER: Yeah.

11 MS. FICKEN SACHS: What is speedy?

12 CHIEF JUSTICE ROBERTS: Yeah.

13 MS. FICKEN SACHS: Oh.

14 CHIEF JUSTICE ROBERTS: If you file --
15 if I file one of these cases, I -- well, in
16 this case, Ms. Knick says you're violating her
17 property rights because your rule is people get
18 to walk all over land to go see the old
19 gravestones, and she brings a suit.

20 How long would it take her to get a
21 decision through the Pennsylvania Supreme
22 Court?

23 MS. FICKEN SACHS: Well, it would have
24 been over before now, Your Honor. But I think
25 the important part is where it starts because I

1 don't think we can assume that the state court
2 wouldn't properly apply the law at the outset.
3 The Inverse Condemnation Act of Pennsylvania --

4 CHIEF JUSTICE ROBERTS: Well, the
5 state court might --

6 MS. FICKEN SACHS: I'm sorry.

7 CHIEF JUSTICE ROBERTS: I'm sorry, go
8 ahead.

9 MS. FICKEN SACHS: But I think, to --
10 to answer Your Honor's question, this process,
11 Petitioner has never even questioned as a
12 reasonable, certain, and adequate. It's far --
13 in some ways offers far more remedies and is
14 more generous than the Tucker Act.

15 CHIEF JUSTICE ROBERTS: Well, I don't
16 think that does -- I don't think that does
17 answer my question. I mean, you -- you --
18 you've litigated in these courts. How long do
19 you think it would take, on average?

20 MS. FICKEN SACHS: For an inverse
21 condemnation action to go through the -- the
22 determination? Two years perhaps, because
23 they're entitled to immediate appeals, and
24 every aspect of the statute, unlike our
25 standard procedures, emphasizes promptness.

1 Every stage along the way, assigning a
2 board of reviewers, holding a hearing,
3 assessing the compensation, all has to happen
4 promptly. This is a very, very favorable
5 process for the property owner.

6 JUSTICE ALITO: Why would the --

7 MS. FICKEN SACHS: And if it weren't
8 -- I'm sorry.

9 JUSTICE ALITO: Would the property
10 owner be entitled to attorneys' fees if the
11 property owner prevailed?

12 MS. FICKEN SACHS: Yes.

13 JUSTICE ALITO: Under Pennsylvania
14 law --

15 MS. FICKEN SACHS: Yes.

16 JUSTICE ALITO: -- would be entitled
17 to attorneys' fees?

18 MS. FICKEN SACHS: Yes.

19 JUSTICE ALITO: Why do you want to be
20 in state court?

21 MS. FICKEN SACHS: Because the state
22 court --

23 JUSTICE ALITO: I mean, Mr. -- Mr.
24 Breemer wants to be in federal court. You want
25 to be in state court.

1 Does -- does he want to be in federal
2 court because he thinks the state courts are
3 bad? Do you want to be in state court because
4 you think the federal courts are bad?

5 MS. FICKEN SACHS: Your Honor, I
6 think --

7 (Laughter.)

8 MS. FICKEN SACHS: Of course not, Your
9 Honor.

10 JUSTICE ALITO: So why do you want to
11 be in state court?

12 MS. FICKEN SACHS: I --

13 JUSTICE ALITO: You want the home
14 court advantage, right? That's what all --
15 that's what all litigants and lawyers want.
16 They want the home court advantage.

17 MS. FICKEN SACHS: No, because this --

18 JUSTICE ALITO: No?

19 MS. FICKEN SACHS: The question of how
20 to get into federal court relies on -- on a --
21 a preliminary determination that we've somehow
22 violated the Constitution. And that's what we
23 don't want.

24 We -- the -- the Section 1983
25 interpretation that has been posited by

1 Petitioner and by the Solicitor General that
2 Section 1983 now doesn't require a violation,
3 it can just be used as an alternate
4 enforcement mechanism, that is --

5 JUSTICE ALITO: You're telling me that
6 you have no practical reason for wanting to be
7 in state court as opposed to federal court?

8 MS. FICKEN SACHS: Well --

9 JUSTICE ALITO: It's just some airy,
10 theoretical idea you -- that -- that the state
11 court --

12 MS. FICKEN SACHS: I --

13 JUSTICE ALITO: -- is where this
14 belongs?

15 MS. FICKEN SACHS: -- I think there's
16 a -- I think there's a -- a legal reason as far
17 as doctrine, and there's also a practical
18 reason, Your Honor. I think -- doctrinally, I
19 think the states have -- they're -- they're the
20 best places to look at all these issues of
21 state law that involve balancing a lot of local
22 interests. They have an interest in shaping
23 state property law.

