No. 12-17749

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RANCHO DE CALISTOGA, a California General Partnership

Petitioner and Appellant,

v.

CITY OF CALISTOGA; W. SCOTT SNOWDEN,
Hearing Officer, The City of Calistoga,

Respondents and Appellees.

On Appeal from the United States District Court
for the Northern District of California
Honorable Jeffrey S. White, District Judge
District Court No. C11-05015 JSW

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER AND APPELLANT RANCHO DE CALISTOGA, FILED WITH CONSENT OF ALL PARTIES PURSUANT TO FRAP 29(a)

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Amicus Curiae Pacific Legal Foundation, a nonprofit corporation organized under the laws of California, hereby states that it has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

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Amicus Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of Petitioner and Appellant Rancho de Calistoga. All parties have consented to the filing of this brief, pursuant to Federal Rule of Appellate Procedure 29(a). No party's counsel authored this brief in whole or in part; no party or its counsel contributed money to fund the brief; and no person other than Amicus PLF and its members contributed money to fund the brief.

IDENTITY AND INTEREST OF AMICUS

Pacific Legal Foundation is the largest and most experienced public interest legal foundation of its kind in the United States. Founded 40 years ago, PLF is a nonprofit, tax-exempt corporation organized under the laws of California for the purpose of litigating matters affecting the public interest at all levels of state and federal courts. Representing the views of thousands of supporters nationwide, PLF is an advocate of individual rights, including the fundamental right to own and make productive use of private property.

PLF has appeared before this Court and the United States Supreme Court in many leading cases arising under the Takings and Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution. PLF attorneys were counsel of record before the nation's highest court in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); and *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). PLF has also

participated as amicus curiae in nearly every major real property takings case heard by the Supreme Court in the last three decades. PLF filed a brief amicus curiae with the United States Supreme Court in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), and argued before the California Supreme Court as amicus curiae in *Kavanau v. Santa Monica Rent Control Board*, 941 P.2d 851 (Cal. 1997), two takings cases of special relevance to the present dispute. Finally, PLF attorneys were counsel of record before this Court in *Crown Point Development, Inc. v. City of Sun Valley*, 506 F.3d 851 (9th Cir. 2007), the case that established that—contrary to the holding below—substantive due process claims are analytically distinct from regulatory takings claims, and cannot be treated as equivalent for purposes of dismissal.

PLF believes that its litigation experience in the issues involved, its special expertise in Fifth Amendment takings law, and its public interest perspective will assist this Court in resolving the important issues presented by this case.

INTRODUCTION

This case raises important issues concerning the right of California property owners to have their federal constitutional claims reviewed in federal court. Plaintiff and Appellant Rancho de Calistoga (Rancho), is the owner of a mobile home park in the City of Calistoga (City), which is subject to the City's rent control ordinance.

This litigation challenges the constitutionality of the rent regulations as applied to Rancho's property under this ordinance.

Rancho's lawsuit includes a claim that the City's actions comprised a regulatory taking of its property without just compensation, in violation of the Takings Clause of the Fifth Amendment. The district court dismissed this claim on the grounds that Rancho had not first sought compensation in state court, as required by *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*. *See* Order Granting Motion to Dismiss, With Leave to Amend and Setting Case Management Conference, 2012 WL 2501075 (June 27, 2012) (June Order), at 4. Yet this holding is irreconcilable with the fact that just compensation for a taking arising from the operation of a rent control law is not available in the California state courts as a matter of law, under *Kavanau v. Santa Monica Rent Control Board.*

The court below also dismissed Rancho's claim for a violation of substantive due process under the Fourteenth Amendment. The district court reasoned that Rancho's due process claim was "subsumed by the purported takings claim," and therefore could not be maintained as a viable cause of action in its own right. Order Granting Motion to Dismiss First Amended Petition for Writ of Mandamus, 2012 WL 5636356 (Nov. 15, 2012) (November Order), at 4. This holding is squarely contradictory to this Court's decision in *Crown Point Development, Inc. v. City of Sun Valley*, and must be reversed under the law of this Circuit.

