No. ________

In The
Supreme Court of the United States

JACK KURTZ, on behalf of himself and all others similarly situated, JOSEPH GRILLO, husband, VIVIAN GRILLO, wife, JEFF MICHAELS, husband, BARBARA MICHAELS, wife, 31-11 30TH AVE. LLC, AGRINIOS REALTY INC., K.A.P. REALTY INC., LINDA DAVIS, PETER BLIDY, VASILIOS CHRYSIKOS, 3212 ASTORIA BLVD. REALTY CORP., MNT REALTY LLC, ANTHONY CARDELLA, BRIAN CARDELLA, 46-06 30TH AVENUE REALTY CORP., CATHERINE PICCIONE, and CROMWELL ASSOC. LLC,

Petitioners,

v.

VERIZON NEW YORK, INC., fka NEW YORK TELEPHONE COMPANY, VERIZON COMMUNICATIONS INC., IVAN G. SEIDENBERG, LOWELL C. MCADAM, RANDALL S. MILCH, and JOHN DOES,

Respondents.

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

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Court, in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), said that property owners bringing certain Takings Clause claims in federal court must both (1) demonstrate that the government's decision regarding their property is "final" and (2) exhaust available state-court remedies for compensation. Although Members of this Court have criticized this second requirement, it has actually been expanded by courts of appeals. In the case below, the Second Circuit announced a rule requiring all procedural due-process claims that share facts with a possible Takings claim to meet this exhaustion requirement. In so doing, it joined the Seventh and Tenth Circuits but departed from the approaches of the Third, Fourth, Fifth, Sixth, Eighth, Ninth, Eleventh, and D.C. Circuits.

The questions presented are:

1) Whether *Williamson County*'s exhaustion requirements apply to any constitutional claim – including the procedural due-process claims in this case – when that claim shares facts in common with a possible Takings Clause claim.

2) Whether federal courts must impose special exhaustion requirements on Takings Clause claims even where, as here, the taking is "final."

PARTIES TO THE PROCEEDINGS

The caption of this case contains all parties to this action.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

The corporate Petitioners in this case – 31-11 30th Ave., LLC, Agrinios Realty, Inc., K.A.P. Realty, Inc., 3212 Asotria Blvd. Realty Corp., MNT Realty LLC, 46-06, 30th Avenue Realty Corp., and Cromwell Assoc., LLC – all have no parent corporations, and no publicly held corporation owns 10% or more of their stock or units. All other Petitioners are natural persons.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners seek a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. at 1-19) is reported at 758 F.3d 506. The memorandum and order of the district court (App. at 20-36) is reported at 976 F. Supp. 2d 354.

JURISDICTION

The judgment of the court of appeals was entered on July 16, 2014. This petition is timely filed on October 14, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The plaintiffs below brought this action pursuant to 42 U.S.C. § 1983, alleging violations of the Fourteenth Amendment (which prohibits states from "depriv[ing] any person of * * * property, without due process of law") and the Fifth Amendment (which provides, "nor shall private property be taken for public use, without just compensation"). The relevant

statute, N.Y. CLS Trans. Corp. § 27 (2014) is reproduced in the Appendix at 35.

STATEMENT

1. New York State law delegates the State's eminent-domain power to private telecommunications companies in order to facilitate the construction of certain kinds of telecom infrastructure. *See* N.Y. CLS Trans. Corp. § 27. This statutory authorization permits Respondent Verizon New York to construct "terminal boxes" on private property that allow Verizon to provide telephone service to an entire area (not just to the property on which the box is installed), "subject to the right of owners thereof to full compensation for the same." App. at 35. This compensation can be determined either by "agree[ment] with such owner" or "ascertained in the manner provided in the eminent domain procedure law." *Id.*; *see also* App. at 3-4; *cf. Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435-36 & n.12 (1982) (finding that permanent installations of telecommunications equipment like this constitute a taking within the meaning of the Takings Clause).

This case is a putative class action under 42 U.S.C. § 1983 challenging the manner in which

Verizon has exercised this authority.[1] The Complaint alleges two basic constitutional violations:

First, it claims that Verizon has violated the Fourteenth Amendment by failing to provide sufficient notice or procedural protections to the owners of the properties on which these boxes have been installed. App. at 5. As summarized by the court of appeals, the Complaint laid out four independent procedural violations, alleging that Verizon (1) failed to provide notice of (or actually concealed) the property owners' right to full compensation; (2) failed to make any offer of compensation; (3) gave property owners the false impression that they must consent to these installations if they wanted telephone service in their own buildings; and (4) failed to initiate eminent domain proceedings to compensate the owners for the taking, instead forcing property owners to shoulder the burden of initiating inverse-condemnation actions. *Id.* In short, the Complaint alleged that Verizon failed to provide sufficient notice and opportunity to be heard to allow the property

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[1] This case is one of a series of challenges to Verizon's practices under this statute, all of which have been litigated by the same attorney. App. at 5. Only one of those lawsuits shares plaintiffs with this one, and that case has been stayed in state court while the plaintiffs litigate about their right to bring their federal claims in federal court. *Id.* As is common in cases where federal-court jurisdiction is uncertain, the stayed state-court case serves "as a protective measure * * * should the federal court decide to abstain" from exercising jurisdiction over the federal claims. *Sprint Commc'ns, Inc. v. Jacobs*, 134 S. Ct. 584, 589 (2013).

owners to protect their rights under New York law. *See, e.g., Fuentes v. Shevin*, 407 U.S. 67, 80 (1972); *cf. City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 712 (1999) (Kennedy, J., plurality opinion) ("Even when the government does not dispute its seizure of the property or its obligation to pay for it, the mere shifting of the initiative from the condemning authority to the condemnee can place the landowner at a significant disadvantage." (internal quotation marks omitted)).

The second constitutional violation alleged by the Complaint is equally straightforward: The permanent installation of these terminal boxes on an individual's private property is a physical taking, and property owners are entitled to just compensation for that taking. *E.g., Loretto*, 458 U.S. at 435-36.

2. Verizon moved to dismiss this action pursuant to both Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6), and the district court addressed only the former motion; finding that it lacked subject-matter jurisdiction, it declined to consider any other issues. App. at 33. The Second Circuit affirmed for the same reason, finding that both of the claims raised by the Complaint were unripe under *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985). App. at 3. *Williamson County* imposes a special, two-pronged ripeness test on federal takings claims: A plaintiff bringing a takings claim in federal court must show that (1) the government's decision to "take" property is final and (2) the plaintiff has exhausted all available state-court

remedies for compensation. 473 U.S. at 191, 193. The Second Circuit acknowledged that the physical invasions at issue here are obviously "final" within the meaning of *Williamson County* and therefore addressed only the exhaustion requirements. App. at 12-13.

With respect to the Takings Clause, the court of appeals, applying circuit precedent, found that the claim was unripe because the property owners here had not exhausted their state-court remedies by litigating an inverse-condemnation action against Verizon. App. at 12-13.

With respect to the claims under the Due Process Clause, the court of appeals acknowledged the application of *Williamson County*'s exhaustion requirements to procedural due-process claims like these was a question of first impression in the Second Circuit. App. at 15 ("The plaintiffs' due process claims fall within a gap in our precedents[.]").[2] Looking to

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[2] It is worth noting that, in coming to the conclusion that this was a question of first impression, the court of appeals failed to acknowledge a relevant Second Circuit opinion written by then-Judge Sotomayor. *See* App. at 16. The opinion below distinguishes an earlier Second Circuit case, *Brody v. Village of Port Chester*, 434 F.3d 121 (2d Cir. 2005), by saying it had considered a "due process claim[ ] with little connection to a taking claim." App. at 16. But in an earlier ruling in the same litigation, then-Judge Sotomayor (writing for the court), had explained that the plaintiff in that case claimed that "the procedures used by the Village *in condemning his commercial property* for use in an urban redevelopment project denied him

(Continued on following page)

precedents from the Seventh and Tenth Circuits, the court of appeals said it was "persuaded" that it should adopt a categorical rule applying *Williamson County*'s exhaustion requirements to "due process claims arising from the same nucleus of facts as a takings claim." App. at 16-17 (citing *B. Willis, C.P.A., Inc. v. BNSF Ry. Corp.*, 531 F.3d 1282, 1299 n.19 (10th Cir. 2008); *Greenfield Mills, Inc. v. Macklin*, 361 F.3d 934, 961 (7th Cir. 2004)).

The Second Circuit identified three reasons for this holding. First, it said that, where individuals are entitled to post-deprivation remedies, "federal courts cannot determine whether the state's process is constitutionally deficient until the owner has pursued the available state remedy." App. at 17. Second, it said that a categorical rule "prevents evasion of the ripeness test by artful pleading of a takings claim as a due process claim." *Id.* And third, it said that applying *Williamson County* generally to these claims "avoids messy distinctions" between permissible and impermissible due-process claims. App. at 18. It did not, however, cite to or explain its departure from any of the Circuits that have rejected this approach. *See infra* at 10-14.

This petition for certiorari followed.

due process[.]" *Brody v. Vill. of Port Chester*, 345 F.3d 103, 104-05 (2d Cir. 2003) (Sotomayor, J.) (emphasis added).

REASONS FOR GRANTING THE PETITION

The Second Circuit erred in holding that it was barred from considering the Petitioners' claims – either the claim that Verizon violated the Petitioners' procedural due-process rights or the claim that Verizon owes the Petitioners just compensation for the physical invasion of their property – until the Petitioners exhausted all available state-court remedies.

With respect to the Petitioners' procedural due-process claims, the holding in this case directly conflicts with the law of several other courts of appeals, deepening a long-standing, openly acknowledged disagreement among the Circuits regarding when (if ever) *Williamson County*'s exhaustion requirements apply to non-Takings claims. The Second Circuit now stands with two other courts of appeals (the Seventh and Tenth Circuits) in requiring procedural due-process claims that share facts with a possible Takings Clause claim to satisfy both *Williamson County*'s finality and exhaustion requirements. Four other courts of appeals (the Fourth, Fifth, Sixth, and D.C. Circuits) do not apply *Williamson County* to these claims at all. And four other courts of appeals (the Third, Eighth, Ninth, and Eleventh Circuits) apply only the finality prong but not the exhaustion requirements. This fully developed, three-way split requires this Court's intervention.

With respect to the Petitioners' Takings Clause claims, this case presents an opportunity to reconsider

Williamson County's *dictum* about the exhaustion of state-court remedies in Takings Clause cases – a step that several Members of this Court have specifically called for. In the absence of any opinion clarifying or reaffirming that *dictum*, the lower courts have divided over both the nature and scope of the exhaustion requirement. Some courts of appeals (like the Second Circuit below) continue to treat the doctrine as jurisdictional and binding; others (like the Fourth Circuit) treat it as a purely prudential doctrine to be set aside at their discretion. Still other Circuits have held that this *dictum* cannot be applied to final, physical takings like the ones at issue in this case. As it has done with other doctrines that limit the ability of the federal courts to exercise their jurisdiction, this Court should take this opportunity to clarify the scope and continued force of *Williamson County*'s requirement that Takings plaintiffs first exhaust their state-court remedies.

Finally, this Court's intervention is warranted because this case presents a straightforward vehicle with which to resolve both of these issues. The district court and court of appeals below decided only the threshold *Williamson County* issue without passing on any of the underlying case's merits; this Court's analysis can be similarly limited to only that issue.

