Case No. 02-1504

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

FRANKLIN P. KOTTSCHADE,

Appellant,

v.

CITY OF ROCHESTER**,**

Appellee.

On Appeal From The United States District Court
District Of Minnesota
District Court Civil No. 01-898 ADM/AJB
The Honorable Ann D. Montgomery

BRIEF OF *AMICI CURIAE* LEAGUE OF MINNESOTA CITIES, NATIONAL LEAGUE OF CITIES, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION IN SUPPORT OF APPELLEE CITY OF ROCHESTER

TIMOTHY J. DOWLING
CHIEF COUNSEL
COMMUNITY RIGHTS COUNSEL
1726 M STREET, NW SUITE 703
WASHINGTON, DC 20036
(202) 296-6889

Attorney for *Amici Curiae*

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INTEREST OF *AMICI CURIAE*

Amici's members include local governments and local officials throughout the United States. As noted in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), local officials "have long engaged in the commendable task of land use planning." *Id.* at 396. We thus bring a vital perspective to regulatory takings issues and have submitted *amicus* briefs in many takings cases. *E.g., Tahoe-Sierra Preserv. Council, Inc. v. Tahoe Reg'l Planning Agency*, 122 S. Ct. 1465 (2002); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001). *Amici* have a compelling interest in the continued uniformity in the law regarding the appropriate forum for takings claims against local officials.

All parties have consented to the filing of this brief.

INTRODUCTION

This is a simple case. The District Court dismissed Kottschade's federal takings claim by applying a nearly twenty-year-old precedent -- *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985) -- which holds 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." *Id*. at 195. Under *Williamson County*, claimants must be denied compensation in state court before asserting a federal takings claim. *Id*. at 194-97.

Williamson County's state-court requirement is based on the language and structure of the Takings Clause itself: "[B]ecause 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." *Id*. In so ruling, the *Williamson County* Court relied on precedent stretching back more than a century. *Id.* at 194 (citing *Hurley v. Kinkead*, 285 U.S. 95 (1932); *Cherokee Nation v. Southern Kansas Ry. Co.*, 135 U.S. 641 (1890)). The Supreme Court repeatedly has reaffirmed *Williamson County*'s state-court mandate,[1] and this Court has invoked *Williamson County* as recently as this year.[2]

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[1] *E.g., Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 734 (1997) ("'[I]f 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.'") (quoting *Williamson County*); *Preseault v. ICC*, 494 U.S. 1, 11 (1990) ("'If the government has provided an adequate process for obtaining compensation, and if resort to that process 'yield[s] just compensation,' then the property owner 'has no claim against the Government for a taking.'") (quoting *Williamson County*); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 312 n.6 (1987) ("Our cases have also required that one seeking compensation must 'seek compensation through the procedures the State has provided for doing so' before the claim is ripe for review.") (quoting *Williamson County*); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 128 (1985) ("[S]o long as compensation is available for those whose property is in fact taken, the governmental action is not unconstitutional.") (citing *Williamson County*).

[2] *United States v. Kornwolf*, 276 F.3d 1014, 1016 (8th Cir. 2002) ("[I]f just compensation is received [in state court] then no claim exists against the Government.") (citing *Williamson County*); *Carpenter Outdoor Adver. Co. v. City*

Kottschade contends that *City of Chicago v. International Coll. of Surgeons*, 522 U.S. 156 (1997), "axiomatically modifies" (Br. 14) and "ineluctably changed" (Br. 24) the requirements of *Williamson County*. This reading is untenable for three reasons. First, *College of Surgeons* does not even cite *Williamson County*, much less eviscerate its requirements. The Supreme Court rarely modifies its cases so obliquely. *See Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000) ("This Court does not normally overturn, or so dramatically limit, earlier authority *sub silentio*.").

Second, as demonstrated by the District Court's opinion and the City's brief, the reasoning and holding of *College of Surgeons* in no way modify *Williamson County*'s state-court mandate.

Third, the Supreme Court reaffirmed *Williamson County*'s state-court requirement after *College of Surgeons*. In language that could not be clearer, the Court stated that a federal court "cannot entertain a takings claim under § 1983 unless or until the complaining landowner has been denied an adequate postdeprivation remedy." *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*,

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of Fenton, 251 F.3d 686, 690-91 (8th Cir. 2001) ("Carpenter's claim based on the Just Compensation Clause of the Fifth Amendment fails because '[t]he general rule is that a plaintiff must seek compensation through state procedures before filing a federal takings claim.'") (quoting *Von Kerssenbrock-Praschma v. Saunders*, 121 F.3d 373, 379 (8th Cir.1997)); *McKenzie v. City of White Hall*, 112 F.3d 313, 317 (8th Cir. 1997) (under *Williamson County,* "the plaintiff must seek compensation from the state before proceeding to federal court").

