**No. M2018-00834-COA-R3-CV**

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**IN THE COURT OF APPEALS OF TENNESSEE**
**AT NASHVILLE**

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**HOME BUILDERS ASSOCIATION OF MIDDLE TENNESSEE,**

**Appellant/Plaintiff**

**v.**

**METROPOLITAN GOVERNMENT OF NASHVILLE & DAVIDSON COUNTY,**

**Appellee/Defendant**

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**On Appeal from the Chancery Court of Davidson County, Tennessee Twentieth Judicial District at Nashville**
**WILLIAM E. YOUNG, Case No. 17-386-II**

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# REPLY BRIEF OF THE APPELLANT/PLAINTIFF

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**

**Other Authorities**

**Constitutional Provisions**

## Summary of the Argument

HBAMT's taking claim is not subject to *Williamson County*'s ripeness conditions for four reasons: 1) it is based on the unconstitutional conditions doctrine; 2) it is a facial challenge; 3) it challenges, in part, monetary exactions; and 4) the case is in state court. *Williamson County* does not justify departing from the ordinary rules of ripeness that allow for facial challenges to be brought upon enactment of challenged law.

This Court can easily ascertain that Metro's insistence that HBAMT must satisfy the *Williamson County*'s ripeness conditions before filing its taking claim in state court is wrongly premised on the notion that HBAMT brought a regulatory taking claim. As repeatedly stated, HBAMT asserted a facial exaction claim, *an entirely distinct* constitutional theory. Courts, including the United States Supreme Court, frequently recognize the existence of the unconstitutional condition doctrine and its application to takings claims. Perhaps most perplexing of all, Metro itself recognizes the existence of this doctrine in its table breaking down the "different types of takings doctrines." (Metro Br. at 3.)

The Supreme Court did not abolish the unconstitutional conditions doctrine in *Lingle* as Metro erroneously asserts. In fact, the Court said so in *Lingle* itself even as it overruled its prior (and entirely unrelated) "substantially advances" test. Eight years later, the Supreme Court issued a major takings case affirming the viability of takings claims based on the unconstitutional conditions doctrine. *See Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 607 (2013).

This Court already decided in *Consolidated Waste* that *Williamson County* did not apply to facial taking cases of any kind. Metro unsuccessfully distinguishes *Consolidated Waste* on the grounds that it was a due process challenge to a zoning ordinance. Metro forgets that the reason why this Court ruled that facial due process challenges do not need to be exhausted administratively under *Williamson County* was entirely because facial takings claims can immediately proceed to court. Precedent indicates that *Williamson County* has no sway here.

Moreover, application of *Williamson County*'s ripeness conditions here makes no sense on a number of levels. It makes no sense in an unconstitutionally conditioned taking because the remedy is an injunction removing the impermissible dilemma and not compensation. It makes no sense in the context of a facial challenge because those are based solely on the text of the law. Whether the taking "goes too far" or the city fully compensates the property owner under *Williamson County* are all factors that matter under an actual application of a law in regulatory taking cases, but not when the law is unconstitutional in all its applications. And it makes no sense to apply *Williamson County*'s ripeness conditions in a state court because the whole doctrine is a prudential federal doctrine predicated on concerns for federalism and not prematurely ruling on what could first be resolved at the state level.

Assuming *arguendo* that *Williamson County* could be applied to a facial exaction claim, Metro ignores two independent reasons that justify consideration of these issues. First, it would be futile to ask Metro to not demand the unconstitutional condition because it is required by law.

Second, this case is appropriate for pre-enforcement review because the case is entirely legal and only hardship would await actual enforcement.

Metro's argument that HBAMT needs a private right of action to keep Metro from violating state law is no longer live. HBAMT did not raise state law in this appeal. HBAMT's appeal is entirely based on constitutional grounds – here, 42 U.S.C. § 1983 and the inherent authority to enforce the Constitution provide a cause of action.

Finally, this Court should reject *Williamson County* as a matter of Tennessee law. The doctrine is heavily criticized, even among Supreme Court Justices, as an aberrancy that is hostile to judicial protection of constitutionally protected property rights.

