No. 04-340

IN THE

Supreme Court of the United States

SAN REMO HOTEL L.P., THOMAS FIELD, ROBERT FIELD, AND T & R INVESTMENTS CORP.,
Petitioners,

v.

CITY AND COUNTY OF SAN FRANCISCO, DEPARTMENT OF CITY PLANNING, CITY PLANNING COMMISSION, BOARD OF PERMIT APPEALS, BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED

This Court limited review to the following question:

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?

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BRIEF FOR THE RESPONDENTS

This case involves a takings challenge to a San Francisco ordinance that protects the stock of affordable housing available to city residents—particularly the elderly, the disabled, and those with low incomes—by regulating the conversion of hotel rooms from residential to tourist use. The state courts considered and rejected petitioners' takings claims under state law, applying standards identical to those of federal law. Petitioners now seek the right to relitigate every issue underlying the identical federal claims in federal court, as if the state proceedings had never occurred.

Petitioners' themes are unfairness and delay. There is, however, no unfairness in holding petitioners bound by the

state courts' resolution of issues common to their state and federal claims. Doing so merely applies a basic principle of preclusion—embodied in California law, and binding on the federal courts under the Full Faith and Credit Act, 28 U.S.C. § 1738. As to delay, the federal courts could have resolved petitioners' central claim—their facial challenge to the hotel ordinance on the ground that it does not "substantially advance" legitimate goals—when petitioners first brought it. In petitioners' first federal proceeding the district court dismissed that claim as time-barred—not because any state proceeding was "required to ripen" it (Pet. Br. i). It was petitioners who snatched delay from the jaws of defeat on that claim by persuading the court of appeals to order abstention—in favor of a state administrative mandamus proceeding that they had allowed to languish for the previous five years. Likewise, with respect to petitioners' compensation-seeking claims, it is petitioners who chose to spend five years pursuing relief in the federal courts when, under *Williamson County Regional Planning Commission* v. *Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), they were plainly required to proceed first in state court. Having unsuccessfully presented the state versions of all their takings claims, including the facial claim, to the California courts, petitioners have now returned to the federal courts seeking to press the parallel federal claims once again. They can hardly complain about unfair delay.

To the contrary, it is the courts whose patience should be wearing thin. The current proceedings are petitioners' third iteration of essentially identical takings claims. Issue preclusion, and the FFCA, are designed to prevent exactly this sort of abuse. In the end, petitioners' argument for relitigation of the issues underlying their takings claims rests less on any "promise[]" (Pet. Br. 7) made by this Court in *Williamson County* than on petitioners' evident distrust of the state courts. Yet both Congress and this Court have made very clear that state courts' determinations are entitled to full respect. Terminating this litigation risks no unfairness to petitioners. Prolonging it would be inconsistent with the Full Faith and Credit Act and with its underlying

principles of comity and federalism, and would impose unwarranted burdens on state and local governments and the federal courts.

STATEMENT

1. a. In the late 1970s, San Francisco's Board of Supervisors concluded that a progressive loss of residential hotel rooms was contributing to "a severe shortage of decent, safe, sanitary and affordable rental housing in the City." *See* Pet. App. 195a-197a (S.F. Admin. Code § 41.3). Because "[m]any of the [City's] elderly, disabled and low-income persons and households reside in residential hotel units," this trend posed a particular threat to "those persons who are least able to cope with displacement in San Francisco's housing market." *Id.* at 196a-197a (§ 41.3(c), (h)). In 1979, the Board instituted a moratorium on the demolition or conversion of residential hotel units, and in 1981, it enacted a Residential Hotel Unit Conversion and Demolition Ordinance (HCO). *See id.* at 5a, 196a-197a.

The HCO required each hotel in San Francisco to report the number of residential and tourist units in the hotel as of September 23, 1979. Pet. App. 203a, 205a-209a (§§ 41.4(q), (s), 41.6). The City would then issue a certificate of use, designating the hotel's baseline number of residential and tourist units. *Id.* at 207a (§ 41.6(d)). The HCO permits unlimited tourist use of rooms designated as tourist units. Under certain conditions, rooms designated as residential units may also be used as tourist rooms during the summer tourist season (May through September). Residential units must be returned to residential use during the winter, when demand for tourist rooms declines. *Id.* at 236a (§ 41.19(a)(3)).

An owner may convert historically residential units to permanent tourist use if the owner elects either to arrange for the construction or rehabilitation of replacement units, or to pay into the City's Residential Hotel Preservation Fund an in-lieu fee equal to a defined portion of the cost to replace the converted units. *See* Pet. App. 224a-230a (§§ 41.12-41.13). The City's Department of Building Inspection, which

administers the HCO, has no discretion to vary the amount of replacement housing required or the amount of the in-lieu payment. *See id.* at 137a-138a.[1]

b. The City's Planning Code also separately restricts changes in the use of residential property in some districts. Pet. App. 6a. The North Beach Neighborhood Commercial District zoning ordinance, S.F. Planning Code §§ 722.1 *et seq.*, requires property owners who seek to establish a new permanent tourist hotel use to first secure a conditional use permit from the City's Planning Commission. *Id.* § 722.55.

2. Petitioners are the San Remo Hotel, a 62-room hotel located in North Beach, and its owners. *See* JA 71-72. In 1981, when the HCO first went into effect, petitioners' agent submitted an Initial Unit Usage Report stating that all of the San Remo's rooms were in residential use on September 23, 1979. Pet. App. 7a; JA 78-79. Based on petitioners' own report, the City confirmed the number of residential units in an HCO certificate of use. JA 78-79. Petitioners did not challenge the City's classification under the procedures provided by the HCO, and the certificate of use became final. *See id.*; Pet. App. 7a; *id.* at 208a-209a (HCO § 41.6(f)-(g) (procedures for appealing initial unit status determination)).[2]

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[1] In 1990, the City revised and reenacted the HCO. Among other changes, the revision increased the construction cost component of the in-lieu fee from 40% to 80%, but exempted owners (such as petitioners) who applied for conversion permits before the revised ordinance took effect. *See* Pet. App. 6a, 110a n.3; *id.* at 227a-230a (§ 41.13(a)(4), (d)).

[2] Petitioners allege that the HCO interfered with the historic use of the San Remo as a tourist hotel. *See* Pet. Br. 3-4. They maintain that the hotel operator who filled out the HCO use report on their behalf mistakenly over-reported the number of rooms in residential use on the HCO's baseline date. *See id.* at 3; JA 78-79. There is reason to question the degree of any misstatement. *See* Pet. App. 114a-116a (describing state administrative record); J. Schimmel, *San Remo Hotel 1906-1976, Historical Resource Manual* 5-16 (1998) (indicating that before 1979 the San Remo was used primarily, if not exclusively, as a residential hotel). In any event, as the state and lower federal courts recognized, the HCO certificate of use was reasonably based on self-reporting by petitioners or their agents, and it became legally final when petitioners failed to invoke the procedures provided for making any correction. Pet. App. 7a, 56a-57a,

In May 1990, petitioners applied for a permit under the HCO to convert all of the San Remo's residential units to permanent tourist use. Pet. App. 7a. Because petitioners chose not to offset the conversion by creating or renovating comparable units elsewhere, the HCO required them to pay into the City's housing fund an in-lieu fee for 62 replacement units—a total of $567,000, based on two independent appraisals. *See id.* at 110a, 118a, 227a.

Independently, the North Beach zoning ordinance required petitioners to obtain a conditional use permit before establishing a new tourist use. Pet. App. 7a-9a, 59a. Petitioners challenged the applicability of that requirement, but in December 1992 the City's Board of Permit Appeals (BPA) rejected their objection. *Id.* at 8a, 60a. In January 1993, the Planning Commission approved petitioners' conditional use permit subject to certain conditions, including compliance with the HCO through payment of the in-lieu fee. *Id.* at 60a-61a.[3]

In March 1993, petitioners filed a petition for administrative mandamus in California Superior Court, challenging the BPA's requirement that they obtain a conditional use permit under the Planning Code. *See* Pet. App. 9a. Petitioners based their challenge on California law allowing the

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152a-153a. As petitioners stressed in their reply at the petition stage (at pp. 9-10), in this Court "the relevant facts are undisputed or are a matter of public record." The undisputed, public-record fact is that for purposes of the HCO and related ordinances, the historical use of all the San Remo's rooms is legally established by the HCO certificate of use.

[3] As the California Supreme Court recognized, the Planning Commission's decision imposed no fee of its own; it merely required petitioners to comply with the HCO, as petitioners had represented that they would. Pet. App. 129a. Petitioners began operating the San Remo as a permanent tourist hotel in September 1993 when the federal district court enjoined the City's enforcement of the HCO. *See* p. 6 n.5, *infra*. In December 1996, after the district court dissolved that injunction, petitioners paid the HCO fee under protest. JA 85. In March 1997, the City issued a conversion permit under the HCO. JA 86.

continuation of nonconforming uses under certain circumstances.[4]

3. a. *San Remo I.* In May 1993, rather than bringing takings claims in state court or pursuing their mandamus action—which they allowed to lie dormant until 1998—petitioners filed this lawsuit in federal court.[5]

Petitioners' complaint (as with subsequent complaints described below) advanced several theories for relief. *See* JA 88-94 (federal complaint), 98-123 (state complaint). The courts below distinguished principally between petitioners' facial and as-applied claims. *See, e.g.*, Pet. Br. 5; Pet. App. 9a-11a, 35a, 144a, 152a. In its first review of the case, the court of appeals also distinguished between petitioners' claims or theories that sought compensation for the economic impact of a taking ("economic impact" claims)—for instance, "that the HCO deprived [petitioners] of the economically viable use of [their] hotel"—and those claims that instead sought a declaration that the HCO is invalid, on its face or as applied, because it "does not substantially advance

[4] A legal nonconforming use under California law is "a lawful use existing on the effective date of the zoning restriction and continuing since that time in nonconformance to the ordinance." *Hill* v. *City of Manhattan Beach*, 6 Cal. 3d 279, 285, 491 P.2d 369, 373 (1971) (internal quotation marks omitted).

[5] In filing their suit, petitioners designated it as "related" to a case brought by other hotel owners challenging the constitutionality of the HCO. Pet. App. 61a. That case was pending before district judge John Vukasin, who had already publicly indicated that he thought the HCO was invalid. In September 1993, Judge Vukasin declared the HCO facially unconstitutional in the related case, and then granted petitioners' request for a preliminary injunction. *See id.* at 62a. Soon thereafter Judge Vukasin died, and the case was reassigned. *See id.* After further proceedings in both cases (during which the court of appeals vacated Judge Vukasin's declaration and remanded for consideration of the statute of limitations), the district court ruled for the City, as described in the text. *See id.* at 63a, 66a.

legitimate state interests" ("substantially advance" claims). App. 8a-10a.[6] We draw those same distinctions here.