526 U.S. 687, 721 (1999); *accord id*. at 710 ("Had the city paid for the property or had an adequate postdeprivation remedy been available, Del Monte Dunes would have suffered no constitutional injury from the taking alone.") (citing *Williamson County*).[3]

So straightforward is this case, and so baseless the appeal, that we hesitate to burden the Court with this submission. We do so because of the overriding need for continued uniformity regarding the appropriate forum for regulatory takings lawsuits against local governments.

The City's brief demonstrates that the District Court properly applied *Williamson County*. We supplement the City's submission in several ways. In Section I, we show that *Williamson County* does not unfairly "discriminate" against landowners. Section II demonstrates that this appeal is little more than an attempt to revive the failed legislative agenda of the national developers' lobby, which twice unsuccessfully sought to have the U.S. Congress eliminate *Williamson County*'s requirements. In Section III, we show that Kottschade's reliance on the so-called Takings Retreat Report is misplaced. Finally, we conclude with a request that this Court, on its own motion, exercise its discretion under 28 U.S.C. § 1912

[3] *Williamson County*'s other core holding -- which requires regulatory action to be final before a takings claim is ripe (473 U.S. at 186-94) -- was reaffirmed just last year with no suggestion that any portion of *Williamson County* had been modified. *See Palazzolo*, 533 U.S. at 618-26.

and Rule 38 of the Federal Rules of Appellate Procedure to impose just damages and double costs for this frivolous appeal.

ARGUMENT

I. KOTTSCHADE HAS NO "ABSOLUTE RIGHT" TO LITIGATE HIS PURPORTED "FEDERAL CLAIM" IN FEDERAL COURT.

A. Kottschade Has No Federal Takings Claim Because He Has Not Sought and Been Denied Compensation in State Court.

Because Kottschade and his *amici* take such liberties with it, we begin by reiterating the central holding in *Williamson County*: "[I]f 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. This ruling recognizes that the Takings Clause -- "nor shall private property be taken for public use, without just compensation" -- is different in kind from most other constitutional provisions. *Id.* at 196 n.14 (discussing "the special nature" of the Takings Clause). The Takings Clause does not prohibit government action like the First and Fourth Amendments, but merely conditions certain government action on the payment of just compensation. *Id.* at 194. "The nature of the constitutional right therefore requires that a property owner utilize [state] procedures for obtaining compensation before bringing a 1983 action." *Id*. at 194 n.13.

Kottschade spends considerable rhetorical energy arguing that every person with a federal claim has an absolute right to litigate that claim in federal court. This argument not only is wrong (*see* Section I.B, below), but also misses the whole point of *Williamson County*, which is that until a landowner is denied just compensation in state court, there is no violation of the federal Just Compensation Clause, and there is no federal constitutional claim.

Kottschade's developer *amici* cite "surveys" purportedly showing that federal courts frequently dismiss takings claims. Developer *Amicus* Br. at 14-15. These surveys contain many flaws, but suffice it to note that in the overwhelming majority of the cases considered in those surveys, the takings claimant sued in federal court without first seeking compensation in state court. *See* S. Rep. No. 105-242, at 42-43 (1998) (minority views) (analyzing distortions in the survey statistics cited by NAHB), *available at* http://www.communityrights.org/SR105-242.pdf. The surveys merely reflect the recalcitrance of certain developers who refuse to comply with *Williamson County*'s clear mandate. The only surprise is that the dismissal rate was not closer to 100 percent. *Cf. River Park, Inc. v. City of Highland Park,* 23 F.3d 164, 165 (7th Cir. 1994) ("Federal courts are not boards of zoning appeals. This message, oft-repeated, has not penetrated the consciousness of property owners who believe that federal judges are more hospitable to their

claims than are state judges. * * * Litigants who neglect or disdain their state remedies are out of court, period.").

