November 15, 2006

The Honorable Patrick Leahy
Chairman Designate
Judiciary Committee
U.S. Senate
433 Russell Senate Office Building
Washington, D.C. 20510

The Honorable Arlen Specter
Chairman, Judiciary Committee
Judiciary Committee
U.S. Senate
711 Hart Senate Office Building
Washington, D.C. 20510

Dear Senators Leahy and Specter:

We are writing to express our view that H.R. 4772, the *Private Property Rights Implementation Act of 2005*, raises serious constitutional concerns by seeking to rewrite the Fifth Amendment to the Constitution so as to change the balance of power the Constitution strikes between state and local governments and those who claim that the regulation of their property constitutes a "taking." We are law professors who teach constitutional law, federal courts, environmental law, land use or property law, and therefore are familiar with the constitutional issues that H.R. 4772 would raise if enacted. We believe that one important factor in your consideration of this bill should be its constitutionality, and accordingly have directed our comments to that issue.

Sections 2, 3, and 4 of H.R. 4772 respond to the Supreme Court's decision in Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172 (1985). *Williamson County* interpreted the Fifth Amendment to require that a property owner who claims that a state or local land use or environmental regulation has taken his property in violation of the Fifth Amendment must use any remedial mechanisms provided by the state before filing a claim in the federal courts. The Court 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 the more than twenty years since *Williamson County* was decided, the Court has rejected numerous attempts by the property rights bar to reverse *Williamson County*, and has reiterated time and time again that the exhaustion of available state remedies is an essential element of a Fifth Amendment claim. See, e.g., MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 351 (1986); Presault v. Interstate Commerce Comm'n, 494 U.S. 1, 11 (1990); City of Monterey v. Del Monte Dunes, 526 U.S. 687, 710 (1999); San Remo Hotel, L.P. v. City & County of San Francisco, 545 U.S. 323 (2005).

In light of the Court's firm and consistent holdings that the Constitution is not violated unless and until the property owner claiming a taking has sought and been denied compensation through the mechanisms the state has established for addressing such claims, the Court is likely to view H.R. 4772's elimination of the exhaustion of state remedies requirement as an attempt to change the *substance* of the constitutional protection afforded private property owners.

In a series of cases beginning with City of Boerne v. Flores, 521 U.S. 507 (1997), the Supreme Court has made clear that fundamental tenets of federalism as well as principles of separation of powers dictate that Congress "may not supersede this Court's decisions interpreting and applying the Constitution." Dickerson v. United States, 530 U.S. 428, 437 (2000). Otherwise, the Court has noted, "[s]hifting legislative majorities could change the Constitution and effectively circumvent the difficult and detailed amendment process contained in Article V." *Boerne*, 521 U.S. at 529; see also Board of Trustees of University of Alabama v. Garrett, 531 U.S. 356, 365 (2001)**.**

Congress has remedial powers under Section Five of the 14th Amendment to *enforce* the Constitution, of course. The Court tests whether Congress is attempting to supersede the Court's interpretation of the Constitution or is appropriately exercising its remedial powers by examining whether the challenged statute exhibits "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Boerne*, 521 U.S, at 520. 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).

Sections 2, 3 and 4 of H.R. 4772 likely would fail that test. The legislative history of the bill contains no evidence that state courts routinely or systematically deny compensation to property owners who would receive compensation in federal court.

Absent significant evidence that state courts apply standards for judging whether property has been taken that are different from those applied by federal courts, or that state courts provide remedies for takings that are constitutionally inadequate, the Supreme Court is likely to find that Congress has overstepped its authority and is attempting to overrule the Supreme Court's interpretation of the Fifth Amendment. See Max Kidalov and Richard H. Seamon, The Missing Pieces of The Debate Over Federal Property Rights Legislation, 27 Hastings Const. L.Q. 1 (1999) (concluding that earlier versions of H.R. 4772 would fail the first prong of the test).