## Argument

### I. Courts frequently recognize facial exactions claims.

It is simply not true that the type of claim asserted by HBAMT no longer exists.[1] HBAMT did not assert a physical taking claim. HBAMT did not assert a regulatory taking claim. And it certainly did not assert a

[1] Notably, Metro concedes as much in the chart it provides in Section III of its brief. (Metro Br. at 3-4.) In citing *Lingle v. Chevron*, 544 U.S. 528 (2005), for the well-established point that the Supreme Court rejected the *Agins v. City of Tiburon*, 447 U.S. 255 (1980), "substantially advances" regulatory takings test, Metro itself acknowledges that the Court "reaffirm[ed] that a plaintiff seeking to challenge a government regulation as an uncompensated taking of private property may proceed . . . by alleging . . . a land-use exaction violating the standards set forth in *Nollan* and *Dolan*." *Lingle*, 544 U.S. at 548.

claim pursuant to the no longer recognized *Agins v. City of Tiburon* "substantially advances" test. Rather, as HBAMT explained in its opening brief, it asserted a facial exactions claim and alleged that the Ordinance violated the unconstitutional conditions doctrine – a claim frequently and still recognized by state and federal courts including the United States Supreme Court as recently as 2013. (Br. at 21; 23-26.) *See also Koontz,* 570 U.S. 595.

On more than one occasion the Supreme Court has emphasized that taking claims based on the unconstitutional conditions doctrine are viable. For example, in *Lingle*, the very case Metro asserts obsoleted HBAMT's claim, the Court stressed that in rejecting the *Agins* "substantially advances" test, it did not repudiate *Nollan* and *Dolan. See Lingle*, 544 U.S. at 545-46. Moreover, the Court distinguished *Nollan* and *Dolan* from *Agins*, and opined that the nexus and rough proportionality tests set forth in *Nollan* and *Dolan* constitute a "special application" of the unconstitutional conditions doctrine. *See Lingle*, 544 U.S. at 530 (referencing *Dolan v. City of Tigard*, 512 U.S. 374 (1994) and *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987)). And it was only five years ago, in *Koontz*, that the Supreme Court applied *Nollan* and *Dolan* to a monetary exaction imposed pursuant to a state law and noted that to do otherwise "would effectively render *Nollan* and *Dolan* dead letter." *Koontz*, 570 U.S. at 607. In so doing, the Court demonstrated the continued viability of such claims.

Despite the trial court and Metro's incorrect assertions that only "public use" taking claims may be asserted as facial claims, courts

frequently recognize facial *Nollan*, *Dolan*, and *Koontz* claims. *See, e.g.*, *Levin v. City & Cty. of S.F.*, 71 F. Supp.3d 1072, 1081-89 (N.D. Cal. 2014) (invalidating tenant relocation fee ordinance under *Nollan* and *Dolan*); *Tower of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d 620, 641 (Tex. 2004)[2] (*Dolan* applied to impact fee ordinance imposing road improvement requirements as a condition to obtain a development permit); *Home Builders Ass'n of Dayton & Miami Valley v. City of Beavercreek*, 729 N.E.2d 349, 355-56 (Ohio 2000) (*Dolan* applied to impact fee ordinance conditioning permit approval on payment of fees); *City of Portsmouth v. Schlesinger*, 57 F.3d 12, 16 (1st Cir. 1995) (same); *Curtis v. Town of S. Thomaston*, 708 A.2d 657, 660 (Me. 1998) (*Dolan* applied to ordinance imposing easement for fire prevention purposes as a condition for subdivision permit approval); *N. Ill. Home Builders Ass'n, Inc. v. Cty. of Du Page*, 649 N.E.2d 384, 397 (Ill. 1995) (*Dolan* applied to state statutes and local ordinances imposing transportation impact fees on new developments); *Manocherian v. Lenox Hill Hosp.*, 84 N.Y.2d 385, 393-94, *cert. denied*, 514 U.S. 1109 (1995) (*Dolan* applied to rent stabilization ordinance).

Further, a close reading of *Nollan*, *Dolan*, and *Koontz* supports recognition of such claims because the permit conditions at issue in all three cases were mandated by acts of general legislation that applied to

[2] HBAMT inadvertently cited *Tower of Flower Mound* as a Tennessee case in its opening brief.

all parcels in the respective jurisdictions.[3] *See Nollan*, 483 U.S. at 827-30 (the unconstitutional permit condition was imposed pursuant to the requirements of a state law); *Dolan*, 512 U.S. at 377-78 (the unconstitutional permit condition was imposed pursuant to the city's development code); *Koontz*, 570 U.S. at 601-02 (the unconstitutional impact fee condition was imposed pursuant to the mandates of a state law). There is nothing in the Ordinance to meaningfully distinguish its permit conditions from those at issue in these seminal Supreme Court cases. All three of the conditions were mandated by acts of general legislation. And all three imposed mandatory conditions on the issuance of development permits. The fact that Metro adopted the condition in advance of any particular permit application is of no significance because "unconstitutional conditions cases have long refused to attach significance to the distinction between conditions precedent and