A. The Circuits Are Deeply Divided Over When (If Ever) *Williamson County*'s Exhaustion Requirements Apply To Non-Takings Claims.

1. This Court has never decided whether *Williamson County* applies to anything other than regulatory-takings claims. *See, e.g.,* 473 U.S. at 195 n.14 (noting that exhaustion is required for takings claims "because of the special nature of the Just Compensation Clause" and distinguishing claims for just compensation from procedural claims under the Due Process Clause). On its face, the opinion says only that (1) claims under the Just Compensation Clause must meet the finality and exhaustion requirements and (2) *substantive* due-process claims that a land-use regulation "goes too far" must meet at least the finality requirement. *Id.* at 195, 199-200. Neither *Williamson County* nor any subsequent decision of this Court speaks to the fate of *procedural* due-process claims or other constitutional claims.

In the absence of guidance on this point, the courts of appeals have aligned themselves into three general camps. Some refuse to apply *Williamson County* to non-Takings Clause claims, even when those claims share facts with a possible Takings Clause claim. Some apply *Williamson County*'s finality requirement to these non-Takings Clause claims but do not apply the state-court exhaustion requirements. Finally, some apply both *Williamson County*'s finality and its exhaustion requirements to these claims. And, because this Court has never articulated

a test for when (if ever) *Williamson County* applies, some Circuits are inconsistent – applying *Williamson County* to some non-Takings Clause claims, but not others.

The Second Circuit in this case adopted a categorical rule that applies both *Williamson County* prongs to all procedural due-process claims that share a "nexus of facts" with a potential Takings Claim. App. at 18. And the court of appeals was correct that, in adopting this general rule, it joined both the Seventh and Tenth Circuits. App. at 16-17.

But the court of appeals failed to mention that other courts disagree. The Fifth Circuit, for example, has rejected the approach taken below; instead, it simply applies "general ripeness principles" to all due-process claims, whether or not they share facts with a Takings Clause claim. *See Bowlby v. City of Aberdeen*, 681 F.3d 215, 223 (5th Cir. 2012). The Fifth Circuit acknowledges that its approach to these questions splits with the very line of cases on which the Second Circuit relied below. *Compare* App. at 16-17 (citing with approval *Bateman v. City of West Bountiful*, 89 F.3d 704, 709 (10th Cir. 1996)) *with John Corp. v. City of Houston*, 214 F.3d 573, 584 (5th Cir. 2000) (citing – and rejecting – *Bateman*, 89 F.3d at 709 (10th Cir. 1996)).

The Fifth Circuit is explicitly joined in this approach by the Fourth and Sixth Circuits, as well as implicitly by the D.C. Circuit. *See Grace Cmty.*

Church v. Lenox Twp., 544 F.3d 609, 618 (6th Cir. 2008) ("[A] procedural due process claim is 'the only type of case in which we have not imposed the finality requirement on constitutional claims arising out of land use disputes.'" (quoting *Insomnia, Inc. v. City of Memphis*, 278 F. App'x 609 (6th Cir. 2008)); *Front Royal & Warren Cnty. Indus. Park Corp. v. Town of Front Royal*, 135 F.3d 275, 283 n.3 (4th Cir. 1998) (noting that *Williamson County*'s concerns about exhaustion are "[a]bsent" with respect to "Fourteenth Amendment due process and equal protection claims"); *cf. Tri Cnty. Indus., Inc. v. District of Columbia*, 104 F.3d 455, 458-62 (D.C. Cir. 1997) (upholding application of *Williamson County* to substantive due-process claim but addressing procedural due-process claim on the merits).

Other Circuits – the Third, Eighth, and Eleventh – take a middle approach, applying *Williamson County*'s finality requirement to procedural due-process claims that share facts with possible Takings claims, but refusing to require state-court exhaustion. *See McKenzie v. City of White Hall*, 112 F.3d 313, 317 (8th Cir. 1997) ("Because the City's decisions to deny zoning and building permits absent surrender of the privacy buffer were final, the McKenzies' due process and equal protection claims based on those decisions are ripe."); *Strickland v. Alderman*, 74 F.3d 260, 265 (11th Cir. 1996) ("As applied due process and equal protection claims are ripe for adjudication when the local authority has rendered its final decision with respect to the application of the regulation."); *Acierno*

v. Mitchell, 6 F.3d 970, 976 (3d Cir. 1993) (noting that constitutional claims would be "mature" once the plaintiff "secure[d] a final decision from the Board of Adjustment on his application for a building permit"); *see also John Corp. v. City of Houston*, 214 F.3d 573, 584 (5th Cir. 2000) (summarizing cases and discussing the distinct approaches of other Circuits).

These different approaches matter: Under the approach of these other circuits, the procedural due-process claims in this case would be decided on the merits. For example, the Fifth Circuit recently found a procedural due-process claim was ripe despite sharing common facts with a possible takings claim in *Bowlby v. City of Aberdeen*, 681 F.3d 215 (5th Cir. 2012). The *Bowlby* plaintiff alleged that the City of Aberdeen had taken away her business permit without due process. 681 F.3d at 218-19. To be sure, the plaintiff could have had a takings claim for the value of her lost business, but the Fifth Circuit found that she could *also* receive an award for the due-process violation that "could be very different, and potentially much smaller, than the value of her entire business." *Id.* at 225; *see also id.* ("Indeed, she may receive merely nominal damages, if a court finds that the only injury stated is the lack of process itself."). The fact that the plaintiff might have been able to recover on a Takings Clause theory was irrelevant because the amount of compensation (if any) due for the taking of the permit would "not assist a court in determining what process the City should have

provided her prior to taking away her business permits." *Id.* at 226.

Under the Second Circuit's rule in this case *Bowlby* would have come out differently: The claim there shared a "nucleus of facts" with a Takings Clause claim, and it would be governed by the categorical rule announced below. *See* App. at 16, 18. And this case would have come out differently under *Bowlby*: As in *Bowlby*, the plaintiffs here have alleged and may be able to prove damages that flow from the lack of due process – damages independent from the damage of the physical invasion itself – or they may be entitled to nominal damages, or to declaratory or injunctive relief. Under the Fifth Circuit's rule, that presents a ripe claim. *See Bowlby*, 681 F.3d at 223 (agreeing that "the *Williamson County* final-decision requirement makes more sense when the taking alleged is a regulatory taking"); *see also id.* at 226 ("The provision of adequate due process not only helps to prevent unwarranted deprivations, but also 'serve[s] the purpose of making an individual feel that the government has dealt with [her] fairly.'" (quoting *Williamson Cnty.*, 473 U.S. at 195 n.14)).

Similarly, this case would have come out differently in the Third, Eighth, or Eleventh Circuits, all of which apply only the finality prong of *Williamson County* to claims like these. The parties here all agree that "the local authority has rendered its final decision with respect to the application of the regulation," which is all that is necessary to state a ripe due-process claim in those Circuits. *Strickland*, 74 F.3d at 265.

In short, the Circuits are split over whether *Williamson County* imposes special exhaustion requirements on procedural due-process claims that share a nexus of facts with a possible takings claim. They have been split for well over a decade, and they continue to hand down conflicting cases today. This Court should resolve this longstanding disagreement.

2. A decision in this case also has the potential to resolve circuit splits over how *Williamson County* applies to claims other than procedural due process. Because this Court has never offered any guidance in this area, the Circuits have frequently questioned when *Williamson County* applies to claims under the First Amendment or Equal Protection or Due Process Clauses. And the Circuits have reached various answers to these questions – answers that run the gamut from "always" to "never," with many permutations in between. A decision here will certainly resolve the split as to procedural due-process claims, but it has the potential to resolve the split as to other claims as well – and it will, at a minimum, provide the courts of appeals with much-needed guidance.

In the chart on the following page, Petitioners summarize the current state of the law in the courts of appeals on the basic question of which claims can be brought without triggering *Williamson County*'s requirements and which cannot:[3]

[3] Of course, this chart understates the level of disagreement in the courts of appeals. As discussed above at 10-12, there is a
(Continued on following page)

Can A Plaintiff Bring A Due Process, Equal Protection, Or First Amendment Claim That Shares Facts With A Takings Claim Without Satisfying *Williamson County*'s Special Ripeness Rules?

Circuit	Due Process	Equal Protection	First Amendment
1st Circuit	Unclear.[4]	Unclear.[5]	Sometimes.[6]
2nd Circuit	No.[7]	No.[8]	Sometimes.[9]
3rd Circuit	No.[10]	No.[11]	Yes.[12]
4th Circuit	Yes.[13]	Yes.[14]	Yes.[15]
5th Circuit	Yes.[16]	Yes.[17]	Unclear.[18]
6th Circuit	Yes.[19]	No.[20]	No.[21]
7th Circuit	No.[22]	Sometimes.[23]	Unclear.[24]
8th Circuit	No.[25]	No.[26]	Unclear.[27]
9th Circuit	Sometimes.[28]	Sometimes.[29]	Unclear.[30]
10th Circuit	No.[31]	No.[32]	Yes.[33]
11th Circuit	No.[34]	Sometimes.[35]	Yes.[36]
D.C. Circuit	Yes.[37]	Yes.[38]	Unclear.[39]

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further split among courts that apply *Williamson County* to due-process claims over whether to apply both the finality and exhaustion requirements or to apply only the finality requirement.

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[4] *Compare Castro-Rivera v. Fagundo*, 129 F. App'x 632, 632-33 (1st Cir. 2005) (per curiam) (dismissing a Takings Clause claim under *Williamson County* but dismissing a related procedural due-process claim for failure to state a claim) *with Downing/Salt Pond Partners, L.P. v. Rhode Island*, 643 F.3d 16, 28 (1st Cir. 2011) (declining to address – due to waiver by the appellant – whether *Williamson County* applies to claims under the Due Process or Equal Protection Clauses).

[5] *See supra* note 4; *but see Downing/Salt Pond Partners, L.P. v. Rhode Island*, 698 F. Supp. 2d 278, 289-90 (D.R.I. 2010) (relying on *Patel v. City of Chicago*, 383 F.3d 569, 573 (7th Cir. 2004) to apply *Williamson County* to Equal Protection Clause claim), *aff'd,* 643 F.3d 16 (1st Cir. 2011).

[6] *See Roman Catholic Bishop of Springfield v. City of Springfield*, 724 F.3d 78, 91-92 & n.12 (1st Cir. 2013) (concluding that "at least sometimes" First Amendment challenges to land-use regulations need not satisfy *Williamson County*).

[7] *See* App. at 18.

[8] *Kittay v. Giuliani*, 252 F.3d 645, 646-47 (2d Cir. 2001) (per curiam).

[9] *Compare Dougherty v. Town of N. Hempstead Bd. of Zoning Appeals*, 282 F.3d 83, 89-91 (2d Cir. 2002) (holding First Amendment retaliation claim justiciable without applying *Williamson County*) *with Murphy v. New Milford Zoning Comm'n*, 402 F.3d 342, 350-52 (2d Cir. 2005) (holding First Amendment and RLUIPA claims nonjusticiable under *Williamson County*).

[10] *Taylor Inv., Ltd. v. Upper Darby Twp.*, 983 F.2d 1285, 1294 (3d Cir. 1993).

[11] *Acierno v. Mitchell*, 6 F.3d 970, 974-75 (3d Cir. 1993).

