July 5, 2000

Senator Orrin G. Hatch, Chairman
U.S. Senate Committee on the Judiciary
Room SD-224, Dirksen Senate Office Building
Washington, D.C. 20510-6275

Dear Senator Hatch:

We are writing to express our view that S 1028, the Citizens Access to Justice Act, and its companion bill, HR 2372, the Private Property Rights Implementation Act, raise serious constitutional concerns under the Supreme Court's current jurisprudence. We are law professors who teach either constitutional law, federal courts, environmental law, or land use, and therefore are familiar with the issues that S 1028 would raise under the Court's recent federalism and separation of powers decisions. We are not taking a position about the wisdom of S 1028, or about the need for and appropriateness of the changes the bill would make to the law. We believe, however, that one important factor in your decision about whether to vote for the bill should be its constitutionality and accordingly wish to address that issue.

S 1028 responds to the Supreme Court's decision in Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172 (1985). *Williamson County* rejected a property owner's claim that the county's denial of its development plans constituted an uncompensated taking in violation of the Fifth Amendment. In the portion of the decision relevant to the constitutionality of S 1028, the Court found that the property owner had not exhausted available state remedies for pursuing compensation before suing in federal court, and held that "if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." 473 U.S. at 195.

The *Williamson County* Court described its "exhaustion of state remedies" requirement as an essential element of the constitutional violation. It noted, for example, that "because the Constitution does not require pretaking compensation, and is instead satisfied by a reasonable and adequate provision for obtaining compensation after the taking, *the State's action here is not 'complete'* until the State fails to provide adequate compensation for the taking." 473 U.S. at 195 (emphasis added). The Court also stated that "[t]he *nature of the constitutional right* therefore requires that a property owner utilize procedures for obtaining compensation before bringing a §1983 action." 473 U.S. at 194 n.13 (emphasis added).

In several more recent cases, the Court has reiterated that exhaustion of available remedies is an essential element of a Fifth Amendment claim.[1] See, e.g., Preseault v. Interstate Commerce Comm'n, 494 U.S. 1, 11 (1990) ("If the government has provided an adequate process for obtaining compensation, and if resort to that process 'yields just compensation,' then the property owner 'has no claim against the Government' for a taking." (internal citations omitted)). The Court's latest discussion of the issue was in City of Monterey v. Del Monte Dunes, 526 U.S. 687, 710 (1999), a case decided after the Senate's last hearings on the issues involved in S 1028. *Del Monte Dunes* addressed whether the property owner was entitled to a jury trial, which turned upon whether its claim was "an action at law within the meaning of the Seventh Amendment." In describing the property owner's claim, the Court again referred to the state remedies requirement as an element of the constitutional claim:

> It [the property owner] was entitled to proceed in federal court under §1983 because, at the time of the defendant city's actions, the State of California did not provide a compensatory remedy for temporary regulatory takings. The constitutional injury alleged, therefore, is not that property was taken but that it was taken without just compensation. Had the city paid for the property or *had an adequate post-deprivation remedy been available, Del Monte Dunes would have suffered no constitutional injury* from the taking alone. See *Williamson*, 473 U.S. at 194-195.

Del Monte Dunes, 526 U.S. at 710 (some citations omitted) (emphasis added).

In light of these precedents, the Court is likely to view S 1028's elimination of the requirement that property owners first seek compensation through available state procedures as an attempt to change the *substance* of the constitutional prohibition on takings without just compensation. Serious questions would then arise about whether S 1028 would exceed Congress' power under Section Five of the 14th Amendment.

