No. 11-189

In the Supreme Court of the United States

COLONY COVE PROPERTIES, LLC,
Petitioner,

v.

CITY OF CARSON, CALIFORNIA, et al.,
Respondents.

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

BRIEF IN OPPOSITION

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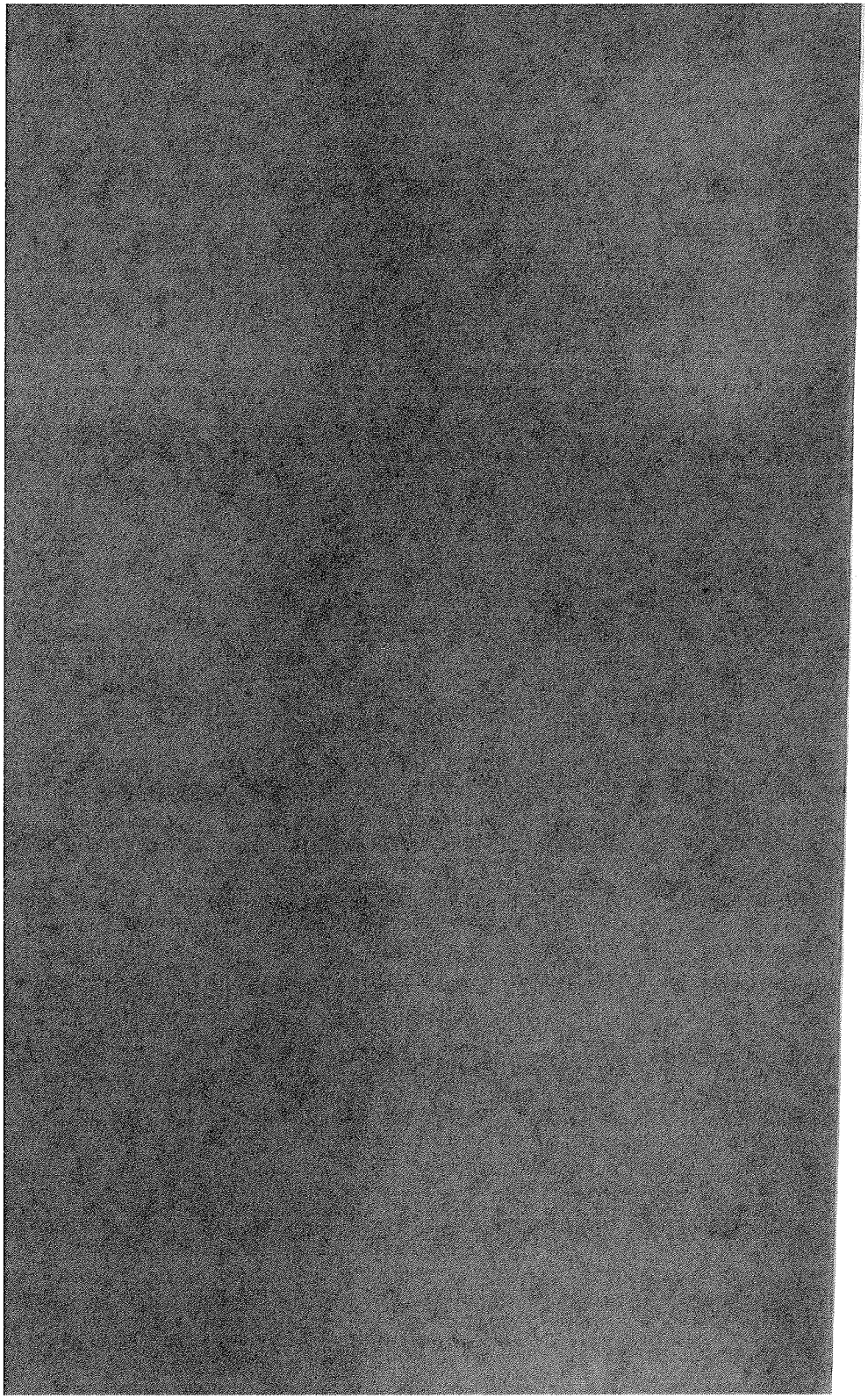

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Should this Honorable Court consider whether the "state procedures" requirement of *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985) denies Petitioner, Colony Cove Properties, LLC ("Colony Cove"), access to a federal forum in purported conflict with 42 U.S.C. § 1983, notwithstanding the undisputed fact that Colony Cove has yet to be denied a federal forum?

2. Assuming *arguendo* that *Williamson County* will, in fact, deny a federal forum to Colony Cove, should this Honorable Court revisit, and then overturn, its long-standing precedent in that case, particularly given that fact that all nine justices re-affirmed in *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005) that there is no absolute right to a federal forum for takings claimants seeking relief under 42 U.S.C. § 1983?

3. Should this Honorable Court reverse the long-standing determination of the California Supreme Court (on a purely state law matter), articulated in *Galland v. City of Clovis*, 24 Cal. 4th 1003 (2001), that California state law provides an inverse condemnation remedy for plaintiffs seeking takings damages in rent control cases against a municipality, particularly when Colony Cove has already ***admitted*** in its Ninth Circuit filings that the determination of the highest court in California in *Galland* is correct?