B. There is No Absolute Right to Litigate a Federal Claim in Federal Court.

It is highly inaccurate for Kottschade and his developer *amici* to suggest that takings claimants are the only litigants with potential federal claims who are sent to state court. Other federal constitutional claimants regularly are required to litigate those claims in state court or state administrative tribunals. *See SGB Fin. Servs., Inc. v. Consolidated City of Indianapolis-Marion County*, 235 F.3d 1036, 1038 (7th Cir. 2000) ("*Williamson County* is just one among many federal doctrines routing suits to state court."). For example, state prisoners must exhaust administrative remedies before challenging prison conditions under the Eighth Amendment. *See Porter v. Nussle*, 534 U.S. 516 (2002) (unanimous) (§ 1983 claim that the claimant was severely beaten in violation of the Eighth Amendment is subject to statutory exhaustion requirements). Strict exhaustion requirements apply to state convicts seeking habeas relief under any federal constitutional provision. *E.g., Duncan v. Walker*, 533 U.S. 167 (2001) (requiring exhaustion through state supreme court discretionary review). Even death row inmates must exhaust state remedies prior to presenting federal constitutional claims in federal court. *E.g.*, *Tigner v. Cockrell*, 264 F.3d 521, 526 (5th Cir. 2001) (refusing to

consider a death row inmate's federal constitutional claim for failure to exhaust state remedies).

There also are countless examples in civil proceedings. In *Winters v. Lavine*, 574 F.2d 46, 69-72 (2d Cir. 1978), the court abstained from hearing a First Amendment claim that a New York statute violated the claimant's free exercise rights until a state court could construe the law in a parallel proceeding. In *Manney v. Cabell*, 654 F.2d 1280, 1284-85 (9th Cir. 1980), abstention was appropriate on a federal constitutional claim alleging that a juvenile facility forced detainees to sleep on the floor and offered inadequate medical care because state court review might have obviated the need to decide the federal constitutional claim. In *Tiger Inn v. Edwards*, 636 F.Supp. 787, 790-91 (D.N.J. 1986), the court declined to hear free association claims of certain clubs because state law left open a pivotal threshold issue. One federal appeals court has noted the similarities between *Williamson County*'s state-court mandate and the Tax Injunction Act, 28 U.S.C. § 1341. *See SGB Fin. Servs.*, 235 F.3d at 1038. *Williamson County* itself drew support from civil due process rulings that require resort to state processes prior to filing a federal constitutional claim. *See Williamson County*, 473 U.S. at 195 (discussing *Parratt v. Taylor*, 451 U.S. 527 (1981) (claimant alleging deprivation of property through a random and unauthorized act by a state employee

must pursue available postdeprivation processes before filing a federal due process claim)).

In these and other cases, federal courts abstain where resort to state courts might make it unnecessary to reach a federal constitutional question. These rulings implement a principle analogous to the concept that drives *Williamson County*'s state-compensation mandate, namely, that federal courts should defer to state court adjudication where the state court ruling might allow the federal court to avoid a determination that the state violated the federal constitution.

Even where preclusion doctrines apply, the Supreme Court has made clear that there is no absolute right to litigate federal claims in federal court. In *Allen v. McCurry*, 449 U.S. 90 (1980), a criminal defendant unsuccessfully raised a Fourth Amendment issue in state court and subsequently brought an action in federal court under § 1983 to recover damages for the alleged violation. The Supreme Court ruled that the state court's rejection of the allegation precluded relitigation of the matter in federal court under the federal "full faith and credit" statute. In rejecting the argument that every federal claimant has the right to appear in federal court, the *Allen* Court wrote:

> [T]he authority for this principle is difficult to discern. It cannot lie in the Constitution, which makes no such guarantee, but leaves the scope of the jurisdiction of the federal district courts to the wisdom of Congress. And no such authority is to be found in § 1983 itself. * * * There is, in short, no reason to believe that Congress intended to provide a person claiming a federal right an unrestricted opportunity

> to relitigate an issue already decided in state court simply because the issue arose in a state proceeding in which he would rather not have been engaged at all.

Allen, 449 U.S. at 103-04 (footnotes omitted).[4]

In sum, the straightforward application of *Williamson County* results in no discrimination against landowners, and it violates no purported absolute right to litigate federal claims in federal courts. Kottschade will have no cognizable federal takings claim against the City until a state court denies compensation.

II. THIS COURT SHOULD REJECT THE NATIONAL DEVELOPER LOBBY'S REQUEST TO RESURRECT ITS FAILED LEGISLATIVE AGENDA.

The National Association of Home Builders (NAHB) is listed on the cover of Kottschade's brief as providing him with legal representation. NAHB's website and press releases have trumpeted this case, vowing to take it "all the way to the U.S. Supreme Court if necessary." *See* http://www.nahb.org/news/kottschade.htm.

