No. 17-30692

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

LOURDES T. ARCHBOLD-GARRETT,
wife of/and; DAVID L. GARRETT,

Plaintiffs – Appellants,

v.

NEW ORLEANS CITY; METRO DURR GROUP,

Defendants – Appellees.

On Appeal from the United States District Court
for the Eastern District of Louisiana
Honorable Ivan L. R. Lemelle, District Judge

APPELLANTS' OPENING BRIEF

REGEL L. BISSO, *Of Counsel*
Bisso & Miller, L.L.C.
3925 N. I-10 Service Road W.,
Suite 227
Metairie, Louisiana 70002
Telephone: (504) 830-3401
Facsimile: (504) 883-3157
E-mail: rbisso@bissomiller.com

J. DAVID BREEMER
DEBORAH J. LA FETRA
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: jbreemer@pacificlegal.org
E-mail: dlafetra@pacificlegal.org

Attorneys for Plaintiffs – Appellants

CERTIFICATE OF INTERESTED PERSONS

Case No. 17-30692

LOURDES T. ARCHBOLD-GARRETT,
wife of/and; DAVID L. GARRETT,

Plaintiffs – Appellants

v.

NEW ORLEANS CITY; METRO DURR GROUP,

Defendants – Appellees

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Parties:

LOURDES T. ARCHBOLD-GARRETT

DAVID L. GARRETT

CITY OF NEW ORLEANS

METRO DURR GROUP

Counsel:

PACIFIC LEGAL FOUNDATION
J. DAVID BREEMER
DEBORAH J. LA FETRA
REGEL BISSO
(counsel for Plaintiffs-Appellants)

STEPHANIE DOVALINA
Counsel for Defendants-Appellees)

s/ J. David Breemer
J. DAVID BREEMER

STATEMENT REGARDING ORAL ARGUMENT

This case raises important jurisdictional issues concerning the scope of the federal courts' power to review property rights claims grounded in the United States Constitution. It is appropriate for oral argument and Appellants respectfully request it.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rule

Other Authorities

JURISDICTIONAL STATEMENT

This case involves federal constitutional issues raised under 42 U.S.C. § 1983. The district court had jurisdiction under 28 U.S.C § 1331.

The district court issued a final judgment disposing of all claims on August 4, 2017. ROA.102 (R.E.07). An appeal was filed in this case on August 24, 2017. ROA.103 (R.E.05). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Whether a traditional procedural due process claim that raises injuries and remedies distinct from a takings claim is an independent, non-"ancillary" claim that is fit for federal court review without regard for potential state court remedies for a taking?

2. Whether a Fourth Amendment unreasonable seizure claim arising from the completed destruction of a building is fit for adjudication in federal court without regard for potential state court remedies for a taking?

3. Whether Appellants' federal takings claim is ripe without state court litigation under *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194-96 (1985), where that

ripeness concept is prudential and not jurisdictional, and requiring state litigation in this case would not crystalize the takings issue, but would cause serious unfairness and judicial economy problems?

INTRODUCTION

In 2015, Plaintiff-Appellants Mr. and Mrs. David L. Garrett (Garretts) purchased improved property from Defendant City of New Orleans (City), which the City had owned and neglected for the prior seventeen years. ROA.13 (R.E.021). The city sold the property without any notice of defect or danger, ROA.82 – ROA.84 (R.E.052-054), and the sale was immediately recorded with the City Conveyance Office. ROA.14 ¶ 8(C) (R.E.022 ¶ 8(C)); ROA.71, ROA.74 (R.E.041, R.E.044). The Garretts' plan was to fix up an older building on the land or sell the property. But they never had a chance. Approximately four months after the acquisition, the City demolished the building. It provided the Garretts with no prior notice, hearing, or opportunity to repair. ROA.14 ¶ 8(C) (R.E.022 ¶ 8(C)).

The City's actions are unconscionable since the Garretts' interests were easily ascertainable and indeed, obvious, given the Garretts' recent and recorded purchase from the City itself. Yet, the only notices and hearings prior to demolition were directed to a long-gone owner of the property from the 1990's, someone who had not owned the property since the City took possession in 1998. ROA.14 ¶ 8(A) (R.E.022 ¶ 8(A)). The Garretts' building was demolished pursuant to procedures and orders that never named, involved, or notified them. To add insult to injury, when the Garretts complained about the demolition, the City ordered them to pay for it, to the tune of more than $11,000. ROA.14 ¶ 8(F) (R.E.022 ¶ 8(F)); ROA.70 (R.E.040).

The City's treatment of the Garretts violates multiple constitutional provisions. The most obvious problem is the City's failure to provide basic due process; i.e., reasonable notice and an opportunity to be heard before the demolition. It is highly unlikely that demolition would have occurred if the City had fulfilled its basic due process obligations and contacted and listened to the Garretts. But it did occur, and the resulting destruction of the Garretts' building in an unreasonable manner and without just compensation created additional, substantive constitutional injuries. The Garretts accordingly filed a complaint in federal court that asserted multiple constitutional claims against the

City, including procedural due process, Fourth Amendment seizure, and federal takings claims. ROA.12 – ROA.17 (R.E.020 – R.E.025).

The district court quickly dismissed the case for lack of jurisdiction on the ground that it was unripe. ROA.88 – ROA.99 (R.E.08 – R.E.019). The court initially held that the Garretts' Fifth Amendment takings claim was unripe under *Williamson County*, 473 U.S. at 194-96, because the Garretts had not pursued compensation in state court before resorting to federal court. ROA.92 – ROA.96 (R.E.012 – R.E.016). The court then held that the Garretts' procedural due process and unreasonable seizure claims also would not ripen until they sought takings compensation in state court. ROA.96 – ROA.99 (R.E.016 – R.E.019).