Petitioners' core argument in their first federal litigation was, as it is now, that the HCO "fail[s] to substantially advance legitimate government interests" because it unfairly "force[s] [petitioners] to bear the public burden of housing the poor[.]" JA 89 (third amended complaint); *see, e.g.*, JA 92; App. 8a; *compare* Pet. Cert. Reply Br. 10. That "substantially advance" claim is primarily facial (although petitioners have also stated it in as-applied terms) and, if successful, would justify the invalidation of the ordinance, rather than payment of just compensation for its application. *See* Pet. App. 80a-83a. In addition, petitioners alleged that the HCO, in conjunction with the North Beach zoning ordinance, deprived them of all or an impermissible portion of the value of their property, without providing for just compensation. *See* JA 87, 93; App. 6a. Those "economic impact" claims are essentially as-applied (although they can be stated in facial terms). At least in theory, if successful, they would lead to an order that the City compensate petitioners for the value of the property "taken." *See, e.g.*, App. 8a-9a.

The district court held that any facial takings claim arose when the HCO was enacted and was therefore barred by the statute of limitations. August 26, 1996 Order at 11-15, JA 24 (#126); *see* Pet. App. 66a. The court further held that any as-applied takings claim was "unripe for federal review" under *Williamson County Regional Planning Commission* v. *Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), because petitioners had not sought compensation through available state procedures. August 26, 1996 Order at 18; *see id.* at 15-18; Pet. App. 66a.

The court of appeals affirmed in part. The court agreed that, under *Williamson County*, any "economic impact" claim was "unripe until the owner has sought, and been de-

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[6] The court of appeals' first decision—in *San Remo Hotel* v. *City & County of San Francisco*, 145 F.3d 1095 (9th Cir. 1998)—is included as an appendix to this brief.

nied, just compensation by the state." App. 8a (facial claims); App. 10a (as-applied claims). On the other hand, the court recognized that, because the remedy for a successful facial "substantially advance" claim is not an award of just compensation but rather invalidation of the regulation, petitioners' claim that the HCO "is a facial taking because it is not sufficiently related to legitimate state interests . . . [was] ripe." App. 10a. The court therefore could have affirmed the district court's holding that that claim was barred by the statute of limitations, and brought at least a substantial portion of this litigation to an end.

On appeal, however, petitioners for the first time invoked *Railroad Commission* v. *Pullman Co.*, 312 U.S. 496 (1941). *See* App. 7a-8a, 14a-17a. They argued that the federal courts should abstain from deciding any of their federal takings claims, because their administrative mandamus challenge to the conditional use permit requirement—which they had failed to prosecute in the five years since its filing—might "moot the issue of whether the [HCO] is a facial or an as-applied taking under the Fifth Amendment[.]" JA 68 (petitioners' brief); *see* JA 50-68 (same); App. 16a. The court recognized the irony in petitioners' request for abstention, given that they had sought federal jurisdiction in the first place. The court also noted the possibility that petitioners, whose facial claim had been dismissed with prejudice as untimely, were seeking a "tactical advantage[]" through their belated argument for abstention. App. 15a. The court nonetheless accepted petitioners' representation that the state administrative mandamus proceedings might moot or narrow their facial "substantially advance" claim and thus remanded with instructions that the district court abstain on that claim. App. 16a-17a.[7]

b. *San Remo II*. Upon return to state court, petitioners amended their petition for administrative mandamus to add

[7] It is unclear how, if at all, the court of appeals addressed the as-applied "substantially advance" claim.

a full range of taking claims under the California Constitution. Pet. App. 67a; JA 103-123. These included not only some "economic impact" claims, but also—indeed, principally—"substantially advance" claims, predicated on the theory that the HCO and zoning requirements force "[petitioners] and other similarly situated property owners" to "bear public burdens which, in all fairness and justice, should be borne by the public as a whole." JA 103-104; *see, e.g.*, *id.* at 106 (fee imposed "not roughly proportional" to impact of petitioners' use on government interest), 107, 119-120, 120-121 (no "close nexus" between fee and public harm). As finally amended, the state petition and complaint also briefly set out, but purported to "reserve[]," an "as applied" federal takings claim. JA 125 (capitalization altered); *see* Pet. App. 67a-68a.

The superior court rejected petitioners' administrative mandamus challenge to the application of the North Beach zoning ordinance. *See San Remo Hotel L.P.* v. *City & County of San Francisco*, 100 Cal. Rptr. 2d 1, 8 (Cal. Ct. App. 2000) (describing trial court's determination). The court also sustained a demurrer to petitioners' facial takings challenge to the HCO, concluding that even if the facts they pleaded were true, the law would not support petitioners' claim. *Id.* at 7-8. The court reasoned that, as a general legislative regulation, the HCO was not subject to the heightened scrutiny established by this Court for certain federal takings claims in *Nollan* v. *California Coastal Commission*, 483 U.S. 825, 834 (1987), and *Dolan* v. *City of Tigard*, 512 U.S. 374, 385 (1994). *See* Pet. App. 119a. The court rejected any "as applied" claims on waiver grounds. *Id.*; 100 Cal. Rptr. 2d at 8.

The state court of appeal reversed. 100 Cal. Rptr. 2d at 4. With respect to the administrative mandamus challenge, it held that the trial court should make factual findings about the actual use of the San Remo's rooms before enactment of the North Beach zoning ordinance. *Id.* at 16-19. As to the takings claims, the court concluded that petitioners' "substantially advance" challenge to the HCO should be evalu-

ated under the heightened scrutiny of *Nollan* and *Dolan*, and that the takings issues should be remanded for further proceedings. *Id.* at 9-16.

In March 2002, the California Supreme Court reversed. Pet. App. 106a-194a.[8] On the mandamus issue, the court upheld application of the conditional use permit requirement, regardless of the actual proportions of tourist and residential use at the hotel before the North Beach zoning ordinance took effect. *Id.* at 122a-130a. On the takings issues, the court noted that it was not deciding any federal claim. *Id.* at 107a n.1. It explained, however, that because California and federal takings law are largely coextensive, it would "analyze [petitioners'] takings claim under the relevant decisions of both this court and the United States Supreme Court." *Id.* at 130a-131a.

Like the state court of appeal, the Supreme Court recognized that petitioners' arguments turned on the "substantially advance" strain of takings analysis. Pet. App. 131a, 144a & n.14.[9] The court held that petitioners' claim was not subject to the *Nollan/Dolan* heightened standard of review. *See id.* at 131a-144a. The court then carefully considered and rejected petitioners' various arguments that the HCO does not substantially advance legitimate government interests. *See id.* at 144a-155a. It concluded, for example, that the HCO's "housing replacement fees bear a reasonable relationship to loss of housing" (*id.* at 144a); that "the use of a defined historical measurement point is reasonably related to the HCO's housing preservation goals" (*id.* at 145a); that "[t]he HCO was clearly not designed as a means of raising general revenue" (*id.* at 147a); and that "[m]aintaining the

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[8] Justices Baxter and Chin concurred in part and dissented in part. Pet. App. 155a-174a. Justice Brown dissented. *Id.* at 175a-194a.

[9] Responding to Justice Baxter's separate opinion, the court specifically held that the scope of its analysis reflected "choices [petitioners] ha[d] made in refining their claims as they climbed the appellate ladder"—including failing to press any compensation-seeking, economic-impact claim. *Compare* Pet. App. 144a n.14 *with id.* at 172a-173a (Baxter, J., concurring and dissenting).

availability of residential hotel rooms is a reasonable means of serving one segment of San Franciscans' housing needs" (*id.*). It also rejected the arguments that the HCO "targets an arbitrary small group of property owners," or "deprives all the burdened properties of so much of their value, without any corresponding benefit, as to constitute a taking on its face." *Id.* at 150a. It noted that the HCO on its face "allows the property owner to continue the property's preordinance use unhindered," and therefore "'does not interfere with what must be regarded as [the property owner's] primary expectation concerning the use of the parcel.'" *Id.* (quoting *Penn Central Transport Co.* v. *New York City*, 438 U.S. 104, 136 (1978)).

The court specifically considered and rejected petitioners' claims not only as a facial matter, but also in the context of their particular factual allegations. Pet. App. 152a-155a. It held, for example, that the designation of all the San Remo's rooms as residential "was reasonably based on the hotel management's own report of the rooms' use on the HCO's initial status date" (*id.* at 152a & n.17); that the HCO's method of determining the in-lieu housing replacement fee was reasonable "even if no current resident were required to move" (*id.* at 153a-154a); and that because the converted residential housing had not been previously abandoned or demolished, a mitigation fee measured by the units lost was "reasonably related to the impacts of [petitioners'] proposed change in use." *Id.* at 155a.

c. *San Remo III*. In June 2002, petitioners returned to federal court and amended their complaint to seek *de novo* relitigation of common issues raised by their state and federal takings claims. *See* Pet. App. 68a-69a. While the amended complaint invokes multiple theories, petitioners only pressed their "substantially advance" claim—the same claim they eventually sought to raise on the merits in their petition to this Court. *Compare*, *e.g.*, JA 31 (#167) *with* Pet. 10-18 (seeking review of court of appeals' conclusion that "there is no heightened scrutiny [under *Nollan* and *Dolan*] for exactions imposed by legislation"). As the district court

emphasized, petitioners sought to "argu[e] a violation of the Takings Clause based on the exact same facts and circumstances argued before the state courts." Pet. App. 96a.

In two extensive opinions, the district court first held—as it had in the first federal litigation—that petitioners' "substantially advance" challenges are barred by the statute of limitations. Pet. App. 31a-32a, 72a-85a. In any event, the court held, the Full Faith and Credit Act, 28 U.S.C. § 1738, required it to give issue-preclusive effect to the state court's prior judgment, because "the substantive laws of takings in California and federal courts are coextensive[.]" Pet. App. 86a-87a. After reviewing the California Supreme Court's decision (*id.* at 88a-90a), the district court concluded that the state court "decided the identical issue[s] now pled in the Amended Complaint with respect to the HCO." *Id.* at 90a; *see also id.* at 50a-51a (same as to challenge to application of zoning ordinance). The court rejected petitioners' argument that preclusion should not apply because the California court applied a less stringent standard of scrutiny than the proper federal standard. *Id.* at 91a-94a. Considering the question independently as a matter of federal law, the court agreed with the California Supreme Court's conclusion that *Nollan/Dolan* heightened review "do[es] not apply in this case." *Id.* at 94a; *see also id.* at 44a-48a. Accordingly, the court applied issue preclusion, which in turn had the effect of resolving each of petitioners' federal takings claims. *Id.* at 50a-51a, 104a-105a.[10]

The court of appeals affirmed. Pet. App. 3a-21a. Like the district court, it concluded that petitioners' federal takings claims were "based on the same factual allegations" and legally "identical" to those they had already litigated in state court. *Id.* at 17a. It therefore affirmed judgment for respondents on the basis of the issue preclusion required by the Full Faith and Credit Act. *Id.* at 16a-21a. The court noted that the California Supreme Court construed the state

[10] The district court further indicated that if it had reached the merits it would have agreed with the California Supreme Court. Pet. App. 101a-103a.

and federal takings clauses "congruently" and had "applied 'the relevant decisions of both [the California] court and the United States Supreme Court.'" *Id.* at 17a (quoting *id.* at 130a-131a). Like the district court, the court of appeals also considered and rejected petitioners' argument that California law was in fact *not* "coextensive" with federal law, because federal law would require *Nollan/Dolan* heightened scrutiny. *Id.* at 17a-21a. The court specifically noted that it had "rejected the applicability of *Nollan/Dolan* to monetary exactions such as the ones at issue here." *Id.* at 19a (citing *Commercial Builders* v. *Sacramento*, 941 F.2d 872, 874 (9th Cir. 1991), *cert. denied*, 504 U.S. 931 (1992), for proposition that deferential review applies to generally applicable development impact fee). The court of appeals did not consider the statute of limitations. *Id.* at 11a.

