8/11/11

No. 11-189

In the
Supreme Court of the United States

COLONY COVE PROPERTIES, LLC, a Delaware limited liability company,

Petitioner,

v.

CITY OF CARSON, a municipal corporation; and CITY OF CARSON MOBILEHOME PARK RENTAL REVIEW BOARD, a public administrative body,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This case involves a regulatory takings claim brought under the Fifth Amendment and 42 U.S.C. § 1983. The Ninth Circuit Court of Appeals upheld the district court's dismissal of the claim, holding that Petitioner is required to seek a remedy for the taking through the California state courts, rather than the federal courts, pursuant to *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). The Ninth Circuit reached this conclusion even though it recognized that California does not offer a remedy of inverse condemnation to plaintiffs like Petitioner, who assert a violation of their Fifth Amendment rights through the application of a confiscatory rent control ordinance. The questions presented are:

1. Should *Williamson County* be overruled, to the extent that it arbitrarily denies a federal forum to regulatory takings claimants seeking just compensation for the violation of their rights under the Fifth Amendment, contrary to the intention of Congress in enacting Section 1983?

2. Should this Court recognize an exception to *Williamson County*'s "state procedures" requirement for takings claimants like Petitioner, whose Fifth Amendment claims will otherwise be relegated to a California state court system that does not recognize or provide a remedy of just compensation for their injuries?

LIST OF ALL PARTIES

All parties to this proceeding are named in the caption of the case.

CORPORATE DISCLOSURE STATEMENT

Colony Cove Properties, LLC, is wholly owned by El Dorado Palm Springs, L.P., and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF ALL PARTIES ii

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES vi

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE 2

STATEMENT OF THE CASE 2

Colony Purchases a Mobile Home Park and Attempts To Establish Profitable Operations 3

The District Court Dismisses Colony's Section 1983 Claim, Citing *Williamson County* 4

The Ninth Circuit Affirms 5

REASONS FOR GRANTING THE WRIT 6

ARGUMENT 6

TABLE OF CONTENTS—Continued

Page

I. ABSTAINING FROM ADJUDICATING FIFTH AMENDMENT TAKINGS CLAIMS UNDER *WILLIAMSON COUNTY*, AS THE NINTH CIRCUIT DID IN THIS CASE, WRONGFULLY DEPRIVES PLAINTIFFS OF A FEDERAL FORUM, CONTRARY TO THE INTENT OF CONGRESS IN ENACTING SECTION 1983 6

A. As It Is Currently Applied, *Williamson County* Is Not a Prudential Ripeness Doctrine, but a Species of Ad-Hoc Federal Abstention Lacking Any Doctrinal Rationale Comparable to Those Underlying This Court's Formal Abstention Doctrines 7

B. Abstaining from Hearing a Claim Asserting the Violation of an Express Constitutional Right, with No Persuasive Doctrinal Rationale for Doing So, Negates the Very Purpose of Section 1983 12

II. IN THE ALTERNATIVE, CERTIORARI SHOULD BE GRANTED TO CLARIFY THAT FEDERAL COURTS MAY NOT ABSTAIN FROM ADJUDICATING FIFTH AMENDMENT TAKINGS CLAIMS WHEN THE STATE COURTS DO NOT PROVIDE AN INVERSE CONDEMNATION REMEDY 14

CONCLUSION 19

TABLE OF CONTENTS—Continued

Page

APPENDIX

Decision of the United States Court of Appeals for the Ninth Circuit, decided March 28, 2011 . . . . . App. A

Order of Dismissal of the United States District Court for the Central District of California, dated November 24, 2009. . . . . App. B

City of Carson Municipal Code Section IV, Chapter 7: Mobilehome Space Rent Control . . . . . App. C

City of Carson Mobilehome Park Rental Review Board Resolution No. 2008-256, dated August 6, 2008 . . . . . App. D

TABLE OF AUTHORITIES

Page

Cases

Abbott Laboratories v. Gardner,
387 U.S. 136 (1967) 4-5

Carson Harbor Village, Ltd. v. City of Carson, 353 F.3d 824 (9th Cir. 2004) . 4, 15, 17-18

