No. _____

IN THE
Supreme Court of the United States

DAVID P. DEMAREST,

Petitioner,

v.

TOWN OF UNDERHILL,
a municipality and charter town, *et al.,*

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
For the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

MICHAEL M. BERGER*
*COUNSEL OF RECORD
MANATT, PHELPS & PHILLIPS, LLP
2049 Century Park East, Suite 1700
Los Angeles, CA 90067
(310) 312-4000
mmberger@manatt.com

QUESTIONS PRESENTED

The Court of Appeals refused to give retroactive effect to this Court's landmark decision in *Knick v. Township of Scott*, 139 S.Ct. 2162 (2019), which opened the federal courts to constitutional property litigation for the first time in 34 years. Compounding that error, the Court of Appeals refused to grant rehearing to consider the impact of the then pending decision in *Wilkins v. United States*, 143 S.Ct. 870 (2023), which ended up restricting the impact of statutes of limitation. In combination, the Court of Appeals' refusal to apply this Court's current law deprived Petitioner of property without just compensation and due process of law.

The questions presented are:

1. When *Knick* changed the world of takings litigation by allowing—for the first time since 1985—a property owner with a claim for unconstitutional taking of property to file suit in federal court, must that decision be applied retroactively, with the time to file suit tolled until the date *Knick* was decided, so as to give its benefit to property owners who had been precluded from suing in federal court before?

2. When *Wilkins* confirmed in the real property context that statutes of limitation are not jurisdictional but are merely claim processing tools, must lower courts now treat statutes of limitation as affirmative defenses to be proved at trial by the defendant?

PARTIES TO THE PROCEEDING

Petitioner David P. Demarest was the plaintiff in the District Court and appellant in the Court of Appeals.

Respondents are the Town of Underhill, a municipality and charter town, Daniel Steinbauer, as an individual and in official capacity as Selectboard Chair, Bob Stone, as an individual and in official capacity, Dick Albertini, as an individual and in official capacity, Seth Friedman, in official capacity, Marcy Gibson, as an individual and in official capacity, Rick Heh, as an individual and in official capacity, Brad Holden, as an individual and in official capacity, Anton Kelsey, in official capacity, Karen McKnight, as an individual and in official capacity, Nancy McRae, as an individual and in official capacity, Steve Owens, as an individual and in official capacity, Clifford Peterson, as an individual and in official capacity, Patricia Sabalis, as an individual and in official capacity, Cynthia Seybolt, as an individual and in official capacity, Revor Squirrell, as an individual and in official capacity, Rita St. Germain, as an individual and in official capacity, Daphne Tanis, as an individual and in official capacity, Walter "Ted" Tedford, as an individual and in official capacity, Steve Walkerman, as an individual and in official capacity, and Mike Weisel, as an individual and in official capacity were the defendants in the District Court and appellees in the Court of Appeals.

The following were named as defendants in the district court but were not involved in the appeal: Judy Bond, in official capacity, Peter Brooks, in

official capacity, Peter Duvall, in official capacity, Barbara Greene, in official capacity, Carolyn Gregson, in official capacity, Stan Hamlet, as an individual and in official capacity, Faith Ingulsrud, in official capacity, Kurt Johnson, in official capacity, Michael Oman, in official capacity, Mary Pacifici, in official capacity, Barbara Yerrick, in official capacity, Front Porch Forum, as a Public Benefit Corporation fairly treated as acting under color of law due to past and present factual considerations while serving the traditional governmental role of providing "essential civic infrastructure" ranging from the distribution of public meeting agendas to the coordination of civilian natural disaster relief efforts, Jericho Underhill Land Trust, as Non-Profit Corporation fairly treated as acting under color of law due to past and present factual considerations and a special relationship willfully participating in and actively directing acquisition of municipal property by the town of Underhill.

RELATED PROCEEDINGS

- *Demarest v. Town of Underhill*, Vermont Supreme Court, docket no. No. 20-098; judgment entered Feb. 26, 2021; 256 A.3d 554;
- *Demarest v. Town of Underhill*, Vermont Supreme Court, docket no. No. 15–248; judgment entered Jan. 15, 2016; 138 A.3d 206;
- *Demarest v. Town of Underhill*, Vermont Supreme Court, docket no. 12–403; judgment entered Sept. 27, 2013; 87 A.3d 439.

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PETITION FOR WRIT OF CERTIORARI

Petitioner David Demarest respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit.

