No.

In the Supreme Court of the United States

REDEVELOPMENT AUTHORITY OF THE COUNTY OF MONTGOMERY, PENNSYLVANIA, DONALD W. PULVER, GREATER CONSHOHOCKEN IMPROVEMENT CORP., AND TBFA PARTNERS, L.P.,

Petitioners,

v.

R & J HOLDING COMPANY AND RJ FLORIG INDUSTRIAL COMPANY, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *San Remo Hotel, L.P. v. City & County of San Francisco*, 545 U.S. 323 (2005), this Court held that state court judgments in actions filed pursuant to *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), are entitled to preclusive effect on takings claims in a later federal action. The Court also held that this preclusive effect could not be "negate[d]" by asserting in the state court a purported "reservation," under *England v. Louisiana State Bd. of Med. Examiners*, 375 U.S. 411 (1964), of the right to press the same takings claim in federal court based on the Fifth Amendment. The questions presented are:

1. Whether issue preclusion bars a takings claim based on the Fifth Amendment only where the state court expressly decides Fifth Amendment issues or, additionally, where the state court decides the same takings claim under state takings law?

2. Whether, after a federal court's dismissal of a takings claim under *Williamson County*, and the assertion in state court of an *England* reservation, a federal court—circumventing *San Remo Hotel* and *Williamson County*—can rely on that reservation, notwithstanding its invalidity, in refusing to apply claim preclusion to bar the reasserted takings claim?

RULE 29.6 STATEMENT

Pursuant to this Court's Rule 29.6, undersigned counsel states that Petitioner Greater Conshohocken Improvement Corporation has no parent company, is not a publicly owned company, and no publicly held company owns 10% or more of its stock.

Petitioner TBFA Partners, L.P. is a limited partnership and not a corporate entity. TBFA has no parent company, is not a publicly owned company, and no publicly held company owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Redevelopment Authority of the County of Montgomery, Pennsylvania, Donald W. Pulver, Greater Conshohocken Improvement Corporation, and TBFA Partners, L.P. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The court of appeals' opinion is reported at 670 F.3d 420. Appendix ("App.") 1. Its order denying rehearing and rehearing en banc is available at App. 131. The district court's opinion is available at 2009 WL 4362567 and App. 40.

JURISDICTION

The court of appeals filed its opinion on December 9, 2011, and denied timely petitions for panel rehearing and rehearing en banc on January 13, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The full faith and credit statute, 28 U.S.C. § 1738, provides in relevant part:

> The records and judicial proceedings of any court of any such State . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage

in the courts of such State . . . from which they are taken.

STATEMENT

The full faith and credit statute implements the longstanding rule—which "predates the Republic"—that "parties should not be permitted to relitigate issues that have been resolved by courts of competent jurisdiction. . . ." *San Remo Hotel*, 545 U.S. at 336. The statute's bar on relitigation, expressed in the doctrines of issue and claim preclusion, is "'demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination.'" *Id.* at 336-37 (quoting *S. Pac. R. Co. v. United States*, 168 U.S. 1, 49 (1897)). Strict enforcement of these preclusion doctrines is particularly critical where related state and federal proceedings are implicated because there is an abiding interest in preserving "the comity between state and federal courts that has been recognized as a bulwark of the federal system." *Allen v. McCurry*, 449 U.S. 90, 96 (1980) (citation omitted).

In keeping with these fundamental principles, this Court made clear in *San Remo Hotel* that there is no exception to the full faith and credit statute, and the preclusion doctrines it encompasses, for a state court's adjudication of takings claims that, under *Williamson County*, 473 U.S. 172, a federal court cannot consider until state procedures are first

exhausted. *San Remo Hotel*, 545 U.S. 323; *see also Stop The Beach Renourishment, Inc. v. Florida Dept. of Envtl. Prot.*, 130 S. Ct. 2592, 2609 (2010) (reiterating that after a final state court decision in a *Williamson County*-directed proceeding, preclusion principles bar a claimant from "launch[ing] a lower-court federal suit against the [same] taking"). The Court also rejected the notion that an "*England* reservation" of federal takings claims would "negate the preclusive effect of the state-court judgment with respect to any and all federal issues that might arise in the future federal litigation. . . ." *San Remo Hotel*, 545 U.S. at 338. Rather, such an *England* reservation is only effective where—unlike in the *Williamson County* context—a federal court had jurisdiction over the federal claim in the first instance, but abstained from exercising it. *Id.*

Despite these holdings, conflict and confusion remain in the lower courts over the proper application of issue preclusion to state court judgments in proceedings required by *Williamson County*. Consistent with *San Remo Hotel* but contrary to the Third Circuit's decision here, the Eighth and Eleventh Circuits have rejected efforts to circumvent issue preclusion where—as in this case—a state court previously resolved the same takings issues. *See Knutson v. City of Fargo*, 600 F.3d 992, 997-98 (8th Cir. 2010), *cert. denied*, 131 S. Ct. 357 (2010); *Agripost, LLC v. Miami-Dade County*, 525 F.3d 1049, 1055-56 (11th Cir. 2008), *cert. denied*, 129 S. Ct. 1668 (2009).