These holdings were mistaken. Traditional pre-deprivation due process and Fourth Amendment seizure claims, like those here, are not subject to an exhaustion of state remedies requirement. *Zinermon v. Burch*, 494 U.S. 113, 131 (1990). Further, in this case, such claims cannot be treated as a takings claim, and subject to a state litigation ripeness requirement on that ground. The Garretts' due process and Fourth Amendment claims invoke different injuries and remedies than a takings claim. *Bowlby v. City of Aberdeen, Miss.*, 681 F.3d 215, 225-26 (5th Cir. 2012). Such claims are pled and operate as distinct claims and must be analyzed that way. *Soldal v. Cook County, Ill.*, 506 U.S. 56, 70 (1992); *Severance v. Patterson*, 566 F.3d 490, 501 (5th Cir. 2009). Under the correct analysis, they are ripe.

The court was also wrong to dismiss the Garretts' federal takings claim for lack of ripeness. *Williamson County*'s state exhaustion doctrine is a flexible prudential concept which courts can waive as circumstances warrant. This Court should decline to require further state litigation in this case, given the concrete nature of the issues, and fairness and judicial economy concerns that warrant immediate review. *Town of Nags Head v. Toloczko*, 728 F.3d 391, 399 (4th Cir. 2013). In all events, though, the Garretts' procedural due process and Fourth Amendment claims are ripe and should be remanded. *See, e.g.*, *Kinnison v. City of San Antonio*, 480 Fed. App'x 271, 276-81 (5th Cir. 2012) (reversing summary judgment for demolition victim on due process and seizure claims, but allowing claims to go to trial without ripeness concerns).

FACTS

A. The Garretts and Their Property

The property at issue is located at 7720 I-10 Service Road, New Orleans, Louisiana. ROA.13 ¶ 5 (R.E.021 ¶ 5). In 1998, the City acquired the parcel, and a building on it, from Mr. Charles D. Jett (Mr. Jett), through a tax sale. ROA.13 ¶ 6 (R.E.021 ¶ 6). The City's 1998 acquisition was recorded with the City Conveyance Office. *Id.* The City owned the property for the next seventeen years. ROA.13 ¶ 7 (R.E.021 ¶ 7). In 2012, while it held title, the City initiated code enforcement proceedings related to the property against Mr. Jett, apparently failing to realize that the City itself, not Mr. Jett, owned the parcel at the time. ROA.14 ¶ 8(A) (R.E.022 ¶ 8(A)).

In 2015, the Garretts became interested in the property. On October 2, 2015, they purchased it from the City for a little over $7,000. ROA.14 ¶ 8(B) (R.E.022 ¶ 8(B)). The building was not in danger of collapse, did not present an immediate safety threat, and the Garretts were not warned of any defect at the time of purchase. The purchase documents did not include any warnings. ROA.82 – ROA.84 (R.E.052 – R.E.054). The sale was documented, notarized, and then duly recorded in the City Conveyance Office on October 14, 2015. ROA.85 (R.E.055). The Garretts subsequently entered into negotiations to sell the property to a re-developer. ROA.76 (R.E.046).

B. The City's Unnoticed Proceedings and Cancellation of Liens

On or about October 9, 2015, a week after the Garretts bought the property, the City instituted further code enforcement proceedings against Mr. Jett, the person who had owned the property prior to 1998 and before City ownership. ROA.14 ¶ 8(C) (R.E.022 ¶ 8(C)). The City did not notify the Garretts. *Id.*

On or about October 29, 2015, the City issued an administrative judgment against Mr. Jett. This judgment ordered payment of $12,000 in fines and apparently warned of demolition of the building as a potential future City step.[1] *Id.* The City did not record a lien evidencing this event until December 7, 2015, two months after the Garretts purchased the property and recorded their acquisition. ROA.81 (R.E.051). The City did not name the Garretts in the judgment or lien or otherwise notify them.

---

[1] It is possible that further, subsequent order of demolition may have issued on November 23, 2015, a month and a half after the Garretts' acquisition. ROA.70 (R.E.040). If so, the Garretts also received no notice or hearing related to this order.

The Garretts believe that the City notified and scheduled hearings for Mr. Jett, and not them, because it relied on tax records, which specifically state they should not be relied upon to determine ownership, rather than official Conveyance office records. ROA.15 ¶ 11 (R.E.023 ¶ 11).

C. The Demolition

In mid-January of 2016, the Garretts indirectly learned of the 2015 proceedings against Mr. Jett. Mr. Garrett and his agents contacted City officials, and informed them of the Garretts' ownership of the property. ROA.74 – ROA.79 (R.E.044 – R.E.049). The City then agreed to cancel the lien against the property derived from the 2015 proceedings against Mr. Jett. On January 25, 2016, the City in fact cancelled that lien. ROA.80 (R.E.050). The same day, the Garretts paid the 2016 taxes on the property. ROA.74 (R.E.044).

Less than a week later, on January 29, 2016, the City demolished the Garretts' building. ROA.14 ¶ 8(E) (R.E.022 ¶ 8(E)). The City did not contact or notify the Garretts, nor did it give them any reasonable opportunity to discuss or object to the apparent demolition plans. The City gave them no warning it intended to renege on its recent cancellation of the lien by demolishing the building.

On April 14, 2016, the Garretts sent a letter to the City objecting to the demolition. ROA.69 (R.E.039). The letter asked the City for compensation and threatened a suit, if necessary. *Id.* A few days later, on April 19, 2016, the City sent a bill to the Garretts to recover the costs of the demolition. ROA.70 (R.E.040). It specifically ordered the Garretts to reimburse the City $11,174.36 for such costs.[2] *Id.*

D. Federal Procedure

On October 28, 2016, the Garretts filed a complaint in federal court.[3] The complaint raises claims against the City under the Takings

[2] The City's letter ordering the Garretts to pay the costs of demolition indicated they could appeal the "accuracy and reasonableness" of the imposed costs. ROA.70 (R.E.040). In such a costs appeal, the City Hearing Officer has no power to review the constitutionality of the underlying demolition action or to waive costs because the demolition is allegedly unconstitutional. *See Albe v. Louisiana Workers' Compensation Corp.*, 700 So. 2d 824, 827-28 (La. 1997) ("The courts of this state have consistently held that administrative agencies do not have the authority to determine questions of constitutionality."); *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 215 (1994) ("[a]djudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies"); *see also* City Code of Ordinances § 6-35 (setting out hearing officer's powers). Since the Garretts' complaint and defense to costs is constitutional in nature, they could not and did not appeal.