INTRODUCTION

In *Knick v. Township of Scott,* 139 S.Ct. 2162 (2019), this Court revolutionized the litigation process in 5th Amendment takings cases. There, the Court removed a roadblock that had prevented property owners—alone among constitutional claimants—from seeking relief in federal court. The roadblock was erected by *Williamson County Reg. Planning Agency v. Hamilton Bank*, 473 U.S. 172 (1985). Thirty-four years after *Williamson County* banished takings claimants to state court (under the "simply confused" (139 S.Ct. at 2174) theory that such litigation would "ripen" the claims for federal court), the Court finally acknowledged that it had, on the contrary, killed those claims, i.e., that in the guise of "ripening" them, the claims "died aborning" because of the doctrine of claim preclusion. *Knick*, 139 S.Ct. at 2167. Claim preclusion was applied here, but it should not have been because of *Knick*.

In order to at least partially undo the damage caused by *Williamson County*, it is essential that *Knick* be applied retroactively, in the general manner prescribed and applied by the Court in *Harper v. Virginia Department of Taxation*, 509 U.S. 86, 89-90 (1993):

> "[W]e hold that this Court's application of a rule of federal law to the parties before the

> Court *requires every court* to give *retroactive* effect to that decision. We therefore reverse." *Id*. at 90 (emphasis added).

Moreover, in this case the problem was compounded by the lower courts' application of a statute of limitations, mechanically treating it as a jurisdictional bar to filing suit. Before the decision of the Court of Appeals was final in this case, this Court heard argument in *Wilkins v. United States*, 143 S.Ct. 870 (2023). There, the Court added to a string of its recent decisions declaring statutes of limitation to be mere claim processing tools that should not be automatically applied to bar claimants from court. (See discussion *post*, pp. 17-20.)

When Mr. Demarest petitioned for rehearing so the Court of Appeals could await the decision and consider the impact of *Wilkins,* the Court of Appeals simply denied the petition without comment. (App. 54)

The combination of *Knick* and *Wilkins* demonstrates how the lower courts denied Mr. Demarest his day in court. ***Until*** *Knick* was decided on ***June 21, 2019***, Mr. Demarest ***could not*** have filed this suit in federal court. The now-overruled *Williamson County* rule categorically forbade it. Thus, any limitations period should have been tolled until *Knick* was decided. That would have been consonant with *Wilkins*, treating the statute of limitations as a claims processing tool to be employed by the defendant as an affirmative defense. That would allow the defendant Town to prove at trial, if it could, why the strict limitations period should apply in the teeth of *Knick*. Instead,

the courts below applied the statute of limitations as having started and finished its run *before* the *Knick* decision was handed down and refused to toll the statute until *Knick* was decided.

Certiorari is needed because the interaction of the *Knick* and *Wilkins* rules shows that the clock could not start ticking on the federal litigation suits of property owners with regulatory takings claims until the date of the *Knick* decision when this Court held that they could file suit in federal court.

OPINIONS BELOW

The Second Circuit Court of Appeals' Summary Order is not published but is available at 2022 WL 17481817 and is reproduced at Pet.App.1. The order denying rehearing either by the panel or en banc is at Pet.App. 54. The District Court's Opinion and Order is not published but is available at 2022 WL 911146 and is reproduced at App. 9.

JURISDICTION

The Second Circuit Court of Appeals filed its Summary Order on December 7, 2022. The petition for rehearing was denied on February 7, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides: "nor shall private property be taken for public use without just compensation."

STATEMENT OF THE CASE

A. Mr. Demarest Bought Land in the Town and Built a House, With the Town's Promise That He Would Have Access. But That Promise Was Broken.

David Demarest bought a 51.64-acre parcel of land in the Town of Underhill, Vermont in 2002, adjacent to Town Highway 26. (Pet.App.15) He built a single-family home on this large parcel, having been explicitly assured by the Town that he would have access. (Pet.App.11; Complaint ¶46) Surrounded by so many of his own acres, he reasonably expected significant privacy.

Since then, the complaint alleges that the Town has had a long-term goal of rescinding both its implicit and explicit promises for reasonable access to his home and surrounding acreage. (Pet.App.11) To accomplish this goal, the Town reclassified portions of Town Highway 26 to a mere trail that would not be maintained (Pet.App.16) and which presently appears on National Geographic maps as a recreational trail (Complaint, ¶158).[1]

When Mr. Demarest purchased his property, the highway was generally a through road, providing continuous access in both directions. After converting it to a trail, the Town advertised the general area as a recreational destination. As a

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[1] Crudely demonstrating its contempt for Mr. Demarest, the Town reclassified his lot designation from "NR" to "FU." (Complaint, ¶56) In response to Mr. Demarest's complaints about the highway, the Planning Commission Chair emailed him, chiding him for his "excessive whining" and concluding "If you don't like it here leave." (Complaint, ¶177.)

