No. _____

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether taking and due process claims arising from a subdivision disapproval ripen under *Williamson County Regional Planning Commission et al. v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985) upon disapproval of an initial application or only upon a final, definitive determination of permitted use of property.

Whether the procedure set up by the California Supreme Court requiring that all challenges to a subdivision decision be filed within 90 days – and barring later claims – provides an available and adequate state remedy under *Williamson* for taking claims which do not ripen until later.

LIST OF ALL PARTIES

The party to the judgment from which review is sought is Petitioner Nicholas Honchariw, Trustee of the Honchariw Family Trust U/A/D March 8, 1991, as amended. He was a party in all proceedings below.

Respondents are the County of Stanislaus and the Board of Supervisors of the County of Stanislaus.

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PETITION FOR A WRIT OF CERTIORARI

Nicholas Honchariw, Trustee of the Honchariw Family Trust U/A/D March 8, 1991, as amended, respectfully requests that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Memorandum Opinion of the Ninth Circuit Court of Appeals is unpublished. It is attached hereto as Appendix (App.) A. The Memorandum Decision of the district court is reported at *Honchariw, Ttee v. County of Stanislaus*, No. 1:16-cv-01183-LJO-BAM (E.D.Cal. Nov. 14, 2016). It is attached hereto as Appendix B.

JURISDICTION

The lower court had jurisdiction over this case under 28 U.S.C. § 1331, 42 U.S.C. § 1983, and the Fifth Amendment to the United States Constitution. The Court of Appeals for the Ninth Circuit entered final judgment on March 22, 2018. Appendix B at App. 5. Honchariw filed a request for rehearing which was denied April 27, 2018. Appendix C at App. 22. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AT ISSUE

The Fifth Amendment to the U.S. Constitution provides, "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

INTRODUCTION

This case offers a glaring example of the continuing pervasive misunderstanding of the ripeness requirements in taking and due process claims set by this Court in *Williamson County Regional Planning Commission et al. v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), and lays bare the unavailability and inadequacy of the exclusive procedure set forth by the California Supreme Court for taking claims which do not ripen until after expiration of the 90-day limitations period set by the court for challenging a subdivision disapproval.

After overturning the 2009 disapproval of his small residential lot subdivision in rural California at the California court of appeals under the California "Anti-NIMBY Law" (Gov't Code § 65589.5), Honchariw secured reconsideration and approval of his application by the County in May 2012. He then filed an action in state court seeking just compensation and damages under taking and due process claims in December 2012 for the temporary taking and deprivation of due

process under the extreme circumstances of the disapproval and subsequent proceedings.

Affirming the superior court, the California court of appeals dismissed the complaint as untimely for failure to file within 90 days of the 2009 disapproval under Cal. Gov't Code § 66499.37 per the requirements crafted by the California Supreme Court in *Hensler v. City of Glendale*, 8 Cal.4th 1 (1994). The California Supreme Court denied Honchariw's petition for review.

Honchariw filed this action on the basis that state relief was unavailable and inadequate. He could not have filed his claims within 90 days of disapproval under *Williamson*. *Williamson*'s first basic principle of ripeness was that a taking (or due process) claim was not ripe until a final, definitive determination of the permissible development of property, and that was not achieved here until the 2012 approval of his subdivision, three years after the *Hensler* limitations period had expired. Honchariw never had the opportunity under the *Hensler* framework to present his claims in state court.

But the district court dismissed his claims, and the decision below affirmed, on the basis that Honchariw's claims were ripe upon disapproval in 2009, so he could have filed, under the standard that Honchariw then knew or had reason to know of the injury which was the basis for the action. Both courts viewed this as an unremarkable example of untimely filing under available state court procedures. The result is that Honchariw never had an opportunity to present his claims for

just compensation for a temporary taking and damages for deprivation of due process.