The effect of an attempted *England* reservation in a *Williamson County*-directed state court proceeding—or any other state court proceeding where a federal court has not previously abstained from resolving the federal claims under *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941)—has generated even deeper conflict and confusion. Some courts have determined that a purported *England* reservation is ineffective as a bar to the application of issue preclusion in the absence of a federal court's abstention under *Pullman*, but that it does bar the application of claim preclusion. *E.g., Los Altos El Granada Investors v. City of Capitola*, 583 F.3d 674, 686 & n. 3 (9th Cir. 2009). Other courts have concluded that such an *England* reservation, in the absence of *Pullman* abstention, is ineffective as a bar to the application of claim preclusion to the state court's judgment. *E.g., Edwards v. City of Jonesboro*, 645 F.3d 1014, 1020 (8th Cir. 2011). Still other courts have suggested that even in the absence of *Pullman* abstention, an asserted *England* reservation would bar the application of both issue and claim preclusion. *E.g., Fields v. Sarasota Manatee Airport Auth.*, 953 F.2d 1299, 1305 (11th Cir. 1992).

Here, the Third Circuit majority adopted an unprecedented approach to resolving the interplay between *England* reservations and preclusion under the full faith and credit statute. While purporting not to address the validity of an attempted *England* reservation in a *Williamson County*-directed state

court proceeding, it nevertheless relied on the validity of such a reservation in refusing to apply claim preclusion to bar Respondents' Fifth Amendment claims.

The Third Circuit's decision accordingly contravenes *San Remo Hotel*, the full faith and credit statute, decisions of other circuits, and foundational principles of preclusion, comity and federalism. It also deepens the uncertainty over the preclusive effect of a state court judgment on Fifth Amendment takings claims in federal court. And, it allows claimants to bypass this Court's decisions in *Williamson County* and *San Remo Hotel* and to obtain a second bite at litigating a state court-adjudicated takings claim in federal court. This Court's immediate intervention is needed to resolve these conflicts and uncertainty and to help engender uniformity in the application of these important and fundamental jurisprudential principles.

1. Historically, the town of Conshohocken, Pennsylvania, located thirteen miles northwest of downtown Philadelphia, was home to a thriving industrial economy on the banks of the Schuylkill River. By the early 1980s, however, its once-vibrant riverfront industries had migrated elsewhere and its riverfront properties had fallen into disrepair. This prompted the Montgomery County Planning Commission to perform a blight study which led it to conclude that 80 acres of riverfront property were in need of redevelopment.

The property at issue is a 3-acre plot located within these 80 riverfront acres. Respondent R & J Holding purchased the property in 1984 and later leased it to Respondent RJ Florig Industrial Company, Inc. Florig operated a steel processing business on the property for the next 24 years until it vacated the property in late 2008.

In 1993, Petitioners Redevelopment Authority and GCIC entered an agreement specifically providing for the condemnation of R & J Holding's 3 acres. App. 76-77. (GCIC later assigned its rights and obligations under the 1993 agreement to Petitioner TBFA Partners, L.P., a partnership including GCIC and other developers. App. 109.) The following year, the Montgomery County Commissioners approved the Planning Commission's proposal to redevelop the 80 acres of riverfront property.

In 1996, the Authority filed a Declaration of Taking of R & J Holding's 3-acre property pursuant to the Pennsylvania Eminent Domain Code, 26 Pa C.S.A. § 1-101, *et seq.*, App. 5-6, which provides the "complete and exclusive procedure and law to govern all condemnations of property for public purposes and the assessment of damages therefore." 26 P.S. § 1-303 (repealed 2006).[1] Respondents contested the

[1] The Pennsylvania Eminent Domain Code was repealed and replaced in 2006, but the provisions of the pre-2006 Code are at issue in this case. App. 6 n. 1.

condemnation in state court and the Commonwealth Court of Pennsylvania invalidated it. App. 6. In June 2003, Respondents were awarded more than $550,000 as reimbursement for their expenses in connection with the condemnation action. App. 7.

2. In late 2002, Respondents filed an action against Petitioners in federal court under 42 U.S.C. § 1983, asserting a substantive due process claim and a claim under the takings clause of the Fifth Amendment. App. 7, 64. In this federal proceeding, they alleged that the state condemnation proceedings had placed a "cloud" on their property and caused damages arising from their claimed inability to sell the property or to expand the steel processing business.

The district court dismissed Respondents' claims, concluding that their takings claims were not ripe under *Williamson County* because they had not yet pursued their alleged just compensation damages in state court via the Eminent Domain Code. App. 107, 120. The Third Circuit affirmed, finding that Respondents' § 1983 claims arising from Petitioners' unlawful delegation of authority to a private individual were time-barred. App. 60.