ARGUMENT

I

THE "STATE PROCEDURES" PRONG OF *WILLIAMSON COUNTY* CANNOT BE APPLIED TO BAR FEDERAL TAKINGS CLAIMANTS FROM ACCESS TO FEDERAL COURTS WHEN, AS IN THIS CASE, THE STATE COURTS DO NOT PROVIDE AN INVERSE CONDEMNATION REMEDY AS A MATTER OF LAW

The court below opined that Rancho's regulatory taking claim must be dismissed as unripe for federal adjudication under *Williamson County*. *See* June Order at 4-5. Yet on its face, *Williamson County* cannot bar Fifth Amendment takings claims such as this one from federal court, since California state courts do not provide an inverse condemnation remedy for plaintiffs in Rancho's position.

In *Williamson County*, the Supreme Court established an unprecedented procedural requirement for plaintiffs seeking to vindicate their constitutional rights under the Fifth Amendment. Before a claim for just compensation for a taking may be brought in federal court, the aggrieved party must seek "compensation through the procedures the State has provided for doing so." 473 U.S. at 194. But this "state procedures" requirement applies only when the state in question makes available "reasonable, certain, and adequate" procedures for obtaining compensation. *Id.* For example, in *Williamson County* itself, the Court's finding that the plaintiff's takings

claim was unripe rested upon the immediate availability of inverse condemnation proceedings in the Tennessee courts under the facts of that case. *Id.* at 196-97.

In stark contrast, under California law, plaintiffs like Rancho are barred from seeking just compensation by way of an inverse condemnation claim. The California Supreme Court in *Kavanau v. Santa Monica Rent Control Board*, 941 P.2d 851, foreclosed a remedy of just compensation for plaintiffs in Rancho's position. Instead, rental property owners who have suffered a taking by the operation of a rent control ordinance are limited to a due process remedy of administrative mandamus, followed (if mandamus is granted) by an application to the offending agency to make the plaintiff whole via increases in future rents. These procedures were never intended as, nor do they provide, a means for securing just compensation for a taking.

In *Kavanau*, the plaintiff obtained a judgment from a state appellate court that the Santa Monica Rent Board's application of its regulations to his property was unconstitutionally confiscatory. 941 P.2d at 855. Kavanau then filed a timely inverse condemnation action seeking just compensation for the period during which the rent board had effectively taken his property. *Id.*

In response, the California Supreme Court created a new doctrine. According to the *Kavanau* court, the due process remedy of setting aside the confiscatory application of a rent control law is also a substitute for just compensation. According to the reasoning of the state's highest court, because Kavanau could return to the rent

board and go through the petitioning process anew (to once more seek the rent increases that had previously been wrongfully denied), this in itself was an adequate remedy for any taking he had suffered: "[A] remedy for [a] due process violation, if available and adequate, obviates a finding of a taking." *Kavanau*, 941 P.2d at 865.

Because every takings claimant is required, under California's procedural scheme, to obtain a due process remedy (*e.g.*, setting aside the confiscatory denial of a rent application) as a prerequisite to pursuing inverse condemnation, and the due process remedy itself obviates the finding of a taking in the context of rent control, the California Supreme Court has effectively foreclosed inverse condemnation as a remedy in all cases such as the one at bar.

By the plain terms of *Williamson County*, federal takings plaintiffs must "ripen" their claims in state court only if a remedy of just compensation is readily available in the state forum. 473 U.S. at 194-97. Because California's *Kavanau* procedure is the only remedy the courts of that state offer to takings claimants in the context of rent control, and that procedure cannot conceivably be described as a "reasonable, certain, and adequate" means of obtaining just compensation, *Williamson County*'s requirement of exhausting state procedures is inapplicable to plaintiffs like Rancho. Accordingly, the ruling below, that Rancho's regulatory taking claim is not ripe for federal adjudication, is erroneous as a matter of law and must be reversed.

