Appeal Nos. 12-15971 and 12-16076

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIDGE AINA LE'A, Plaintiff-Appellee-Cross Appellant,

vs.

KYLE CHOCK, in his individual and official capacity et al,
Defendants-Appellants-Cross Appellees,

On Appeal From the United States District Court
for the District of Hawai`i
Honorable Susan O. Mollway

Case No. 11-00414 SOM BMK

DEFENDANTS-APPELLANTS-CROSS APPELLEES' THIRD BRIEF

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DEFENDANTS-APPELLANTS-CROSS APPELLEES'[1] THIRD BRIEF

INTRODUCTION

Plaintiff filed this suit seeking millions of dollars in alleged damages from volunteer members of the State of Hawai'i Land Use Commission. These Individual Commissioners are entitled to absolute quasi judicial immunity and qualified immunity. They filed a motion to dismiss on that basis.

But the district court refused even to consider the motion on the merits. Instead the court incorrectly invoked *Pullman* abstention, thereby refusing to rule at all and consigning the Individual Commissioners to years with the shadow of this lawsuit hanging over their heads.

This decision was and is wrong. The federal courts should not abstain. The district court should have and this Court should rule that the Individual Commissioners are immune from personal liability and are entitled to dismissal of all claims against them personally.

I. SUMMARY OF THE ARGUMENT[2]

Defendants contend that the district court erred in

[1] The State Land Use Commission and official capacity defendants are collectively referred to as the "Commission" or the "LUC." Individual capacity defendants are referred to as "Individual Commissioners." All defendants collectively are referred to as "defendants."

[2] This third brief omits the jurisdictional statement, statement of the issues presented for review, statement of the case, standards of review, and statement of the facts. Defendants respectfully refer this Court to their opening brief for these items.

exercising *Pullman* abstention. If this is correct, then the sole issue on plaintiff's cross appeal – whether all or portions of the case should be remanded to state court – is moot.

We therefore first discuss abstention. This discussion is limited because plaintiff did not mention the issue at all other than incorporating the district court's ruling.

We next show that plaintiff's arguments on the merits of absolute and qualified immunity are wrong and that the Individuals Commissioners are entitled to immunity.

Finally (for the sake of completeness), we explain that even if abstention is appropriate, no portion of the case should be remanded to state court.

II. ARGUMENT

A. THE DISTRICT COURT SHOULD HAVE AND THIS COURT SHOULD RULE ON THE INDIVIDUAL COMMISSIONERS' ENTITLEMENT TO IMMUNITY

Plaintiff makes no argument as to the threshold issue on this appeal – whether the district court should have abstained from ruling on the Individual Commissioners' claims of absolute and qualified immunity. Instead plaintiff does nothing more than refer this Court to the district court's opinion. *See* second brief, page 30 fn. 8.

Plaintiff's approach deprives this Court of the benefit of a true "adversarial process" that would allow the "issues and the evidence [to] be clarified and sharpened by vigorous

presentations from both sides." *Gerlaugh v. Stewart*, 129 F.3d 1027, 1051 (9th Cir. 1997) (Reinhardt J. concurring and dissenting)

In any event, plaintiff's strategic decision leaves nothing for defendants to respond to. With respect, the district court's decision to abstain was error. Absolute and qualified immunities "are immunities from suit, not just from damages. *See Mitchell v. Forsyth,* 472 U.S. 511, 525, 527, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985)." *al-Kidd v. Ashcroft*, 580 F.3d 949, 956 (9th Cir. 2009), *rev'd on other grounds and remanded*, 131 S. Ct. 2074 (2011).

To illustrate the point, defendants respectfully ask this Court to posit that the exact issues had been decided by a state court judge and plaintiff's complaint named that judge as a defendant. It is inconceivable that the district court would have refused to rule as to the claim against a judge. But there is no relevant difference between a hypothetical suit against a judge and the actual suit against the Individual Commissioners. The state court appeal does not address the issue of whether the Individual Commissioners were acting in a quasi judicial capacity – indeed it is settled Hawai'i law that they were. Plaintiff's own complaint admitted it.

If (as we now show) the Individual Commissioners are entitled to quasi judicial immunity or qualified immunity, then by the very nature of those immunities, they are entitled to them now rather than some indefinite time in the future.

