

**DRAFT**

*San Remo Hotel v. City and County of San Francisco*

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**I. Introduction**

On June 20, 2005, local government celebrated a landmark victory in the United States Supreme Court in the regulatory takings case *San Remo Hotel v. City and County of San Francisco*. No. 04-340 (“*San Remo III*”).<sup>1</sup> *San Remo III* is responsible for two major advances for government regulation of real estate development and other business activity: it will protect local government environmental, health, and safety regulation from expensive and duplicative litigation in the state and federal courts, and preserve local control over such regulation.

*San Remo III* affirmed that regulatory takings cases against local government must be litigated in state courts rather than federal courts. The Supreme Court’s ruling is significant because real estate developers and other businesses have historically used the threat of a federal court lawsuit as a hammer to the head of local government officials seeking to protect the public from unreasonable development and other harms. But in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), the United States Supreme Court required takings claimants challenging local government regulations to first seek compensation in state courts under the Just Compensation Clause of the state constitution, before bringing a takings claim in federal court under the Just Compensation Clause of the Fifth Amendment to the United States Constitution. This result, the Court held, is dictated by the language of the Just Compensation Clause, that private property shall not be taken for public use, “without just compensation.” U.S. Const. amend. V. Emphasis added. Reacting to this language, the Court determined that regulatory takings claims are not ripe until a State fails “to provide adequate compensation for the taking.” *Williamson County*, 473 U.S. at 195.

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<sup>1</sup> The San Remo saga resulted in three published opinions: *San Remo Hotel v. City and County of San Francisco*, 145 F.3d 1095 (9<sup>th</sup> Cir. 1998) (“*San Remo I*”) and *San Remo Hotel v. City and County of San Francisco* 27 Cal.4<sup>th</sup> 654 (2002) (“*San Remo II*”) in addition to *San Remo III*.

The San Remo Hotel claimed that it had been forced to litigate its takings claim in the California state courts under *Williamson County*.<sup>2</sup> After the California Supreme Court rejected the San Remo’s takings claim under the state constitution, the San Remo insisted on a right to litigate a takings claim in federal court under the federal constitution based on identical issues of fact and law to the state takings claim, without any deference to the state court’s ruling. The lower federal courts refused to allow the San Remo to re-litigate essentially the same claim.

The United States Supreme Court granted review to decide whether the San Remo would be entitled to a second chance in federal court. In a unanimous ruling in favor of San Francisco, the high court held that local governments regulating private property to protect the environment and other community interests should not be forced to defend these regulations twice—first in state court, and then again in federal court.

## **A. Background**

### **1. The HCO and the San Remo Hotel**

This 11 1/2 year old case (the “Bleak House” of takings) involves a takings challenge to San Francisco’s Residential Hotel Unit and Demolition Ordinance (HCO). In the years preceding the enactment of the HCO in 1979, the City faced a growing loss of rental housing. One major reason for this loss was the increasing conversion of residential hotel units to tourist use. After years of study, the City adopted a temporary HCO, and in 1981, adopted a permanent ordinance:

to benefit the general public by minimizing adverse impacts on the housing supply and on displaced low income, elderly, and disabled persons resulting from the loss of residential hotel units through their conversion and demolition.<sup>3</sup>

The HCO requires residential hotel owners to continue the historic use of their hotels. An owner can convert residential hotel units to non-residential use or demolish residential units if the owner replaces the

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<sup>2</sup> As the Supreme Court discovered following briefing on the merits, this premise of the San Remo’s petition for certiorari – that the San Remo had been forced to litigate its takings claims in state court under *Williamson County* – was false. *San Remo III*, Slip Op. at 21-22 (hereafter citations to the Court’s Slip Opinion will be to “*San Remo III*”). The Court nonetheless assumed that the San Remo had in fact litigated involuntarily in state court, and proceeded to decide that that fact, even if true, would not justify allowing the San Remo to re-litigate an identical takings claim in federal court. *Id.* at 18-20.

<sup>3</sup> HCO § 41.2.

converted residential units. An owner may provide replacement housing by building new units. Alternatively, to assist in the construction of replacement units, an owner may contribute an in lieu fee to the City equal to the land cost and 40% of the construction cost of the converted units.