[12] *Peachlum v. City of York*, 333 F.3d 429, 436-37 (3d Cir. 2003); *but see Congregation Anshei Roosevelt v. Planning & Zoning Bd.*, 338 F. App'x 214, 214-9 (3d Cir. 2009) (dismissing RLUIPA claim under *Williamson County*).

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[13] *Front Royal & Warren Cnty. Indus. Park Corp. v. Town of Front Royal*, 135 F.3d 275, 283 n.3 (noting that *Williamson County*'s concerns about exhaustion are "[a]bsent" with respect to "Fourteenth Amendment due process and equal protection claims").

[14] *Id.*

[15] *Naegle Outdoor Adver., Inc. v. City of Durham*, 844 F.2d 172, 173-74 (4th Cir. 1988) (analyzing First Amendment claim separately from Takings Clause claim without reference to *Williamson County*).

[16] *John Corp. v. City of Houston*, 214 F.3d 573, 584-85 (5th Cir. 2000); *see also Bowlby v. City of Aberdeen*, 681 F.3d 215, 223-26 (5th Cir. 2012).

[17] *John Corp.*, 214 F.3d at 584.

[18] *See Opulent Life Church v. City of Holly Springs*, 697 F.3d 279, 286-87 & n.7 (5th Cir. 2012) (expressly declining to decide whether *Williamson County* applies to First Amendment challenges to land use decisions).

[19] *Grace Cmty. Church v. Lenox Twp.*, 544 F.3d 609, 618 (6th Cir. 2008) ("[A] procedural due process claim is 'the only type of case in which we have not imposed the finality requirement on constitutional claims arising out of land use disputes.'" (quoting *Insomnia, Inc. v. City of Memphis*, 278 F. App'x 609, 613 (6th Cir. 2008))).

[20] *Id.*

[21] *Id.*

[22] *River Park, Inc. v. City of Highland Park*, 23 F.3d 164, 167 (7th Cir. 1994).

[23] *Compare Unity Ventures v. Cnty. of Lake*, 841 F.2d 770, 774-75 (7th Cir. 1988) (adopting the view that *Williamson County* "applies as well to equal protection and due process claims" in the context of a land-use decision) *with Forseth v. Vill. of Sussex*, 199 F.3d 363, 371 (7th Cir. 2000) (holding that equal protection claims in the land-use context need not satisfy *Williamson County* if and only if the plaintiff alleges "malicious conduct of a government agent" or "circumstances . . . that

(Continued on following page)

sufficiently suggest that the plaintiff has not raised just a single takings claim with different disguises" (citation omitted)).

[24] Petitioners can find no on-point Seventh Circuit case discussing the application of *Williamson County* to First Amendment claims. *But cf. Forseth*, 199 F.3d at 370 (noting that the Circuit "has read *Williamson* broadly").

[25] *McKenzie v. City of White Hall*, 112 F.3d 313, 316-18 (8th Cir. 1997) (applying the first prong of *Williamson County* to both due-process and equal-protection claims).

[26] *Id.*

[27] Petitioners can find no on-point Eighth Circuit case discussing the application of *Williamson County* to First Amendment claims. *But see Edwards v. City of Jonesboro*, No. 3:09CV00168, 2010 U.S. Dist. LEXIS 54426, at *28 n.12, 2010 WL 2228444, at * 8 n.12 (E.D. Ark. Apr. 14, 2010) (noting in passing, without citation to Eighth Circuit precedent, that *Williamson County* does not apply to "First Amendment or equal protection challenges to municipal land-use regulations" (citations omitted)).

[28] The general rule in the Ninth Circuit is that *Williamson County*'s finality requirement (but not its requirement of exhausting state-court remedies for compensation) applies to both procedural due-process and equal-protection claims that are related to a Takings Clause claim. *See, e.g.*, *Hoehne v. Cnty. of San Benito*, 870 F.2d 529, 532 (9th Cir. 1989). More recent cases, however, have suggested that there are "certain limited and appropriate circumstances" where these claims might be ripe even where a related Takings Clause claim is not. *See Carpinteria Valley Farms, Ltd. v. Cnty. of Santa Barbara*, 344 F.3d 822, 831 (9th Cir. 2003).

[29] *See* discussion *supra* note 28.

[30] *Guatay Christian F'ship v. Cnty. of San Diego*, 670 F.3d 957, 987 (9th Cir. 2011) (declining to reach the "open question" of whether *Williamson County* applies to First Amendment claims).

[31] *Bateman v. City of W. Bountiful*, 89 F.3d 704, 709 (10th Cir. 1996) ("the ripeness requirement of *Williamson County* applies to due process and equal protection claims that rest

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upon the same facts as a concomitant takings claim"); *but see Schanzenbach v. Town of La Barge*, 706 F.3d 1277, 1283 (10th Cir. 2013) (allowing procedural due-process challenge that is "factual and conceptually distinct from [the related] takings claim").

[32] *Bateman*, 89 F.3d at 709.

[33] *See generally Nat'l Adver. Co. v. City & Cnty. of Denver*, 912 F.2d 405, 413-14 (10th Cir. 1990) (dismissing Takings Clause claim under *Williamson County* but deciding related First Amendment claim on the merits).

[34] *See Strickland v. Alderman*, 74 F.3d 260, 265 (11th Cir. 1996) ("As applied due process and equal protection claims are ripe for adjudication when the local authority has rendered its final decision with respect to the application of the regulation.").

[35] The Eleventh Circuit generally applies *Williamson County*'s finality doctrine to as-applied equal-protection claims, but makes an exception for claims of discriminatory animus. *Compare Strickland*, 74 F.3d at 265 (stating general rule) *with Temple B'Nai Zion, Inc. v. City of Sunny Isles Beach*, 727 F.3d 1349, 1357 (11th Cir. 2013) (refusing to apply *Williamson County* to animus claim).

[36] *See Temple B'Nai Zion*, 727 F.3d at 1357 (declining to apply *Williamson County* to First Amendment free-exercise claim and citing with approval *Dougherty v. Town of North Hempstead Board of Zoning Appeals*, 282 F.3d 83, 90 (2d Cir. 2002) (declining to apply *Williamson County* to First Amendment retaliation claim)).

[37] *Tri Cnty. Indus., Inc. v. District of Columbia*, 104 F.3d 455, 462 (D.C. Cir. 1997).

[38] *Rumber v. District of Columbia*, 487 F.3d 941, 944-45 (D.C. Cir. 2007).

[39] Petitioners can find no case from the D.C. Circuit addressing *Williamson County* in the context of First Amendment claims.

3. This deep confusion among the Circuits exists for a reason: This Court has never articulated when (if ever) *Williamson County* should be applied to non-Takings Clause claims. Because the result of this Court's silence has been continued confusion and conflict among lower courts, this Court should take this opportunity to settle the matter.

In part, the confusion in the courts of appeals can be traced to the tension between the original ruling in *Williamson County* and this Court's general approach to constitutional claims under 42 U.S.C. § 1983. Outside the context of the Takings Clause, this Court has repeatedly articulated two basic principles in this area:

First, the Court has "stated categorically that exhaustion is not a prerequisite to an action under § 1983." *Patsy v. Bd. of Regents of State of Fla.*, 457 U.S. 496, 500-01 (1982). In other words, it has "uniformly held that individuals seeking relief under 42 U.S.C. § 1983 need not present their federal constitutional claims in state court before coming to a federal forum." *Zablocki v. Redhail*, 434 U.S. 374, 379 n.5 (1978) (citation omitted); *see also Lynch v. Household Fin. Corp.*, 405 U.S. 538, 543 (1972) ("The Congress that enacted the predecessor of [Section] 1983 * * * intended to provide a federal judicial forum for the redress of wrongful deprivations of property by persons acting under color of state law.").

Second, the Court has repeatedly acknowledged that a single factual scenario can give rise to more

than one constitutional claim. *See, e.g., United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 50 (1993) (noting that where "the seizure of property implicates two 'explicit textual source[s] of constitutional protection' * * * * [t]he proper question is not which Amendment controls but whether either Amendment is violated" (quoting *Soldal v. Cook Cnty.*, 506 U.S. 56, 70 (1992)); *see also Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 543 (2005) (distinguishing between Takings Clause claims and claims that, for example, government action is "so arbitrary as to violate due process").

Lower courts, then, are left with a choice. They can follow the general rules applicable to § 1983 claims, or they can follow those Circuits that have expanded the logic of *Williamson County* to cover all constitutional claims that share facts with a possible Takings Clause claim. Some have taken the first path, others the second. This Court should take this opportunity to point them in the right direction.

B. This Case Presents An Opportunity To Consider Whether Federal Courts Must Impose Special Exhaustion Requirements On Concededly "Final" Takings Claims.

In the 30 years since this Court first decided *Williamson County*, several Members of this Court have suggested the need to revisit that case's *dictum* requiring plaintiffs to exhaust their state-court remedies for compensation before bringing their

claims in federal court. This Court, however, has never had an opportunity to squarely address the question; it has signaled that the doctrine is limited in certain ways, but it has never been presented with a direct opportunity to address or limit the exhaustion requirement.

As a result of this Court's silence, lower courts are split over the continued viability and scope of that requirement. Some courts, like the First and Seventh Circuits, treat exhaustion as a mandatory requirement. Other courts, like the Fourth and Ninth Circuits, treat it as a purely prudential doctrine, one from which they can depart at their discretion. Nor do the Circuits agree about what is covered by the doctrine: The Sixth Circuit, for example, continues to apply the doctrine to regulatory takings but refuses to apply it to physical invasions like the ones in this case; the Second Circuit, as demonstrated below, disagrees.

This case presents an opportunity to revisit the exhaustion prong of *Williamson County* and resolve these disagreements. As it has done with other doctrines that limit the federal courts' ability to exercise their jurisdiction, this Court should take this opportunity to review – and, if necessary, curtail – the uneven expansion of *Williamson County*'s exhaustion requirement in the lower courts.