3. Following the district court's dismissal, Respondents filed a "Petition for Appointment of Viewers" in state court pursuant to § 502 of the

Eminent Domain Code.[2] App. 79. In their petition, Respondents stated that they were "not assert[ing] any claims under the Takings Clause of the United States Constitution" and were "reserv[ing] the right to pursue such claims in federal court" under *England*, 375 U.S. 411. Respondents sought just compensation damages but § 502(e) only provides for damages if "no declaration of taking" has been filed by the condemnor.

Respondents admitted that § 502(e) "does not, by its terms, contemplate [their] claim because the Declaration of Taking was actually filed[,]" and they therefore could not—and did not—rely solely on the plain language of § 502. Instead, Respondents argued that the takings clause of the Pennsylvania Constitution (PA. CONST. art. I, § 10)—which is "almost identical" to the Fifth Amendment's takings clause (*United Artists' Theater Circuit, Inc. v. City of Philadelphia*, 635 A.2d 612, 615 (Pa. 1993))—required the court to interpret § 502 to provide for just compensation in this instance. A contrary conclusion, Respondents contended, "would render hollow [their] right under the Pennsylvania Constitution and common law to seek compensation for the unlawful taking of their property."

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[2] Viewers are court-appointed officials who examine the property at issue, hold hearings, and file a report which includes a statement of the nature of the interest condemned, a plan showing the extent of any taking or injury, and a schedule of damages awarded. 26 Pa. C.S.A. §§ 504(a), 512.

The state trial court accepted Respondents' interpretation and ordered that a board of viewers calculate their just compensation damages, if any. App. 105-06. The court concluded that the Authority's "unlawful exercise of its condemnation power constitutes a compensable taking under Pennsylvania Law and must be compensated." App. 96. It thus "interpreted the Eminent Domain Code to find a remedy and not negate [Respondents'] rights under the common law and Pennsylvania Constitution to seek compensation for the unlawful taking of their property." App. 102.

Petitioners appealed to the Commonwealth Court of Pennsylvania. In attempting to justify the trial court's reading of the Pennsylvania Eminent Domain Code, including its award of just compensation, Respondents argued on appeal that the "remedy is compelled by the [Pennsylvania] constitutional requirement of just compensation." They later asserted that "the Pennsylvania Constitution requires that the [Authority] pay just compensation for taking." Respondents also reiterated their intention to reserve any claims they might have "under the Takings Clause of the United States Constitution" to be brought in federal court, but they expressly limited their asserted reservation this time "to the extent [it was] not inconsistent with *San Remo Hotel*. . . ."

The Commonwealth Court was not persuaded, and reversed. App. 75. It specifically rejected

Respondents' interpretation because a declaration of taking had been filed and the plain language of § 502(e) of the Code authorized a just compensation remedy only where *no* declaration of taking had been filed. App. 90. Although the court did not expressly address Respondents' constitutional arguments supporting their interpretation, it necessarily considered and denied those arguments by reversing the trial court's order and adopting Petitioners' contrary interpretation.

Respondents petitioned the Supreme Court of Pennsylvania for allowance of appeal. App. 10. They claimed, among other things, that the Commonwealth Court's decision "plainly conflicts with" the takings clause of Pennsylvania's Constitution. Their petition was denied. App. 10. Respondents did not seek review in this Court.

4. In 2006, Respondents filed a second federal proceeding—this action—asserting takings claims under the Fifth Amendment's takings clause and § 1983, as well as under state law. App. 10. Petitioners moved to dismiss on multiple grounds. They argued that under the full faith and credit statute, as applied in *San Remo Hotel*, claim preclusion attached to the Commonwealth Court's decision, barring Respondents' claims. Petitioners also maintained that issue preclusion attached to the Commonwealth Court's ruling that Respondents were not entitled to just compensation under the Eminent Domain Code and the Pennsylvania

Constitution's takings clause. The district court found that Respondents' purported *England* reservation of their takings claim in state court was a "nullity" and, based on claim preclusion, granted Petitioners' motions and dismissed Respondents' action. App. 58-59 & n. 6.

The Third Circuit reversed. App. 1. Relying on Respondents' purported *England* reservation in the state court proceeding, the court found that Respondents had expressed an intention in that proceeding to split their federal takings claims. App. 15-16. And, because Petitioners did not affirmatively object to this supposed expression of intention to split, the court held that an exception to claim preclusion applied under Pennsylvania law. App. 14, 16.

The Third Circuit ignored the fact that Respondents explicitly limited their asserted *England* reservation only to the extent it was consistent with *San Remo Hotel*—a case establishing that *England* reservations in a *Williamson County*-directed state court proceeding are without effect. The court also claimed not to have resolved whether Respondents' purported *England* reservation was in fact valid. App. 15-16. But the court necessarily did so, because it found that Petitioners had acquiesced in the substance of Respondents' attempted *England*

reservation, and there plainly could be no such acquiescence if that reservation was a nullity.[3]

The Third Circuit also held that issue preclusion did not attach to the Commonwealth Court's ruling. It noted that the Commonwealth Court held "that the Eminent Domain Code did not provide for 'just compensation' under the circumstances of this case," but reasoned that its ruling was not issue preclusive of Respondents' federal claim for just compensation here because the Commonwealth Court did not "directly address[ ] whether such an interpretation was permitted under the United States Constitution." App. 17-18.