When the City adopted the HCO, the San Remo Hotel had 62 residential units and 0 tourist units. In May 1990, the San Remo filed an application under the HCO for a permit to convert all 62 residential units to tourist use. Under the HCO's formula for the in lieu fee, the San Remo was required to pay \$567,000 to replace 40% of the affordable housing lost as a result of the conversion. In 1990, the San Remo also applied for a conditional use permit to convert to a commercial (tourist) use under the City's Planning Code, a different City ordinance. At the same time, the San Remo argued that a conditional use permit was not required because the San Remo Hotel was a legal nonconforming tourist hotel use prior to 1987, the date on which the Planning Code was amended to require a conditional use permit to establish a new tourist use. The San Remo appealed the Planning Department's determination that a conditional use permit was required to the City's Board of Permit Appeals. The Board affirmed the decision of the Department. Following that decision, the City Planning Commission approved a conditional use permit allowing the San Remo to convert to a commercial hotel under the Planning Code, on the condition that the San Remo comply with the HCO's replacement housing requirement.

Although the San Remo had failed to pay the HCO replacement housing fee, it nevertheless converted to a tourist hotel in September 1993 and sued the City. On December 11, 1996, petitioners paid the fee under protest. On March 6, 1997, the City issued a conversion permit under the HCO allowing the San Remo to use all 62 of its rooms for tourist use.

## **B. Procedural History**

### **1. *San Remo I***

The issue in *San Remo III* is simple: whether takings claimants suing a local agency get two bites at the apple – one in state court and one in federal court. To understand the issues in this appeal, however, it is unfortunately necessary to understand the nightmarish, labyrinth of this case as it wound its way through the federal courts, then the state courts, and back to the federal court system. As Ninth Circuit Judge Hawkins exclaimed at the oral argument in *San Remo III*, “I would hate to try explaining this case to a sixth grader!”

In 1993, the San Remo filed suit in U.S. District Court (*San Remo I*). The San Remo alleged that the HCO and City Planning Code, both of which restricted the San Remo's conversion of its residential hotel to a permanent tourist hotel, failed to substantially advance legitimate state interests on their face and as-applied. The San Remo further alleged a claim under state law that the San Remo was not required to comply with the Planning Code because it was a legal nonconforming tourist use.

In August 1997, the district court granted summary judgment to the City.<sup>4</sup> The court found that under *Williamson County*, the San Remo was required to try its takings claims first in state court under the state Takings Clause, and if denied compensation, then the San Remo could refile its takings claims in federal court and attempt to secure compensation. *Williamson County* holds that because the Fifth Amendment Takings Clause provides that "nor shall private property be taking for public use, without just compensation," if the claimant can obtain compensation under the procedures for takings claims under state law in state court, the claimant will not have been denied "just compensation" under the Fifth Amendment.<sup>5</sup> This rule, applicable to all takings claims against local government agencies, is known as the "state compensation" requirement. The practical result of the state compensation requirement is that takings claims against local government must begin in state court. The district court also recognized that even if the state denies compensation and the claimant returns to federal court, the federal court would ordinarily apply issue preclusion (collateral estoppel) to bar the takings claim under *Dodd v. Hood River County*.<sup>6</sup>

The San Remo appealed the district court's ruling. Despite having chosen the federal forum to prosecute its takings claim, the San Remo argued on appeal, for the first time, that the district court should have abstained from adjudicating its takings claims under *Railroad Commission v. Pullman*, 312 U.S. 496 (1941). The purpose of abstention, the San Remo argued, would be to permit the San Remo to adjudicate its state law claim that tourist use of the Hotel would be allowed as a legal nonconforming use under the Planning Code. The San Remo argued, and the Ninth Circuit panel agreed, that success on this state law claim may obviate constitutional issues.<sup>7</sup> Despite expressing "some sympathy" for the City's claim that the

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<sup>4</sup> See *San Remo I*, 145 F.3d at 1100.

<sup>5</sup> *Id.* at 195.

<sup>6</sup> See *Dodd v. Hood River County*, 59 F.3d 852, 863 (9<sup>th</sup> Cir. 1995) *aff'd after remand*, 136 F.3d 1219 (9<sup>th</sup> Cir. 1998).

<sup>7</sup> See *San Remo I*, 145 F.3d at 1104-05.

