No. 18-294

In The
Supreme Court of the United States

NICHOLAS HONCHARIW, TTEE,

Petitioner,

v.

COUNTY OF STANISLAUS, BOARD OF SUPERVISORS OF THE COUNTY OF STANISLAUS,

Respondents.

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

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REPLY BRIEF

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INTRODUCTION

The Brief in Opposition cites no misstatement of fact or law that bears on what issues properly would be before this Court if certiorari were granted. *See* Sup. Ct. Rule 15. The questions presented remain cleanly presented.

REASONS FOR GRANTING THE PETITION

I. THE PETITION IS BASED ON THIS COURT'S CRITERIA FOR CERTIORARI.

Contrary to the Brief in Opposition, the Petition is not based upon an "asserted error consist[ing] of . . . the misapplication of a properly stated rule of law." Opp. at 5. Although the decision below pays homage to *Williamson*, it baldly misstates the rules of law stated in *Williamson* and elaborated in *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340 (1986). Instead of correctly stating that a claim ripens (and thus accrues) only upon a "final, definitive position regarding how [an administrative agency] will apply the regulations at issue to the particular land in question," *id.* at 191, the decision below framed the test as whether petitioner knew or had reason to know of his claims, which it held occurred upon disapproval of his subdivision in 2009. It went on to rule that the disapproval represented the "final administrative decision" required under *Williamson*, but *Williamson* requires a "final, definitive position" as to permitted development of a particular property, not the "final administrative

decision" with regard to a particular application. Appendix A at App. 3-4. The Petition contends that the decision below by a United States court of appeal has decided an important question of federal law in a way that conflicts with relevant decisions of this Court. Sup. Ct. Rule 10(c).

II. THE DECISION BELOW ERRONEOUSLY DENIED HONCHARIW A HEARING ON THE MERITS FOR HIS TAKING AND DUE PROCESS CLAIMS.

The Brief in Opposition restates the analysis of the decision below without breaking relevant new ground. It is notable, nevertheless, for validating the California court of appeal's holding that the 90-day limitations period set by *Hensler v. City of Glendale,* 8 Cal.4th 1 (1994), is absolute, confirming the inadequacy and unavailability of a remedy for taking claims which do not ripen within that short period: "*Hensler* had held that *all* claims challenging a local government's subdivision decisions – including inverse condemnation claims – must be brought within the . . . 90-day statute of limitations." Opp. at 3 (*ital. in orig*.) The sole exception recognized by the California court of appeal was a slight expansion of the sole exception recognized in *Hensler* – a later suit for damages was allowed if but only if grounded in a final judgment of a compensable taking or other constitutional claim resulting from a filing itself made within the 90-day limitations period. *Honchariw, Ttee v. County of Stanislaus*, 238 Cal.App.4th 1, 14 (2015).

The court of appeal did not analyze and hold that Honchariw's particular taking claim was ripe upon disapproval of his application in 2009. In dismissing his claim as time-barred, the court of appeal simply recited and applied the bedrock rule of *Hensler* that a taking claim is ripe upon disapproval of an application – period – even if the amount of compensation is then unknowable:

> "Such a challenge to the validity would be ripe when the mandamus petition is filed and, therefore, section 66499.37 requires that challenge be brought within 90 days even though the exact parameters of any compensation for the taking cannot be determined. . . . [*Hensler*, *supra*, at p.11]"

Honchariw, Ttee II at 13-14. *Hensler* had specifically provided that "the statute of limitations for initiating a judicial challenge to the administrative action runs from the date of the final adjudicatory administrative decision," *id.* at 22, which was the "final administrative action approving or rejecting the tentative map." *Id*. at fn. 11.

This rule of course flies in the face of *Williamson*, which explicitly recognizes that a judgment of a taking is premature without knowledge of the ultimate economic impact of the decision under *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978).[1]

[1] As noted in the Petition, it also flies in the face of the subsequent California Supreme Court decision in *Landgate, Inc. v. California Coastal Comm.*, 17 Cal.4th 1006 (1998), accepting the *Williamson* approach.

Williamson recognized that this knowledge did not just affect the question of damages but the very question whether a taking had occurred. It is the need for such complete knowledge that is the basis for the *Williamson* standard of a final, definitive determination of permitted development of a particular property. The rule renders California procedures unavailable and inadequate for taking (and due process) claims which, as here, do not ripen under *Williamson* until after expiration of the limitations period.