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SUMMARY OF THE CITY'S ARGUMENT

Petitioner, Colony Cove Properties, LLC ("Colony Cove"), urges this Honorable Court to reconsider its decision in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985) ("*Williamson County*") because it purportedly conflicts with the "intent" of 42 U.S.C. § 1983 ("Section 1983") by preventing Colony Cove from bringing a Fifth Amendment taking claim in Federal Court. As will be demonstrated herein, Colony Cove is simply wrong. There is no reason to grant the Petition in this case and the same should be summarily denied.

Indeed, this Honorable Court has wisely elected to ***deny*** *certiorari* in at least three (3) prior petitions in just the past (3) three years seeking to revisit and then overrule *Williamson County* on substantially the same grounds raised in the Colony Cove Petition (most of which were brought by the same "counsel of record" in this case).[1] *See, e.g., Agripost, LLC v. Miami-Dade County, Fla.*, No. 08-567, 129 S. Ct. 1668 (2009); *Braun v. Ann Arbor Charter Tp.*, No. 08-250, 555 U.S. 1062 (2008); *Peters v. Village of Clifton, Ill.*, No. 07-635, 552 U.S. 1251 (2008).

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[1] The repeated efforts by these lawyers (and their industry-funded *amici*) to reverse *Williamson County* cannot help but remind one of a line from a song made famous by the British rockers, *"Herman's Hermits,"* in the 60s entitled *"I'm Henery the Eighth, I Am,"* where the stanza goes "second verse, same as the first." In this case, however, the stanza would have to be adapted to be "fourth verse, same as the first."

The "state procedures" prong of *Williamson County* requires that, where a State provides an adequate procedure for seeking just compensation in their courts, a property owner ***cannot*** claim a violation of the Fifth Amendment's "Just Compensation" clause in federal court ***unless*** and ***until*** it has utilized the state procedure ***and*** been denied just compensation. *Williamson County*, 473 U.S. at 194-95. A contrary rule of law would, of course, allow the worst kind of "forum" shopping by a potential plaintiff. Indeed, one could easily envision this Petitioner arguing that it should be able to pursue its "just compensation" damages claims simultaneously in ***both*** state and federal courts and on an identical set of facts.

It is also true this Honorable Court has wisely held, in *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005), that once a property owner has exhausted state procedures and the state courts have determined that the property owner is not entitled to compensation (or is entitled to compensation less than that sought by a plaintiff), a federal claim for compensation (the so-called "second bite at the apple" as it were) under Section 1983 is generally barred by issue preclusion and/or claim preclusion under the Full Faith and Credit Act (28 U.S.C. § 1738). A contrary rule of law would place a potential defendant in the wholly untenable position of ***twice*** defending itself from monetary damages claims on the identical set of facts, and a well-financed plaintiff, like this one, would be wise to "roll the dice"

in both state and federal courts, as he very likely would given his incredibly litigious history in the City.[2]

Colony Cove, and its lawyers, claim the foregoing rule of case law creates an "irreconcilable conflict" between *Williamson County* and Section 1983. Pet., p. 14. Not so.

First, it is undisputed that despite this Plaintiff's litigious nature, it has chosen for tactical reasons not to pursue California's state procedures before proceeding in federal court in this case. Pet. App., A-18. As a matter of law, therefore, Colony Cove cannot claim to be an aggrieved party by *San Remo*'s enforcement of the Full Faith and Credit Act. In short, Colony Cove has yet to be denied a federal forum because it has ***failed to seek or be denied*** just compensation for a claimed taking in the California courts!

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[2] *See, e.g., Carson Harbor Village, Ltd. v. City of Carson*, 37 F.3d 468 (9th Cir. 1994); *Carson Harbor Village, Ltd. v. City of Carson Mobilehome Park Rental Review Board*, 70 Cal. App. 4th 281 (1999); *Carson Harbor Village, Ltd. v. City of Carson*, 353 F.3d 824 (9th Cir. 2004); *Colony Cove Properties, LLC v. City of Carson*, Cal. 2nd App. Dist. No. B208994 (Dec. 8, 2009); *Carson Harbor Village, Ltd. v. City of Carson*, Cal. 2nd App. Dist. No. B211777 (March 30, 2010); *Colony Cove Properties, LLC v. City of Carson*, 187 Cal. App. 4th 1487 (2010); *Colony Cove Properties, LLC v. City of Carson*, Cal. 2nd App. Dist. No. B234985 (pending); *Colony Cove Properties, LLC v. City of Carson*, Cal. 2nd App. Dist. No. B227092 (pending); *Colony Cove Properties, LLC v. City of Carson*, Los Angeles County Superior Court No. BS127863 (pending); *Colony Cove Properties, LLC v. City of Carson*, Los Angeles County Superior Court No. BS132471 (pending); *Carson Harbor Village, Ltd. v. City of Carson*, Los Angeles County Superior Court No. BC381581 (pending).

Thus, the pending Petition does not present the necessary procedural posture for this Court to review some theoretical conflict between *Williamson County* and Section 1983 in the first instance. The issue must be raised, if at all, by a property owner who has actually been denied a federal forum. *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969) ("[questions] not raised below are those on which the record is very likely to be inadequate since it certainly was not compiled with those questions in mind.").