The decision below was stone-cold wrong under *Williamson*. Honchariw's claims only ripened upon the "final, definitive" decision of the County in the form of the 2012 approval. Honchariw was entitled to present his claims in federal court under *Williamson* since he never had any opportunity to present them in state court. The decision below misread its own holding years earlier in *Norco Construction, Inc. v. King County*, 801 F.2d 1143 (9th Cir. 1986), directly on the heels of *Williamson*.

This case presents a clean opportunity to reaffirm the basic principles of ripeness, to declare the unavailability and inadequacy of the California procedures in cases where claims are not ripe until after the state limitations period expires, and to reaffirm the promise of *Williamson* that a claimant is entitled to present his claims in federal court where denied access in state court because of unavailability and inadequacy of state procedures. It raises the question whether state court proceedings should be required absent clearly available and adequate state procedures. In this respect, it may be a useful sister case to the Court's grant of certiorari in *Knick v. Township of Scott*, Docket No. 17-647, challenging *Williamson*'s second ripeness requirement of unsuccessful state court action.

STATEMENT OF THE CASE

A. Factual Background

1. Subdivision Disapproval

In 2006, Honchariw, Ttee, filed an application to subdivide 19 acres of rural property into 7 custom home lots. Appendix D at App. 32. Overriding the favorable recommendation of its planning staff, the County disapproved his application for Vesting Tentative Map 2006-06 ("VTM 2006-06") in May 2009 in the face of vocal neighborhood opposition. Over Honchariw's objection, the County refused to apply Cal. Gov't Code § 66589.5(j) of the Anti-NIMBY Law, which expressly directs that proposed residential subdivisions such as VTM 2006-06 that comply with objective general plan and zoning requirements can only be disapproved upon written findings supported by substantial evidence of a specific, adverse effect upon public health or safety that cannot be avoided or satisfactorily mitigated. The legislative history makes clear the intent to prevent local agencies from succumbing to NIMBY opposition for housing projects, which was found to drive up the cost and limit the availability of state housing. *See Honchariw, Ttee v. County of Stanislaus*, 200 Cal.App.4th 1066, 1075 (2011) (*Honchariw, Ttee I*). Although planning staff had found, and the Board did not question, that VTM 2006-06 complied with general plan and zoning requirements, the Board refused to apply the law and found that the property was "unsuitable" for the development under its usual discretionary standards for subdivisions. Appendix D at App. 34-36.

2. Approval after Disapproval Set Aside by State Court Action

Honchariw timely filed a petition for writ of mandate to set aside the disapproval as unlawful within the 90-day limitations period of Cal. Gov't Code § 66499.37 of the California Subdivision Map Act (Cal. Gov't Code § 66410) ("SMA") and ultimately succeeded in securing a unanimous court of appeal decision ordering issuance of a writ directing the Board to set aside its disapproval and reconsider the decision under the Anti-NIMBY Law. *Honchariw, Ttee I.* Doing so, the Board was unable to make written findings of any specific, adverse effect upon public health or safety which could not be avoided or satisfactorily mitigated and approved the application. Appendix D at App. 42.

B. State Court Procedure

However, the approval came more than 3 years after disapproval and 6 years after submission of the application.

1. Superior Court.

On December 12, 2012 Honchariw filed a complaint in the Superior Court for Stanislaus County seeking just compensation, damages and other relief for taking and due process claims arising from the 2009 disapproval of his subdivision in violation of the Anti-NIMBY Law in accordance with the second *Williamson* ripeness requirement of state litigation. Appendix D at App. 46-47.

The gravamen of the complaint was that the delay was not a normal incident of the regulatory process but that the Board's disapproval and course of conduct in opposing Honchariw's subdivision application and mandamus action was arbitrary and capricious action and/or willful and deliberate obstruction of his statutorily-protected property rights under the Anti-NIMBY Law. In light of its substantial and objective restrictions on a local agency's discretion to deny an application, the Anti-NIMBY Law had been ruled to create a constitutionally-protected property interest. *North Pacifica, LLC v. City of Pacifica*, 24 F.Supp.2d 1053, 1059-60 (N.D.Cal. 2002). The Complaint alleged that the character of the regulatory action, its economic impact, and its effect upon Honchariw's reasonable investment-backed expectations supported a taking claim under the analysis of *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978), and that the character of the regulatory action and the nature of the affected interest supported a due process claim.