24 But, as a practical matter --

25 JUSTICE KAVANAUGH: Do you agree

1 with --

2 MS. FICKEN SACHS: -- you're also
3 talking --

4 JUSTICE KAVANAUGH: I'm -- please
5 finish.

6 MS. FICKEN SACHS: I'll be quick. As
7 a practical matter, you're also talking about
8 requiring local municipalities to, instead of
9 litigating cases that do come up close to home,
10 they're -- you're now adding an additional
11 benefit of litigating a constitutional
12 violation in a more distant court.

13 And when you're talking about a lot of
14 municipalities and a lot of regulations,
15 potentially, you're talking especially for --
16 for the Respondent here -- this is a small,
17 rural county, and there are many, many, many
18 like them across the country, where there's a
19 state interest in developing the law and in
20 enabling these resolutions in -- in a way that
21 doesn't bankrupt the municipality and the
22 taxpayers.

23 JUSTICE KAVANAUGH: Do the
24 municipalities get a home court advantage in
25 state court as compared to federal court, in

1 your judgment?

2 MS. FICKEN SACHS: No, Your Honor. I
3 would say no, and I would also say that that is
4 this Court's role. This Court has said that
5 most of its takings litigation comes from state
6 courts of last resort.

7 This Court can -- can correct any
8 misapprehensions or misapplications of federal
9 law, if this Court sees that, and -- and always
10 has. So that --

11 JUSTICE KAGAN: So the -- the -- the
12 difficulty, Ms. Sachs, with your position, I --
13 I don't think that there would be any
14 difficulty if it weren't for preclusion rules,
15 because, if it weren't for preclusion rules,
16 you would go through the state system, and if
17 you were dissatisfied, then you would have a
18 federal claim, you would file your federal
19 claim.

20 I think the difficulty with your
21 position is not Williamson, which says go to
22 the state courts first. It's San Remo, which
23 says that the federal courts are going to be
24 applying preclusion rules, and the state
25 court's judgment is going to be effectively

1 final.

2 So I guess, first, are we looking at
3 the wrong case? But, second, you know, what
4 should we do with that? Isn't that a
5 difficulty?

6 MS. FICKEN SACHS: I think that --
7 that San Remo is -- is a great place to start,
8 Your Honor, because, in this -- in San Remo,
9 this Court teed that up for Congress. This is
10 an issue that Congress could address.

11 Congress is aware of it. They
12 certainly were aware of it after San Remo. But
13 they have considered it at least three times,
14 and they have rejected it.

15 This is something that Congress could
16 address. This Court should not be
17 reinterpreting the Constitution and tossing
18 away over 100 years of its jurisprudence to
19 address something Congress should address.

20 CHIEF JUSTICE ROBERTS: But you -- you
21 love San Remo, right?

22 (Laughter.)

23 MS. FICKEN SACHS: Would I love --

24 CHIEF JUSTICE ROBERTS: You would not
25 -- that's the last thing you would want, to get

1 rid of San Remo, because then we go through
2 your system entirely, and they say, okay, let's
3 start all over again. You wouldn't like that?

4 MS. FICKEN SACHS: No. No, Your
5 Honor, but what I'm saying is, when -- when
6 Justice Kagan was asking about how do we
7 address this, I think that the way to address
8 it is what this Court did in San Remo, which is
9 clarify what the rule is. And that is a
10 necessary result of the full faith and credit
11 statute.

12 JUSTICE KAVANAUGH: What about --

13 MS. FICKEN SACHS: Congress could
14 address that statute if Congress thought it
15 needed addressing, and they have considered it
16 and --

17 JUSTICE GORSUCH: Okay, so San Remo is
18 going nowhere. I think we've established that
19 in your view.

20 MS. FICKEN SACHS: Uh-huh.

21 JUSTICE GORSUCH: What do we do about
22 the fact that a -- an individual who claims the
23 federal government has engaged in a taking can
24 bring a claim immediately for a takings
25 violation in -- under the Tucker Act in federal

1 court, but you would have those who happen to
2 be the victim of state takings have to exhaust
3 these administrative remedies?