[3] The complaint named the City and Metro Durr Group as defendants. However, the Garretts no longer press their claims against Metro Durr Group. They have kept it on the caption only because that is the style of the case.

Clause of the Fifth Amendment, the Fourth Amendment, and Fourteenth Amendment's Due Process Clause, through the vehicle of 42 U.S.C. § 1983. The Garretts filed these claims in federal court in part because state courts cannot compel the City to pay damage judgments, *Newman Marchive Partnership, Inc. v. City of Shreveport*, 979 So. 2d 1262, 1266-69 (La. 2008), and the City has refused or delayed payment to hundreds of state court judgment creditors—to whom it owes approximately 35-40 million dollars.

The City soon moved to dismiss the complaint for lack of jurisdiction under FRCP Rule 12(b)(1).[4] ROA.89 (R.E.09); ROA.40 – ROA.50 (District Court Docket No. 14). The motion rested on a single theory: that all the Garretts' claims were unripe because the Garretts had not sought just compensation for a taking in state court. *Id.*

The court granted the City's motion. Addressing the takings claim first, the district court held that it was unripe under *Williamson County*, 473 U.S at 194, because the Garretts had not unsuccessfully sought compensation through an inverse condemnation action in state court before suing in federal court. ROA.92 – ROA.96 (R.E.012 – R.E.016).

[4] The City did not file a motion to dismiss for failure to state a claim.

Noting that the "only exception to the [state court exhaustion] requirement . . . is when they 'almost certainly will not compensate the claimant,'" the court concluded that the Garretts could not satisfy this standard and therefore that they had to initiate and finish state court litigation to ripen their takings claim. ROA.93 – ROA.95 (R.E.013 – R.E.015).

Turning to the Garretts' procedural due process claim, the court concluded that this claim was also unripe, under "general" ripeness standards, "[b]ecause Plaintiffs have not sought a remedy for their just compensation claim through an inverse condemnation action in state court." ROA.96 – ROA.97 (R.E.016 – R.E.017).

As for the Fourth Amendment claim, the district court recognized that it was not subject to takings ripeness rules. Instead, it applied a purported multi-factor ripeness test, under which the court held that the Garretts' Fourth Amendment claim would also not ripen until the Garretts exhausted the state court litigation (allegedly) needed to ripen their takings claim. ROA.97 – ROA.98 (R.E.017 – R.E.018).

Ultimately, the court dismissed the Garretts' claims for lack of jurisdiction. ROA.99 (R.E.019). The Garretts timely appealed. ROA.103 (R.E.05).

SUMMARY OF ARGUMENT

The district court's analysis is badly flawed. In concluding that none of the Garretts' claims would ripen until the Garretts seek "just compensation" for a taking in state court, the court wrongly imputed an exhaustion of state remedies requirement into exempt procedural due process and Fourth Amendment claims and wrongly treated the Garretts' independent, non-takings claims as dependent adjuncts of a takings claim. The court's analysis of the takings claim is also flawed as it fails to account for the prudential nature of *Williamson County* and the many prudential factors militating against application of the state exhaustion rule in this case.

The Garretts' initial claim asserts a violation of their basic and settled right to pre-deprivation due process. *Swann v. City of Dallas*, 922 F. Supp. 1184, 1197-98 (N.D. Tex. 1996) ("That a property owner has a clearly established due process right to notice and a meaningful opportunity to be heard prior to a hearing ordering the property's demolition cannot be seriously disputed."). Under due process precedent, such pre-deprivation claims are not contingent on exhaustion of state remedies. *Bowlby*, 681 F.3d at 222. Further, where, as here, such claims raise distinct, non-takings injuries and remedies, they cannot be disposed of under takings concepts. *Id.* at 225-27. They must be analyzed under due process law, including the standard, "no exhaustion" principle.

The Garretts' due process claim is not akin to a takings claim. The process it challenges is not a provision of "compensation," but lack of reasonable notice and a hearing, a separately cognizable injury, and one not covered by the Takings Clause. *Id.* at 222. Further, a *post-deprivation* "just compensation" remedy does not bear on the adequacy of *pre-deprivation* process. The Garretts' due process claim is an independent and necessary claim and, as such, it must be analyzed under due process, not takings law. Under this inquiry, the claim became ripe when the City destroyed their property without proper notice or a hearing, and state remedies (including for a taking) are irrelevant. *Zinermon*, 494 U.S. at 132 ("[W]here the State feasibly can provide a predeprivation hearing before taking property, it generally must do so regardless of the adequacy of a postdeprivation tort remedy to compensate for the taking.").

A similar analysis applies to the Garretts' Fourth Amendment seizure claim. The four-part ripeness test on which the lower court relied is inapplicable to a post-enforcement seizure claim seeking damages, such as the one here. The Garretts' claim ripened when the demolition and damages occurred. Their building is gone, and they have suffered harm, due to a series of official, yet illegal and unjustifiable City actions. Nothing stands in the way of deciding whether the demolition was unreasonable, in violation of the Fourth Amendment. *Kinnison v. City of San Antonio*, 480 Fed. App'x 271. Whether an uncompensated taking exists is irrelevant to the issue. *Severance*, 566 F.3d at 501; *United States v. James Daniel Good Real Property*, 510 U.S. 43, 49 (1993) ("We have rejected the view that the applicability of one constitutional amendment pre-empts the guarantees of another.").

