No. 11-1234

In the Supreme Court of the United States

REDEVELOPMENT AUTHORITY OF THE COUNTY OF MONTGOMERY, PENNSYLVANIA, DONALD W. PULVER, GREATER CONSHOHOCKEN IMPROVEMENT CORP., AND TBFA PARTNERS, L.P.,
Petitioners,

v.

R & J HOLDING COMPANY AND RJ FLORIG INDUSTRIAL COMPANY, INC.,
Respondents.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the decision below properly found, under Pennsylvania preclusion law applied to the particular facts presented in this case, that Respondents' takings claim was not barred by claim and issue preclusion in the federal court.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, the undersigned counsel states that Respondent RJ Florig Industrial Company, Inc. has no parent company, is not a publicly owned company, and no publicly-held company owns 10% or more of its stock.

Respondent R&J Holding Company is a general partnership and not a corporate entity. R&J Holding Company has no parent company, is not a publicly owned company, and no publicly-held company owns 10% or more of its stock.

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INTRODUCTION

Respondents, Plaintiffs below, R&J Holding Co. ("R&J Holding") and RJ Florig Industrial Company, Inc. ("RJ Florig") hereby respond to the Petition for Writ of Certiorari filed by the Petitioners, Defendants below, the Redevelopment Authority of the County of Montgomery ("RDA"), Donald Pulver ("Pulver"), Greater Conshohocken Improvement Corp. ("GCIC"), and TBFA Partners, L.P. ("TBFA").[1]

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[1] Respondents received a timely notice under Supreme Court Rule 37.2(a) from two prospective *amici curiae*: the Pennsylvania Association of Housing and Redevelopment Agencies ("PAHRA") and the International Municipal Lawyers Association ("IMLA"). Respondents consent to a request by these *amici* to file *amicus curiae* brief in support of the Petition for Writ of Certiorari in this case. Respondents, however, decline to seek additional time to respond to the *amici* brief. To begin with, Respondents do not believe that these are true *amici curiae, e.g*. "friends of the court." PAHRA, for one, counts Petitioner RDA as one of its members. When the underlying state court condemnation and the inverse condemnation proceedings came up on appeal in the Pennsylvania Commonwealth Court, PAHRA filed *amicus curiae* briefs in support of the RDA. In both instances, PAHRA was represented by Reed Smith LLP. Reed Smith is counsel for Petitioners in this Court and represented the RDA in the first federal action filed in 2002 and in this action filed in 2006. Moreover, in the Inverse Condemnation Action, Reed Smith filed the *amicus curiae* brief on behalf of PAHRA at the same time it represented the RDA before the Third Circuit Court of Appeals on appeal in the first federal action. The other purported *amicus*, IMLA, is very familiar to this Court. By our count, IMLA appeared on more than 100 *amicus curiae* briefs filed with this Court in the last 12 years and touts itself as "the service organization of primary resort for its members in all cases in which a party to a case before the United States Supreme Court is represented by an IMLA member." http://www.imla.org/index.php?option=com_content&task=view&id=29&Itemid=394 (last visited May 11, 2012). Finally,

There is no compelling reason for this Court to review the decision below and the Petition therefore should be denied. The Third Circuit's ruling on issue and claim preclusion issues, which Petitioners urge this Court to review, turns exclusively on the interpretation and application of state preclusion law and does not otherwise implicate any exceptionally important issues requiring this Court's review.

Once the Third Circuit determined that no issue or claim preclusion applied under state law, it faithfully applied the Full Faith and Credit Statute, 28 U.S.C. § 1738, to allow Respondents' takings claim to proceed in federal court. This ruling is fully consistent with this Court's precedent and the decisions in other Circuits as to whether state court proceedings constitute an adjudication so as to preclude a subsequent takings action in federal court.

The Third Circuit's claim preclusion ruling similarly does not conflict with this Court's precedent or other Circuit decisions regarding an impact of an asserted *England* reservation of federal claims in state court. As the Third Circuit clearly explained in its Opinion, it did not need to decide, and did not decide, whether Respondents' reservation of federal claims was valid under *England v. Louisiana State Bd. of*

Respondents decline to delay resolution of the Petition given that Petitioners sought and obtained a stay of all proceedings in the District Court "pending the filing and disposition of [their] Petition for Writ of Certiorari," despite the Third Circuit's expressed concerns over the length of this dispute. Petitioners' Appendix ("Pet. App.") at 17. Petitioners have still not filed an Answer to the Complaint. The Complaint was filed in April of 2006 — more than six years ago.