III. HONCHARIW'S CLAIMS ARE VIABLE AND DESERVE AN OPPORTUNITY FOR HEARING ON THE MERITS.

1. *San Remo Hotel L.P. v. City & Cty. of S.F.*, 545 U.S. 323 (2005), and the accompanying citations are inapposite. This Court was "concerned only with issues actually decided by the state court that are dispositive of federal claims. . . ." *Id*. at 343-44. While *San Remo* would bar federal litigation of Honchariw's federal taking (and due process) claims if the state courts resolved them (or perhaps just congruent state claims) on the merits, the merits were never addressed by the California courts here. They were dismissed as time-barred under *Hensler*.

The County neglects to acknowledge that claim preclusion attaches only to a final judgment on the merits under California law and that a final judgment of dismissal based on a statute of limitations is not a "judgment on the merits":

> "It is settled that the doctrine of res judicata precludes parties . . . from relitigating a cause of action that had been finally determined by a court of competent jurisdiction. [citations omitted] However, a judgment not rendered on the merits does not operate as a bar. [citations omitted]
>
> Termination of an action by a statute of limitations is deemed a technical or procedural, rather than a substantive, termination. [citation omitted] 'Thus the purpose served by dismissal on limitations grounds is in no way dependent on nor reflective of the merits – or lack thereof – in the underlying action.' [citation omitted] In fact, statutes of limitation are intended to set controversies at rest by foreclosing consideration on the merits of the claim. [citations omitted]"

Koch v. Rodlin Enterprises, Inc. (1990) 223 Cal.App.3d 1591, 1595-96. Accordingly Honchariw's claims are not subject to preclusion.[2]

The County's citations to *Adam Bros. Farming, Inc. v. City of Santa Barbara*, 604 F.3d 1142 (9th Cir. 2010) and *Palomar Mobilehome Park Ass'n v. San Marcos*, 989 F.2d 362 (9th Cir. 1993) are similarly

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[2] The Superior Court of Stanislaus County expressly acknowledged in its ruling that Honchariw did take a reservation under *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964) in his Second Amended Complaint after demurrers were sustained for untimeliness to his earlier complaints, Appendix D at App. 48, but that reservation is of course unnecessary here.

unavailing because they, too, both dealt with attempts in federal court to relitigate claims which had been decided on the merits in state court. In *Adam Bros.*, the Ninth Circuit, acknowledging *San Remo*, turned to California law and affirmed that res judicata requires a "final judgment on the merits," which the court observed had been reached in that case. *Id.* at 1148-49. In *Palomar*, the court observed that the "appellate court dealt with Palomar's federal claims at length and found that no taking had occurred." *Id.* at 363.

2. Honchariw appealed the district court's dismissal of his due process claim for failure to state a cause of action, but the decision below never reached the issue and it is not in issue here. In fact, as stated in the complaint, the Superior Court of Stanislaus County had overruled the County's demurrer on the merits. Appendix D at App. 47. The complaint recited a series of extreme circumstances justifying the claim, Appendix D at App. 39-42, which dealt not with the broad discretionary powers of an administrative agency to approve or disapprove a subdivision application under traditional wide-open criteria but the duties of an agency to comply with California's Anti-NIMBY Law mandating approval of qualified residential subdivisions absent a specific, adverse impact to public health or safety which cannot be mitigated or avoided. Appendix D at App. 33. Honchariw enjoyed a protected statutory entitlement.

IV. HONCHARIW IS NOT ARGUING FOR A DIVERSION OF LAND USE DISPUTES TO THE FEDERAL COURTS . . . JUST ACCESS WHERE, AS HERE, STATE COURTS FAIL TO PROVIDE THE CERTAIN, AVAILABLE AND ADEQUATE REMEDY ENVISIONED IN *WILLIAMSON*.

If California were to provide a certain, available and adequate remedy for a taking claim arising out of a subdivision disapproval where – in normal course – a final, definitive determination of the permitted use of property is not made until after expiration of the 90-day *Hensler* limitations period, *Williamson* would require resort to the state courts. Honchariw is not challenging that requirement. But of course access to federal court must remain open where state procedures are uncertain, unavailable or inadequate.

The issue which is highlighted here is whether a plaintiff should be required to exhaust state judicial remedies where there are "serious concerns about the adequacy of the procedures," as required by *Carson Harbor Village v. City of Carson*, 353 F.3d 824 (9th Cir. 2004). Such a requirement carries great costs of time, money, and effort, and, as here, may expose a claimant to a gauntlet of threats of sanctions. A state that wants to channel land use taking proceedings into state courts has every means to provide certain, available and adequate procedures to do so. If it does not, it can scarcely complain if claimants want direct access to federal courts.

CONCLUSION

The Court should grant the Petition for Writ of Certiorari.

DATED: November 29, 2018

Respectfully submitted,

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Counsel for Petitioner