Judge Nygaard dissented. App. 27. He reasoned that Respondents' "Fifth Amendment taking claim is, in every respect, the *de facto* condemnation claim raised and dismissed in state court[,]" and, even "assum[ing] that the federal claims were properly severed from the state claim," they nonetheless were still barred by preclusion. App. 31.

5. Petitioners filed timely petitions for panel rehearing and rehearing en banc. Those petitions were denied. App. 131-32.

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[3] The Third Circuit did observe that the "availability of an England reservation in the *Williamson County* context" like Respondents' here "has been called into question by *San Remo Hotel*. . . ." App. 15.

REASONS FOR GRANTING THE PETITION

The Third Circuit's decision substantially curtails the preclusive effect of state court judgments in takings lawsuits required by this Court's decision in *Williamson County*, even where those judgments decide the same substantive issues as those raised in a later federal lawsuit. In doing so, the decision contravenes the full faith and credit statute and this Court's decision in *San Remo Hotel*, and creates a split with other circuits that have accorded issue preclusive effect to state court judgments even in the absence of an express ruling on federal takings law issues.

Additionally, by transforming an invalid *England* reservation—and the opposing party's failure to object to that invalid reservation—into the basis for evading this Court's holdings in *Williamson County* and *San Remo Hotel*, the Third Circuit's ruling contravenes this Court's own precedents that have rejected the attempted use of an *England* reservation to circumvent the full faith and credit statute. In that fashion, the Third Circuit's decision also highlights the conflict and confusion in the lower courts over the validity of *England* reservations in this and related circumstances.

This Court's review is necessary to eliminate this uncertainty and unpredictability, to resolve the disagreement among the circuits, and to enforce the clear dictates of its own precedents.

I. THE DECISION BELOW CONFLICTS WITH *SAN REMO HOTEL* AND CREATES A CIRCUIT SPLIT REGARDING THE ISSUE PRECLUSIVE EFFECT OF STATE COURT JUDGMENTS IN FEDERAL TAKINGS ACTIONS.

The "adjudication of a state inverse condemnation claim will nearly always involve resolution of the same questions—regarding the nature of the government's action and its impact on the plaintiff's property—that would be at stake in a federal takings claim." J. Patashnik, *Bringing A Judicial Takings Claim*, 64 Stan. L. Rev. 255, 271 (2012). Thus, before the Third Circuit's decision here, the circuits uniformly held that issue preclusion attaches to state court judgments in *Williamson County*-directed proceedings that resolve takings claims under state law. *See Edwards v. City of Jonesboro*, 645 F.3d 1014, 1020 (8th Cir. 2011); *Knutson v. City of Fargo*, 600 F.3d 992, 997-98 (8th Cir. 2010), *cert. denied*, 131 S. Ct. 357 (2010); *Agripost, LLC v. Miami-Dade County*, 525 F.3d 1049, 1055 & n. 6 (11th Cir. 2008), *cert. denied*, 129 S. Ct. 1668 (2009); *cf. Downing/Salt Pond Partners, L.P. v. Rhode Island & Providence Plantations*, 643 F.3d 16, 21 (1st Cir. 2011) (stating that "[u]nder the *Williamson County* ripeness rules a plaintiff might be precluded from ever bringing a takings claim in federal court if the substance of the federal claim is litigated in state court"), *cert. denied*, 132 S. Ct. 502 (2011).

This issue preclusion holding applied between state and federal proceedings is mandated by *San Remo Hotel*. There, the Court answered in the affirmative the question it had accepted for review: "Whether a Fifth Amendment Takings claim [is] barred by issue preclusion based on a judgment denying compensation solely under state law, which was rendered in a state court proceeding that was required to ripen the federal Takings claim?" *San Remo Hotel*, 545 U.S. at 327 n. 1. The Court also specifically disapproved the holding in *Santini v. Connecticut Hazardous Waste Mgmt. Serv.*, 342 F.3d 118 (2d Cir. 2003)—where the property owners asserted only a state law takings claim in state court (*id.* at 123)—that "parties 'who litigate state-law takings claims in state court 'involuntarily' pursuant to *Williamson County* cannot be precluded from having those very claims" under the Fifth Amendment heard in federal court. *Id.* at 342.

The Eighth Circuit followed this Court's reasoning in *Knutson*. There, the plaintiffs sought just compensation for the City of Fargo's alleged taking through an action in state court under a North Dakota constitutional provision "nearly identical" to the Fifth Amendment's Takings Clause, and the state court denied their claim. *Knutson*, 600 F.3d at 997. Plaintiffs then sought just compensation for the same alleged taking via a Fifth Amendment claim in federal court. The Eighth Circuit held that issue preclusion barred the Fifth Amendment claim because it involved the identical

issue litigated and decided in the state proceeding—"the City's alleged taking of private property without just compensation. . . ." *Id.*

The Eleventh Circuit reached the same result in *Agripost*. The plaintiffs in that case sought just compensation for Dade County's alleged regulatory taking through an action in state court under Florida's takings law, and the state court denied their claim. Plaintiffs then sought just compensation for the same alleged taking in federal court under the Fifth Amendment. Like the Eighth Circuit in *Knutson*, the Eleventh Circuit held that issue preclusion barred Plaintiffs' Fifth Amendment claim because "the issues forming Agripost's state takings claim are the same as those involved in Agripost's federal takings claim and the resolution of these issues was necessary for the state court's decision in favor of the County." *Agripost*, 525 F.3d at 1055 (citation omitted).

