Docket No. 06-56306

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DANIEL GUGGENHEIM, SUSAN GUGGENHEIM AND MAUREEN H. PIERCE,

Plaintiffs-Appellants,

versus

CITY OF GOLETA, et al.,

Defendant-Appellee.

Appeal From the United States District Court for the Central District of California
Florence Marie Cooper, District Judge, Case No. CV 02-02478 FMC (RZx)

BRIEF OF AMICI CURIAE LEAGUE OF CALIFORNIA CITIES AND CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF DEFENDANT-APPELLEE CITY OF GOLETA ON REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, amici curiae League of California Cities and California State Association of Counties aver that they are nonprofit corporations which do not issue stock and which are not subsidiaries or affiliates of any publicly owned corporation.

STATEMENT REGARDING CONSENT TO FILE

Appellants and Appellee have given consent to the filing of this amicus brief, which is being filed pursuant to this Court's April 21, 2010 Order extending the deadline for filing *amicus curiae* briefs to May 15, 2010.

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I. INTRODUCTION

The panel decision found that Appellants' obligation under *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), to pursue state inverse condemnation proceedings as a prerequisite to bringing a federal takings claim was merely "prudential" and that Appellants' failure to do so was not a bar to their takings claim. Seeking to expand upon that decision, numerous amici supporting the Appellants urge the Court to further erode *Williamson County* by claiming that the state compensation requirement should not apply in facial claims or, some amici argue, at all.

The panel's *Williamson County* analysis, and *a fortiori* the more extreme analysis urged by Appellants' amici, represents a basic misunderstanding of the role of *Williamson County* in Fifth Amendment jurisprudence. The Fifth Amendment does not prohibit the government from taking property through either condemnation or regulation. It *only* prohibits the taking of property without payment of just compensation. The second *Williamson County* prong flows directly from this distinction, and requires all litigants alleging a federal takings claim to have *first* pursued *and* completed state procedures designed to provide compensation for such regulatory takings. This is *not* an administrative exhaustion rule or even a prudential rule of deference to state proceedings. Where the regulated property owner has not been denied compensation through existing state

procedures, no taking has occurred. Thus, without completion of state compensation procedures, any purported regulatory takings claim is unripe and outside the subject matter jurisdiction of the federal courts. The panel's conclusion that Appellants proved an uncompensated regulatory taking without first obtaining a final judgment in an inverse condemnation action in the California courts (or even initiating one) is fundamentally inconsistent with the Fifth Amendment's scope and clear Supreme Court precedent.

II. STATEMENT OF INTEREST

The League of California Cities ("League") is an association of 474 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. California State Association of Counties ("CSAC")'s membership consists of all 58 California counties, which together provide a vast array of municipal services to the State's residents, including roads, parks, law enforcement, emergency response services, and public health and welfare delivery.

These amici monitor litigation of concern to local governments and land use planners and seek to participate in those cases of statewide or nationwide significance. Amici have determined that this is such a case.

More than 100 of the cities and counties that Amici represent have adopted some form of mobilehome rent control and thus will be directly affected by the

majority opinion. These jurisdictions have determined that mobilehome owners are in a uniquely vulnerable position warranting enactment of ordinances to protect their investment in their homes.

Moreover, although nominally about mobilehome rent control, the majority opinion's significance extends far beyond that field. The opinion fundamentally reorients and expands regulatory takings doctrine in ways that will subject local governments to facial takings challenges to, and thus significant expense defending, a wide variety of land use regulations. In doing so, the majority opinion is likely to substantially increase lawsuits filed against local governments and attendant litigation costs. These increased risks of liability and litigation costs will chill local governments' exercise of their police power to protect public welfare both in and beyond the context of rent control.

III. ARGUMENT[1]

A. Pursuit of Available State Court Remedies Is A Jurisdictional Prerequisite To A Federal Takings Claim

It is undisputed that before bringing the federal takings claim presented here, Appellants did not seek compensation for the alleged regulatory taking in the California courts as required by the second prong of *Williamson County*, 473 U.S. at 194-95.[2] The panel majority decision found that this prong of the *Williamson County* ripeness doctrine is merely "prudential," and that the City of Goleta had forfeited this argument by not raising it on appeal (although the City did initially raise it in the district court). 582 F.3d at 1008-1011. Several amici supporting Appellants urge this Court not only to uphold this finding, but to go further and declare that takings claims can be brought in federal court without pursuing state

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[1] This brief is focused on the second *Williamson County* requirement and the related issue of California's inverse condemnation procedures and *Kavanau v. Santa Monica Rent Control Board*, 16 Cal. 4th 761 (1997). Different amici supporting the City of Goleta are filing briefs concerning the applicable statute of limitations and standing rules, the panel's erroneous *Penn Central* analysis including its economic impact and "character" analysis, and the background rationality of the mobilehome rent control law specifically at issue in this action. The amici presenting this brief agree that the panel's discussion of all of these issues was erroneous and inconsistent with established law.