Finally, the Garretts' takings claim should also be held ripe. Because *Williamson County*'s state court exhaustion requirement is a prudential principle, and not jurisdictional, courts can decline to apply it as needed. *Sansotta v. Town of Nags Head*, 724 F.3d 533, 545 (4th Cir. 2013). The court should waive the doctrine here. It is unnecessary, inefficient, and unjust to require the Garretts to seek a state court compensation judgment that will not crystalize their claim any further, that cannot be enforced against the City, and which splits their suit between state and federal forums. The court should hold the entire case fit for review, *Horne v. Department of Agriculture*, 133 S. Ct. 2053, 2062 n.6 (2013) ("A 'Case' or 'Controversy' exists once the government has taken private property without paying for it . . . whether an alternative remedy exists does not affect the jurisdiction of the federal court."), and remand it for further litigation.

ARGUMENT

I.

THE GARRETTS' PROCEDURAL DUE PROCESS AND FOURTH AMENDMENT CLAIMS, WHICH ARISE FROM THE COMPLETED, UNNOTICED, AND UNREASONABLE DESTRUCTION OF THEIR BUILDING, ARE RIPE WITHOUT STATE COURT LITIGATION

A. Ripeness Principles

1. General Rules

Ripeness is a justiciability doctrine designed "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967). In certain instances, particularly in the context of a pre-enforcement, equitable relief-seeking regulatory challenge, the ripeness inquiry involves (1) "the fitness of the issues for judicial decision and [(2)] the hardship to the parties of withholding court consideration." *Id.* at 149; *see also Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 808 (2003). This inquiry is rarely an issue in a damages suit against a completed enforcement action, since such an action is inherently "felt" and "concrete."

2. The Limited *Williamson County* Framework

In *Williamson County*, the Supreme Court articulated a special ripeness test for certain regulatory takings claims seeking "just compensation." 473 U.S. at 192-96. The Court held that such claims would not ripen until (1) the claimant had secured a final agency decision applying a restriction to the subject property, *id.* at 190-92, and (2) the claimant unsuccessfully sought just compensation through state court procedures, such as an inverse condemnation action, if available and adequate. *Id.* at 194-96. The first prong is not at issue here.

The "state litigation" requirement relevant here "addresses a unique aspect of Just Compensation Takings claims," *i.e.*, the "'special nature of the Just Compensation Clause.'" *County Concrete Corp. v. Township of Roxbury*, 442 F.3d 159, 168-69 (3d Cir. 2006) (quoting *Williamson County*, 473 U.S. at 195 n.14). Indeed, this prudential concept "stems from the Fifth Amendment's proviso that only takings without 'just compensation' infringe that Amendment," *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 734 (1997). Thus, *Williamson County* emphasizes that a "property owner cannot claim a *violation of the Just Compensation Clause* until it has used the [state] procedure and been denied just compensation." 473 U.S. at 195 (emphasis added). Consistent with *Williamson County*'s limits, the Supreme Court has never applied the state litigation requirement to a property-related procedural due process or Fourth Amendment claim.

B. The Garretts' Procedural Due Process Claim Is Ripe Now, Without State Court Litigation

1. Background Due Process Law

The right to due process is among the most fundamental individual constitutional rights. *Boddie v. Connecticut*, 401 U.S. 371, 375 (1971). Except for a few unusual cases, this right requires the government to supply personal notice and an opportunity to be heard *before* it deprives one of property. *Zinermon*, 494 U.S. at 127; *Caine v. Hardy*, 943 F.2d 1406, 1411-12 (5th Cir. 1991); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15, 318 (1950).

Such basic pre-deprivation process is fundamental and highly protected because it ensures that citizens have a chance to participate in decision-making affecting their rights, to address and negotiate with decision-makers, and to help the government avoid mistakes. *Fuentes v. Shevin*, 407 U.S. 67, 80-81 (1972). The opportunity to proclaim one's innocence is a particularly important function of pre-deprivation notice. *James Daniel Good*, 510 U.S. at 55. This case illustrates the purposes and necessity of pre-deprivation notice. If the City had simply checked its own official Conveyance records and contacted, and then heard, the Garretts prior to demolishing their building—as is required[5]—this case would be different. The Garretts would have corrected the City's mistaken beliefs about ownership and informed it of the sale of clean title and the invalidity of any liens or judgments against former owners. In

---

[5] *See, e.g, Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 798 & n.4 (1983) (government must check recorded public records to identify and notify property owners).

short, they would have shown their good faith and innocent ownership, and demolition likely would not have occurred.[6]

2. State Exhaustion Rules Do Not Burden Distinct and Traditional Pre-Deprivation Due Process Claims

To escape accountability for running afoul of settled due process rules, the City seeks to graft an inapposite state remedies ripeness requirement onto the Garretts' due process claim. This tactic fails. *Zinermon*, 494 U.S. at 131.

As a general matter, "exhaustion of state remedies is *not* required before a plaintiff can bring suit under § 1983 for denial of due process." *Bowlby,* 681 F.3d at 222 (emphasis added). Indeed, when pre-deprivation process is due—as is the case in almost all due process disputes arising from official government acts (including this one)—post-deprivation state remedies are irrelevant, and need not be utilized. *Zinermon*, 494 U.S. at

[6] There is no doubt that the City could have provided notice and some kind of hearing or meeting. It waited until almost four months after it sold the property to the Garretts, and issued the judgment against Mr, Jett, to destroy the property—plenty of time to meet with them to correct or iron out any outstanding issues. But the City did not make reasonable efforts to find and notify them before the property was destroyed. *See Walker v. City of Hutchinson, Kan.*, 352 U.S. 112, 116 (1956) (The "name was known to the city and was on the official records. Even a letter would have apprised him that his property was about to be taken and that he must appear if he wanted to be heard[.]").

