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 A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

REPLY BRIEF FOR PETITIONERS

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Respondents' opposition makes even clearer what the petition already provides: there is a manifest circuit split on the application of claim and issue preclusion principles in takings cases that engenders conflicting and confusing results. Further confirmation of both the conflicts and their profound effects is provided by the brief of the dozen directly concerned *amici curiae* representing government bodies and their lawyers.

I. RESPONDENTS' ARGUMENTS THAT STATE LAW SHIELDS THIS CASE FROM SUPREME COURT REVIEW ARE MISDIRECTED.

The predominant theme of Respondents' opposition is that the Third Circuit's application of claim and issue preclusion was based "exclusively" on state law and, therefore, is inappropriate for this Court's review.[1] Opp. 19 (emphasis omitted). Of course, any federal court decision involving the full

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[1] In making this argument, Respondents misstate this Court's approach to the certworthiness of cases implicating, in some fashion, state law principles. In one of Respondents' own cases (cited at 19), the Court reviewed a question of Utah statutory severability law, and summarily reversed on that question. *Leavitt v. Jane L.*, 518 U.S. 137 (1996). *See also Steele v. Gen. Mills, Inc.*, 329 U.S. 433, 438, 440-41 (1947) (reviewing questions of Texas law); *Wichita Royalty Co. v. City Nat'l Bank of Wichita Falls*, 306 U.S. 103, 107 (1939) (reviewing a question of Texas law, "the only question for our decision") (per curiam). In any event, as is clear from the discussion below, the questions presented here indisputably rest on several important issues of federal law.

faith and credit statute implicates state preclusion law. But that obviously does not mean that fundamental questions of federal law are not also raised in such decisions. That is the case here as well.

The first question presented asks whether a federal court, based on the simple expedient of a property owner's strategic refusal to cite federal authorities in state court, can create an exception to the preclusive effect of a judgment, under the full faith and credit statute, on a federal constitutional claim. Pet. i, 13-18. This question is directly related to the question the Court accepted for review in *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005). Pet. 15.

The second question has the same federal character, asking whether a federal court can rely on a federal law doctrine—created by one of this Court's precedents (*England v. Louisiana State Bd. of Med. Examiners*, 375 U.S. 411 (1964))—in refusing, under the full faith and credit statute, to bar a federal constitutional claim. Pet. i, 19-25, 30. More specifically, the second question asks whether a federal court can transform an asserted *England* reservation, which is not valid as a matter of "supreme" federal law under this Court's settled precedents (*Cooper v. Aaron*, 358 U.S. 1, 18 (1959)), into the sole basis for the application of a state law exception to claim preclusion.

Respondents nevertheless contend that this Court is powerless to intervene because the Third Circuit's exclusive reliance on their invalid *England* reservation to block the application of claim preclusion was based solely on Pennsylvania law—and even then, only because the Third Circuit said so. Opp. 9, 16-17, 19. But the Third Circuit cannot predetermine or "dictate" to this Court the "consequences of its own judgment" merely by stating that state law is dispositive of the issue. *Medellin v. Texas*, 552 U.S. 491, 513 n. 9 (2008) (citation and internal quotation marks omitted); *see also Price v. Vincent*, 538 U.S. 634, 640 (2003) (holding that lower court's "characterization of [its] own ruling is not controlling [and] inquiring into" what lower court "actually" decided, "whatever its label") (citations and internal quotation marks omitted); *Spates v. Manson*, 619 F.2d 204, 209 n. 3 (2d Cir. 1980) (Friendly, J.) (analyzing what lower court "ordered, not . . . how" lower court "described" its ruling). Indeed, what the Third Circuit indisputably ***did***—rely solely on an *England* reservation invoked under federal law to support an exception to claim preclusion under state law—indicates that the Circuit must first have found the reservation valid under federal law.

Even if one assumes that the Third Circuit did not decide the validity of the purported *England* reservation, federal law remains at the heart of this dispute. The Third Circuit still took the unprecedented step of converting an asserted

England reservation, which is invalid under federal law, into the sole basis for refusing to apply state preclusion principles to bar a federal constitutional claim. If a decision implicating state law "undoubtedly should" be reviewed "where the alternative is allowing blatant federal-court nullification of state law[,]" *Leavitt*, 518 U.S. at 144-45, surely a decision implicating state law "undoubtedly should" be reviewed "where the alternative is allowing blatant federal-court nullification of [***federal***] law."