[2] Panel Decision, 582 F.3d 996, 1006 ("When the Park Owners filed suit in federal district court, they had approached the City of Goleta to ask for relief from the RCO, but had not brought an inverse condemnation suit in a California court.").

compensation remedies.[3] These views represent a fundamental misunderstanding of basic Fifth Amendment doctrine and should be unequivocally rejected by this Court.

1. The second *Williamson County* requirement flows directly from the Fifth Amendment

Williamson County creates two ripeness requirements for federal takings claims:

> The first condition ... requires a claimant to utilize available administrative mechanisms, such as seeking variances from overly-restrictive or confiscatory zoning ordinances, so that a federal court can assess the scope of the regulatory taking. ... The second condition ... is based on the principle that "[t]he Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation." Consequently, "if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the [federal] Just Compensation Clause until it has used the procedure and been denied just compensation."

W. Linn Corporate Park LLC v. City of West Linn, 534 F.3d 1091, 1099-1100 (9th Cir. 2008) (citations omitted). Only the second requirement is at issue here.

As the Supreme Court has explained, under the Fifth Amendment *no violation occurs* unless the plaintiff has sought and been denied compensation through state procedures. "As its language indicates, and as the Court has frequently noted, [the Fifth Amendment] does not prohibit the taking of private

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[3] (See Brief of Amicus Curiae Equity Lifestyle Properties pp. 9-12; Brief of Manufactured Housing Educational Trust et al. pp. 16-25.)

property, but instead places a condition on the exercise of that power. This basic understanding of the Amendment makes clear that it is designed not to limit the government interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking." *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 314-15 (1987) (citations omitted); *see Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 536-37 (2005).

In other words, if a landowner has not sought compensation through available state procedures, he or she *has no federal takings claim* because one of the elements of that claim cannot be shown. "[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 <u>and</u> been denied** just compensation." *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 734 (1997) (emphasis added). "[N]o 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 194 n.13.

This second requirement is *not* an administrative exhaustion rule as it is mischaracterized by Appellants' amici; it is a fundamental element of the takings claim:

> Instead of being a true "exhaustion of state remedies" requirement, however, the second prong of *Williamson's* ripeness test merely addresses a unique aspect of Just Compensation Takings claims. . . . [A] plaintiff "cannot claim a violation of the Just Compensation Clause until" he or she has exhausted a state's "procedure for seeking just compensation." Only then can a Takings claimant allege that he or she has actually been denied just compensation, and, thus, only then is his or her Takings claim ripe.

County Concrete Corp. v. Township of Roxbury, 442 F.3d 159, 168 (3d Cir. 2006) (quoting *Williamson County*, 473 U.S. at 194-95); *Peters v. Village of Clifton*, 498 F.3d 727, 730 n.4 (7th Cir. 2007) (accord).

2. Compliance with the second *Williamson County* requirement has been widely recognized as a non-waivable jurisdictional requirement

The panel majority reasoned that *Williamson County*'s second prong was "prudential" and could therefore be disregarded if not raised properly by the defendant. Appellants' amici also urge this "prudential" characterization, along with the assertion that the lower courts can (and should) just ignore the requirement as they choose. These arguments are wholly inconsistent with the nature of the second prong as discussed above. Because no violation of the Fifth Amendment occurs until *after* state compensation has been sought and denied, no

ripe claim exists before that time. A party cannot forfeit or waive the fact that an element of the claim does not exist; nor can such absence be otherwise disregarded by the court.

This Court has repeatedly held that compliance with the second prong of *Williamson County* is a prerequisite for subject matter jurisdiction over a takings claim. *See*, *e.g.*, *Equity Lifestyle Properties, Inc. v. County of San Luis Obispo*, 548 F.3d 1184, 1191-92 (9th Cir. 2008); *Ventura Mobilehome Communities Owners Ass'n v. City of San Buenaventura*, 371 F.3d 1046, 1052-53 (9th Cir. 2004); *Carson Harbor Village Ltd. v. City of Carson*, 353 F.3d 824, 826-30 (9th Cir. 2004) (*CHV II*); *Hacienda Valley Mobile Estates v. City of Morgan Hill*, 353 F.3d 651, 657-61 (9th Cir. 2003); *Sinclair Oil Corp. v. County of Santa Barbara*, 96 F.3d 401, 406 (9th Cir. 1996); *Jones Intercable of San Diego, Inc. v. City of Chula Vista*, 80 F.3d 320, 323-24 (9th Cir. 1996); *Carson Harbor Village Ltd. v. City of Carson*, 37 F.3d 468, 474-75 (9th Cir. 1994) (*CHV I*); *S. Pac. Transp. Co. v. City of Los Angeles*, 922 F.2d 498, 502-03 (9th Cir. 1990).