Colony Cove Properties, LLC v. City of Carson, 640 F.3d 948 (9th Cir. 2011) 1

Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976) 9

Fair Assessment in Real Estate Ass'n, Inc. v. McNary, 454 U.S. 100 (1981) 10

Galland v. City of Clovis,
16 P.3d 130 (Cal. 2001) 13-14, 16

Kavanau v. Santa Monica Rent Control Board, 941 P.2d 851 (Cal. 1997) . . . 13, 16

Lingle v. Chevron USA,
544 U.S. 528 (2005) 6

Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959) 9

Mitchum v. Foster, 407 U.S. 225 (1972) 12

Monroe v. Pape, 365 U.S. 167 (1961), *overruled on other grounds by Monell v. Dep't of Soc. Servs.,* 436 U.S. 658 (1978) 13

Patsy v. Bd. of Regents, 457 U.S. 496 (1982) . . 12-13

San Remo Hotel v. City and County of San Francisco, 545 U.S. 323 (2005) 2, 5-8, 10-11

TABLE OF AUTHORITIES—Continued

Page

Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection, __ U.S. ___; 130 S. Ct. 2592 (2010) 7

Suitum v. Tahoe Regional Planning Agency, 520 U.S. 725 (1997) 7

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Younger v. Harris, 401 U.S. 37 (1971) 9

United States Constitution

U.S. Const. amend. V. 2, 9

Miscellaneous

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Page

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PETITION FOR WRIT OF CERTIORARI

Petitioner Colony Cove properties, LLC (Colony), respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit, entered in the above-entitled proceedings on March 28, 2011.

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals is reported as *Colony Cove Properties, LLC v. City of Carson*, 640 F.3d 948 (9th Cir. 2011), and is reproduced at Appendix A to this Petition. The order of the United States District Court granting the City of Carson's motion to dismiss is unreported, and is reproduced at Appendix B to this petition.

JURISDICTION

The district court had jurisdiction to review this case pursuant to 28 U.S.C. § 1331. The decision of the Ninth Circuit Court of Appeals was entered on March 28, 2011. Petition Appendix (App.) A-1. On June 17, 2011, Justice Kennedy granted Petitioner's timely application to extend the time within which to file the petition to August 11, 2011. No. 10A1192. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The Fifth Amendment to the United States Constitution provides in pertinent part: "[P]rivate property [shall not] be taken for public use without just compensation."

The City of Carson's Mobilehome Space Rent Control Ordinance, as codified at Chapter 7 of the Carson Municipal Code, is reproduced as Appendix C to this petition.

The Resolution of the City of Carson Mobilehome Park Rental Review Board, dated August 6, 2008, rendering a final administrative determination of Colony Cove's application for a general rent increase, is reproduced as Appendix D to this petition.

STATEMENT OF THE CASE

Under *Williamson County Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), plaintiffs who have suffered an uncompensated taking of property may not assert their Fifth Amendment rights in federal court until they have pursued just compensation through state procedures. *Id.* at 194-95. But once plaintiffs comply with this prescription and seek compensation for the taking in state court, their claim will normally be barred from further litigation in the federal courts. *San Remo Hotel v. City and County of San Francisco,* 545 U.S. 323 (2005). Thus, although *Williamson County* was couched in terms of a ripeness doctrine, it is in fact a species of federal abstention that

has evolved piecemeal over two decades, with no doctrinal rationale comparable to those supporting this Court's more formally established abstention rules. This case squarely presents the conflict between *Williamson County*'s ad-hoc abstention doctrine and the fundamental policy objective of 42 U.S.C. § 1983—ensuring a federal forum for claims of deprivation of federally guaranteed civil rights by the actions of state and local governments.

Colony Purchases a Mobile Home Park and Attempts To Establish Profitable Operations

In 2006, Colony purchased the Colony Cove Mobile Estates mobile home park in the City of Carson (City). App. A-5. The City's Mobilehome Space Rent Control Ordinance (Ordinance) restricts the rent Colony may charge tenants for occupying spaces in its park. The Ordinance initially fixed rents in the park in 1979, does not allow rents to be increased when tenants move out of the park, and does not provide for automatic rent increases to offset inflation. The effect of rent regulations of this type is to transfer part of the value of the underlying land to the park's tenants, who can capture this "placement value" when they sell their mobile homes. *See* Werner Z. Hirsch & Joel G. Hirsch, *Legal-Economic Analysis of Rent Controls in a Mobile Home Context: Placement Values and Vacancy Decontrol*, 35 UCLA L. Rev. 399 (1988); Diehang Zheng, *et al.*, *An Examination of the Impact of Rent Control on Mobile Home Prices in California*, 16 J. Housing Econ. 209 (2007).