4. In their petition for certiorari, petitioners acknowledged that the court of appeals had "held that the California Supreme Court's refusal to apply heightened scrutiny to legislative exactions under state law is consistent with federal Takings law." Pet. i; *see also* Pet. 10-11. Petitioners sought review of that "refusal" in the second question presented in the petition (Pet. i), but this Court declined to review that question. Instead, the Court granted certiorari solely on the question whether a judgment under state law should have issue-preclusive effect where the state judgment was "rendered in a state court proceeding that was required to ripen the federal Takings claim." Pet. i.

SUMMARY OF ARGUMENT

Petitioners argue that they have been caught in an unfair trap: They were forced to litigate their state takings claim in state court before they could bring a federal claim, but once they had litigated the state claim they found that litigation of issues relevant to their federal claim had been precluded. Petitioners' characterization of the proceedings is misleading, but in any event there is nothing unusual or unfair about the application of issue preclusion in this case.

The Full Faith and Credit Act (FFCA) requires federal courts to give a state judgment the same preclusive effect that it would have in the State's own courts. Here, petitioners litigated their state takings claims through to a final judgment from the state supreme court, which held that they had failed to state a valid claim. They then presented the same allegations to the federal courts, arguing largely that federal takings law required application of the higher *Nollan/Dolan* standard of scrutiny that the state supreme court had refused to apply under state law. Having considered and rejected that argument on the merits, the federal courts recognized that in every other respect the claims petitioners were pressing turned on issues identical to those already addressed by the state court. Concluding that the California courts would give the state supreme court's judgment issue-preclusive effect, the federal courts properly refused to permit *de novo* relitigation of identical issues in federal court.

This Court has recognized only limited exceptions to the commands of the FFCA, and none of those exceptions applies here. Petitioners rely by analogy on *England* v. *Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964), but that case involved whether state proceedings following a federal-court abstention would preclude the later federal litigation of substantially different federal claims, as to which the plaintiff had properly invoked federal jurisdiction in the first instance. That situation differs markedly from the *Williamson County* context contemplated by the question presented, in which a claimant alleging a taking by a state or local government must use available remedies to seek compensation under state law before a claim that the State has denied just compensation in violation of federal law can even arise. Moreover, an *England* reservation of federal *claims* provides no basis for an exception from *issue* preclusion in a case, like this one (but unlike *England* itself), in which the state law issues presented and resolved in the state proceedings are substantially identical to those underlying a federal claim. And if, as petitioners argue, *England* is analogous here because in both instances plaintiffs are re-

quired to present certain issues first to the state courts, certainly nothing in *England* suggests that a federal court should deny preclusive effect to the state courts' resolution of *those very issues*.

Petitioners in effect ask the Court to create a new exception to the FFCA based on *Williamson County*. Yet nothing in that case suggests that the Court intended to displace the statutory rules that govern the preclusive effect of state judgments. Where federal takings law differs (or is alleged to differ) materially from state law, the unresolved and distinct federal issues will be open for litigation in any appropriate forum once the limits of state relief are clear and the federal claim has matured under *Williamson County*. Where, however, state law considers the same issues and affords the same rights as federal law, and the state courts have provided an adequate forum for the assertion and testing of those rights, there is no reason to permit relitigation of the very same issues in any subsequent federal proceeding.

Ultimately, petitioners' position is that it is unacceptable to "consign" their compensation claim to state courts. Petitioners cannot, however, argue that the California courts failed to offer them an adequate forum; and any more general argument for refusing to respect state judgments is untenable. State courts are, if anything, better suited than federal courts to hear and resolve constitutional claims involving local land-use issues, and there is no basis for speculation that they are systematically less receptive to takings claims than federal courts. In any event, this Court has soundly rejected inchoate distrust of the state courts as a ground for resisting application of the FFCA. The unusual and unfair result in this case would be to *deny* state judgments preclusive effect, thus condemning local and state governments to bear the enormous burden of relitigating in federal court issues already considered and fairly resolved by the state courts.

ARGUMENT

I. THE FULL FAITH AND CREDIT ACT BARS RELITIGATION OF ISSUES PREVIOUSLY RESOLVED BY THE STATE COURTS

A. The Act Requires The Federal Courts To Give Issue-Preclusive Effect To The California Judgment In This Case

As this Court has long recognized,

> "[p]ublic policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties." We have stressed that "[the] doctrine [of preclusion] is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, 'of public policy and of private peace,' which should be cordially regarded and enforced by the courts . . . ."

Federated Dep't Stores, Inc. v. *Moitie*, 452 U.S. 394, 401 (1981) (citations omitted). To these ends, principles of preclusion "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication." *Allen* v. *McCurry*, 449 U.S. 90, 94 (1980); *see also, e.g.*, *Univ. of Tenn.* v. *Elliott*, 478 U.S. 788, 798 (1986) (" 'The law of res judicata, much more than most other segments of law, has rhyme, reason, and rhythm—something in common with good poetry. Its inner logic is rather satisfying. It consists entirely of an elaboration of the obvious principle that a controversy should be resolved once, not more than once.' " (quoting 4 K. Davis, Administrative Law Treatise § 21.9, at 78 (2d ed. 1983))).

In addition, rules of preclusion reflect the respect that courts from one system owe to the judgments of those in another. Honoring them "not only reduce[s] unnecessary litigation and foster[s] reliance on adjudication, but also promote[s] the comity between state and federal courts that has

been recognized as a bulwark of the federal system." *Allen*, 449 U.S. at 95-96.

In that context, since 1790 Congress has required, through the Full Faith and Credit Act, that the "judicial proceedings" of each State 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* Act of May 26, 1790, ch. 11, 1 Stat. 122. This 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 Elec. Indus. Co.* 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); *Marrese* v. *American Acad. 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). The FFCA "does not allow federal courts to employ their own rules in determining the effect of state judgments," but rather "goes beyond the common law and commands a federal court to accept the rules chosen by the State from which the judgment is taken." *Kremer*, 456 U.S. at 481-482; *see also Matsushita*, 516 U.S. at 373; *Parsons Steel*, 474 U.S. at 523; *Marrese*, 470 U.S. at 380; *Allen*, 449 U.S. at 96 ("[T]hough the federal courts may look to the common law or to the policies supporting res judicata and collateral estoppel in assessing the preclusive effect of decisions of other federal courts, Congress has specifically required all federal courts to give preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerged would do so.").

Under the FFCA and this Court's cases, the court of appeals was not free to disregard a judgment of a California court addressing petitioners' cognate state-law claims. Rather, the court of appeals properly looked to California law to determine the issue-preclusive effect of that adjudication in the federal case. First, it determined that the California courts would invoke the prior judgment to bar reliti-

gation of identical issues in a later case. Pet. App. 16a-17a (citing *Stolz* v. *Bank of America*, 15 Cal. App. 4th 217, 222, 19 Cal. Rptr. 2d 19, 22 (1993)).[11] The court of appeals then carefully considered petitioners' only suggestion that the federal issues were *not* identical: the contention that federal law should apply heightened *Nollan/Dolan* scrutiny to petitioners' claim of a "monetary exaction," which the state court had refused to do under state law. Pet. App. 17a; *see id.* at 17a- 21a.[12] Having rejected that contention, the court concluded that the California Supreme Court's determination of the issues underlying petitioners' state-law takings claim was "equivalent" to a determination of the issues rele-

[11] Petitioners now argue (Br. 19-21) that the Ninth Circuit misapplied California preclusion law. That issue of state law was not raised in the petition, and is not fairly included in the question presented. *See* S. Ct. R. 14.1(a); *Yee* v. *City of Escondido*, 503 U.S. 519, 535-536 (1992); *see also Allen*, 449 U.S. at 93 n.2 (declining to address specific application of state preclusion rules); *cf. Haring* v. *Prosise*, 462 U.S. 306, 314 n.8 (1983). In any event, the argument lacks merit. California courts apply issue preclusion to identical issues litigated and decided in a prior proceeding. *See, e.g.*, *Lumpkin* v. *Jordan*, 49 Cal. App. 4th 1223, 1229-1230, 57 Cal. Rptr. 2d 303, 307 (1996); *Stolz*, 15 Cal. App. 4th at 222, 19 Cal. Rptr. 2d at 22. An issue may be identical for these purposes even if the claim raised in the subsequent proceeding is governed by a different sovereign's law. *See Calhoun* v. *Franchise Tax Bd.*, 20 Cal. 3d 881, 884-886, 574 P.2d 763, 764-765 (1978); *Lumpkin*, 49 Cal. App. 4th at 1231-1232, 57 Cal. Rptr. 2d at 308. In *American Continental Insurance Co.* v. *American Casualty Co.*, 86 Cal. App. 4th 929, 103 Cal. Rptr. 2d 632 (2001), on which petitioners rely, the court refused to apply issue preclusion because California and Arizona law *diverged* on the relevant issue. *See id.* at 945, 103 Cal. Rptr. 2d at 643 (refusing "to bind a California litigant to a principle of law adopted in the prior foreign court litigation *which is contrary to the law of California*") (emphasis added). Here, if the court of appeals had concluded that federal takings law differed materially from state takings law, as petitioners argued, it would not have treated the state judgment as conclusive. Instead, as described in the text, it concluded that the applicable state and federal law were "equivalent." Pet. App. 21a.

[12] Respondents have never conceded that petitioners' "substantially advance" challenge to the HCO states a proper theory of relief under the Just Compensation Clause. To the contrary, respondents contend that such challenges properly arise only in the narrow context, exemplified by *Nollan* and *Dolan*, in which government officials condition individual land-use permits on uncompensated public access to private property.

vant to the parallel claim under federal law. *Id.* at 21a. In light of that conclusion, it properly refused to allow petitioners to relitigate the same issues in federal court.[13]

B. Petitioners Do Not Come Within Any Recognized Exception To The Full Faith And Credit Act

Petitioners scarcely discuss the federal statute that controls this case. *See* Pet. Br. 12, 17-19. (Likewise, only one of petitioners' nine amici even cites the FFCA. *See* Brief Amici Curiae of Equity Lifestyle Properties, Inc. et al. at 13.) Petitioners have not sought to invoke either of the established grounds for an exception—a superseding statute or a challenge to the basic fairness of the state proceedings. To the extent they address the FFCA at all, they seek to rely by analogy on this Court's decision in *England* v. *Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964). That case is inapposite here.