Although advised of both *Knutson* and *Agripost*, the Third Circuit reached the opposite conclusion in this case. It did not consider whether the state appellate court's denial of Respondents' takings claim seeking just compensation under state law—including the Pennsylvania Constitution's takings provision—resolved the same issues presented by Respondents' takings claim under the Fifth Amendment's nearly identical Takings Clause. Rather, the panel majority ruled that because the state appellate court did not expressly determine the

federal constitutionality of the Pennsylvania Eminent Domain Code, its decision did not bar Respondents' Fifth Amendment claim.[4]

Under *Knutson*, *Agripost*, and the other cases cited above, however, the outcome clearly would be different. As in *Knutson*, the state court here determined that Respondents were not entitled to just compensation under a state constitution's takings clause nearly identical to the Fifth Amendment's Takings Clause.[5] *See United Artists'*

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[4] Here, the dissent strongly and correctly disagreed, reasoning that Respondents' "federal Fifth Amendment taking claim is, in every respect, the *de facto* condemnation claim raised and dismissed in state court." App. 31 (Nygaard, J., dissenting). To now invoke the Fifth Amendment in support of that claim in federal court does not change the fundamental character of the claim. This is not a situation in which a plaintiff has tried to split apart claims that are different from one another. Rather, the so-called "federal claim" and the so-called "state claim" are here one and the same.

[5] In the Commonwealth Court, Respondents expressly argued that the just compensation they sought was compelled by the Pennsylvania Constitution's takings clause. The Commonwealth Court necessarily rejected this state constitutional argument when it reversed the trial court's decision to award just compensation. *See Grubb v. Pub. Utils. Comm'n of Ohio*, 281 U.S. 470, 477–78 (1930) ("The question of … constitutional validity … was distinctly presented … and necessarily was resolved … by the judgment affirming the order. Omitting to mention that question in the opinion did not eliminate it from the case or make the judgment … any less an adjudication of it."); *Balent v. City of Wilkes–Barre*, 669 A.2d 309, 315 (Pa. 1995) ("[W]e must assume that the court properly considered the constitutional implications, before making its final determination that the taking was non-compensable.").

Theater Circuit, 635 A.2d at 615 (observing that the "texts of both [the Pennsylvania and Fifth Amendment] constitutional [takings] provisions are almost identical"); *see also Machipongo Land and Coal Co., Inc. v. Com.*, 799 A.2d 751, 763 n. 7 (Pa. 2002) (noting that the Pennsylvania Supreme "Court has consistently relied upon the decisions of the U.S. Supreme Court when considering takings issues") (citations omitted). Moreover, as in *Knutson*, Respondents did *not* assert federal claims or invoke federal constitutional authorities in the state action, and the state court "did not even mention federal law when deciding their takings claim." *Knutson*, 600 F.3d at 998. And as in *Knutson*, the state court denied Respondents' state law takings claim for just compensation and Respondents then sought just compensation for the same taking through a Fifth Amendment takings claim in federal court. This same fact pattern led the Eighth Circuit in *Knutson* (and later in *Edwards*, 645 F.3d 1014) to apply issue preclusion and dismiss the property owner's claims.

In the end, there is no avoiding it. The Third Circuit's issue preclusion analysis is an improper evasion of *Williamson County* and conflicts with *San Remo Hotel* and other circuit precedents. This Court's review is warranted for these reasons alone.

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENT REGARDING THE CLAIM PRECLUSIVE EFFECT OF STATE COURT JUDGMENTS IN FEDERAL TAKINGS ACTIONS AND DEEPENS UNCERTAINTY AMONG LOWER COURTS OVER THE IMPACT OF AN ASSERTED *ENGLAND* RESERVATION ON A PRECLUSION ANALYSIS.

The Third Circuit panel majority's novel acceptance of Respondents' purported *England* reservation in refusing to apply claim preclusion to bar their federal takings claims also conflicts with this Court's precedent and highlights the conflicts and confusion in the lower courts over the effect of an asserted *England* reservation on the application of preclusion under the full faith and credit statute.

This Court has made clear that in the absence of a federal court's abstention from deciding federal constitutional claims on the basis of *Pullman*, an attempted *England* reservation of those claims in state court does not negate the preclusive effect of the state court's judgment on those claims in a later federal action. In *England* itself, the Court described the right to reserve as a "right to return" to federal court. *England*, 375 U.S. at 422. This description "strongly implies that the Supreme Court was referring in *England* only to cases where a litigant, *because of the abstention doctrine*, has been sent by the federal courts to the state courts against his will." *Roy v. Jones*, 484 F.2d 96, 101

n. 25 (3d Cir. 1973) (citation omitted; emphasis added).