San Remo had initially chosen the federal forum, and noting that "as a matter of the responsible conduct of litigation, a party desiring to raise abstention will normally seek it first in the district court," the Ninth Circuit nevertheless ordered the district court to abstain under Pullman from adjudicating the San Remo's facial substantially advance takings claim.<sup>8</sup> The panel assumed that the San Remo would return to federal court after the state court litigation to adjudicate the federal facial constitutional claim. On the other hand, the Ninth Circuit concluded that the San Remo's as-applied substantially advance takings claim was not ripe for adjudication in federal court under the state compensation requirement of *Williamson County*, and ordered that claim dismissed.<sup>9</sup>

The Ninth Circuit's distinction between the San Remo's facial and as-applied substantially advance claims for purposes of the state compensation requirement was error. The mistake involved another policy unique to the Ninth Circuit, providing that because the remedy for substantially advance claims is not compensation, but rather invalidation of the regulation, the state compensation requirement does not apply to substantially advance claims.<sup>10</sup> There is no reason, however, and the *San Remo I* court offered none in its opinion, to distinguish between facial and as-applied substantially advance claims in applying the state compensation requirement – both claims seek equitable relief rather than compensation.

## **2. *San Remo II***

Following *San Remo I*, the San Remo filed a complaint in state court alleging not only that the San Remo was a legal nonconforming use under the Planning Code, but also that the HCO and Planning Code effected a facial and as-applied taking under the substantially advance test. Thus, while the Ninth Circuit did not require the San Remo to adjudicate its facial substantially advance claim in state court, the San Remo voluntarily did so. The Superior Court granted judgment to the City on all claims. The Court of Appeal reversed, finding that the HCO failed to substantially advance a legitimate public purpose because the San Remo did not cause the shortage of affordable housing that the HCO was designed to remedy. The California Supreme Court granted review. In March 2002, the Supreme Court issued its decision in favor of the City on all issues.

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 1102.

<sup>10</sup> *Sinclair Oil Corp. v. County of Santa Barbara*, 96 F.3d 401, 407 (9<sup>th</sup> Cir. 1996).

The California Supreme Court rejected the San Remo's facial and as-applied substantially advance challenge to the HCO's replacement housing fee.<sup>11</sup> The Court held that: (1) "housing replacement fees assessed under the HCO are not subject to [heightened] scrutiny,"<sup>12</sup> (2) the San Remo was required to show that there is no "reasonable relationship" between the conversion of the San Remo to permanent tourist hotel use and the mitigation fee;<sup>13</sup> and (3) because the fee is "measured by the resulting loss of housing units, . . . [it] was thus reasonably related to the impacts of plaintiffs' proposed change in use" and did not effect a taking.<sup>14</sup> Although the court stated that it was not deciding the San Remo's federal takings claims, the court applied the federal law of takings throughout its opinion and emphasized that California and federal takings law are coextensive.<sup>15</sup> The Supreme Court also resolved the San Remo's state law claim for a legal nonconforming use in the City's favor.<sup>16</sup>

In response to the property owner's argument that it was entitled to compensation in any instance where the burden of the government regulation, expressed in dollars of lost market value, exceeds the benefit in dollars of market value gained from the regulation,<sup>17</sup> the Court held that, to survive challenge, the advantage from regulation need not be direct. Rather, it held, the benefit could be as abstract and indirect as "the advantage of living and doing business in a civilized community."<sup>18</sup>

[T]he necessary reciprocity of advantage lies not in a precise balance of burdens and benefits accruing to property from a single law, or in an exact equality of burdens among all property owners, but in the interlocking system of benefits, economic and noneconomic, that all the participants in a

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<sup>11</sup> *San Remo II*, 27 Cal.4<sup>th</sup> at 672-79.)

<sup>12</sup> *Id.* at 670.

<sup>13</sup> *Id.* at 673.

<sup>14</sup> *Id.* at 679.

<sup>15</sup> *Id.* at 664.

<sup>16</sup> *Id.* at 663.

<sup>17</sup> The San Remo relied on *Armstrong v. United States*, 364 U.S. 40, 49 (1960) for this proposition. In *Armstrong*, the Court stated that the Takings Clause "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." Takings claimants frequently misuse this language to argue that they are entitled to compensation whenever government action imposes a burden on them greater than the burden imposed on anyone else.