1. There is a stark difference between this Court's treatment of the *Williamson County* doctrine, which has been both ambivalent and strictly confined

to the regulatory-takings context, and the broad treatment the doctrine has received in many of the Circuits. Indeed, Members of this Court have repeatedly questioned the wisdom of *Williamson County*'s special exhaustion doctrine. In *San Remo Hotel, L.P. v. City and County of San Francisco*, Chief Justice Rehnquist explicitly advocated rethinking the second prong of *Williamson County*, noting that the decision's "state-litigation rule has created some real anomalies, justifying our revisiting the issue." 545 U.S. 323, 351 (2005) (Rehnquist, C.J., joined by O'Connor, Kennedy, and Thomas, JJ., concurring in the judgment). And in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, Justice Kennedy echoed these concerns, correctly noting that the exhaustion prong of *Williamson County* was *dicta* and suggesting that adherence to this rule "explains why federal courts have not been able to provide much analysis on the issue of judicial takings." 560 U.S. 702, 742 (2010) (Kennedy, J., joined by Sotomayor, J., concurring in part and concurring in the judgment).[40]

[40] These criticisms have been echoed and expanded upon in the academic literature. *See, e.g.,* Michael M. Berger & Gideon Kanner, *Shell Game! You Can't Get There from Here: Supreme Court Ripeness Jurisprudence in Takings Cases at Long Last Reaches the Self-Parody Stage*, 36 URB. LAW. 671 (2004); J. David Breemer, *The Rebirth of Federal Takings Review? The Courts' "Prudential" Answer to* Williamson County*'s Flawed State Litigation Ripeness Requirement*, 30 TOURO L. REV. 319 (2014); John J. Delaney & Duane J. Desiderio, *Who Will Clean*

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These calls to reconsider the issue come in the context of the Court's own slow retreat from the doctrine. In many ways, the high-water mark of the *Williamson County* doctrine in this Court was *Williamson County* itself. Since then, the Court's treatment of the doctrine has largely consisted of rejecting lower-court attempts to expand it beyond the four corners of the opinion itself. For example, *Williamson County* identified the two prerequisites to a "ripe" regulatory-takings claim – finality and exhaustion of state-court remedies for compensation – but made no mention of whether these considerations were prudential or jurisdictional. *See* 473 U.S. at 186. Despite the opinion's silence on this point, lower courts quickly latched onto the doctrine as a jurisdictional requirement. *See, e.g., Samaad v. City of Dallas*, 940 F.2d 925, 934 (5th Cir. 1991) (holding that *Williamson County* presents an unwaivable jurisdictional bar); *Austin v. City & Cnty. of Honolulu*, 840 F.2d 678, 682 (9th Cir. 1988) ("*Williamson County* affects [courts'] jurisdiction to hear takings claims."). And this Court pulled them back: In *Lucas v. South Carolina Coastal Council*, this Court clarified that the finality prong of *Williamson County* was merely a "prudential" doctrine. 505 U.S. 1003, 1011-13 (1992). The second prong of the test was similarly clarified a few years later. *See Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 733-34 (1997) (referring to *Williamson*

Up the "Ripeness Mess"? A Call for Reform so Takings Plaintiffs Can Enter the Federal Courthouse, 31 URB. LAW. 195 (1999).

County's "two independent prudential hurdles to a regulatory takings claim brought against a state entity in federal court"). As discussed *infra*, these admonishments have not always been heeded by the courts of appeals, but this Court has consistently stressed the prudential nature of *Williamson County*.

Moreover, it is worth noting that this "prudential" doctrine has never once stopped this Court from considering the constitutional merits of an actual final taking. In *Stop the Beach Renourishment, Inc.*, the Court simply brushed aside the Respondent's arguments about exhaustion, noting that exhaustion is nonjurisdictional and had therefore been waived. 560 U.S. at 729. And just last Term, in *Horne v. United States Department of Agriculture*, this Court unanimously re-affirmed its ordinary ripeness doctrine in the context of a Takings Clause claim, stating that: "A 'Case' or 'Controversy' exists once the government has taken private property without paying for it. Accordingly, whether an alternative remedy exists does not affect the jurisdiction of the federal court." 133 S. Ct. 2053, 2062 n.6 (2013). Academic commentators have already noted that *Horne* directly undermines the logic of *Williamson County*. *See, e.g.,* R.S. Radford & Jennifer F. Thompson, *The Accidental Abstention Doctrine: After Nearly 30 Years, the Case for Diverting Federal Takings Claims to State Court Under* Williamson County *Has Yet to Be Made*, 60 (Program for Judicial Awareness Working Paper Series No. 13-508, 2014), *available at* http://ssrn.com/abstract=2492595 (citing Michael W. McConnell,

Horne *and the Normalization of Takings Litigation: A Response to Professor Echeverria*, 43 ENVTL. L. REP. NEWS & ANALYSIS 10749, 10751 (2013)).

While the Court has steadily emphasized the prudential nature of *Williamson County* and while individual Justices have directly questioned the doctrine's wisdom, this Court has not had an opportunity to directly re-visit *Williamson County* itself, nor to consider its application to the kind of physical takings at issue in this case.

2. Perhaps as a result of the combination of some Justices' stated desire to revisit the doctrine and this Court's lack of an opportunity to directly address it, lower courts have taken conflicting approaches to *Williamson County* exhaustion – both in terms of whether the requirement binds them and in terms of what the requirement even covers.

Indeed, the Circuits do not even agree about whether the exhaustion requirement continues to be mandatory. Some Circuits, for example, take seriously the idea that the doctrine is a prudential one that can be set aside in their discretion. *See, e.g.*, *Sansotta v. Town of Nags Head*, 724 F.3d 533, 545 (4th Cir. 2013) ("Because *Williamson County* is a prudential rather than a jurisdictional rule, we may determine that in some instances, the rule should not apply and we still have the power to decide the case."); *Guggenheim v. City of Goleta*, 638 F.3d 1111, 1118 (9th Cir. 2010) (en banc) ("In this case, we * * * exercise our discretion not to impose the prudential requirement

of exhaustion in state court."). Other courts disagree and hold that the exhaustion requirements are still mandatory. *See Peters v. Vill. of Clifton*, 498 F.3d 727, 734 (7th Cir. 2007) ("The prudential character of the Williamson County requirements do not, however, give the lower federal courts license to disregard them."); *accord Downing/Salt Pond Partners, L.P. v. Rhode Island*, 643 F.3d 16, 24-25 (1st Cir. 2011) (holding that lower courts lack the discretion to narrow the *Williamson County* test).

Nor can the Circuits agree on what kinds of takings are covered by the doctrine. Some Circuits, taking note of the fact that this Court has never applied the exhaustion requirement to physical takings, decline to do so themselves. *See Kruse v. Vill. of Chagrin Falls*, 74 F.3d 694, 701 (6th Cir. 1996). Others, like the court of appeals below, expressly disagree. *See* App. at 12 n.1 (disagreeing with this passage of *Kruse* and dismissing it as *dicta*).

In short, at least with respect to physical takings, all that remains of *Williamson County*'s exhaustion requirement is this: a sometimes discretionary doctrine that allows some courts to refrain from deciding otherwise ripe claims – an option that some courts choose to exercise and some courts choose not to. In order to provide certainty and uniformity of decision throughout the country, this Court should take this opportunity to clarify when and whether abstention from takings claims continues to be appropriate.

3. This split among the Circuits should also be resolved because the unchecked expansion of *Williamson County* by some lower courts is in tension with this Court's treatment of similar doctrines limiting federal-court jurisdiction. In recent years, this Court has repeatedly reversed lower courts when they have expanded jurisdiction-limiting doctrines beyond what has been expressly authorized by this Court's decisions. Because this Court has not had an opportunity to do the same with respect to *Williamson County*, that doctrine – virtually alone among this Court's abstention doctrines – continues to grow unchecked among the courts of appeals.

For example, this Court's treatment of *Younger* abstention is instructive. The *Younger* doctrine, as initially articulated, requires federal-court abstention where there is a pending parallel state criminal proceeding. *See generally Younger v. Harris*, 401 U.S. 37 (1971). This Court subsequently extended that doctrine to include certain civil proceedings that are sufficiently like criminal proceedings in *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975), and then, in *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987), to certain proceedings that implicate a State's interest in enforcing the judgments of its courts. *See New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 367-68 (1989) ("*NOPSI*") (cataloguing the development of the *Younger* doctrine). But there is where it stops: This Court has subsequently made clear that *Younger* abstention applies in those three "exceptional" circumstances, and those three *alone*.

See Sprint Commc'ns, Inc. v. Jacobs, 134 S. Ct. 584, 588 (2011) ("Because this case presents none of the circumstances this Court has ranked as 'exceptional,' the general rule governs* * * * ").

Other abstention doctrines have received similarly careful scrutiny. In *NOPSI*, for example, this Court reaffirmed the general principle that "federal courts lack the authority to abstain from the exercise of jurisdiction that has been conferred" and that the federal courts' authority to refrain from granting certain kinds of relief (the so-called "abstention" doctrines) must be confined to "carefully defined" areas. 491 U.S. at 358-59.

But perhaps the closest analogy to *Williamson County* can be found in the fate of the *Rooker-Feldman* doctrine. Just as with *Williamson County*, that doctrine arose in a very specific factual context (with *Rooker-Feldman*, state-court losers challenging state-court judgments in federal court; with *Williamson County*, plaintiffs bringing regulatory-takings claims where the finality of the taking was uncertain) and was expanded well beyond its initial scope by lower courts. *See Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 283 (2005) ("Variously interpreted in the lower courts, the doctrine has sometimes been construed to extend far beyond the contours of the *Rooker* and *Feldman* cases, overriding Congress' conferral of federal-court jurisdiction concurrent with jurisdiction exercised by state courts, and superseding the ordinary application of preclusion law* * * * ").

The primary difference between *Rooker-Feldman* and *Williamson County* is that this Court has had occasion to consider – and curtail – the lower courts' expansion of *Rooker-Feldman*. *See Skinner v. Switzer*, 131 S. Ct. 1289, 1297 (2011) (noting that "the *Rooker-Feldman* doctrine has been applied by this Court only twice, i.e., only in the two cases from which the doctrine takes its name"); *Lance v. Dennis*, 546 U.S. 459, 466 (2006); *Exxon Mobil Corp.*, 544 U.S. at 283. There has been no similar examination of the expansion of *Williamson County*.

Importantly, the near-demise of the *Rooker-Feldman* doctrine does not mean that state-court losers have free rein to re-litigate settled claims in federal court. Instead, it simply means that ordinary principles of preclusion prevent settled claims from getting re-litigated – and that the federal courts do not need an additional doctrine to help them avoid exercising jurisdiction. *See Lance*, 546 U.S. at 466 (drawing a sharp distinction between *Rooker-Feldman* and the ordinary law of preclusion). The same should be true here. Ordinary principles of Article III ripeness will prevent federal courts from deciding cases that are too attenuated or undeveloped. Indeed, that has proven to be precisely the case in the Fifth Circuit, where "ordinary ripeness principles" have replaced *Williamson County* for procedural due-process claims related to a taking without triggering any flood of litigation. *See generally supra* at 10-11. There is no need for an additional legal principle to stand between federal courts and their statutory

jurisdiction. This Court should take this opportunity to say as much.

C. This Case Presents A Clear Vehicle For Resolving These Questions.

This case presents a perfect vehicle for resolving these questions because the threshold question is the only question decided by either the district court or the court of appeals below. While the Respondents moved to dismiss under both Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6), both the district court and the appellate court explicitly confined their holdings to the *Williamson County* questions. *See* App. at 3 (court of appeals); 33 (district court). This Court's analysis can be similarly limited and need not address the merits at all.

Where a lower court has decided not to exercise jurisdiction over a claim, this Court routinely decides the jurisdictional question only, refusing to evaluate the parties' merits arguments in the first instance. In *Skinner v. Switzer*, for example, this Court reversed the court of appeals' determination that it lacked jurisdiction and expressly declined to address the Respondents' alternative arguments about the merits of the case because those arguments had not been decided below. 131 S. Ct. 1289, 1300 (2011). Instead, this Court instructed the parties to litigate those issues on remand, explaining: "Mindful that we are a court of review, not of first view, we confine this opinion to the matter on which we granted certiorari

and express no opinion on the ultimate disposition of Skinner's federal action." *Id.* (internal quotation marks and citation omitted). *Accord Zivotsky v. Clinton*, 132 S. Ct. 1421, 1430-31 (2012) ("In particular, when we reverse on a threshold question, we typically remand for resolution of any claims the lower courts' error prevented them from addressing." (citing *Bond v. United States*, 564 U.S. ___, ___, 131 S. Ct. 2355, 180 L. Ed. 2d 269, 275 (2011)); *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 168 (2004) ("We ordinarily do not decide in the first instance issues not decided below." (quoting *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 109 (2001) (per curiam) (internal quotation marks omitted)).