Notably, Respondents' state law "insulation from review" principle would have applied equally in *San Remo Hotel* itself, where this Court reviewed the Ninth Circuit's application of California preclusion law to bar a federal takings claim based on a state court decision. It also would have applied to the Court's numerous other decisions reviewing applications of the full faith and credit statute. *See, e.g., Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001); *Baker v. Gen. Motors Corp.*, 522 U.S. 222 (1998); *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75 (1984); *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461 (1982).

The Court reviewed and decided each of these cases because of the need to lend certainty to full faith and credit law. So it is in the wake of the Third Circuit's decision here.

II. RESPONDENTS' ARGUMENTS PROVIDE FURTHER IMPETUS TO REVIEW THE ISSUE PRECLUSION CONFLICTS RAISED BY THE THIRD CIRCUIT'S DECISION.

Respondents' argument that the Third Circuit's application of issue preclusion does not create any conflicts depends on their mistaken assertion that the Pennsylvania Commonwealth Court did not decide Respondents' takings claims. Opp. 13-14. Once that misstatement is corrected, however, any claim that the Third Circuit's decision is not in conflict with *San Remo Hotel* and decisions of the Eighth and Eleventh Circuits collapses.

Contrary to Respondents' assertion, the Commonwealth Court plainly did decide whether Respondents were entitled to just compensation under the Pennsylvania Constitution's takings provision. Pet. 8-10, 16-18 & n. 5. Nor does this conclusion, as Respondents would have it, "require an in-depth analysis of the state court proceedings" to ascertain. Opp. 19. It requires only: (1) a brief recitation of Respondents' own takings claims as presented in the state court action, which undisputedly included arguments under the Pennsylvania Constitution's takings clause; and (2) the application of controlling precedent—including this Court's holding in *Grubb v. Pub. Utils. Comm'n of Ohio*, 281 U.S. 470, 477-78 (1930)—to determine whether the Commonwealth Court decided Respondents' constitutional contentions. There is

nothing complicated or "in-depth" about this analysis.[2]

In their failed effort to avoid the conflict, Respondents point (at Opp. 6-7, n. 5) to the Commonwealth Court's generic statement that it did "not need to address the Authority's remaining arguments," a comment that manifestly was a reference to arguments that Petitioner ***Authority*** raised, not to the Pennsylvania constitutional arguments that ***Respondents*** strenuously—but unsuccessfully—advanced in seeking to uphold the lower court's ruling in their favor.[3]

Perhaps more fundamentally, the Commonwealth Court's generic statement does not negate the fact that in deciding Respondents' claim for just compensation, that court ***necessarily rejected*** Respondents' argument that such relief was "compelled by the [Pennsylvania] constitutional requirement of just compensation." Pet. 9 (quoting Respondents' brief to Commonwealth Court). In that

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[2] Nor do Respondents deny, because they cannot, that the Pennsylvania Constitution's takings provision is almost identical to the Fifth Amendment's takings clause. Pet. 17-18.

[3] Respondents further claim (at 7 n. 6) that Petitioners somehow "acknowledg[ed] that Respondents did not present and the [state] courts did not decide any federal constitutional issues. . . ." But Petitioners have never taken the position that federal constitutional issues were decided. Rather, Petitioners' argument consistently has been that the Commonwealth Court decided issues under the Pennsylvania Constitution's takings provision that are identical to issues raised in this case.

regard, controlling precedent consistently has considered constitutional issues to have been decided when they have been expressly raised and their determination is necessary to the result reached. Pet. 17 n. 5 (citing *Grubb*, 281 U.S. at 477-78; *Balent v. City of Wilkes-Barre*, 669 A.2d 309, 315 (Pa. 1995)).[4]

Moreover, when the Commonwealth Court's decision is put in its proper perspective, it is equally apparent that ***there is*** a clear and demonstrable split between the Third Circuit's decision and *Knutson v. City of Fargo*, 600 F.3d 992 (8th Cir. 2010), *cert. denied*, 131 S. Ct. 357 (2010), and *Agripost, LLC v. Miami-Dade County*, 525 F.3d 1049 (11th Cir. 2008), *cert. denied*, 129 S. Ct. 1668 (2009). Indeed, the underlying state court judgments at issue in *Knutson* and *Agripost*—just like the Commonwealth Court's decision at issue here—resolved the property owners' claims for just