The vast majority of other Circuits have also held that the *Williamson County* requirements are jurisdictional. *Island Park, LLC v. CSX Transp.*, 559 F.3d 96, 109-110 (2d Cir. 2009); *Snaza v. City of Saint Paul, Minnesota*, 548 F.3d 1178, 1182 (8th Cir. 2008); *Braun v. Ann Arbor Charter Twp.*, 519 F.3d 564, 569-71 (6th Cir. 2008); *Peters*, 498 F.3d at 734 (7th Cir.); *Pascoag Reservoir & Dam,*

LLC v. Rhode Island, 337 F.3d 87, 94-96 (1st Cir. 2003); *Stern v. Halligan*, 158 F.3d 729, 734 (3d Cir. 1998); *Clajon Production Corp. v. Petera*, 70 F.3d 1566, 1575 (10th Cir. 1995); *Reahard v. Lee County*, 30 F.3d 1412, 1415-18 (11th Cir. 1994); *Samaad v. City of Dallas*, 940 F.2d 925, 933 (5th Cir. 1991).

The Supreme Court has also recently re-affirmed that *Williamson County*'s second prong *must* be followed even if doing so means that a landowner will have no ability to later sue in federal court. "[F]ederal takings claims ... are not ripe until the entry of a final state judgment denying just compensation." *San Remo Hotel L.P. v. City and County of San Francisco*, 545 U.S. 323, 337 (2005) (citing *Williamson County*, 473 U.S. 172).

The panel majority, and Appellants' amici, disregard these cases and rely instead on stray language from a few cases describing *Williamson County* as a "prudential" doctrine without specifically analyzing how the second requirement can logically be disregarded if it is a pre-requisite to the existence of a constitutional harm as explained by the Supreme Court in *Williamson County* and *Suitum*. None of these authorities support the requested radical shift away from a absolute requirement first to seek compensation through available state procedures.

In *Suitum*, the Supreme Court described *Williamson County*'s two requirements as "prudential hurdles." *Suitum*, 520 U.S. at 734. *Suitum*, however, did not decide that these requirements could be disregarded and, indeed, it found

that the first requirement *was met* and that the second was not before it.[4] *Id.* at 734 n.8, 744. *Suitum* thus clearly cannot stand for the proposition that the *Williamson County* requirements are waivable (much less optional as Appellants' amici argue). *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 386-87 n.5 (1992) (it is "contrary to all traditions of our jurisprudence to consider the law on this point conclusively resolved by broad language in cases where the issue was not presented or even envisioned").

As for the panel's citation to the use of the word "prudential" in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), *Lucas* came to the Supreme Court on certiorari from the South Carolina Supreme Court; thus the second *Williamson County* prong was necessarily satisfied in that case. That prong was not even discussed in the *Lucas* opinion, which discussed only the first *Williamson County* prong. *Id.* at 1012-13.

Appellants' amici also point to Justice Rehnquist's concurrence in *San Remo Hotel*, 545 U.S. at 349, wherein a minority of the Justices questioned the wisdom of *Williamson County*. That minority opinion is obviously not precedent. As discussed above, the controlling majority *San Remo Hotel* opinion re-affirmed the second *Williamson County* prong. 545 U.S. at 337. Moreover, since *San Remo*

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[4] *Suitum* involved a challenge to a decision by the Tahoe Regional Planning Agency, a multistate agency created by interstate compact which did not provide its own compensation procedures. *Id.* at 734 n.8.

Hotel, the Supreme Court has consistently denied petitions for writs of certiorari seeking to overturn this requirement. *See*, *e.g.*, *Agripost, LLC v. Miami-Dade County, Fla.*, 129 S.Ct. 1668 (2009); *Braun v. Ann Arbor Charter Tp.*, 129 S. Ct. 628 (2008); *Peters v. Village of Clifton, Ill.*, 552 U.S. 1251 (2008). Plainly the Supreme Court does not want to revise or abandon *Williamson County*, and it is the only appropriate court to consider doing so.