The year after it acquired the park at fair market value, in October, 2007, Colony for the first time applied to the City's Mobilehome Park Rental Review

Board (Rent Board) for a general rent adjustment sufficient to allow profitable operation of the property. App. A-7 - A-8. Ten months later, the Rent Board acted on Colony's application by approving rent increases of approximately 6% of the amount Colony had requested. App. A-8; App. D. Because this disposition left Colony no way to avoid incurring large annual losses, Colony filed the present action in federal district court under 42 U.S.C. § 1983, alleging, *inter alia*, that the Rent Board's actions violated Colony's federal constitutional rights under the Takings Clause of the Fifth Amendment. App. A-9.

The District Court Dismisses Colony's Section 1983 Claim, Citing *Williamson County*

The district court granted the City's motion to dismiss Colony's federal constitutional claims. In particular, Colony's as-applied takings claim was dismissed as "unripe" because Colony had not sought just compensation through California state procedures, pursuant to *Williamson County*. App. B-13 - B-18. The district court understood that Colony would not have been permitted to file an inverse condemnation action in California state court. App. B-14. But the court held that California's so-called *Kavanau* procedure—whereby Colony could return to the Rent Board to re-apply for the same rent increase that had previously been denied—was an "adequate" means of obtaining just compensation, within the meaning of *Williamson County*. App. B-14 - B-18. Although the court recognized that dismissal under *Williamson County* is prudential, rather than jurisdictional, App. B-18, it failed to analyze any of the determinants of prudential ripeness. *See Abbott Laboratories v.*

Gardner, 387 U.S. 136 (1967). Rather, Colony's Section 1983 claim for the violation of its federal constitutional rights was simply relegated to the California courts "to allow the State the opportunity to evaluate Plaintiff's claims and determine if compensation is warranted." App. B-18.

The Ninth Circuit Affirms

On appeal, the Ninth Circuit affirmed the dismissal of Colony's Fifth Amendment takings claim under *Williamson County*. Like the trial court, the appellate panel recognized that inverse condemnation is no longer available to California takings claimants in Colony's position. App. A-18. Instead, as the court recited, the only remedy available in the California courts pursuant to *Kavanau* "involves filing a writ of mandamus in state court and, if the writ is granted, seeking an adjustment of future rents from the local rent control board"—*i.e.*, the very agency charged with violating Colony's civil rights in the first place. App. A-18. Without considering whether this procedure can be deemed a "reasonable" or "certain" method of obtaining just compensation, as required by *Williamson County* itself, 473 U.S. 194, the Ninth Circuit merely noted that "the *Kavanau* adjustment process provides 'an adequate procedure for seeking just compensation,'" App. A-18 (citations deleted). To underscore this point, the court added that any "argument that California's *Kavanau* adjustment process is inadequate is foreclosed by the law of this circuit." App. A-20.

Colony now petitions this Court to resolve a question of extreme nationwide importance: whether the time has come to reconsider *Williamson County*'s de facto abstention doctrine, as urged by four Justices

of this Court in *San Remo*, 545 U.S. at 352 (Rehnquist, C.J., concurring). Alternatively, Colony petitions this Court to determine whether California's *Kavanau* procedure satisfies *Williamson County*'s mandate of a "reasonable, certain, and adequate provision for obtaining compensation" as a precondition for relegating Fifth Amendment takings claims brought under Section 1983 to the state courts. *Williamson County*, 473 U.S. at 194.

REASONS FOR GRANTING THE WRIT

On occasion, a would-be doctrinal rule or test finds its way into our case law through simple repetition of a phrase—however fortuitously coined.[1]

ARGUMENT

I

ABSTAINING FROM ADJUDICATING FIFTH AMENDMENT TAKINGS CLAIMS UNDER *WILLIAMSON COUNTY*, AS THE NINTH CIRCUIT DID IN THIS CASE, WRONGFULLY DEPRIVES PLAINTIFFS OF A FEDERAL FORUM, CONTRARY TO THE INTENT OF CONGRESS IN ENACTING SECTION 1983

[1] *Lingle v. Chevron USA*, 544 U.S. 528, 531 (2005).