<sup>18</sup> *Id.* at 675, quoting *Mahon*, 260 U.S. at 422 (Brandeis, J., dissenting).

democratic society may expect to receive, each also being called upon from time to time to sacrifice some advantage, economic or noneconomic, for the common good.<sup>19</sup>

The *San Remo II* Court found that the HCO "ensur[ed] affordable and available housing for those San Franciscans who would otherwise be without it, carr[ying] benefits for all the City's property owners, including those operating tourist hotels."<sup>20</sup> Implicit in the court's findings is the assumption that the availability of housing affordable to households of diverse incomes and backgrounds preserves the character of San Francisco as a socially and culturally diverse city. These qualities attract tourists and indirectly benefit tourist hotels. Thus, the San Remo Court broadly construed reciprocity of advantage.

### 3. *San Remo III*

Not satisfied with a full and fair hearing on the merits of its challenge to the HCO in the state's trial, appellate, and supreme courts, in June 1997 the San Remo again shopped for a more favorable forum. It attempted to return to federal court with the same arguments it had pressed initially in the federal court, and later in the state court. The San Remo claimed that because it "reserved" its federal takings claim in state court for later litigation in federal court under *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964), it was entitled to another hearing of its takings claim in the federal court.

In *England*, chiropractors challenged a state regulation affecting their certification to practice under the federal constitution. The federal court abstained from adjudicating the plaintiffs' federal constitutional claim, remanding to state court the question of the applicability of the state law to the plaintiffs. After litigating the issue of the application of state law in the state court, the plaintiffs were permitted to return to federal court to prosecute their federal constitutional claim, even though the state court had purported to adjudicate the federal constitutional claim. *Id.* at 419. Accordingly, in this narrow context, the plaintiffs were not barred from proceeding in federal court on their federal constitutional claims by the anti-claim splitting doctrine of the state in which the litigation arose, which ordinarily would result in res judicata in federal court of plaintiffs' claims that were raised or could have been raised in state court.

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<sup>19</sup> *Id.* at 675-76.

<sup>20</sup> *Id.* at 676.

As the district court held, “In this case, San Remo is arguing a violation of the Takings Clause based on the exact same facts and circumstances argued before the state courts.”<sup>21</sup> The district court dismissed the facial and as-applied claims as time-barred, with the exception of the as-applied takings challenge to the Planning Code.

The district court further concluded that as to each of the San Remo’s takings claims, the court was required to defer to the rulings of the California Supreme Court under the law of the Ninth Circuit, in *Dodd v. Hood River County*, which provides that the federal court will defer to rulings of the state court on identical takings claims where the substantive takings law of the state is the same as the federal law. The Ninth Circuit has found that this result is compelled under the Full Faith and Credit Act, 28 U.S.C. § 1738, which requires that federal courts give the same effect to final judgments of the state court that other state courts would give the judgment. Accordingly, the court applied issue preclusion to bar each of the San Remo’s takings claims.

Although it did not reach the merits, the district court indicated that, were it to rule on the merits, it would agree with the California Supreme Court and find in favor of the City, on the ground that the HCO “substantially advances a legitimate government interest” and does not effect a taking under any other takings test.<sup>22</sup>

Invoking the issue preclusion doctrine (collateral estoppel), the Ninth Circuit rejected the San Remo’s attempt to litigate its federal takings claim, finding that the San Remo’s federal takings claim was grounded in the same facts and law as its state constitutional takings claim.<sup>23</sup> The court concluded that it was required to apply issue preclusion to the San Remo’s claim under the Full Faith and Credit Act, which provides that the “judicial proceedings” of each state shall be given “the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts” of the rendering state. 28 U.S.C. § 1738; *see* 1 Stat. 122 (1790).<sup>24</sup> Because the

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<sup>21</sup> Order filed Oct. 15, 2002 in Northern Dist. of Cal. Action No. 293-1644 DLJ, at 38 (“Order”).

<sup>22</sup> Order at 52-57.

<sup>23</sup> *San Remo Hotel v. City and County of San Francisco*, 364 F.3d 1088, 1096-97 (9<sup>th</sup> Cir. 2004).

<sup>24</sup> The Supreme Court has made clear that the Act “directs all [federal] courts to treat a state court judgment with the same respect that it would receive in the courts of the rendering state.” *Matsushita Electric Industrial Co., Ltd. v. Epstein*, 516 U.S. 367, 373 (1996); *see also, e.g., Parsons Steel, Inc. v. First Ala. Bank*, 474 U.S. 518, 523 (1986);

California courts would give preclusive effect to the California Supreme Court's judgment, the Ninth Circuit held, the federal courts were not empowered to hear the San Remo's claims de novo. The Ninth Circuit did not reach the statute of limitations issue.