4 MS. FICKEN SACHS: We're not talking
5 about an exhaustion of administrative remedies,
6 Your Honor. We're talking about the state
7 process that is the equivalent --

8 JUSTICE GORSUCH: You're saying they
9 can't bring -- you're saying they can't bring a
10 takings claim.

11 MS. FICKEN SACHS: We're saying that
12 the --

13 JUSTICE GORSUCH: That is an
14 exhaustion requirement. How come that applies
15 in state court but not in federal?

16 MS. FICKEN SACHS: Because it -- I --
17 I think that the -- that the difference that
18 I'm trying to point out, Your Honor, is that
19 it's an element of the Section 1983 cause of
20 action that does not give such a claimant an
21 automatic right to be in federal court because
22 they don't have a constitutional --

23 JUSTICE GORSUCH: But if it's -- so if
24 it comes from -- so you're saying it comes from
25 1983, not the Takings Clause then, right?

1 MS. FICKEN SACHS: I -- the -- the
2 Takings Clause, they have an immediate right,
3 and I think in this respect --

4 JUSTICE GORSUCH: Okay. So --

5 MS. FICKEN SACHS: -- there's no
6 disagreement to --

7 JUSTICE GORSUCH: -- so it comes from
8 1983? That's your position now?

9 MS. FICKEN SACHS: It -- the -- the --
10 the fact that they do not have a federal cause
11 of action, yes.

12 JUSTICE GORSUCH: Okay.

13 MS. FICKEN SACHS: There -- there's --
14 there --

15 JUSTICE GORSUCH: Okay.

16 MS. FICKEN SACHS: Congress has not
17 given a --

18 JUSTICE GORSUCH: What do we do about
19 the fact that we've said repeatedly that there
20 is no exhaustion requirement in 1983? Now
21 maybe there should be. And if there is, maybe
22 there should be for Fourth Amendment claims and
23 Fourteenth Amendment claims too because there
24 are wonderful state courts capable of
25 adjudicating the deprivation of Fourth

1 Amendment rights, capable of adjudicating fully
2 and fairly. I think we'd all agree the
3 deprivation of Fourteenth Amendment rights.
4 But we don't generally require that.

5 And if we're going to get into the
6 business of saying exhaustion here, I guess I'm
7 at a loss as to why we wouldn't say exhaustion
8 everywhere.

9 MS. FICKEN SACHS: And -- and to try
10 to answer that, Your Honor, I -- I just have to
11 disagree with the -- the calculus of exhaustion
12 because it's not an exhaustion of an existing
13 remedy. It's the fact that they don't yet have
14 a cause of action. I didn't --

15 JUSTICE GORSUCH: Now you keep going
16 back. A cause of action under 1983?

17 MS. FICKEN SACHS: Under 1983, but
18 they do have a cause of action in state court,
19 which is the equivalent of the Tucker Act.
20 They're entitled to go to state court and get
21 their just compensation. And we agree that the
22 injury occurs at the time of taking.

23 The question is that Congress has not
24 created a cause of action that would give every
25 takings plaintiff the right to come to federal

1 court with their claim. And 1331 should not be
2 that.

3 JUSTICE KAVANAUGH: What about 1331?
4 Yes, 13 -- what about the 1331 argument?

5 MS. FICKEN SACHS: Because 1331 has --
6 has been always treated by this Court as for
7 special cases under state law, the -- the
8 unusual case that doesn't upset the
9 constitutional balance of authority that
10 Congress has created.

11 Allowing every plaintiff in every
12 takings case in every county or municipality to
13 go straight to federal court would certainly
14 upset that balance, but it'll also -- this
15 would not be the case to even consider that
16 question, Your Honor, because, in this case,
17 there is no state takings claim. Petitioner
18 never made a state takings claim.

19 JUSTICE KAVANAUGH: But -- but, in
20 terms of the law on 1331, if we were to so
21 hold, as the Solicitor General argues, then
22 Congress, of course, could trim that back. But
23 their argument is 1331, at least as interpreted
24 by our precedent, does allow a certain narrow
25 category of state law claims to be directly

1 brought in federal court, and the question is
2 what -- why is that wrong and what problems
3 would that create, in your view?

4 MS. FICKEN SACHS: Because every claim
5 that involves a federal element is not a case
6 arising under federal law for Section 1331
7 purposes, at least as this Court has ever
8 interpreted it.