This Court confirmed this reading of *England* in *Allen v. McCurry*, 449 U.S. 90 (1980), where it held that a state court judgment was entitled to preclusive effect in a subsequent § 1983 suit in federal court. Addressing *England*, the Court in *Allen* detailed its limited scope:

> The holding in *England* depended entirely on this Court's view of the purpose of abstention in such a case: Where a plaintiff properly invokes federal-court jurisdiction in the first instance on a federal claim, the federal court has a duty to accept that jurisdiction.

Allen, 449 U.S. at 101-02 n. 17; *see also Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 85 n. 7 (1984) (same).

Thereafter, in *San Remo Hotel*, this Court reinforced the narrow window of application for *England* reservations—this time in the specific context of state actions conducted pursuant to *Williamson County*:

> "Typical" *England* cases generally involve federal constitutional challenges to a state statute that can be avoided if a state court construes the statute in a particular manner. In such cases, the purpose of abstention is not to afford state courts an

> opportunity to adjudicate an issue that is functionally identical to the federal question. To the contrary, the purpose of *Pullman* abstention in such cases is to avoid resolving the federal question by encouraging a state-law determination that may moot the federal controversy.

San Remo Hotel, 545 U.S. at 339 (citing *England*, 375 U.S. at 416-17 & n. 7). *See also Duty Free Shop, Inc. v. Administracion De Terrenos De Puerto Rico*, 889 F.2d 1181, 1183 (1st Cir. 1989) (Breyer, J.) (recognizing that *England* reservations are effective only where the federal court first engages in *Pullman* abstention and "ask[s] a state court to clarify a murky question of *state* law involved in the case, while permitting the plaintiff to *return* to the federal forum for determination of the federal question after the state court has decided the issue") (citations omitted).

Yet, despite this Court's directives in *Allen* and *San Remo Hotel*, the circuits are divided over the scope and effect of asserted *England* reservations.

In that regard, several circuits have ruled that attempted *England* reservations of federal constitutional claims—without a prior federal court decision abstaining from resolving those claims under *Pullman*—are ineffective and do not deprive a state court judgment of any preclusive effect. *Edwards*, 645 F.3d at 1020 (holding that property owner "did not avoid claim preclusion through the

reservation of federal rights that he included in the third amended complaint filed in the state-court action"); *Knutson*, 600 F.3d at 998 (holding that "attempted reservation of the [Fifth Amendment] claim for adjudication in federal court was ineffective under *San Remo Hotel*" and applying issue preclusion); *Geiger v. Foley Hoag LLP Retirement Plan*, 521 F.3d 60, 67 (1st Cir. 2008) ("The right to reserve claims [under *England*] only arises where a federal court abstains from deciding a federal issue to enable the state court to address an antecedent state law issue.") (citations omitted); *cf. Lewis v. E. Feliciana Parish Sch. Bd.*, 820 F.2d 143, 147 n. 1 (5th Cir. 1987) ("We doubt the effectiveness of a reservation of federal claims absent a prior federal abstention" under *Pullman*) (citations omitted).

For its part, the Ninth Circuit has determined that while an asserted *England* reservation in the absence of *Pullman* abstention by a federal court does not bar the application of issue preclusion, it does bar the application of claim preclusion. *Compare Dodd v. Hood River County*, 136 F.3d 1219, 1227 (9th Cir. 1998) (*England* "reservation doctrine does not enable [a litigant] to avoid preclusion of issues actually litigated in the state forum") (citations omitted) *with Los Altos El Granada Investors v. City of Capitola*, 583 F.3d 674, 686 n. 3 (9th Cir. 2009) (holding that "[b]ecause *Williamson* ineluctably forces litigants into state court, a proper *England* reservation may prevent claim preclusion") (citations omitted).

The Sixth Circuit, in turn, agrees with the Ninth Circuit "that a party's *England* reservation of federal takings claims in a state takings action will suffice to defeat claim preclusion in a subsequent federal action[,]" *DLX, Inc. v. Kentucky*, 381 F.3d 511, 523 (6th Cir. 2004), but it has declined to consider whether an asserted *England* reservation also defeats issue preclusion, *id.*

The Eleventh Circuit is internally conflicted on the issue. While it recently expressed doubt over whether an asserted *England* reservation, in the absence of a federal court's *Pullman* abstention, would bar the application of both issue and claim preclusion, the Eleventh Circuit held in 1992 that it would. *Compare Fields v. Sarasota Manatee Airport Auth.*, 953 F.2d 1299, 1305 (11th Cir. 1992) *with Agripost, LLC v. Miami-Dade County*, 525 F.3d 1049, 1055 (11th Cir. 2008) (noting that the "Supreme Court's reasoning in *San Remo Hotel* seems to undercut much of the support for . . . *Fields*" but declining to resolve the issue), *cert. denied*, 129 S. Ct. 1668 (2009).