Second, all nine justices of this Court have already held that there is no right to a federal forum in Section 1983 cases -- hence there is no conflict between Section 1983 and *Williamson County* in the first instance. *See, San Remo*, 545 U.S. at 342 (citing *Migra v. Warren City School Dist. Bd. of Ed.*, 465 U.S. 75, 84 (1984); *Allen v. McCurry*, 449 U.S. 90, 103-04 (1980)).

Colony Cove further postulates that *Williamson County* is unsupported by any doctrinal rationale. Colony Cove's view represents a basic misunderstanding of the role of *Williamson County* in Fifth Amendment jurisprudence. "[B]ecause the Fifth Amendment proscribes takings *without just compensation*, no constitutional violation occurs until just compensation has been denied. The nature of the constitutional right therefore requires that a property owner utilize procedures for obtaining compensation before bringing a § 1983 action." *Williamson County*, 473 U.S. at 195 n. 13 (emphasis in original).

In other words, it is not that taking that is unlawful, it is the denial of "just compensation" that results in a constitutional violation if at all. Where a regulated property owner has not been denied just

compensation through existing adequate state procedures, no violation of the Fifth Amendment has occurred. *See also, City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 710 (1999). There simply is no basis to grant this Petition or revisit the holding or the rationale of *Williamson County*.

Colony Cove's alternative claim that California provides "*no procedure whatsoever* whereby Colony could obtain just compensation for the taking," Pet., p. 15, and that therefore California takings plaintiffs in rent control cases should be exempted from *Williamson County*, ignores clear California Supreme Court precedent to the contrary. Under California law, if a rent control ordinance effects an unconstitutional regulatory taking, a landlord is entitled to compensation for any such taking.

That compensation is determined through the procedure established by California's highest court, in *Kavanau v. Santa Monica Rent Control Board*, 16 Cal. 4th 761 (1997). Under *Kavanau,* a regulated landlord is entitled, provided the same can demonstrate being denied a "fair return, to "an adjustment of future rents that takes into consideration past confiscatory rents." *Kavanau*, 16 Cal. 4th at 783-85. The so-called *Kavanau* adjustment results in the awarding of an increase in rents from the regulated landlord's tenants.

In *Galland v. City of Clovis*, 24 Cal. 4th 1003 (2001), the California Supreme Court went even further and held that, in the event that a so-called *Kavanau* adjustment proves legally inadequate or unavailable, a regulated landlord may ***further*** seek money damages through an action for inverse

condemnation and recover the same directly from the regulating municipality. *Galland*, 24 Cal. 4th at 1022, 1029-30. ("In *Kavanau*, we further held that a landlord may not obtain inverse condemnation damages against a government agency for temporarily imposing rent ceilings that a court had deemed confiscatory ***so long as*** the landlord was able to obtain an adequate adjustment of prospective rents that would compensate for past losses.") (Emphasis added.)

This "one-two punch" afforded by the courts in California has been correctly recognized by the Ninth Circuit as a viable remedy (actually remedies) under state law in California rent control cases. *See, e.g.*, *Carson Harbor Village, Ltd. v. City of Carson* ("*CHV*"), 353 F.3d 824, 829 (9th Cir. 2004) ("[I]nverse condemnation and section 1983 damages remedies . . . ***remain available*** if the mandamus/*Kavanau* adjustment remedy proves inadequate.") (emphasis added); *CHV*, 353 F.3d at 830 n. 5; *Manufactured Home Communities, Inc. v. City of San Jose*, 420 F.3d 1022, 1036 n. 16 (9th Cir. 2005).

Most telling, of course, Colony Cove has ***admitted*** in this case that California provides an inverse condemnation remedy in rent control cases. R. App., p. 6b, n. 6 [explaining how to bring an inverse condemnation action under California law]. Colony Cove cannot escape its admission below and now claim inverse condemnation in rent control cases does not exist under California law.

Finally, even assuming this Court were ever inclined to take up the issue of some theoretical conflict between Supreme Court doctrine and Section 1983, this case does not present a factual scenario

apropos for doing so. This sophisticated and well-financed Petitioner, ably represented by a veritable army of legal counsel who know this area of the law, arrogantly chose to ignore its state-afforded legal remedies.

This Petitioner ***did not even attempt*** to seek redress in California state court before bringing its ill-conceived federal lawsuit. Pet. App., A-18. This Court should not reward a party who flouts the law, and take up the question of whether California provides a "reasonable, certain, and adequate" remedy when the record below is completely devoid of any attempt by Colony Cove to seek such a remedy.

Inverse condemnation clearly exists in California state courts, and compensation ***from the government*** is available, when and if warranted, to a plaintiff seeking relief in rent control cases where a *Kavanau* adjustment proves legally inadequate. This Court need not review this settled issue of state law. This Petition, like the three (3) similar petitions before it, should also be denied.

SUPPLEMENT TO PETITIONER'S STATEMENT OF THE CASE

As required by Rule 15.2, the City addresses the following misstatements and omissions in the Petition that bear on the questions presented.