Specifically Honchariw alleged, *inter alia*, that the disapproval itself was in flagrant disregard and violation of the express language of the Anti-NIMBY Law, its stated purpose and legislative history, and case authorities. The only rationale stated by the County for disapproving the application was that the Anti-NIMBY Law was only applicable if the County first found that the subdivision satisfied all of the usual County subdivision requirements. The complaint alleged that this was arbitrary and capricious and/or a

deliberate obstruction of Honchariw's property interest since the Anti-NIMBY Law could thus always be sidestepped in exactly those circumstances where it was designed to apply. Appendix D at App. 36-37.

Further Honchariw alleged that repeated arbitrary and capricious conduct and/or willful and deliberate obstruction by the County in opposing Honchariw's mandamus action had caused prolonged and inexcusable delay. Appendix D at App. 25-26. Allegations included an unlawful delay of almost 6 months beyond the 30-day statutory allowance in producing the administrative record and contrived misrepresentation to the trial court that the proposed lots did not connect to a public water and sewer system in violation of general plan and zoning requirements and thus did not qualify for the Anti-NIMBY Law. Appendix D at App. 38-40. Although no such claim had been made at the time of disapproval, the misrepresentation was accepted by the trial court at face value and became the sole basis for the trial court's denial of Honchariw's petition. Appendix D at App. 41. The court of appeal found "nothing in the record" to support the misrepresentation and reversed. *Honchariw, Ttee I*, at 1071.

The County demurred on a variety of grounds, including on the merits and untimeliness under the 90-day limitations period of Cal. Gov't Code § 66499.37 to challenge the disapproval. Appendix D at App. 47-48. The court rejected the demurrer as to all grounds except for untimeliness under § 66499.37 as construed by the California Supreme Court in *Hensler v. City of Glendale*, 8 Cal.4th 1 (1994). Honchariw took a so-called

England exception to reserve his rights for federal review of his federal claims. Appendix B at App. 7-8.

2. Court of Appeal.

Honchariw timely appealed to the California Fifth District Court of Appeal on March 20, 2014. On June 3, 2015, the court of appeal affirmed the dismissal in *Honchariw, Ttee v. County of Stanislaus*, 238 Cal.App.4th 1 (2015) (*Honchariw, Ttee II*), as untimely under *Hensler* because it was not filed within 90 days after disapproval and did not qualify for the 2-step exception crafted in *Hensler*. Although Honchariw had timely set aside the 2009 disapproval, he had not filed a taking claim and secured a final judgment of a taking within 90 days of disapproval and therefore did not qualify to file a claim for just compensation later under the 2-step *Hensler* procedure. *Id.* at 4-5. The California Supreme Court denied Honchariw's petition for review on August 10, 2015.

C. District Court Procedure

Honchariw then filed the underlying complaint on August 10, 2016, alleging taking and due process claims arising out of the County's disapproval of his subdivision. The County moved to dismiss without leave to amend, contending that both claims were barred by res judicata, *Williamson*, and the applicable statute of limitations, and that his due process claim failed to state a cause of action. Appendix B at App. 5-6. On November 14, 2016 the court granted the motion

to dismiss without leave to amend, finding that the taking claim was not ripe – and could never ripen – because of Honchariw's failure to file his state claim within the 90-day *Hensler* limitations period, Appendix B at App. 16-19, and that the due process claim was time-barred and failed to state a claim. Appendix B at App. 19-21. Honchariw timely appealed to the Ninth Circuit.

