No. 11-189

In the
Supreme Court of the United States

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

v.

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

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

PETITIONER'S REPLY BRIEF

RICHARD H. CLOSE
THOMAS W. CASPARIAN
Gilchrist & Rutter
1299 Ocean Avenue,
Suite 900
Santa Monica, CA 90401
Telephone: (310) 393-4000
Facsimile: (310) 394-4700
E-Mail:
rclose@gilchristrutter.com
tcasparian@gilchristrutter.com

R. S. RADFORD
Counsel of Record
Pacific Legal Foundation
930 G Street
Sacramento, CA 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: rsr@pacificlegal.org

Counsel for Petitioner

No. 11-189

In the
Supreme Court of the United States

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

v.

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

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

PETITIONER'S REPLY BRIEF

RICHARD H. CLOSE
THOMAS W. CASPARIAN
Gilchrist & Rutter
1299 Ocean Avenue,
Suite 900
Santa Monica, CA 90401
Telephone: (310) 393-4000
Facsimile: (310) 394-4700
E-Mail:
rclose@gilchristrutter.com
tcasparian@gilchristrutter.com

R. S. RADFORD
Counsel of Record
Pacific Legal Foundation
930 G Street
Sacramento, CA 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: rsr@pacificlegal.org

Counsel for Petitioner

QUESTIONS PRESENTED

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

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

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

CORPORATE DISCLOSURE STATEMENT

Colony Cove Properties, LLC, has no parent corporation and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

Cases

INTRODUCTION

Petitioner Colony Cove Properties, LLC, respectfully submits this Reply to the Brief in Opposition (Opp.) of Respondents City of Carson, *et al.* (City). The City cites to a 1960s rock ditty for the proposition that this Court has declined previous opportunities to reconsider the ad-hoc abstention doctrine of *Williamson County*, so therefore the present Petition for Writ of Certiorari should also be denied. Opp. at 1. As attested by the array of amici who have filed briefs in support of the Petition, however, *Williamson County*'s fundamental conflict with the purpose and intent of 42 U.S.C. § 1983 is a matter of great national importance that cries out for review. *See* Brief Amicus Curiae of Western Manufactured Housing Communities Association in Support of Petition for Certiorari (WMA Brief) at 2 ("The rule laid down in *Williamson County* . . . has caused jurisprudential havoc in the quarter-century of its existence."); Brief of Amici Curiae Cato Institute, New England Legal Foundation, National Federation of Independent Business, Institute for Justice, Goldwater Institute, Richard Epstein, and James Ely in Support of Petitioner (Cato Brief) at 1 ("This case presents an opportunity to rectify a significant indefensible anomaly in this Court's jurisprudence.").

Because the widespread and manifest harms created by a *de facto* abstention doctrine that lacks any underlying doctrinal rationale will only worsen with the passage of more time, this Court should grant the Petition as the "appropriate case" in which to reconsider *Williamson County*. *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323, 352 (2005) (Rehnquist, C.J., concurring).

I

THE CITY'S ASSERTION THAT COLONY HAS NOT BEEN DEPRIVED OF A FEDERAL FORUM IN THIS CASE REFLECTS A MISUNDERSTANDING OF THE GRAVAMEN OF THE PETITION

In a curious parody of the ultimate legal issue in this case, the City argues that Colony's Petition is "premature" because Colony has not yet sought compensation in state court for the City's violation of its constitutional rights. Opp. at 8. Under the City's theory, until Colony submits its Section 1983 claim to the California judiciary, in a proceeding that would have preclusive effect on any subsequent federal litigation, Colony cannot allege that it has been deprived of a federal forum. *Id.* at 8-10.

This argument apparently reflects the City's mistaken belief that the Petition asks this Court to overrule *San Remo*. *See* Opp. at 3 (asserting that, until Colony's Section 1983 claim is submitted to the California courts and subsequently barred from further federal litigation, Colony "cannot claim to be an aggrieved party by *San Remo's* enforcement of the Full Faith and Credit Act"). As was made clear in the Petition, Colony asks this Court to revisit *Williamson County*, not *San Remo*. Pet. at 11 ("[I]t is not *San Remo* that is the source of the ad-hoc doctrine of federal abstention from adjudicating Fifth Amendment takings claims. The source of that doctrine is the 'fortuitously coined' wording of *Williamson County* itself, which is long past due for reconsideration by this Court.").

Colony was deprived of its right to a federal forum by the federal district court's abstention from hearing Colony's Section 1983 claim under *Williamson County*. Petition Appendix (Pet. App.) at B-18 (dismissing Colony's allegations of a violation of its federal constitutional rights "to allow the State the opportunity to evaluate Plaintiff's claims and determine if compensation is warranted"). This deprivation of Colony's right to a federal forum was affirmed by the Ninth Circuit. Pet. App. at A-1. No further "ripening" of Colony's claim is necessary to present this Court with an opportunity to squarely confront and resolve the fundamental conflict between *Williamson County* and Section 1983.