The Petition states that the City granted a rent increase to Colony Cove amounting to a mere "6% of the amount Colony Cove had requested." Pet., p. 4. Colony Cove omits that the rent increase amounted to approximately a 9% increase of the existing rents in

the mobilehome park. Pet. App., D-1, D-2. Colony Cove had requested a nearly 150% rent increase over existing rents. *Id.*

The Petition states that, upon dismissing Colony Cove's as-applied taking claim for failure to first seek compensation through state procedures in state court, both the District Court and Ninth Circuit below "understood" and "recognized" that Colony Cove "would not have been permitted to file an inverse condemnation action in California state court." Pet., pp. 4, 5. To the contrary, both the District Court and Ninth Circuit opinions expressly determined that inverse condemnation would be available to Colony Cove as part of California's compensation procedures. Pet. App., B-17, A-21.

REASONS FOR DENYING THE PETITION

I. *WILLIAMSON COUNTY* DOES NOT CONFLICT WITH SECTION 1983, AND IT SHOULD NOT BE OVERRULED.

A. This Petition Is Premature – Colony Cove Has Not Yet Been Denied A Federal Forum.

This Petition is premature. Colony Cove has not yet been denied a federal forum. The procedural posture of this case therefore does not present an appropriate circumstance in which to even take up the issue of whether *Williamson County* denies a federal forum to plaintiffs seeking relief under Section 1983 for alleged violations of the Fifth Amendment's takings clause, or whether *Williamson County* conflicts with the purported right to a federal forum allegedly

intended by the drafters of Section 1983. This Court should not review the alleged future denial of a purported right when it is unknown whether the right will ever be exercised or denied. *Williamson County* holds that "a property owner has not suffered a violation of the Just Compensation clause until the owner has unsuccessfully attempted to obtain just compensation through the procedures provided by the State for obtaining such compensation". *Williamson County*, 473 U.S. at 195. Without being denied compensation through state procedures, a Fifth Amendment taking claim in federal court is "not yet ripe" and must be dismissed. *Id.* at 194. It is undisputed that Colony Cove did not attempt to seek compensation through state procedures prior to filing this action in federal district court. Pet. App., A-18. For that reason, the district court dismissed Colony Cove's as-applied taking claim as unripe under *Williamson County*, and the Ninth Circuit correctly affirmed. *Id.* at A-21. That is the procedural posture of this case as it is presented to this Court. Colony Cove has not yet been denied (or granted) compensation through state procedures, and thus has not attempted to return to federal court to state its federal claims. Currently, it is wholly speculative whether Colony Cove will be denied access to federal court.

Colony Cove cannot frame the issue in any meaningful or concrete way to this Court. Its arguments are entirely speculative and it is, in effect, seeking an advisory opinion from this Court on a theoretical set of facts. Colony Cove has not been denied a valid federal claim due to a state court's erroneous conclusion that a Rent Board's decision did not result in a taking. Nor can it show that a state

court failed to justly compensate it for the alleged taking of its property. *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969) ("[questions] not raised below are those on which the record is very likely to be inadequate since it certainly was not compiled with those questions in mind.").

Assuming at some point in the future Colony Cove seeks and is denied compensation through state procedures and attempts to return to federal court, and the federal court dismisses Colony Cove's federal claims as barred by claim preclusion or issue preclusion as Colony Cove's Petition speculates they will be, ***then and only then*** would it be appropriate to petition this Honorable Court for consideration of Colony Cove's claim that *Williamson County* denies federal takings plaintiffs access to a federal forum and that such denial purportedly conflicts with the intent of Section 1983.

B. This Court Has Re-Affirmed Its Holding and Rationale That There Is No Right To A Federal Forum In Section 1983 Takings Cases, And That Lack Of Such Right Does Not Conflict With Section 1983.

Colony Cove's entire legal "house of cards" is built upon the assumption that the operation of *Williamson County* will deny it a federal forum for its Section 1983 takings claims. Based upon that assumption, Colony Cove next argues that such denial "negate[s] the very purpose of Section 1983." (Pet., p. 12.) This "house of cards" collapses because this Court has established ***and*** re-affirmed a rule of law that there is no absolute right to a federal forum for Section 1983 plaintiffs.

In *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005), the federal court dismissed plaintiff's Section 1983 federal as-applied taking claim as unripe under *Williamson County* because plaintiff had failed to pursue state law procedures. *San Remo*, 545 U.S. at 330. Plaintiff then filed a state law compensation action in state court, and alleged not only state law issues and claims, but also federal law takings issues and claims. *Id.* at 331, 341.

When plaintiff attempted to return to federal court to litigate its now-ripened Section 1983 federal takings claim, this Court held that the federal courts are barred by issue preclusion and claim preclusion from deciding the federal issues and claims that were asserted and decided in state court. *Id.* at 347-48. Full faith and credit must be given to state court proceedings under 28 U.S.C. § 1738, even if to do so would deny plaintiffs a federal forum. *Id.*

All nine justices agreed that this Court has repeatedly rejected the "assumption that plaintiffs have a right to vindicate their federal claims in a federal forum." *See, San Remo*, 545 U.S. at 342 (citing *Migra v. Warren City School Dist. Bd. of Ed.*, 465 U.S. 75, 84 (1984); *Allen v. McCurry*, 449 U.S. 90, 103-104 (1980). Further, "[t]his is so even when the plaintiff would have preferred not to litigate in state court, but was required to do so by statute or prudential rules." *Id.*

This Court has anticipated and already addressed Colony Cove's argument that this result is somehow inconsistent with or negates Section 1983. The Court

cited its decision in *Allen*, in which it "rejected that argument emphatically." *Id.* at 343.