In its petition for certiorari to the United States Supreme Court, the San Remo presented two questions for review:

1. Is a Fifth Amendment Takings claim 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?

2. Is deferential scrutiny, akin to the rational basis test, appropriate for exactions imposed by legislation even though exactions imposed by administrative adjudications are subject to heightened scrutiny under *Nollan v. California Coastal Commission* and *Dolan v. City of Tigard*?

On December 10, 2004, the Supreme Court granted certiorari on the first question only. At that time, it appeared that the Court intended to resolve the second question in *Lingle v. Chevron*. Oral argument in San Remo Hotel was March 28, 2005.

## **II. The Opinion of the Court in *San Remo III***

### **A. The Majority Opinion**

In *San Remo III*, the United States Supreme Court affirmed the lower court judgment. Writing for a unanimous Supreme Court, Justice Stevens declared that once property owners challenging regulations have a full and fair hearing in state court, they are not entitled to "a second bite at the apple" by refileing the same challenge in federal court to try their claim a second time. *San Remo III* at 21. In a nod to federalism, Justice Stevens wrote, "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." *Id.* at 23.

The Court found that the issues of fact and law comprising the San Remo's federal takings claim were identical to those of its state claim. *See*

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*Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 380 (1985); *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 466 (1982); 18B Charles A. Wright et al., *Federal Practice and Procedure* § 4469, at 70 (2d ed. 2002).

Slip Op. at 16. Agreeing with the Ninth Circuit, the Court held that the Full Faith and Credit Act and the issue preclusion doctrine barred re-litigation of the San Remo's takings claim. *Id.* at 13. The Court rejected the San Remo's contentions that the Hotel's reservation of its federal constitutional claims in the state court litigation under *England* and *Williamson County* compelled the federal courts to entertain the San Remo's takings claim de novo.

The San Remo Hotel Court held that *England* cannot be properly applied outside the abstention context. Thus, it concluded, there would be no reason to extend *England* to bar issue preclusion in a *Williamson County* case.<sup>25</sup> *San Remo III* at 16. *England* held only that a plaintiff could explain its federal claim to a state court, to inform the state court's decision on a predicate and distinct issue of state law, without shifting the entire claim from federal to state court for final decision. *See* 375 U.S. at 419-420. The *England* Court had no occasion to consider circumstances in which the plaintiff submitted to the state courts state claims substantially identical to those potentially available under federal law, or in which adjudication of the submitted state claims necessarily addressed issues identical to those underlying a parallel federal claim. *See San Remo III* at 15-16. *England* did not hold that a plaintiff in state court may "reserve" any "right" to two full litigations of issues that are relevant to both state and federal claims. *Id.*

Moreover, the Court held, even if *England* were analogous here, then the analogy is fatal to the San Remo's case. *England* involved predicate state-law issues that the federal court decided should be resolved by the state courts. Certainly, the Court contemplated that the state decisions as to those issues would be fully preclusive if and when the case returned to federal court. Indeed, obtaining a binding state court adjudication of those issues is the sole motivation for the abstention that prompts an *England* reservation. *See id.*

The Court also found unpersuasive the San Remo's argument that *Williamson County* grants a takings claimant forced into state court the right to re-litigate essentially the same claim in federal court under the federal constitution. The Court concluded that a takings claimant has no absolute right to a federal forum "even when the plaintiff would have preferred not to litigate in state court, but was required to do so by statute or prudential

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<sup>25</sup> Again, the high court indulged the San Remo's false claim that it had been forced into state court under *Williamson County*. The San Remo abandoned its as-applied claims for compensation in the state court and pressed forward with its substantially advance claim only – a claim that was properly filed in federal court in the first instance. *See San Remo III* at 21.

rules.” *San Remo III* at 18. The Court relied on *Allen v. McCurry*, 449 U.S. at 103-04, where following a criminal conviction and an unsuccessful attempt to suppress evidence under the Fourth and Fourteenth Amendments in state court, the criminal defendant brought a civil suit for damages under the federal constitution in federal court against the police who had entered his home. The Supreme Court found that even where a criminal defendant was forced to litigate a federal constitutional claim in state court – certainly a stronger case for involuntariness than the *San Remo*’s – the Full Faith and Credit Act barred re-litigation of the federal constitutional claim in federal court. *San Remo III* at 18-19. “As in *Allen*, we are presently concerned only with the issues actually decided by the state court that are dispositive of federal claims raised under § 1983.” *Id.* at 19 (emphasis original).