Thus, no Supreme Court authority supports the illogical proposition that second *Williamson County* prong – an element required by the very nature of the Fifth Amendment right – can be forfeited or otherwise disregarded. The attempt to latch onto this stray "prudential" language and transform that into a rejection of the widely acknowledged mandatory prerequisite to seek compensation in the state courts presents the casual doctrinal drift warned against in *Lingle*. *See Lingle*, 544 U.S. at 531 ("On occasion, a would-be doctrinal rule or test finds its way into our case law through simple repetition of a phrase – however fortuitously coined.").

The other appellate authority cited by Appellants' amici does not support their conclusion that a federal court can find a taking has occurred when the plaintiff has not first sought compensation through available state remedies. *B. Willis, C.P.A. v. BNSF Railway Corp.*, 531 F.3d 1282 (10th Cir. 2008), found that the Court could apply issue preclusion to bar plaintiff's claim even though plaintiff had not fully ripened his claim under *Williamson County*. *Id.* at 1300 n.20.

Holliday Amusement Co. v. South Carolina, 493 F.3d 404 (4th Cir. 2007), referred to *Williamson County* as "prudential," but then found the claim was not ripe and that no valid claim was stated in any event. *Id.* at 406-11. *Beverly Boulevard LLC v. City of West Hollywood*, 238 Fed. Appx. 210 (9th Cir. 2007) (unpublished), similarly assumed the claim was ripe before rejecting it. *Id.* at 212. *Asociacion de Subscripcion Conjunta Del Seguro Responsabilidad Obligatorio v. Galarza*, 484 F.3d 1 (1st Cir. 2007), reaches a number of general conclusions about the purposes of *Williamson County* that are inconsistent with the broad body of federal takings law, but ultimately decides that compensation was not available given Puerto Rico's lack of an inverse condemnation procedure. *Id.* at 19. *Washlefske v. Winston*, 234 F.3d 179 (4th Cir. 2000), held that the *first prong* of *Williamson County* was inapplicable because the challenged law was sufficiently final; no mention was made of the state compensation prong at issue here. *Id.* at 182-83. None of these cases suggest, much less hold, that a federal takings claim can be proven without compliance with *Williamson County*'s express requirement that compensation first be sought, and denied, through available state procedures.[5] The

[5] Moreover, calling the *Williamson County* requirements "prudential" would not change the fact that under Supreme Court precedent they are a jurisdictionally required element of any takings claim. As the Seventh Circuit explained in *Peters v. Village of Clifton*, "[t]he Supreme Court has determined, as a matter of law, when federal takings claims are ripe and has set forth a rule in *Williamson County* that this court is bound to follow." 498 F.3d at 734.

panel majority thus erred in finding a regulatory taking despite Appellants' admitted failure to seek compensation through the available state procedures.

3. The second *Williamson County* requirement applies to facial challenges

Amici Manufactured Housing Educational Trust et al. go even further than the panel decision, asserting that this Court should reverse longstanding Circuit law and find that the second *Williamson County* prong does not apply to any case labeled as a "facial" challenge. This argument is also wholly without merit.

First, as discussed above, the *purpose* of the second *Williamson County* prong is to enforce the Fifth Amendment's limitation to "takings" where just compensation was denied by the state. That purpose is equally applicable in facial takings challenges. While Appellants' amici argue that there should be no need to "exhaust" where the challenged law itself does not provide for compensation, that assertion is flatly inconsistent with *Williamson County* and its progeny. *See County Concrete Corp.*, 442 F.3d at 168; *Peters*, 498 F.3d at 730 n.4.

Nor are Appellants' amici correct that the facially challenged law must itself provide for compensation or that compensation must be provided automatically. "A state need not provide compensation prior to, or contemporaneous with, the alleged taking, so long as there is a 'reasonable, certain, and adequate provision' at the time of the taking for an injured property owner to obtain just compensation

from the state after the taking has been accomplished." *Peters*, 498 F.3d at 732 (quoting *Williamson* County, 473 U.S. at 194).

Indeed, as Appellants' amici themselves admit, this Court has repeatedly held that, while the "final decision" prong of *Williamson County* does not apply to facial challenges, the second prong *does*. *Hacienda Valley Mobile Estates*, 353 F.3d at 655 ("The state remedies prong, however, does apply to facial challenges."). This issue was addressed exhaustively in *Southern Pacific Transportation Co.*, 922 F.2d at 505-507, and *Sinclair Oil Corp.*, 96 F.3d at 406-07. While a plaintiff did not need to seek state compensation under the now-defunct "substantially advances" test,[6] exhaustion of state compensation procedures *is* required for facial challenges under *Penn Central* and other traditional takings tests. *Holliday Amusement Co.*, 493 F.3d at 407; *Sinclair Oil Corp.*, 96 F.3d at 406-07; *Southern Pacific Transportation Co*., 922 F.2d at 506-507.