B. THE INDIVIDUAL COMMISSIONERS ARE ENTITLED TO ABSOLUTE QUASI JUDICIAL IMMUNITY AS TO ALL FEDERAL CLAIMS AGAINST THEM PERSONALLY

Plaintiff's argument opposing Individual Commissioners' right to absolute immunity begins on page 36 of their brief. As it did in the district court, plaintiff relies largely on *Zamsky v. Hansell,* 933 F.2d 677 (9th Cir. 1991). Defendants' opening brief already shows why that case is not applicable. Plaintiff's arguments do not overcome that showing.

The Court in *Zamsky* gave three reasons why the Oregon Land Conservation and Development Commission (LCDC) commissioners were not entitled to quasi judicial immunity. The first two reasons are indisputably inapplicable. Even plaintiff does not refer to them, relying solely on the third reason (second brief at 39):

> And finally, unlike the professional administrative law judges in *Butz,* the LCDC Commissioners are not insulated from the agency that promulgates the rules to be applied. Instead, they are the same individuals who promulgate the "goals" in the first place; they combine the functions of lawmaker and monitor of compliance.

In a strained attempt to apply this factor to our case, plaintiff makes five arguments (second brief 39 - 41): 1) the Individual Commissioners created the administrative rules that apply to all petitioners in any proceeding before the Commission; 2) the Individual Commissioners created all of the requirements and conditions for the project; 3) the Individual Commissioners actively monitored compliance with their 2005 order and 2009 orders; 4) the Individual Commissioners amended the property's

land use boundary to agricultural use, despite numerous procedural violations; and 5) Individual Commissioners allegedly played "specific and integral role" in the process. None of these points have merit.

The Individual Commissioners did not create the administrative rules that apply to all petitioners in any proceeding before the Commission

This argument is both untrue and irrelevant.

It is untrue because the Individual Commissioners did not "create" any of the rules applicable to the Commission generally or the contested case specifically. All of these rules were passed long before any of them became Commissioners.[3]

A second reason the argument is untrue is because the Commission does not "create" it own rules. These rules - like any administrative rules in Hawai'i - are adopted through an elaborate rule making procedure detailed in Haw. Rev. Stat. § 91-3 (2012). The process includes public input, review by the Department of Attorney General, and approval by the Governor.

Besides being untrue, plaintiff's argument is irrelevant - the rules of procedure applicable to quasi judicial proceedings are nothing like the broad goals at issue in *Zamsky*. Moreover, like the Commission, courts also routinely adopt rules of procedure. Doing so does not make the process any less judicial.

[3] The LUC's rules, compiled at HAR chapter 15-15 may be accessed at http://luc.hawaii.gov/adminstrative-rules/unofficial-land-use-commission-rules-chapter-15-15/ . This website gives the dates of enactment and amendment for most of the rules. The most recent amendments to the rules occurred in 2000.

The Individual Commissioners did not create all of the requirements and conditions for the project

The goals of chapter 205 are established by the legislature. These goals are stated in the statute. When deciding whether to reclassify land, the Commission is tasked to determine - in a quasi judicial process - whether those broad goals are met in a particular case. The Commission approves reclassification only when it "finds upon the clear preponderance of the evidence that the proposed boundary is reasonable, not violative of section 205-2 and part III of this chapter, and consistent with the policies and criteria established pursuant to sections 205-16 and 205-17." Haw. Rev. Stat. § 205-4(h) (Cum. Supp. 2012).

The application of broad rules and goals to a specific set of facts is a peculiarly judicial function. In this case, the Commission found that the goals were met and reclassified the land in 1989 – long before any of the Individual Commissioners took office. Compl. ¶ 11, ER 84. The Commission set certain conditions at that time, *id.*, because the Commission is specifically authorized and directed as part of the reclassification process to "impos[e] conditions necessary to uphold the intent and spirit of this chapter or the policies and criteria established pursuant to section 205-17." Haw. Rev. Stat. § 205-4(g) (2001).

These conditions are not the same as the "goals" referred to in *Zamsky*.

To the extent the Individual Commissioners actively monitored compliance with their 2005 order and 2009 orders, they were complying with Hawai'i law

The Commission later, in another quasi judicial proceeding, considered whether those conditions were met. Again, it did so as directed by statute. Haw. Rev. Stat. § 205-4(g) (2001) ("the commission shall issue and serve upon the party bound by the condition an order to show cause why the property should not revert to its former land use classification or be changed to a more appropriate classification."). Complying with its enabling statute does not make this case like *Zamsky*.