[4] Kottschade might try to distinguish *Allen* by arguing that unlike takings claimants (who are required by the Fifth Amendment first to seek compensation in state court), the criminal defendant in *Allen* was not compelled to raise the Fourth Amendment issue in state court. The *Allen* Court assumed just the opposite, however, noting that "it is difficult to imagine a defendant risking conviction and imprisonment [by not raising the issue in state court] because he hoped to win a later civil judgment based upon an allegedly illegal search and seizure." *Id*. at 104 n.23. Thus, although the criminal defendant in *Allen* was effectively compelled to raise the issue in state court, the *Allen* Court held that he was precluded from relitigating the issue in federal court.

It should come as no surprise that NAHB is playing such a prominent role. From 1997 to 2000, NAHB lobbied heavily for a federal bill designed to eliminate *Williamson County*'s state-court mandate and radically alter its finality ripeness requirement. NAHB lawyers proclaimed the measures -- designated as H.R. 1534, S. 1204, S. 1256, and S. 2271 in the 105th Congress, and as H.R. 2372 and S. 1028 in the 106th Congress -- as NAHB's "main legislative initiatives." John J. Delaney and Duane J. Desiderio, *Who Will Clean Up the "Ripeness Mess"? A Call for Reform So Takings Plaintiffs Can Enter the Federal Courthouse*, 31 Urb. Law. 195, 195 (1999).

The NAHB bill was designed to shift the balance of power in land-use negotiations by allowing developers to threaten expensive, time-consuming federal court litigation far earlier in the land-use process. Under the measure, a developer could pressure local officials to accede to unreasonable demands rather than face the substantial cost of defending against federal court litigation. As noted by Senate opponents of the bill, 90 percent of American municipalities have less than 10,000 people and cannot afford a full-time municipal lawyer. *See* S. Rep. No. 105-242, at 44-45 (1998) (minority views), *available at* http://www.communityrights.org/SR105-242.pdf. As a result, deep-pocket developers often have a huge advantage over local officials in small towns, and the NAHB bill would have added to this unfairness by allowing developers to threaten

an immediate, expensive lawsuit in what is often a distant, unfamiliar federal court. *Id.* The former President of NAHB candidly called the bill a much-needed "hammer to the head" of state and local officials. *See* National Journal's CongressDailyAM (March 14, 2000). Senate Judiciary Committee Chair Patrick Leahy condemned the measure as blatantly special interest: "In my 23 years [in the Senate], I've rarely seen anything so arrogantly special interest as this. * * * [The bill] wouldn't pass the smell test in any town in America." Glenn P. Sugameli, *"Takings" Bills Threaten People, Property, Zoning, and the Environment*, 31 Urb. Law. 177, 179-180 (1999) (citing sources).

The NAHB bill generated widespread opposition. The Judicial Conference of the United States, chaired by Chief Justice William Rehnquist, concluded that it "would alter deeply ingrained federalism principles by prematurely involving the federal courts in property regulatory matters that have historically been processed at the state and local levels." S. Rep. No. 105-242, at 56-57. The Conference of Chief Justices, representing the highest courts of all 50 states, strongly opposed the bill because it "would drastically change the traditional state and federal roles in 'takings' cases and upset the balance of our federal system in an area that is fundamentally a state and local matter." *Id*. at 56. The U.S. Department of Justice expressed serious constitutional concerns with the bill because the state-court compensation requirement "is based on the fifth amendment itself" and thus not

subject to legislative change. *Id*. at 49, 56. Other opponents of the bill included the National Governors Association, 40 state Attorneys General, the American Planning Association, major religious groups, labor organizations, environmental groups, and virtually every national group that represents local governments.

Bill opponents stressed that a dramatic revision of *Williamson County*'s requirements would undermine informed decisionmaking, a point recently reiterated by the Supreme Court in *Tahoe*: "[I]t is the interest in informed decisionmaking that underlies our decisions imposing a strict ripeness requirement on landowners asserting regulatory takings claims." *Tahoe*, 122 S. Ct. at 1488. Although the rationale has particular application to *Williamson County*'s finality ripeness requirement, it applies to the state-court mandate as well by allowing state courts to sort out state land-use issues before a federal court is required to rule on a federal takings claim.

Due to its inherent flaws and widespread opposition, the NAHB measure never made it to the Senate floor for a vote on the merits, failing in the 105th Congress on a motion to proceed on July 13, 1998. *See* Sugameli, 31 Urb. Law. at 192-193. In the 106th Congress, the bill died in a Senate committee. *See* http://thomas.loc.gov (search "bill status" for S. 1028 in the 106th Congress).