To be sure, there are other legal issues to be resolved in this case. Perhaps class certification is appropriate; perhaps not. Perhaps the due-process theory articulated by the Complaint is viable; perhaps not. Perhaps the plaintiffs in this case will be entitled to actual damages; perhaps only nominal damages; perhaps none at all. But none of these questions has been examined by a lower court, and none of them has been the subject of any factual development. None, therefore, need to be addressed by this Court.

This case, then, represents a perfect vehicle to address a pressing legal dispute that affects the rights of property owners nationwide. Under the Second Circuit's ruling in this case, property owners' rights are relegated to second-class status: If a New York plaintiff alleges a constitutional violation that

deprives him of property in violation of the Federal Constitution, he is saddled with special exhaustion requirements not applied to any other species of constitutional violation. He could avoid these exhaustion requirements easily, if only (1) he had been fortunate enough to lose some other protected interest, rather than real property, or (2) he had the good luck to live elsewhere in the country where a different rule of law applies. This situation is untenable, and this case presents the Court with a straightforward opportunity to clarify the law in this area.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2013

(Argued: April 11, 2014 Decided: July 16, 2014)

Docket No. 13-3900-cv

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JACK KURTZ, on behalf of himself and all others similarly situated, JOSEPH GRILLO, husband, VIVIAN GRILLO, wife, JEFF MICHAELS, husband, BARBARA MICHAELS, wife, 31-11 30TH AVE LLC, AGRINIOS REALTY INC., K.A.P. REALTY INC., LINDA DAVIS, PETER BLIDY, VASILIOS CHRYSIKOS, 3212 ASTORIA BLVD. REALTY CORP., MNT REALTY LLC, ANTHONY CARDELLA, BRIAN CARDELLA, 46-06 30TH AVENUE REALTY CORP., CATHERINE PICCIONE, CROMWELL ASSOC., LLC,

Plaintiffs-Appellants,

- v -

VERIZON NEW YORK, INC., FKA NEW YORK TELEPHONE COMPANY, VERIZON COMMUNICATIONS INC., IVAN G. SEIDENBERG, LOWELL C. McADAM, RANDALL S. MILCH, JOHN DOES,

Defendants-Appellees.* x

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* The Clerk of Court is respectfully directed to amend the official caption in this case to conform with the caption above.

Before: JACOBS, CALABRESI and LIVINGSTON, *Circuit Judges*.

The Plaintiffs-Appellants, a putative plaintiff class of property owners in New York, appeal from a judgment of the United States District Court for the Eastern District of New York (Irizarry, J.), dismissing their takings and due process claims as unripe under the two-part test in *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City,* 473 U.S. 172 (1985). We conclude that 1) *Williamson County* applies to physical takings claims as it does to regulatory takings, with the recognition that an allegation of a physical taking satisfies the finality requirement; and 2) *Williamson County* applies to procedural due process claims arising from the same circumstances as a takings claim. Affirmed.

DAVID M. WISE, Law Offices of David M. Wise, P.A., Cranford, NJ, *for Plaintiffs-Appellants*.

PATRICK F. PHILBIN (John S. Moran, *on the brief*), Kirkland & Ellis LLP, Washington, DC, *for Defendants-Appellees*.

DENNIS JACOBS, *Circuit Judge*:

New York allows telecommunications companies to exercise the state's eminent domain powers to facilitate the construction and maintenance of telecommunications networks. Property owners are compensated by the company under the procedures outlined in state law. A putative plaintiff class alleges that Verizon installed multi-unit terminal boxes on

their property without just compensation, and cites procedural due process violations in connection with the installation. The United States District Court for the Eastern District of New York (Irizarry, J.) dismissed the complaint because the claims were unripe under the test established by *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City,* 473 U.S. 172 (1985). That case held that a takings claim under the Fifth Amendment is not ripe for federal review until a final decision is reached by local authorities and the owner exhausts state remedies.

On appeal, the plaintiffs argue that *Williamson County* applies only to regulatory takings claims and not to their physical takings claims, and that *Williamson County* is inapplicable to their due process claims. We conclude that *Williamson County* does apply to physical takings, with the recognition that the finality requirement is satisfied by a physical taking. The exhaustion requirement, however, remains. As to the plaintiffs' due process claims, we conclude that *Williamson County* applies to such claims arising from the same circumstances as a takings claim. Because the plaintiffs have failed to exhaust their state remedies through an inverse condemnation proceeding, we affirm the judgment of the district court.

BACKGROUND

Telecommunications networks, particularly in congested urban areas, may require installation of

network equipment on private property. Often, the company secures permission from the owner in the form of a license or easement. If consent cannot be obtained, however, New York law permits the company to employ the state's power of eminent domain. Section 27 of the Transportation Corporations Law provides this authority:

> Any [telephone] corporation may erect, construct and maintain the necessary fixtures for its lines upon, over or under any of the public roads, streets and highways . . . and may erect, construct and maintain its necessary stations, plants, equipment or lines upon, through or over any other land, subject to the right of the owners thereof to full compensation for the same. If any such corporation can not agree with such owner or owners upon the compensation to be paid therefor, such compensation shall be ascertained in the manner provided in the eminent domain procedure law.

N.Y. Transp. Corp. Law § 27.

The plaintiffs allege that Verizon exercised this power of eminent domain to install multi-unit terminal boxes on their properties. These boxes, typically attached to an exterior wall or to a pole in the yard, split the local high-capacity cables into the lines that serve individual phone subscribers in nearby buildings. Thus, these boxes serve the neighborhood as well as the subscribers on the subject property.

The plaintiffs assert that Verizon failed to pay full compensation for placing terminals on their properties. They further assert that Verizon violated their procedural due process rights by: 1) concealing their right to full compensation, or failing to notify them of it; 2) offering them no compensation; 3) giving the false impression that they must consent if they wanted telephone service in their own buildings; and 4) placing the onus on them to initiate an eminent domain proceeding if no agreement was reached.

Two related cases in the New York state courts have bearing on the present matter. Both were filed by plaintiffs' counsel here and both involve the same plaintiffs, or plaintiffs similarly-situated. The first, *Corsello v. Verizon,* was commenced in 2007 on behalf of a putative class represented by William and Evelyn Corsello. They alleged Verizon's use of their property without consent and asserted claims premised on New York statutory and common law (not the Due Process and Takings Clause claims at issue here). After discovery, the Corsellos sought class certification. The New York Supreme Court, Kings County, denied certification on the grounds that individual inquiries into how Verizon acquired permission to install the terminals would predominate and that the Corsellos were not adequate class representatives. *See generally Corsello v. Verizon N.Y. Inc.,* No. 39610/07, 2009 WL 3682595 (N.Y. Sup. Ct. Nov. 5, 2009).

Appeals of that certification decision (and other decisions made by the trial court) eventually reached the New York Court of Appeals, which held (*inter*

alia) that the plaintiffs alleged a valid inverse condemnation claim, but affirmed the denial of class certification. *See Corsello v. Verizon N.Y., Inc.,* 18 N.Y.3d 777, 783-87, 791-92 (2012).

While the *Corsello* appeal was pending, plaintiffs' counsel commenced two other putative class actions: this case in federal court; and (afterward) *Grillo v. Verizon N.Y., Inc.* in New York Supreme Court, Queens County. (The Corsellos, originally named as class plaintiffs in the *Grillo* action, were later dropped.) The *Grillo* complaint acknowledged the filing of this federal case and stated that the plaintiffs wished to hold their claims in abeyance until the federal court's subject matter jurisdiction was determined. *See Grillo* Compl., J.A. at 198-99. The proceedings in *Grillo* have been stayed accordingly.

The plaintiffs commenced this action in December 2010 and filed a Second Amended Complaint in July 2010. (As in *Grillo*, the Corsellos were originally named as class plaintiffs and later dropped.) The complaint alleged several causes of action under 28 U.S.C. § 1983 for wrongful taking of plaintiffs' property without just compensation and for violation of their associated due process rights. The complaint also sought certification for a class consisting of all property owners with Verizon multi-property terminals other than those who have signed an easement or received compensation greater than one dollar.

Verizon moved to dismiss on the grounds that: 1) the district court lacked jurisdiction because the

claims were unripe pursuant to the Supreme Court's decision in *Williamson County*; 2) the plaintiffs lacked standing; 3) the claims were time-barred; 4) the complaint failed to state a cause of action; and 5) the declaratory judgment relief sought by the plaintiffs was an impermissible attempt to obtain an advisory opinion. The district court granted Verizon's motion in September 2013, holding that *Williamson County* barred the plaintiffs' claims. *See generally Corsello v. Verizon N.Y., Inc.,* 976 F. Supp. 2d 354 (S.D.N.Y. 2013). The plaintiffs timely appealed.

DISCUSSION

"We review *de novo* a district court's determination that it lacks subject-matter jurisdiction on ripeness grounds." *Nat'l Org. for Marriage, Inc. v. Walsh,* 714 F.3d 682, 687 (2d Cir. 2013); *see also Connecticut v. Duncan,* 612 F.3d 107, 112 (2d Cir. 2010) ("A district court's ripeness determination is . . . a legal determination subject to *de novo* review.").

I

"To be justiciable, a cause of action must be ripe – it must present a real, substantial controversy, not a mere hypothetical question." *Nat'l Org. for Marriage,* 714 F.3d at 687 (quotation marks omitted). "A claim is not ripe if it depends upon contingent future events that may or may not occur as anticipated, or indeed may not occur at all. The doctrine's major purpose is to prevent the courts, through avoidance of

premature adjudication, from entangling themselves in abstract disagreements." *Id.* (quotation marks and internal citation omitted).

To test the ripeness of a constitutional takings claim in federal court, we consult *Williamson County.* In that case, a "plaintiff owner of a tract of land sued a Tennessee regional planning commission alleging that the commission's application of various zoning laws and regulations to the plaintiff's property amounted to an unconstitutional 'taking' under the Fifth Amendment." *Dougherty v. Town of N. Hempstead Bd. of Zoning Appeals,* 282 F.3d 83, 88 (2d Cir. 2002). *Williamson County* held that the claim was unripe: "a plaintiff alleging a Fifth Amendment taking of a property interest must . . . show that (1) the state regulatory entity has rendered a 'final decision' on the matter, and (2) the plaintiff has sought just compensation by means of an available state procedure." *Id.*

As to finality, "a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations . . . has reached a final decision regarding the application of the regulations to the property at issue." *Williamson County,* 473 U.S. at 186. This requirement is compelled by the Takings Clause because the factors relevant to determining whether a taking has occurred are the economic impact of the state's actions and its interference with investment-backed expectations, and these factors cannot be "evaluated until the

administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question." *Id.* at 191. The finality requirement also helps to develop a full record for review, limits judicial entanglement in constitutional disputes, and gives proper respect to principles of federalism. *See Murphy v. New Milford Zoning Comm'n,* 402 F.3d 342, 348 (2d Cir. 2005). Because the plaintiff in *Williamson County* sought no variance from the zoning provision at issue, there was no "final, definitive position" to review. 473 U.S. at 188-90.