9 For the reason that it would not fall
10 within that special category of cases, it would
11 be every case. Every state case would now be
12 in federal court. And Section 1331
13 jurisdiction has been interpreted by this Court
14 much more narrowly.

15 And, again, Congress could fix that.
16 Congress could enact Section 1331(a) and give
17 -- or whatever, and give state takings
18 claimants, just looking for compensation, a
19 route straight to federal court.

20 But Congress has not done that. And
21 this Court should not do that by modifying or
22 creating a whole different interpretation of
23 federal court jurisdiction.

24 JUSTICE BREYER: Well, suppose --
25 suppose you tried this: Suppose you said,

1 since it's San Remo, San Remo says your claim
2 isn't ripe until they deny you the
3 compensation. And then, when they do deny you
4 the compensation, you try to go to federal
5 court, they say it's res judicata, and that
6 does seem rather unfair.

7 So suppose you said that once the
8 state indicates either through a lengthy
9 proceeding or in other ways, that there will
10 not be a speedy and fair determination, under
11 those circumstances, the claim is ripe and
12 that's all you'd need, because, once the claim
13 is ripe, you can go into federal court.

14 MS. FICKEN SACHS: And -- and to
15 answer that question --

16 JUSTICE BREYER: And then suppose you
17 had fairly strict rules. I mean, suppose you
18 had fairly strict --

19 MS. FICKEN SACHS: And to answer that
20 question --

21 JUSTICE BREYER: Yeah.

22 MS. FICKEN SACHS: -- yes, I think
23 that that -- that the court -- Congress could
24 say that. And I actually think that Section
25 1983 --

1 JUSTICE BREYER: Well, why couldn't we
2 say that in interpreting -- in interpreting
3 when this unusual hybrid taking plus no
4 compensation becomes ripe for adjudication?

5 MS. FICKEN SACHS: You're the Supreme
6 Court, Your Honor --

7 JUSTICE BREYER: Yeah, but not for one
8 of those reasons, but I mean --

9 MS. FICKEN SACHS: -- but in Section
10 1983 --

11 JUSTICE BREYER: -- ripeness is --
12 ripeness is a fairly -- ripeness is the kind of
13 issue that judges do decide.

14 MS. FICKEN SACHS: But -- but I -- I
15 think, perhaps, although you could do that, it
16 would not be necessary where Section 1983 would
17 already provide that claim.

18 A claimant could say my state process
19 doesn't -- there's no existing state process
20 that's reasonable, certain, and adequate, or
21 they could even later, at the conclusion of a
22 state case, perhaps, say, as applied to my
23 case, this process was not reasonable, certain,
24 and adequate means to just compensation.

25 That's a Section 1983 claim because

1 it's a constitutional violation. So then we
2 already have a cause of action over which
3 Congress has given the federal courts
4 jurisdiction, and no need to -- to jump in and
5 reinterpret this Court's existing jurisprudence
6 on Section 1331.

7 JUSTICE SOTOMAYOR: Do you have any --
8 have you given any thought to the possibility
9 that if you lose this case, that a 1983
10 plaintiff could go into federal court and
11 enjoin the municipality from enforcing a
12 regulation?

13 MS. FICKEN SACHS: Yes, Your Honor.
14 And that is one of the problems, I think, that,
15 when we were talking earlier about how the
16 municipalities have -- have depended on -- on
17 the current interpretation to -- that there's
18 no takings -- no federal takings claim until
19 there's a violation --

20 CHIEF JUSTICE ROBERTS: Well, it's a
21 normal --

22 MS. FICKEN SACHS: -- the Constitution
23 isn't violated until --

24 CHIEF JUSTICE ROBERTS: Go ahead,
25 sure, no, go ahead.

1 JUSTICE SOTOMAYOR: Well, an
2 injunction is a high bar because money can --
3 if money can --

4 MS. FICKEN SACHS: Right.

5 JUSTICE SOTOMAYOR: -- make you whole,
6 you can't get an injunction. But I can
7 certainly see people arguing that money can't
8 make them whole because whatever it is that
9 they have is unique and not compensable by
10 money, presumably.

11 MS. FICKEN SACHS: It certainly --

12 JUSTICE SOTOMAYOR: Some people could
13 argue that on some pieces of property.

14 MS. FICKEN SACHS: I agree, Your
15 Honor, that is certainly a danger. And it is
16 one of the reasons why being able to rely upon
17 the state process to ensure that no
18 constitutional violation ever happens also
19 prohibits or -- or shortcuts any possibility of
20 a Section 1983 claim seeking to enjoin a
21 violation.