D. The Ninth Circuit Decision

At the Ninth Circuit, Honchariw argued, first, that he was entitled to bring his taking claim under *Williamson* on the grounds that the state court procedure was unavailable and inadequate as applied to him because he could never have complied with the 90-day limitations period since his claims did not ripen until the final, definitive determination of the County as to permitted development of the property upon approval in May 2012, and second, that since his due process claim similarly did not ripen until 2012, he was not barred by the 2-year statute of limitations under § 1983 and stated a viable due process claim.

The Ninth Circuit affirmed the district court's dismissal on the basis that both the taking and due process claims ripened with the 2009 disapproval, not the 2012 approval, so that a state court remedy was available and adequate. Honchariw had the full 90-day *Hensler* limitations period to file his taking claim in state court and a full 2 years to file his § 1983 claim. By failing to timely file his state court action within 90 days, he forfeited his right to bring this federal action

by failing to comply with *Williamson*'s second ripeness requirement, and his due process claim was untimely under the applicable 2-year limitations period of § 1983.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's decision directly conflicts with this Court's precedent in *Williamson*, elaborated and reaffirmed in *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340 (1986), and reveals such a deep misunderstanding of the first basic principle of ripeness for both taking and due process claims that restatement and reaffirmation are called for. When it is recognized that his claims were not ripe until his 2012 approval, the decision below lays bare the inadequacy and unavailability of California procedures to compensate claimants such as Honchariw with a taking claim arising from a subdivision disapproval where, as here and in normal course, the claim does not ripen until after expiration of the short 90-day *Hensler* limitations period, and, separately, denies any recourse to claimants with a due process claim that does not ripen until after the § 1983 limitations period. The Court should reaffirm that the federal courthouse remains available in such instances to protect the constitutional right of claimants to present their claims.

I. THE DECISION BELOW REVEALS A COMPLETE MISUNDERSTANDING AND DIRECTLY CONFLICTS WITH THE BASIC RIPENESS REQUIREMENT ESTABLISHED BY THE COURT IN *WILLIAMSON* AND ELABORATED IN *MACDONALD*.

Identifying the "thrust of Honchariw's argument . . . that neither claim ripened until the 2012 approval," Appendix A at App. 2-3, the decision below concluded:

> ". . . the challenged deprivation of use of property took place in 2009 with the permit denial, and thus all grievances stem from that action. See *TwoRivers v. Lewis*, 174 F.3d 987, 991 (9th Cir. 1999) ("[A] claim accrues when the plaintiff knows or has reason to know of the injury which is the basis of the action.").
>
> "The cases on which Honchariw relies recognize that claims based on regulatory denials of property accrue when there has been a final administrative decision under state law as to the claimed denial. *See Williamson Cty*, 473 U.S. at 186; *Norco Constr., Inc. v. King Cty*, 801 F.2d 1143, 1145 (9th Cir. 1986). That final decision here was the Board's 2009 denial, not its 2012 approval. Indeed if an owner had to wait for a favorable result he might never be able to challenge a denial as a violation of federal rights."

Appendix A at App. 3-4. Because Honchariw did not file a state inverse condemnation action within 90 days of disapproval in 2009, the decision below held that he failed to comply with the second *Williamson* ripeness

requirement of exhausting state remedies, and because he did not file his due process claim within 2 years of the disapproval, it held he was time-barred by the 2-year limitations period applicable to § 1983 actions. These determinations are stone-cold wrong under *Williamson* and *MacDonald* and under the Ninth Circuit decision in *Norco Construction, Inc. v. King County*, 801 F.2d 1143 (9th Cir. 1986).