131; *Hroch v. City of Omaha*, 4 F.3d 693, 695 (8th Cir. 1993) (After *Zinermon* "we think it clear that the constitutional adequacy of this predeprivation remedy may be challenged under § 1983, regardless of whether a postdeprivation remedy is also available."). In this respect, due process and takings claims inhabit separate worlds in the Supreme Court's jurisprudence. State court remedies may be required for some takings claims, but not for traditional due process claims. *Compare Williamson County*, 473 U.S at 194-96, *with James Daniel Good*, 510 U.S. at 49-51 (no state court ripeness issue in a procedural due process case initiated and litigated in federal court).

3. The Garretts' Claim Cannot Be Treated as a Mere Adjunct of a Takings Claim Potentially Subject to Ripeness Rules

This Court has not, however, always maintained a clear line between due process and takings law. It has detached due process claims from takings analysis when the "'main thrust [of the due process claim] is not a claim for a taking.'" *Bowlby*, 681 F.3d at 223-24 (citation omitted). But when due process claims "'involve allegations of deprivations "ancillary" to or "arising from" a takings claim,'" this Court sometimes collapses due process and takings analysis. *Id.*

Here, the district court concluded that the Garretts' due process claim is ancillary to their takings claim for "just compensation" and thus, must be litigated with the takings claim. In effect, the court concluded that (1) the claims target the same injury and are redundant and (2) the due process claim may be relieved if the Garretts get "just compensation" for a taking. Neither is true.

The Garretts' due process claim challenges different injuries and seeks different forms of relief than their takings claim. The primary injury challenged by a takings claim is loss of a private property interest. *See Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005). But in a traditional due process case, the injury is lack of "sufficient process," *Bowlby*, 681 F.3d at 220; *i.e.*, the claim challenges "the *means* by which the deprivation was effected," not the deprivation itself. *Caine v. Hardy*, 943 F.2d at 1411 (emphasis added). Importantly, the Takings Clause does not address the adequacy of government's "means." *Lingle*, 544 U.S at 542. It *assumes* legitimate means, and is only concerned with any subsequent, substantive impact on owner rights, and whether there is just compensation. *Id.* at 543.

The remedy for the Garretts' notice and hearing due process claim is also distinct from the remedy for a takings claim. The "just compensation" remedy for a taking generally does not allow a court to grant equitable relief. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001-04 (1984); *Warner/Elektra/Atlantic Corp. v. County of DuPage*, 991 F.2d 1280, 1285 (7th Cir. 1993). As a form of a damages remedy, "just compensation" is highly limited. It secures only the fair-market value of taken property, 991 F.2d at 1285, and does not include personal, economic, punitive, and special damages. *Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461, 464 (7th Cir. 1988). The payment of "just compensation" generally results in a transfer of title of the taken property to the government.

In contrast, in a procedural due process claim arising under section 1983, like that here, the plaintiff may obtain a broad array of common law remedies. *See generally J & B Entertainment v. City of Jackson, Miss.*, 720 F. Supp. 2d 757, 763-64 (S.D. Miss. 2010) (reviewing law of Section 1983 damages). A property owner may seek out-of-pocket costs, lost profits, and other damages, not just lost property values, *id.*, as well as declaratory and injunctive relief. *Coniston Corp.*, 844 F.2d at 464 (A due process claimant may "seek[] an injunction against the taking . . . or full tort damages, not just market value."). If damages are paid, the payee is not required to transfer title to property to the government; he keeps it. Here, the Garretts' due process claim does not simply ask for a limited "just compensation" remedy; it seeks all "damages," such as costs and lost profits, and to invalidate fines imposed because of the unconstitutional demolition. "Just compensation" for a taking cannot give the Garretts the relief they seek or make them whole.[7]

Takings "just compensation" also can do nothing to clarify their due process claim. After all, "just compensation" is a post-deprivation issue, not a *pre-deprivation* process—the issue with which the Garretts' due process claim is concerned. *Bowlby*, 681 F.3d at 226 (just compensation "will not assist a court in determining what process . . . should have [been] provided"). If "just compensation" from a state court were needed to clarify a due process claim, then federal courts would *never* hear pre-deprivation due process claims. But, of course, this is not the case. The

[7] A procedural due process violation gives right to damages specifically for that violation, even when there are no other calculable damages. *Carey v. Piphus*, 435 U.S. 247, 266 (1978). This confirms that a due process violation is an independently justiciable injury.

real issue is not whether a just compensation remedy exists, but whether a due process claim asserts the same injuries and seeks the same relief as a takings claim. *Bowlby*, 681 F.3d at 220. As we have seen, that is not the case here.

The fact that the Garretts' claims arise from a common set of facts related to their "property" loss does not change the foregoing analysis. ""Two or more legal theories may cover the same conduct and a plaintiff is entitled to prove each claim according to its terms."" *Bowlby*, 681 F.3d at 225 (quoting *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 882 F.2d 1398, 1404 (9th Cir. 1989)). The Constitution's framers chose to include multiple and different protections for private property. The Garretts are entitled to raise such provisions individually, and courts are obligated to address each on their merits, not to bundle them up into a single predominate claim. *Id.*; *see also Soldal*, 506 U.S at 70; *see also Presley v. City of Charlottesville*, 464 F.3d 480, 845 (4th Cir. 2006) ("Because the legal elements of a seizure claim and a takings claim differ, there is no danger that one constitutional provision will subsume the other, even if a single set of facts provides the basis for a cause of action under both.").

4. *Rosedale* and *John Corp.* Are Inapposite

The City may rely on *Rosedale* and *John Corp.* for a contrary conclusion. However, those cases are inapposite because the Garretts' allegations and claims differ in important respects from those in *Rosedale* and *John Corp.*

In *Rosedale* and *John Corp.*, the courts read the plaintiffs' due process claims to seek solely monetary damages for their destroyed building. *Bowlby*, 681 F.3d at 225 ("[T]he only calculable damages were the value of the demolished properties."). The *Rosedale* and *John Corp.* courts thus thought that "just compensation" for a taking would give the plaintiffs full relief.

