No. 17-17504

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PEYMAN PAKDEL; SIGMA CHEGINI,

Plaintiffs – Appellants,

v.

CITY AND COUNTY OF SAN FRANSICSO;
SAN FRANCISCO BOARD OF SUPERVISORS;
SAN FRANCISCO DEPARTMENT OF PUBLIC WORKS,

Defendants – Appellees.

On Appeal from the United States District Court
for the Northern District of California
Honorable Richard Seeborg, District Judge

BRIEF OF THE PELICAN INSITUTE FOR PUBLIC POLICY AS AMICUS CURIAE IN SUPPORT OF APPELLANTS' PETITION FOR REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure, Rule 26.1, Amicus Curiae Pelican Institute for Public Policy states that it has no parent corporation and, as it has no stock, that no publicly traded corporation owns 10% or more of its stock.

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IDENTITY OF AMICUS CURIAE

The Pelican Institute for Public Policy is a nonpartisan research and educational organization—a think tank—and the leading voice for free markets in Louisiana. The Institute's mission is to conduct research and analysis that advances sound policies based on free enterprise, individual liberty, and constitutionally-limited government.

AUTHORSHIP AND FUNDING OF THIS BRIEF

No party's counsel authored any part of this brief. No party and no counsel for any party contributed money intended to fund preparing or submitting this brief. No person—other than amicus curiae Pelican Institute for Public Policy—contributed money intended to fund preparing or submitting this brief.

ARGUMENT

Thirty-five years ago, the Supreme Court ruled that a plaintiff seeking to assert a Takings Claim under the Fifth Amendment to the Constitution needed to jump through two procedural hoops before bringing their claim to federal court. *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City* required takings claimants to first obtain a final decision on the applicability of regulations to the property in question and bring their case to state court. Only after following these two steps would the takings claim be ripe for a federal court to hear. 473 U.S. 172, 186 (1985). It did not take long for takings claimants to discover that

Williamson County created a procedural quagmire.

San Remo Hotel, L.P., v. City and County of San Francisco confirmed that litigating a takings claim in state court was *res judicata* to a subsequent claim in federal court. 545 U.S. 323, 347 (2005). The resulting preclusion trap has been described as "deceptive, inherently nonsensical, draconian, and a Kafkaesque maze." Ian Fine, *Why Judicial Takings are Unripe*, 38 Ecology L.Q. 749, 773 (2011).

Just last year, the Supreme Court ended nearly four decades of frustration for claimants and legal scholars by doing away with the state litigation requirement. The Court recognized the Catch-22 created by the state litigation requirement and found that it "imposes an unjustifiable burden on takings plaintiffs, conflicts with the rest of our takings jurisprudence, and must be overruled." *Knick v. Twp of Scott,* 139 S.Ct. 2162, 2167 (2019).

Unfortunately for the Pakdels, *Knick* was only a partial victory for takings claimants seeking redress in federal courts because it did not also overturn the finality requirement. *Id*. at 2169. The Pakdel's experience is typical of takings claimants over the years. The Takings Clause of the Fifth Amendment does not receive the same deference as the Bill of Rights' other guarantees.[1] Amicus curiae's

[1] Michael M. Berger writes, "No other federally protected rights have the *Williamson County* precondition to federal litigation. All other federally protected rights may be vindicated in federal court without having to pass through a state court filter, if the

goal is to provide this court with a brief history of the poor treatment takings claimants have suffered in federal courts. Plaintiffs with § 1983 claims arising under any other provision of the Bill of Rights are welcome in federal courts without the procedural hurdles required of takings claimants. Courts still have a long way to go to restore "takings claims to the full-fledged constitutional status the Framers envisioned when they included the [Takings] Clause among the other protections in the Bill of Rights." *Knick,* 139 S.Ct. at 2162. We urge this court to grant the Pakdels' request for rehearing en banc.

More Than 200 Years of Supreme Court Jurisprudence Confirms that The Framers Intended for Civil Rights Litigants to Have Ready Access to Federal Courts

The jurisdictional problems vexing takings claimants got their start in Temple Hills Country Club Estates, a proposed development in Williamson County, Tennessee. Hamilton Bank, which foreclosed on the property owned by the developers, alleged that an uncompensated taking of the property occurred at the hands of Williamson County Regional Planning Commission through their application of zoning laws and regulations. *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 175-176 (1985). The bank brought their

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plaintiff so chooses. Indeed, the rule seems to be that the more unsavory the litigant, the higher the level of constitutional scrutiny. The protections routinely provided to Nazis and Klansmen is legendary." *Supreme Bait & Switch: The Ripeness Ruse in Regulatory Takings*, 3 Wash. U. J.L. & Pol'y, 99, 123 (2000).

claim to federal court, where a jury awarded $350,000 as just compensation for the taking. However, the trial court granted the defendant county a judgment notwithstanding the verdict. The monetary award was reinstated on appeal. *Williamson County*, 473 U.S. at 176.