Med. Examiners, 375 U.S. 411 (1964). Pet. App. at 15-16. Rather, it relied **"solely"** on its interpretation of Pennsylvania claim preclusion law and its finding, under state law, that Petitioners acquiesced in Respondents' splitting off of federal claims. *Id*. at 16.

The Petition should also be denied because this Court's review of the decision below would have little utility beyond the context of this action, as the preclusion arguments advanced by Petitioners turn on the fact-specific analysis of the prior state court proceedings, the parties' arguments therein, and the interpretation of a singular decision of the Pennsylvania Commonwealth Court.

Finally, the Petition should be denied because the Third Circuit correctly decided preclusion issues in Respondents' favor.

STATEMENT OF THE CASE

R&J Holding was at all relevant times the owner and RJ Florig was a lessee of the property located in Conshohocken, Pennsylvania ("Florig property") which was subject of unlawful condemnation proceedings for more than five years. RJ Florig is the owner and the operator of the steel processing business which at all relevant times was located on the property.

Pulver, who was a developer in Conshohocken and West Conshohocken, sought to obtain the Florig property. GCIC and TBFA are entities he owned and/or controlled.

In July of 1996, the RDA commenced the condemnation proceedings against the Florig property

at the direction of Pulver and pursuant to the unlawful written agreements between the Pulver entities and the RDA.

The condemnation continued for more than five years, during which time the RDA had title to the property, and the Respondents were deprived of their most fundamental rights as the owner and lessee of the property, including rights to sell or develop the property, right to expand their business, and ability to relocate. The Pennsylvania Commonwealth Court voided the condemnation in 2001, when it determined that the RDA unlawfully delegated its eminent domain power to Pulver and his entities, and that the RDA "was merely acting on Pulver's behalf." *In re Condemnation of 110 Washington St.*, 767 A.2d 1154, 1160 (Pa. Cmwlth. Ct. 2001), *appeal denied*, 788 A.2d 379 (Pa. 2001). Although, as a prevailing condemnee, R&J Holding was able to recover certain fees and costs under the Pennsylvania Eminent Domain Code,[2] Respondents have never received any compensation for the unlawful taking of their property rights for more than five years.

Respondents began their efforts to obtain compensation for the unlawful taking by filing a complaint in federal court in 2002 against the parties who are Defendants/Petitioners in this case. The District Court dismissed the takings claim without prejudice, holding that the takings claim was not ripe pursuant to the "just compensation" requirement in

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[2] Act of June 22, 1964, Special Sess., P.L. 84, *as amended*, formerly 26 P.S. §§ 1-101-1-903, repealed 2006 by section 5(2) of the Act of May 4, 2006, P.L. 112.

Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985) since the Pennsylvania Eminent Domain Code provided an inverse condemnation procedure under which plaintiffs could seek compensation for the taking of their property under state law.[3] Pet. App. at 118-20.

Respondents, therefore, applied for compensation in Pennsylvania state courts pursuant to the inverse condemnation procedures outlined in the Pennsylvania Eminent Domain Code (hereinafter "Inverse Condemnation Action"). In the Inverse Condemnation Action, Respondents — consistent with Pennsylvania law — expressly stated their intent to split off and reserve their federal claims for adjudication in a federal forum. The RDA did not object to Respondents' repeated reservations, even though it had every opportunity to do so under state law.[4]

The Pennsylvania Court of Common Pleas for Montgomery County held that the Eminent Domain Code provides a remedy and directed the parties to proceed to the board of view for determination of damages. Pet. App. at 95. The Court of Common

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[3] In *Williamson County*, this 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.

[4] Although the other Petitioners were not parties in the Inverse Condemnation Action, they claim to be in privity with the RDA for purposes of the preclusion analysis, and therefore are bound by the RDA's implied consent to Respondents' reservation of rights in state court. Pet. App. at 14 fn. 5.

Pleas determined that the direct appropriation of Respondents' fundamental property rights by the RDA in the unlawful exercise of its condemnation power constituted a compensable taking under Pennsylvania law for which Respondents must be compensated. *Id.* at 96.

On appeal, the Pennsylvania Commonwealth Court did not reach the merits of the takings claim under state or federal law. The Court held that the Eminent Domain Code does not provide for compensatory damages in the case of an unlawful, *de jure* condemnation, regardless of the extent of taking, Pet. App. at 90-91, and, accordingly, that there was no reason for the Court to reach the merits of the unlawful taking claim. The Commonwealth Court adopted the RDA's position in the state court and held that under the Code, a property owner who demonstrates that his property has been unlawfully condemned can only obtain reimbursement of certain costs and fees, and does not have a remedy for compensatory damages. *Id*.[5] The Pennsylvania Supreme Court declined to take an appeal.[6]

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[5] After concluding that the Code does not provide for compensation for loss of property rights in a failed *de jure* condemnation, the Commonwealth Court stated in footnote 5 of its Opinion that "[h]aving reached this conclusion, we do not need to address the Authority's remaining arguments," which included the RDA's appeal on the merits of the taking claims. Pet. App. at 91 fn. 5. The Commonwealth Court's own words conclusively refute Petitioners' argument that the Court somehow "necessarily" considered and ruled on the merits of the takings claim.

