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RESPONDING TO *KNICK*

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I.

INTRODUCTION

Last summer, the U.S. Supreme Court issued its decision in *Knick v. Township of Scott, Pennsylvania*, ___ U.S. ____, 139 S. Ct. 2162 (2019), overruling takings precedents stretching back to the late 1800s by holding that land use litigants no longer need to seek compensation under state takings law in order to ripen their federal takings claims. This paper will discuss (1) the ripeness doctrine and its underpinnings prior to *Knick*, (2) the oral argument in *Knick*, (3) the *Knick* opinion and the differing views of the Justices on the issues presented, and (4) the practical impacts of *Knick*.

II.

RIPENESS PRE-*KNICK*

The ripeness defense to takings claims has historically consisted of two elements: (1) "a final and authoritative determination" of how much and what type of development the government will permit (*MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 348 (1986)) and (2) a rejection of a just compensation claim in state court (*Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985)). Only the second prong - the exhaustion of state constitutional remedies - was addressed in *Knick*.

In *Williamson County*, the Supreme Court held that a property developer's federal takings claim was "premature" because he had not sought compensation through the State's inverse condemnation procedure. *Id*., 473 U.S. at 197. In that case, a property developer brought a takings claim under 42 U.S.C. § 1983 against a zoning board that had rejected the developer's proposal for a new subdivision. The Court reasoned that the developer had no federal takings claim because he had not sought compensation "through the procedures the State ha[d] provided for doing so." *Id*. at 194. According to the Court, "if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the [Takings] Clause until it has used the procedure and been denied just compensation." *Id*. at 195. The Court concluded that the developer's federal takings claim was "premature" because he had not sought compensation through the State's inverse condemnation procedure. *Id*. at 197.

The Court in *Williamson County* relied on statements in prior Supreme Court opinions reaching back over a hundred years that the Takings Clause "does not provide or require that compensation shall be actually paid in advance of the occupancy of the land to be taken. But the owner is entitled to reasonable, certain and adequate provision for obtaining compensation" after a taking. *Cherokee Nation v. Southern Kansas R. Co.*, 135 U.S. 641, 659 (1890). *Williamson County* was rooted in an understanding of the Fifth Amendment's Takings Clause stretching back to the late 1800s. On that view, a government could take property so long as it provided a reliable mechanism to pay just compensation, even if the payment came after the fact.

Texas follows this same analysis. As noted by the Texas Supreme Court in *City of Dallas v. VSC, LLC,* 347 S.W.3d 231 (Tex. 2011), "[t]here is a ripeness requirement for federal takings claims based on state action. In general, for a federal taking claim to be ripe, the owner of the allegedly taken property must (1) obtain a final decision regarding the application of the regulations to the property at issue from the government entity charged with implementing the regulations, and (2) utilize state procedures for obtaining just compensation. *Id*. at 245 (citing *Williamson County,* 473 U.S. at 186).

Prior to *Knick*, the Takings Clause was viewed not to prohibit takings; but rather to permit an otherwise valid taking provided the government provides just compensation. The rationale was when the government "takes and pays," it is not violating the Constitution. The Takings Clause violation was required to have satisfied two prongs: (1) the government must take the property, and (2) it must deny the property owner just compensation. *See Horne v. Department of Agriculture*, 569 U.S. 513, 525–526 (2013) ("[A] Fifth Amendment claim is premature until it is clear that the Government has both taken property *and* denied just compensation" (emphasis in original)). If the government had not done both, no constitutional violation occurred. This was firmly established law until *Knick*. *See, e.g., United States v. Jones*, 109 U.S. 513, 518 (1883); *Albert Hanson Lumber Co. v. United States*, 261 U.S. 581, 586 (1923).

III.

KNICK

A. Factual Background.

It is perhaps fitting that the state-litigation ripeness requirement died in a dispute over a gravesite, backyard burials, and a family cemetery. Petitioner Rose Mary Knick, the owner of 90 acres of land in Scott Township, Pennsylvania, a small community just north of Scranton, lived in a single-family home on the property and used the rest of the land as a grazing area for horses and other farm animals. Her property, however, included a small graveyard where the ancestors of her neighbors were alleged to have been buried in a family cemetery.

In December 2012, the Township passed an ordinance requiring that "[a]ll cemeteries ... be kept open and accessible to the general public during daylight hours." The ordinance defined a "cemetery" as "[a] place or area of ground, whether contained on private or public property, which has been set apart for or otherwise utilized as a burial place for deceased human beings." The ordinance also authorized Township "code enforcement" officers to "enter upon any property" to determine the existence and location of a cemetery.

In 2013, a Township officer found several grave markers on Knick's property and notified her that she was violating the ordinance by failing to open the cemetery to the public during the day. Knick responded by seeking declaratory and injunctive relief in state court on the ground that the ordinance effected a taking of her property. Knick, however, did not seek compensation for the taking by bringing an "inverse condemnation" action under Pennsylvania state law and that state's inverse condemnation proceedings.

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