1. The Court has made clear that a statutory exception to the FFCA "will not be recognized unless a later statute contains an express or implied partial repeal." *Kremer*, 456 U.S. at 468; *see also Parsons*, 474 U.S. at 523; *Marrese*, 470 U.S. at 381. Indeed, despite the theoretical possibility, the

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[13] This Court denied review of petitioners' *Nollan/Dolan* question, and neither petitioners nor their amici have identified any other difference—real or alleged—in the substantive law applicable to petitioners' state and federal claims. To the contrary, the application of issue preclusion is so clear that even some of petitioners' amici take that conclusion as their starting point, arguing that the Court should reconsider its decision in *Williamson County* in light of the effect of the FFCA. *See* Brief of Amici Curiae Defenders of Property Rights et al. at 12-14; Brief of Amicus Curiae Franklin P. Kottschade at 16-27; Brief Amici Curiae of Evandro S. Santini et al. at 13. Whatever the merits of that suggestion, petitioners themselves have not questioned *Williamson County*, and the current case presents no occasion for revisiting it. *See, e.g.*, *Dep't of Taxation & Fin.* v. *Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 77 n.11 (1994) (declining to address argument made by amicus that was not raised by parties or court of appeals); *see also* S. Ct. R. 14.1(a). Moreover, the Court should not consider overruling *Williamson County* without affording the City, thousands of other state and local governments, and other interested parties the opportunity to develop an appropriate record and respond to amici's evidence and arguments. *See Yee*, 503 U.S. at 538.

Court has "seldom, if ever" recognized an implied repeal. *Matsushita*, 516 U.S. at 380. Petitioners make no argument that any statute has repealed the FFCA in the context presented here, nor could they. The Court has twice held that 42 U.S.C. § 1983, which creates petitioners' cause of action here, does not impliedly repeal the FFCA. *Allen*, 449 U.S. at 97-98 ("nothing in the language of § 1983 remotely expresses any congressional intent to contravene the common-law rules of preclusion or to repeal the express statutory requirements of the predecessor of 28 U.S.C. § 1738"); *Migra* v. *Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 83 (1984) ("*Allen* . . . made clear that issues actually litigated in a state-court proceeding are entitled to the same preclusive effect in a subsequent federal § 1983 suit as they enjoy in the courts of the State where the judgment was rendered."); *see also* 18B Wright et al., *supra*, § 4471.2, at 280.

2. A court also may refuse to enforce the FFCA if the original proceedings failed to "satisfy the minimum procedural requirements of the . . . Due Process Clause." *Kremer*, 456 U.S. at 481; *see also* 18B Wright et al., *supra*, § 4471.2, at 306.[14] Petitioners do not contend that California's treatment of their claims failed to satisfy due process. They had two opportunities to amend their state complaint, and the opportunity to file briefs and argue orally in each of three courts. The California Superior Court, the Court of Appeal, and the Supreme Court all addressed the issues and arguments that petitioners laid before them. Indeed, petitioners prevailed

[14] The Court has sometimes described this principle more particularly as a requirement "that the first adjudication offer a full and fair opportunity to litigate." *Kremer*, 456 U.S. at 481; *see, e.g.*, *Haring*, 462 U.S. at 313. The courts lack power to craft non-constitutional, common-law exceptions to the FFCA. Nonetheless, where applicable state preclusion law does not by its terms include a "full and fair litigation" requirement, that rule is imposed by the Due Process Clause: "A State may not grant preclusive effect in its own courts to a constitutionally infirm judgment, and other state and federal courts are not required to accord full faith and credit to such a judgment. . . . In such a case, there could be no constitutionally recognizable preclusion at all." *Kremer*, 456 U.S. at 482-483; *see also* 18B Wright et al., *supra*, § 4471.2, at 275-276.

in the Court of Appeal and received three of seven votes in the Supreme Court. They did not ultimately prevail, but they were surely fully heard.

3. Petitioners seek to reason by analogy from one principle, of "indefinite but narrow contours" (18B Wright et al., *supra*, § 4471.1, at 246) that this Court recognized in *England*. That decision did not discuss the FFCA, and thus did not by its terms create an "exception" to that Act. In any event, it does not help petitioners with the *Williamson County* question presented by the petition.

In *England*, the petitioner originally "properly invoked the jurisdiction of a Federal District Court to consider federal constitutional claims." 375 U.S. at 415. The federal court abstained from addressing those claims so that a state court could first determine distinct, predicate issues of state law. *Id.* at 413. The Court held that, in such a case, so long as the plaintiff did not voluntarily submit his federal claims to the state courts for resolution on the merits, the prudential doctrine of abstention should not result in those claims being precluded once the case returned to federal court. *Id.* at 415, 421-422.

As we discuss below, under *Williamson County*, a federal claim for just compensation based on a state or local taking does not arise, for purposes of federal jurisdiction, until the claimant has invoked available state remedies and the state has refused to provide compensation. *See* pp. 24, *infra*. Thus, in contrast to the abstention situation, a claimant cannot "properly invoke[] the jurisdiction" of the federal court (*England*, 375 U.S. at 415) to decide a federal compensation claim until he has first litigated a parallel state claim through any available and adequate state procedures. There is accordingly no concern here, as there was in *England*, that a prudential judicial abstention will lead to the effective abdication of federal jurisdiction. *See id.* at 416. As petitioners themselves recognize (Br. 13-14), *Williamson County*'s jurisdictional rule is not prudential, but is rooted in the nature of the Just Compensation Clause itself. At a claimant's first opportunity to invoke federal jurisdiction

over a federal just compensation claim, the FFCA instructs the court to accord any prior state-court judgment the same preclusive effect the State itself would give it.

As this Court has recognized, *England* is limited to the abstention context. *See Allen*, 449 U.S. at 101 n.17; *Migra*, 465 U.S. at 85 n.7. Even if the decision could properly be applied more broadly, however, it would not aid petitioners here. First, there would be no reason to extend *England* to bar *issue* preclusion in a *Williamson County* case. *England* held only that a plaintiff could explain his 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 419-421. The Court had no occasion to consider circumstances in which the plaintiff submitted to the state court 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. *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.

Second, if petitioners are correct that *England* is analogous here, then the analogy is fatal to their 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 purpose for the federal court's abstention. If the issues underlying petitioners' federal just-compensation claims are analogous to the issues deferred to the state courts in *England*, then the state courts' resolution of those issues is final and preclusive.[15]

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[15] *England* is perhaps relevant, by its terms, to petitioners' facial "substantially advance" claim, as to which the court of appeals originally ordered *Pullman* abstention. Petitioners, however, did not reserve that

II. THERE IS NO BASIS FOR CREATING AN EXCEPTION TO THE FFCA IN THIS CASE

The FFCA and this Court's cases thus provide a straightforward answer to the question presented: The federal courts must accord the California Supreme Court's decision in this case the same issue-preclusive effect it would receive under California law. In seeking the opposite answer—allowing *de novo* federal litigation of issues already resolved by the state courts—petitioners effectively ask the Court to craft a new exception to the FFCA. In essence, they argue that this Court should displace the FFCA in light of *Williamson County*, because if it does not then claimants such as petitioners will be required to litigate issues relating to alleged state takings in state forums, and be bound by the results to the extent the issues resolved are also relevant to federal claims.

A. *Williamson County* Does Not Require An Exception

1. Petitioners contend that when this 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

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facial claim in state court. *See* JA 125-127. Nor have they even argued that applying issue preclusion to that claim was erroneous under *England* itself. The question presented concerns only the claim that the court of appeals originally found unripe under *Williamson County*. *See* Pet. i. In any event, an *England* reservation should not bar issue preclusion under the circumstances here for the reasons stated in the text. The court of appeals ordered abstention in this case only to permit the completion of petitioners' state administrative mandamus challenge to the City's application of the North Beach zoning ordinance, which the court thought might conceivably have some effect on petitioners' status under the HCO. *See* App. 16a. Nothing in *England* suggests that in light of that abstention, petitioners were entitled to amend their state complaint, as they did, to present a state facial "substantially advance" challenge to the HCO, while "reserving" the right to relitigate identical federal issues *de novo* if they should lose on the state-law claim. To the contrary, *England* indicates that to the extent a plaintiff "unreservedly litigat[es]" claims in state court that the abstention order did not require him to resolve there, he should not later "be allowed to ignore the adverse state decision and start all over again in the District Court." 375 U.S. at 419.

federal courts [would be] required to disregard" them. Pet. Br. 7-8. Otherwise, they argue, *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 the merits." *Id.* at 16-17; *see id.* at 14. But *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 relitigate those very issues in federal court.

Williamson County holds that a federal cause of action seeking just compensation for an alleged taking by a state or local government does not accrue until the claimant has used available state procedures for obtaining compensation and can properly allege that the State has denied it. *See* 473 U.S. at 195; *see also City of Monterey* v. *Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 710 (1999). As petitioners recognize (Br. 13), that approach is mandated by the nature of the Just Compensation Clause, which guarantees compensation—not freedom from the underlying taking.[16] Nothing in *Williamson County* suggests that the Court was concerned with providing a federal forum for takings claims. Indeed, the Court simply had no occasion to address how a federal court should adjudicate a federal compensation claim once it has properly accrued, including what respect is due under the FFCA to the state courts' prior resolution of issues that are relevant to both state and federal claims. It surely did not intend to carve out an exception to the FFCA without mentioning either the Act itself or its underlying principles of comity and preclusion.

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[16] By contrast, as discussed above (at pp. 6-7), where (as, principally, here) a plaintiff claims that an enactment on its face does not substantially advance a legitimate state interest, the remedy is invalidation and other equitable relief, not compensation—and the claim accrues at the time of the government action. *See Yee*, 503 U.S. at 533-534; *see also* pp. 29-30, *infra*.

2. *Williamson County*'s explication of the nature of a federal compensation claim does not, as petitioners contend (Br. 14-17), bar any adjudication of that federal claim. Because the States typically do provide mechanisms for seeking compensation, federal compensation claims generally will not arise until there has been some adjudication in state court.[17] Thus, it is likely that in many or even most cases at least some issues germane to the federal claim will already have been addressed in state proceedings on a cognate state law claim. That does not, however, mean that any potential federal claim is lost.

In some States, petitioners may be able (or even required) to present any federal claim along with their state claims, as an alternative ground for relief in the event that state law does not provide what they claim as just compensation. *See, e.g.*, *MC Assocs.* v. *Town of Cape Elizabeth*, 773 A.2d 439, 443 (Me. 2001); *Bruley* v. *City of Birmingham*, 675 N.W.2d 910, 918 (Mich. Ct. App. 2003), *appeal dismissed*, 679 N.W.2d 66 (Mich. 2004); *Guetersloh* v. *State*, 930 S.W.2d 284, 287-88 (Tex. App. 1996). In that event, the claimant may efficiently litigate both claims at the same time, with the opportunity to seek review by this Court of any contention that the state court has misconstrued or misapplied federal law. *See* 28 U.S.C. § 1257; *First English Evangelical Lutheran Church* v. *County of Los Angeles*, 482 U.S. 304, 313 n.8 (1987); *cf. ASARCO, Inc.* v. *Kadish*, 490 U.S. 605, 617-625 (1989).