This case is different. As explained above, the Garretts' claims seek equitable relief (to halt the City's attempt to make them pay for the demolition), and personal and economic damages that go beyond the fair-market value of their demolished building. Therefore, unlike in *Rosedale* and *John Corp.*, "just compensation" for a building cannot possibly remedy or describe all the asserted injuries. *See, e.g.*, *Bowlby*, 681 F.3d at 222 (distinguishing *John Corp.* and *Rosedale* and finding a due process claim to be separate from a takings claim because the "potential damages for a due process violation and a takings claim are not necessarily identical"). The Garretts' due process claim accordingly does not fall within the takings analysis which controlled the claims in *Rosedale* and *John Corp*.

Instead, because the Garretts' due process claim is distinct from their takings claim, it is adjudicated according to traditional due process standards, under which a "due process injury is . . . complete at the time process is denied." *Bowlby*, 681 F.3d at 225; *see also G & H Development, L.L.C. v. Benton-Parish Metropolitan Planning Comm'n*, 641 Fed. App'x 354, 356-58 (5th Cir. 2016) (adjudicating a procedural due process claim seeking varied damages and an injunction on the merits). Here, the City denied due process when it failed to provide notice or hearing to the lawful owners, as required, prior to demolition. The Garretts' claim became complete when the City went on to destroy their building. *Burns v. Pa. Dep't of Corr.*, 544 F.3d 279, 284 (3d Cir. 2008) ("[A] procedural due process violation is complete at the moment an individual is deprived of a liberty or property interest without being afforded the requisite process."). While post-deprivation state procedures might exist as an alternative option, they do not present a mandatory federal jurisdictional requirement. *Fuentes*, 407 U.S. at 82 ("[N]o later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred."). In sum, the facts—the completed destruction of property and lack of prior, reasonable notice—raise the issue of whether the Garretts' due process claim is valid, not whether it is justiciable. *Bryan v. City of Madison, Miss.*, 213 F.3d 267, 275 (5th Cir. 2000); *Weinberg v. Whatcom County*, 241 F.3d 746, 753-54 (9th Cir. 2001) (adjudicating a due process claim based on a lack of hearing before revocation of pre-approved development plans).

C. The Fourth Amendment Seizure Claim Is Also Ripe Without Regard for Takings Litigation or for State Remedies Associated With Such Litigation

The Fourth Amendment prohibits the unreasonable seizure of private property. This guarantee applies in the civil, as well as criminal, context. *Soldal*, 506 U.S. at 67.

The Garretts' complaint alleges, consistent with circuit precedent, that the demolition of their building amounts to an unreasonable seizure and Fourth Amendment violation, for which they are entitled to damages under 42 U.S.C. § 1983. *Freeman v. City of Dallas*, 242 F.3d 642, 647, 653-54 (5th Cir. 2001). This claim also ripened when the City demolished their building, *id.* at 647 n.5, without respect to state takings remedies.

1. The *Abbott Labs.* Ripeness Test Does Not Apply to the Claim Here

In concluding that the Garretts need to wait until completion of a state takings suit to ripen their Fourth Amendment claim, the district court appeared to apply a four-part ripeness test drawn from the decision in *Severance*. *Severance* in turn drew from the Supreme Court's decision in *Abbott Labs.*, *Severance*, 566 F.3d at 500 (citing *Abbott Labs.*, 387 U.S. at 149-55). The *Abbott Labs./Severance* ripeness inquiry is misplaced here.

In *Abbot Labs.*, the Supreme Court considered a pre-enforcement challenge to a regulation requiring the labeling of prescription drugs. The suit sought declaratory and injunctive relief. In considering ripeness, the Court began its analysis by noting "the injunctive and declaratory judgment remedies are discretionary, and courts traditionally have been reluctant to apply them to administrative determinations unless these arise in the context of a controversy 'ripe' for judicial resolution." 387 U.S. at 148. It went on to hold that ripeness in this context involved consideration of "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.* at 149. The "fitness" issue itself required consideration of whether the issues were "legal" and whether there was "final agency action." *Id.*

Severance was also a case that involved an equitable relief-seeking challenge to a general policy. *Severance*, 566 F.3d at 500. The plaintiff specifically filed "suit seeking declaratory and injunctive relief to prevent them from enforcing a public easement under the Texas Open Beaches Act" through a "rolling easement doctrine." *Id.* at 492-93. One of the claims was a Fourth Amendment claim. The plaintiff did not seek damages. *Id.* at 494.

This case is nothing like *Abbott Labs.* or *Severance*. It does not challenge a policy enacted prior to an actual injury. It does not seek to enjoin enforcement of general City regulations. The asserted seizure is not only "imminent;" it already happened. And the Garretts conspicuously seek damages. The *Abbott Labs./Severance* test was not designed for this situation. It was designed to address the different circumstances of the *Abbott Labs.* case, *i.e.*, a pre-injury, equitable relief-seeking claim against a new regulation.

2. The Garretts' Claim Ripened When Their Building Was Seized and Destroyed

When there is a completed seizure and allegation of damages, as here, ripeness is not an issue because no further events need to occur before a court can decide if the action violated the Fourth Amendment. *See, e.g.*, *Shanko v. Lake County*, 116 F. Supp. 3d 1055, 1061 (N.D. Cal. 2015) ("As the destruction has not yet occurred, any Fourth Amendment claim for damages premised upon an unlawful seizure is not yet ripe."). All a court has to do is decide whether the seizure was unreasonable, a legal issue. Thus, Fourth Amendment claims seeking damages for a completed seizure are typically litigated on the merits, not analyzed for ripeness. *Soldal*, 506 U.S. at 72; *Freeman*, 242 F.3d at 648, 647 n.5; *Hensley v. Gassman*, 693 F.3d 681, 688-94 (6th Cir. 2012) (adjudicating a seizure of a car with no ripeness issues); *Winters v. Board of County Comm'rs*, 4 F.3d 848, 853-55 (10th Cir. 1993) (adjudicating a seizure of a ring on merits); *Brown v. Metro. Gov't of Nashville & Davidson County, Tenn.*, No. 11-5339, 2012 WL 2861593, at *4 (6th Cir. Jan. 9, 2012)

("Brown's Fourth Amendment claim accrued . . . as soon as Brown had reason to know that MGNDC had demolished his property.").