> "The actual basis of the Court of Appeals' holding appears to be a generally framed principle that every person asserting a federal right is entitled to one unencumbered opportunity to litigate that right in a federal district court, regardless of the legal posture in which the federal claim arises. But the authority for this principle is difficult to discern. It cannot lie in the Constitution, which makes no such guarantee, but leaves the scope of the jurisdiction of the federal district courts to the wisdom of Congress. ***And no such authority is to be found in § 1983 itself*** . . . . There is, in short, no reason to believe that Congress intended to provide a person claiming a federal right an unrestricted opportunity to relitigate an issue already decided in state court simply because the issue arose in a state proceeding in which he would rather not have been engaged at all."

Id. (citing *Allen*, 449 U.S. at 103-04) (emphasis added).

Justice Rehnquist's concurrence in *San Remo* is in agreement. "Whatever the reasons for petitioner's chosen course of litigation in the state courts, 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." *Id.* at 348 (Rehnquist, J., concurring) (emphasis added).

There is no compelling reason to revisit this rule of law or its rationale simply because Colony Cove regurgitates arguments previously made and rejected. It is well-established, and has been unanimously decided, under this Court's precedent that there is no "irreconcilable conflict" between *Williamson County* and Section 1983.

C. The "State Procedures" Requirement of *Williamson County* Is Justified By The Language Of The Fifth Amendment Itself.

Colony Cove urges this Court to overrule the quarter-century-old precedent in *Williamson County* because it believes the "state procedures" requirement "lack[s] any doctrinal rationale." Pet., pp. 7-11. To the contrary, this Court in *Williamson County* held the "state procedures" requirement flows directly from the language of the Fifth Amendment.

"[B]ecause the Fifth Amendment proscribes takings *without just compensation*, no constitutional violation occurs until just compensation has been denied. The nature of the constitutional right therefore requires that a property owner utilize procedures for obtaining compensation before bringing a § 1983 action." *Williamson County*, 473 U.S. at 195 n. 13 (emphasis in original). In other words, it is a denial of compensation that is the constitutional harm under the Fifth Amendment – not the "taking" itself. This Court restated this rationale in *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999), another takings case brought under Section 1983:

> "The constitutional injury alleged, therefore, is not that property was taken but that it was taken without just compensation. Had the city paid for the property or had an adequate postdeprivation remedy been available, ***Del Monte Dunes would have suffered no constitutional injury from the taking alone.*** [citation] Because its statutory action did not accrue until it was denied just compensation, in a strict sense ***Del Monte Dunes sought not just compensation per se but rather damages for the unconstitutional denial of such compensation.***"

Id. at 710 (emphasis added).

This Court has affirmed the "state procedures" requirement numerous times and has been offered no good reason to reconsider the wisdom of such reaffirmations in this Petition (other than this Petitioner does not approve of this rule of law). *See, e.g., Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 734 (1997) ("[I]f 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."); *San Remo Hotel L.P. v. City and County of San Francisco*, 545 U.S. 323, 337 (2005) ("[F]ederal takings claims ... are not ripe until the entry of a final state judgment denying just compensation.").

Colony Cove precedes its Argument with an apparent attempt to introduce a "theme" to its Petition, suggesting that the "state procedures" doctrine is derived entirely from "fortuitously coined"

language in *Williamson County*. Pet., pp. 6, 11. But as demonstrated above, the language justifying the "state procedures" doctrine was coined not by Justice Blackmun in *Williamson County*, but by the drafters of the Fifth Amendment to the United States Constitution (and not fortuitously, but rather quite deliberately).

Colony Cove points out that the Fifth Amendment similarly proscribes the deprivation of life, liberty, or property "without due process of law," but the federal courts do not require plaintiffs to seek "due process" through state procedures before seeking federal court relief for those deprivations. Pet., p. 9-10.

Clever, but wrong. Colony Cove glaringly omits the discussion of ***this very issue*** by this Court in *Williamson County*. In your opinion, the Court analogized to *Parratt v. Taylor*, 451 U.S. 527 (1981), in which it held there is no violation of the Due Process Clause when a plaintiff has been deprived of property but has not taken advantage of the state's reasonable and adequate post-deprivation remedies. *Id.* at 195.

Williamson County held exactly the same for the Just Compensation Clause when a plaintiff has not taken advantage of the state's reasonable and adequate post-taking compensation remedies. *Id.* at 194-95. Due Process and Just Compensation claims are treated exactly the same way by this Court.[3]

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[3] *Parratt* was a case in which pre-deprivation state remedies were impossible due to the nature of the deprivation (a random and unauthorized act by a state employee), so post-deprivation state remedies were held to be adequate. *Parratt*, 451 U.S. at 539-541. But in other types of Due Process cases, where the deprivation of

Colony Cove's view represents a fundamental misunderstanding of basic Fifth Amendment doctrine. Perhaps that is why this Court has consistently denied petitions for writs of certiorari (most by this same law firm) seeking to overturn the *Williamson County* "state procedures" requirement in recent years. *See, e.g., Agripost, LLC v. Miami-Dade County, Fla.*, No. 08-567, 129 S. Ct. 1668 (2009); *Braun v. Ann Arbor Charter Tp.*, No. 08-250, 555 U.S. 1062 (2008); *Peters v. Village of Clifton, Ill.*, No. 07-635, 552 U.S. 1251 (2008).