The Individual Commissioners did not "amend" the property's land use boundary to its original agricultural use, "despite numerous procedural violations"

All of plaintiff's so-called procedural violations turn on one issue – whether reverting the property to its former land use classification as directed in Haw. Rev. Stat. § 205-4(g) (2001) is the same as reclassifying the land in the first place pursuant to section 205-4(a) and 205-4(h). *See also Lanai Co., Inc. v. Land Use Com'n*, 105 Haw. 296, 318, 97 P.3d 372, 394 (2004):

> But the legislature granted the LUC the authority to impose conditions and to down-zone land for the violation of such conditions for the purpose of "uphold[ing] the intent and spirit" of HRS chapter 205, and for "assur[ing] substantial compliance with representations made" by petitioners. HRS § 205-4(g) . . . Consequently, the LUC must necessarily be able to order that a condition it imposed be complied with, and that violation of a condition cease.

The Commission – advised every step of the way by its

attorneys from the Department of Attorney General – understood that reversion is not the same as reclassification. This disagreement explains every one of the alleged "violations."

In any event, plaintiff's argument proves nothing. It does not change the undisputed fact that the reversion was accomplished in quasi judicial proceedings that spanned months of extensive hearings, motions practice, and meetings. *See e.g.* Compl. ¶ ¶ 37-40, 44, 45, 50, 60, 61, 75, and 81-124, ER 79 et seq. Plaintiff itself specifically alleged that the decision to revert was made by way of a contested case hearing. Compl. at ¶ ¶ 40 and 44, ER 92:

> 40. Also, the Order to Show Cause specifically stated that "the Commission will conduct a hearing on this matter in accordance with the requirements of Chapter 91, Hawaii Revised Statutes, and Subchapters 7 and 9 of Chapter 15-15-, Hawaii Administrative Rules."
>
> * * *
>
> 44. On January 9, 2009, the hearing on the Order to Show Cause commenced before the Commission. The Order to Show Cause hearing was a "contested case" under HRS Chapter 91.

See second brief at 11 ("the hearing on the order to show cause . . . was a contested case").

A contested case is by its very nature a judicial procedure. *Kaniakapupu v. Land Use Com'n*, 111 Haw. 124, 140, 139 P.3d 712, 728 (2006) (Acoba J. dissenting): "[T]he LUC was performing an adjudicatory function which is inherent in a contested case

hearing." Plaintiff's disagreement as to the exact requirements of the quasi judicial proceeding does not change the fact that it was a quasi judicial proceeding.

Individual Commissioners allegedly played "specific and integral role[s]" in the process

Plaintiff's point seems to be that the Individual Commissioners were biased against it. The Individual Commissioners' disagree. To the extent Individual Commissioners wanted to "impose consequences" for violation of conditions, second brief at 22, doing so is simply their job under Haw. Rev. Stat. § 205-4(g) (2001) ("absent substantial commencement of use of the land in accordance with such representations, the commission shall issue and serve upon the party bound by the condition an order to show cause why the property should not revert to its former land use classification or be changed to a more appropriate classification.").

In any event, judicial immunity would be meaningless if the mere allegation of bias was sufficient to thwart it. Therefore the applicable law is clear – "Judges' immunity from civil liability should not be 'affected by the motives with which their judicial acts are performed.'" *Ashelman v. Pope,* 793 F.2d 1072, 1075 (9th Cir. 1986) (en banc) (citing *Cleavinger v. Saxner,* 474 U.S. 193, 199–200 (1985) (quotations omitted)).

Ashelman noted that "policy considerations favor a liberal application of [judicial] immunity." *Id.* at 1078. It held that to effectuate the policy considerations behind judicial immunity

"we will broadly construe the scope of immunity." In pursuit of these goals, the Court upheld judicial immunity on pleadings that go far beyond those at issue here.

Ashelman itself upheld dismissal of a complaint that accused a judge of conspiracy and bribery. "To foreclose immunity upon allegations that judicial and prosecutorial decisions were conditioned upon a conspiracy or bribery serves to defeat these policies." *Id.* The Court also cited with approval cases alleging "bad faith, personal interest or outright malevolence." *Id.* at 1077.

After its failed references to *Zamsky*, plaintiff reiterates (second brief at 41-43) its allegations that the Commission and Individual Commissioners did not correctly follow procedures required in a contested case.