In the few Fourth Amendment cases that consider ripeness, state court exhaustion requirements, like that found in *Williamson County*, are inapplicable. *Severance*, 566 F.3d at 500 (a seizure claim is "not governed by the *Williamson County* framework"); *Presley*, 464 F.3d at 486-87 (rejecting dissent's contention that a seizure claim was controlled by takings rules, including *Williamson County*'s state exhaustion ripeness concept). The Garretts' Fourth Amendment claim is ripe.

II.

THE GARRETTS' FIFTH AMENDMENT TAKINGS CLAIM IS RIPE WITHOUT EXHAUSTION OF STATE COMPENSATION REMEDIES FOR PRUDENTIAL REASONS

The district court's application of ripeness doctrine to the Garretts' takings claim is also wrong, but for different reasons. In particular, the court applied an improperly strict version of *Williamson County*, and failed to account for prudential factors that render the claim ripe without prior state compensation procedures. The lower court concluded, for example, that *Williamson County*'s state procedures rule can only be waived in the narrow instance when state procedures are inadequate and "almost certainly will not compensate the claimant" ROA.93 (R.E.013) (citing *Rolf v. City of San Antonio*, 77 F.3d 823, 826 (5th Cir. 1996) (citing *Samaad v. City of Dallas*, 940 F.2d 925, 934 (5th Cir. 1991))). This is an outdated and erroneous view. *Rosedale Missionary Baptist Church v. New Orleans City*, 641 F.3d 86, 88-89 (5th Cir. 2011). Courts now consider multiple prudential considerations when deciding whether to enforce *Williamson County*. Here, such considerations justify immediate federal review of the takings claim. *Toloczko*, 728 F.3d at 399.

A. *Williamson County* Is a Discretionary, Prudential Rule

It is true that courts once conceived of *Williamson*'s takings state litigation doctrine as a rigid, jurisdictional bar. But in several recent cases, the Supreme Court and this Court have clarified that this earlier view was wrong. *Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Prot.*, 560 U.S. 702, 710 (2010); *Rosedale*, 641 F.3d at 88-89. *Williamson County*'s state litigation concept is only a prudential doctrine. *Id.*

The development is important because it means that *Williamson County*'s ripeness rules are now largely discretionary. 641 F.3d at 89 (the view "that *Williamson County* ripeness is an unwaivable jurisdictional requirement is no longer good law"); *Sansotta*, 724 F.3d at 545 ("Because *Williamson County* is a prudential . . . rule, we may determine that in some instances, the rule should not apply . . . ."). Courts may decline to apply *Williamson County* for prudential reasons. *Id.*

Put another way, since *Williamson County* is not jurisdictional, federal courts have power to hear a takings claim without prior state litigation. *Horne*, 133 S. Ct. at 2062 n.6 ("A 'Case' or 'Controversy' exists once the government has taken private property without paying for it . . . . [W]hether an alternative remedy exists does not affect the jurisdiction of the federal court."); *Kolton v. Frerichs*, 869 F.3d 532, 534 (7th Cir. 2017). The only question is whether to demand such litigation as an *additional* requirement. In answering, courts often consider the posture of the issues, judicial economy, and basic fairness. *Toloczko*, 728 F.3d at 399; *Quinn v. Board of County Comm'rs for Queen Anne's County, Md.*, 862 F.3d 433, 439 n.1 (4th Cir. 2017) (hearing claim in part to serve "fairness and judicial economy"). Courts will not require procedures for their own sake or when they result in an unfair or piece-meal process. *San Remo Hotel, L.P. v. City & County of San Francisco, Cal.*, 545 U.S. 323, 346 (2005) (ripeness does not require "'resort to piecemeal litigation or otherwise unfair procedures'") (quoting *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 350 n.7 (1986)); *Palazzolo v. Rhode Island*, 533 U.S. 606, 621 (2001) (ripeness does not require "repetitive or unfair" procedures); *id.* at 622 (ripeness does not require submission to procedures "for their own sake").

B. Important Fairness and Judicial Economy Factors Justify Immediate Review of the Garretts' Takings Claim

In this case, prudential considerations weigh heavily in favor of holding the Garretts' takings claim ripe without state court litigation. The claim is concrete, the issues are capable of resolution now, and there is a great risk that unfairness and hardship will result if the court requires state court litigation as a predicate to federal review. Finally, immediate review serves judicial economy and avoids improper piece-meal litigation.

1. The Takings Issues Are Fit for Review Now

At the outset, it is clear that this is not a case challenging a future or hypothetical taking. *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 833 F.2d 583, 586 (5th Cir. 1987) (ripeness bars review if the harm is abstract or hypothetical). Pursuant to City orders, the City destroyed and took the Garretts' building. Thus, unlike in many unripe takings cases, *see Urban Developers LLC v. City of Jackson, Miss.*, 468 F.3d 281, 293-95 (5th Cir. 2006), there is no question that the challenged government action is complete and concrete. Further, the City has not paid compensation, offered it, or pointed to any City mechanism for promptly supplying it. When the Garretts sent the City a letter demanding compensation for the destruction for their building, the City appeared to retaliate by billing the Garretts, a clear indication it does not mean to compensate. The demolition of their building has occurred "without just compensation." Nothing more is needed to create a justiciable case. *Horne*, 133 S. Ct. at 2062 n.6.