22 JUSTICE GORSUCH: Counsel, when we're
23 talking about stare decisis, not only have we
24 -- the courts often said, of course, that money
25 damages, the availability precludes injunctive

1 relief in just these sorts of cases, but an
2 additional factor for me is Williamson
3 purported to interpret the Constitution.

4 You're now not arguing that. You're
5 saying 1983. Williamson County was talking
6 about the Constitution, though, at least as I
7 read it. So help me out with that, number one.

8 Number two, when we're looking at
9 stare decisis, this is an alternative holding.
10 It isn't well reasoned. It's very briefly
11 provided. And it's inconsistent with a lot of
12 other law that's developed around it, including
13 First English, which this Court has held that
14 the deprivation of the right takes place
15 immediately.

16 So all of those factors seem to weigh
17 against you. What do we do about that?

18 MS. FICKEN SACHS: Justice Gorsuch,
19 let me go back to the -- the first part of your
20 question, which is the -- the violation under
21 Williamson County, and was Williamson County
22 talking about the Constitution or Section 1983.

23 And I would respectfully disagree
24 because the entire definition --

25 JUSTICE GORSUCH: Okay. Assume you're

1 wrong on that. Then what?

2 (Laughter.)

3 MS. FICKEN SACHS: I'm sorry?

4 JUSTICE GORSUCH: Assuming I disagree
5 with you on that, then what?

6 MS. FICKEN SACHS: I would say that
7 you still have to have a constitutional
8 violation. And in Williamson County, the only
9 claim --

10 JUSTICE GORSUCH: The precedential
11 force, you would concede, if Williamson County
12 was interpreting the Constitution, the
13 precedential force is diminished when you're
14 arguing only it's a matter of interpreting
15 1983, right?

16 MS. FICKEN SACHS: Statutory -- well,
17 actually, statutory decisis has a stronger --
18 yes, stronger stare decisis effect. So, if it
19 were only constitutional, I would agree with
20 Your Honor.

21 But that, again, that's a -- that's a
22 supposition because the only claim raised in
23 Williamson County, just like the only claim
24 raised in this case, was a Section 1983 claim.

25 And so, to answer Your Honor's second

1 question about whether Williamson County was
2 well reasoned, it is when you put it back in
3 that context.

4 The context was, has a constitutional
5 violation been identified? And there was no
6 constitutional violation because the petitioner
7 there had not been deprived of a reasonable,
8 certain, and adequate means of getting
9 compensation.

10 And, therefore, there is -- that that
11 was the -- that -- that marrying of the two
12 doctrines that I talked about before. The
13 Court did talk about the constitutional
14 requirements and what would violate the Fifth
15 Amendment, but they found that a Section 1983
16 violation had not occurred.

17 JUSTICE KAVANAUGH: If Williamson
18 County is wrong, you argue that it still should
19 not be overruled. Why?

20 MS. FICKEN SACHS: Your Honor, because
21 the -- the -- the underlying principles of
22 Williamson County are what municipalities have
23 relied upon.

24 JUSTICE KAVANAUGH: And how do they
25 rely on them?

1 MS. FICKEN SACHS: They've relied upon
2 them by enacting litigation -- I'm sorry,
3 regulations, ordinances, statutes, knowing that
4 they cannot be attacked as unconstitutional for
5 failing to provide just compensation.

6 They -- they know that --

7 JUSTICE KAVANAUGH: Well, they know
8 they can be attacked in state court.

9 MS. FICKEN SACHS: They can -- they
10 can be -- compensation can be requested, but
11 the enactments are not rendered
12 unconstitutional by failing to provide just
13 compensation.

14 And that's a really important
15 difference. And it goes back to one of the
16 questions here before about -- about regulatory
17 takings and their difficulty.

18 I think it's -- it's important just to
19 keep in mind that when this Court found in the
20 Mahon case in 1922 that the -- the doc -- sort
21 of created the doctrine of regulatory takings
22 in the first place, it was against an existing
23 backdrop of the Hayes case, just two years
24 earlier, where this Court held that a -- an
25 inverse condemnation action was a reasonable,

1 certain, and adequate method for obtaining
2 compensation, even where the government, as it
3 did in that case, denied that there was any
4 taking.