Appellants' amici provide no reasoned basis to depart from this established law. Nor do they explain how, when seeking and being denied state compensation is required to trigger the Fifth Amendment's protection, that element can somehow

[6] A "substantially advances" challenge sought to invalidate the challenged law as beyond the power of the state rather than seek compensation for a taking, which is why the Supreme Court held that the test "has no proper place in our takings jurisprudence." *Lingle*, 544 U.S. at 540, 543. With respect to that now defunct species of claim, the Ninth Circuit reasoned that seeking compensation was not necessary. *Sinclair Oil Corp.*, 96 F.3d at 406.

be ignored in a facial challenge. Instead they cite to *Yee*, which was heard on certiorari from a state court proceeding, *Lingle* and *San Remo*, which dealt with substantially advances invalidity claims that, as discussed above, do not relate to just compensation, and *Suitum*, where the compensation question was expressly not reached (and where the regulatory body had no applicable compensation procedures in any event). *Suitum*, 520 U.S. at 734 n.8. None of these suggest that a valid facial takings challenge can be brought in federal court without complying with the second prong of *Williamson County*. Nor do the cursory assertions in *Asociacion de Subscripcion*, 484 F.3d at 14, or *Kittay v. Giuliani*, 252 F.3d 645, 647 (2d Cir. 2001), provide any reasoned basis to create the massive loophole in *Williamson County* urged by Appellants' amici.

4. There is no right to a federal forum on a takings claim

Being more direct about the real goal of Appellants' amici, amicus ELS insists that the *Williamson County* rule is wrong, and that a plaintiff "should not be required to pursue state court litigation before proceeding in a federal court on a federal taking claim." ELS falsely analogizes *Williamson County* to a normally barred state administrative exhaustion rule – as discussed above, that analogy is simply incorrect. *County Concrete Corp.*, 442 F.3d at 168.

ELS also complains that the Supreme Court's existing rules effectively bar plaintiffs from federal court on these takings claims. The Supreme Court expressly approved that result in *San Remo Hotel*:

> It is hardly a radical notion to recognize that, as a practical matter, a significant number of plaintiffs will necessarily litigate their federal takings claims in state courts. ... [T]here is scant precedent for the litigation in federal district court of claims that a state agency has taken property in violation of the Fifth Amendment's Takings Clause. To the contrary, most of the cases in our takings jurisprudence, including nearly all of the cases on which petitioners rely, came to us on writs of certiorari from state courts of last resort. . . . State courts are fully competent to adjudicate constitutional challenges to local land-use decisions. Indeed, state courts undoubtedly have more experience than federal courts do in resolving the complex factual, technical, and legal questions related to zoning and land-use regulations.

San Remo Hotel, 545 U.S. at 346-47 (citations omitted).

Amici note that the result sought by Appellants' amici would not only divert these cases away from the more experienced state courts, but would create a massive volume of new cases in the already overburdened district courts. Such a result is wholly inconsistent with the Supreme Court's clear direction in *San Remo Hotel*. *See also Hoehne v. County of San Benito*, 870 F.2d 529, 532 (9th Cir. 1989) (*Williamson County* "guard[s] against the federal courts becoming the Grand Mufti of local zoning boards."). "

Appellants' amici may not like the *Williamson County* or *San Remo Hotel* decisions, but they cannot eliminate them by repeatedly pointing to the minority

concurring view in *San Remo Hotel* and insisting that this Court should somehow ignore or evade Supreme Court precedent. This Court should, and indeed, must, leave undisturbed the clear requirement that a takings plaintiff fully pursue an available state inverse condemnation action as a prerequisite to any federal takings claim.[7] *Equity Lifestyle Properties, Inc.*, 548 F.3d at 1191("Unless a complainant has sought relief through a Kavanau adjustment, he cannot file a federal complaint objecting to an uncompensated taking by the state."); *San Remo Hotel v. City and County of San Francisco*, 145 F.3d 1095, 1102 (9th Cir. 1998) ("Field has not filed an inverse condemnation action in state court, and therefore has not been denied just compensation by California. It follows that Field's facial takings claim-insofar as it alleges the denial of the economically viable use of his property-is unripe"); *Jones Intercable of San Diego*, 80 F.3d at 324 ("In order for Jones' claim that the City took its property without just compensation to be ripe for federal judicial

[7] Amici ELS attempts to further confuse the law by asserting that in *Ventura Mobilehome Communities Owners Ass'n*, 371 F.3d 1046, this Court held that "virtually any form of state litigation or administrative process" satisfies *Williamson County*. Nonsense. The cited portion of *Ventura Mobilehome* simply lists all of the various steps the plaintiff in that case did not take; it in no way suggests that performing any of those steps short of a completed state inverse condemnation action would have been sufficient. Indeed, ELS (previously called MHC) itself has repeatedly been held *not* to have properly ripened a similar federal takings claims because it refused to pursue state court inverse condemnation proceedings. *Equity Lifestyle Properties, Inc.*, 548 F.3d at 1191-92; *Manufactured Home Communities, Inc. v. City of San Jose*, 420 F.3d 1022, 1035-36 (9th Cir. 2005).

review, Jones was required first to seek compensation through California's inverse condemnation proceedings.").