[6] The RDA's response to the Petition for Allowance of Appeal filed by Respondents with the Pennsylvania Supreme Court belies the very arguments Petitioners advance before this Court: In its

Respondents filed this federal action on April 20, 2006. Respondents asserted a takings claim directly under the Fifth and Fourteenth Amendments to the United States Constitution, as well as under 42 U.S.C. § 1983. Contrary to Petitioners' assertion on page 10 of the Petition, Respondents did not assert a takings claims under state law in this action.

Petitioners moved to dismiss the takings claim on the grounds of claim preclusion, statute of limitations, and on the merits. An issue preclusion argument, which Petitioners ardently advance before this Court, was merely an afterthought in the District Court, as Petitioners had not pursued that theory until their post-oral argument brief in the District Court. The District Court dismissed the takings claim on the claim preclusion grounds and did not reach the other arguments advanced by Petitioners. Pet. App. 56.

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response, the RDA admitted that the Commonwealth Court "never reached [the issue of whether] Plaintiffs were entitled to damages as though a *de facto* taking had occurred," *i.e.* the merits of the takings claim under Pennsylvania law. *See* Joint Appendix in the Third Circuit Court of Appeals at 619. Further, acknowledging that Respondents did not present and the lower courts did not decide any federal constitutional issues in the Inverse Condemnation Action, the RDA asked the Pennsylvania Supreme Court to address the issue of taking under the Federal Constitution in the event that the court accepted the appeal on the question of state law so that this claim would not have to be litigated in federal court. *Id*. at 622. Of course, if the RDA believed that the federal takings claim was precluded, either through claim or issue preclusion, it would not have asked the Supreme Court to review the claim. Moreover, the RDA made this request six months after this Court decided *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005) — the very decision Petitioners argue requires a ruling in their favor on the preclusion issues in this case.

The Third Circuit reversed. On preclusion issues, the Third Circuit, consistent with this Court's decision in *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 466 (1982), correctly noted that under the Full Faith and Credit Statute, 28 U.S.C. § 1738, "[t]o determine the effect of a Pennsylvania court judgment, we are required to apply Pennsylvania's claim– and issue–peclusion law." Pet. App. at 11.

Accordingly, the Third Circuit began its claim preclusion analysis with Pennsylvania claim preclusion law. Pennsylvania follows Section 26(1)(a) of the Restatement (Second) of Judgments, which provides that claim preclusion does not apply where "[t]he parties have agreed in terms or in effect that the plaintiff may split his claim or the defendant has acquiesced therein." Pet. App. at 13. The Third Circuit noted that in its prior decision interpreting Pennsylvania preclusion law, it held that pursuant to the commentary in the Restatement, "the failure of the defendant to object to the splitting of the plaintiff's claim is effective as an acquiescence in the splitting of the claim." *Id*., citing *Bradley v. Pittsburgh Bd. of Educ.*, 913 F.2d 1064, 1072 (3d Cir. 1990), quoting Restatement (Second) of Judgments § 26(1)(a) cmt. a (1982). *See also Dodd v. Hood River Cnty.*, 59 F.3d 852, 862 (9th Cir. 1995) ("Because the primary purpose of claim preclusion is to protect defendants from being harassed by repetitive actions based on the same claim, the rule need not be enforced where the [defendants] have implicitly consented to the splitting of [landowners' takings] claim under state and federal law.") In *Bradley*, the Third Circuit also held that pursuant to the Restatement, "the opposing party may acquiesce in the federal claim being split off and reserved." *Id*., citing *Bradley*, 913 F.2d at 1073,

quoting Restatement (Second) of Judgments § 86, cmt. f. The Third Circuit further observed that Pennsylvania state courts have consistently held that the law of Pennsylvania is in accord with the approach taken by the Restatement. *Id.* at 13-14. Finally, the Court noted that it had not uncovered any cases which would call its interpretation of Pennsylvania law in *Bradley* into question. *Id*. at 14.