[4] Respondents also make passing reference (at 6-7 n. 6) to arguments made by Petitioner Authority in response to Respondents' efforts to persuade the Supreme Court of Pennsylvania to review the Commonwealth Court's decision. But the Pennsylvania Supreme Court chose not to grant further review and did not decide any issue. App. 10. Thus, those arguments have no bearing on what the Commonwealth Court decided or whether the Third Circuit erroneously determined the preclusive effect of the Commonwealth Court's decision. Nor is there any suggestion in the Third Circuit's opinion that it believed the parties' briefing to the Supreme Court of Pennsylvania had any relevance to the preclusion issues presented.

compensation under state constitutional takings provisions like Pennsylvania's. And they did so applying North Dakota and Florida issue preclusion principles, respectively, which mirror Pennsylvania's—a fact Respondents do not dispute. Yet the Third Circuit, contrary to *Knutson* and *Agripost*, refused to give issue preclusive effect under indistinguishable circumstances. This is a conflict by any measure.

Respondents' contention (at 12-13) that the Third Circuit's decision does not conflict with *San Remo Hotel* is wrong, too, and highlights a further reason for this Court to intervene. The Third Circuit has created an exception to the application of issue preclusion under the full faith and credit statute to a federal takings claim where the property owner strategically omits any reference in state court to federal law. This broad holding is not confined to the interpretation of a particular state court's decision in a given case. Rather, it threatens potential application, across the range of takings cases, of a rule that encourages gamesmanship and virtually guarantees duplicative federal litigation. And it does so despite the fact that duplicative litigation is unnecessary because "state courts undoubtedly have more experience than federal courts do in resolving the complex factual, technical, and legal questions related to zoning and land-use regulations." *San Remo Hotel*, 545 U.S. at 347. *See also Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 275 (1997) ("'emphatic[ally] reaffirm[ing] . . . the

constitutional obligation of the state courts to uphold federal law, and [our] expression of confidence in their ability to do so'") (citations omitted).[5]

The Third Circuit's creation of a novel, expansive, and easily established exception to the full faith and credit statute thus runs contrary to this Court's express admonition in *San Remo Hotel* that courts may not "simply create exceptions to 28 U.S.C. § 1738 wherever [they] deem them appropriate." 545 U.S. at 344. There is, in short, conflict here as well.

III. RESPONDENTS' ARGUMENTS PROVIDE FURTHER IMPETUS TO REVIEW THE CONFLICTS OVER THE EFFECT OF *ENGLAND* RESERVATIONS.

Respondents do not—because they cannot—deny the deep split in the circuits over the validity of an

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[5] Additionally, Respondents' contention (at 19) that review is unwarranted because the Third Circuit's issue preclusion analysis "turns on the interpretation of a singular Pennsylvania Commonwealth Court opinion" is inapposite. That is because application of the full faith and credit statute ***always*** involves the interpretation of a state court proceeding and decision—because the statute's plain text requires it. If the need to interpret a prior action and decision were a reason to deny certiorari, the Court never would review cases applying the statute. Nor, for example, would the Court ever review cases raising questions of federal preclusion law that require examination of a federal court proceeding and decision, *e.g.*, *Bobby v. Bies*, 556 U.S. 825, 834-36 (2009); *Taylor v. Sturgell*, 553 U.S. 880, 904-06 (2008), or *habeas corpus* cases requiring the interpretation of a state court proceeding and decision. *See* 28 U.S.C. § 2254(d); *Cullen v. Pinholster*, 131 S. Ct. 1388, 1398 (2011).