A. Taking Claim.

Honchariw pursued his taking claim in accordance with *Williamson*'s ripeness requirements and procedures. Two distinct ripeness requirements are stated. As capsulized by the Ninth Circuit in *Carson Harbor Village, Ltd. v. City of Carson*, 353 F.3d 824, 826-27 (9th Cir. 2004):

> "Under *Williamson*, an as-applied takings claim is ripe only if the plaintiff can establish that (1) 'the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulation to the property at issue,' and (2) the claimant has sought 'compensation through the procedures the state has provided for doing so.' 473 U.S. at 186, 194 [citation omitted] . . . "

Holding that disapproval was the "final" decision, so that the taking claim accrued upon disapproval, the decision below affirmed the district court's dismissal of Honchariw's taking claim as unripe under the second ripeness requirement because he had not pursued his

state court remedies in a timely manner within the 90-day *Hensler* limitations period. But *MacDonald* and *Williamson* expressly preclude that conclusion. They make clear that the claim accrued only when it became ripe under the first ripeness requirement over three years after disapproval when the subdivision was approved in 2012.

Under the first *Williamson* ripeness test, a taking claim arising from a disapproval of development is not ripe until a final, definitive determination of permitted development. Until final, definitive action is taken, a challenge is premature. In *Williamson*, where the developer had not sought possible variances to proceed with a development after a disapproval, the court elaborated:

> "respondent has not yet obtained a final decision regarding how it will be allowed to develop its property. Our reluctance to examine taking cases until such a final decision has been made is compelled by the very nature of the inquiry required by the Just Compensation Clause. Although '[t]he question of what constitutes a taking for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty [citation omitted], the Court consistently has indicated that among the factors of particular significance in the inquiry are the economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations. [citations omitted] Those factors simply cannot be evaluated until the administrative

> agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question."

Id. at 190-91.

The Court affirmed in *MacDonald* that this requires more than a disapproval of a single application. There a developer had filed a taking claim after disapproval of one subdivision application. Citing *Williamson*, the Court held the claim unripe:

> "[A]ppellant has submitted one subdivision proposal and has received the Board's response thereto. Nevertheless, appellant still has yet to receive the Board's 'final, definitive position regarding how it will apply the regulations at issue to the particular land in question'."

Id. at 351. This was the situation here upon disapproval in 2009. Honchariw's initial subdivision application had been denied but no "final, definitive position" had been reached regarding development. The decision below mistakenly conflated a "final" decision on a single subdivision application with a "final, definitive" decision with regard to permitted development of the property.

MacDonald recognized "[o]ur cases uniformly reflect an insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it." *Id.* at 351. This action illustrates why. At the time

of disapproval in 2009, any claim for a taking was inchoate. The County had flouted the Anti-NIMBY Law, claiming that the project first had to pass muster under local subdivision standards, but the claim was so flagrant that Honchariw had reason to expect an early set-aside, reconsideration and approval, with limited impact upon the project. Unfortunately, the County then took a series of further arbitrary and capricious and/or willful and deliberate steps to obstruct the mandamus action and the development, causing prolonged delays with serious economic impact upon the development. The totality of facts and circumstances only became fully known with the approval in 2012. That marked the final, definitive determination of the permitted use of the property. An action filed within 90 days of the disapproval would have been premature.

Without knowing the timing, scope, and nature of final, definitive action, the very question whether there has been a taking is simply unknowable. A final, definitive decision to bar any development casts a different light than a temporary bar to some development. A final, definitive disapproval of any development casts a different light than an approval of 2 lots, which casts a different light than an approval of 7 lots. A 3-year delay until a final, definitive decision casts a different light than a 3-month delay. In normal course, disapprovals do not ripen into constitutional taking and due process claims, and it would be utterly useless and wasteful to turn all of them into occasions for filing inchoate constitutional claims to avoid forfeiture of claims which may ripen.