Before reaching the question of whether the County's actions constituted a Fifth Amendment taking, the Supreme Court rejected the bank's claim as unripe. *Id*. at 185-186. The Court held that Hamilton Bank needed to ripen its claim by obtaining a "final decision" regarding the application of the zoning laws to its property, then using the procedures Tennessee courts offer for obtaining just compensation for the taking. *Id*. at 186. Only after following this two-step process could takings claimants assert their rights in federal court. In arriving at this conclusion, the Court noted that the finality requirement differs from the administrative exhaustion expressly rejected a few years earlier in *Patsy v. Board of Regents of State of Florida*, 457 U.S. 496, 501-502 (1982). The difference, the Court explained, is that *Patsy* exhaustion referred to administrative procedures, and finality concerns whether an actual injury has been inflicted by the initial decisionmaker. *Williamson County*, 473 U.S. at 192-193.

The two-step requirement announced in *Williamson County* created a procedural quagmire for takings claims litigants that became known as the *San Remo* preclusion trap. *San Remo Hotel, L.P. v. City and Cty. of San Francisco* confirmed

that litigating a takings claim in state court precluded a subsequent claim in federal court. 545 U.S. 323, 347 (2005). Plaintiffs with takings claims were left with no choice other than to effectively kill their claim by filing in state court, exactly as they were instructed to do to ripen their claim by no less an authority than the Supreme Court of the United States. These requirements are contrary to more than two hundred years of Supreme Court decisions affirming that civil rights litigants are guaranteed a federal forum.

The importance of making federal courts available to those seeking to protect their constitutional rights was evident as early as 1816. In as exhaustive an examination of Article III of the U.S. Constitution as there ever was, the Supreme Court held in *Martin v. Hunter's Lessee* that federal courts had authority over state courts in matters of civil law. The Framers were motivated by "the importance, and even necessity of *uniformity* of decisions throughout the United States, upon all subjects within the purview of the constitution." 14 U.S. 304, 347-348 (1816). The Supreme Court recognized the calamity that would result if state court judges "of equal learning and integrity, in different states, might differently interpret…the [U.S.] Constitution." *Martin* at 14 U.S. at 347-348.

Decisions over the years confirm the understanding of expansive access to federal court for those seeking to assert their constitutional rights, rather than limiting access. "A federal court's obligation to hear and decide cases within its

jurisdiction is virtually unflagging." *Lexmark Int'l, Inc., v. Static Control Components, Inc.*, 134 S.Ct. 1377, 1386 (2014).

Indeed, the statute under which the Pakdels bring their claim, 42 U.S.C. § 1983, provides "a uniquely federal remedy." *Mitchum v. Foster*, 407 U.S. 225, 239-240 (1972). On appeal, this Court noted that the *Williamson County* finality requirement was in accord with principles of federalism because it allows local officials to exercise discretion and encourages resolution of land use disputes at the local level. *Pakdel v. City & Cty. of San Francisco*, 952 F.3d 1157, 1164 (9th Cir. 2020). Respect for federalism and local conflict resolution have never been requirements for a § 1983 claim to be brought in federal court.

A discussion of the legislative history of § 1983 is instructive here. It is clear that in enacting the Civil Rights Act of 1871, §1983's predecessor, that the Congress intended to "interpose the federal courts between the States and the people, as guardians of the people's federal rights to protect the people from unconstitutional action." *Mitchum*, 407 U.S. at 242.

The landmark decision of *Patsy v. Board of Regents of the State of Florida* highlights the Congressional history of 42 U.S.C. § 1983 and the importance of access to federal courts for litigants asserting their constitutional rights. Ms. Georgia Patsy sued her employer, Florida International University, alleging that the school violated her civil rights by denying her employment opportunities based on her race

and sex. She brought her § 1983 claims directly to federal court. *Patsy,* 457 U.S. at 498. The Fifth Circuit Court of Appeals dismissed the case after determining that Ms. Patsy was required to exhaust her available administrative remedies before bringing her claims to federal court, and the Supreme Court granted certiorari to consider this process. *Id*.

The Court examined the Congressional history of § 1 of the Civil Rights Act of 1871, the precursor to § 1983, in arriving at their holding that a plaintiff bringing a § 1983 action need not exhaust her state administrative remedies. *Id*. at 501-502. Congress' intent was to provide ready access to the federal courts. Administrative exhaustion is incompatible with this intent, and the Court identified three themes to support this conclusion. *Id.* at 503.