5 This Court has held that many times
6 since then and --

7 JUSTICE ALITO: You've totally -- you
8 totally lost me in your explanation on what --

9 MS. FICKEN SACHS: I'll --

10 JUSTICE ALITO: -- where -- where the
11 municipal reliance is.

12 MS. FICKEN SACHS: Because if -- if
13 the -- if municipalities -- the reliance, I
14 guess, maybe I can say it's on the front end,
15 Your Honor. It's not on the back end, are they
16 going to federal court or state court.

17 It's on the front end. Are their
18 enactments constitutional or are they not
19 constitutional? And we know that their --

20 JUSTICE ALITO: Yeah, and that's going
21 to be decided if it's -- you know, if the
22 property owner disagrees, it's going to be
23 contested in state court or in federal court.

24 I -- I don't understand the
25 difference. What's -- where's the reliance,

1 other than reliance on the fact that, well, if
2 we go ahead with this, at least we're going to
3 get -- and -- and it's challenged, at least
4 it's going to be in our own courts.

5 MS. FICKEN SACHS: Because the basis
6 of the challenge would be different, Your
7 Honor.

8 JUSTICE ALITO: No, it won't. How is
9 it different?

10 MS. FICKEN SACHS: Because, under
11 Section 1983, the claim is that the
12 municipality has already violated the
13 Constitution. And the -- under a state inverse
14 condemnation action, it's a claim for -- for
15 compensation.

16 JUSTICE GORSUCH: But you conceded --

17 JUSTICE SOTOMAYOR: Ms. Evans --

18 JUSTICE GORSUCH: -- that there is a
19 violation of the Constitution. I mean, you
20 acknowledge that the violation of the
21 Constitution is complete. So --

22 MS. FICKEN SACHS: No, Your Honor. If
23 I -- if I said that, let me back up. The
24 injury, there is an injury, but there is --

25 JUSTICE GORSUCH: Well, I -- I -- I'm

1 sure I heard that, and I'm quite sure I heard
2 that, counsel, that you said the problem here
3 is that there's no 1983 cause of action.

4 MS. FICKEN SACHS: Correct.

5 JUSTICE GORSUCH: Not that there's a
6 violation of the Constitution, absence of that.

7 MS. FICKEN SACHS: No. The 1983 cause
8 of action requires violation of the
9 Constitution, Your Honor. So I -- I don't
10 know -- if I missaid that, let me say it again.

11 A 1983 action requires a violation of
12 the Constitution.

13 JUSTICE GORSUCH: Surely, but, again,
14 counsel, I -- I -- I'm pretty sure I heard
15 earlier --

16 MS. FICKEN SACHS: Okay.

17 JUSTICE GORSUCH: -- that -- you
18 acknowledge that there's a violation of the
19 Constitution upon the taking and the failure to
20 provide compensation. We said as much in First
21 English, right?

22 MS. FICKEN SACHS: No. No, only when
23 there's not -- yeah, where there's no process
24 provided. And I agree with Your Honor. If
25 there's no process provided, then yes. The

1 taking and the violation happen at the same
2 time.

3 But the -- the -- the injury, that's
4 the taking, is not the same as the violation.
5 And I think that is really important to keep in
6 mind because I think there's been a lot of
7 conflating of those two terms in talking about
8 a federal takings claim versus a constitutional
9 -- a claim for a constitutional violation.

10 JUSTICE KAGAN: And -- and, Ms. Sachs,
11 tell me if I'm wrong, but I understood the
12 argument you were just making as very similar
13 to the General's argument, at the end of his
14 argument, where he said if -- if Mr. Breemer's
15 theory were accepted, it would put employees of
16 the government in a very ticklish situation
17 because, at a much earlier time, you would be
18 forcing employees to say we're going to go
19 invade the Constitution. Isn't that right?

20 MS. FICKEN SACHS: Yes. Correct, Your
21 Honor.

22 JUSTICE GORSUCH: So you are adopting
23 the government's view on this score?

24 MS. FICKEN SACHS: On -- on -- we --
25 we are in agreement with the government with

1 respect to the -- the fact that a -- an inverse
2 condemnation action provides what the
3 Constitution requires.

4 I think the Solicitor General says it
5 provides what the Constitution requires, all
6 that the Takings Clause requires under the
7 Fifth Amendment, and yet somehow the Solicitor
8 General says that's not true when a state does
9 the same thing. And that's where we greatly
10 disagree.