In other States, state courts may preclude a plaintiff who brings a just-compensation claim under state law from

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[17] The federal claim is ripe without state proceedings if the claimant can show that state remedies are "unavailable or inadequate." 473 U.S. at 196-197; *see also, e.g.*, *Del Monte Dunes at Monterey, Ltd.* v. *City of Monterey*, 920 F.2d 1496, 1507 (9th Cir. 1990) (no ripeness issue because California did not, at time of government action, provide compensation for regulatory takings); *Daniels* v. *Area Plan Comm'n*, 306 F.3d 445, 456-57 (7th Cir. 2002) (Indiana inverse condemnation action could not provide equitable relief); *Clajon Prod. Corp.* v. *Petera*, 70 F.3d 1566, 1575 (10th Cir. 1995) (defendant not subject to Wyoming inverse condemnation action).

concurrently presenting a contingent federal claim, because that claim has not yet arisen under *Williamson County*. *See* Pet. Br. 15; *Breneric Assocs.* v. *City of Del Mar*, 69 Cal. App. 4th 166, 188-89, 81 Cal. Rptr. 2d 324 (1998). In that event, a new federal claim (brought in either federal or state court) will not be barred by *claim* preclusion, precisely because it could not have been asserted in the prior state litigation. *See, e.g.*, *Brown* v. *Felsen*, 442 U.S. 127, 131 (1979) ("Res judicata prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding."). Indeed, as petitioners point out (Br. 18), respondents have never asserted claim preclusion in this case. As in this case, the claimant in such a new action may argue that federal law offers, or should offer, greater protection than state law in some respect. If such an argument prevails, then the claimant may recover on the federal *claim*, despite the preclusive effect of the prior state judgment as to *issues* that were adjudicated in the prior state litigation. And if the argument for more expansive federal protection fails in the lower courts, the claimant may still ask this Court to review it—just as petitioners did in this case. *See* Pet. i.[18]

There is, accordingly, no substance to petitioners' argument (Pet. 14-17) that the nature of federal just-compensation claims, combined with ordinary principles of *issue* preclusion, puts those *claims* beyond the reach of any court. What *is* true is that, as petitioners complain, a claimant frequently will not have the opportunity to demand initial adjudication of every relevant *issue* by a federal court. How

[18] Alternatively, even where a state court will not formally entertain a contingent federal compensation claim, the claimant may seek review in this Court directly from a state-court judgment that resolves a state compensation claim on grounds that clearly depend on the state court's understanding of federal law. *See generally Zacchini* v. *Scripps-Howard Broad. Co.*, 433 U.S. 562, 566-568 (1977); *Pennsylvania* v. *Muniz*, 496 U.S. 582, 589 n.4 (1990); *Ohio* v. *Reiner*, 532 U.S. 17, 21-22 (2001); *see also South Dakota* v. *Neville*, 459 U.S. 553, 556 n.5 (1983); *Delaware* v. *Prouse*, 440 U.S. 648, 652-653 (1979).

often that will be true, and what precise effect issue preclusion will have on later litigation of a federal claim, depends principally on how fully the States conform the protection provided by their own just-compensation law to that afforded by the federal Constitution, and to what extent the scope of federal protection is unsettled.

In recent years, many state courts have generally conformed their own takings law to federal law, so that in most instances fair litigation of a state compensation claim may now be tantamount to fair litigation of the entire federal claim. That result is fully consonant with the spirit of *Williamson County*—which points out that no federal compensation claim even *arises* unless the petitioner can allege that a State has both taken private property *and* refused to provide "just compensation" to the extent required by the Fifth Amendment. If a State provides a fair forum and adjudicates just-compensation claims under standards at least as protective as those of federal law, no alleged state or local taking need ever give rise to a meritorious federal claim. If and when there are actual or alleged differences between state and federal just-compensation law, nothing in the application of issue preclusion under the FFCA will prevent claimants from having the distinct federal issues considered and resolved by some competent forum as a matter of federal law.[19]

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[19] There have been differences in the scope of state and federal takings law in the past. *See*, *e.g.*, *Dodd* v. *Hood River County*, 136 F.3d 1219, 1228-1229 (9th Cir. 1998) (because Oregon courts recognize *Lucas* categorical taking but not *Penn Central* multi-factor taking, claimant entitled to federal forum on merits of *Penn Central* claim); *Galbraith* v. *Planning Dep't*, 627 N.E.2d 850, 852-853 (Ind. Ct. App. 1994) (suggesting that Indiana courts recognize *Lucas* categorical taking but not *Penn Central* taking theory); *compare Hall* v. *City of Santa Barbara*, 833 F.2d 1270, 1276-1278 (9th Cir. 1986) (finding that mobile home rent control law resulted in physical taking of property) *and Sierra Lake Reserve* v. *City of Rocklin*, 938 F.2d 951, 955 (9th Cir. 1991), *vacated*, 506 U.S. 802 (1992) (holding that plaintiff may bring mobile home rent control takings claim directly in federal court because California, unlike Ninth Circuit, did not recognize a cause of action for physical takings resulting from mobile home rent control) *with Yee* v. *City of Escondido*, 224 Cal. App. 3d 1349, 1355-1359, 274

3. Petitioners' objection to the operation of the FFCA here thus reduces to the point that because of the nature of the federal compensation claim, where States provide a forum for seeking compensation, a claimant will be forced to accept the adjudication of many relevant issues by state courts. As this Court has previously made clear, however, in refusing to recognize an exception to the FFCA,

> [t]here is . . . no reason to believe that Congress intended to provide a person claiming a federal right an unrestricted opportunity to relitigate an issue already decided in state court simply because the issue [originally] arose in a state proceeding in which he would rather not have been engaged at all.

Allen, 449 U.S. at 104. *Allen* involved preclusion of issues resolved against the federal plaintiff when he was the defendant in a state criminal proceeding—a purely involuntary litigant. The same principle applies *a fortiori* to issues resolved in the state-court proceedings contemplated by *Williamson County*. Whether a claimant started in state court voluntarily or involuntarily is not relevant. The important point is that property owners have a means for seeking just compensation—not that they be able to litigate every issue twice. *See also Migra*, 465 U.S. at 84 (the FFCA "embodies the view that it is more important to give full faith and credit to state-court judgments than to ensure separate forums for federal and state claims").[20]

Cal. Rptr. 551, 555-557 (1990) (specifically rejecting *Hall* analysis of taking claim), *aff'd*, 503 U.S. 519 (1992).

[20] There are other contexts in which plaintiffs may press federal constitutional claims only in state courts. *See Fair Assessment in Real Estate Ass'n, Inc.* v. *McNary*, 454 U.S. 100, 116 (1981) ("[T]axpayers are barred by the principle of comity from asserting § 1983 actions against the validity of state tax systems in federal courts"; they "may ultimately seek review of the state decisions in this Court."). And there are other doctrines that result in state courts having the final authority to resolve federal issues, subject only to review by this Court. *See, e.g.*, *Dist. of Columbia Ct. of App.* v. *Feldman*, 460 U.S. 462, 482 (1983); *Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413, 416 (1923); *New Orleans Pub. Serv., Inc.* v. *Council of City of New Orleans*, 491 U.S. 350, 360-361 (1989) (*Burford* doctrine).

4. Finally, we note that the facts of this case present a dubious context for complaints about the application of preclusion principles to genuine *Williamson County* claims. Petitioners' principal argument on the merits has always been that the HCO is invalid on its face, because it does not substantially advance legitimate state interests. *See, e.g.*, JA 31 (#167), 34-35 (#184), 44-45, 47. As the court of appeals recognized in *San Remo I* (*see* pp. 6-7, *supra*), *that* claim sought invalidation of the HCO, not compensation, and it was ripe—indeed, *over*-ripe—at the time of petitioners' original federal complaint. *See Yee*, 503 U.S. at 533-534. The district court held that it was time-barred—not that petitioners were required by *Williamson County* to litigate it first in the state courts. *See* Pet. App. 28a. To escape the consequences of that ruling, petitioners belatedly asked the court of appeals for *Pullman* abstention. That court obliged, on the theory that the outcome of petitioners' state administrative challenge to the City's application of the North Beach zoning ordinance might have some effect on the federal claim. App. 16a-17a. It was petitioners' other claims that the federal courts dismissed under *Williamson County*. App. 9a-10a.

Once back in state court, however, petitioners voluntarily amended their mandamus pleading and actively prosecuted the state version of their facial "substantially advance" claim—while effectively abandoning their "economic impact" claims. *See, e.g.*, Pet. App. 144a n.14. It was petitioners' always-ripe "substantially advance" claim—the claim unaffected by *Williamson County*—that petitioners pressed in the state courts; that the Supreme Court of California principally considered and decided; that petitioners principally renewed in federal court; that the district court again dismissed as time-barred; and that the court of appeals decided by invoking issue preclusion.[21] While petitioners may object

[21] The court of appeals could also have affirmed dismissal of the "substantially advance" claim on the alternative time-bar ground, and that course is also open to this Court. *See, e.g.*, *Bennett* v. *Spear*, 520 U.S. 154, 166-167 (1997). At a minimum, that ground remains open on any remand.

to the court's application of the FFCA, it is at best ironic for them to argue, in that regard, that they have been caught in some "trap" laid for them by *Williamson County*.

B. There Is No Justification For Refusing To Respect State Judgments In This Context

Ultimately, petitioners' position is that it is unacceptable to "consign[]" their compensation claims to state courts. Pet. Br. 14; *see* Brief Amicus Curiae of Pacific Legal Foundation et al. (Pacific Legal Fdn. Br.) at 15-16 (arguing expressly that state courts generally do not provide an adequate forum for the adjudication of federal takings claims). If petitioners could substantiate a contention that the state courts did not provide an adequate forum for the litigation of the issues raised by their state takings claims, then ordinary principles would prevent the state courts' determination of those issues from being preclusive. *See* pp. 20-21, *supra*. They could hardly make that argument in this case, however, given the attention their claims received from the California courts—including their victory in the state court of appeal, and their narrow loss in the state supreme court.[22] And any more general argument is untenable.

To begin with, it makes no sense to argue that state courts are not 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 Assocs.* v. *Inc. Village of*

[22] Nor is it entirely clear what petitioners hope to gain by relitigation in the federal courts, since the district court in this case indicated that it also would have rejected petitioners' claims on their merits. *See* Pet. App. 100a-103a.

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 quotation marks and citations omitted); *see also* J. Juergensmeyer and T. Roberts, *Land Use Planning and Control Law* § 10.10(c), at 450-451 (1998) (application of FFCA and issue preclusion by federal courts to prevent relitigation 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 the Relegation of Takings Claims to State Courts: The Federal Courts' Misguided Attempts to Avoid Preclusion Under* Williamson County, 26 Ecology L.Q. 1, 45-46 (1999).

Moreover, there is no basis for speculation that state courts are systematically more or less likely than federal courts to be predisposed to favor either side in a takings case. *See* Pacific Legal Fdn. Br. 15-16. State judges may have just as close associations with property owners or developers as with local officials or proponents of regulation; and federal judges are as much local residents as their state colleagues. The judicial selection process may produce individuals with favorable or unfavorable philosophical predispositions in either the state or the federal system. And any analysis is unpredictable and unstable as to place and over time. Even if the inquiry were appropriate (which it is not), it would be entirely bootless.