A. As It Is Currently Applied, *Williamson County* Is Not a Prudential Ripeness Doctrine, but a Species of Ad-Hoc Federal Abstention Lacking Any Doctrinal Rationale Comparable to Those Underlying This Court's Formal Abstention Doctrines

In *Williamson County*, 473 U.S. 172, this Court held that a regulatory takings claim was not ripe for adjudication in federal court because "respondent did not seek compensation through the procedures the State has provided for doing so." *Id.* at 194. The text of *Williamson County* repeatedly describes this "state-procedures" requirement as a means of *ripening* a claim for subsequent federal adjudication. *See id.* ("not yet ripe"); *id.* at 195 (federal claim is "premature," not yet "complete"); *id.* at 197 ("until [the plaintiff] has utilized that procedure, its takings claim is premature"). This Court has twice suggested that diverting federal takings claims to state court is a "prudential" ripeness guideline. *See Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 736 n.7 (1997) (referring to *Williamson County*'s "prudential ripeness requirements"); *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, __ U.S. __; 130 S. Ct. 2592, 2610 (2010) (noting that *Williamson County*'s state-procedures standard is not jurisdictional). But in *San Remo Hotel*, the Court finally acknowledged what had been clear to many observers from the start: in most cases, complying with the state-procedures requirement does not ripen Fifth Amendment takings claims for federal adjudication, it extinguishes them. 545 U.S. at 341-48.

In *San Remo*, this Court declined to create an exception to the Full Faith and Credit Act "in order to provide a federal forum for litigants who seek to advance federal takings claims that are not ripe until the entry of a final state judgment denying just compensation." 545 U.S. at 337. *San Remo*'s holding "ensures that litigants who go to state court to seek compensation will likely be unable later to assert their federal takings claims in federal court." *Id.* at 351 (Rehnquist, C.J., concurring).

Thus, *Williamson County*'s requirement of seeking compensation through state-court procedures is not a ripeness doctrine in any ordinary sense of the term; it is an abstention doctrine. Federal-court litigants asserting violations of their civil rights under the Fifth Amendment are turned away and told to take their case to state court, with no prospect of review by the federal judiciary except via a petition for writ of certiorari to this Court. The singular peculiarity of this doctrine has been noted by Ninth Circuit Judge William Fletcher:

> Jurisdiction stripping statutes, which deprive the federal courts of authority to decide cases, have often been suggested by political actors who wish to avoid the consequences of substantive decisions by the United States Supreme Court in certain controversial areas of the law. For the most part, such statutes have not been enacted into law, and those few that have been enacted have been interpreted narrowly by the Supreme Court. But in *San Remo Hotel*, the jurisdiction stripping has been accomplished by the Court itself.

William A. Fletcher, *Kelo, Lingle, and San Remo Hotel: Takings Law Now Belongs to the States*, 46 Santa Clara L. Rev. 767, 779 (2006).

Of course, this Court has expressly stripped the federal courts of jurisdiction to hear certain types of claims, under certain circumstances, under its formal abstention doctrines. In each case, however, the basis for abstention has rested on some express, persuasive rationale favoring adjudication in state court. *See*, *e.g.*, *Younger v. Harris*, 401 U.S. 37 (1971) (requiring federal-court abstention from adjudicating claims when the plaintiff is being prosecuted for a matter arising from that claim in state court); *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959) (federal courts may abstain to allow a state's highest court to interpret issues of state law that are of great public importance); *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976) (abstention is appropriate when concurrent litigation is underway in state court to resolve the same legal issue).

No equivalent doctrinal rationale has ever been advanced for abstaining to exercise federal jurisdiction under *Williamson County*. As originally formulated, the *Williamson County* doctrine rested on a simple truism: "The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation." 473 U.S. at 194 (citation omitted). Obviously, that is indeed what the text says; just as the same Amendment does not proscribe the deprivation of life, liberty, or property; rather, it proscribes the deprivation of life, liberty, or property "without due process of law." U.S. Const. amend. V. Yet this Court has never taken that to mean due

process claims brought under Section 1983 should be relegated to state court for a determination of whether due process can be obtained "through the procedures the state has provided for doing so." *Williamson County*, 473 U.S. at 194. Reading either the Takings Clause or the Due Process Clause as incorporating an implication that a remedy must be sought in state court is simply a non sequitur.