Again (as pointed out above) this is irrelevant. The question is whether the proceeding at issue is "judicial in nature." Ashelman, 793 at 1075. "The factors relevant in determining whether an act is judicial 'relate to the nature of the act itself, i.e., whether it is a function normally performed by a judge, and to the expectations of the parties, i.e., whether they dealt with the judge in his judicial capacity.'" *Id.* citing *Stump v. Sparkman,* 435 U.S. 349, 362 (1978). The Court went on:

> To determine if a given action is judicial, those courts focus on whether (1) the precise act is a normal judicial function; (2) the events occurred in the judge's chambers; (3) the controversy centered around a case then pending before the judge; and (4) the events

> at issue arose directly and immediately out of a confrontation with the judge in his or her official capacity. *See*

793 F.2d at 1075-76.

Here, the Commission's proceedings were required by Hawai'i law to be by way of contested case, a quasi judicial proceeding under Hawai'i law. Disagreement as to the exact procedures required in the contested case is irrelevant.

Plaintiff next (second brief 43) unsuccessfully attempts to distinguish *Buckles v. King County*, 191 F.3d 1127 (9th Cir. 1999). Plaintiff argues that the "Commission's order to show cause did not have the characteristics of a traditional adversarial proceeding" and 'the Commission's proceedings in this case had few if any characteristics of the judicial process."

This argument fails to acknowledge plaintiff's own admission that the decision to revert was made by way of a contested case hearing. Compl. at ¶ ¶ 40 and 44, ER 92-93; second brief at 11.

Nor does plaintiff deny the mountains of process and opportunities to present evidence pointed out in its own complaint. *See e.g.* Compl. ¶ ¶ 37-40, 44, 45, 50, 60, 61, 75, and 81-124, ER 79 et seq.

The fact that the proceedings were not conducted the way plaintiff wanted may or may not have been error. But plaintiff's disagreement does not mean the Commission acted in the "clear absence of all jurisdiction." *Ashelman*, 793 F.2d at 1075.

Plaintiff's only argument as "to insulation from political

influence" is that "for the first time ever, the Governor's Office of Planning was publicly advocating that the Commissioners kill an ongoing affordable housing project." Second brief at 46. Even if the OP reflects the Governor's wishes, the Governor does not have the power to remove commissioners or shorten their term except in very limited circumstances. *See generally* opening brief at 27-28.

Finally, plaintiff argues that the Commission "willfully disregarded their own longstanding precedent." Second brief at 46. This apparently restates plaintiff's allegation of a "class of one" equal protection claim. The Commission disagreed as to the applicability of the alleged precedent. But even accepting for purposes of this motion only that plaintiff is right and that there is no rational basis for the difference in treatment, the error does not abrogate the immunity.

Judicial immunity applies no matter how "erroneous the act may have been, and however injurious in its consequences it may have proved to the plaintiff." *Ashelman v. Pope,* 793 F.2d 1072, 1075 (9th Cir. 1986) (en banc) (citing *Cleavinger v. Saxner,* 474 U.S. 193, 199–200 (1985) (quotations omitted)). If judicial immunity vanished every time the judge or tribunal disagreed with a party's appeal to precedent, then immunity would never exist.

C. IN ADDITION OR IN THE ALTERNATIVE, INDIVIDUAL COMMISSIONERS ARE ENTITLED TO QUALIFIED IMMUNITY AS TO ALL FEDERAL LAW CLAIMS AGAINST THEM PERSONALLY

> Whether a right is clearly established for the purposes of qualified immunity "depends substantially upon the level of generality at which the relevant 'legal rule' is to be identified." *Anderson v. Creighton,* 483 U.S. 635, 639, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). The right must not be stated as a broad general proposition, but rather must be defined with enough specificity to put a reasonable officer on notice that his conduct is unlawful. *Reichle v. Howards,* ––– U.S. ––– –, 132 S.Ct. 2088, 2093–94, 182 L.Ed.2d 985 (2012); *cf. Hope,* 536 U.S. at 741, 122 S.Ct. 2508 (holding that "general statements of the law are not inherently incapable of giving fair and clear warning" to officers even where their specific conduct has not previously been held unlawful) (quoting *United States v. Lanier,* 520 U.S. 259, 271, 117 S.Ct. 1219, 137 L.Ed.2d 432 (1997)). A right can be clearly established despite a lack of factually analogous preexisting case law, and officers can be on notice that their conduct is unlawful even in novel factual circumstances. *See Karl v. City of Mountlake Terrace,* 678 F.3d 1062, 1073 (9th Cir.2012). The relevant inquiry is whether, at the time of the officers' action, the state of the law gave the officers fair warning that their conduct was unconstitutional. *Hope,* 536 U.S. at 741, 122 S.Ct. 2508. We must assess the legal rule "in light of the specific context of the case, not as a broad general proposition." *Saucier,* 533 U.S. at 201, 121 S.Ct. 2151.