In any event, this Court has made completely clear that inchoate distrust of state courts is not a permissible ground for resisting application of the FFCA. In *Allen*, the Court rejected any "general distrust of the capacity of the state courts to render correct decisions on constitutional issues" as even a "conceivable basis for finding a universal right to litigate a federal claim in a federal district court." 449 U.S. at 105. The Court instead noted its "emphatic reaffirmation

in [*Stone* v. *Powell*, 428 U.S. 465 (1976)] of the constitutional obligation of the state courts to uphold federal law, and its expression of confidence in their ability to do so." *Allen*, 449 U.S. at 105; *see also id.* at 103-104 (rejecting proposition "that every person asserting a federal right is entitled to one unencumbered opportunity to litigate that right in a federal district court"); *Kremer*, 456 U.S. at 476. In stressing later that the FFCA "embodies the view that it is more important to give full faith and credit to state-court judgments than to ensure separate forums for federal and state claims," the Court noted that its holding reflected "notions of comity," as well as "the need to prevent vexatious litigation, and a desire to conserve judicial resources." *Migra*, 465 U.S. at 84; *see also Idaho* v. *Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 275 (1997) (opinion of Kennedy, J.) (refusing to "conclude that state courts are a less than adequate forum for resolving federal questions" or to embrace any "doctrine based on the inherent inadequacy of state forums," because it "would run counter to basic principles of federalism").

In short, there is nothing extraordinary about the court of appeals' application of standard issue-preclusion principles in this case. Indeed, it would be extraordinary not to apply them. Allowing federal takings claimants to ignore the full and fair adjudication of relevant issues by state courts, simply so that a federal court could pass on the same issues, would be a substantial affront to well-established principles of comity and federalism. Even more important, however, it would impose unique and substantial litigation costs on States and their subdivisions, which would be deprived of the benefit of the usual rules of preclusion, finality and repose that are reflected in their own laws, and that are normally incorporated into federal law by the FFCA. Municipalities, which in many cases already have extremely limited litigation budgets, face perennial fiscal crises.[23] A legal rule

[23] *See* Michael A. Pagano, National League of Cities, City Fiscal Conditions in 2004, at iii (2004), *available at* http://www.nlc.org/content/Files/RMPctyfiscalcondrpt04.pdf (reporting, inter alia, that 61% of 288 city finance directors surveyed expected that "their cities will be

subjecting these entities to duplicative litigation would exacerbate this financial distress. *See* Brief of New York et al.; Brief of the National Association of Counties, et al.; Brief of Community Rights Counsel et al. Petitioners have suggested no adequate justification for imposing this wasteful burden on States and localities—or the matching burden on the federal courts. From any perspective, the regime of duplicative litigation sought by petitioners cannot possibly be the right result.

'less able' to meet financial needs in 2005 than in [2004]"); Senate Comm. on the Judiciary, The Private Property Rights Implementation Act of 1998, S. Rep. No. 105-242, at 45 (1998) (minority views) (noting municipalities' limited budgetary capacity for litigation); Susan A. McManus, *The Impact of Litigation on Municipalities: Total Cost, Driving Factors, and Cost Containment Mechanisms*, 44 Syracuse L. Rev. 833, 834-37 (1993) (noting major impact of "zoning and land development" litigation on cities, especially those in poor fiscal condition").

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE SAN REMO HOTEL, THOMAS FIELD,
ROBERT FIELD, AND T & R INVESTMENT CORP.,
Plaintiffs-Appellants,
v.

CITY AND COUNTY OF SAN FRANCISCO,
a municipal corporation, DEPARTMENT OF CITY PLANNING,
BOARD OF PERMIT APPEALS, AND
SAN FRANCISCO BOARD OF SUPERVISORS,
Defendants-Appellees.

No. 96-16843

Argued and Submitted Nov. 4, 1997
Decided June 3, 1998

[145 F.3d 1095]

Before: WOOD,* RYMER, and TASHIMA, Circuit Judges.

TASHIMA, Circuit Judge:

Success is sometimes said to be the father of failure, and this and like cases are before the courts because San Francisco's success in attracting tourists has fathered a failure in an adequate stock of housing for the low income and disadvantaged population of the City. In 1990, the City and County of San Francisco (the "City") revised its Hotel Conversion Ordinance ("HCO") to increase restrictions on the use of hotel rooms for tourists and to increase the expense of converting a hotel room from residential to tourist use. This

* Honorable Harlington Wood, Jr., Senior Circuit Judge, United States Court of Appeals for the Seventh Circuit, sitting by designation.

revised ordinance has triggered several constitutional challenges based on the Takings Clause of the Fifth Amendment. *E.g.*, *Golden Gate Hotel Ass'n. v. City and County of San Francisco*, 18 F.3d 1482 (9th Cir. 1994), *on remand*, 1994 WL 443666 (N.D. Cal. Aug. 2, 1994), aff'd, 76 F.3d 386 (9th Cir.) (Table), *cert. denied*, 519 U.S. 808, 117 S. Ct. 51, 136 L. Ed. 2d 15 (1996); *Lambert v. City and County of San Francisco*, 57 Cal. App. 4th 1172, 67 Cal. Rptr. 2d 562 (1997), *review granted*, 71 Cal. Rptr. 2d 215, 950 P.2d 59 (Cal. 1998). The present case is the latest installment.

Due to the procedural complexities of this case and the state law issues that may moot the Takings Clause challenge, we do not resolve the constitutionality of the HCO. Instead, we invoke *Pullman* abstention[1] and send the plaintiffs to state court. We note also that subsequent to the submission of this case for decision, the California Supreme Court granted hearing in a case involving the constitutionality of the HCO, *see Lambert*, 57 Cal. App. 4th 1172, 67 Cal. Rptr. 2d 562, *review granted*, 71 Cal. Rptr. 2d 215, 950 P.2d 59, and it may be that the California Supreme Court's decision will completely vindicate the plaintiffs' claims in state court, making a return to federal court unnecessary.

I. THE STATUTORY FRAMEWORK

San Francisco has enacted several hotel conversion ordinances in order to stop the depletion of housing for the poor, elderly and disabled. The City conducted a study that revealed that between 1975 and 1979, almost 20 percent of the residential hotel units in the City were lost due to demolition and conversion, and that most of the conversion **[*1099]** was from residential to tourist use. HCO § 41.3(d). In 1979, the City enacted its first HCO as a temporary measure, which it later codified as a permanent ordinance in 1981.

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[1] *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 61 S. Ct. 643, 85 L. Ed. 971 (1941).

Under the 1981 HCO, hotel units could be converted to non-residential use only if the owner obtained a permit to convert. The City granted a permit only if the property owner provided relocation assistance to hotel residents and replaced the residential hotel units being converted through one of the following methods: (1) construction of an equal number of replacement units; (2) rehabilitation of an equal number of residential hotel units; or (3) contribution of a fee to the City's Residential Hotel Preservation Fund Account in the amount of 40 percent of the construction costs of the number of units converted (the "in lieu payment"). HCO §§ 41.12 & 41.13.

The 1981 HCO defined a "residential unit" as a hotel room occupied by a permanent resident as of September 23, 1979, *i.e.*, the 1981 HCO was an extension of the 1979 moratorium. To determine whether a unit was residential as of September 23, 1979, the City sent surveys to the operators of hotels.

In May 1990, the City repealed the 1981 HCO and enacted the 1990 HCO. This new ordinance made four changes from the old law: (1) it prohibited the summer tourist use of residential rooms; (2) it increased the in lieu payment from 40 percent to 80 percent; (3) it added the requirement that any hotel that rents rooms to tourists during the summer must rent the rooms at least 50 percent of the time to permanent residents during the winter; and (4) the new law did not provide for relief on the ground of economic hardship. To ease the effect of the new ordinance, the 1990 HCO allowed hotel owners who applied before May 12, 1990, to pay a 40 percent in lieu fee, instead of the otherwise-required 80 percent fee.

Entirely distinct from the HCOs are the City's zoning ordinances. In 1987, the City enacted the North Beach Neighborhood Commercial District zoning ordinance ("zoning law"), which requires conditional use authorization to establish a tourist hotel. Owners who establish a prior nonconforming commercial use are exempt from this requirement of obtaining a conditional use permit. The zoning law

borrows the September 23, 1979, classification from the HCO in order to determine what is a residential unit. In other words, a hotel unit that had been mistakenly characterized as residential under the HCO but that in fact was operating commercially as a tourist unit in 1987 would *not* be said to have a prior non-conforming use under the zoning law, despite the actual use of the unit.

II. THE FACTS

The plaintiffs are the owners of the San Remo Hotel, as well as the hotel itself; for convenience, we refer to them collectively as "Field." Field bought the San Remo Hotel in 1971, when it was zoned for commercial use and was subject to no restrictions on tourist use. He leased the hotel to Jean Irribarren (not a party) from 1977 to 1983. Irribarren spoke English badly, and when the 1979 survey arrived and asked him to indicate the nature of the hotel units for the new HCO, Irribarren mistakenly indicated that every single one of the hotel's 62 units was residential. Field had no notice or knowledge of this survey, or of Irribarren's responses.

In 1984, after the lease to Irribarren expired, Field again began operating the hotel. In his 1984 Annual Unit Usage Report, Field stated that the actual use of the hotel on September 30, 1984, was still as 62 residential units and zero tourist units. He explains this usage report by arguing that the 1981 HCO was not burdensome to comply with, even with the residential designation. In particular, the 1981 HCO allowed for unlimited tourist use of residential rooms from May to October, which are the most profitable months for a tourist hotel.

On May 11, 1990, Field applied under the 1990 HCO to convert the 62 residential rooms to tourist use. The City Zoning Administrator objected on the ground that if such a conversion were granted, the hotel would then be operating in violation of the zoning laws. After all, the 1987 zoning law looked back to the September 23, 1979, survey and characterized the hotel as entirely **[*1100]** residential. Therefore, even though the hotel had arguably been operating as a

tourist hotel when the zoning law was enacted in 1987, it was not considered a prior non-conforming use. In order to satisfy the zoning law, Field had to obtain a conditional use permit, which he has never gotten.[2]

Field then filed an application for a conditional use permit, so the hotel would no longer be operating in violation of the zoning law. The Planning Department scheduled a hearing for August 20, 1992, before the City Planning Commission to decide the merits of this application. On August 19, 1992, the Planning Department concluded that the Commission lacked jurisdiction to decide what the hotel's prior zoning status had been, and the parties agreed to continue the hearing until the Zoning Administrator could make such a determination. On September 9, 1992, the Zoning Administrator formally declared that the hotel had not been zoned for commercial use. Therefore, a conditional use permit would be required.