II

THIS COURT'S RULING IN *CROWN POINT DEVELOPMENT* PRECLUDES THE LOWER COURT'S DISMISSAL OF RANCHO'S SUBSTANTIVE DUE PROCESS CLAIM

The court below dismissed Rancho's substantive due process claim on the grounds that it is "subsumed" by Rancho's regulatory taking claim. June Order at 5; November Order at 4. Although its reasoning is not transparent, the trial court apparently based its holding on the fact that, since Rancho's due process and takings claims arose from the same body of operative facts (the denial of Rancho's rent application), those claims could be treated as equivalent for purposes of dismissal. *See* June Order at 5 (Rancho's takings and due process claims are both "based [on] allegations that Respondents did not fully approve the requested rent increase"). This is not the law, and in fact the trial court's reasoning has been expressly repudiated both by the United States Supreme Court and by this Court.

From 1996 until 2007, this Court held that facts giving rise to a claim for a regulatory taking also necessarily stated a claim for a violation of substantive due process. *See Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996). Therefore, a due process claim arising from such facts would always be dismissed as precluded by the takings claim. *Id.* at 1324. In 2005, however, the United States Supreme Court underscored that regulatory takings claims are conceptually and doctrinally distinct

from substantive due process claims; the elements required to support the latter *cannot* state a claim for a taking. *See Lingle v. Chevron USA*, 544 U.S. 528 (2005). Thus, as a logical matter, substantive due process claims based on an alleged failure to substantially advance legitimate state interests cannot be subsumed by regulatory takings claims, which must be evaluated under the multi-factor factual analysis of *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), cited in *Lingle*, 544 U.S. at 539, 548.

Here, the essence of Rancho's due process claim is that the City's application of the rent control ordinance, under the facts of this case, fails to substantially advance a legitimate governmental interest (or, in Rancho's terms, is "plainly arbitrary"). Appellant's Opening Brief at 63. The Supreme Court expressly ruled in *Lingle* that this type of claim *cannot* be stated as a violation of the Takings Clause; rather, it properly states a claim for a violation of substantive due process, as Rancho has done.

This Circuit has already recognized that *Lingle* overruled *Armendariz* to this extent, and that substantive due process claims such as the one Rancho has stated may no longer be "subsumed in," or precluded by, regulatory takings claims based on the same facts. In *Crown Point Development, Inc. v. City of Sun Valley*, this Court expressly noted that "*Lingle* pulls the rug out from under our rationale for totally precluding substantive due process claims based on arbitrary or unreasonable

conduct." 506 F.3d at 855. The *Crown Point* court further explained that, since *Lingle* made clear that "there is no specific textual source in the Fifth Amendment for protecting a property owner from conduct that furthers no legitimate government purpose," there is no basis for precluding both a takings claim and a substantive due process claim arising from a common body of facts. *Id.*

Ironically, the court below cites to *Crown Point* for precisely the opposite of its actual holding, in support of its erroneous dismissal of Rancho's due process claim. *See* June Order at 5, November Order at 4, both citing *Crown Point* for the proposition that "the Fifth Amendment would preclude a due process challenge only if the alleged conduct is actually covered by the Takings Clause." Since the essence of both *Crown Point* and *Lingle* is that allegations of arbitrary government action, or of failure to substantially advance legitimate state interests, is *not* conduct that is covered by the Takings Clause, the district court has simply resurrected the *Armendariz* doctrine. As such, the dismissal of Rancho's substantive due process claim is contrary to the law of this Circuit, and must be reversed.

CONCLUSION

Because the dismissal of Rancho's regulatory takings and substantive due process claims rested on the trial court's erroneous belief that just compensation could be obtained in the California courts on the facts stated, and that the due process

claim could be restated as a taking claim, dismissal of Rancho's complaint on those grounds was clearly erroneous and must be reversed.

DATED: May 17, 2013.

Respectfully submitted,

By /s/ R. S. Radford
R.S. RADFORD

Counsel for Amicus Curiae
Pacific Legal Foundation

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DATED: May 17, 2013.

/s/ R. S. Radford
R.S. RADFORD
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CERTIFICATE OF SERVICE

I hereby certify that on May 17, 2013, I electronically filed the foregoing BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER AND APPELLANT RANCHO DE CALISTOGA FILED WITH CONSENT OF ALL PARTIES PURSUANT TO F.R.A.P. 29(a) with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, to the following non-CM/ECF participants:

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