This is why the generally-stated rule relied on by the decision below that a claim accrues when the plaintiff knows or has reason to know of an injury gives way under *Williamson* to the requirement of a final, definitive determination. This was explicitly recognized in *Norco*, which, like *MacDonald*, came right on the heels of *Williamson*. It presented facts analogous to ours. A developer applied for a plat (subdivision) approval in May 1977. Despite a state law requiring a local agency to act on an application within 90 days, the county had taken no action by October 1977 and in January 1978 it deferred action pending completion of a county plan review. In February 1979 the developer filed a petition for writ of mandate in state court to compel review and a decision. He secured a writ of mandate, but the county requested and was granted a stay pending appeal. The Washington Supreme Court affirmed in July 1982. In August 1982 the county approved the application. In February 1983 the developer sued in state court for damages resulting from the county's failure to act before August 1982. Under § 1983 the complaint alleged, *inter alia*, a taking and deprivation of due process. The county removed the case to federal court. The district court dismissed his claims for untimeliness under the 3-year state statute of limitations incorporated by § 1983 because the complaint was not filed within 3 years of October 1977. The district court concluded that the claims accrued then because the developer then knew or had reason to know of his claims. *Id.* at 1144-45. This was the standard invoked by the decision below.

The Ninth Circuit reversed. While acknowledging the general rule that a federal claim accrues when a plaintiff knows or has reason to know of its claims, the court concluded that the district court's result was "foreclosed by *Williamson.*" *Norco*, at 1145. *Williamson* required a different result:

> " . . . under federal law the general rule is that claims for inverse taking, and for alleged related injuries from denial of . . . due process by unreasonable delay or failure to act under mandated time periods are not matured claims until planning authorities and state review entities make a final determination on the status of the property. The duration of the wrongful taking may be relevant to determining whether a wrong has occurred, as well as the extent of the damage suffered."

Id.

The court went on to state:

> "The conclusion that a claim is premature for adjudication controls as well the determination that the claim has not accrued for purposes of limitations of actions. In suits for wrongful deprivation of property under 42 U.S.C. § 1983, the same considerations that render a claim premature prevent accrual of a claim for limitations purposes, and the claim does not accrue until the relevant governmental authorities have made a final decision on the fate of the property."

Id. at 1146.

The court thus held that the claims could not have accrued before August 1982 when the county made its final decision in approving the project. *Id.*

Williamson, MacDonald and *Norco* compel the conclusion that Honchariw's taking claim was not ripe upon disapproval in 2009 but only ripened upon approval in 2012. That was the "final, definitive position" on development of the property. Honchariw accepted the approval and its conditions.

B. Due Process Claim.

There is no disagreement that the statute of limitations for the § 1983 due process claim is 2 years, borrowing the California statute of limitations for personal injury claims per *Action Apartment Association, Inc. v. Santa Monica Rent Control Board*, 509 F.3d 1020 (9th Cir. 2007), but the decision below erred in affirming the district court's holding that the claim accrued upon disapproval in 2009:

> "The district court also correctly determined that Honchariw's federal due process claim is time barred. Honchariw's claim accrued when the application was denied in 2009."

Appendix A at App. 4.

Indeed, the district court had expressed its bewilderment at the concept that a due process claim accrued only upon approval: "Plaintiff asserts his due process claim, predicated on the Board's 2009 *denial* of his application, did not accrue until the Board

approved his application in 2012. Frankly, the Court does not follow the logic of this argument." (ital. in original) Appendix B at App. 20. The decision below demonstrated its own confoundment by its aside that if an approval were required, an owner "might never be able to challenge a denial as a violation of federal rights." Appendix A at App. 3-4. It seemed to infer that an approval was required. A "final, definitive" decision might be an approval, as here, but of course it might also be a final disapproval.

The decision below is again just wrong. Affirming the district court, it failed to recognize that the first *Williamson* ripeness requirement for a taking claim was explicitly held to apply to a due process claim as well. The due process claim was dismissed for lack of ripeness on the same grounds that the Court dismissed the taking claim:

> "Viewing a regulation that 'goes too far' as an invalid exercise of the police power, rather than as a 'taking' for which just compensation must be paid, does not resolve the difficult problem of how to define 'too far', that is, how to distinguish the point at which regulation becomes so onerous that it has the same effect as an appropriation of the property. . . . As we have noted, resolution of that question depends, in significant part, upon an analysis of the effect the Commission's application of the zoning ordinance and subdivision regulations had on the value of respondent's property and investment-backed profit expectations. That effect cannot be measured until a final

> decision is made as to how the regulations will be applied to respondent's property."