The Fifth Amendment's proscription of a taking without just compensation underlies *Williamson County*'s exhaustion requirement: "the Fifth Amendment [does not] require that just compensation be paid in advance of, or contemporaneously with, the taking; all that is required is that a reasonable, certain and adequate provision for obtaining compensation exist at the time of the taking." *Id.* at 194 (quotation marks omitted). Therefore, "if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." *Id.* at 195. In other terms, "because the Constitution does not require pretaking compensation, and is instead satisfied by a reasonable and adequate provision for obtaining compensation after the taking, the State's action . . . is not 'complete' until the State fails to provide adequate compensation for the taking." *Id.* A plaintiff, however,

may achieve exhaustion by showing that the state's inverse condemnation procedure is unavailable or inadequate. *See id.* at 196. The *Williamson County* plaintiff, having failed to use Tennessee's inverse condemnation action, failed to exhaust. *Id.*

II

Plaintiffs argue that *Williamson County* was a case about regulatory takings, and that it does not govern claims in which, as in theirs, the taking is physical. We disagree. The finality and exhaustion requirements are both derived from elements that must be shown in any takings claim: [i] a "taking" [ii] "without just compensation." *See id.* at 190-91,194-95. So *Williamson County* applies to *all* takings claims. *See Island Park, LLC v. CSX Transp.,* 559 F.3d 96, 108 (2d Cir. 2009) ("Before a federal takings claim can be asserted, compensation must first be sought from the state if it has a reasonable, certain and adequate provision for obtaining compensation." (quotation marks omitted)). "*Williamson* [*County*] drew no distinction between physical and regulatory takings, and the rationale of that case, that 'a property owner has not suffered a violation of the Just Compensation Clause until the owner has unsuccessfully attempted to obtain just compensation through the procedures provided by the State,' demonstrates that any such distinction would be unjustified." *Villager Pond, Inc. v. Town of Darien,* 56 F.3d 375, 380 (2d Cir. 1995) (internal citation omitted) (quoting *Williamson Cnty.,* 473 U.S. at 195).

While *Williamson County* applies to regulatory and physical takings alike, a physical taking in itself satisfies the need to show finality. "[A]n alleged physical taking is by definition a final decision for the purpose of satisfying Williamson [County's] first requirement." *Juliano v. Montgomery-Otsego-Schoharie Solid Waste Mgmt. Auth.,* 983 F. Supp. 319, 323 (N.D.N.Y. 1997); *see also Hall v. City of Santa Barbara,* 833 F.2d 1270, 1281 n.28 (9th Cir. 1986) ("Where there has been a physical invasion, the taking occurs at once, and nothing the city can do or say after that point will change that fact.").

The plaintiffs further argue that a physical taking also satisfies the test of exhaustion, and thereby obviates *Williamson County* altogether, because it is unconstitutional to require them to initiate a suit for compensation after a taking occurs. The cases cited by the plaintiffs do not support this argument. For example, the venerable *Bloodgood v. Mohawk & Hudson R.R. Co.,* 18 Wend. 9 (N.Y. 1837) was a gloss on New York law, and its holding (that compensation must be paid prior to a taking) rested on a state statute. *Id.* at 19. The federal principle is prescribed in *Williamson County*: "Nor does the Fifth Amendment require that just compensation be paid in advance of, or contemporaneously with, the taking; all that is required is that a reasonable, certain and adequate provision for obtaining compensation exist at the time of the taking." 473 U.S. at 194.

The cases relied on by plaintiffs are inapposite. *See Kruse v. Vill. of Chagrin Falls, Ohio,* 74 F.3d 694

(6th Cir. 1996); *Juliano,* 983 F. Supp. at 323-24. In each case, a physical takings claim was held to be ripe. But neither case is incompatible with the analysis in this opinion: the physical taking satisfies the finality requirement; and the exhaustion requirement is satisfied by the unavailability of an adequate procedure for post-taking compensation. *See Kruse,* 74 F.3d at 698-700 (holding that Ohio's inverse condemnation remedy is uncertain, confusing, and lacks statutory authority); *Juliano,* 983 F. Supp. at 323 (no evidence in the record of an adequate provision for obtaining compensation in the state). In both cases, ripeness under *Williamson County* was achieved.[1] *See Juliano,* 983 F. Supp. at 323 ("Here, under the physical occupation theory of takings liability Plaintiffs have met *both prongs* of the ripeness test." (emphasis added)).

The plaintiffs' takings claim here is unripe. Although the pleading of a physical taking sufficiently

[1] The Sixth Circuit's opinion in *Kruse* does suggest that *Williamson County* exhaustion need not be shown when there has been a physical taking. *See* 74 F.3d at 701. This passage of the opinion, however, is dicta said to be in "further support" for a conclusion already reached: that the plaintiffs were not required to pursue a state-level inverse condemnation proceeding. *Id.* In any event, such a dispensation contradicts *Williamson County,* which ties the exhaustion requirement directly to the wording of the Fifth Amendment. *See* 473 U.S. at 195 ("[I]f a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation.").

shows finality, plaintiffs flunk the exhaustion requirement by their failure to seek compensation at the state level. "It is well-settled that New York State has a reasonable, certain and adequate provision for obtaining compensation." *Country View Estates @ Ridge LLC v. Town of Brookhaven,* 452 F. Supp. 2d 142, 157 (E.D.N.Y. 2006) (quotation marks omitted); *see also Island Park,* 559 F.3d at 110 (holding claim was not ripe because plaintiffs failed to pursue an inverse condemnation proceeding under New York's Eminent Domain Procedure Law). The plaintiffs have pending an action in the New York courts to seek compensation (the *Grillo* action). Until such litigation has run its course, the plaintiffs have no ripe takings claim for adjudication in the federal courts.

III

Williamson County's applicability to the plaintiffs' due process claims is less clear. After *Williamson County,* courts have attempted to settle questions of ripeness in the several contexts of due process claims: substantive or procedural; substantive claims alleging regulatory overreach or those alleging arbitrary and capricious conduct; claims arising from the same nucleus of fact as a takings claim, or not; and regulatory or physical takings. Myriad permutations can result. The plaintiffs' due process claims present one such permutation that is not considered in precedent. Though the precedents we have are distinguishable, they are instructive nevertheless.

We start with *Williamson County* itself. The plaintiff there pursued a substantive due process claim of regulatory overreach arising from the same set of facts as the takings claim: when a "regulation . . . goes so far that it has the same effect as a taking by eminent domain [such that it] is an invalid exercise of the police power." 473 U.S. at 197. Instead of "just compensation," the remedy for such a claim would be invalidation of the regulation and, possibly, damages. *Id.* Without deciding whether such a claim is cognizable, the Court ruled that it was unripe because the effect "[could not] be measured until a final decision is made as to how the regulations will be applied to [the plaintiff's] property." *Id.* at 200. It is thus (at least) implied that finality is a prerequisite to this type of due process claim. The Court did not reach any issue of exhaustion.

Since *Williamson County,* this Court has considered its applicability to due process claims on only a few occasions. Substantive due process claims have been treated differently based on the nature of the claim. Claims alleging regulatory overreach, such as the one considered in *Williamson County,* must satisfy the finality and exhaustion requirements to be ripe. *See Southview Assocs., Ltd. v. Bongartz,* 980 F.2d 84, 96 (2d Cir. 1992) ("If the state provides an acceptable procedure for obtaining compensation, the state's regulatory action will generally not exceed its police powers."). Substantive due process claims of arbitrary and capricious conduct, however, require only a showing of finality – there is no exhaustion

requirement. *See id.* at 97; *see also Villager Pond,* 56 F.3d at 381.[2] We have also suggested that *Williamson County* (the finality requirement at least) applies broadly in the context of land use challenges. *See Dougherty,* 282 F.3d at 88 (stating *Williamson County* "has been extended to equal protection and due process claims asserted in the context of land use challenges"); *Murphy,* 402 F.3d at 349-50 (observing that *Williamson County* has not been "strictly confined" to a regulatory takings challenge and "[f]ollowing the view of . . . other circuits, we have applied prong-one [finality] ripeness to land use disputes implicating more than just Fifth Amendment takings claims").

The plaintiffs' due process claims fall within a gap in our precedents: procedural due process claims arising from a physical taking.[3] The plaintiffs argue

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[2] *Williamson County* generally controls for substantive due process claims based on the same nucleus of facts as a takings claim, on the principle that courts should not use a generalized notion of substantive due process when the Constitution provides an explicit source of protection against the conduct alleged. *See Graham v. Connor,* 490 U.S. 386, 395 (1989) ("Because the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims.").

[3] The plaintiffs also argue *Williamson County* does not apply to their substantive due process claim of arbitrary and capricious conduct, citing *Villager Pond* and *Southview Associates.* However, the plaintiffs' complaint and arguments in the district court refer only to procedural due process violations. This argument is, therefore, waived.

that this Court has "repeatedly not applied [*Williamson County*] [r]ipeness to procedural due process claims involving denial of appropriate notice and hearing in takings-type contexts." Appellant Br. at 49. The cases cited by the plaintiffs, however, fail to support their argument that *Williamson County* is inapplicable. In *Ford Motor Credit Co. v. N.Y.C. Police Dep't,* 503 F.3d 186 (2d Cir. 2007), the Court addressed due process in a criminal forfeiture proceeding. Although the district court dismissed a taking claim for lack of ripeness, that issue was not presented on appeal and, accordingly, was unremarked upon in our opinion. Similarly, the other cases cited by the plaintiffs allowed due process claims with little connection to a taking claim and did so, again, without mention of *Williamson County. See Brody v. Vill. of Port Chester,* 434 F.3d 121, 127 (2d Cir. 2005) (addressing whether the public use and just compensation limitations trigger procedural due process rights for a condemnee); *Kraebel v. N.Y.C. Dep't of Housing Preservation & Dev.,* 959 F.2d 395 (2d Cir. 1992) (remanding to determine if there was a property interest in a payment from the city after determining that a delay in entitlement payments cannot constitute a taking).

We are persuaded by those courts holding that *Williamson County* applies to due process claims arising from the same nucleus of facts as a takings claim. *See, e.g., B. Willis, C.P.A., Inc. v. BNSF Ry. Corp.,* 531 F.3d 1282, 1299 n.19 (10th Cir. 2008) ("This court has acknowledged the possibility that, under certain circumstances, due process rights may

arise which are beyond the more particularized claim asserted pursuant to the Just Compensation Clause. . . . Nevertheless, this court has held that, where the property interest in which a plaintiff asserts a right to procedural due process is coextensive with the asserted takings claim, *Williamson County*'s ripeness principle still applies." (quotation marks omitted)); *Greenfield Mills, Inc. v. Macklin,* 361 F.3d 934, 961 (7th Cir. 2004) ("[O]ur case law explains that the *Williamson County* exhaustion requirement applies with full force to due process claims (both procedural and substantive) when based on the same facts as a takings claim."); *Goldfine v. Kelly,* 80 F. Supp. 2d 153, 158 (S.D.N.Y. 2000) (Conner, J.) ("Although in *Williamson* [*County*] the ripeness test was applied to a takings claim only, the same ripeness test applies to due process and equal protection claims."). Such a rule finds support in *Williamson County* itself: if the only process guaranteed to one whose property is taken is a post-deprivation remedy, a federal court cannot determine whether the state's process is constitutionally deficient until the owner has pursued the available state remedy. *See* 473 U.S. at 194.