Nor was the Court persuaded that *Williamson County* created an exception to the Full Faith and Credit Act. Quoting *Kremer*, 456 U.S. at 468, the Court noted that “an exception to §1738 will not be recognized unless a later statute contains an express or implied partial repeal.” “Congress,” the Court wrote, “has not expressed any intent to exempt from the full faith and credit statute federal takings claims. Consequently, we apply our normal assumption that the weighty interests in finality and comity trump the interest in giving losing litigants access to an additional appellate tribunal.” *San Remo III* at 20.

*San Remo III* also rejected the argument that when the Court decided *Williamson County*, it implicitly “promised” that “because . . . state court proceedings were required to ripen [a] federal takings claim,” once those proceedings were concluded “the federal courts [would be] required to disregard” them. Brief for Petitioners at 7-8. The *San Remo* contended that *Williamson County* creates a “trap” that “effectively precludes consideration of the merits of federal takings claims in both state and federal court,” with “no opportunity at all for this Court to review on the merits.” *Id.* at 16-17; *see id.* at 14. The Supreme Court held that *Williamson County* creates no such “trap”; and it assuredly never “promised” that if, in adjudicating a state takings claim, a state court resolves issues substantially identical to those underlying a federal claim, the claimant would nonetheless have the right to re-litigate those very issues de novo in federal court. *San Remo III* at 20.

The Court disposed of the *San Remo*’s argument that *Williamson County* would preclude any litigation of takings claims under the federal constitution by referring to the common practice of “state courts . . . hearing simultaneously a plaintiff’s request for compensation under state law and the claim that, in the alternative, the denial of compensation would violate the

Fifth Amendment of the Federal Constitution.” *Id.* at 21-22. This conclusion is questionable in light of *Williamson County*’s finding that a federal takings claim does not exist, *i.e.*, is unripe, until the claimant is denied compensation under the state constitution. Accordingly, the more efficient practice, and one more consistent with *Williamson County*, would appear to be to allow the claimant to litigate its state and federal takings claims in the state court in sequence, rather than simultaneously. Where the factual and legal issues of the claims are identical and the state court rejects the state claim, as here, the outcome of the federal claim should be the same. If, on the other hand, a claimant elects to allege a takings claim under the state constitution in state court, and if unsuccessful, allege a federal takings claim in federal court, under the issue preclusion doctrine and the Full Faith and Credit Act, the federal claim would be subject to issue preclusion.

The Court further rejected the corollary notion that the effect of *Williamson County* would be to deprive the Supreme Court of jurisdiction over federal takings claims. To the contrary, the Court recognized that it often had the occasion to review federal takings claim on appeal directly from state courts. *San Remo III* at 22 & n.26.

### **B. The Concurring Opinion**

Chief Justice William H. Rehnquist filed an opinion concurring in the judgment, in which Justices O’Connor, Kennedy, and Thomas joined, agreeing that the San Remo should not be permitted a second bite at the apple, but questioning the wisdom of *Williamson County* if application of that case would result in denying a federal forum to most takings claimants:

It is not clear to me that *Williamson County* was correct in demanding that, once a government entity has reached a final decision with respect to a claimant’s property, the claimant must seek compensation in state court before bringing a federal takings claim in federal court. *San Remo III*, concurring opinion of Chief Justice Rehnquist (“Con. Op.”) at 5.

The concurring opinion, however, conceded that the validity of *Williamson County* was not fairly included in the questions presented to the Court. Nonetheless, the concurrence criticized *Williamson County* in three respects, indicating that *Williamson County*’s state compensation requirement should be “reconsider[ed]” “[i]n an appropriate case.” Con. Op. at 5.

The concurring opinion found four significant flaws in *Williamson County*. First, the Chief Justice wrote, the state compensation requirement

of *Williamson County* is a “merely prudential requirement” based on an exhaustion of remedies doctrine that does not apply to federal constitutional claims. Conc. Op. at 2. To the contrary, the state compensation requirement arises not from prudential concerns, but rather from the text of the Fifth Amendment. The *Williamson County* approach is mandated by the very nature of the Just Compensation Clause, which provides that a federal takings claim exists only where the state government takes property “without compensation.” 473 U.S. at 195.