Having lost in two successive Congresses, NAHB now seeks to advance the same illegitimate agenda in this Court. NAHB fails to disclose, however, that its

arguments to this Court are diametrically opposed to those it made in support of its takings bill. During the legislative debate, there was no suggestion by NAHB or its allies that *College of Surgeons* somehow modified *Williamson County*. Indeed, any such suggestion would have rendered unnecessary those portions of the bill that purported to abolish *Williamson County*'s state-court requirement. The 1998 Senate Report on the bill, which summarizes NAHB's arguments in favor of the bill, does not even mention *College of Surgeons*, but instead proceeds on the assumption that both requirements of *Williamson County* -- its finality ripeness ruling and its state-court mandate -- are binding precedent. S. Rep. No. 105-242 at 8 ("A takings plaintiff must meet both [*Williamson County*] requirements before the case will be considered ripe for Federal adjudication.").

In a law review article touting the bill, NAHB lobbyists discuss *College of Surgeons* but never suggest that it modified *Williamson County.* Delaney & Desiderio, 31 Urb. Law. at 198-200. To the contrary, they acknowledge that even after *College of Surgeons*, *Williamson County* requires "that a property owner must first exhaust state compensation remedies prior to receiving a federal hearing on the merits of a taking." *Id*. at 197 & n.9 (citing *Williamson County*).

This Court should decline the invitation to revive NAHB's failed legislative agenda in this appeal and should reject the suggestion that *College of Surgeons*

somehow modified *Williamson County*, a position that NAHB contradicted throughout the legislative debate.

III. THE "TAKINGS RETREAT" OFFERS NO SUPPORT TO KOTTSCHADE'S REQUEST THAT THIS COURT DISREGARD *WILLIAMSON COUNTY*.

Kottschade relies (Br. at 29-30) on a 1999 Takings Retreat Report reproduced in TAKING SIDES ON TAKINGS ISSUES (Thomas E. Roberts ed., 2002) [hereinafter "TAKING SIDES"]. This reliance is misplaced for at least two reasons.[5]

First, as noted in the introduction to the report, "[t]he Retreat did not advocate change in the essentials of the *Williamson County* ripeness requirements" because "[t]here was no consensus on such changes." TAKING SIDES at 570. In fact, the portion of the report quoted by Kottschade supports the City's position, plainly stating that "under *Williamson*, a plaintiff cannot also sue for a takings in federal court." *Id.* at 574. Nothing in the report suggests that the Supreme Court has modified *Williamson County* or that federal appeals courts should disregard it.

Second, the ABA Section on State and Local Government Law, which co-sponsored the retreat, refused to ratify the report. TAKING SIDES states that "the Section did not endorse or adopt the retreat report" and "[t]hus, the retreat report

[5] For the sake of full disclosure, we note that the signatory of the instant brief attended the retreat and was a vocal critic of the report. Because they fail to do so, we further note that Kottschade's attorneys, Michael Berger and Gideon Kanner, were on the retreat organizing committee and voted in favor of the report.

should not be cited as reflecting the position of the ABA or the ABA Section of State and Local Government." *Id*. at 567.

In fact, the report provoked a firestorm of protest, resulting in letters of strong opposition by the International Municipal Lawyers Association (IMLA), the National League of Cities, the National Association of Counties, the U.S. Department of Justice, the American Planning Association, and many others, with much of the condemnation focusing on the report's treatment of *Williamson County*. *See* TAKING SIDES at 569 ("The initial Retreat report stirred a great deal of controversy."), *id*. at 581, 583 (setting forth IMLA's opposition to the report, which "strongly cautions against ABA endorsement or even involvement" because "[t]he ABA should not associate itself with controversial proposals designed to advance the agendas of special interests.").

The retreat report failed to reflect a consensus. An ABA Section leader explained that "[t]he original idea of the retreat was to try to develop a consensus that would lead to a proposal to clarify and improve the law governing takings. But this has not occurred." Minutes of the May 5, 2000 ABA Section Council Meeting, *available at* http://www.communityrights.org/ABAMinutes.asp. Rather than approve the report, the Section instead solicited additional analyses of takings issues, essays that now comprise the bulk of TAKING SIDES. So emphatic was the

Section's refusal to ratify the report that it declined to make the report the lead article in TAKING SIDES, relegating it instead to mere Appendix status:

> Tom Roberts [then the Section's Communications Director] pointed out that the retreat report should not serve as a lead article of such a book. He argued that the report is one-sided, pro-developer, and insufficient to set an agenda for considering the takings issue. Instead the report should be seen as a catalyst for the publication. [Then-ABA Section Chair] Sholem Friedman commented that this was the intent of the Executive Committee.