The Third Circuit has taken its own unique approach. To begin with, it, too, is internally conflicted over the efficacy of *England* reservations in the absence of a federal court's *Pullman* abstention. In certain decisions, the court has indicated that an *England* reservation is effective only where a federal court has abstained on *Pullman* grounds. *See Roy*, 484 F.2d at 101 ("It would appear

the power to 'reserve' federal claims [under *England*] when proceeding in a state court can arise *only* when a plaintiff is before the state tribunal because the federal court has refused, on [*Pullman*] abstention grounds, to proceed with his case."). In others, the Third Circuit has suggested that an *England* reservation is valid only where a federal court has abstained on *Pullman* grounds *or* under *Younger v. Harris*, 401 U.S. 37 (1971). *Switlik v. Hardwicke Co., Inc.*, 651 F.2d 852, 858-59 (3d Cir. 1981).[6] In a more recent decision, the Third Circuit held that an *England* reservation was valid despite the absence of a federal court's *Pullman* abstention. *Bradley v. Pittsburgh Bd. of Ed.*, 913 F.2d 1064, 1072 (3d Cir. 1990).

Then, in this case, by extending the view it expressed in *Bradley*, the Third Circuit adopted

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[6] The Third Circuit's suggestion in *Switlik* that an *England* reservation is effective following a federal court's *Younger* abstention is itself contrary to the decisions of other circuits. *See United Parcel Serv., Inc. v. California Public Utils. Comm'n*, 77 F.3d 1178, 1184 n. 5 (9th Cir. 1996) (noting that "the *England* reservation is not available when a federal court abstains pursuant to *Younger*, thereby declining rather than postponing jurisdiction as it would under *Pullman*"); *Temple of Lost Sheep Inc. v. Abrams*, 930 F.2d 178, 183 (2d Cir. 1991) ("We accordingly hold that a federal plaintiff may not avoid preclusion by reserving in the state court its federal claims following *Younger* abstention."); *Duty Free Shop*, 889 F.2d at 1183 (Breyer, J.) ("*England*, and its reservations, are not relevant here, in the *Younger* context, where the purpose of abstention is not clarification of state law, but reluctance to interfere with an ongoing state judicial proceeding").

another—and unprecedented—stance on the efficacy of *England* reservations in the absence of a federal court's *Pullman* abstention. Here, it converted Respondents' purported *England* reservation into a supposed notice of intention to split their federal takings claims and, because Petitioners did not object to the reservation, applied a "claim splitting/acquiescence" exception to claim preclusion under the Restatement (Second) of Judgments, which Pennsylvania law had adopted. In doing so, the Third Circuit overlooked the fact that Respondents had expressly limited their claimed *England* reservation in state court "to the extent not inconsistent with *San Remo Hotel*." Given the Court's conclusion in *San Remo Hotel* that *England* reservations are ineffective in the *Williamson County* context in the absence of *Pullman* abstention, Respondents' attempted reservation was, *by its own terms*, ineffective and not subject to any possible objection by Petitioners.

Accordingly, there is conflict and uncertainty in the lower courts over the validity of *England* reservations of federal constitutional claims, including Fifth Amendment takings claims, in the absence of a federal court's prior abstention on *Pullman* grounds. This Court should grant review to eliminate the unpredictability and harmful effects these conflicting and confusing approaches generate for property owners, condemning authorities, and parties who are litigating federal constitutional claims implicating related state court proceedings.

III. THE QUESTIONS PRESENTED IMPLICATE EXCEPTIONALLY IMPORTANT AND RECURRING ISSUES OF PRECLUSION, COMITY, AND FEDERALISM.

The Third Circuit's decision has profound and serious ramifications for the principles of preclusion, federal-state comity, and federalism that are critical to the proper functioning of our state and federal judicial systems and the fair administration of justice.

Within the confines of our system of justice, the preclusion doctrines "'serve[ ] vital public interests beyond any individual judge's ad hoc determination of the equities in a particular case.'" *San Remo Hotel*, 545 U.S. at 345 (quoting *Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1981)). "Application of both [preclusion] doctrines is central to the purpose for which civil courts have been established, the conclusive resolution of disputes within their jurisdictions." *Montana v. United States*, 440 U.S. 147, 153 (1979) (citations omitted).

By establishing the conclusiveness of final judgments, the preclusion doctrines further a related, but equally important, purpose: promoting comity between our federal and state court systems. As this Court itself has noted, "federal and state courts are complementary systems for administering justice in our Nation" and "[c]ooperation and comity, not competition and conflict, are essential to the federal design.'" *Kowalski v. Tesmer*, 543 U.S. 125,

133 (2004) (quoting *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 586 (1999)); *San Remo Hotel*, 545 U.S. at 345 (noting the "weighty interests in finality and comity" implicated in this circumstance). Indeed, "comity between state and federal courts . . . has been recognized as a bulwark of the federal system." *Allen*, 449 U.S. at 96. Most simply put, "[d]epriving state judgments of finality . . . would violate basic tenets of comity and federalism. . . ." *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 478 (1982) (citation omitted).