The Third Circuit then applied Pennsylvania claim preclusion law, as interpreted by *Bradley*, to the facts in this case. The Court noted that on the very first page of their complaint in state court, Respondents noted their intent to split off federal claims for adjudication in a federal forum and then reiterated their intent in the filings before the Pennsylvania Commonwealth and Supreme Courts. The Court held that since "[Petitioners] uttered not a word about the reserved federal claims while [Respondents] prosecuted their state claims all the way to the Pennsylvania Supreme Court, [t]hey cannot now benefit from their silence." Pet. App. at 14. Accordingly, held the Third Circuit, Pennsylvania law does not bar the Respondents' claim.

The Third Circuit also took pains to explain that its decision "relie[d] solely on [its] interpretation of Pennsylvania claim preclusion law," rather than on any determination of the validity of an *England* reservation under federal law. Pet. App. at 15. The Court carefully analyzed the implications of this Court's decision in *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005) and noted that this Court called into question the availability of an *England* reservation in the *Williamson County* context. The Third Circuit,

however, held that it did not need to consider the continued viability of *England* in the context of this case, since **"[r]egardless of whether [Respondents'] statement was valid as an *England* reservation,** it provided notice to [Petitioners] of [Respondents'] intent to split their sate and federal claims" under state law. Pet. App. at 16 (emphasis added). Thus, "pursuant to 28 U.S.C. § 1738, we faithfully apply Pennsylvania law in concluding that [Respondents'] claims are permitted" in federal court. *Id*.

The Third Circuit similarly relied on Pennsylvania law to refute Petitioners' issue preclusion arguments on appeal.[7] As the Court explained, under Pennsylvania law, "[t]he fundamental question is whether the issue has been *actually decided* by a court in a prior action." Pet. App. at 17, citing *McNeil v. Owens-Corning Fiberglass Corp*., 680 A.2d 1145, 1147-48 (Pa. 1996) (emphasis in the original). The Third Circuit recognized that the parties' dispute over issue preclusion boils down to their divergent reading of the Commonwealth Court's Opinion in the Inverse Condemnation Action. The Petitioners, relying on state law, argued that the Commonwealth Court somehow impliedly decided the takings issue on the merits, under state law, although all parties and the Third Circuit agree that there is no discussion of the constitutional issues in the Commonwealth Court's Opinion. Respondents took the Commonwealth Court

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[7] Concerned with the length of this protracted dispute, the Third Circuit, contrary to its practice, addressed Petitioners' alternative arguments for affirming the District Court's judgment, including issue preclusion, even though the District Court never ruled on these issues. Pet. App. at 16.

at its word when it explicitly stated that it did not reach the merits of the takings claim. The Third Circuit rejected Petitioners' far-fetched reading and held that the Commonwealth Court did not actually decide the constitutional issues advanced by Respondents in the federal court. Therefore, the Third Circuit held that Pennsylvania issue preclusion law does not bar Respondents' suit in the federal court. Pet. App. at 19.

The Third Circuit also rejected Petitioners' statute of limitations argument. Pet. App. at 24. Finally, the Court held that an actual, *per se*, taking of the Florig property occurred because the property title transferred to the RDA at the declaration of taking — a conclusion supported by all judges on the panel. Pet. App. at 23, 32. The Petitioners do not seek review of these determinations in their Petition for Writ of Certiorari.

The Third Circuit denied Petitioners requests for panel rehearing and rehearing *en banc*. Pet. App. at 132.

REASONS FOR DENYING THE PETITION

I. THE DECISION BELOW DOES NOT CONFLICT WITH *SAN REMO* OR CIRCUIT DECISIONS REGARDING THE ISSUE PRECLUSIVE EFFECT OF STATE COURT JUDGMENTS IN FEDERAL TAKINGS ACTIONS

The Petition should be denied because the Third Circuit's decision does not conflict with this Court's application of issue preclusion in *San Remo* or the

decisions in other Circuits applying issue preclusion in the context of the *Williamson County* state court proceedings.

Under the Full Faith and Credit Statute, "judicial proceedings. . . shall have the same full faith and credit in every court within the United States … as they have by law or usage in the courts of" the states from which they emerged. 28 U.S.C. § 1738. Thus, under the Statute, federal court must "give the same preclusive effect to state court judgments that those judgments would be given in the courts of the State from which the judgments emerged." *Kremer*, 456 U.S. at 466.

In *San Remo*, this Court declined to recognize any exceptions to the application of California issue preclusion law under the Statute in the context of the state court proceedings under *Williamson County*, where the California Supreme Court decided the merits of the takings issue. *San Remo*, 545 U.S. at 342-45. Thus, the *San Remo* Court held that the property owners could not re-litigate the issue of taking in the federal court if the same issue was barred by a prior decision in the *Williamson County* proceedings in the state court. The underlying state law question of whether issue preclusion applied in the first place, however, was not before this Court. *See id*. at 335 fn. 14 ("Our limited review in this case does not include the question whether the Court of Appeals' reading of California preclusion law was in error.") and *id*. at 337 fn. 18.