Ford v. City of Yakima, 706 F.3d 1188, 1195 (9th Cir. 2013).

This discussion is directly applicable here. The law as to due process and equal protection (class of one) is well established at a high level of generality. But in this case, the Individual Commissioners were exercising their statutory

discretion to decide this case. Haw. Rev. Stat. § 205-4(g) (2001) ("The commission may provide by condition that absent substantial commencement of use of the land in accordance with such representations, the commission shall issue and serve upon the party bound by the condition an order to show cause why the property should not revert to its former land use classification or be changed to a more appropriate classification.").

The Individual Commissioners could not have known that daring to disagree with plaintiff as to how to apply this discretion would subject them to millions of dollars in potential personal liability. *See Towery v. Brewer*, 672 F.3d 650, 660 (9th Cir.), *cert. denied*, 132 S. Ct. 1656 (2012):

> The class-of-one doctrine does not apply to forms of state action that "by their nature involve discretionary decisionmaking based on a vast array of subjective, individualized assessments." *Engquist v. Oregon Dep't of Agric.*, 553 U.S. 591, 603, 128 S.Ct. 2146, 170 L.Ed.2d 975 (2008). "In such cases," the Court noted,
>
> > the rule that people should be 'treated alike, under like circumstances and conditions' is not violated when one person is treated differently from others, because treating like individuals differently is an accepted consequence of the discretion granted. In such situations, allowing a challenge based on the arbitrary singling out of a particular person would undermine the very discretion that such state officials are entrusted to exercise.

Id.

Plaintiff's main case, *Gerhart v. Lake County, Mont.*, 637 F.3d 1013 (9th Cir.), cert. denied, 132 S. Ct. 249 (2011), supports the Individual Commissioners as to the due process claim. The Individual Commissioners would have no reason to think that plaintiff had a property right to keep the land use classification without complying with provisos that had always conditioned that classification.

As to equal protection, *Gerhart* is not applicable because the Individual Commissioners were exercising their discretion in a quasi judicial proceeding. *See Towery, id.*

Moreover, *Gerhart* was not filed until March 18, 2011, and certiorari was not denied until October 3, 2011. To the extent the case clarifies or changes circuit law and raises an issue as to *Enquist* ("The class-of-one doctrine does not apply to forms of state action that 'by their nature involve discretionary decisionmaking'") it was not available to the Individual Commissioners (or their lawyers at the Department of Attorney General) at the time the Commission -

- issued its Order to Show Cause ("OSC") on September 18, 2008 (Compl. ¶ 37, ER 92)
- adopted the OSC on April 29, 2009 (Compl. ¶ ¶ 48-50, ER 94-95)
- filed its order rescinding OSC on condition precedent on September 28, 2009 (Compl. ¶ 60, ER 97)

- kept the OSC in place on July 1, 2010 (Compl. ¶ ¶ 73-76, ER 100-101)
- voted to revert the property to agriculture classification on January 20, 2011 (Compl. ¶ ¶ 90-96, ER 105-106)
- approved the form of the order doing so on March 10, 2011 (Compl. ¶ ¶ 100-103, ER 107)[4]

The only action taken after *Gerhart* was filed (and even this was before denial of certiorari) was to finalize the order on April 21, 2011 (Compl. ¶ ¶ 111 and 119, ER 109 and 111). Therefore, at the time the Individual Commissioners acted *Gerhart* was not available to either them or their attorneys as clearly established law and does not affect their right to qualified immunity. *See Anderson v. Creighton*, 483 U.S. 635, 640 (1987) ("in the light of pre-existing law the unlawfulness must be apparent") (emphasis added).

At a minimum, *Enquist* "injected uncertainty into the law" such that it was not clearly established that the Individual Commissioners violated plaintiff's rights by exercising their statutory discretion. *Reichle v. Howards*, 132 S.Ct. 2088, 2096 - 2097 (2012).