II

SAN REMO DOES NOT HOLD THAT THERE IS NO RIGHT TO A FEDERAL FORUM IN TAKINGS CASES BROUGHT UNDER SECTION 1983, EXCEPT WHEN THE SAME CLAIM HAS PREVIOUSLY BEEN LITIGATED IN STATE COURT

The Opposition Brief argues that Colony cannot complain of being deprived of a federal forum for its Section 1983 claim because the City misunderstands *San Remo* as holding there is "no right to a federal forum in Section 1983 takings cases." Opp. at 10-13. Yet this entire section of the Opposition Brief relies on cases in which a Section 1983 claim had previously been litigated in state court. *Id.* (citing and quoting at length from *San Remo* and *Allen v. McCurry*, 449 U.S. 90 (1980)). Neither *San Remo* nor any other case cited by the City stands for the general proposition that there is an exception to the Civil Rights Act whereby Section 1983 claims may be relegated to state court

solely because the plaintiff alleges a violation of its rights under the Fifth Amendment's Takings Clause. The conflict between *Williamson County*'s abstention doctrine and the fundamental purpose of Section 1983—assuring a federal forum for the vindication of federal constitutional rights—was not addressed by *San Remo*, except in the special instance of claims that have already been litigated in state court and are therefore barred from federal reconsideration by the Full Faith and Credit Act. The essential clash between the intent of Congress in adopting Section 1983 and a court-made abstention doctrine that lacks any underlying rationale can and should be addressed by granting the Petition for Writ of Certiorari in the present case.

III

THE OPPOSITION BRIEF CONFIRMS THERE IS NO COHERENT DOCTRINAL RATIONALE SUPPORTING *WILLIAMSON COUNTY*'S *AD-HOC* ABSTENTION RULE

As the Petition points out, not even its staunchest governmental supporters have been able to devise a coherent doctrinal rationale for federal abstention from regulatory takings claims under *Williamson County*. Pet. at 9. Instead, courts and defendants who invoke the ad-hoc abstention doctrine merely repeat the obvious but irrelevant truism, "The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation." *Id.* (quoting *Williamson County*, 473 U.S. at 194). Proffering its own variation on this theme, the Opposition Brief sets forth the City's conception of the constitutional doctrine underlying *Williamson County*: "[B]ecause the

Fifth Amendment proscribes takings *without just compensation*, no constitutional violation occurs until just compensation has been denied." Opp. at 13 (quoting *Williamson County*, 473 U.S. at 195 n.13).

The problem is that, no matter how often these passages are repeated, they are silent as to why a state court is competent to adjudicate a claim of deprivation of Fifth Amendment rights under color of law, while a federal court cannot adjudicate the identical claim, on identical facts. Groping for some justification for federal abstention, the City posits that if Section 1983 takings claimants could gain access to the federal courts, it would supposedly lead to "the worst kind of 'forum' shopping." Opp. at 2. But this objection would apply equally to every provision of the Bill of Rights. *See* WMA Brief at 10 ("As state and federal courts have concurrent jurisdiction to decide constitutional claims, the choice of forum, as in other cases, should belong in the first instance to the plaintiff."). The task facing the City—and, with respect, facing this Court—is to explain why our system of overlapping federal and state jurisdiction is the general rule for seeking redress for violations of constitutional rights, but federal abstention is required in adjudicating claims brought under the Takings Clause. The Opposition Brief has singularly failed to advance such an explanation.

IV

THE CITY'S RELIANCE ON *PARRATT v. TAYLOR* IS MISPLACED

In demonstrating the absence of any substantive doctrinal rationale for federal abstention under *Williamson County*, the Petition analogized to this

Court's treatment of Section 1983 claims arising under the Due Process Clause:

> [The Due Process Clause] does not proscribe the deprivation of life, liberty, or property; rather, it proscribes the deprivation of life, liberty, or property "without due process of law." U.S. Const. amend. V. Yet this Court has never taken that to mean due process claims brought under Section 1983 should be relegated to state court for a determination of whether due process can be obtained "through the procedures the state has provided for doing so." *Williamson County*, 473 U.S. at 194.

Pet. at 9-10. The City responds that, to the contrary, this Court does indeed relegate Section 1983 due process claims to state court under *Parratt v. Taylor*, 451 U.S. 527 (1981). Opp. at 15.

Parratt, however, does not create a general doctrine of federal abstention in due process claims, as *Williamson County* does with claims brought under the Takings Clause. *Parratt* applies only to a small subset of due process complaints—those alleging violation of *procedural* due process by "random and unauthorized" acts of government agents, when postdeprivation procedures exist to remedy the unauthorized deprivation. *Parratt*, 451 U.S. at 541. This Court carefully stressed the unique features of the case that justified the holding in *Parratt*:

> Although [the plaintiff] has been deprived of property under color of state law, the deprivation did not occur as a result of some established state procedure. Indeed, the deprivation occurred as a result of the

> unauthorized failure of agents of the State to follow established state procedure.