England reservation outside the context of *Pullman* abstention. They do claim that post-*San Remo Hotel*, the circuits have found that *England* reservations do not bar the application of claim preclusion. Opp. 17 (citing cases). But Respondents inexplicably ignore the Ninth Circuit's contrary holding in *Los Altos El Granada Investors v. City of Capitola*, 583 F.3d 674, 686 & n. 3 (9th Cir. 2009), and the Sixth Circuit's indication in *Trafalgar Corp. v. Miami County Bd. of Comm'rs*, 519 F.3d 285, 287-88 (6th Cir. 2008), that it would continue to adhere to its decision in *DLX, Inc. v. Kentucky*, 381 F.3d 511, 523 (6th Cir 2004) (holding "that a party's *England* reservation of federal takings claims in a state takings action will suffice to defeat claim preclusion in a subsequent federal action"). What remains, therefore, is an irreconcilable patchwork of circuit rules on these issues that can only be rectified by this Court.

Respondents also repeat their argument (at 16-17) that the Third Circuit did not decide the validity of Respondents' *England* reservation but, rather, rested its claim preclusion decision solely on state law. Yet, whether the Third Circuit did or did not decide the validity of Respondents' *England* reservation, its unprecedented use of that reservation exacerbates the uncertainty in the circuits over the effect of *England* reservations outside the context of *Pullman* abstention.

Respondents also appear to suggest that review is improper because there is an alternative basis for the Third Circuit's claim preclusion decision. Opp. 18 n. 10 (citing *Wade v. City of Pittsburgh*, 765 F.2d 405 (3d Cir. 1985)). But the existence of an alternative ground for affirmance on remand—particularly where, as here, that ground was not addressed below and is beyond the scope of the questions presented in the petition—is no reason to decline review of the grounds upon which the case was actually decided. *Milner v. Dept. of the Navy*, 131 S. Ct. 1259, 1264 n. 3, 1271 (2011) (deciding question presented and reversing despite presence of alternative ground for affirmance); *Archer v. Warner*, 538 U.S. 314, 322 (2003) (declining to reach alternative grounds where "the Court of Appeals did not determine the merits of either argument, both of which are . . . outside the scope of the question presented and insufficiently addressed below"). Nor, in any event, does Respondents' claimed alternative basis for decision have any merit. In *Wade*, the Third Circuit refused to give preclusive effect to a state court's application of a state immunity statute to bar a state tort claim (765 F.2d at 408-11)—the state court's decision thus plainly was not "on the merits," and did not involve a taking.

Despite Respondents' attempts at deflection, what is left in the wake of the Third Circuit's decision is more confusion and uncertainty, not less. The need for this Court's intervention to spell out the efficacy of *England* reservations remains.

IV. RESPONDENTS' ARGUMENTS REINFORCE THE IMPORTANCE OF THE ISSUES PRESENTED AND THE NEED FOR THIS COURT'S IMMEDIATE INTERVENTION.

With one minor exception, Respondents do not dispute the unsettling impact the Third Circuit's decision will inflict on condemning authorities and the taxpayers who support them.[6] *Amici*, who collectively represent every aspect of municipal, county, and state government in the United States, describe in clear detail in their brief the negative ramifications of the Third Circuit's decision for those government bodies—namely, the increase in duplicative takings litigation, and the concomitant escalation of costs, delay of redevelopment planning efforts, and disruption of land-use regulatory activity that come with it. *See* Br. of *Amici Curiae* Nat'l League of Cities, *et al.*, No. 11-1234 (filed May 16, 2012). Taxpaying citizens should be able to carry

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[6] The minor exception is Respondents' observation (at 20) that non-parties and *amici* can easily "avoid[ ]" the Third Circuit's claim preclusion ruling "by express non-agreement" with an asserted *England* reservation. But as the petition explains (at 27-28), given this Court's clear directives in *Allen v. McCurry*, 449 U.S. 90 (1980) and *San Remo Hotel* regarding the inefficacy of *England* reservations in the absence of *Pullman* abstention, condemning bodies rightly may see no need to object to asserted *England* reservations in this context. Respondents' observation is, in any case, irrelevant because it does nothing to negate the clear error in the Third Circuit's ruling, or its clear conflict with this Court's decision in *San Remo Hotel* and the decisions of other circuits.

out agreed-upon redevelopment improvements in their communities without the skewing effect created by the increasingly present specter of duplicative and protracted takings litigation.

CONCLUSION

On considered reflection, the conflicts and uncertainty on the critical preclusion issues are not in dispute. The petition for a writ of certiorari should be granted.

Respectfully submitted.

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