Seeking just compensation from the defendant governmental agency is the essence of a Fifth Amendment takings claim, regardless of whether it is litigated in state or federal court. No plausible reason has ever been advanced to support *Williamson County*'s implicit assumption that state courts are in some way more capable than the federal judiciary of determining whether the federal Constitution has been violated.

The *San Remo* majority sought in vain to find some compelling doctrinal rationale for federal abstention under *Williamson County*, analogizing to the comity concerns that bar Section 1983 claims by state taxpayers challenging the validity of their state tax systems. *See San Remo*, 545 U.S. at 347 (citing to *Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100 (1981)). But as Chief Justice Rehnquist noted in concurrence, no "longstanding principle of comity toward state courts in handling federal takings claims existed at the time *Williamson County* was decided," nor has one developed since then. 545 U.S. at 350 (Rehnquist, C.J., concurring). And in response to the majority's assertion that state courts have greater experience than their federal counterparts in adjudicating issues relating to land-use regulations, the concurrence also had a ready answer:

> [T]he Court has not explained why we should hand authority over federal takings claims to state courts, based simply on their relative familiarity with local land-use decisions and proceedings, while allowing plaintiffs to proceed directly to federal court in cases involving, for example, challenges to municipal land-use regulations based on the First Amendment or the Equal Protection Clause. In short, the affirmative case for the state-litigation requirement has yet to be made.

Id. at 350-51 (citations deleted).

It is no overstatement to label the post-hoc doctrinal justifications that have been advanced for *Williamson County* as "rather tenuous." Rachel A. Rubin, Note, *Taking the Courts: A Brief History of Takings Jurisprudence and the Relationship Between State, Federal, and the United States Supreme Courts*, 35 Hastings Const. L.Q. 897, 917 (2008). Indeed, this absence of a doctrinal foundation leads Judge Fletcher to surmise that *San Remo* may ultimately be overruled by this Court, just as the rule of *Agins v. Tiburon* was repudiated in *Lingle*. William A. Fletcher, *Kelo, Lingle, and San Remo Hotel*, 46 Santa Clara L. Rev. at 779. But it is not *San Remo* that is the source of the ad-hoc doctrine of federal abstention from adjudicating Fifth Amendment takings claims. The source of that doctrine is the "fortuitously coined" wording of *Williamson County* itself, which is long past due for reconsideration by this Court.

B. Abstaining from Hearing a Claim Asserting the Violation of an Express Constitutional Right, with No Persuasive Doctrinal Rationale for Doing So, Negates the Very Purpose of Section 1983

Not only does *Williamson County*'s de facto abstention doctrine have no persuasive doctrinal rationale, it contravenes the important policy objectives of 42 U.S.C. § 1983. Section 1983, originally enacted as section 1 of the Ku Klux Act, was designed to protect individual constitutional and statutory rights against infringement by state and local governments. *See*, *e.g.*, David Achtenberg, *A "Milder Measure of Villainy": The Unknown History of 42 U.S.C. § 1983 and the Meaning of "Under Color of" Law*, 1999 Utah L. Rev. 1, 2. As one commentator has put it, "The legislative history is clear: Congress intended, and fully expected, that the federal courts would be the primary guarantors of federal rights." Bryce M. Baird, Comment, *Federal Court Abstention in Civil Rights Cases: Chief Justice Rehnquist and the New Doctrine of Civil Rights Abstention*, 42 Buffalo L. Rev. 501, 510 (1994).

This Court has often recognized that a core principle of Section 1983 is to guarantee civil rights plaintiffs a federal forum for their claims. The purpose of the statute was to "interpose the federal courts between the States and the people, as guardians of the people's federal rights." *Mitchum v. Foster*, 407 U.S. 225, 242 (1972). *Accord, Patsy v. Bd. of Regents*, 457 U.S. 496, 504 (1982) (Congress intended Section 1983 to "throw open the doors of the United States courts," providing individuals who had been deprived

of their federal rights with "immediate access to the federal courts."); *Monroe v. Pape*, 365 U.S. 167, 180 (1961), *overruled on other grounds by Monell v. Dep't of Soc. Servs.,* 436 U.S. 658 (1978) ("[O]ne reason the legislation was passed was to afford a federal right in federal courts because . . . the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.").