Indeed, the Court struck down legislation similar to H.R. 4772 in *Florida Prepaid*. At issue there was the Patent Remedy Act, which Congress justified as necessary to prevent States from depriving patent owners of their property. The Supreme Court noted that the Constitution is not violated by a State's mere 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 then invalidated the Patent Remedy 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 . . . ." 527 U.S. at 644. Likewise, the evidence advanced before Congress for H.R. 4772 relates to how property owners' litigation in federal court has been delayed by the requirements of *Williamson County*, and about how property owners would prefer to have the opportunity to shop for the most convenient and favorable forum. Congress has not received significant evidence that state courts are failing to adequately protect property owners' rights. The Court accordingly is likely to see Sections 2, 3 and 4 of H.R. 4772 not as a remedy for widespread constitutional violations, but instead as an attempt by Congress to rewrite the Constitution to give property owners greater power against state and local governments seeking to enforce environmental and land use regulations.

Sections 5 and 6 of H.R. 4772 are even more blatant efforts to overrule several of the Court's decisions interpreting the confines of the Fifth Amendment, and thus are inconsistent with the principles articulated in *Boerne* and its progeny. Subsection (1) of each section is confusingly worded, but appears to declare that the demanding tests the Supreme Court imposed upon ad hoc exactions of physical easements in Nollan v. California Coastal Commission, 483 U.S. 825 (1987), and Dolan v. City of Tigard, 512 U.S. 374 (1994), must be applied to *any* condition upon development, including impact fees and conditions mandated by general legislation. The Court has rejected that expansion of *Nollan* and *Dolan*, see Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 547 (2005) and *Dolan*, 512 U.S. at 391 n. 8.

Subsection (2) seeks to overcome the Supreme Court's repeated refusals to allow property owners to segment their holdings to exaggerate the effect of a regulation that allows development on some portions of the land but not on others (such as wetlands).

The Court has insisted that property must be viewed as a whole. See, e.g., Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, 535 U.S. 302, 327 (2002). H.R. 4772 would trump the Court's interpretation by allowing property owners to subdivide their land and claim that they should receive compensation for any lot on which regulations prohibit development, even if they are able to build on the vast majority of the parcel as a whole.

Subsection (3) attempts to force the courts to judge complaints that an action violates due process according to whether the action "is arbitrary, capricious, an abuse of discretion, *or otherwise not in accordance with law*" (emphasis added). The federal courts have refused to allow every violation of state or local law to give rise to a federal due process challenge. In City of Cuyahoga Falls, Ohio v. Buckeye Community Hope Foundation, 538 U.S. 188, 198 (2003), the Court rejected a developer's claim that the city violated due process by refusing to issue a building permit, noting that the refusal "in no sense constituted egregious or arbitrary government conduct." The circuit courts have split over the standard to be applied to property owners' due process claims. Some circuits require that the government's action must "shock[] the conscience," see, e.g., United Artists Theatre Circuit, Inc. v. Township of Warrington, 316 F.3d 392 (3d Cir. 2003); others require that the government conduct be "truly irrational." Chesterfield Development Corp. v. City of Chesterfield, 963 F.2d 1102, 1104 (8th Cir. 1992). None allow the mere fact that a government official has violated state or local law to constitute a violation of due process. See, e.g., Baker v. Coxe, 230 F.3d 470, 474 (1st Cir. 2000) (a mere violation of the law cannot constitute a violation of the Due Process Clause because the protections of due process must "observe a marked difference between the inevitable misjudgments, wrongheadedness, and mistakes of local government bureaucracies and the utterly unjustified, malignant and extreme actions of those who would be parochial potentates").

The wisdom of H.R. 4772's policy judgments in each of these three areas is controversial, to say the least. Our concern is more fundamental. The irony of H.R. 4772 is that it is billed as an attempt to "expedite access" to federal courts for injured property owners, but it will instead cause enormous confusion, false starts, and delay as it is challenged, and likely overturned, as an improper attempt to over-rule the Court's takings decisions and change the very meaning of the Fifth Amendment. We urge you to reject the bill.

Sincerely,

Names of 100 signatories attached. The affiliations of all signatories are given for the purposes of identification only.

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