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[1] In Suitum v. Tahoe Regional Planning Agency, 520 U.S. 725 (1997), a case that involved *Williamson County's* other ripeness requirement -- that a property owner have received a final decision about how the government will allow the property to be used before seeking compensation -- the Court described both the final decision requirement and the exhaustion of state remedies requirement as "prudential" ripeness hurdles. 520 U.S. at 734 & nn. 7, 8. It went on, however, to then say the opposite -- that the exhaustion of state remedies requirement "stems from the Fifth Amendment's proviso that only takings without "just compensation" infringe that Amendment." Further, both of the competing statements about the exhaustion requirement were *dicta* -- the Court noted at the end of the paragraph that "[b]ecause only the "final decision" prong of *Williamson* was addressed below and briefed before this Court, we confine our discussion here to that issue." 520 U.S. at 734.

The Supreme Court recently has issued several decisions regarding the scope of Congress' power under Section Five. Beginning with City of Boerne v. Flores, 521 U.S. 507 (1997), a challenge to the constitutionality of the Religious Freedom Restoration Act (RFRA), the Court has emphasized that fundamental tenets of federalism as well as principles of separation of powers require that Congress' power to enact legislation under Section Five is limited to "measures that remedy or prevent unconstitutional actions" and does not extend to "measures that make a substantive change in the governing law." 521 U.S. at 519. Congress "does not enforce a constitutional right by changing what the right is. It has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation." Id. Otherwise, the Court noted, "[s]hifting legislative majorities could change the Constitution and effectively circumvent the difficult and detailed amendment process contained in Article V." 521 U.S. at 529.

Although the Court acknowledged in *Boerne* that the line between remedies and substance is not an easy one to draw, it noted that to qualify as "remedial," an act of Congress must evidence "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." 521 U.S. at 520. RFRA failed that test because the legislative history of the Act failed to reveal evidence of a "widespread pattern" of the religious discrimination to which the Act was said to be aimed, and because the Act's provisions were "out of proportion to a supposed remedial or preventive object." 521 U.S. at 532. The "object of valid § 5 legislation must be the carefully delimited remediation or prevention of constitutional violations." College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board, 527 U.S. 666, 672 (1999). Accordingly, "to invoke § 5, Congress must identify conduct transgressing the . . . [Constitution's] substantive provisions, and must tailor its legislative scheme to remedying or preventing such conduct." Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank, 527 U.S. 627, 639 (1999).

Like RFRA, S 1028 would likely fail both parts of that test. The legislative history of the bill (along with its companion legislation in the House) contains evidence that *Williamson County's* requirement that plaintiffs first seek state remedies prevents property owners from litigating all their Fifth Amendment claims in federal court. It contains little or no evidence, however, that state courts routinely or systematically deny compensation to property owners who would receive compensation in federal court. Absent evidence that state courts apply standards for judging whether property has been taken that are different from those applied by federal courts,[2] or that state courts provide remedies for takings that are constitutionally inadequate, the

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[2]What little empirical evidence that exists about whether the state courts differ from federal courts in the way they treat takings cases will not help Congress in overcoming *Boerne*. In "Parity Revisited: An Empirical Comparison of State and Lower Federal Court Interpretations of *Nollan v. California Coastal Commission*," 23 Harv. J.L. & Pub. Pol'y 233, 285 (1999), Brett Christopher Gerry's analysis of the federal and state cases applying an important Supreme Court takings decision concluded "there is no evidence whatever of disparity between the state and

Supreme Court is likely to find, as it did in *Boerne*, that the record does not support concerns that would justify invocation of Section Five's remedial powers.[3]

Indeed, the Court struck down legislation similar to S 1028 in Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank, 527 U.S. 627 (1999). *Florida Prepaid* involved the Patent Remedy Act, which Congress sought to justify (in part) as necessary to prevent States from depriving patent owners of their property without due process of law. The Supreme Court noted that the Fourteenth Amendment's Due Process Clause (like the Fifth Amendment Takings Clause as interpreted by *Williamson County*) is not violated by a State's infringement of a patent:

> Instead, only where the State provides no remedy, or only inadequate remedies, to injured patent owners for its infringement of their patent could a deprivation of property without due process result.