II. CALIFORNIA PROVIDES AN INVERSE CONDEMNATION REMEDY TO OBTAIN COMPENSATION FROM THE GOVERNMENT IN RENT CONTROL CASES

Colony Cove's alternative request to "recognize an exception to *Williamson County*'s 'state procedures' requirement" for all California takings claimants in

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property is effected pursuant to an established state policy or procedure, post-deprivation remedies are *in*adequate because the "only meaningful opportunity to invoke the discretion of the decision maker is likely to be before the [deprivation] takes effect". *Williamson County*, 473 U.S. at 195 n. 14 (citing *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 543 (1985)). It is therefore true that these other types of Due Process cases can be brought directly in federal court immediately following the deprivation. *See, Cleveland*, 470 U.S. at 543. But again, takings claims are treated the same. When state post-taking compensation remedies are inadequate in takings cases, the takings case can be brought directly in federal court immediately after the taking. *Williamson County*, 473 U.S. at 194 (plaintiff can proceed in federal court when the state provides no "reasonable, certain and adequate provision for obtaining compensation").

rent control cases whose claims will be relegated to a "California state court system that does not recognize or provide a remedy of just compensation" ignores very clear California Supreme Court precedent. California does provide an inverse condemnation remedy for rent control takings claimants to obtain just compensation from the government.

Both the California Supreme Court and the Ninth Circuit have expressly recognized that remedy, as have *both the District Court's and Ninth Circuit's opinions below in this very case*. This Court should not grant *certiorari* to review the California Supreme Court's interpretation of this issue of state law.

Under California law, if a rent control statute constitutes a regulatory taking, the landlord is entitled to compensation for any such taking. That compensation is determined through the procedure established in *Kavanau v. Santa Monica Rent Control Board*, 16 Cal. 4th 761 (1997).

The *Kavanau* adjustment, as it is commonly referred to, recognizes that the first method of compensating a landlord for inadequate prior rents is "an adjustment of future rents that takes into consideration past confiscatory rents." *Kavanau*, 16 Cal. 4th at 783-85; *Equity Lifestyle Properties, Inc. v. County of San Luis Obispo*, 548 F.3d 1184, 1191 (9th Cir. 2008).

If such an adjustment is found to be legally inadequate, the California Supreme Court has made certain that a regulated landlord can choose an additional remedy and seek money damages in inverse condemnation directly from the regulating

municipality. *Galland v. City of Clovis*, 24 Cal. 4th 1003, 1022, 1029-30 (2001) ("In *Kavanau*, we further held that a landlord may not obtain inverse condemnation damages against a government agency for temporarily imposing rent ceilings that a court had deemed confiscatory ***so long as*** the landlord was able to obtain an adequate adjustment of prospective rents that would compensate for past losses.") (emphasis added).

The Ninth Circuit as well has repeatedly recognized the viability of the California inverse condemnation remedy in rent control cases. *See, e.g.*, *Carson Harbor Village, Ltd. v. City of Carson* ("*CHV*"), 353 F.3d 824, 829 (9th Cir. 2004) ("[I]nverse condemnation and section 1983 damages remedies . . . ***remain available*** if the mandamus/*Kavanau* adjustment remedy proves inadequate.") (emphasis added); *CHV*, 353 F.3d at 830 n. 5 (rejecting claim that state law remedies are inadequate, even if *Kavanau* is, because plaintiff "has not shown that it would be precluded from obtaining damages ***from the municipality***") (emphasis added); *Manufactured Home Communities, Inc. v. City of San Jose*, 420 F.3d 1022, 1036 n. 16 (9th Cir. 2005) ("The writ and the Kavanau adjustment must be pursued before any inverse condemnation or § 1983 action may be pursued in state court.").

And contrary to Colony Cove's misrepresentations, both the Ninth Circuit and District Court opinions below expressly recognized that Colony Cove has not shown inverse condemnation is unavailable in California courts. *See*, Pet. App., A-21 ("To the extent that the Kavanau adjustment process would be inadequate to address any adjustment of future

rents . . . , Colony Cove has not demonstrated that resort to a state inverse condemnation action against the City would not serve as a reasonable, certain and adequate procedure for obtaining just compensation, as required by *Williamson*.") (citing *Galland*, 24 Cal. 4th at 1025) (emphasis removed); Pet. App., B-17 ("should the Board deny Plaintiff's [Kavanau] adjustment, [plaintiff] is still free to bring an inverse condemnation action") (citing *CHV*, 353 F.3d at 829).[4]

More telling still, Colony Cove has already ***admitted***, in its filings with the Ninth Circuit that California provides an inverse condemnation remedy. R. App., p. 6b, n. 6 (explaining how to bring an inverse condemnation action under California law, stating "To bring an inverse condemnation action, Colony Cove would need to . . . [detailing thereafter the steps needed to bring such an action]"). Although Colony Cove alleged in the same footnote that California's inverse condemnation remedy is inadequate, Colony Cove cannot now turn around and allege inverse condemnation *does not even exist* in California rent control cases.