consequence, the Demarest property was subject to trespassers and miscreants who used the property as a dump site, creating a public nuisance at the Town's invitation. (Complaint, ¶161)

The Town also blocked the road with large boulders and refused to remove them when Mr. Demarest complained about the obstruction to his access. (Complaint, ¶153)

The upshot of the Town's actions was to take a 49.5 foot wide swath of private property and convert it to public use without compensation. The Town has taken not only the reasonable access to Mr. Demarest's home, a common law right of access owned by neighboring landowners, but his reasonable expectation of privacy around the home. (Pet.App.41)

B. Proceedings Before the Lower Courts.

Mr. Demarest has been in litigation with the Town for many years, largely in the Vermont state courts. Although, to some degree, that litigation related to his access road, it was crimped and restricted by (1) limitations of the coverage of state law, and (2) *Williamson County*'s prohibition on litigating federal constitutional issues in federal court.

Under state law, Mr. Demarest was restricted to an abuse of discretion review of the Town's actions rather than an in-depth trial of their validity. Thus, although some issues regarding the legality of the Town's blockage of his access were reviewed, he was precluded from a non-deferential standard of review and the kind of examination that would have been available as of right under 42 U.S.C. § 1983.

To make matters worse, he was prevented from bringing his federal claims in federal court at all. Precluded, that is, until *Knick* overruled *Williamson County* and, for the first time as of June 21, 2019, allowed property owners like Mr. Demarest to bring suit directly in federal court.

When Mr. Demarest brought suit in federal court, the district court applied the statute of limitations as though it were jurisdictional and dismissed the case. (Pet.App.45)

That court also concluded that "a state court is fully competent to adjudicate federal constitutional claims." (Pet.App.38) The court said that without any consideration of *Knick* and this Court's conclusion that property owners were *entitled at their option* to have access to a federal court to remediate their federal constitutional injuries. The court said it could ignore *Knick* because Mr. Demarest had litigated his claim in state court and lost. (Pet.App.44) That ignores, however, the restricted nature of the state court litigation and the fact that Mr. Demarest was precluded from litigating his constitutional claims there. (See *Ketchum v. Town of Dorset*, 22 A.3d 500, 505-06 (Vt. 2011)). The Second Circuit refused to apply *Knick* retroactively and affirmed in a brief unpublished disposition. (Pet.App.45)

Almost immediately after the appeal was decided, this Court heard argument in *Wilkins*. As the appeal was still alive, Mr. Demarest petitioned the Second Circuit for rehearing to await *Wilkins* and consider its impact on the non-jurisdictional nature of the statute of limitations. Rehearing was denied without consideration or opinion.

(Pet.App.54) This Petition for Writ of Certiorari followed.

REASONS FOR GRANTING CERTIORARI

I. The Court Should Grant Certiorari to Ensure the Retroactive Application of *Knick* to Redress in Federal Court the Fifth Amendment Rights of Property Owners Who Suffer Regulatory Takings.

A. *Knick* Revolutionized the Litigation of Regulatory Takings Cases Against Municipalities.

There is no way to underplay the impact of *Knick* on regulatory takings law. It took a key part of the litigational playbook (*Williamson County*) and discarded it as being:

> "not just wrong. Its reasoning was exceptionally ill founded and conflicted with much of our takings jurisprudence." (*Knick*, 139 S.Ct. at 2178.)

Williamson County held flatly that a property owner with a 5th Amendment claim "*cannot* bring a federal takings claim in federal court." (139 S.Ct. at 2167 (emphasis added)). *Knick* overruled that. (139 S.Ct. at 2179.)

The decision overruling *Williamson County* needs to be enforced realistically by the lower courts and applied retroactively if it is to have any meaning and impact and provide justice to those who have been injured by *Williamson County*'s "mistaken view of the Fifth Amendment." (139 S.Ct. at 2167.)

Commentators immediately noticed the importance of the *Knick* decision and its potential for significant impact on 5th Amendment takings suits against overreaching municipal governments:

> "[*Knick*] put a long-overdue end to a *badly misguided precedent* that had barred most takings cases from federal court" … "[*Knick*] eliminated an *egregious double standard* that barred numerous [5th Amendment] takings cases from federal court."[2]
>
> "[*Knick*] marks a *sea change* in the U.S. Supreme Court's interpretation of the Fifth Amendment and promises to have a significant impact on the development of takings law and litigation practices nationwide" … "[*Knick*] *reset the game board* for takings litigation."[3]
>
> "[*Knick*] corrected one of the most egregious and inexplicable blunders of [the Court's] 230-year history."[4]
>
> "[*Knick*] jettison[ed] the Court's long-standing rule that a taking claim against a

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

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

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

local government must be filed, at least in the first instance, in state court" … "major victory achieved by property rights advocates."[5]