Applying *Williamson County* more broadly to these due process claims confers other benefits. It prevents evasion of the ripeness test by artful pleading of a takings claim as a due process claim. *See Bateman v. City of West Bountiful,* 89 F.3d 704, 709 (10th Cir. 1996) ("The Tenth Circuit repeatedly has held that the ripeness requirement of *Williamson*

[*County*] applies to due process and equal protection claims that rest upon the same facts as a concomitant takings claim. . . . A contrary holding would render the Supreme Court's decision in *Williamson* [*County*] nugatory, as it would enable a resourceful litigant to circumvent the ripeness requirements simply by alleging a more generalized due process or equal protection violation."). Applying *Williamson County* generally to these types of due process claims also provides a clear rule that avoids messy distinctions based on how a due process claim is pled.

We conclude that the *Williamson County* ripeness requirement (finality and exhaustion) applies to all procedural due process claims arising from the same circumstances as a taking claim.[4] Since we have concluded that New York's inverse condemnation procedures are adequate on their face, no claim would arise until the plaintiffs, having availed themselves of those procedures, show them to be wanting in practice. The procedural due process claims in this case, which are based on the circumstances surrounding the takings claim, are therefore premature. Because the plaintiffs did not exhaust available state

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[4] The plaintiffs also argue that *Williamson County* does not apply to claims for declaratory and injunctive relief. The cases cited by the plaintiffs, however, do not support this argument. This case is not one in which we need to decide whether a particular state statute facially violates the Fifth Amendment. *See Wash. Legal Found. v. Legal Found. of Wash.,* 236 F.3d 1097, 1104 (9th Cir. 2001). The remaining cases relate to criminal forfeiture practices, which are distinct from public use takings.

remedies, their due process claims are not ripe for federal review.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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WILLIAM CORSELLO, EVEYLYN CORSELLO, JACK KURTZ, JOSEPH GRILLO and VIVIAN GRILLO, husband and wife, JEFF MICHAELS and BARBARA MICHAELS, husband and wife, 31-11 30th AVE LLC, AGRINIOS REALTY INC., K.A.P. REALTY INC., LINDA DAVIS, PETER BLIDY, VASILLIOS CHRYSIKOS, 3212 ASTORIA BLVD. REALTY CORP., MNT REALTY LLC, ANTHONY CARDELLA and BRIAN CARDELLA, 46-06 30th AVENUE REALTY CORP., CATHERINE PICCIONE, and CROMWELL ASSOC. LLC, on their own behalf and on behalf of all others similarly situated,

Plaintiffs,

-against-

VERIZON NEW YORK, INC. (F/K/A NEW YORK TELEPHONE COMPANY), VERIZON COMMUNICATIONS, INC., IVAN G. SEIDENBERG, LOWELL C. McADAM, RANDALL S. MILCH, and JOHN DOES,

Defendants.

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MEMORANDUM AND ORDER
10-CV-6059 (DLI)(RML)

(Filed Sep. 30, 2013)

DORA L. IRIZARRY, U.S. District Judge:

Plaintiffs Jack Kurtz ("Kurtz"), Joseph Grillo ("Mr. Grillo"), Vivian Grillo ("Mrs. Grillo"), Jeff Michaels ("Mr. Michaels"), Barbara Michaels ("Mrs. Michaels"), 31-11 30th Ave LLC ("31-11 30th Ave."), Agrinios Realty Inc. ("Agrinios"), K.A.P. Realty Inc. ("K.A.P."), Linda Davis ("Davis"), Peter Blidy ("Blidy"), Vasillios Chrysikos ("Chrysikos"), 3212 Astoria Blvd. Realty Corp. ("3212 Astoria Blvd."), MNT Realty LLC ("MNT"), Anthony Cardella, Brian Cardella, 46-06 30th Avenue Realty Corp. ("46-06 30th Ave."), Catherine Picciones ("Picciones"), and Cromwell Assoc. LLC ("Cromwell") (collectively, "Plaintiffs")[1] bring this action, on behalf of themselves and on behalf of all others similarly situated, against Verizon New York, Inc. ("Verizon New York"), Verizon Communications, Inc. ("Verizon Communications," and together with Verizon New York, Inc., "Verizon"), Ivan G. Seidenberg ("Seidenberg"), Lowell C. McAdam ("McAdam"), and Randall S. Milch ("Milch") (together with Seidenberg and McAdam, the "individual Defendants" and collectively with Verizon, "Defendants").

Plaintiffs' second amended complaint seeks relief pursuant to 42 U.S.C. § 1983, alleging that Defendants have violated: 1) Plaintiffs' right to procedural due process pursuant to the Fourteenth Amendment

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[1] William Corsello ("Mr. Corsello") and Evelyn Corsello ("Mrs. Corsello") were originally named as Plaintiffs, but their claims were withdrawn as of July 27, 2012.

of the United States Constitution ("Fourteenth Amendment"), and 2) Plaintiffs' right to be free from a taking without just compensation pursuant to the Fifth Amendment of the United States Constitution ("Fifth Amendment"). Specifically, Plaintiffs claim that Defendants have violated their constitutional rights by "appropriat[ing] space on [Plaintiffs'] private properties to host tens of thousands of installations of [telephone] terminals and associated apparatus, each of which services telephone customers in numerous buildings." (Compl. ¶ 1, Docket Entry No. 14.) Defendants move to dismiss all of the claims asserted against them pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. (Docket Entry No. 17.) Plaintiffs oppose. For the reasons set forth below, Defendants' motion is granted due to lack of subject matter jurisdiction.

BACKGROUND

The following facts are taken from the Plaintiffs' second amended complaint, as well as matters of which judicial notice may be taken, and are assumed true solely for purposes of this motion. Defendant Verizon New York is a New York State corporation and the "franchised incumbent local exchange carrier ("ILEC") for all of New York City and most of New York State." (Compl. ¶ 23.) Defendant Verizon Communications is a Delaware corporation and the corporate parent of Verizon New York. (Compl. ¶ 24.) Defendant Seidenberg is the Chairman and CEO of Verizon (Compl. ¶ 25), Defendant McAdam is

Verizon's President and Chief Operating Officer (Compl. ¶ 26), and Defendant Milch is Verizon's Executive Vice President and General Counsel. (Compl. ¶ 27.)

In a typical electric telephone network, "distribution cables" carrying many telephone lines branch out from a telephone company's central offices. (Compl. ¶ 34.) The distribution cables eventually intersect with "service lines" that run to the premises of individual customers. (Compl. ¶ 34.) "Terminals," or "terminal boxes," are installed at the point of intersection between distribution cables and service lines. (Compl. ¶ 35.) Terminal boxes can be placed on the inside or the outside of customers' buildings, and they can be used to service single or multiple buildings. (Compl. ¶ 36.) Plaintiffs' second amended complaint concerns only Verizon terminal boxes placed on the exterior walls of Plaintiffs' buildings or on poles in their yards that are used to service multiple buildings. (Compl. ¶¶ 36, 39.)

Plaintiffs allege that the terminal boxes at issue "constitute permanent appropriations of portions of the host properties for the public use." (Compl. ¶ 52.) Plaintiffs complain that the terminals typically require several technician crew visits each year for the benefit of properties other than the host properties, resulting in frequent physical invasions. (Compl. ¶ 48.) According to Plaintiffs, Verizon owns approximately 30,000-50,000 multi-property service wall mounted terminals in New York State for which there has been no payment of agreed full compensation or a

knowing and enforceable waiver of full compensation. (Compl. ¶ 53.) The number of multi-property yard pole mounted terminals in New York State for which there has been no payment of full compensation or waiver of full compensation is unknown, but is believed to be in the tens of thousands. (Compl. ¶ 54.)

As an ILEC, Verizon enjoys "extraordinary state granted privileges to attach telephone equipment to private properties." (Compl. ¶ 55.) However, Plaintiffs claim that these privileges are subject to important limitations. For example, the privilege granted through the New York State Transportation Corporations Law 27 ("TCL 27") allows Verizon to place equipment necessary for its telephone network on private property, but "subjects the resulting attachments to the 'full compensation' rights of the property owners" and requires Verizon to "affirmatively . . . ensure that these full compensation rights are . . . honored." (Compl. ¶ 58.) According to Plaintiffs, Verizon has flouted its procedural obligations under TCL 27 and the Fourteenth Amendment by, *inter alia,* failing to notify building owners of their full compensation rights and failing to offer or pay full compensation. (Comp.¶¶ 64, 74-75, 79.) Plaintiffs allege that Verizon has disregarded such procedural requirements "as a matter of established corporate policy and practice." (Compl. ¶ 79.) Plaintiffs further contend that the placement of Verizon's terminal boxes on their property constitutes unconstitutional "taking" for public use without just compensation, as prohibited by the Fifth Amendment. (Compl. ¶¶ 127-28.)

On December 17, 2007, Plaintiffs' counsel filed a putative class action against Verizon in New York State Supreme Court, Kings County, naming William Corsello and Evelyn Corsello as plaintiffs and raising a similar set of claims as those alleged in the present action (the "*Corsello* action"). (Defs.' Mem. at 7-8, Docket Entry No. 16; First Am. Compl. in *Corsello v. Verizon New York, Inc.,* No. 39610/07 (N.Y. Sup. Ct.)) On November 5, 2009, the state trial court denied class certification on various grounds. *See Corsello v. Verizon New York, Inc.,* 2009 WL 3682595 (N.Y. Sup. Ct. Nov. 5, 2009). On March 29, 2012, the New York State Court of Appeals affirmed the trial courts' denial of class certification in the *Corsello* action. *See Corsello v. Verizon New York, Inc.,* 18 N.Y. 3d 777 (2012). The New York State Court of Appeals also ruled that: 1) the Corsellos had stated a claim for inverse condemnation; 2) their inverse condemnation claim was not barred by limitations; 3) their deceptive trade practices claim was barred by limitations; and 4) their unjust enrichment claim was duplicative of their other claims. *See id.* According to Defendants, the *Corsello* state action has been voluntarily discontinued, and the Corsellos are no longer party to any litigation against Defendants. (Defs.' Reply at 1, n.1, Docket Entry No. 27.)

On December 30, 2010, while the Corsello's case was making its way through the state appellate courts, William Corsello, Evelyn Corsello, and Jack Kurtz commenced this putative class action against Verizon and the individual defendants. (Docket Entry

No. 1.) On April 29, 2011, Plaintiffs filed their first amended complaint, which added as named Plaintiffs Mr. and Mrs. Grillo, Mr. and Mrs. Michaels, 31-11 30th Ave, Agrinios, K.A.P., Davis, Blidy, Chrysikos, 3212 Astoria Blvd., MNT, Anthony Cardella, Brian Cardella, 46-06 30th Ave., Picciones, and Cromwell (the "*Grillo* Plaintiffs"). (Docket Entry No. 8.) On July 27, 2012, Plaintiffs filed their second amended complaint, which withdrew William and Evelyn Corsello's claims. (Docket Entry No. 14.)

On December 9, 2011, the *Grillo* Plaintiffs filed an amended complaint in New York State Supreme Court, Queens County, in connection with another putative class action brought against Verizon based on essentially the same set of facts as alleged here (the "*Grillo* action").[2] (Amd. Compl. in *Grillo v. Verizon New York, Inc.,* No. 12580-11 (N.Y. Sup. Ct.) (the "*Grillo* Compl.")) The *Grillo* Plaintiffs stated that they intended to hold the *Grillo* action in abeyance pending this Court's determination of jurisdiction in the present action. (*Grillo* Compl. ¶ 113.)