Yet this understanding was set aside *sub silentio* by *Williamson County*, in the case of plaintiffs seeking to vindicate their rights under the Fifth Amendment's Takings Clause. Although *Williamson County* initially held out the promise that these plaintiffs would ultimately receive a federal forum after "ripening" their claims, *San Remo* made it clear that they would normally be permanently barred from federal court, once the *Williamson County* doctrine is invoked.

In cases such as the one at bar, the combination of *Williamson County* abstention by the Ninth Circuit and the application of *Kavanau v. Santa Monica Rent Control Board*, 941 P.2d 851 (Cal. 1997), by the California courts stands Section 1983 on its head by forcing plaintiffs who assert violations of their civil rights to seek a remedy from the very state officials charged with violating those rights. As Justice Janice Rogers Brown has pointed out:

> The thrust of [the Supreme Court's Section 1983] decisions is that, far from relegating plaintiffs to the same corrupt system that inflicted their injury, section 1983 exists to give plaintiffs an adjudicative alternative that will ensure protection of their rights.

> Therefore, as the high court stated in [*Felder v. Casey*, 487 U.S. 131, 147 (1988)], "there is simply no reason to suppose that Congress . . . contemplated that those who sought to vindicate their federal rights . . . could be required to seek redress in the first instance from the very state officials whose hostility to those rights precipitated their injuries."

Galland v. City of Clovis, 16 P.3d 130, 161 (Cal. 2001) (Brown, J., dissenting) (citations omitted).

An irreconcilable conflict now exists between *Williamson County*'s judicially created, ad-hoc abstention rule and Section 1983's policy objective of guaranteeing federal-court access for all claimants asserting deprivation of their federal civil rights by state officials. The decision of the Ninth Circuit in this case starkly highlights this conflict, which only this Court can resolve.

II

IN THE ALTERNATIVE, CERTIORARI SHOULD BE GRANTED TO CLARIFY THAT FEDERAL COURTS MAY NOT ABSTAIN FROM ADJUDICATING FIFTH AMENDMENT TAKINGS CLAIMS WHEN THE STATE COURTS DO NOT PROVIDE AN INVERSE CONDEMNATION REMEDY

Regardless of whether the state-procedures prong is viewed as a matter of prudential ripeness or abstention, *Williamson County* provided that federal courts may avoid adjudicating regulatory takings claims only when the state offers a "reasonable, certain and

adequate provision for obtaining compensation." 473 U.S. at 194 (citations omitted). Yet in this case, the Ninth Circuit relegated Colony's as-applied takings claim to the California courts despite the fact that California offers *no procedure whatsoever* whereby Colony could obtain just compensation for the taking.

The Ninth Circuit has long recognized that inverse condemnation is not available in California to plaintiffs like Colony. *See, e.g., Carson Harbor Village, Ltd. v. City of Carson*, 353 F.3d 824, 827 (9th Cir. 2004) ("***Until*** the California Supreme Court decided *Kavanau v. Santa Monica Rent Control Board,* 941 P.2d 851 (Cal. 1997), the state procedure for obtaining just compensation for a takings claim was to bring an inverse condemnation action in state court.") (emphasis added; citation deleted). In *Kavanau*, however, the California Supreme Court foreclosed payment of just compensation by the government as a remedy for any plaintiff in Colony's position, who alleges a regulatory taking effected by the application of a confiscatory rent control ordinance. As noted by the court below,

> [t]he state procedure a plaintiff asserting an as applied challenge to a rent control ordinance must pursue includes a "*Kavanau* adjustment," which involves filing a writ of mandamus in state court and, if the writ is granted, seeking an adjustment of future rents from the local rent control board.

App. A-18.