[4] It should be noted that not all of the Individual Commissioners participated in all those decisions.

D. INDIVIDUAL COMMISSIONERS ARE ENTITLED TO ABSOLUTE JUDICIAL IMMUNITY AND STATUTORY IMMUNITY/QUALIFIED PRIVILEGE AS TO ALL STATE LAW CLAIMS AGAINST THEM FOR DAMAGES, INCLUDING JUST COMPENSATION

Plaintiff advances five cursory points opposing state law immunity and privilege. None of the five have merit.

First, the absence of a Hawai'i supreme court case directly on point does not mean this Court cannot or should not rule as to absolute immunity. Rather:

> In the absence of such a decision, a federal court must predict how the highest state court would decide the issue using intermediate appellate court decisions, decisions from other jurisdictions, statutes, treatises, and restatements as guidance.

Trishan Air, Inc. v. Fed. Ins. Co., 635 F.3d 422, 427 (9th Cir. 2011).

Second, plaintiff does not directly dispute that quasi judicial immunity should apply to the state claims in the same manner as to the federal claims. Plaintiff does not address or dispute that Hawai'i case law extends quasi judicial immunity to court-appointed psychiatrists, probation officers, prosecutors, and court appointed receivers – all based on federal law principles.

Based on the cases cited in the opening brief, the most reasonable prediction is that quasi judicial immunity will apply to state claims the same as it does to federal claims.

Third, it is true that Haw. Rev. Stat. § 26-35.5(b) does not apply to constitutional claims. But there is no direct cause of

action for state constitutional claims. *Figueroa v. State*, 61 Haw. 369, 381-382, 604 P.2d 1198, 1205 (1979). There is no Hawai‘i equivalent of a *Bivens* action and no Hawai‘i statutory right comparable to section 1983.

Moreover, if there was a claim for violation of the state constitution and even if the Individual Commissioners did not have statutory immunity or a privilege, they would in any event have a common law privilege under Hawai‘i case law.

Fourth, plaintiff fails to point to any allegation in its complaint to support a claim that the Individual Commissioners acted with “a malicious or improper purpose,” Haw. Rev. Stat. § 26-35.5(b) (2009), or that they were “motivated by malice and not by an otherwise proper purpose.”

The best they can do is a generalized reference to pages of the complaint rather than allegations or paragraphs. These pages do not contain plausible, non conclusory facts as to malice or improper purpose. *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009). At the very most, the allegations are “merely consistent with” potential liability. But that is not enough. The allegations are also “compatible with, but indeed [] more likely explained by,” 556 U.S. at 680, the Individual Commissioners’ good faith belief that they were acting lawfully in discharge of their legal responsibilities. The allegations, therefore, “stop[] short of the line between possibility and plausibility of ‘entitlement to relief.’” *Id.* (citation omitted).

E. THIS CASE CANNOT BE SENT BACK TO STATE COURT

We turn now to plaintiff's claim that all or part of this case should be remanded back to state court. Of course this question is moot if the Court agrees with the Individual Commissioners that abstention is not warranted.

In no event should the Court remand any claims to state court. The rule with respect to *Pullman* abstention is quite clear.

> If a court invokes *Pullman* abstention, it should stay the federal constitutional question "until the matter has been sent to state court for a determination of the uncertain state law issue." Erwin Chemerinsky, *Federal Jurisdiction,* § 12.2.1, at 737 (3d ed.1999).

Fireman's Fund Ins. Co. v. City of Lodi, California, 302 F.3d 928, 940 (9th Cir. 2002).

No Ninth Circuit[5] case suggests that this clear rule is inapplicable because the case was originally filed in state court and properly removed as of right. Nor should there be a difference. Plaintiff pleaded federal law claims against the Individual Commissioners. No one disputes that defendants properly removed, as was their right.

There is no policy reason or equitable reason to remand all or part of the case. Plaintiff's arguments are unpersuasive. To the extent plaintiff wishes to proceed now with its taking claim

[5]Or any other circuit so far as our research has found. Plaintiff cites no circuit court case. Its district court cases are unpersuasive as discussed below.

(second brief at 32), that claim can proceed in federal court just as easily as in state court. There is no need or reason to remand in order to proceed with the taking claim. The claim has just as little merit in either court.