11 The Section 1983 provides remedies
12 coextensive with the Fourteenth Amendment. The
13 Fourteenth Amendment does not put greater
14 burdens on the state than it does on the
15 federal government.

16 CHIEF JUSTICE ROBERTS: Thank you.

17 MS. FICKEN SACHS: And the Solicitor
18 General cannot have it both ways. Thank you,
19 Your Honor.

20 CHIEF JUSTICE ROBERTS: Thank you, Ms.
21 Sachs.

22 Mr. Breemer, two minutes remaining.

23 REBUTTAL ARGUMENT OF J. DAVID BREEMER
24 ON BEHALF OF THE PETITIONER

25 MR. BREEMER: Thank you. May it

1 please the Court:

2 I want to talk about state courts real
3 quickly. One of the problems in just saying,
4 well, it's a wash and you can bring your Fifth
5 Amendment claim in state court, so what's the
6 problem, is you can't bring your Fifth
7 Amendment claim in a state court.

8 Williamson County says this: No Fifth
9 Amendment Takings Clause claim exists until you
10 use a state law inverse condemnation process.

11 In federal court or state court, it
12 does not exist, while over in the court of
13 claims it does exist. And since you have to
14 use that state law inverse condemnation
15 process, it's different in every state.

16 There are different procedures,
17 different rules. And until you go through all
18 that state law procedure, you don't have a
19 Fifth Amendment claim. But why is a Just
20 Compensation Clause different?

21 JUSTICE KAVANAUGH: Is the substance
22 of the claim any different from the takings
23 claim?

24 MR. BREEMER: In many case, it is,
25 yes. In state law inverse condemnation cases,

1 in many cases, it is. In many states, you have
2 to file a writ of mandate action first before
3 you can bring that inverse condemnation.
4 Inverse condemnation requires that initial writ
5 of mandate action to try and invalidate. And
6 Section 1983 doesn't require that. And the
7 Just Compensation Clause doesn't require that.

8 The other point I would like to make
9 real quickly is that the government doesn't
10 have to consider every regulation to see if
11 it's a taking unless it wants the benefit of
12 the Cherokee Nation exception. That's a
13 benefit for the government to say, oh, we're
14 going to consider if it's a taking, and -- and
15 admit it and provide a process. That's not a
16 burden. That's a benefit.

17 It can go under the regular rule, just
18 like every other constitutional provision, and
19 decide, look, we're going to do this, final
20 act, it may harm some people --

21 JUSTICE SOTOMAYOR: What happens --
22 what happens when the government says, yes, the
23 graveyard municipality ordinance requires
24 compensation. Everybody who has some person
25 living there gets compensation.

1 MR. BREEMER: That's the --

2 JUSTICE SOTOMAYOR: Now somebody comes
3 in and says, I have my goldfish or my dog
4 buried there. Why shouldn't I get compensation
5 for the people who want to come visit -- the
6 prior owners who want to visit the dog
7 cemetery? Well, that person can go to federal
8 court now?

9 MR. BREEMER: No, I --

10 JUSTICE SOTOMAYOR: Even though the
11 state has said we'll pay compensation for a
12 taking?

13 MR. BREEMER: If the -- when the state
14 says we'll pay compensation for a specific act,
15 that's Cherokee Nation. Then it -- the
16 entitlement is established. There's no
17 violation of just compensation. The
18 entitlement is established. That's why there's
19 an exception for that rule.

20 JUSTICE SOTOMAYOR: So why can't the
21 state just come in and say we will pay just
22 compensation to anyone who's been injured by
23 this so long as a state court says it's a
24 taking? I -- I don't -- it's no different than
25 the goldfish guy.

1 CHIEF JUSTICE ROBERTS: You --

2 MR. BREEMER: Can I answer?

3 CHIEF JUSTICE ROBERTS: You may -- you
4 may answer briefly.

5 MR. BREEMER: Because we're talking
6 about the Fifth Amendment. There are state
7 remedies for many, many injuries, but there are
8 also federal remedies.

9 And the Fifth Amendment stands on its
10 own in that the just compensation is complete
11 at the time of invasion. And when the United
12 States invades you, it should be complete at
13 the time when the local government invades you,
14 and we wouldn't have all these problems with
15 res judicata removal that make the state court
16 option practically unviable and unpredictable.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel. The case is submitted.

19 (Whereupon, at 11:07 a.m., the case
20 was submitted.)

21

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Official - Subject to Final Review

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