"The case that *redefined* the Fifth Amendment's protections" … "The *Knick* decision has already left incredible consequences on Fifth Amendment jurisprudence ranging from *ensuring federal court access* for takings plaintiffs to preventing gamesmanship by government defendants" … "ended the doctrinal paradox that has frustrated landowners for over thirty years."[6]

"The federal courthouse doors are open once again to property owners seeking to vindicate their federal constitutional claims" … "[*Knick*] rightly *relegated to history's dustbin* a judicially created doctrine that deprived property owners of a federal court forum to resolve federal constitutional claims" … "The Court rectified an unforced error—a mistake it never should have made—and correctly restored property owners' rights to the 'full-

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

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

> fledged constitutional status' they should enjoy."[7]
>
> "[*Knick*] [is] an important milestone in takings jurisprudence."[8]
>
> "[*Knick*] [is] a significant departure from the pre-existing process for pursuing a claim for a regulatory taking in federal court."[9]
>
> "[*Knick*] [is the] most significant property rights case of the last decade."[10]

B. Certiorari is Needed to Ensure That *Knick* Will Be Retroactively Applied so its Benefits Will be Fully Realized.

Applying the *Knick* rule in the future will surely be a step forward. However, to be fully effective, the rule needs to be retroactively applied, as the Court has held with other rules recently.

Retroactivity seems particularly appropriate here because *Knick* concluded that, when it decided *Williamson County*, "the Court was simply confused" (139 S.Ct. at 2174), and devised a rule

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[7] Robert H. Thomas, *Sublimating Municipal Home Rule and Separation of Powers in* Knick v. Township of Scott, 47 Fordham Urb. L.J. 509, 525, 533 (2020) (emphasis added).

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

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

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

that placed an "unjustifiable burden" on property owners (139 S.Ct. at 2167), based on "poor reasoning" (139 S.Ct. at 2174), "shaky foundations" (139 S.Ct.at 2178), and a "mistaken view of the Fifth Amendment" (139 S.Ct. at 2167) that "proved to be unworkable in practice" (139 S.Ct. at 2178). To rectify the problems caused by the Court's prior confusion, the new rule's net should be cast as broadly as possible.

The rule of retroactivity in civil cases was stated clearly and directly by this Court:

> "a rule of federal law, once announced and applied to the parties to the controversy, *must* be given *full* retroactive effect by *all courts* adjudicating federal law." *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 89-90 (1993) (emphasis added).

In the past, such Supreme Court holdings have been held retroactive. For example, in *Monell v. Department of Social Services*, 436 U.S. 658 (1978), this Court held that government agencies (in addition to their employees) could be liable under 42 U.S.C. § 1983, reversing prior decisions of its own (as well as decisions of various Circuit Courts). That holding was held retroactive in *Owen v. City of Independence*, 445 U.S. 622 (1980) for actions that took place six years before *Monell*. *See also Tosti v. City of Los Angeles*, 754 F.2d 1485 (9th Cir. 1985) (actions eight years before *Monell*).

The same result occurred when this Court decided *Wilson v. Garcia*, 471 U.S. 261 (1985). There, this Court laid down the proper rules regarding the statute of limitations in § 1983 cases.

That rule was held retroactive. *See Rivera v. Green*, 775 F.2d 1381 (9th Cir. 1985); *Smith v. Pittsburgh,* 764 F.2d 188, 197-98 (3d Cir. 1985); *Bartholomew v. Fischl*, 782 F.2d 1148 (3d Cir. 1986); *Gates v. Spinks*, 771 F.2d 916 (5th Cir. 1985), *cert. denied*, 475 U.S. 1065 (1986); *Jones v. Preuit & Mauldin*, 763 F.2d 1250 (11th Cir. 1985), *cert. denied*, 474 U.S. 1105 (1986).

Demonstrating its seriousness, the Court rendered a per curiam reversal of a decision refusing to give retroactive effect to a civil judgment. *See National Mines Corp. v. Caryl*, 497 U.S. 922 (1990).