[3] To say, as the court below did, that *Nollan*, *Dolan*, and *Koontz* involved exactions as to single parcels of land is incorrect. All three cases involved exactions arising pursuant to general legislation that applied to all parcels of land in the respective jurisdictions. Likewise, the challenged exaction in this case applies to all parcels of land in Nashville and Davidson County. Moreover, Metro misses the point in laboring to make a distinction. (Metro Br. at 12.) The point is that the Court did not apply *Williamson County* to *Nollan*, *Dolan*, or *Koontz*. If *Williamson County* applies to unconstitutional conditions cases, then it would have done so in those cases. That they involved individual parcels does nothing to alter that fact.

conditions subsequent." *Koontz*, 570 U.S. at 607 (citing *Frost & Frost Trucking Co. v. R.R. Comm'n of Cal.*, 271 U.S. 583, 592-93 (1926); *S. Pacific Co. v. Denton*, 146 U.S. 202, 207 (1892)).

Thus, while it is true that neither this Court nor the Tennessee Supreme Court have recognized a facial exaction claim, such lack of recognition is simply because neither court has been presented with the opportunity to do so, not because either court has rejected such a claim. It follows that since Tennessee courts interpret the Tennessee Constitution's section governing takings or property in the same manner as the Takings Clause of the Fifth Amendment to the United States Constitution, *Phillips v. Montgomery Cty.*, 442 S.W.3d 233, 244 (Tenn. 2014), that this Court should recognize facial exaction claims.

## II. HBAMT's exaction claim is not subject to the *Williamson County* ripeness conditions.

### A. This Court has already recognized that *Williamson County* does not apply to facial exaction claims.

This Court can quickly conclude that HBAMT could lodge a facial challenge of any type of taking claim on the basis of its prior decision in *Consolidated Waste Systems, LLC v. Metro Government of Nashville & Davidson County*, 2005 Tenn. App. LEXIS 382 (Tenn. Ct. App. June 30, 2005) (no app. filed). This Court expressly found that the *Williamson County* ripeness requirements do not apply to parties facially "challenging the constitutionality of a zoning ordinance" in Tennessee state courts. *Id.* at *97. A straightforward application of this Court's precedent in *Consolidated Waste* means property owners asserting facial challenges need not exhaust administrative remedies because such

avenues would be pointless, even "inappropriate" as administrative agencies may not consider constitutional challenges. *Id.* at *100-01.

*Consolidated Waste* remains the most applicable precedent both from this Court and in this State. To its credit, Metro at least acknowledges that this Court held in *Consolidated Waste* that the *Williamson County* doctrine is inapplicable to facial challenges. (Metro Br. at 11-12.) However, Metro is simply wrong when it argues that the decision applied only to due process and equal protection claims. (*Id.* at 11.) It is true that this Court was directly addressing an argument (also made by Metro, the defendant in that case) that *Williamson County* required exhaustion of facial due process claims. *Consol. Waste*, 2005 Tenn. LEXIS App. 382 at *84-85. What Metro misses is that this Court held that *Williamson County* did not apply to a facial due process claim because it does not apply to facial taking claims. *Id.* at *89 ("First, the requirement that a landowner seek a final decision by the zoning entity . . . does not apply to a facial challenge to a zoning ordinance, even when it is brought as a takings claim.") (emphasis added). The portion of *Consolidated Waste* cited by Metro to support its argument that this Court "noted that the *Williamson County* ripeness requirements are applicable to takings claims," (Metro Br. at 11), was a restatement of the general rule for regulatory takings that preceded this Court's analysis over facial claims and why they are different – not this Court's analysis of the scope of *Williamson County*'s ripeness conditions or holding that such conditions are inapplicable to facial taking claims.

Thus, this Court's opinion in *Consolidated Waste* left no room to argue that its analysis would apply differently to any kind of taking claim: "Consequently, Consolidated's takings claim itself would have been ripe for review to the extent it was based, like its due process claim, on a challenge to the relationship between the ordinances and a valid public interest." *Consol. Waste*, 2005 Tenn. LEXIS App. 382 at *92. This Court's precedent in *Consolidated Waste* establishes that facial challenges of any kind are not subject to *Williamson County*.