B. California Provides A Constitutionally Adequate Avenue For Compensation For Regulatory Takings

Under California law, if a rent control statute constitutes a regulatory taking, the landlord is entitled to compensation for that taking. That compensation is determined through the procedure established in *Kavanau v. Santa Monica Rent Control Board*, 16 Cal. 4th 761 (1997). A landlord must first challenge the regulated rent through an action for administrative mandamus in state court. *Galland v. City of Clovis*, 24 Cal. 4th 1003, 1022 (2001). If a writ of mandamus is granted, the property owner must then seek an adjustment of future rents from the governing rent board "that takes into consideration past confiscatory rents." *Kavanau*, 16 Cal. 4th at 783-85; *Equity Lifestyle Properties, Inc.*, 548 F.3d at 1191. Such an adjustment is referred to as a "*Kavanau* adjustment." See *Galland*, 24 Cal. 4th at 1025. If such an adjustment is found inadequate, the landlord can sue for inverse condemnation damages. *Id.* at 1029-30.

This Court has "expressly held that, post 1987, California's inverse condemnation procedures are adequate to address a regulatory takings claim." *San Remo Hotel*, 145 F.3d at 1102 (citations omitted). In no less than ***five published opinions***, this Court has rejected attempts by landlords, who did not even bother to seek a *Kavanau* adjustment, to have the *Kavanau* remedy declared futile or

inadequate. *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*, 371 F.3d at 1053; *Carson Harbor Village Ltd. v. City of Carson*, 353 F.3d at 827-30; *Hacienda Valley Mobile Estates*, 353 F.3d at 658-59.

Appellants' amicus, Center for Constitutional Jurisprudence ("CCJ"), urges this Court to reverse this long settled law and determine that California's compensation procedures do not provide an adequate remedy with respect to rent control takings cases. CCJ presents some anecdotal, and clearly political, arguments as to why it believes the *Kavanau* procedures are inadequate. However, it bears noting, at the outset, that ***the adequacy of California's Kavanau remedy is entirely irrelevant to the issues in the panel's decision in this case.*** The issue in this case is whether a landowner must have ***attempted*** to obtain compensation in the California courts before bringing a takings claim in federal court (the validity of the *Williamson County* doctrine). Despite CCJ's invitation, this Court has no occasion to assess ***the adequacy*** of California's compensation procedures.[8]

Appellants have not shown that California's state-law procedures are inadequate. Indeed, as discussed above it is undisputed that Appellants ***never even attempted to pursue damages in California court***. It would, therefore, not only be

[8] CCJ misrepresents the Panel's holding when it states, on page 5 of its brief: "The panel opinion held that the *Williamson County* rule was satisfied here . . . because no California remedy satisfied it." The three-judge panel did not even consider this issue, much less make such a holding.

wholly inappropriate and unwise for this Court to take up the adequacy of *Kavanau*, but to do so will be completely inconsistent with the history of Ninth Circuit precedent cited herein.

Rather than overrule long standing precedent based on allegations in a brief by a non-party amicus, this Court should stay its hand until a proper case arises in which the adequacy or futility of *Kavanau* can be assessed based upon a fully developed factual record in which a plaintiff has attempted the process. Here, Appellants never even commenced the process leading up to a *Kavanau* remedy by seeking to obtain a rent increase higher than the "automatic increase" allowed under the City's ordinance. Notwithstanding these insurmountable procedural failures, CCJ's "frontal" attacks on *Kavanau* are without legal merit.

The bulk of CCJ's brief is a political diatribe decrying California as a rogue state whose court system cannot be trusted to fairly apply the law or respect federal rights. Such obvious "character assassination" does not merit specific rebuttal; except to say that ***both*** the Supreme Court and this Court have ***repeatedly*** recognized that state courts are fully capable of protecting federal rights. *See*, *e.g.*, *San Remo Hotel*, 545 U.S. at 346-47; *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 116 (1981); *Hirsh v. Justices of the Supreme Court of the State of California*, 67 F.3d 708, 713 (9th Cir. 1995) ("Refusing to abstain would require presuming that the California Supreme Court will not adequately safeguard

federal constitutional rights, a presumption the U.S. Supreme Court [has] squarely rejected ...").[9]

With respect to *Kavanau*, CCJ first argues that a takings remedy is only adequate if the government itself pays the compensation. However, this Circuit has held that "this concern does not affect a property owner's claim of adequate compensation." *Equity Lifestyle*, 548 F.3d at 1192, n.14 (2008). The question is ***whether*** compensation is available, not ***who*** is to provide such compensation.