The Third Circuit's decision is consistent with this holding in *San Remo*. As instructed by *San Remo*, the Third Circuit gave the same issue preclusive effect to

the Commonwealth Court's judgment in the federal court that the judgment would have been given in Pennsylvania state court. Since the Third Circuit found that the takings issue was not precluded under Pennsylvania law as it was not "actually decided" in a prior state court action, the proper application of the Full Faith and Credit Statute compelled the Third Circuit to hold that the takings issues was not barred in the federal court. *See Haring v. Prosise*, 462 U.S. 306, 314 fn. 6 (1983), quoting *Union & Planters' Bank of Memphis v. Memphis*, 189 U.S. 71, 75 (1903) ("If the state courts would not give preclusive effect to the prior judgment, 'the courts of the United States can accord it no greater efficacy' under § 1738").

Similarly, the Third Circuit's decision is consistent with the application of the Full Faith and Credit Statute to issue preclusion by the Eighth Circuit in *Knutson v. City of Fargo*, 600 F.3d 992 (8th Cir. 2010), *cert. denied*, 131 S.Ct. 357 (2010) and the Eleventh Circuit in *Agripost, LLC v. Miami-Dade County, Florida*, 525 F.3d 1049 (11th Cir. 2008), *cert. denied*, 129 S.Ct. 1668 (2009).[8] In *Knutson*, the Eighth Circuit held that the homeowners' takings claim was barred in federal court by the application of North Dakota issue preclusion law because the takings issue was litigated and decided by the state courts, 600 F.3d at 997, and in *Agripost*, the Eleventh Circuit held that plaintiff's claim was barred by the application of Florida issue preclusion law for the same reasons. 525 F.3d at 1055.

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[8] In *Edwards v. City of Jonesboro*, 645 F.3d 1014, 1019 (8th Cir. 2011), another Eighth Circuit decision cited by Petitioners, the Court of Appeals affirmed the district court's dismissal on the grounds of claim preclusion but declined to address the issue preclusion arguments.

The Full Faith and Credit Statute required these courts to give the same preclusive effect to the state court judgments in the federal court. In this case, the Third Circuit found that the Pennsylvania preclusion law required that it *not* give preclusive effect to the state court takings case, in which there was no adjudication or discussion of the merits of the takings claim. Therefore, although the outcome in this case was different — based on the Third Circuit's application of state preclusion laws — the Third Circuit applied the Full Faith and Credit Statute consistently with the other Circuits and this Court's decision in *San Remo*.

Finally, Petitioners repeatedly assert that the decision below somehow "evaded" this Court's holding in *Williamson County*, *see* Pet. at 13, 18, but never bother to explain their reasoning. To the extent that Petitioners suggest that *Williamson County* mandates that property owners are automatically precluded from asserting takings claims upon return to the federal court irrespective of whether issue preclusion otherwise applies under state law, they are simply wrong. Neither *Williamson County* nor *San Remo* held this to be the law. The law of federal court jurisdiction would be stood on its head by an interpretation of *Williamson County* that *Williamson County de facto* deprives federal courts of jurisdiction of a federal takings claim where state courts refuse to consider the merits of the takings claim under state or federal law.

II. THE DECISION BELOW DOES NOT CONFLICT WITH SUPREME COURT PRECEDENT OR CIRCUIT DECISIONS REGARDING THE IMPACT OF AN ASSERTED *ENGLAND* RESERVATION IN CLAIM PRECLUSION ANALYSIS

The Petition should also be denied because the Third Circuit's decision does not conflict with this Court's precedent or other Circuit decisions regarding the impact of an asserted *England* reservation in claim preclusion analysis.

In *San Remo*, this Court held that the property owners' reservation of the federal claims under *England v. Louisiana State Bd. of Med. Examiners*, 375 U.S. 411 (1964), could not overcome the application of California issue preclusion rules. Drawing a distinction between *Pullman* abstention involved in *England* and the dismissal of the takings claim on ripeness grounds under *Williamson County*, the *San Remo* Court held that unlike in *Pullman* abstention cases, the takings claim was not properly before the federal court in the first instance because the claim was unripe under *Williamson County*. 545 U.S. at 341.

Petitioners assert that the Third Circuit's decision somehow conflicts with this holding in *San Remo* and this Court's discussion of *England* in *Allen v. McCurry*, 449 U.S. 90 (1980), as well as "highlights the conflicts and confusion in the lower courts over the effect of an asserted *England* reservation" on the application of claim preclusion under the Full Faith and Credit Statute. Pet. at 19.