### B. The United States Supreme Court has never subjected exaction claims to *Williamson County*'s ripeness conditions.

In its opening brief, HBAMT explained in detail why *Williamson County* does not apply here:[4] 1) this is a facial challenge; 2) this is a taking based on the unconstitutional conditions doctrine seeking equitable relief; 3) this is a case challenging, in part, a monetary exaction;

[4] Metro begins its brief by laying out a table displaying different types of takings. It includes exactions, but also separately lays out regulatory takings. (Metro Br. at 3-4.) Metro then proceeds to argue that "[a] regulatory taking claim is not ripe *until the regulation has been applied* to the property at issue," (*Id.* at 5) (emphasis in original), before then spending the remainder of its brief arguing this point. Yet Metro devotes no attention whatsoever to demonstrating that this is a regulatory taking case, which it is not. This is baffling given that HBAMT repeatedly asserted that this is an unconstitutional conditions taking case, not a regulatory taking. (TR. I at 2-3, 10-11, 15, 91; Br. at 20-26.)

and 4) this is a state court, not a federal one. In short: 1) neither of *Williamson County*'s ripeness conditions apply to facial claims that seek to invalidate a law rather than seek just compensation (Br. at 31-33); 2) *Williamson County*'s state litigation requirement is not applicable to takings claims predicated on the unconstitutional conditions doctrine (facial or as-applied) because such claims seek equitable relief, not monetary damages (Br. at 33-36); 3) *Williamson County*'s ripeness conditions do not apply to challenges of monetary exactions (Br. at 36-37); 4) *Williamson County* applies to regulatory claims brought in federal court, not state courts. (Br. at 29, 34.)

Rather than respond to HBAMT's arguments, Metro simply relies on the trial court's footnote where it noted that it "finds no authority excluding exaction cases from the *Williamson County* and *Phillips* requirements." (Metro Br. at 12.) A brief timeline shows the trial court erred because such authority does exist. In fact, all three of the Supreme Court's cases regarding the "special application" of the unconstitutional conditions doctrine – *Nollan*, *Dolan*, and *Koontz* – are post-*Williamson County* cases. The Supreme Court decided *Williamson County* in 1985, *Nollan* two years later in 1987, *Dolan* nine years later in 1994, and *Koontz* 28 years later in 2013. All three of these post-*Williamson County* cases asserted the exact same claim asserted by HBAMT. And all three were filed in federal court. But notably, none of the cases were dismissed for failure to satisfy the *Williamson County* conditions because, as HBAMT explains in its opening brief, *Williamson County*'s ripeness conditions only apply to regulatory takings claims. (Br. at 20-29.) Thus,

by the very nature of HBAMT's claim, it is excluded from *Williamson County*.

### C. *Williamson County*'s ripeness conditions only apply to regulatory taking claims seeking just compensation.

Applying *Williamson County*'s ripeness conditions to HBAMT's claim simply makes no sense because the remedy for an unconstitutional condition is an injunction, not compensation. Accordingly, HBAMT seeks only equitable relief – a declaration that the Ordinance is unconstitutional and an injunction preventing Metro from applying it. Requiring HBAMT to file a state inverse condemnation proceeding and forcing it to seek monetary damages makes no sense because monetary damages would not remedy the constitutional infirmity here. The remedy is removal of the unconstitutional condition, not money. While compensation may remedy a regulatory taking, it cannot remedy a taking claim based on an unconstitutional condition because local governments cannot put its citizens in this position, period. Only removal of the condition remedies the wrong. Application of *Williamson County* to exaction claims would ultimately result in the continued existence of unconstitutional conditions and unconstitutional laws. It also makes no sense because this is a facial challenge based on the text of the Ordinance itself. The *Williamson County* rules concerning whether an action "goes too far" or whether the local government has fully compensated the property owner do not matter.

Finally, it makes no sense because *Williamson County* is a rule for federal courts regarding when they may hear a taking claim. The *Williamson County* ripeness conditions are supposed to be a totem of

federalism that, obviously, has no bearing on a claim that is brought in state court. This Court recognized as much when it stated: "The requirement that a landowner pursue state remedies for just compensation before bringing a claim based on violation of the Fifth Amendment is a ripeness requirement applicable to *federal* courts." *STS/BAC Joint Venture v. City of Mount Juliet*, 2004 Tenn. App. LEXIS 821, *23 (Tenn. Ct. App. Dec. 1, 2004) (no app. filed) (emphasis added).