Several of the causes of action in Plaintiffs' second amended complaint are improper requests for advisory opinions regarding the Defendants' anticipated defenses. For example, Plaintiffs' 5th cause of action purports to seek a declaratory judgment that the statute of limitations on Plaintiffs' claims has

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[2] It is unknown when this state action was originally filed, because the parties did not provide this information.

tolled. (Compl. ¶¶ 223-230.)[3] Notably, the New York State Court of Appeals held that certain of the Corsello's claims were time barred. *See Corsello v. Verizon New York, Inc.,* 18 N.Y. 3d at 788-89. Plaintiffs' second amended complaint also includes claims for alternative remedies improperly styled as causes of action. (*See* Compl. ¶¶ 237-251.) Thus, these claims, which the Court views as improper requests for advisory opinions, will not be addressed by the Court in connection with the present motion to dismiss. The Court will only consider those causes of action that properly may be brought in a complaint.

Accordingly, the Court construes Plaintiffs' second amended complaint as asserting claims for violations of Plaintiffs' procedural due process rights under the Fourteenth Amendment and right to be free of a taking without just compensation under the Fifth Amendment. Defendants move to dismiss Plaintiffs' claims against them pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, claiming that Plaintiffs' claims are unripe and time-barred, Plaintiffs' lack standing, and the second amended complaint fails to state a claim upon which relief may be granted. (Defs.' Mem.)

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[3] Causes of action 2, 3, and 4 also address anticipated affirmative defenses. These three causes of action seek declaratory judgment that "verbal licenses," "Row-3's," and "90-day-revocables" "are not valid grounds under due process to deprive property owners of full compensation." (Compl. ¶¶ 202-222.)

For the reasons set forth below, Defendants' motion is granted on the ground that Plaintiffs' claims are not ripe for judicial review due to failure to exhaust existing state remedies. As such, the Court need not reach any of Defendants' additional grounds for dismissal.

DISCUSSION

I. Legal Standard

Subject matter jurisdiction is a threshold issue. Thus, where a party moves to dismiss under both Rules 12(b)(1) and 12(b)(6), the court must address the 12(b)(1) motion first. *Sherman v. Black,* 510 F. Supp. 2d 193, 197 (E.D.N.Y. 2007) (citing *Rhulen Agency, Inc. v. Alabama Ins. Guar. Ass'n,* 896 F.2d 674, 678 (2d Cir. 1990)). It is axiomatic "that federal courts are courts of limited jurisdiction and lack the power to disregard such limits as have been imposed by the Constitution or Congress." *Durant, Nichols, Houston, Hodgson & Cortese-Costa P.C. v. Dupont,* 565 F.3d 56, 62 (2d Cir. 2009) (quotation marks omitted). "If subject matter jurisdiction is lacking and no party has called the matter to the court's attention, the court has the duty to dismiss the action *sua sponte.*" *Id.*

Federal subject matter jurisdiction exists only where the action presents a federal question pursuant to 28 U.S.C. § 1331 or where there is diversity jurisdiction pursuant to 28 U.S.C. § 1332. *See Petway v. N.Y.C. Transit Auth.,* 2010 WL 1438774, at *2

(E.D.N.Y. Apr. 7, 2010), *aff'd,* 450 F. App'x. 66 (2d Cir. 2011). Federal question jurisdiction is invoked where the plaintiff's claim arises "under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. A case arises under federal law within the meaning of the general federal question statute only if the federal question appears from the facts of the plaintiff's well pleaded complaint. *See Louisville & Nashville R.R. v. Mottley,* 211 U.S. 149 (1908).

In order to invoke the limited jurisdiction of the federal court, Article III of the United States Constitution requires that a case or controversy exist. *Port Washington Teachers' Ass'n v. Bd. of Educ. of Port Washington Union Free Sch. Dist.,* 478 F.3d 494, 501 (2d Cir. 2007) (citing U.S. Const. art. III, § 2, cl. 1). Critical to the determination as to whether there is a case or controversy is whether an action is ripe for review. *See Dougherty v. Town of N. Hempstead Bd. of Zoning Appeals,* 282 F.3d 83, 90 (2d Cir. 2002) (citing *Abbott Laboratories v. Gardner,* 387 U.S. 136, 148 (1967)) (finding that "[t]he purpose of the ripeness requirement is to ensure that a dispute has generated injury significant enough to satisfy the case or controversy requirement of Article III of the U.S. Constitution."); If the case is not ripe for review, subject matter jurisdiction does not exist and the case must be dismissed. *See United States v. Fell,* 360 F.3d 135, 139 (2d Cir. 2004) (finding that "[r]ipeness is a constitutional prerequisite to exercise of jurisdiction by federal courts.")

II. Analysis

a. Plaintiffs' Claims Are Unripe

In *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City,* the Supreme Court held, in relevant part, that a takings claim brought in federal court is not ripe until the party seeking just compensation pursues the procedures the State has provided for doing so. 473 U.S. 172 (1985). The Court reasoned that, since the Fifth Amendment does not require that just compensation "be paid in advance of, or contemporaneously with, the taking," the State's action is not "complete" until the party seeking compensation has exhausted any available "reasonable and adequate provision[s] for obtaining compensation after the taking." *Id.* at 195.

Defendants argue that Plaintiffs' claims are unripe because Plaintiffs have not pursued the available procedures for seeking just compensation provided under New York State law through an inverse condemnation action. (Defs.' Mem. at 12-13.) In response, Plaintiffs argue that *Williamson* does not apply here because: 1) the exhaustion requirement applies only to regulatory, rather than physical takings claims (Pls.' Mem. at 13-15, Docket Entry No. 19); 2) Plaintiffs' second amended complaint includes a cause of action sounding in procedural due process (Pls.' Mem. at 16-17); and 3) New York State does not provide a "reasonable, certain, and adequate provision for obtaining compensation," because each Plaintiff may

be required to sue Verizon individually.[4] (Pls.' Mem. at 17.) Each of Plaintiffs' arguments that *Williamson* does not apply to the present action are utterly without merit.

First, the Second Circuit explicitly has held that the exhaustion requirement announced in *Williamson* applies to both regulatory and physical takings claims. *Villager Pond, Inc. v. Town of Darien,* 56 F.3d 375, 380 (2d Cir. 1995) (finding that "*Williamson* drew no distinction between physical and regulatory takings, and the rationale of that case . . . demonstrates that any such distinction would be unjustified").

Next, the Second Circuit also has held that "[l]and use challenges, whether pursued as a takings claim under the Fifth Amendment or as violations of equal protection or due process, are subject to the ripeness requirement articulated by the Supreme Court in *Williamson.*" *Dreher v. Doherty,* 2013 WL 4437180 (2d Cir. Aug. 21, 2013) (citing generally *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City,* 473 U.S. 172); *Dougherty v. Town of N. Hempstead Bd. of Zoning Appeals,* 282 F.3d at 88 (finding that "[t]he ripeness requirement of *Williamson,* although announced in a takings context, has been extended to equal protection and due process claims asserted in the context of land use

[4] Plaintiffs are presumably referring to the denial of class certification in the *Corsello* action. To this court's knowledge, class certification has not yet been denied in the *Grillo* state action.

challenges"). Where takings and due process claims arise out of the same factual events, courts apply the same ripeness inquiry to both claims. *See Country View Estates @ Ridge LLC v. Town of Brookhaven,* 452 F. Supp. 2d 142, 149 (E.D.N.Y. 2006) (requiring exhaustion of state procedures for awarding just compensation where plaintiffs alleged that defendants had violated their right to due process by, *inter alia,* failing to notify plaintiff of a relevant section of the town code).

Finally, *Williamson* forecloses Plaintiffs' argument that New York State's procedure for obtaining compensation is inadequate because it requires Plaintiffs to sue instead of forcing Verizon to initiate eminent domain proceedings. *See Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City,* 473 U.S. at 196-97 (holding that inverse condemnation proceedings are adequate procedures for obtaining compensation.) Plaintiffs' claim that they must be allowed to bring their allegations against Verizon in the form of a class action suit also fails.[5] *See Villager Pond, Inc. v. Town of Darien,* 56 F.3d at 380 (quoting *Southview Associates, Ltd. v. Bongartz,* 980 F.2d 84, 99 (2d Cir. 1992)) (finding that a state's procedure for obtaining compensation is available and adequate even where it "remains unsure and undeveloped . . .

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[5] Plaintiffs' filing of duplicative lawsuits in this and the *Grillo* action – to which every one of the Plaintiffs other than Mr. Kurtz is a named party – is blatant forum shopping for a court that will grant class certification.

so long as a remedy potentially is available. . . .")[6] "It is well-settled that New York State has a 'reasonable, certain and adequate provision for obtaining compensation.'" *Country View Estates @ Ridge LLC v. Town of Brookhaven,* 452 F. Supp. 2d at 156 (observing that the New York State Constitution provides that "private property shall not be taken for public use without just compensation"). Plaintiffs have failed to persuade the Court otherwise.

In summary, because Plaintiffs have not pursued the mechanisms for seeking just compensation provided under New York State law, Plaintiffs' claims are not ripe for review. As such, the Court lacks subject matter jurisdiction over this action, and the complaint must be dismissed. Having found that this court lacks jurisdiction, it is unnecessary to address the Defendants' remaining arguments supporting dismissal.

CONCLUSION

For the reasons stated above, Defendants' motion to dismiss is granted in its entirety.

SO ORDERED.

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[6] In *Southview,* for example, the Second Circuit held that a regulatory takings claim was unripe until state procedures were exhausted even though no court in the state had ever interpreted the relevant state law clause to require compensation for a regulatory taking. *Southview Associates, Ltd. v. Bongartz,* 980 F.2d at 99-100.

Dated: Brooklyn, New York
September 30, 2013

_____________ /s/ _____________
DORA L. IRIZARRY
United States District Judge

TRANSPORTATION CORPORATIONS LAW ARTICLE 3. TELEGRAPH AND TELEPHONE CORPORATIONS

NY CLS Trans Corp § 27 (2014)

§ 27. Construction of lines

Any such corporation may erect, construct and maintain the necessary fixtures for its lines upon, over or under any of the public roads, streets and highways; and through, across or under any of the waters within the limits of this state, and may erect, construct and maintain its necessary stations, plants, equipment or lines upon, through or over any other land, subject to the right of the owners thereof to full compensation for the same. If any such corporation can not agree with such owner or owners upon the compensation to be paid therefor, such compensation shall be ascertained in the manner provided in the eminent domain procedure law. Any such corporation is authorized, from time to time, to construct and lay lines of electrical conductors under ground in any city, village or town within the limits of this state, subject to all the provisions of law in reference to such companies not inconsistent with this section; provided that such corporation shall, before laying any such line in any city, village or town of this state, first obtain from the common council of cities, or other body having like jurisdiction therein, the trustees of villages, or the town superintendents of towns, permission to use the streets within such city, village or town for the purposes herein set forth. Nothing in this section shall limit, alter, or affect the provisions

or powers relating or granted to telegraph corporations heretofore created by special act of the legislature of this state, except in so far as to confer on any such corporation the right to lay electrical conductors under ground.