Knick played a significant part in the more recent decision in *Pakdel v. City & County of San Francisco*, 141 S.Ct. 2226 (2021). There, the district court had applied the now-rejected *Williamson County* rule. This Court decided *Knick* while the matter was being considered by the 9th Circuit. The 9th Circuit acknowledged that the state litigation part of *Williamson County* no longer controlled, but held that the finality requirement required affirmance of the dismissal. This Court reversed, holding that the Court of Appeals had inserted an exhaustion of remedies requirement contrary to settled law, agreeing with the dissent in that court that the holding "directly contravened … *Knick*." 141 S.Ct. at 2229-30. The matter was remanded for reconsideration.[11]

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[11] Adding to the retroactivity discussion, the Court also instructed the 9th Circuit to consider on remand the recent decision in *Cedar Point Nursery v. Hassid*, 141 S.Ct. 2063 (2021) which had not existed at the time of the lower court's initial consideration. Despite this Court's instruction that "the

And, indeed, some lower courts have gotten the message. In *4th Leaf, LLC v. City of Grayson*, 425 F. Supp. 3d 810 (E.D. Ky. 2019), for example, the court was faced with a claim that the one year statute of limitations began to run when an ordinance was adopted in **2012**. Taking note of *Knick*, however, the court held that *no limitations period could begin* before June 21, **2019**, the date this Court decided *Knick*. Until then, the statute was tolled. *Id*. at 817. Later in the opinion, the court was even more emphatic about the impact of *Knick*:

> "Because the state-exhaustion requirement of *Williamson County* likely would have prevented Plaintiff from immediately bringing its due-process claims after the Ordinance was passed, it would be *unjust* to find that the claims are now barred. *Instead, the Court finds that the statute of limitations was tolled until June 21, 2019* when the Supreme Court overruled *Williamson County* and removed the state-exhaustion requirement for federal-takings claims pursuant to § 1983." *Id*. at 821 (emphasis added).

The same is true of *Donnelly v. Maryland*, 602 F. Supp. 3d 836 (D. Md. 2022). There, "after many decades" (*id*. at 841), the plaintiff sought relief for the denial of the right to build piers. The court aptly recognized that it had to deal with *Knick* because the

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Ninth Circuit may give further consideration to [substantive] claims in light of our recent decision in *Cedar Point,*" the 9th Circuit simply remanded to the district court without further consideration on its own. *Pakdel v. City & County of San Francisco*, 5 F.4th 1099 (9th Cir. 2021).

case "might otherwise seem to be a straightforward application of the doctrine of *res judicata*" because there had been prior proceedings in state court. *Id.* at 843. In sum, the court concluded that the case could proceed *even after the passage of time and the litigation of some issues in state court* because "by reason of *Williamson County*, they were effectively deprived [of] their right to bring their claim directly in federal court …." *Id.* at 853. In other words, *Knick* was applied retroactively to preserve the property owner's right to sue in federal court for redress of a federal constitutional right.

The rule is demonstrated by other plaintiffs with federal constitutional claims who actually had a *choice* of whether to file in state or federal court. Compare *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 84-85 (1984) (holding that petitioner's state-court judgment had a preclusive effect in federal court because she *could have brought* her federal claim in federal court). The stark difference in this case is that Mr. Demarest was forbidden by federal law to bring his federal suit in federal court and, simultaneously, the state courts' construction of state law would have made a takings claim in state court both premature and futile in light of the state courts' construction of state law. The way that the state courts applied state administrative law meant that the prior litigation resulted simply in *deferential ratification* of the municipal defendants' decisions. ***The federal issues never got litigated, nor could they have been***. That violates *Lucky Brand Dungarees, Inc. v. Marcel Fashions Grp., Inc.*, 140 S.Ct. 1589 (2020) which forbids claim preclusion unless based on a

common nucleus of operative fact. As there was no litigation of the central federal issues, there could be no common nucleus.

But there is conflict in the lower courts about *Knick*'s retroactivity. In addition to the case brought here from the Second Circuit by Mr. Demarest, see *Honchariw v. County of Stanislaus*, 539 F. Supp. 3d 939 (E.D. Cal. 2021). There, the court acknowledged that *Knick* was to be applied retroactively because this Court had ordered it so: "case remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of *Knick v. Township of Scott*, 588 U.S. —, 139 S.Ct. 2162, — L.E.2d —— (2019)." *Honchariw v. County of Stanislaus*, 204 L. Ed. 2d 1153, 139 S.Ct. 2772 (2019). Contrary to *4th Leaf* and *Donnelly*, however, *Honchariw* refused to toll the statute of limitations until the date *Knick* was decided.

An insidious effort to evade retroactive application of *Knick* has been to apply abstention (under *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941)) to force litigation into state court regardless of this Court's clear determination that these cases belong in federal court. *See Gearing v. City of Half Moon Bay*, 54 F.4th 1144 (9th Cir. 2022). There, the 9th Circuit invoked its oft-invoked theory that abstention should apply when the subject matter of the litigation "touches [a] sensitive area of social policy" (*id.* at 1150), and it applies that "sensitive" field label routinely in land use cases. That is a canard that this Court needs to deal with because, under the 9th Circuit's reading, *all* property cases touch a "sensitive area of social policy" and thus all regulatory takings cases would be subject to

being shunted right over to state court whenever a property owner seeks to take advantage of *Knick* and sue directly in federal court. That cannot have been what this Court intended when it said it was providing a "*federal forum* for claims of unconstitutional treatment at the hands of state officials." *Knick*, 139 S.Ct. at 2167; emphasis added.