Finally, Metro ignores this Court's precedent and overstates the holding and reach of *Wilkins v. Daniels*, 744 F.3d 409 (6th Cir. 2014), when it suggests that the Sixth Circuit held that *Williamson County* applies to all facial taking challenges regardless of the relief sought and regardless of whether the suit is brought in state or federal court. (Metro Br. at 8.) *Wilkins* did no such thing and the paragraph Metro quotes in its brief proves as much. (*Id.*) The facial challenge at issue in *Wilkins* was a just compensation challenge – in other words, a regulatory taking claim. *Wilkins*, 744 F.3d at 417 ("Appellants bring a just-compensation claim."). In finding *Williamson County*'s state litigation requirement applicable to the property owner's taking claim, the court explained, "[w]ith respect to just-compensation challenges, while *Williamson County*'s first requirement may not apply to facial challenges, its second requirement – that plaintiffs must seek just compensation through state procedures – does."[5] (Metro Br. at 8.) (citing *Wilkins*, 744 F.3d at 417)

[5] It is worth noting that *Wilkins* is also inapplicable because the Sixth Circuit was specifically addressing ripeness of taking claims in federal, not state, court. *Id.* at 417. As the Court explained, *Williamson County*'s

(emphasis added). Thus, *Wilkins* is wholly inapplicable to HBAMT's taking claim based on the unconstitutional conditions doctrine which seeks equitable relief, not compensation.

### III. This facial exaction claim is currently ripe for pre-enforcement review and requiring exhaustion through inverse condemnation would be futile even assuming *arguendo* that *Williamson County* could be applied.

Even if Metro was correct that *Williamson County* did, or even could be, applied to a facial exactions claim – and to be clear, it is not correct – it has ignored the two independent bases for this case to proceed. HBAMT argues that this case fits under two exceptions to traditional standing doctrine: futility and pre-enforcement.

First, inverse condemnation would be futile since HBAMT is requesting removal of the unconstitutional condition, not compensation, and the Ordinance requires that builders of rental units "shall" comply. HBAMT developed this argument in depth, explaining how the Ordinance is unconstitutional on its face, without making an application for compensation. (Br. at 40-46.) Metro ignored this argument altogether,

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second prong serves important federalism interests because it requires litigants to address important issues of state policy in state courts. While that point is debatable in its own right, *see Knick v. Twp. of Scott*, 862 F.3d 310 (3rd Cir. 2017), *cert. granted,* 2018 U.S. LEXIS 1541 (U.S., Mar. 5, 2018) (No. 17-647), it shows that even in extending *Williamson County*'s state litigation reach to facial regulatory takings claims, the Sixth Circuit did not extend the reach to claims asserted in state court.

even though the law is well established that traditional exhaustion doctrine includes an exception for when the administrative route would be futile. *See Palazzolo v. Rhode Island*, 533 U.S. 606, 622 (2001) ("ripeness rules do not require submission of further and futile applications with other agencies"); *Cantrell v. Walker Die Casting, Inc.*, 121 S.W.3d 391, 396, n.3 (Tenn. Ct. App. 2003); *see also State ex rel. Jones v. City of Nashville*, 279 S.W.2d 267, 268-69 (Tenn. 1955). And where the party seeking judicial review is raising questions of law, not fact, standing does not require the administrative body first pass on the matter. *See Consol. Waste*, 2005 Tenn. LEXIS App. 382 at *101, n.40. Because the text of the Ordinance requires property owners to provide housing at below market rate, there is nothing an administrative body can do. It must administer the law. It would be futile to request anything else. Ripeness does not demand this pointless step.

Second, Metro additionally ignores HBAMT's pre-enforcement argument as well, which was also related at length. (Br. at 48-53.) Even if the case was not yet ripe because none of HBAMT's members had yet suffered enforcement, the Declaratory Judgment Act was designed to allow for challenges to be brought before harm occurs. *See City of White House v. Whitley*, 979 S.W.2d 262, 265 (Tenn. 1998). Declaratory actions are properly maintained even prior to actual injury when property rights "would be destroyed by the enforcement of the statute." *Erwin Billiards v. Buckner*, 300 S.W. 565, 566 (Tenn. 1927). A case is appropriate for review when it "comes from [a] claimant who faces a choice between

immediately complying with a burdensome law or risk[ing] serious criminal and civil penalties." *West v. Schofield*, 468 S.W.3d 482, 492 (Tenn. 2015) (quotation omitted). An unconstitutional condition always places a person in this dilemma. HBAMT's members must either surrender a constitutional right or not ask for the amendments to the zoning map they need. They do not need to actually choose for this Court to review this largely legal issue.