The availability of inverse condemnation is perhaps one of the reasons that, in no less than ***five published***

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[4] Colony Cove's citations to *Kavanau*, *Galland*, and *CHV*, Pet., pp. 15-17, to support its argument that there is *no* inverse condemnation remedy available in California rent control cases takes language from those cases wholly (and troublingly) out of context. The cited language indicates not that inverse condemnation is entirely unavailable, but merely that California's compensation procedure requires pursuing compensation through the *Kavanau* process before inverse condemnation becomes available in state court.

opinions, the Ninth Circuit has rejected attempts by landlords to have California's compensation procedure in rent control cases declared inadequate. *See, e.g., Equity Lifestyle Properties, Inc.*, 548 F.3d at 1191-92; *Manufactured Home Communities, Inc.*, 420 F.3d at 1035-36; *Ventura Mobilehome Communities Owners Ass'n v. City of San Buenaventura*, 371 F.3d 1046, 1053 (9th Cir. 2004); *CHV*, 353 F.3d at 827-30; *Hacienda Valley Mobile Estates v. City of Morgan Hill*, 353 F.3d 651, 658-59 (9th Cir. 2003).

Finally, even assuming this Court were ever inclined to consider the adequacy of California's compensation remedies, this case does not present a factual scenario apropos for doing so. This sophisticated and well-financed Petitioner, ably represented by a veritable army of legal counsel who know this area of the law, arrogantly chose to ignore its state-afforded legal remedies.

Colony Cove ***did not even attempt*** to obtain compensation in California state court before bringing its federal lawsuit. Pet. App., A-18. This Court cannot assess whether California provides a "reasonable, certain, and adequate" compensation remedy when the record is completely devoid of any attempt by Colony Cove to seek that remedy. Inverse condemnation clearly exists in California, and compensation *from the government* is therefore available to plaintiffs seeking relief in rent control cases if the *Kavanau* remedy proves inadequate. This Court need not review this settled issue of state law.[5]

[5] Even assuming *arguendo* Colony Cove were correct that inverse condemnation is not available, the *Kavanau* writ-and-remand procedure alone is still a sufficient compensation remedy for Fifth Amendment purposes. Colony Cove argues that a takings remedy is only adequate if the government itself pays the compensation. However, "this concern does not affect a property owner's claim of adequate compensation." *Equity Lifestyle*, 548 F.3d at 1192 n 14. The question is ***whether*** compensation is available, not ***who*** is to provide such compensation. Moreover, the *Kavanau* remedy, "as opposed to an award of damages against the Rent Board, places the cost of compensating [the landlord] roughly on those tenants who benefited from unconstitutionally low rents." *Kavanau*, 16 Cal. 4th at 783-84. "Finally, the remedy of future rent adjustments avoids putting a reviewing court in the position of declaring the appropriate regulated rent ceiling for a particular apartment in order to measure damages." *Id.* For that reason, the California Supreme Court "strongly resist[s] any rule that would impose on a reviewing court the impossible task of finding somewhere in the penumbra of the Constitution a stipulation that a particular apartment in a particular building should rent for $746.00 per month rather than $745.00." *Id.* This Court's precedents also demonstrate that the government need not be the one to pay compensation. *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 423 (1982) (government statutorily authorizes cable franchise to install cable television equipment on private property and requires cable franchise to pay compensation to landowner); *National R.R. Passenger Corp. v. Boston & Me. Corp.*, 503 U.S. 407, 409 (1992) (government statutorily authorizes Amtrak to condemn property and requires Amtrak to pay just compensation).

III. CONCLUSION

For each and all of the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: September 14, 2011

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APPENDIX

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APPENDIX A

Docket No. 09-57039

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

COLONY COVE PROPERTIES, LLC,
a Delaware limited liability company,
Plaintiff-Appellant,

v.

CITY OF CARSON, a municipal corporation;
CITY OF CARSON MOBILEHOME PARK
RENTAL REVIEW BOARD,
a public administrative body,
Defendants-Appellees.

Appeal from the United States District
Court for the Central District of California
D.C. No. 2:08-cv-07065-PA-JWJ

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* * *

1. Colony Cove Has Satisfied the Final Decision Requirement.

A final decision by the local rent control authority satisfies the Final Decision Requirement, even in the absence of a state-court action for an administrative writ. *Equity Lifestyle*, 548 F.3d at 1190; *Manufactured Home Cmtys. v. City of San Jose*, 420 F.3d 1022, 1035 (9th Cir. 2005). Because the City reached a final decision on Colony Cove's application, it has satisfied the Final Decision Requirement.

A private takings claim need only satisfy the Final Decision Requirement because it cannot be constitutional even if compensated. *Armendariz*, 75 F.3d at 1321 n.5. Colony Cove's private takings claim is therefore ripe for adjudication regardless of the second *Williamson County* prong.

2. There Is No Adequate State-Law Procedure Available to Colony Cove for Obtaining Just Compensation.

In *Williamson County*, the Court made clear that the State Litigation Requirement is designed to allow "reasonable, certain and adequate" state law remedies to be pursued. *Id.* at 194, 197. Because California's procedure is not reasonable, certain, and adequate on the facts of this case, Colony Cove need not comply with this requirement.