Id. at 543.

In stark contrast to *Parratt*'s cabining of a narrow subset of due process cases in which federal courts may withhold adjudication, *Williamson County* sweeps the entire population of Fifth Amendment takings claims off the federal docket, despite Section 1983's promise of a federal forum for violations of federal constitutional rights. *See* Cato Brief at 22 ("Despite Section 1983's plain language and evident purpose to protect constitutional rights by providing immediate access to federal courts for plaintiffs whose federal rights have been violated, these [takings] plaintiffs have been shut out because *Williamson County* eviscerated Section 1983."). It is this gross inconsistency in the Court's treatment of companion clauses within the Bill of Rights that has caused virtually all commentators and many lower courts, as well as Petitioner, to note that *Williamson County*'s ad-hoc abstention doctrine lacks any substantive doctrinal footing and should be reconsidered.

V

THE OPPOSITION BRIEF MISREPRESENTS THE AVAILABILITY OF AN INVERSE CONDEMNATION REMEDY TO COLONY IN THE CALIFORNIA COURTS

The second section of the Opposition Brief is boldly headed, "California Provides an Inverse Condemnation Remedy to Obtain Compensation from the Government in Rent Control Cases." Opp. at 16. Yet despite this misleading section heading, the City does not (and

cannot) dispute the fact that inverse condemnation was expressly foreclosed to plaintiffs in Colony's position by *Kavanau v. Santa Monica Rent Control Board*, 16 Cal. 4th 761, 767; 941 P.2d 851, 854 (1997) (A property owner who has suffered a taking through the application of confiscatory rent control "is not entitled to maintain an inverse condemnation action.").

As was fully set out in the Petition, the California Supreme Court in *Kavanau* unequivocally foreclosed an inverse condemnation remedy to plaintiffs in Colony's position. Pet. at 14-16. Although Colony has a fully ripe takings claim based on the City's use of its rent control ordinance to confiscate the value of Colony's property and transfer it to a politically dominant voting bloc, a complaint for inverse condemnation in state court would be summarily dismissed as failing to state a claim for which relief can be granted.

The inverse condemnation remedy referred to by the City is ***not*** a remedy for a taking effected by a predatory rent control ordinance. Rather, it is a wholly hypothetical procedure hinted at (although never spelled out and never granted) by the California Supreme Court as a potential remedy for an "inadequate" *Kavanau* adjustment! *See Galland v. City of Clovis*, 24 Cal. 4th 1003, 1029-30; 16 P.3d 130, 148 (2001) ("It is conceivable there *might* be a case when it is clear that resort to a *Kavanau* adjustment will not prevent a constitutional injury from occurring . . . . Under such circumstances, a section 1983 damages remedy *may well* be available.") (emphasis added). Unsurprisingly, the precise nature of, and procedure for obtaining, this hypothetical remedy are notably vague. In short, it would have been nearer the

truth if this section of the Opposition Brief had been headed, "California May One Day Provide an Inverse Condemnation Remedy for Hypothetical Plaintiffs Who Can Prove that a "*Kavanau* Adjustment" Is Constitutionally Inadequate, Although No One Knows What That Might Entail, and It Has Never Been Done."

The City somehow finds it telling that Colony made reference to the hypothetical existence of such a remedy in its opening brief to the Ninth Circuit. Opp. at 19 ("Colony Cove has already ***admitted***, in its filings with the Ninth Circuit that California provides an inverse condemnation remedy.") (bolded italics in original). As is readily apparent from the excerpt of Colony's brief the City attached as "Appendix A" to its Opposition, no such admission occurred. The point of the appended passage, clearly, is that even the California Supreme Court has hinted that a "*Kavanau* adjustment" may not in fact be a constitutionally adequate remedy for a taking. Yet the *Kavanau* procedure is the ***only*** remedy available in the California courts, for plaintiffs in Colony's position. It was on that basis that Colony invoked the jurisdiction of the district court to hear its Section 1983 claim, and it remains the basis of Colony's plea to this Court to recognize an exception to *Williamson County* in this case, even if *Williamson County* is to remain good law.

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be granted.

DATED: September, 2011.

Respectfully submitted,

RICHARD H. CLOSE
THOMAS W. CASPARIAN
Gilchrist & Rutter
1299 Ocean Avenue,
Suite 900
Santa Monica, CA 90401
Telephone: (310) 393-4000
Facsimile: (310) 394-4700
E-mail:
rclose@gilchristrutter.com
tcasparian@gilchristrutter.com

R. S. RADFORD
Counsel of Record
Pacific Legal Foundation
930 G Street
Sacramento, CA 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: rsr@pacificlegal.org

Counsel for Petitioner