## IV. HBAMT has a cause of action to enforce the constitution, and it no longer challenges the ordinance as violating state law.

Metro also contends that HBAMT could not challenge its authority to pass an inclusionary zoning ordinance as a matter of state law, because no private right of action authorized it. (Metro Br. 12-16.) This issue, however, is now no longer a live one. In its Complaint, HBAMT raised two claims based on state law. (TR. I at 10-15.) It did not re-raise either in its appeal. Whether HBAMT had a cause of action to challenge a violation of state law is not presently before the Court.

The only issue before the Court is constitutional, and there is no doubt (nor does Metro appear to question) that HBAMT may raise a constitutional claim. First, HBAMT brought the claim under 42 U.S.C. § 1983. (TR. I at 3.) This Court has the power to consider the claims under 42 U.S.C. § 1983. *See King v. Betts*, 354 S.W.3d 691, 707 (Tenn. 2011). Second, HBAMT invoked both the state and federal constitutions and the constitutions provides inherent authority. (TR. I at 10.) A private right of action need not be created by statute; it can also emerge from "some other source." *Thompson v. Thompson*, 484 U.S. 174, 179 (1988). The

Constitution is such a source. This was settled long ago in federal court with the seminal case of *Ex parte Young*, 209 U.S. 123, 152 (1908), and even longer ago by the Tennessee Supreme Court. *See Patten v. City of Chattanooga*, 65 S.W. 414, 420 (Tenn. 1901) ("There is no question as to the jurisdiction of the Chancery Court to restrain municipal ordinances upon the ground that they are beyond the powers conferred upon the municipality, or that they were not passed regularly or according to the forms of law."); *Bradley v. Comm'rs*, 21 Tenn. 428, 432 (1841) (enforcement of an unconstitutional law "is a void exercise of power, which can and must be stopped by the judicial department of the State"); *see also Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827, 850, n.16 (Tenn. 2008) (describing *Ex parte Young* as "one of the three most important decisions the Supreme Court of the United States has ever handed down") (quotations omitted).

The inherent authority of courts to enforce the constitution has existed for centuries. *See, e.g.*, *Lynn v. Polk*, 76 Tenn. 129, 130 (1881); *Mayor v. Winfield*, 27 Tenn. 707 (1848). For obvious reasons, if the courts cannot intercede when localities violate the Tennessee Constitution, then it "is a dead letter." *Bradley*, 21 Tenn. at 432. Accordingly, Tennessee courts may also restrain officers — including Metro here — from executing unconstitutional laws and violating rights and privileges guaranteed by either the U.S. or Tennessee Constitutions.

## V. This Court should formally rule that *Williamson County* is inapplicable to all takings claims brought in state court.

This Court should also substantively address HBAMT's argument that *Williamson County* should not be adopted as a matter of state law, even if it had any applicability in this context.[6] (Br. at 16, n.1.) The *Williamson County* ripeness conditions have come under withering criticism. *See* Michael M. Berger & Gideon Kanner, *Shell Game! You Can't Get There from Here: Supreme Court Ripeness Jurisprudence in Takings Cases at Long Last Reaches the Self-Parody Stage*, 36 Urb. Law. 671, 702–03 (2004) (collecting descriptions such as "unfortunate," "ill-considered," "unclear and inexact," "bewildering," "worse than mere chaos," "misleading," "deceptive," "source of intense confusion," "inherently nonsensical," "shocking," "absurd,"' "unjust," "self-stultifying," "pernicious," "revolutionary," "draconian," "riddled with obfuscation and inconsistency," containing an "Alice in Wonderland quality" and creating "a procedural morass," "labyrinth," "havoc," "mess," "trap," "quagmire," "Kafkaesque maze," "a fraud or hoax on landowners," "a weapon of mass obstruction," "a Catch-22 for takings plaintiffs"). It is the exception to the general rule that federal rights can directly be brought to court without first pursuing state remedies. *See Patsy v. Bd. of Regents*, 457 U.S. 496, 503 (1982). The text of the Fifth Amendment certainly contains no basis for this exceptional treatment. U.S. Const. amend. V. When the Fifth Amendment was incorporated against the states via the Fourteenth Amendment, it did not alter the nature of the constitutional protections secured under the Bill of Rights. The

[6] HBAMT also wishes to preserve its argument that the Supreme Court should overrule *Williamson County*. (Br. at 16, n.1.)