The 9th Circuit overplayed the abstention doctrine. As summarized by this Court, "when a federal constitutional claim is premised on an unsettled question of state law, the federal court should stay its hand in order to provide the state courts an opportunity to settle the underlying state-law question and thus avoid the possibility of unnecessarily deciding a constitutional question." *Harris County, etc. v. Moore* (1975) 420 U.S. 77, 82. Moreover, such abstention from the exercise of jurisdiction should be rarely invoked, and never used as a simple means to "escape from [the] duty" of adjudicating cases within federal jurisdiction. *Zwickler v. Koota* (1967) 389 U.S. 241, 248.

Thus, abstention should be reserved for the rare case in which there is an unsettled question of state law, not an issue of the constitutionality of any local regulation. Any court is competent to adjudicate the latter, and—particularly after *Knick* directly rejected the idea that there is any reason to defer to the supposed expertise of local courts—there is no justifiable reason to evade this recent decision and, once again, consign regulatory taking plaintiffs to state court against their will. Indeed, it makes no sense to believe that this Court intended to allow its decision in *Knick*—which so carefully demolished the state court litigation requirement of *Williamson*

County—to be so easily end-run.

II. Certiorari is Needed to Solidify the Interplay Between *Knick* and *Wilkins* so that the Right to Court Access Won in *Knick* is Not Defeated by Knee-Jerk Applications of Limitation Statutes.

Plainly, this Court intended to provide serious redress to property owners when it harshly consigned its 34-year old precedent in *Williamson County* to "history's dustbin." Robert H. Thomas, *supra*, 47 Fordham Urb. L.J. at 525. *Knick* was meant to open the federal courthouse doors by enforcing 42 U.S.C. § 1983 which, after all, "guarantees a *federal forum* for claims of unconstitutional treatment at the hands of state officials …" *Knick*, 139 S.Ct. at 2167 (emphasis added; internal quotation marks deleted).

Decisions like the one below, however, undermine both *Knick*'s intent to provide property owners with a federal forum and *Wilkins's* intent to reduce most statutes of limitation to claim processing tools that defendants must invoke at trial to show why claims should be pretermitted.

A. The Second Circuit's Decision Conflicts With this Court's Recent Decisions Holding that Statutes of Limitation are Mere Claim Processing Rules, Not Jurisdictional Barriers.

This Court's recent precedents plainly show "that most time bars are *not jurisdictional*." *United States v. Wong*, 575 U.S. 402, 410 (2015) (emphasis added). "Time and again," this Court has "described filing

deadlines as 'quintessential claim-processing rules,' which 'seek to promote the orderly progress of litigation,' but *do not deprive a court of authority* to hear a case." *Id.* (quoting *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 435 (2011) (emphasis added)).

The reason for so holding is the "harsh consequences" that result from labeling a rule jurisdictional. *Wong*, 575 U.S. at 409. Jurisdictional rules are "unique in our adversarial system" and can be used to "disturbingly disarm litigants." *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153 (2013). "The Court has therefore stressed the distinction between jurisdictional prescriptions and nonjurisdictional claim-processing rules." *Fort Bend Cty., Texas v. Davis*, 139 S.Ct. 1843, 1849 (2019).

Moreover, the Court has articulated a "readily administrable bright line" rule to determine whether a filing rule is jurisdictional. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 5116 (2006). That rule requires clear explication from Congress.[12] Absent a "clear statement" from Congress, courts should treat filing deadlines "as nonjurisdictional in character." *Sebelius*, 568 U.S. at 153. Congress need not "incant magic words" to make a rule jurisdictional, but "traditional tools of statutory construction must plainly show that Congress imbued a procedural bar with jurisdictional consequences." *Wong*, 575 U.S. at 410 (quoting *Sebelius*, 568 U.S. at 153). "[A]bsent such a clear statement, … courts should treat the

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[12] This is in accord with the Court's recent decision in *West Virginia v. Environmental Protection Agency*, 142 S.Ct. 2587 (2022), requiring clear statements from Congress in statutes authorizing regulatory action.

restriction as nonjurisdictional." *Wong*, 575 U.S. at 409-10 (alterations original; emphasis added; citations omitted).

The importance of this distinction is that when the limitation period is not jurisdictional the burden is on the defendants to prove its application. That was not done here, where the decision was made as a matter of law, conflicting with decisions of this Court.