The Petitioners' entire argument is premised on the erroneous proposition that the Third Circuit found that Respondents' reservation of federal claims in the state court was valid under *England*. The Third Circuit, however, expressly stated that its claim preclusion decision relied ***"solely"*** on its interpretation of Pennsylvania claim preclusion law, ***not*** *England*. Pet. App. at 15. The Third Circuit explained that it did not need to consider the validity of Respondents' reservation under *England* since "[r]egardless of whether Plaintiff's statement was valid as an *England* reservation, it provided notice to Defendants [under Pennsylvania law] of Plaintiffs' intent to split their state and federal claims." *Id*. at 16. Accordingly, the Third Circuit held that Petitioners' "failure to object constitutes implied consent under Pennsylvania law," such that claim preclusion does not apply under state law. *Id*.[9]

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[9] Petitioners assert that the Third Circuit failed to consider that Respondents "limited their claimed … reservation in state court 'to the extent not inconsistent with *San Remo*,'" thereby rendering it ineffective by its own terms. *See* Pet. at 25. To begin with, Petitioners did not raise this argument below and therefore it is waived. *See Sprietsma v. Mercury Marine, a Div. of Brunswick Corp*., 537 U.S. 51, 56 fn. 4 (2002) ("Because [the] argument was not raised below, it is waived.") Secondly, Respondents' reservation language in the state court complaint did not — and could not — reference *San Remo,* as the Inverse Condemnation Action was filed before *San Remo* was decided. Finally, the exact verbiage of the state court reservation makes absolutely no difference for purposes of claim preclusion analysis: it is undisputed that Respondents repeatedly and unambiguously put Petitioners on notice of their intent to split off federal claims and Petitioners did not object.

Since the Third Circuit did not rule on the validity of Respondents' reservation under *England*, there can be no inconsistency with this Court's decisions in *San Remo* or *Allen*, or with the decisions of other Circuits concerning the impact of an *England* reservation on otherwise applicable preclusion. Nor will this Court's review of the Third Circuit's decision resolve or clarify any purported conflict — assuming, *arguendo*, that there is any disagreement among Circuits on the continued validity of *England* outside of the *Pullman* abstention context — as this case turns solely on the interpretation and application of state law and the *sui generis* situation in which state courts decline to adjudicate the claim that a property owner is entitled to compensation for loss of property rights.

Moreover, Petitioners' extensive reliance on pre-*San Remo* Circuit decisions grossly misrepresents the current state of the Circuit authority in this area. Post-*San Remo* Circuit decisions, cited by Petitioners, which actually considered whether an *England* reservation creates an exception to the otherwise applicable claim preclusion, reached similar results. *See Edwards v. City of Jonesboro*, 645 F.3d 1014 (8th Cir. 2011) (reservation of rights does not create an exception to application of claim preclusion); *Geiger v. Foley Hoag LLP Ret. Plan*, 521 F.3d 60 (1st Cir. 2008) (same); *accord Agripost*, 525 F.3d at 1055 (questioning the continuing validity of its pre-*San Remo* decision which recognized an exception to application of claim preclusion in the context of *Williamson County*).[10]

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[10] Prior to *San Remo*, however, the weight of the circuit-level authority was clearly in favor of allowing an *England*-style reservation of federal takings claim in state-court proceedings

III. THE DECISION BELOW DOES NOT IMPLICATE EXCEPTIONALLY IMPORTANT ISSUES REQUIRING THIS COURT'S REVIEW

The Petition should be denied because the Third Circuit's preclusion ruling does not implicate any exceptionally important issues requiring this Court's review.

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pursuant to *Williamson County* to avoid claim preclusion in a subsequent federal action. *See DLX, Inc. v. Kentucky*, 381 F.3d 511, 521-22 (6th Cir. 2004) ("no [Circuit] court has held that where a plaintiff reserves its federal claims in an *England* reservation … and does not litigate them in the state courts, that *claim* preclusion will operate to bar a federal-court action" (emphasis in original)); *San Remo Hotel, L.P. v. San Francisco City & Cnty.*, 364 F.3d 1088, 1094 (9th Cir. 2004); *Macri v. King Cnty.*, 126 F.3d 1125, 1130 (9th Cir. 1997); *Kottschade v. City of Rochester*, 319 F.3d 1038, 1041-42 (8th Cir. 2003); *Front Royal & Warren Cnty. Indus. Park Corp. v. Town of Front Royal, Va.*, 135 F.3d 275, 283 (7th Cir. 1998); *Fields v. Sarasota Manatee Airport Auth.*, 953 F.2d 1299, 1306 (11th Cir. 1992); *accord Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 85 n. 7 (1984). Under Pennsylvania law, claim preclusion does not apply if plaintiff refrains from litigating federal claims in the state court in justified reliance, based on the existing law, that his state suit would not have preclusive effect in a subsequent federal action. *See Wade v. City of Pittsburgh*, 765 F.2d 405, 410 fn 5 (3d Cir. 1985). Respondents filed the Inverse Condemnation Action before *San Remo* was decided by this Court and relied on the prevailing authority at the time in making a reservation of federal claims in state court. It is an alternative basis, under state law, for the Third Circuit's holding that claim preclusion does not apply in this case. This issue was briefed before the Court of Appeals, and discussed at oral argument, but not decided by the Third Circuit.