These procedures were never intended as, nor do they provide, a means for securing just compensation for a taking. The state's high court was clear that an

aggrieved property owner in Colony's position "is not entitled to maintain an inverse condemnation action." *Kavanau*, 941 P.2d at 854. Instead, the *Kavanau* court expressly fashioned a due process remedy, which that court held would "obviate" a finding of takings liability for plaintiffs in Colony's position. *Id.* at 865. As Justice Baxter stated in dissent, the *Kavanau* majority held "that a compensable taking cannot occur" under the facts of that case or the case at bar. *Id.* at 872 (Baxter, J., dissenting). *Accord, Galland v. City of Clovis*, 16 P.3d 130, 134 (2001) (*Kavanau* "precluded a claim for inverse condemnation").

Even if Colony prevailed at a state mandamus hearing, the most it could obtain would be an order compelling the Rent Board to set aside its final determination and open a new hearing on Colony's rent adjustment petition. What would "obviate" the City's violation of the Fifth Amendment, in the view of the California Supreme Court, would be the prospect of securing future payments from third parties (prospective tenants of Colony's park) sufficient to offset the amount of compensation the City would otherwise be required to pay. But all that the *Kavanau* procedures provide with certainty is to categorically foreclose an inverse condemnation remedy to Colony and other similarly situated plaintiffs, in the face of a federal constitutional claim that is fully ripe for adjudication in any court.

The Fifth Amendment mandates that private property shall not be taken for public use "without payment of just compensation." Since the sole function of the Constitution is to constrain government action, it would have been redundant to insert the words "by the government" at the end of the clause. That the

government may not evade the just compensation requirement by forcing third parties to pay its debts should be implicit in our understanding of the Constitution.

> [T]he clear import . . . of the language of the Fifth Amendment itself, is that those whose property has been taken for public use must be compensated by the general public through the government. The Fifth Amendment is therefore violated when government attempts to lay the general public's burden of just compensation on third parties.

Carson Harbor Village v. City of Carson, 353 F.3d at 831 (O'Scannlain, J., concurring specially).

The understanding that the government is the entity charged with paying just compensation for a violation of the Fifth Amendment permeates judicial opinions and the legal literature on takings. *See*, *e.g.*, *United States v. Dickinson*, 152 F.2d 865, 868 (4th Cir. 1946) ("compensation must be paid by the government under the rules established by the decisions") (citing to six decisions of the Supreme Court); Kenneth Salzberg, *"Takings" as Due Process, or Due Process as "Takings"?,* 36 Val. U. L. Rev. 413, 420 n.42 (2002) (the plain meaning of the Takings Clause "provides that just compensation must be paid by the government to the affected property owner").

Yet under California's *Kavanau* procedure, even if a property owner should succeed in negotiating the process, "the burden of compensation falls not on the government as the representative of the benefitting general public, but on a select group of future tenants."

Carson Harbor Village, 353 F.3d at 830 (O'Scannlain, J., concurring specially). As a practical matter, there is little likelihood that future tenants would be willing or able to pay an increment above market rents to pay for the City's past constitutional violations. But more importantly, by requiring injured parties to seek a remedy from other private citizens, in lieu of just compensation from the agency that violated their rights, California's *Kavanau* procedures undermine the function of the Takings Clause in constraining predatory governmental conduct:

> [T]he compensation requirement puts a crimp on the expansion of public policy: that, together with a concern for justice, is why the Founders put it in the Constitution.

Roger Pilon, *Freedom, Responsibility, and the Constitution: On Recovering Our Founding Principles*, 68 Notre Dame L. Rev. 507, 543 (1993). In contrast, the procedures the California courts apply under *Kavanau* impose no constraints whatsoever upon governmental overreaching, because at best the costs of governmental wrongdoing will simply be foisted off onto private third parties.

According to the opinion below, it is now the law of the Ninth Circuit that the *Kavanau* procedure comprises a reasonable, certain, and adequate method of securing just compensation under the Fifth Amendment—despite the fact that it can never result in just compensation for any plaintiff, nor was it intended to do so. App. A-20. This procedure is so wildly at odds with the state procedures contemplated by *Williamson County* itself that this Court should grant certiorari to declare that, in the context of Fifth Amendment claims arising from the application of

confiscatory rent control schemes, California plaintiffs like Colony are entitled to file their takings claims under Section 1983 directly in federal court.

CONCLUSION

The petition for writ of certiorari should be granted.

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Respectfully submitted,

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