2. Requiring State Procedures Will Not Crystalize Any Issue, but Instead Cause Unfairness and Hardship

Given the foregoing, forcing the Garretts to complete state litigation will do nothing to make this controversy more fit for review. This truth is reinforced by the fact that the City can ignore state court judgments, *Newman Marchive Partnership, Inc.*, 979 So. 2d at 1266-70 (state court judgment creditors cannot compel local government to make payment, it must accede to it, and this scheme "provides [] a right without a remedy"), and routinely does so, refusing to pay numerous long-standing damage judgments.[8] Even if the Garretts prevailed in a state takings suit, there is a high risk, given the City's practices, that it would completely ignore a compensation award or substantially delay paying. *Id.* A state court takings suit would likely leave the Garretts where they are now: without compensation. In this context, requiring state litigation serves no meaningful purpose and is unnecessary. *Palazzolo*, 533 U.S. at 623; *see also Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1012 n.3 (1992) ("pointless" procedures not required).

In fact, it would impose tremendous hardship and unfairness on the Garretts to withhold review until they seek compensation in state courts which cannot enforce a judgment against the City. It would force them to go through an expensive and time-consuming process, delaying justice and leaving their property in limbo, for the sake of form, not substance. Ripeness doctrine does not require this. *Opulent Life Church v. City of Holly Springs, Miss.*, 697 F.3d 279, 288 (5th Cir. 2012) (delay and attendant economic consequences constitutes hardship warranting review); *Kruse v. Village of Chagrin Falls, Ohio*, 74 F.3d 694, 700 (6th Cir. 1996) (exempting a property owner from an uncertain state procedure). The Constitution requires a "'reasonable, *certain* and adequate provision for obtaining compensation'" not a theoretical one.[9] *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 124-25 (1974)

---

[8] *See New Orleans still short on what it owes in court judgments, some dating back to 1990s*, The Times-Picayune, Aug. 3, 2017, http://www.nola.com/politics/index.ssf/2017/08/judgments_city_council_mayor.html; *New Orleans owes more than $34 million in legal judgments, has no plan for paying them*, The Times-Picayune, Oct. 30, 2014, http://www.nola.com/politics/index.ssf/2014/10/new_orleans_owes_more_than_34.html.

[9] In the abstract, courts might consider an inverse condemnation action to be an adequate state remedy, but the issue in actual takings cases is whether the procedure is necessary, prudent, and adequate for the particular plaintiff and dispute at hand. The answer here is clearly "no." That does not mean Louisiana's inverse condemnation procedure is always inadequate and unnecessary, but simply that it is so under the circumstances of this case, due to a confluence of prudential factors.

(emphasis added) (quoting *Cherokee Nation v. Southern Kansas R. Co.*, 135 U.S. 641, 659 (1890)).

The City's demonstrated reluctance to pay state court compensation awards is a perfectly understandable and legitimate reason for the Garretts to file their federal takings claim in federal court. It is also a valid prudential basis (one of several here) for this Court to decline to require state court compensation procedures. The federal judicial system was designed to ensure that citizens with constitutional complaints against local entities can obtain an impartial tribunal if and when there is danger that local interests constrain state courts. Declining to apply *Williamson County* in this case, and thereby asserting federal jurisdiction over the Garretts' takings dispute with the City, serves this important interest. *Mitchum v. Foster*, 407 U.S. 225, 242 (1972) (The "purpose of [42 U.S.C. §] 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights . . . ."); *Monroe v. Pape*, 365 U.S. 167, 183 (1961) ("The federal remedy is supplementary to the State remedy, and the latter need not be first sought and refused before the federal one is invoked.").

3. Waiving State Litigation Serves Judicial Economy and Avoids Piecemeal Litigation

Judicial economy concerns also justify exempting the Garretts from *Williamson County* in this case. *See, e.g.*, *Quinn*, 862 F.3d at 439 n.1 (waiving state litigation in part to serve "judicial economy"); *Toloczko*, 728 F.3d at 399 (same). The Garretts' due process and Fourth Amendment claims must remain in federal court because they are ripe independent of the takings claim. It preserves court and litigant resources to retain the takings claim with them, so that all claims are litigated jointly. Conversely, sending the takings claim to state court, while the federal court reviews the Garretts' other claims, results in wasteful, piece-meal litigation, contrary to the principles underlying ripeness doctrine. *San Remo*, 545 U.S. at 346. The Garretts' takings claim is ripe.

The Garretts did not become subject to unique, expensive, and delay-inducing "state court" exhaustion requirements simply because they raised claims related to an invasion of real property. Distinct, developed, and traditional due process and seizure claims related to property rights, like those here, are proper in federal court—as are takings claims which satisfy prudential standards for the exercise of federal review.

CONCLUSION

The Court should vacate the district court's judgment and remand for further proceedings.

DATED: October 20, 2017.

Respectfully submitted,

J. DAVID BREEMER
DEBORAH J. LA FETRA
REGEL L. BISSO, *Of Counsel*

s/ J. David Breemer
J. DAVID BREEMER

Attorneys for Plaintiffs –Appellants

Certificate of Compliance with Type-Volume Limit, Typeface Requirements, and Type-Style Requirements

1. This document complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B) and 5th Cir. R. 32.3, excluding the parts of the document exempted by Fed. R. App. P. 32(f):

[X] this document contains 7,811 words, **or**

[ ] this brief uses a monospaced typeface and contains _____ lines of text.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because:

[X] this document has been prepared in a proportionally spaced typeface using Word 2013 in Century Schoolbook, 14 point font, **or**

[ ] this document has been prepared in a monospaced typeface using [*state name and version of word-processing program*] with [*state number of characters per inch and name of type*].

DATED: October 20, 2017.

s/ J. David Breemer
J. DAVID BREEMER

CERTIFICATE OF SERVICE

I hereby certify that on October 20, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ J. David Breemer
J. DAVID BREEMER