Field appealed to the Board of Permit Appeals ("BPA"), arguing that the hotel was already a permitted conditional use or a prior non-conforming use. Field also argued that using the HCO to convert the hotel into a truly residential hotel would be an unconstitutional taking and a denial of equal protection. The BPA rejected this argument and held the hotel bound by the 1979 classification. It concluded that the prior disobedience to the 1987 zoning law was not a prior non-conforming use but a special exception allowed (but no longer) by the Zoning Administrator. Thus, the BPA held that Field was required to get a conditional use permit.

The case then went back to the Planning Commission, which on January 21, 1993, approved Field's application for a conditional use permit, provided: (1) Field paid 40 percent of the cost of replacement housing to make up for the loss of the 62 residential units; (2) Field offered lifetime leases to

[2] It would appear that Field had been operating in continual violation of the 1987 zoning law since its enactment, but only when he applied for the HCO conversion did the City Zoning Administrator finally insist on compliance with the zoning law.

existing long-term tenants; and (3) Field fulfilled other minor conditions.[3] The BPA affirmed.

On March 12, 1993, Field filed a petition for administrative mandamus in state court, challenging the BPA's decision that classified the hotel as residential. This mandamus action has been stayed by stipulation of the parties.

On April 19, 1993, the City's Board of Supervisors rejected Field's appeal of the Planning Commission's decision and upheld the conditions for the conditional use permit.

On May 4, 1993, Field filed this action against the City under 42 U.S.C. § 1983. Counts one and two of the amended complaint sought declaratory and injunctive relief from condition # 1 (the 40 percent fee) that the Planning Commission set for awarding the conditional use permit. Field alleged that this condition denied him procedural due process and substantive due process. Counts three and four alleged that the 1990 HCO was a facial and as-applied taking under the Fifth Amendment. Count five sought damages based on the above claims. Count six was a supplemental state law claim under the California Permit Streamlining Act.

On August 27, 1996, the district court granted the City summary judgment. The court ruled against Field on counts one and two on the grounds that procedural due process does not apply to statutes that apply to more than a few people, and that the substantive due process claim was barred by our decision in *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996). It also refused to let Field amend his complaint to state an equal protection claim, reasoning that amendment would be futile because any such claim would be precluded by the BPA's decision.

The court found that count three was invalid because Field failed to meet the statute of limitations, and that count four was invalid because the claim was unripe. It held count

[3] Fulfillment of these three conditions would also satisfy the conversion requirements under the HCO.

[*1101] five meritless because it was derivative of the first four counts, and it dismissed count six.

Field appeals, but he has dropped his procedural and substantive due process claims. Thus, we face only: (1) the facial takings claim; (2) the as-applied takings claim; (3) the equal protection issue; and (4) the state law claim under the California Permit Streamlining Act. In addition, Field argues for the first time on appeal that we should avoid deciding the takings claims because *Pullman* abstention is required.

We have jurisdiction under 28 U.S.C. § 1291. We affirm in part, and reverse and remand in part.

III. CONSTITUTIONAL CLAIMS

The heart of this case is a constitutional challenge to the 1990 HCO as a violation of the Takings Clause of the Fifth Amendment, as incorporated by the Fourteenth Amendment. Complicating our review, however, are two factors. First, Field faces a number of procedural obstacles to the assertion of his constitutional claims. The district court dismissed them all as either unripe, barred by the statute of limitations, or precluded by a prior adverse judgment. Our threshold inquiry, therefore, is whether Field has any live federal constitutional claim. If he does not—that is, if the district court was correct—then the case ends here for Field, and we need decide nothing else.

However, if Field can survive these procedural hurdles, we then face a second difficulty: the possibility that Field might be able to obtain some or all of the relief he seeks without our having to resolve the difficult Takings Clause question. The Supreme Court has admonished that "[i]n litigation generally, and in constitutional litigation most prominently, courts in the United States characteristically pause to ask: Is this conflict really necessary?" *Arizonans for Official English v. Arizona*, 520 U.S. 43, 117 S. Ct. 1055, 1072, 137 L. Ed. 2d 170 (1997). If the constitutional question before us might be mooted or substantially narrowed by decision of the state law claims intertwined with the constitu-

tional issues in this case, then our precedents require abstention in order to avoid an unnecessary conflict between state law and the federal Constitution. *Sinclair Oil Corp. v. County of Santa Barbara*, 96 F.3d 401, 409-10 (9th Cir. 1996), *cert. denied*, 523 U.S. 1059, 118 S. Ct. 1386, 140 L. Ed. 2d 646 (1998); *Pearl Inv. Co. v. City and County of San Francisco*, 774 F.2d 1460, 1464 (9th Cir. 1985). Of course, if Field cannot clear the first hurdle, *i.e.*, if we conclude that all his constitutional claims are unripe, time-barred or precluded, abstention becomes irrelevant. There would be nothing to "abstain" from.

Accordingly, we begin our discussion with the first inquiry: Does Field have a live constitutional claim?

A. Facial Taking

Field's first constitutional claim is that the 1990 HCO is a facial taking of property without just compensation. He presses two, independent theories: that the HCO deprived him of the economically viable use of his hotel, *e.g.*, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992), and, alternatively, that the HCO is not sufficiently related to legitimate state interests. *E.g.*, *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987). The district court dismissed this claim as time-barred.

We begin our inquiry with a jurisdictional question-whether Field's facial takings claim is ripe for adjudication.[4]

Under our precedents, a facial takings claim alleging the denial of the economically viable use of one's property is unripe until the owner has sought, and been denied, just compensation by the state. *Sinclair Oil*, 96 F.3d at 406; *Levald v. Palm*, 998 F.2d 680, 686 (9th Cir. 1993). An exception ex-

[4] Because we conclude that the district court should have abstained under *Pullman*, we do not reach the statute of limitations issue.

ists where the state does not have a "reasonable, [*1102] certain, and adequate provision for obtaining compensation" at the time of the taking, in which case the facial takings claim is instantly ripe. *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985); *Levald*, 998 F.2d at 686.

Field has not filed an inverse condemnation action in state court, and therefore has not been denied just compensation by California. It follows that Field's facial takings claim—insofar as it alleges the denial of the economically viable use of his property—is unripe, unless California's inverse condemnation procedures were inadequate to compensate Field when the alleged taking occurred, *i.e.*, in 1990.

Unfortunately for Field, however, this alleged taking occurred three years too late. Prior to 1987, California did not recognize an inverse condemnation claim for regulatory takings, but in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 310-11, 107 S. Ct. 2378, 96 L. Ed. 2d 250 (1987), the Supreme Court held this restriction on inverse condemnation claims unconstitutional. If the taking of which Field complains had occurred before 1987, resort to the California state courts would not have been required because it would have been futile. *Del Monte Dunes v. City of Monterey*, 920 F.2d 1496, 1507 (9th Cir. 1990). *See also Levald*, 998 F.2d at 687-88. However, *First English* changed the law, and we have expressly held that, post-1987, California's inverse condemnation procedures are adequate to address a regulatory takings claim. *Christensen v. Yolo County Bd. of Supervisors*, 995 F.2d 161, 164 (9th Cir. 1993); *Schnuck v. City of Santa Monica*, 935 F.2d 171, 174 (9th Cir. 1991). These precedents control the case *sub judice*, and bar Field's first theory of a facial taking as unripe.

Field's other theory behind his facial takings claim is that the 1990 HCO does not substantially advance legitimate state interests. For this facial takings theory, we have held that the denial of just compensation is irrelevant for purposes of ripeness. *Sinclair Oil*, 96 F.3d at 407. Therefore,

Field's claim was ripe the instant the 1990 HCO was enacted. Accordingly, to the extent that Field argues that the 1990 HCO is a facial taking because it is not sufficiently related to legitimate state interests, his facial takings claim is ripe. We conclude, therefore, that Field has a live federal constitutional claim challenging the 1990 HCO as a facial taking of property.

B. As-Applied Taking

Field's second constitutional claim is an as-applied taking challenge to the 1990 HCO. The district court held that this claim is unripe, and we agree.

In order to assert an as-applied takings claim, a plaintiff must establish two things: (1) the governmental entity has reached a final decision on the applicability of the regulation to the plaintiff's property; and (2) the plaintiff is unable to receive just compensation from the government. *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, ---- - ----, 117 S. Ct. 1659, 1664-65, 137 L. Ed. 2d 980 (1997); *Williamson County*, 473 U.S. at 186, 194, 105 S. Ct. 3108.

Field clearly fails the second ripeness requirement because he has not pursued an inverse condemnation claim in state court. The Fifth and Fourteenth Amendments do not prohibit the taking of property; they prohibit the taking of property without just compensation. *Williamson County*, 473 U.S. at 194, 105 S. Ct. 3108. Therefore, there is no constitutional injury until the plaintiff has availed himself of the state's procedures for obtaining compensation for the injury, and been denied compensation. *Id.* As with his unripe facial takings theory, Field argues that he is excused from filing an inverse condemnation claim because California's procedures are inadequate for regulatory takings. Again, we reject this argument.

Accordingly, we affirm the district court's dismissal of Field's as-applied takings claim as unripe.

C. Equal Protection

In the district court, Field argued that the City's refusal to recognize the hotel as a prior non-conforming use under the zoning **[*1103]** law denied him procedural and substantive due process. Field has dropped his procedural due process claim, and admits on appeal that his substantive due process claim is foreclosed by our decision in *Armendariz*.

In the district court, Field moved to amend his complaint to recharacterize his due process claim for injunctive relief as an equal protection claim, but the district court denied this motion on the ground that the equal protection claim would be precluded by the BPA's adverse decision, and therefore amendment would be futile. In making this ruling, the district court also noted that comity and finality concerns favoring state court review of administrative decisions "counsel[ ] for abstention until a final judgment is reached by the state court" in Field's mandamus action.

We review the denial of leave to amend for abuse of discretion, *United States v. Pend Oreille Pub. Util. Dist. No. 1*, 926 F.2d 1502, 1511-12 (9th Cir. 1991), but we review the underlying legal issue of the availability of preclusion de novo. *Miller v. County of Santa Cruz*, 39 F.3d 1030, 1032 (9th Cir. 1994).

The district court incorrectly concluded that Field's equal protection claim would have been precluded by the BPA's adverse decision. Federal courts give a state judgment the same preclusive effect that that judgment would receive in state court. This rule extends to state administrative decisions, as well as judicial decisions. *Misischia v. Pirie*, 60 F.3d 626, 629 (9th Cir. 1995). Thus, an unreviewed agency decision against a federal plaintiff can preclude a § 1983 suit in federal court, even though § 1983 does not have an exhaustion requirement. *Id.* at 628- 31; *Miller*, 39 F.3d at 1032. However, California does not extend preclusive effect to non-final agency decisions. *Long Beach Unified Sch. Dist. v. State*, 225 Cal. App. 3d 155, 169, 275 Cal. Rptr. 449 (1990) ("A direct attack on an administrative decision may be made by appeal to the superior court for review

by petition for administrative mandamus. . . . A decision will not be given collateral estoppel effect if such appeal has been taken. . . ."). *See also National Union Fire Ins. Co. v. Stites Prof. Law Corp.*, 235 Cal.App.3d 1718, 1726, 1 Cal.Rptr.2d 570 (1991) ("When, as here, a judgment is still open to direct attack by appeal or otherwise, it is not final and the doctrines of res judicata and collateral estoppel do not apply.").