First, the 1871 Congress intended to "throw open the doors of the United States Courts" and provide immediate access to federal courts to those whose constitutional rights were threatened or violated. *Id*. at 504 (*citing* Cong. Globe, 42nd Cong., 1st Sess., 476 (1871)). Representative Dawes believed that the role of the federal courts in defending civil rights should be paramount. "The first remedy proposed by this bill is a resort to the courts of the United States…I submit to the calm and candid judgment of every member of this House that there is no tribunal so fitted…as that great tribunal of the Constitution." *Id.* at 503 (citing Cong. Globe, 42nd Cong., 1st Sess., 476 (1871)).

Second, the 1871 Congress expressed concern that state authorities were unable or unwilling to protect individuals' constitutional rights, or to punish violators. *Patsy,* 457 U.S. at 505. It is understandable that these concerns were at the forefront of legislators' minds, meeting just a few years after the end of the Civil War. However, it was thought that federal courts were not as susceptible to local prejudice. *Id.* at 506. The Court noted that this concern is still relevant today in the context of administrative remedies. State courts acting on their local prejudice could be a rubber stamp for local administrative agencies. *Id.*

Finally, the debate reflects that legislators intended to provide claimants with the choice of bringing their suit in either federal or state court. *Id*.

Recognizing that the Congress of 1871 was not presented with the issue of administrative exhaustion, the Court looked to the more recent history of 42 U.S.C. § 1997(e) for further guidance. *Id.* at 507-508. This section created a specific, limited exhaustion requirement for adult prisoners with § 1983 claims. Congressional discussion regarding the adoption of § 1997(e) demonstrates that members of Congress believed the administrative requirement to be a change in existing law. The justifications offered for the change are also illustrative. Section 1983 claims brought by adult prisoners constituted the largest class of civil rights claims. The unique legal needs of adult prisoners and the variety of agencies involved justified a carve-out for the fair and efficient administration of these claims, while making sure

that federal courts were available for other claimants. *Patsy*, 457 U.S. at 507-508.

Congress clearly intended to "provide a federal forum for the redress of wrongful deprivations of property by persons acting under color of state law." *Lynch v. Household Finance Corporation*, 405 U.S. 538, 543 (1972). Nevertheless, claimants like the Pakdels seeking to assert their property rights are treated differently. The Fifth Amendment, "as much a part of the Bill of Rights as the First Amendment or the Fourth Amendment, [is] relegated to the status of a poor relation…" *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994). The Supreme Court makes no distinction between personal rights and property rights under 42 U.S.C. § 1983. *Lynch*, 405 at 542 (1972). *Patsy* instructs the federal courts to throw open their doors to litigants asserting civil rights violations; why are the courthouse doors suddenly locked when the "poor relation" with an uncompensated takings claim is seen through the peephole?

This question has frustrated litigants and legal scholars alike in the thirty-five years since *Williamson County* was decided. Writing for the majority in *Knick*, Chief Justice Roberts reminded the Court that the Civil Rights Act of 1871 guarantees "a federal forum for claims of unconstitutional treatment at the hands of state officials." *Knick,* 139 S.Ct. at 2167. Federal courts routinely hear cases involving other aspects of the Bill of Rights. Constitutional claims concerning land use for adult entertainment venues, group homes, and religious purposes are routinely litigated in

federal court.[2] Would the Pakdels be welcomed in federal court if the City of San Francisco forced them to first offer their condo as a group home for Hare Krishnas? It should not matter. The Fifth Amendment is self-executing. *Knick*, 139 S.Ct. at 2172. A case or controversy existed at the time the taking occurred without compensation, and the Pakdels are entitled to their day in an impartial court with no interest other than the constitution. *Knick* at 2172; *Horne v. Dep't of Agric.*, 569 U.S. 513, 526 (2013); *Warth v. Seldin*, 422 U.S. 490, 500 (1975).

CONCLUSION

Appellants' Petition for Rehearing En Banc should be granted.

DATED: May 15, 2020.

Respectfully submitted,

SARAH HARBISON

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SARAH HARBISON

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[2] *See, e.g.*, *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986); *Young v. Am. Mini Theaters, Inc.*, 427 U.S. 50 (1976); *Gammoh v. City of La Habra*, 395 F.3d 1114 (9th Cir.) (entertainment venues); *See, e.g., City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985); *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977); *Vill. of Belle Terre v. Boraas*, 416 U.S. 1 (1974) (group homes); *See, e.g., City of Boerne v. Flores*, 521 U.S. 507 (1997); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982) (religious purposes).

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I hereby certify that on May 15, 2020, I electronically filed the foregoing **Brief of the Pelican Institute for Public Policy as Amicus Curiae in Support of Appellants' Petition for Rehearing En Banc** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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