Plaintiff's alleged fear that it might need injunctive or declaratory relief "if the Commission takes further steps to interfere with the project" (second brief at 34) is nothing more (or less) than raw speculation. The state court has already reversed the Commission's ruling. Nothing the Commission has done since then in any way indicates that it intends to disrespect that ruling.

This Court should not lightly assume that state actors intend to act unlawfully. Even if the Commission's past actions were wrongful (hotly disputed of course) there would still have to be some plausible basis that the threat was on-going or likely to be repeated. *City of Los Angeles v. Lyons,* 461 U.S. 95 (1983).

Contrary to plaintiff's argument (second brief at 35) remand is highly unfair to defendants. If all the claims are remanded, then defendants are deprived of their clear right to have the federal claims decided in federal court.

If only some of the claims are remanded, then either the parties have to litigate the case twice or the federal suit is barred altogether by claim and issue preclusion doctrines. *San*

Remo Hotel, L.P. v. City & Cnty. of San Francisco, Cal., 545 U.S. 323, 348 (2005).

Plaintiff's harm from delay is limited at best. If it prevails on a taking claim, it will presumably seek interest to compensate it for any delay. Indeed, an odd aspect of this case is that (by plaintiff's own admission) it has at most a temporary taking claim at this point. If plaintiff litigated that claim only to lose the state court appeal, then presumably its alleged permanent taking claim would be lost forever. At a minimum, that claim would require additional litigation.

There is no precedent whatsoever for plaintiff's proposed remand in the circumstances of this case. Plaintiff's reliance on *VH Prop. Corp. v. City of Rancho Palos Verdes*, 622 F. Supp. 2d 958 (C.D. Cal. 2009) is misplaced. As the district court recognized:

> The present case differs in a significant manner from *VH Property*. *VH Property* viewed a remand as necessary to put the state claims before a state court for its decision. By contrast, in the present case, the heart of the state claims is already before a state court in Bridge's administrative appeal. The administrative appeal is likely to be highly relevant to, and possibly determinative of, many of the state claims in the present case. Thus, the rationale in *VH Property* for remanding state claims pursuant to *Pullman* does not have the same force in this case.

Bridge Aina Le'a, LLC v. Hawaii Land Use Comm'n, 2012 WL 1109046 (D. Haw. 2012).

Ganz v. City of Belvedere, 739 F. Supp. 507 (N.D. Cal. 1990) is inapplicable for the same reason – a separate state court proceeding is already pending. In addition, defendant in *Ganz* complained "that if the Court were to remand the entire action to state court, they would lose their statutory right under 28 U.S.C. § 1441(b) to have plaintiff's federal claims adjudicated by a federal district court." The court in *Ganz* did not think this was a problem "because defendants may preserve their right to federal district court adjudication of plaintiff's federal claims by making a reservation on the state court record. *England, supra,* at 421, 84 S.Ct. at 467–68." 739 F. Supp. at 510.

Even if this was correct in 1990, it is not an option now because of the Supreme Court's ruling in *San Remo Hotel, L.P. v. City & Cnty. of San Francisco, Cal.*, 545 U.S. 323, 348 (2005) (Rehnquist J concurring) ("it is quite clear that they are now precluded by the full faith and credit statute, 28 U.S.C. § 1738, from relitigating in their 42 U.S.C. § 1983 action those issues which were adjudicated by the California courts").

In *Palmer Trinity Private School, Inc. v. Village of Palmetto Bay, Florida*, 802 F.Supp.2d 1322 (S.D.Fla. 2011) (second brief at 31) the court found that *Pullman* abstention was appropriate and remanded without any discussion or analysis as to why abstention required remand.

III. CONCLUSION

For the reasons stated in their opening brief and in this brief, defendants ask this Court to dismiss all claims filed against the Individual Commissioners and enter judgment in their favor, and to remand to the district court for further proceedings without abstention and in conformity with this Court's ruling.

DATED: Honolulu, Hawai'i, May 13, 2013.

/s/ William J. Wynhoff
Deputy Attorney General
Attorney for DEFENDANTS-APPELLANTS-CROSS APPELLEES

CERTIFICATE OF SERVICE

I hereby certify that on the date the foregoing document is filed it will be served on the following persons electronically through CM/ECF:

Bruce D. Voss

Matthew C. Shannon

Michael C. Carroll

DATED: Honolulu, Hawai‘i, May 13, 2013.

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