Here, the Third Circuit's failure to apply issue preclusion to a state appellate court's adjudication of the same takings claim and issues presented substantially impairs each one of these fundamental principles. Its unprecedented use of Respondents' invalid *England* reservation to circumvent claim preclusion has the same effect. The Third Circuit's decision thus threatens to become a template for encouraging (and permitting) adroit condemnees to refrain from asserting federal law arguments and authorities in state court and, if they are not satisfied with the result in the state proceeding, to take the very "second bite at the apple" in federal court that this Court rejected in *San Remo Hotel*. 545 U.S. at 346.

Beyond that, the Third Circuit's decision also creates the possibility of an unfair procedural trap for condemning authorities. Given this Court's clear directives in *Allen* and *San Remo Hotel*, condemning

authorities rightly may see no need to object to asserted *England* reservations in state court *Williamson County* proceedings, which those authorities reasonably believe are invalid. Under the Third Circuit's decision, however, the failure to object to such invalid *England* reservations would eliminate the authorities' otherwise meritorious claim preclusion defense. Such a procedural trap is unfair and improper, and this Court should clarify in this case why it is flawed under settled precedent.

Further, by narrowing the scope of preclusion, the Third Circuit's decision—and the decisions of like-minded courts—will result in the perpetuation of condemnation litigations, and the excessive costs those litigations will entail. *See, e.g.,* Br. of New York, Connecticut and Vermont as Amici Curiae, *San Remo Hotel, L.P. v. City and County of San Francisco*, No. 04-340, 2005 WL 508091, at *12-17 (March 1, 2005) (describing the excessive costs of takings litigation); S. McManus, *The Impact of Litigation on Municipalities: Total Cost, Driving Factors, and Cost Containment Mechanisms*, 44 Syr. L. Rev. 833, 834-37 (1993) (noting the negative impact of "zoning and land development" litigation on cities, especially those in "poor fiscal condition").

Condemning authorities are in no position to bear these increased costs and burdens. Over the past several years, state and local government revenues have shrunk considerably. *See* C. Hoene & M. Pagano, *City Fiscal Conditions in 2011*, at 3

(2011) ("Cities ended fiscal year 2010 with the largest year-to-year reductions in general fund revenues and expenditures" since the mid-1980s). After the Third Circuit's decision, the mere threat of takings litigation—and the prospect of duplicative actions in state and federal courts—accordingly could severely impair state and local government efforts to "regulat[e] land use . . . perhaps the quintessential state activity[,]" *FERC v. Mississippi*, 456 U.S. 742, 767 (1982) and to "[p]romot[e] economic development[, which] is a traditional and long-accepted function of government." *Kelo v. City of New London*, 545 U.S. 469, 484 (2005).

Hindering economic redevelopment through the exercise of eminent domain is especially harmful and ill-timed now. Indeed, "[e]minent domain is often indispensable for revitalizing local economies, creating much-needed jobs, and generating revenue that enables cities to provide essential services." Br. of Nat'l League of Cities, *et al.* as Amici Curiae, *Kelo v. City of New London*, No. 04-108, 2005 WL 166931, at *1 (Jan. 21, 2005). As *amici* explained in *Kelo*, "[t]he private sector often cannot accomplish the job [of economic revitalization] alone due to a range of market failures, including holdouts; obstacles to assembling an appropriate development site in urban and suburban areas; the risks associated with cleaning up 'brownfield' sites; clouded property title on key parcels; and the need to improve street patterns." *Id.* at *2.

Increasing the costs and burdens of takings litigation, however, will deter these efforts and slow or derail economic redevelopment when and where it is most needed. *See* Dept. of Justice Ltr. to Hon. Charles T. Canady, Chairman, Subcommittee on the Constitution, Committee on the Judiciary, House of Representatives, Sept. 14, 1999, *reprinted in* H.R. Rep. No. 106-518, at 39 (2000) (recognizing, in opposing proposed legislation to expand federal jurisdiction over takings claims, that local officials, "[c]onfronted with the prospect of a potentially costly and time-consuming Federal court lawsuit, … would feel new pressure to approve land use proposals to avoid litigation, even if the proposed use might harm neighboring property owners and the community at large").

Therefore, the Court should grant this Petition and reverse the judgment of the Third Circuit. In so doing, the Court should clarify that state court judgments in *Williamson County* proceedings are entitled to issue preclusive effect on federal takings claims that raise the same substantive issues. The Court also should clarify that in the absence of a federal court's abstention based on *Pullman*, asserted *England* reservations of federal constitutional claims in subsequent state court proceedings are invalid and cannot be employed to defeat claim preclusion and preserve a federal forum for those federal claims in a later case.

CONCLUSION

This Court's review is warranted to ensure the proper application of the preclusion doctrines and *England* reservations, and to prevent the harmful consequences that will flow from the Third Circuit's decision. The petition for a writ of certiorari should be granted.

Respectfully submitted.

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