See Minutes of the May 5, 2000 ABA Section Council Meeting (emphasis added), *available at* http://www.communityrights.org/ABAMinutes.asp.

Although Kottschade describes the retreat as "composed of members with diverse backgrounds" (Br. 29), it excluded key constituencies. Invitations were not extended to the Judicial Conference, the Conference of Chief Justices, the National League of Cities, the National Association of Counties, the state Attorneys General, or many other groups that opposed the NAHB takings bill. *See* TAKING SIDES at 578-80 (listing participants). On the other hand, the NAHB bill's principal lobbyist, its chief academic proponent, and other vocal bill supporters participated in the retreat, as did the Pacific Legal Foundation, one of the most pro-developer groups in the country. *See* TAKING SIDES at 570 (noting NAHB's presence), 578-80 (listing participants). The ABA's leadership noted the disparity and expressed concern "about the outcome in terms of the representativeness of the group." Minutes of the May 5, 2000 ABA Section Council Meeting, *available at*

http://www.communityrights.org/ABAMinutes.asp; *see also* Timothy J. Dowling, *Weighted Scales at ABA*, July 26, 1999, Nat. L. J., at A26, *available at* http://www.communityrights.org/NLJ.asp.

In short, the retreat produced a one-sided, pro-developer report that failed to reflect a consensus among ABA Section members and thus failed to secure Section endorsement. The report is irrelevant to the instant case and offers no support to Kottschade's baseless contentions.

JUST DAMAGES AND COSTS

We ask this Court, on its own motion and after a reasonable opportunity for Kottschade to respond, to exercise its discretion under 28 U.S.C. § 1912 and Rule 38 of the Federal Rules of Appellate Procedure to assess just damages, including the City's attorneys fees and expenses, plus double costs.

This appeal is frivolous. Kottschade argues that controlling U.S. Supreme Court precedent (*Williamson County*) has been somehow modified by an intervening decision (*College of Surgeons*), even though the intervening decision does not cite the controlling precedent, and even though the Supreme Court has since reaffirmed the controlling precedent (*Del Monte Dunes*). Kottschade asks this Court to "reconcile" *Williamson County* and *College of Surgeons,* but as shown by the City and the District Court, there is nothing to reconcile. As the City notes (Br. 34), Kottschade would have this Court "reconcile" *Williamson County*'s

state-court mandate out of existence. This is not reconciliation, but defiance. *Compare Saltany v. Reagan,* 886 F.2d 438, 440-441 (D.C. Cir. 1989) (imposing sanctions where controlling Supreme Court precedent barred the claim). [6]

Kottschade improperly fails to cite controlling precedents of this Court (*see* note 2, citing cases), including cases decided as recently as this year. *Compare Denison v. Commissioner of Internal Revenue,* 751 F.2d 241, 242-243 (8th Cir. 1984) (sanctions appropriate where established precedent contradicted appellant's position); *Giannopoulos v. Brach & Brock Confections, Inc.,* 109 F.3d 406, 412 (7th Cir. 1997) (sanctions appropriate where brief failed "to acknowledge the long list of [Circuit] precedents that are directly contrary to the positions he has taken in this appeal"); *DeSisto Coll., Inc. v. Line*, 888 F.2d 755, 766 (11th Cir. 1989)

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[6] Alternatively, almost in passing, Kottschade (Br. 20-21) offers a bizarre reading of *Williamson County*, suggesting that it requires claimants to seek compensation through state administrative processes, but not through state courts. The *Williamson County* Court, however, expressly required the claimant to pursue remedies available in "Tennessee state courts" through state inverse condemnation proceedings. *Williamson County*, 473 U.S. at 196 (citing Tennessee code provisions and rulings recognizing state-court remedies). Kottschade cites no support for its strange reading of *Williamson County*, nor could he. *See, e.g.*, *SGB Financial Services*, 235 F.3d at 1038 (Under *Williamson County*, "there is no federal wrong unless the state judicial system is unavailable."); *Saboff v. St. John's Water Mgmt. Dist.*, 200 F.3d 1356, (11th Cir. 2000) (*Williamson County* "requires potential federal court plaintiffs to pursue any available state court remedies that might lead to just compensation prior to bringing suit in federal court for a taking claim."); *San Remo Hotel v. City and County of San Francisco*, 145 F.3d 1095, 1102 (9th Cir. 1998) ("Field has not filed an inverse condemnation action in state court, and therefore has not been denied compensation by California.").