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[9] But it should at least be noted that in CCJ's two "illustrations" of the California Supreme Court's purported flouting of United States Supreme Court precedent, the California Supreme Court actually ***followed*** that precedent. CCJ attacks *Landgate v. California Coastal Commn.*, 17 Cal. 4th 1006 (1998) for applying the "substantially advances" test from due process doctrine in a takings case. (CCJ Brief, pp. 11-18.) But at the time *Landgate* was decided, the Supreme Court had arguably approved of that test in takings cases. *See Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). The "substantially advances" test was not rejected until 2005 in *Lingle*, 544 U.S. 528. CCJ also attacks *Landgate* because it purportedly "resuscitates" the takings remedy the Supreme Court had rejected in *First English*. (CCJ Brief, pp. 9-11.) However, in *Landgate* the California Supreme Court recognized *First English*'s holding, and noted that the High Court had expressly held that its ruling did ***not extend*** to "the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like which are not before us." *Landgate*, 17 Cal. 4th at 1010 (quoting *First English*). Thus, the issue in *Landgate* was whether the governmental delay was a taking to be compensated under *First English*, or whether it was a "normal delay" to which the Supreme Court expressly held *First English* would not apply. The California Supreme Court ***followed*** the Supreme Court's command that *First English* should not apply to "normal delays." (And, more pertinent to the case at hand, the *Kavanau* takings remedy in rent control cases *expressly provides* retrospective compensation for the period of any delay in obtaining a constitutional rent increase. *Equity Lifestyle*, 548 F.3d at 1192; *CHV II*, 353 F.3d at 829 ("We do not read *Kavanau* and *Galland* as reinstating the *Agins* rule. . . .").)

More fundamentally, the premise of CCJ's argument is legally incorrect. ***The local government itself does pay to compensate the park owner for confiscatory rents if the park owner cannot obtain compensation through the Kavanau process.*** The *Kavanau* procedure is simply the administrative and judicial remedy that a plaintiff must exhaust before bringing a state law inverse condemnation action in state court, as required by *Hensler v. City of Glendale*, 8 Cal. 4th 1, 13-14 (1994).

If the *Kavanau* process proves futile in compensating the park owner, the state court inverse condemnation remedy remains available for damages ***against the local government.*** *See*, *e.g.*, *Hensler*, 8 Cal. 4th at 13-14 (California law makes "available an action for inverse condemnation if, after exhausting administrative remedies to free the property from the limits placed on development and obtaining a judicial determination that just compensation is due, any restrictions for which compensation must otherwise be paid are not lifted."); *Galland*, 24 Cal. 4th at 1022 ("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."); *CHV II*, 353 F.3d at 829 ("We ***do not*** read *Kavanau* and *Galland* as reinstating the *Agins* rule. . . . [I]nverse condemnation

and section 1983 damages remedies appear to ***remain available*** if the mandamus/*Kavanau* adjustment remedy proves inadequate."); *CHV II*, 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 in each). Contrary to CCJ's claim (CCJ Brief, p. 21), California's compensation procedures *do* comply with any purported requirement that the government must be the one to do the compensating.

Next CCJ asserts that only one landlord has been "successful" since *Kavanau*. Even if that unsupported assertion were true,[10] the more likely explanation is that California's rent control laws are *not* confiscatory, and thus there have been few "takings" requiring a *Kavanau* adjustment. Indeed, CCJ's purported statistic is meaningless without knowing how many landowners have attempted to obtain a *Kavanau* adjustment. *No case* is cited by Appellants' amici where a landowner was found entitled to a *Kavanau* adjustment but did not receive one.[11]

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[10] The assertion is only supported by citation to testimony in a district court case by R.S. Radford, a lawyer for the Pacific Legal Foundation.