And the beat goes on. In *Wilkins*, the Court concluded that "[j]urisdiction … is a word of many, too many, meanings." 143 S.Ct. at 875. Following up, as recently as April 19, 2023, the Court addressed whether a provision of the Bankruptcy Act was "jurisdictional," concluding that the Court has been on a campaign "to bring some discipline to the use of this term" (*Henderson*, 562 U.S. at 435), and to stop the sloppy use of the jurisdictional concept. The provision under review was held not to be jurisdictional. *See MOAC Mall Holdings LLC v. Transform Holdco LLC*, 143 S.Ct. 927 (2023).

Fortifying the importance of trial, and the proper placement of the burden of proof, is the applicability of concepts such as equitable tolling. This Court's view of equitable tolling, issued only a year ago, is clear:

> "Equitable tolling is a traditional feature of American jurisprudence and a background principle against which Congress drafts limitations periods. [Citation] Because we do not understand Congress to alter that backdrop lightly, ***nonjurisdictional limitations periods are presumptively subject to equitable tolling***. *Irwin v.*

> *Department of Veterans Affairs*, 498 U.S. 89, 95-96 (1990)." *Boechler, P.C. v. Commissioner*, 142 S.Ct. 1493, 1500 (2022) (emphasis added).

Determination of the statute of limitations issue without putting the defendants to their full burden of proof conflicts with this Court's precedent. Moreover, taking the allegations in the complaint as true, the first breach of the defendants' written promise to move boulders from the right of way accessing Mr. Demarest's property was alleged to have taken place on November 13, 2019 (complaint, ¶153), well within any limitation period.

There is no such clear legislative statement about the jurisdictional nature of this limitations statute. The Vermont statute uses what this Court calls "mundane statute-of-limitations language, saying only what every time bar, by definition must: that after a certain time a claim is barred." *Wong*, 575 U.S. at 410. As held by the Court in the cases cited above, such language is not sufficient to create a jurisdictional hurdle.

B. The Second Circuit Conflicts With Other Decisions on Whether State or Federal Law Determines the Accrual of a Section 1983 Cause of Action.

Using state law, the trial court determined that Mr. Demarest's claims arose years ago, when the Town determined to reclassify his former highway access, transforming it into a natural trail for recreational use. (Pet.App.45) That was contrary to the federal law that controls this § 1983 issue.

The accrual date of a § 1983 cause of action is a "question of federal law that is not resolved by

reference to state law." *Wallace v. Kato*, 549 U.S. 384, 388 (2007). Until the Second Circuit's ruling in this case, there had been "no federal court of appeals holding to the contrary." *Id.* at 388. Now, there is conflict.

Under federal law, accrual occurs "when the plaintiff has a complete and present cause of action, that is, *when the plaintiff can file suit and obtain relief*[.]" *Id.* at 388 (emphasis added). Clearly, Mr. Demarest could not "file suit and obtain relief" in federal court before June 21, 2019, when this Court decided *Knick*. Until then, *Williamson County* restricted his litigation to state court and the kind of deferential review available in Vermont's courts precluded raising the constitutional issues at the heart of this case, because Vermont law restricts such review to an abuse of discretion standard. *Ketchum v. Town of Dorset*, 22 A.3d 500, 505-06 (Vt. 2011).

In such a case, if it is necessary for state law to step aside, then so be it. This Court has been clear:

> "One of the 'main aims' of § 1983 is to 'override'—and thus compel change of—state laws when necessary to vindicate federal constitutional rights. *Monroe v. Pape*, 365 U.S. 167, 173, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961); see *Zinermon v. Burch*, 494 U.S. 113, 124, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990). Or said otherwise, the ordinary and expected outcome of many a meritorious § 1983 suit is to declare unenforceable (whether on its face or as applied) a state statute as currently written. *See*, *e.g.*, *Cedar Point Nursery v. Hassid*, 594 U.S. —, 141 S.Ct. 2063, 210

L.Ed.2d 369 (2021)." *Nance v. Ward*, 142 S.Ct. 2214, 2223-24 (2022).

III. This Court Should Grant Certiorari to Reinforce the Constitutional Protection Provided by 42 U.S.C. § 1983 *in Federal Court.*

Under the Fourteenth Amendment, Congress acted to provide protection for rights guaranteed by the Constitution when it enacted 42 U.S.C. § 1983. The importance of that action was recognized in *Knick*: "The Civil Rights Act of 1871, after all, *guarantees a federal forum* for claims of unconstitutional treatment at the hands of state officials." 139 S.Ct. at 2167, quoting *Heck v Humphrey*, 512 U.S. 477, 480 (1994) (emphasis added).