To begin with, the Third Circuit decided claim and issue preclusion *exclusively* on state law grounds. *See* Pet. App. at 11, 15. Except in "extraordinary case[s]," this Court "do[es] not normally grant petitions for certiorari solely to review what purports to be an application of state law." *Leavitt v. Jane*, 518 U.S. 137, 144-45 (1996); *Wolf v. Weinstein*, 372 U.S. 633, 636 (1963) (dismissing writ of certiorari as "improvidently granted" where close examination showed that "the controversy . . . implicates questions of Pennsylvania law and presents no federal question of substance.") Moreover, it is this Court's "practice to accept a reasonable construction of state law by the Court of Appeals 'even if an examination of the state-law issue without such guidance might have justified a different conclusion.'" *Haring*, 462 U.S. at 314 fn. 8, quoting *Bishop v. Wood*, 426 U.S. 341, 346 (1976); *accord UNUM Life Ins. Co. of Am. v. Ward*, 526 U.S. 358, 368 (1999) ("We do not normally disturb an appeals court's judgment on an issue . . . heavily dependent on analysis of state law.") Accordingly, the Third Circuit's exclusive reliance on state law is a sufficient ground to deny the Petition.

Secondly, the Third Circuit's determination of issue preclusion in this case has no implications beyond this action, as it turns on the interpretation of a singular Pennsylvania Commonwealth Court's opinion. Moreover, Petitioners' argument that the Commonwealth Court impliedly decided the issue of taking on the merits would require an in-depth analysis of the state court proceedings, the arguments advanced by the parties therein, and parsing through the language of the Commonwealth Court's Opinion, followed by the application of state law. Contrary to Petitioners' arguments, this Court's consideration of

these matters would only be relevant in the context of this action, which is another reason for this Court to deny review.

The claim preclusion analysis, in turn, turns on a fact — particular to this case — that Petitioners failed to object to Respondents' declaration of intent in the Inverse Condemnation Action to split off federal claims, even though Petitioners should have been aware that their failure would bar any claim preclusion arguments in subsequent actions. It is difficult to understand how the Third Circuit's claim preclusion ruling could adversely affect non-parties, including any *amici*, since the ruling can be avoided in other cases by express non-agreement, under state law, to withholding of federal claims in the state court actions. The Petition should be denied for this reason as well.

IV. THE DECISION BELOW WAS CORRECT

Finally, the Petition should be denied because the Third Circuit correctly decided the preclusion issue in Respondents' favor.

A. The Takings Claim Is Not Barred By Pennsylvania Issue Preclusion

Under Pennsylvania law, the necessary elements of issue preclusion are that: (1) the issue decided in the prior case is identical to one presented in the later case; (2) there was a final judgment on the merits; (3) the party against whom the plea is asserted was a party or in privity with a party in the prior case; (4) the party or person privy to the party against whom the doctrine is asserted had a full and fair opportunity

to litigate the issue in the prior proceeding and (5) the determination in the prior proceeding was essential to the judgment. *Catroppa v. Carlton*, 988 A.2d 643, 646 (Pa. Super. Ct. 2010), *appeal denied*, 26 A.3d 1100 (Pa. 2011).

Petitioners cannot possibly establish all these required elements. The *only* issue actually decided by the Commonwealth Court in the Inverse Condemnation Action was that the Pennsylvania Eminent Domain Code does not provide a just compensation remedy to any condemnee who successfully challenges a condemnation under the Code. That issue is separate and distinct from the issue presented before the federal court — whether Petitioners deprived Respondents of their most fundamental property rights without just compensation in violation of the Federal Takings Clause. Correspondingly, the Inverse Condemnation Action did not result in a final adjudication on the merits of the takings claim, under state or federal law.

Petitioners also cannot establish that the ruling on the merits of the takings claim — assuming, *arguendo*, that the Commonwealth Court made such a ruling — was essential to that Court's judgment. It clearly was not: in order for the Commonwealth Court to determine that Respondents had no remedy for taking under the Code, it was not necessary for the Court to rule on whether a compensable taking had occurred, and the Commonwealth Court clearly so recognized in its Opinion. Pet. App. at 91 fn. 5.