[11] In *Hillsboro Properties v. City of Rohnert Park*, 138 Cal. App. 4th 379 (2006), cited by CCJ, the landowner was not entitled to a *Kavanau* adjustment. He had obtained a *federal* court order declaring the ordinance unconstitutional (*id*. at 386), so his remedy was to seek damages in his *federal* lawsuit. *Kavanau* does not apply once a plaintiff is in federal court. The landowner in *Hillsboro* never

It is pure sophistry for CCJ to argue that the "lack" of adjustments means that the system does not work. Speculative allegations are not sufficient to show that *Kavanau* is inadequate. *MHC*, 420 F.3d at 1035. Without having first attempted the *Kavanau* process, any assertion that a rent board will be unlikely to grant a proper rent increase is speculative and insufficient, as a matter of law, to show that *Kavanau* is inadequate or futile. *CHV II*, 353 F.3d at 830. And even if, for the sake of argument only, a *Kavanau* adjustment is shown to be inadequate or unavailable, the California inverse condemnation remedy unquestionably remains available as explained above.

The argument is next made that the *Kavanau* remedy requires multiple steps. The *Los Altos El Granada Investors v. City of Capitola*, 583 F.3d 674 (9th Cir. 2009) case is cited as an extreme example. What *Los Altos* really illustrates is the repeated efforts of a landlord to ***evade state court procedures and remedies*** in an attempt to have the claim heard in federal court. As this Court explained seven years ago, "[a]lthough the route to the *Kavanau* adjustment is longer than [the landlord] would like, we do not believe it is the type of procedure the Supreme Court meant to eliminate. . . . Because the judicial path to the *Kavanau* adjustment is certain and well-defined, we believe that [the landlord] will receive a final

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pursued the administrative procedures under his local rent ordinance to obtain a rent increase that would provide a constitutional "fair return." There was never any government decision in *Hillsboro* which could be challenged in state court by writ of administrative mandate to initiate the *Kavanau* process. *Id*. at 393-394.

answer from the California court system..." *Hacienda Valley Mobile Estates*, 353 F.3d at 559. Further, while fully aware of the number of "steps" *Kavanau* involves, this Court "expressly held that, post 1987, California's inverse condemnation procedures are adequate to address a regulatory takings claim." *San Remo Hotel*, 145 F.3d at 1102 (citations omitted); *see also*, *City of Monterey v. Del Monte Dunes of Monterey, Ltd.*, 526 U.S. 687, 721 (1999).

CCJ also complains that *Kavanau* requires a remand back to the same rent board. (CCJ Brief, p. 30.) This Circuit, in *CHV II*, responded directly to that very argument by holding that, without having first attempted the *Kavanau* process, any assertion that a rent board will be unfair or is unlikely to grant a proper rent increase is speculative and insufficient to show that *Kavanau* is inadequate or futile. *CHV II*, 353 F.3d at 830. Unsubstantiated claims that any particular rent board is biased "at best, produce uncertainty and uncertainty does not equal futility." *MHC*, 420 F.3d at 1035-36.

CCJ's anti-*Kavanau* argument then devolves into a mis-description of the second *Williamson County* prong as an exhaustion doctrine, and the assertion that some "remedy" must be available in federal court for a "violation" of federal rights. As discussed above, this is not really an exhaustion doctrine, but an element of the constitutional tort. Until state remedies are denied, no taking has

occurred and thus there is no federal right to be vindicated. *Williamson County*, 473 U.S. at 195 n.13.

Lastly, federal court dockets need not become clogged as the immediate reviewing body for a host of local rent board or other local administrative land use tribunals around the country, especially when California provides a specific remedy for obtaining any compensation due. *Spence v. Zimmerman*, 873 F.2d 256, 262 (11th Cir. 1989) ("We stress that federal courts do not sit as zoning boards of review and should be most circumspect in determining that constitutional rights are violated in quarrels over zoning decisions."); *Hoehne*, 870 F.2d at 532 (*Williamson County* "guard[s] against the federal courts becoming the Grand Mufti of local zoning boards.").

IV. CONCLUSION

The second prong of the *Williamson County* ripeness doctrine serves a critical purpose in takings law by implementing the Fifth Amendment's limit of federal takings claims to cases where the state has not only "taken" property but has also denied just compensation. As the Supreme Court has repeatedly held, until such compensation is denied no federally cognizable "taking" has occurred. *Williamson County*, 473 U.S. at 195 n.13. Consistent with the wide body of law discussed above, this Court should reaffirm that full compliance with the second *Williamson County* requirement is a jurisdictional prerequisite to a federal takings

claim. The Court should also decline to reach the unnecessary *Kavanau* question presented by Appellants' amici CCJ.

Respectfully submitted,

DATED: May 14, 2010

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Pursuant to Rule 29(d) of the Federal Rules of Appellate Procedure and Ninth Circuit Rules 29-2(c) and 32-1, I certify that the attached amicus brief is proportionately spaced, has a typeface of 14-point, proportionally-spaced font, and contains less than 7,000 words according to the word count function of Microsoft Word 2007.

DATED: May 14, 2010 **KERR & WAGSTAFFE LLP**

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