Id. at 199-200.

In *Norco*, accordingly, the Ninth Circuit applied the same rules for accrual of a due process claim as for accrual of a taking claim – no claim accrued until it was ripe with a final, definitive decision on permitted development. *Id.* at 1145-46. *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 864 F.2d 1475, 1481-82 (9th Cir. 1989). Thus, the claim was only ripe and accrued in May 2012 upon approval and Honchariw's December 2012 filing was timely.

This federal action was not filed until August 2016, more than 2 years after May 2012, but under California law the limitations period to file the claim was tolled during the pendency of the state court action. *Wilson v. Garcia*, 471 U.S. 261 (1985), expressly recognized that in addition to "the length of the limitations period," the "closely related questions of tolling and application are to be governed by state law." *Id.* at 269. "Designed to prevent unjust and technical forfeitures of the right to a trial on the merits when the purpose of the statute of limitations – timely notice to defendants of the plaintiff's claims – has been satisfied," the doctrine of equitable tolling has been long recognized in California to "suspend or extend a statute of limitations as necessary to ensure fundamental practicality and fairness." *McDonald v. Antelope Valley Community College Dist.*, 45 Cal.4th 88, 100 (2008). The district court acknowledged the doctrine but, on

its view that the claim accrued upon disapproval in 2009, found it of no avail since the December 2012 state court filing was already too late. However, since the claim only accrued upon approval in 2012, the December 2012 state court filing was timely and tolled the federal claim. As recognized by the district court, that claim was "materially indistinguishable" from the claim here. Appendix B at App. 20. The doctrine of course is especially appropriate when the initial action is linked to another, such as the taking claim here, which had to be filed in state court.

Accordingly this filing was timely. Excluding the period from filing of the state court action in December 2012 until denial of Honchariw's petition for review by the California Supreme Court in August 2015, the period from the approval on May 22, 2012 until filing of this federal action on August 10, 2016 was well under 2 years.

II. HONCHARIW TIMELY EXHAUSTED POSSIBLE STATE COURT PROCEDURES UPON RIPENING OF HIS TAKING CLAIM BUT THE PROCEDURES SET BY THE CALIFORNIA SUPREME COURT WERE UNAVAILABLE AND INADEQUATE AND HENCE UNCONSTITUTIONAL.

Upon holding Honchariw's taking claim ripe upon disapproval, the decision below, like the district court memorandum, threw Honchariw's claims into the wash with the many cases holding simply that failure to file timely in state court creates a permanent bar to

the federal courthouse. These cases are unremarkable – where a claimant actually had a reasonable opportunity to timely file a claim in state court, *Williamson* does close the federal courthouse door. *See, e.g.*, *Pascoag Reservoir & Dam, LLC v. Rhode Island*, 337 F.3d 87, 94 (1st Cir. 2003) (In affirming the dismissal of a regulatory taking claim in federal court for failure to pursue state remedies first, the court noted that "[a]dequate state remedies were available" but that "plaintiff simply ignored them until it was too late"). But they are inapplicable where, as here, adequate state remedies were not available.

When his taking claim ripened upon his 2012 approval, Honchariw had to exhaust state court procedures for just compensation under *Williamson*'s second ripeness requirement. Whether any procedures were available was uncertain. He did not have available and adequate procedures under the exclusive framework set by the California Supreme Court in *Hensler*. *Hensler* required that all claims be filed within 90 days of the disapproval under § 66499.37, subject only to a strict 2-step procedure allowing a claim of damages after a timely final judgment establishing a compensable taking. *Id.* at 7. He was 3 years too late unless he could qualify for the 2-step procedure, yet he could not qualify for the 2-step procedure because he had not secured a final judgment of compensable taking in an action filed within the 90-day period. Because his claim did not ripen until 2012, he could never have complied. The *Hensler* procedures did not provide the "reasonable, certain, and adequate provision for obtaining

compensation" required by the Fifth Amendment under *Williamson*. *Id.* at 194.