B. The Takings Claim Is Not Barred By Pennsylvania Claim Preclusion

In the courts below, Respondents advanced several arguments under state law in support of their position that the takings claim is not barred by claim preclusion. The Third Circuit relied on one of these grounds to reverse the District Court's dismissal: the Petitioners' acquiescence in the Respondents' reservation of federal claims. As the Third Circuit thoroughly explained in its Opinion, its decision is supported by well-settled Pennsylvania law which follows the Restatement (Second) of Judgments, as well as with on its own precedent, *Bradley*, 913 F.2d 1064, which applied the pertinent Restatement provisions to a prior state proceeding. Pet. App. at 13-16. Given the undisputed fact that Petitioners did not object to Respondents' repeated statements of their intent to split off federal claims for adjudication in a federal forum, the Third Circuit reached the only proper conclusion pursuant to the Restatement: that Petitioners' acquiescence in the state court renders claim prelusion inapplicable in the federal court. *See* Pet. App. 13, quoting Restatement (Second) of Judgments § 26(1)(a), cmt. a, § 86, cmt. f.

Yet another reason for rejecting Petitioners' claim preclusion argument is that the Commonwealth Court in the Inverse Condemnation Action did not rule on the merits of the takings claim. Under Pennsylvania law, the basic prerequisite for applying claim preclusion is that the court in a prior action has rendered a decision on the merits. *See Turner v. Crawford Square Apartments III, L.P.*, 449 F.3d 542, 548 (3d. Cir. 2006) (for claim preclusion to apply under Pennsylvania law, there must be a "final, valid

judgment *on the merits* by a court of competent jurisdiction," quoting *Balent v. City of Wilkes-Barre*, 669 A.2d 309, 313 (Pa. 1995) (emphasis added)); *Wade v. City of Pittsburgh*, 765 F.2d 405, 411 (3d Cir. 1985) (initial judgment *on the merits* is a prerequisite for application of claim preclusion under Pennsylvania law); *Linton v. W.C.A.B (Amcast Indus. Corp.)*, 991 A.2d 376, 381 (Pa. Cmwlth. Ct. 2010) ("claim preclusion[] prevents a future suit between the same parties on the same cause of action after final judgment is entered *on the merits* of the action") (emphasis added).

The Pennsylvania Supreme Court has defined a decision "on the merits" as "one rendered upon essential facts in the case . . . after a legal trial, involving the real grounds of action and defense, if the latter is presented, or after an opportunity for such trial . . ." *McCully v. McCrary*, 112 A. 755, 756 (Pa. 1921); *accord Commonwealth v. Garland*, 142 A.2d 14, 17 (Pa. 1958) (a determination "on the merits" means "that the grant of an injunction depends on the rights and duties of the respective parties based on ultimate facts . . ."). In *Semtek International Incorporated v. Lockheed Martin Corporation*, 531 U.S. 497 (2001), this Court also observed that "[t]he original connotation of an 'on the merits' adjudication is one that actually passes directly on the substance of a particular claim before the court [and] that connotation remains common to every jurisdiction of which we are aware." *Id*. at 501-02 (internal citations omitted). Significantly, this Court concluded that "it is, we think, the meaning intended in those many statements to the effect that a judgment 'on the merits' triggers the doctrine of res judicata or claim preclusion." *Id*. at 502.

In this case, the Commonwealth Court determined that the Eminent Domain Code does not provide a remedy for the taking asserted in this case, regardless of whether a taking requiring compensation has occurred. Having reached this conclusion, the Commonwealth Court determined that it would not address the merits of the takings claim. *See* Pet. App. at 91 fn. 5. Thus, the Commonwealth Court did not consider any evidence and did not make any decision on the ultimate facts pertaining to the merits of the takings claim. Since the merits of the takings claim were not adjudicated in the prior state action, claim preclusion does not apply under Pennsylvania law.

Claim preclusion also does not apply because the purpose behind the doctrine, under Pennsylvania law — prevention of duplicative litigation — is not implicated in this case. Once the state courts refused to adjudicate the state takings claim on the grounds of lack of remedy under the Eminent Domain Code, the federal takings claim was necessarily going to be determined separately, regardless of the court in which the claim would be adjudicated. *See Wade*, 765 F.2d at 411 (even though plaintiff did not present § 1983 claims in the prior state court action arising out of the same occurrence, claim preclusion did not apply where the state judgment was based on statutory immunity which would not have defeated the federal claims). Accordingly, there is no duplication involved in the adjudication of the federal claim in the federal court.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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