Field has sought administrative review of the BPA's decision in a state court mandamus action that has since been stayed by stipulation of the parties. Therefore, the BPA's decision is not final and is not entitled to preclusive effect.

Nonetheless, we affirm. The amendment of Field's complaint to state an equal protection claim would have been futile because the district court would have had to dismiss the claim under *Younger v. Harris*, 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971).[5] Under *Younger* abstention, federal courts may not grant declaratory or injunctive relief that would interfere with state criminal or civil proceedings, including state administrative proceedings that are judicial in nature. *Delta Dental Plan v. Mendoza*, 139 F.3d 1289, 1293-94 (9th Cir. 1998); *Aiona v. Judiciary of the State of Hawaii*, 17 F.3d 1244, 1248 (9th Cir. 1994). Absent extraordinary circumstances, *Younger* abstention is required if the state proceedings are (1) ongoing, (2) implicate important state interests, and (3) provide the plaintiff an adequate opportunity to litigate federal claims. *Hirsh v. Justices of the Supreme Court*, 67 F.3d 708, 712 (9th Cir. 1995). Unlike *Pullman* abstention, *Younger* abstention requires dismissal of the fed-

[5] Although the district court did not specifically abstain under *Younger*, it effectively applied this doctrine when it stated that comity and finality concerns "counsel" for abstention until a final state court judgment on Field's mandamus action is rendered. In any event, we can raise *Younger* abstention *sua sponte*. *See Barichello v. McDonald*, 98 F.3d 948, 955 (7th Cir. 1996) (recognizing federal court's power to raise *Younger* abstention *sua sponte*).

eral claim for injunctive relief, not a stay. *Delta Dental Plan*, 139 F.3d 1289, 1293-94.

We need not decide whether the BPA's decision-making process was sufficiently judicial in nature to warrant *Younger* abstention, *see* **[*1104]** *New Orleans Pub. Serv., Inc. v. Council of the City of New Orleans*, 491 U.S. 350, 370-73, 109 S. Ct. 2506, 105 L. Ed. 2d 298 (1989) (describing inquiry), because it clearly became judicial when Field filed his petition for mandamus in state court, seeking review of the BPA's decision. Therefore, the *Younger* test is applicable.

Prong one of the test is satisfied because Field's mandamus action was pending at the time this suit was filed. It is irrelevant that the state mandamus action was stayed by the stipulation of the parties to allow the federal suit to proceed. As we made clear in *Wiener v. County of San Diego*, 23 F.3d 263 (9th Cir. 1994), our inquiry on prong one of the Younger test is not on what is currently occurring in the state proceedings, but is focused on the narrow question of whether they were pending at the time the federal suit was filed, *id.* at 266; *see also Kitchens v. Bowen*, 825 F.2d 1337, 1341 (9th Cir. 1987), and Field's mandamus action was pending at that time. Because the whole point of *Younger* abstention is to stop federal interference with state proceedings, it seems backwards to reject abstention because the state proceedings have been stayed to allow the federal case to proceed. This is exactly the interference that *Younger* abstention is designed to prevent.

Prong three is indisputably satisfied, leaving only prong two, which is also clearly met. The City has a strong interest in its land-use ordinances and in providing a uniform procedure for resolving zoning disputes. *Cf. Mission Oaks Mobile Home Park v. City of Hollister*, 989 F.2d 359, 361 (9th Cir. 1993) (recognizing strength of municipal interest in rent control); *Rancho Palos Verdes Corp. v. City of Laguna Beach*, 547 F.2d 1092, 1094-95 (9th Cir. 1976) (recognizing California municipalities' interest in land-use regulation). We have held that strong, local, *i.e.*, municipal, interests in land-use regulation qualify as important "state" interests for

purposes of Younger abstention. *Mission Oaks*, 989 F.2d at 361.

Accordingly, all three requirements for *Younger* abstention have been met. Therefore, we affirm the district court's denial of leave to amend Field's complaint as futile, albeit on the ground that his equal protection claim would have been barred by *Younger*.

IV. PULLMAN ABSTENTION

From the foregoing analysis, it is clear that Field has partially survived the first hurdle in this case. That is, he has convinced us that he has a live facial Takings Clause challenge to the 1990 HCO based on the theory that the HCO is not sufficiently related to legitimate state interests. His other claims—the as-applied takings claim, and his equal protection claim—do not clear the first hurdle, and we now put them aside.

On the live constitutional claim, we turn to the second hurdle: "Is this conflict really necessary?" Because of the state law issues in this case, we must answer this question in the negative and invoke *Pullman* abstention.

Pullman abstention is an equitable doctrine that allows federal courts to refrain from deciding sensitive federal constitutional questions when state law issues may moot or narrow the constitutional questions. Abstention is appropriate when: (1) the federal plaintiff's complaint requires resolution of a sensitive question of federal constitutional law; (2) the constitutional question could be mooted or narrowed by a definitive ruling on the state law issues; and (3) the possibly determinative issue of state law is unclear. *Sinclair Oil*, 96 F.3d at 409 (citing *Pearl Inv. Co.*, 774 F.2d at 1463); *Rancho Palos Verdes Corp.*, 547 F.2d at 1094. Once *Pullman* abstention is invoked by the federal court, the federal plaintiff must then seek a definitive ruling in the state courts on the state law questions before returning to the federal forum. *Pullman*, 312 U.S. at 501-02, 61 S. Ct. 643; *Rancho Palos Verdes Corp.*, 547 F.2d at 1096.

Ironically, it is Field who urges us to abstain under *Pullman*. Normally, of course, *Pullman* abstention is invoked by the defendant, not only because it is the plaintiff who initially chose the federal forum (and thus presumably wants it), but because *Pullman* abstention tends to delay resolution of the plaintiff's constitutional claims. *See Arizonans for Official English*, 117 S. Ct. at 1073. Unsurprisingly, the City views Field's **[*1105]** request for abstention as an outrageous act of chutzpah, and argues that Field should be stuck with the federal forum he chose. Although we have some sympathy for the City's position, we agree with Field that a plaintiff may raise *Pullman* abstention just as a defendant may, and he may do so for the first time on appeal.

Pullman abstention does not exist for the benefit of either of the parties but rather for "the rightful independence of the state governments and for the smooth working of the federal judiciary." *Pullman*, 312 U.S. at 501, 61 S. Ct. 643 (internal quotation marks omitted). As the Seventh Circuit has explained: "When a court abstains in order to avoid unnecessary constitutional adjudication . . . it is not seeking to protect the rights of one of the parties; it is seeking to promote a harmonious federal system by avoiding a collision between the federal courts and state (including local) legislatures." *Waldron v. McAtee*, 723 F.2d 1348, 1351 (7th Cir. 1983) (citation omitted). There is no reason why federal defendants should have a monopoly on preserving the harmonious functioning of the federal and state court systems, and there is no reason why a federal plaintiff cannot also argue for *Pullman* abstention. We are not concerned with tactical advantages to be gained from invoking *Pullman* abstention, but only with the comity reasons for abstention, and we willingly accept the suggestion by any party on how better to serve those interests.

Nor do we refuse to consider *Pullman* abstention because it was not raised before the district court. We assume 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. But we have held that the court of appeals may *sua sponte* consider *Pullman* abstention. *Richardson v. Koshiba*, 693 F.2d 911, 915-17 (9th Cir. 1982); *see also Barichello*, 98 F.3d at 955. And it is obvious that, if we ourselves can raise an issue for the first time on appeal, then the parties may do so as well. In any event, having determined that Field has properly raised the abstention question, we now decide whether to invoke the doctrine here.

The federal claim in this case is the facial takings challenge to the 1990 HCO, and we have "consistently held that land use planning is a sensitive area of social policy that meets the first requirement for *Pullman* abstention." *Sinclair Oil*, 96 F.3d at 401 (quoting *Kollsman v. City of Los Angeles*, 737 F.2d 830, 833 (9th Cir. 1984)); *see also Rancho Palos Verdes Corp.*, 547 F.2d at 1094-95; *Sederquist v. City of Tiburon*, 590 F.2d 278, 281-82 (9th Cir. 1978).

The second and third requirements for *Pullman* abstention are met as well. Field's entire case—the applicability of the HCO and the need to obtain a conditional use permit—hinges on the designation of his hotel as "residential." Yet, that is precisely the designation he is challenging in his state mandamus action. In that action, he claims that the BPA erred as a matter of state law in ignoring the actual use (as opposed to the stated use) of his hotel prior to 1990. This claim will necessarily require the court to decide on the meaning of a prior non-conforming use under municipal zoning law, what effect should be given to Irribarren's mistaken designation of the hotel's rooms as residential, and whether a change in zoning designation also alters the hotel's residential/tourist designation under the HCO. These are all uncertain issues of state law, and a state court reversal of the BPA's ruling would moot Field's constitutional claim.

In these circumstances, *Pullman* abstention is appropriate. We reverse[6] the district court's dismissal of Field's

[6] We style this a "reversal" because under our precedents, a holding that the district court should have abstained under *Pullman* is deemed a reversal of a dismissal. *E.g., Isthmus Landowners Ass'n v. California*,

facial takings claim and remand with instructions to enter a stay under *Pullman*.

V. THE PERMIT STREAMLINING ACT

Field's final claim in this case is a supplemental state law claim under the California Permit Streamlining Act. Cal. Gov't Code § 65920 *et seq*. The City argues that this **[*1106]** claim is moot because, since the notice of appeal was filed, it has granted Field the variance he sought for off-street parking. Field does not deny this assertion. In fact, although Field mentions the Permit Streamlining Act in the course of discussing *Pullman* abstention, he never actually says that he has a live claim under that act, he does not mention any such claim in the "issues on appeal" section of his brief, and he does not ask us to reverse the district court's dismissal of this claim. Field has therefore either abandoned this claim on appeal, or tacitly conceded its mootness. Either way, we affirm the district court's dismissal of this state law claim.

VI. CONCLUSION

We affirm the district court's dismissal of Field's as-applied takings claim, the denial of leave to amend the complaint to state an equal protection claim, and the dismissal of the Permit Streamlining Act claim. We reverse the district court's dismissal of Field's facial takings claim and remand with instructions to abstain under *Pullman*.[7] Each side shall bear its own costs on appeal.

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601 F.2d 1087, 1091 (9th Cir. 1979); *Santa Fe Land Improvement Co. v. City of Chula Vista*, 596 F.2d 838, 842 (9th Cir. 1979).

[7] When Field presents his state law claims to the California courts, he is free to present his federal takings claim to them as well. *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 420-21, 84 S. Ct. 461, 11 L. Ed. 2d 440 (1964). If he wishes to retain his right to return to federal court for adjudication of his federal claim, he must make an appropriate reservation in state court. *Id.* at 421, 84 S. Ct. 461; *see also United Parcel Serv., Inc. v. California Pub. Util. Comm'n*, 77 F.3d 1178, 1182-88 (9th Cir. 1996) (discussing *England* reservation).

AFFIRMED in part, REVERSED and REMANDED in part.