In *Kavanau v. Santa Monica Rent Control Board*, the California Supreme Court created a *prospective* rent increase procedure to provide landowners with

the "just compensation" denied as a result of an inadequate rent increase. 16 Cal.4th 761 (1997). A so-called "*Kavanau* adjustment" contemplates that future tenants will pay the amount unconstitutionally taken from property owners and transferred to past tenants in the form of unlawfully low rent. *Carson Harbor Vill., Ltd. v. City of Carson*, 353 F.3d 824, 830 (9th Cir. 2004) (O'Scannlain, J., concurring). Under this procedure, a property owner must first file a request with a local rent control board. If the board imposes rent ceilings that violate the Fifth Amendment, the owner must next file a state law writ. If, after a full round of litigation, the courts agree that the board violated the Constitution, the owner must file a *second* request—before the same board that has already unconstitutionally taken the owner's property—to "adjust" future rents. *Galland*, 24 Cal.4th at 1029. The process takes years, imposing hardships on both the property owner and the future tenants who face the risk of compensating the owner for unconstitutionally low rents charged to earlier tenants.

In *Equity Lifestyle*, a park owner argued that the *Kavanau* adjustment could not offer it adequate compensation because it only provided for an increase in future rents and does not require landowners to be compensated for rent lost prior to or during the course of litigation. 548 F.3d at 1191-92. The Court rejected this argument and concluded that a *Kavanau* adjustment includes losses incurred during the review process. *Id.* at 1191. But the court in *Equity Lifestyle* did not hold that a *Kavanau* adjustment is adequate as a matter of law in all cases and without regard to factual showings a future litigant might make.

Colony Cove has alleged that a *Kavanau* adjustment cannot provide a "reasonable, certain, and adequate" remedy for the unlawful taking *in this case*.

First, a *Kavanau* adjustment is inadequate because of the sums involved. Colony Cove has alleged that a monthly rent increase of more than $200 per space is constitutionally required. ER 144; 181. Under *Kavanau*, at some point in the distant future, the escalating shortfall from past months would be added to the rent ceiling going forward. Because the sums involved are substantial, future tenants will not be able to afford the *Kavanau* adjustment in addition to the proper rents. ER 177. Obtaining permission to charge wildly above-market rents in the future as a means of compensation is no remedy at all where rents are necessarily constrained by fair market values.

The district court rejected these allegations as "speculative." ER 9. In doing so, the Court inverted the applicable legal standard. If Colony Cove proves the city must allow rent increases of $200 per space, per month and it will take approximately ten years for Colony Cove to receive an adjustment, each tenant would need to pay at least an additional $24,000 ($200 x 12 months x 10 years) in lost rents on top of current rent. This would amount to an increase of 500% over current rents. It is inconceivable that future tenants could carry this burden. Colony Cove's allegations that future rents will be too high are neither speculative nor unreasonable.

Second, Colony Cove intends to convert the Park into a resident-owned condominium-style park and has already filed a tract map application with the City. ER

178. Thus, a future rent increase will not compensate Colony Cove. ER 178.

Third, a *Kavanau* adjustment cannot practically or lawfully compensate Colony Cove for the losses resulting from vacancy control. Based on the best available evidence, alleged in the Complaint but ignored by the district court, vacancy control imposes over $30 million in damages on Colony Cove. It is obvious that 403 tenants cannot provide this type of compensation through increased rents. Although the *Kavanau* adjustment might work in garden-variety rent control cases involving relatively modest rent-setting errors, it does not provide a viable state litigation option here.

Finally, the *Kavanau* process is plagued by serious delay, rendering it insufficient to provide "just compensation." ER 176; 177 (alleging that, in practice, receiving a *Kavanau* adjustment has required "ten years of costly and time-consuming litigation"); *cf. Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 864 F.2d 1475, 1480 (9th Cir. 1989) (holding that a delay of 8 to 10 months for trial is not "so excessive as to render . . . the state court system futile").[6]

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[6] To the extent that the lower court relied on the availability of a subsequent inverse condemnation action to compensate for the failures of *Kavanau*, the Court disregarded the harm that would result from the further delay. To bring an inverse condemnation action, Colony Cove would need to (1) file a rent increase application; (2) seek a state writ; (3) return to the Board to seek an adjustment (after a full round of litigation in state court); (4) seek another writ to determine whether the result is tenable; and then (5) file a third lawsuit pursuing an inverse condemnation action (after another full round of litigation). A process that

The California Supreme Court has recognized that a *Kavanau* adjustment may be inadequate under these circumstances. *Galland*, 24 Cal.4th at 1028. In a case where there is a "substantial sum of damages accruing from lost rents," a *Kavanau* adjustment may prove "to be inadequate . . . to reestablish an average reasonable rate of return, [and] then the [plaintiffs] would be free to pursue their section 1983 action." *Id.*; *accord Kavanau*, 16 Cal.4th at 785 (recognizing that market forces may constrain future rent increases). The Complaint presents such a case. At this stage in the proceedings, Colony Cove has made sufficient allegations that the *Kavanau* procedure is inadequate.

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requires Colony Cove to file suit in California court three times and twice before an agency is "inadequate" where a plaintiff has alleged that it is losing over a million dollars annually.