Fourteenth Amendment was conceived as a device to protect the property rights of African Americans and other political minorities against state and local governments. *See* Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction,* 268–69 (1998); *see also* Ilya Somin, *The Civil Rights Implications of Eminent Domain Abuse*, Testimony before the United State Commission on Civil Rights, 5-11 (Aug. 12, 2011) (explaining that minorities suffer disproportionately in the absence of strong property right protections). "Equality in the enjoyment of property rights was regarded by the framers of that Amendment as an essential precondition to the realization of other basic civil liberties which the Amendment was intended to guarantee." *Shelly v. Kraemer*, 334 U.S. 1, 10 (1948).

The Reconstruction Congress designed 42 U.S.C. § 1983 to ensure direct access to the federal courts for any individual seeking to vindicate constitutional rights. *See Briscoe v. Lahue*, 460 U.S. 325, 363–64 (1983) (noting that "[t]he debates over the 1871 Act are replete with hostile comments directed at state judicial systems."). Chief Justice Rehnquist, who joined the original *Williamson County* opinion, voiced his later conclusion that its justifications "are suspect, while its impact on takings plaintiffs is dramatic." *San Remo Hotel, L.P. v. City & Cty. of San Francisco*, 545 U.S. 323, 352 (2005) (Rehnquist, C.J., concurring). He observed that this effect of *Williamson County* was not limited to making the federal court unavailable for takings claims. He noted that some state courts have applied the state-litigation requirement to stop plaintiffs from litigating federal claims even in state court. *See id.* at 351, n.2. For

that reason, he suggested that property owners should be allowed to initiate taking claims in federal court. *Id.* at 349.

Against this backdrop, this Court should simply decline to adopt *Williamson County* as a matter of Tennessee law, especially since *Williamson County* is a federal rule grounded in considerations of state-federal comity. *See id.* at 345. Tennessee courts, of course, have the last word when it comes to matters of Tennessee constitutional rights. *State v. Cox*, 171 S.W.3d 174, 183 (Tenn. 2005) ("We are free to interpret the provisions of our state constitution to afford greater protection than the federal constitution."). Interestingly, the Tennessee Supreme Court has never so much as cited to *Williamson County*, even in *Phillips v. Montgomery County*, when it first recognized regulatory takings. *Phillips*, 442 S.W.3d at 244. This Court has only cited to it four times, most recently in *Consolidated Waste*, in discussing why it held no sway over facial claims.[7] And this Court has never squarely ruled that

[7] In no opinion has this Court held that the *Williamson County* doctrine must be a fixture as a matter of Tennessee law. All were cases involving the application of *Williamson County* for an as-applied taking. *See Universal Outdoor, Inc. v. Tenn. Dep't. of Transp.*, 2008 Tenn. App. LEXIS 558, *24 (Tenn. Ct. App. Sept. 24, 2008) (adjudicating an as-applied taking claim for just compensation) (no app. filed); *see also STS/BAC Joint Venture*, 2004 Tenn. App. LEXIS 821 at *23 (explaining that *Williamson County* was inapplicable to the as-applied taking claim because *Williamson County*'s ripeness conditions apply only to federal court, even though the doctrine may be instructive when a taking claim

*Williamson County* is a procedural requirement for any type of taking claim. This Court is perfectly free to simply rule that it should not apply as a matter of state law, or to overrule its prior precedents to the extent they conflict.

## CONCLUSION

The Court should reverse the ruling of the trial court.

Dated: October 25, 2018

Respectfully submitted,

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brought in state court seeks just compensation); *In re Billing and Collections Tariffs of S. Cent. Bell*, 779 S.W.2d 375, 382 (Tenn. Ct. App. 1989) (citing *Williamson County* for the purpose of supporting the holding that phone rates did not constitute an unconstitutional taking of property).

## CERTIFICATE OF SERVICE

I hereby certify that on October 25, 2018, by filing the foregoing with the Court's electronic filing system, I caused to be served on the following counsel a true and correct copy of the foregoing BRIEF FOR HBAMT AS APPELLANT:

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