A. Until *Knick*, Property Owners With 5th Amendment Claims—Alone Among Constitutional Claimants—Were Banished to State Courts to Litigate Federal Constitutional Claims.

There is no need to belabor this point, as the Court made it crystal clear in *Knick*:

> "Plaintiffs asserting *any other constitutional claim* are *guaranteed a federal forum* under §1983, but the state-litigation requirement [of *Williamson County*] 'hand[s] authority over federal takings claims to state courts.' … Fidelity to the Takings Clause and our cases construing it requires overruling *Williamson County* and restoring takings claims to the full-fledged constitutional

status the framers envisioned ….” 139 S.Ct. at 2169-70 (emphasis added).

As if to emphasize the point, the Court went on to say that, “because a taking without compensation violates the self-executing Fifth Amendment at the time of the taking, the property owner can bring a federal suit at that time. [Citing and quoting numerous authorities on the importance of immediate federal court access.] This is as true for takings claims as for any other claim grounded in the Bill of Rights.” 139 S.Ct at 2172-73.

So saying, the Court ended property owners’ banishment to state courts. *See* 139 S.Ct. at 2176-77. The only loose end was whether that landmark holding would be applied retroactively by the lower courts. That is the question that brings this case here.

B. *Knick* Must be Applied Broadly so That Redress For the Violation of Property Rights Can be Had in Federal Court.

Section 1983 was intended to provide “a uniquely federal remedy” (*Mitchum v. Foster*, 407 U.S. 225, 239 (1972)) with “broad and sweeping protection” (*Lynch v. Household Fin. Corp.*, 405 U.S. 538, 543 (1972) (quoting with approval)), “read against the background of tort liability that makes a man responsible for the natural consequences of his actions” (*Monroe v. Pape*, 365 U.S. 167, 187 (1961), overruled in part, to expand government liability, in *Monell*, 436 U.S. 658), so that individuals in a wide variety of factual situations are able to obtain a *federal* remedy when their *federally* protected rights

are abridged (*Burnett v. Grattan*, 468 U.S. 42, 50, 55 (1984)).

"The purpose of § 1983 is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails." *NCAA v. Tarkanian*, 488 U.S. 179, 191.

Cash may not heal all wounds, but it is a substitute that is both constitutionally mandated and acceptable. *See Knick,* 139 S.Ct. at 2172.

"[T]he central purpose of the Reconstruction-Era laws is to provide compensatory relief to those deprived of their federal rights by state actors" (*Felder v. Casey*, 487 U.S. 131, 141 (1988)), by "interpos[ing] the federal courts between the States and the people, as guardians of the people's federal rights" (*Mitchum*, 407 U.S. at 243).[13]

The importance of involving the federal courts has not been lost on this Court. In the Court's stirring words:

> "We yet like to believe that *wherever the Federal courts sit*, human rights under the Federal Constitution are *always* a proper subject for adjudication, and that *we have not the right to decline* the exercise of that jurisdiction simply because the rights asserted *may be adjudicated in some other forum*." *McNeese v Board of Education*, 373

[13] See, for example, this Court's recent decision in *Cedar Point Nursery v. Hassid*, 141 S.Ct. 2063 (2021), which was brought under section 1983 to preclude the application of a state regulation that violated the Fifth Amendment.

> U.S. 668, 674, n.6 (1963) (emphasis added; quoting with approval).

But "decline" is precisely what the lower federal courts did here when they were beseeched to provide relief to Mr. Demarest for the years of loss he suffered at the hands of the Town's officials.

When the Second Circuit refused to enforce the plain words of the Just Compensation Clause by allowing this suit to proceed after this Court had swept away in *Knick* the blockage to federal court suits put in place by *Williamson County,* it violated Section 1983 and this Court's clear interpretation and implementation of it.

Government agencies will fight to retain the unfair advantage they enjoyed for thirty-odd years under *Williamson County*. But they are not entitled to it. This Court understood, commenting that "there are no reliance interests on the state litigation requirement." 139 S.Ct. at 2178. As *Knick* further explained:

> "Our holding that uncompensated takings violate the Fifth Amendment will not expose governments to new liability; it will simply allow into federal court takings claims that otherwise would have been brought as inverse condemnation suits in state court." *Knick*, 139 S.Ct. at 2179.

If this Court's revolutionary procedural shift in *Knick* is to accomplish the good the Court intended, certiorari is needed in this case to show the lower courts that the way to do that is through retroactive application of the new precedent.

CONCLUSION

The petition for certiorari should be granted.

MICHAEL M. BERGER*
**Counsel of Record*
MANATT, PHELPS & PHILLIPS, LLP
2049 Century Park East, Suite 1700
Los Angeles, CA 90067
(310) 312-4000
mmberger@manatt.com