(affirming sanctions where appellant violated its duty to acknowledge "that the binding precedent of this Circuit disfavored [its] position").

Kottschade also improperly fails to respond to the most salient points of the well-reasoned District Court ruling. Instead, he mischaracterizes the District Court's opinion, stating that the District Court concluded that *Williamson County* and *College of Surgeons* "were in conflict" but nonetheless chose "to ignore the more recent decision." Appellant's Opening Brief at i. The District Court did not view the rulings as in conflict, but instead stressed that "[n]o language in the *College of Surgeons* case operates to alter prior law regarding federal question jurisdiction in federal courts, or the exhaustion requirement for takings claims." *Kottschade v. City of Rochester*, 2002 WL 91641, at *4 (D. Minn. 2002). The District Court gave extensive reasons for its conclusion that, "[a]s a mater of law, *College of Surgeons* simply does not overrule" *Williamson County* (*id.*), reasons that are not seriously discussed by Kottschade. Kottschade's mischaracterization of the District Court's ruling and his wholesale failure to attempt any kind of meaningful response underscores the frivolous nature of this appeal. *Compare Maristuen v. National States Ins. Co*., 57 F.3d 673, 680 (8th Cir. 1995) (awarding attorney fees and double costs under Rule 38 where the district court ruling was "wholly in conformance with applicable law"); *In re Nordbrock*, 772 F.2d 397, 400 (8th Cir. 1985) (awarding attorneys fees and costs because the appeal was

unjustified in light of "the district court's thorough and well-reasoned opinion considering and rejecting the principal authorities relied on by [the appellant]").

In considering an award of just damages under Rule 38, it is also relevant to observe that this appeal is simply one part of a multi-forum campaign against a binding precedent that NAHB and its allies do not like. As noted above in Section II, the NAHB offensive began in the U.S. Congress in the 1990s, where NAHB twice failed to secure legislative modification of *Williamson County*.

Supporters of the NAHB bill also wrote an *amicus* brief in *Suitum* asking the U.S. Supreme Court to overrule *Williamson County*'s state compensation prong. *See* Brief *Amicus Curiae* of the American Planning Association [APA] in Support of Respondent, 1997 WL 9062, at *23-*26 (1997) (Appellee's Appendix ("AA.") at 154-55). Not only did *Suitum* reaffirm *Williamson County* (*Suitum,* 520 U.S. at 734), but the APA subsequently repudiated the brief in a letter to the House Judiciary Committee because the brief did not accurately reflect its views. *See* Delaney and Desiderio, 31 Urb. Law. at 197 n.8 (discussing the APA's repudiation). NAHB again cited the APA brief in its *amicus* filing in *Palazzolo*, prompting yet another disavowal by the APA. *See* Brief of the American Planning Association, et al., 2001 WL 15619, at *12 n.3 (2001) (AA. 167).

NAHB shifted the battleground to the American Bar Association, where it failed to secure the ABA's ratification of recommendations concerning *Williamson*

County. Despite the ABA's refusal to approve the retreat report, NAHB and Kottschade continue to rely on it here.

Nor have federal appeals courts been spared. In *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 882 F.2d 1398 (9th Cir. 1989), *reversed in part on other grounds*, 75 F.3d 1311 (9th Cir. 1996), one of Kottschade's attorneys asked the court to decline to apply *Williamson County*'s state-compensation prong to takings cases involving physical invasions. The Court resoundingly rejected this argument, stating: "Even in physical takings cases, compensation must first be sought from the state if adequate procedures are available." *Id*. at 1402 (applying *Williamson County*) (Kozinski, J.).

Time and again, the developers' lobby has been rebuffed. Time and again, the Supreme Court, federal appeal courts, and others have made clear that *Williamson County* remains good law. After each defeat, the developers' lobby shifted ground to mount a new baseless attack. This is not only frivolity, but frivolity run amok. *Compare Knipe v. Skinner,* 999 F.2d 708, 710 (2d Cir. 1993) (imposing sanctions where appellants' counsel had lost similar appeals and thus could not "seriously claim surprise concerning the ample grounds supporting a motion to dismiss"); *Tomczyk v. Blue Cross & Blue Shield United of Wisconsin*, 951 F.2d 771, 777 (7th Cir. 1991) (imposing sanctions for a baseless appeal that was "just one strand in a tangled web" of arguments made by the same attorneys).