Second, the concurring justices noted that the majority opinion’s defense of *Williamson County*’s state compensation requirement is based on long-standing principles of comity and federalism, as expressed in cases such as *Fair Assessment in Real Estate Assn., Inc. v. McNary*, 454 U.S. 100 (1981), where taxpayers challenging state taxes under § 1983 are limited to the state court forum. The concurring opinion denied that similar federalism concerns support state court adjudication of land use disputes, rejecting the majority’s conclusion that “state courts are more familiar with the issues involved in local land-use and zoning regulations.” Conc. Op at 3-4.

This argument is surprising in light of Supreme Court precedent and the commitment to federalism demonstrated by the justices joining in the concurring opinion. State courts are fully capable of fairly hearing and determining constitutional issues relating to local land use. If anything, state courts bring greater expertise to the typical takings action than their federal counterparts. Land use planning and zoning are traditionally conducted at the local level, in response to local conditions. *See, e.g., FERC v. Mississippi*, 456 U.S. 742, 767 n.30 (1982) (“[R]egulation of land use [] is perhaps the quintessential state activity.”). While both state and federal courts are conversant with takings principles, state courts have a considerable advantage in applying—and even adjusting the actual operation of—the relevant state and local law. *See, e.g., Harlen Associates v. Incorporated Village of Mineola*, 273 F.3d 494, 505 (2d Cir. 2001) (“We repeat the admonition that federal courts should not become zoning boards of appeal. State courts are better equipped in this arena and we should respect principles of federalism . . . [and avoid] unnecessary state-federal conflict with respect to governing principles in an area principally of state concern.”) (internal quotes and citations omitted); *see also* J. Juergensmeyer and T. Roberts, *Land Use Planning and Control Law* (1998) § 10.9(c), at 450-52 (application of Full Faith and Credit Act and issue preclusion by federal courts to prevent re-litigation of takings issues is reasonable in a system that “presumes state court competency” and where “state courts have

greater experience in land use matters than federal courts”); Kathryn E. Kovacs, *Accepting Relegation of Takings Claims to State Courts: The Federal Courts’ Misguided Attempts to Avoid Preclusion Under Williamson County*, 26 *Ecol. Law Quarterly* 1, 45-46 (1999).

Third, the concurrence concluded that there was no basis for relegating takings claims to state court, where other federal constitutional claims, such as free speech and equal protection, could be filed initially in federal court. Conc. Op. at 4. This argument is puzzling in view of the clear difference in language between the Just Compensation Clause and the First and Fourteenth Amendments. The Fifth Amendment Just Compensation Clause is the only provision in the Amendments to the Constitution that has as an element of the prohibited governmental conduct the failure to pay compensation. The First and Fourteenth Amendments do not require the denial of compensation as a prerequisite to a violation of constitutional rights. As pointed out in *Williamson County*, this difference is crucial and sets the Just Compensation Clause sharply apart from other constitutional provisions.

Fourth, the concurring justices opined that a takings claimant has an overriding right to a federal forum to hear the merits of its claim, and that *Williamson County* will result in the “anomal[y]” that federal takings claims may never be heard in federal court. *Id.* The notion that a federal constitutional litigant has an absolute right to a federal forum – trumping paramount principles of res judicata and repose – was amply refuted in the majority opinion. *San Remo III* at 17-20, 22-23; *see also id.* at 22 & n.26 (noting that the Supreme Court has adjudicated several federal takings cases on petition for certiorari from the state courts). Alternatively, the concurrence argues that the requirement that takings claimants initiate litigation in the state courts under state constitutional provisions and litigate that claim to a final judgment before entertaining a federal takings claim is duplicative and wasteful. Conc. Op. at 5 n. 2. The majority answered this point as well by finding that state courts could litigate the state and federal takings claims simultaneously. *San Remo III* at 21-22. *See also* pp. 12-13, *supra* (better practice is to hear state and federal takings claims in sequence in state court).

### **III. Conclusion**

San Remo Hotel has significance well beyond a single San Francisco ordinance. Had the result been otherwise, the enormous costs of a

duplicative defense of social and economic regulation would have a chilling effect on essential environmental, health, and safety regulation for all local governments. Should local government elect to impose social and economic regulation that adversely affects the economic value of property, taxpayers would suffer the expense of defending that regulation in two different forums. Moreover, the three San Remo decisions resulted in an important defense of a local ordinance designed to preserve local flexibility to protect affordable housing.

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