



Cemetery Case Could Change Path for Property Rights Claims Against Local Governments

Bill Lucia

September 30, 2018

Rose Knick's legal troubles with Scott, Pennsylvania began when the township enacted an ordinance requiring her to grant public access to a cemetery on her 90-acre plot of farmland.

On Wednesday, over five years after she was first declared out of compliance with the local law, the U.S. Supreme Court will hear oral arguments in *Knick v. Township of Scott*. If the court rules in Knick's favor, landowners and others who claim that local governments have infringed on their property rights could gain a clearer path to having their cases heard in federal court.

As it stands, a Supreme Court precedent dictates that legal claims over local government "taking" of property—"takings claims"—are not "ripe" enough to go before the federal judiciary until the aggrieved property owner follows state legal procedures to seek compensation.

"The big question here is: In what court system will takings claims proceed?" said Stewart Sterk, a professor, and director of the Center for Real Estate Law and Policy, at the Benjamin N. Cardozo School of Law at Yeshiva University, in New York.

"In *Knick*, what the plaintiffs are trying to do," he added, "is to assure that landowners in cases like this have a forum in federal court at an earlier stage, before a state court has finally ruled on whether compensation is due and how much that compensation should be."

At the heart of the *Knick* case is the U.S. Constitution's Fifth Amendment, which prevents the government from depriving people of life, liberty, or property, without due process of law. Also in play is Section 1983 of the U.S. Code, which enables people to sue states and localities for constitutional rights violations.

U.S. law does not bar the government from taking private property for public use. But, under the Fifth Amendment, property owners are entitled to "just compensation" in return.

The legal precedent *Knick* calls into question was forged by a 1985 Supreme Court decision in the case *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*.

In that case, the bank owned land in Tennessee it wanted to develop into a residential subdivision, but the planning commission said the subdivision's layout would violate zoning regulations. The bank sued, alleging that the regulations were a "taking" of private property.

The Supreme Court rejected the bank's argument in 7-1 decision. It said action under Section 1983 was not yet ripe for consideration in federal court because the bank hadn't pursued state

level options for obtaining compensation, and that Tennessee law appeared to allow for “inverse condemnation” proceedings—a process to obtain compensation in this particular situation.

“No constitutional violation occurs until just compensation has been denied. The nature of the constitutional right therefore requires that a property owner utilize procedures for obtaining compensation before bringing a 1983 action,” a footnote in the court’s majority opinion says.

Knick’s attorneys, from the libertarian Pacific Legal Foundation, argue that the *Williamson County* state litigation requirement should be overruled and that it “causes great harm to property owners, federal courts, and to the overall development of federal takings law.”

“The requirement entirely bars takings litigants from federal court, frustrates their access to state court, and generally turns an attempt to establish a compensable taking into a chaotic, self-defeating, and wasteful endeavor,” their brief adds.

State and local government groups, including the National Governors Association, the National League of Cities, the U.S. Conference of Mayors and the National Association of Counties, are advocating for the *Williamson County* precedent to be left intact.

Lisa Soronen directs the State and Local Legal Center, which submitted a brief on behalf of those organizations in support of the township. She said disputes like the one in *Knick* often involve state statutes that state judges are more familiar with than their federal counterparts.

“The expertise of the state court, I think, means a good deal to my group,” she said.

Among those backing Knick’s position are advocacy groups with conservative and libertarian views, the National Association of Home Builders and the states of Texas and Oklahoma.

“You don’t have to be a libertarian to believe that this is an egregious double standard that should be gotten rid of,” said Ilya Somin, a law professor at George Mason University who co-authored an amicus brief supporting Knick that the Cato Institute and other groups filed.

“No other part of the Bill of Rights do we treat it this same way,” he added.

The Trump administration weighed in saying property owners who bring constitutional claims against local governments should be able to “vindicate their federal rights” in federal court, and urged the justices to clarify or overrule *Williamson County* to make clear they may do so.

Sterk said there’s a notion among some real estate development lawyers that federal courts provide a more receptive venue than state courts for takings claims. “I’m not sure that’s actually empirically true, but I think that’s what motivates some of this,” he said.

But there’s also a more basic consideration. “Lawyers always would prefer to have a choice of forum,” Sterk said.

Scott township argues Pennsylvania has legal procedures in place for property owners to seek just compensation in takings cases. And it adds that if any taking occurred in the Knick case, “just compensation would be ascertained in the first instance by an established panel of local valuation experts retained by the state court.”

Located north of Scranton, Scott township has about 5,000 residents.

Knick's land, which she lives on, is said to contain a cemetery where some of her neighbors' ancestors are buried, according to court filings. Amid discussions about the burial ground that date back to 2008, Knick emphasized that her land title did not indicate that grave sites were present, and told the township she was not aware of any cemetery.

In late 2012, the township passed a law that said cemeteries had to remain open to the public during daylight hours. The township would later explain that the access requirement meant providing entry to burial grounds on private land from the nearest public roadway. The ordinance also authorized local officials to enter onto private property to determine the existence and location of cemeteries. Violations of the local law were subject to \$300 to \$600 fines.

In April 2013, a local code enforcement officer visited Knick's property and afterwards the township issued a violation under the ordinance, telling her they'd found multiple grave markers on her land and ordering her to make public access to the cemetery possible.

Knick challenged the ordinance in a state court, which declined to rule on her complaint saying it wasn't fit for a decision until the township filed a civil enforcement action against her.

She next took the case to a federal district court. There she alleged the town had violated her rights under the Fifth Amendment, and the Fourth Amendment, which protects against unreasonable searches and seizure. After some legal wrangling, the district court dismissed her takings claims as unripe based on *Williamson County*.

The Third Circuit Court of Appeals reached a similar conclusion and also ruled against her.

In filings with the Supreme Court, Knick's lawyers point out inconsistencies between federal circuit courts about how to apply the *Williamson County* standard.

Her attorneys also argue that takings cases that ripen in state court can be blocked from federal court due to "issue preclusion" rules and other legal guidelines that prevent federal courts from deciding cases that have already been litigated at the state level.

They say that a 2005 Supreme Court case that dealt with these matters—*San Remo Hotel, L.P. v. City and County of San Francisco*—"solidified *Williamson County*'s state litigation ripeness doctrine as a complete barrier to prosecution of federal takings claims in federal court."

Adding another twist to the *Knick* case is that it involves cemetery access.

An amicus brief filed by cemetery law scholars in support of the township argues, among other things, that property that contains human remains is subject to unique legal principles that limit the rights of landowners from excluding others.

"It is a well-established principle of common law," they say, "that once human remains are intentionally placed in real property, such real property and all subsequent owners are burdened by encumbrances in favor of the dead, the kin of the dead, and the public."

State and local governments haven't typically fared well before the Supreme Court in recent years in property rights cases, Soronen noted. She said that she predicts the conservative and liberal justices to be divided in the *Knick* case, with conservatives more likely to be sympathetic to the landowner's arguments.

With contentious confirmation proceedings still underway in the U.S. Senate for Supreme Court nominee Brett Kavanaugh, the court is on track to hear arguments in the *Knick* case with only eight justices sitting on the court. Justices who do not hear oral arguments in a case traditionally do not vote on the decision in that case, raising the possibility of a 4-4 decision.

But Somin, who co-authored the Cato brief, voiced doubts that it would be an even split and suggested some of the liberal justices could be persuaded by *Knick*'s case. The fact that the court took the case at all, he added, is a possible sign that a majority of justices could be interested in reversing or curtailing the precedent set by *Williamson County*.