For the municipal groups on this brief that helped defeat passage of the NAHB bill and ABA ratification of the Retreat Report, this appeal is a very unpleasant walk down memory lane, largely involving the same cast of characters. The appeal plainly is a waste of this Court's and the City's time and resources. We thus respectfully ask the Court, on its own motion, to make an appropriate award of the City's attorneys fees and other damages and double costs under 28 U.S.C. § 1912 and FRAP 38. Given Kottschade's untenable reading of *College of Surgeons* and its failure even to cite binding precedent of this Circuit, it is difficult to imagine a stronger case for sanctions.[7] Without a signal that these tactics will not be countenanced, we fully expect to relitigate this same meritless issue in the other federal courts. This Court should make clear that binding precedent from the Supreme Court and federal appeals courts should not be so blithely ignored.[8]

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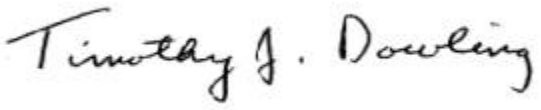
[7] Space limitations preclude a point-by-point listing of all the frivolous assertions in Kottschade's brief. By way of example, consider Kottschade's statement (Br. 24 n.19) that this Court "presaged" Kottschade's reading of *College of Surgeons* in *Nemmers v. City of Dubuque*, 764 F.2d 502 (8th Cir. 1985). As the *Nemmers* Court noted, however, *Williamson County* was pending before the Supreme Court when *Nemmers* was decided. *Id*. at 505 n.2 (noting the grant of certiorari in *Williamson County*). Moreover, the issues in *Nemmers* had nothing to do with the case at bar. *Id*. at 504-06. *Nemmers* presages nothing of significance to this case.

[8] If Kottschade wanted to preserve the issue in order to ask the Supreme Court to reconsider *Williamson County*, the proper procedure would be to acknowledge that *Williamson County* and other binding precedent control the issue in this Court. *E.g.*, *United States v. Berrios-Centeno*, 250 F.3d 294, 297 n.2 (5th Cir. 2001) (noting that the appellant recognizes that an issue has been resolved against him by Supreme Court precedent and simply "raises this issue in order to preserve it for

CONCLUSION

This Court should summarily affirm the District Court's judgment and, on its own motion, impose just damages (including the City's attorneys fees) and double costs.

Respectfully submitted,



Timothy J. Dowling
Chief Counsel
Community Rights Counsel
1726 M Street NW
Suite 703
Washington, D.C. 20036
202-296-6889

June 14, 2002

Attorney for *Amici Curiae*

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further review by the Supreme Court"). A desire to preserve an issue for further review does not justify a frivolous reading of the case law or disregard of this Court's precedents.

CERTIFICATION OF COMPLIANCE

Pursuant to Rules 29 and 32(a)(7)(B) and (C) of the Federal Rules of Appellate Procedure and Eighth Circuit Local Rule 28A, I certify that the foregoing Brief of *Amici Curiae* League of Minnesota Cities, National League of Cities, and International Municipal Lawyers Association in Support of Appellee City of Rochester was prepared using Microsoft Word 97 and contains a total of 5881 words, excluding items listed in Fed. R. App. P. 32(a)(7)(B)(iii). The diskette accompanying this brief contains the full text of the brief and has been scanned for viruses and is virus-free.

June 14, 2002

Timothy J. Dowling

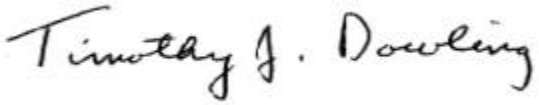
Timothy J. Dowling

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief of *Amici Curiae* League of Minnesota Cities, National League of Cities, and International Municipal Lawyers Association in Support of Appellee City of Rochester, as well as a 3.5 inch computer diskette (scanned for viruses and virus-free) containing the full text of the brief, were served via first class mail, postage prepaid, this 14th day of June, 2002 on the following:

Clifford M. Greene 333 South Seventh Street, Suite 1700 Minneapolis, MN 55402	Attorney for Appellee The City of Rochester
Michael M. Berger Berger & Norton 12121 Wilshire Blvd., Suite 1300 Los Angeles, CA 90025	Attorney for Appellant Franklin P. Kottschade
John J. Delaney Linowes & Blocher LLP 1010 Wayne Avenue Silver Spring, MD 20910	Attorney for *Amici Curiae* in Support of the Appellant Franklin P. Kottschade

Pursuant to Rule 25(d)(2) of the Federal Rules of Appellate Procedure, I certify that the foregoing brief is being mailed to the clerk of the court by first class mail, postage prepaid on this 14th day of June, 2002.



Timothy J. Dowling