527 U.S. at 643. The Court invalidated the Patent Remedies Act because the primary evidence before Congress "was not that state remedies were constitutionally inadequate, but rather that they were less convenient than federal remedies, and might undermine the uniformity of patent law." 527 U.S. at 644. Likewise, if confronted with S 1028, the Court would be likely to find that "the record at best offers scant support for Congress' conclusion that States were depriving . . . owners of property" without just compensation. 527 U.S. at 646. See also Kimel v. Florida Board of Regents, 120 S.Ct. 631, 650 (2000) (finding that the Age Discrimination in Employment Act exceeded Congress' §5 powers "[i]n light of the indiscriminate scope of the Act's substantive requirements, and the lack of evidence of widespread and unconstitutional age discrimination by the States").

The Court also would likely find that S 1028 was out of proportion to any unconstitutional actions that might be occurring. In *Florida Prepaid*, the Court found that the Patent Remedies Act was disproportionate because "Congress did nothing to limit the coverage of the Act to cases involving arguable constitutional violations, such as where a State refuses to offer any state-court remedy for patent owners whose patents it had infringed. Nor did it make any attempt to confine the reach of the Act by . . . providing for suits only against States with questionable remedies or a high incidence of infringement." 527 U.S. at 646-47. Similarly, S

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federal courts in their interpretations" of the precedent.

[3]We take no position on whether substantial evidence of systemic state court failure to award adequate compensation would be enough to justify a Congressional remedy that allows property owners to sue in federal court in situations in which *Williamson County* would indicate that the Fifth Amendment had not yet been violated. A record of such abuse is necessary for invocation of Section 5 power; we do not address whether it would be sufficient.

1028 sweeps extremely broadly, and applies even to those states well known for being more hospitable to property owners than the federal courts. The Court just recently reaffirmed the importance of tailoring remedies only to those states shown to be responsible for constitutional violations. United States v. Morrison, 120 S. Ct. 1740, 1759 (2000) (holding the Violence Against Women Act was not justified by §5, in part because it "applies uniformly throughout the Nation" even though "Congress' findings indicate that the problem of discrimination against the victims of gender-motivated crimes does not exist in all States, or even most States" in contrast to cases in which the §5 remedy was upheld because the remedy "was directed only to the State where the evil found by Congress existed").

Although not specifically addressed to S 1028, numerous scholarly articles buttress our analysis of the Court's recent Section Five jurisprudence. See, e.g., Ruth Colker, The Section Five Quagmire, 47 UCLA L. Rev. 653 (2000); Christopher L. Eisgruber and Lawrence G. Sager, Congressional Power and Religious Liberty after *City of Boerne v. Flores*, 1997 Supreme Court Law Review 79 (1997); Christopher L. Eisgruber and Lawrence G. Sager, Why the Religious Freedom Restoration Act is Unconstitutional, 69 N.Y.U. L. Rev. 437, 461-68 (1994); Marci A. Hamilton and David Schoenbrod, The Reaffirmation of Proportionality Analysis Under Section 5 of the Fourteenth Amendment, 21 Cardozo L. Rev. 469 (1999). In addition, the only scholarship to focus specifically on the constitutionality of Congress' attempt to eliminate the exhaustion of state remedies requirement imposed by *Williamson County* concludes that the attempt, on the present record, would exceed Congress' power under Section Five. See Max Kidalov and Richard Seamon, The Missing Pieces of the Debate Over Federal Property Rights Legislation, 27 Hastings Const. L.Q. 1 (1999).

Predicting how the Supreme Court will decide a particular case is always difficult, especially on highly controversial subjects about which the Court is divided. We take no position about the merits of the Court's recent jurisprudence, and have confined our analysis to how S 1028 would be likely to fare if the Court adheres to its recent cases. It is our considered judgment that S 1028, if enacted, will face an uphill battle under existing caselaw. Because one of the advantages being claimed for the bill is its potential for reducing litigation, the prospect of serious constitutional challenges should raise questions both about the appropriateness of enacting legislation that ignores cases like *Boerne* and about the bill's ability to deliver that advantage.

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