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High Court, With Kavanaugh, Rehears Pa. Takings Dispute

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In *Knick v. Township of Scott*, plaintiff Rose Mary Knick argues she experienced an unconstitutional taking when the township came onto her land, without a warrant, in search of a cemetery. After a state court threw out her suit on procedural grounds, a federal court cited a 1985 decision in concluding it could not hear the case since Knick had failed to obtain an opinion at the state court level.

The high court agreed to take the case in March and first heard it on Oct. 3, 2018, without Justice Kavanaugh, who had yet to be confirmed.

While J. David Breemer of the Pacific Legal Foundation, representing Knick, told Law360 on Wednesday he didn't know why the high court reheard the case, Cato Institute's Trevor Burrus, who filed a brief in support of the plaintiff, told Law360 it's possible the court may have found itself divided 4-4 without Justice Kavanaugh.

Burrus said he also believed the justices felt they needed more clarification on certain points.

Discussion on Wednesday, as it did on Oct. 3, largely centered around a 1985 Supreme Court decision, Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, which says federal courts can only pursue takings claims after a state court has ruled against the plaintiff.

Breemer again argued *Williamson* should be overruled, since, in this case, it has created a situation wherein his client has no jurisdiction.

"Under *Williamson County*, you do not have a federal, Fifth Amendment claim. ... You have no complete compensation entitlement until after state remedies," Breemer said in oral arguments Wednesday. "So the issue is not this court or that court or this agency. It's how are we going to interpret the Fifth Amendment?"

The court, though, expressed concerns that a slew of cases could make their way to federal court if *Williamson County* were reversed.

And Justice Kavanaugh in his questioning repeatedly circled back to the issue of the scope, power and role of state courts.

"I think the implicit premise is that the state courts aren't good enough in protecting rights. Is that because they're not quick enough? Because they're not awarding enough money? Because they're not competent enough?" Kavanaugh asked U.S. Solicitor General Noel Francisco, who argued Wednesday in support of Knick.

Francisco responded by saying Section 1983 of the U.S. Code, which concerns civil rights violations suits against the government, should allow for federal jurisdiction. Knick's claim concerns rights to due process under the Fifth Amendment.

"I don't have any particular criticism ... of state courts today, but Section 1983 was predicated on the Reconstruction-era Congress' judgment that state courts could not be fully entrusted to enforce federal constitutional rights," Francisco said Wednesday. "And that's why they created a dual system where every individual would have a right to access."

Francisco did say that while Breemer argues that a constitutional violation has occurred when a state takes property and doesn't admit it has done so, he believes the federal government in that case must make the determination of whether an unconstitutional taking has occurred.

Teresa Ficken Sachs, arguing for the Township of Scott, said Wednesday that Williamson County should not be overruled because "the underlying principles of Williamson County are what municipalities have relied upon."

Justice Kavanaugh asked Sachs for clarification on that point.

"They've relied upon them by enacting ... regulations, ordinances, statutes, knowing that they cannot be attacked as unconstitutional for failing to provide just compensation," Sachs responded. "Compensation can be requested [at the state level], but the enactments are not rendered unconstitutional by failing to provide just compensation."

Following arguments on Wednesday, Breemer told Law360 he thought the "court was engaged and understands the problems with limiting federal court access for property owners under its 1985 decision in Williamson County."

Sachs could not be immediately reached for comment on Wednesday.

In a statement Wednesday, Knick said "A win for me is a win for all Americans ... [and the case] is about opening the federal courtroom doors so all property owners can fight back when government takes their property without paying for it."

Rose Mary Knick is represented by Deborah La Fetra and J. David Breemer of Pacific Legal Foundation.

The Township of Scott, Pennsylvania, is represented by Teresa Sachs of Marshall Dennehey Warner Coleman & Goggin.

The case is Rose Mary Knick v. Township of Scott, Pennsylvania et al., case number 17-647, in the Supreme Court of the United States.