However, there seemed a possibility that the strict *Hensler* requirements had been loosened under *Kavanau v. Santa Monica Rent Control Bd.*, 16 Cal.4th 761 (1997), so Honchariw filed in state court, as required by the Ninth Circuit, but the court of appeal held that route unavailable. Honchariw exhausted his state court remedies, but since his taking claim only ripened after the 90-day *Hensler* limitations period, there were no available and adequate procedures.

A. Honchariw Could Not File A Taking Claim in 2009.

Since his taking claim was not ripe, Honchariw had no basis to file a taking claim upon disapproval under *Williamson*. *See, e.g.*, 7 Miller & Starr, Cal. Real Estate *Inverse Condemnation – Ripeness doctrine* § 23.34 p.23-181 (4th ed. 2017) ("There is no taking if the claim is not ripe."). He was actually barred – *Norco* expressly cautioned that a plaintiff was "required" not to file until claims were ripe. *Id.* at 1146.

A theoretical question could arise if, despite the lack of ripeness for his federal claim, Honchariw had a ripe state taking claim upon disapproval. In that case he could have filed a timely state claim. But the question is moot, for his state claim was similarly unripe. The California Supreme Court made clear in *Landgate, Inc. v. California Coastal Comm.*, 17 Cal.4th 1006

(1998), that it adhered to the *Williamson* standard of ripeness:

> "'Those [factors determinative of a taking] simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question.' [quoting *Williamson*]."

Landgate, at 1018. California courts have thus recognized that disapproval is not enough. A final, definitive decision must be reached, even if repeated applications and repeated disapprovals may be necessary, as illustrated in *Toigo v. Town of Ross*, 70 Cal.App.4th 309, 325-26 (1998) (two disapprovals insufficient for ripeness and taking claim premature since there still had not been a final, definitive decision regarding development).

B. No Timely Filing Was Possible Upon Ripening in 2012 Under *Hensler*.

Honchariw could not make a timely filing in 2012 under *Hensler*, even though his claim only ripened in 2012.

1. No Stand-Alone Filing.

Except as step two of a 2-step procedure, a filing in 2012 would have been untimely, whether within 90 days of the approval or not. The court of appeal confirmed that it would still have been three years too

late. Except for the 2-step exception, the 90-day limitations period was absolute:

> " . . . Honchariw's inverse condemnation action falls within the statutory text of section 66499.37 and is subject to the 90-day limitations period, unless the exception identified in *Hensler* applies."

Honchariw, Ttee II, at 14.

2. A Step Two Filing Was Not Possible Because of the Lack of the Requisite Final Judgment of Compensable Taking in Step One.

As affirmed by the court of appeal, *Hensler* specifically required a final judgment establishing a compensable taking in step one, timely filed during the 90 days following disapproval, to support a later claim for damages under a 2-step procedure. This was not possible.

C. Honchariw Tried A Possible Alternative Route under *Kavanau* But the Court of Appeal Held It Unavailable Because of the Lack of a Qualified Step One Under *Hensler*.

Since Honchariw could never have timely filed his claims under *Hensler*, California remedies were not "reasonable, certain, and adequate" under *Williamson*. While not "certain," another avenue appeared possible, however. It appeared under *Kavanau v. Santa Monica*

Rent Control Bd., 16 Cal.4th 761 (1997), that setting aside a challenged disapproval without a judgment of taking might be enough to allow a later filing for damages as step two, so that Honchariw might qualify. The court in *Kavanau* recognized that there had been no taking judgment, *id.* at 777, yet allowed a claim for damages to proceed years after expiration of the 90-day limitations period applicable to rent board challenges after a timely set-aside of a rent decision on a finding that the regulation had violated plaintiff's due process rights. Honchariw's set-aside was based on violation of the California Anti-NIMBY Law, so availability of the approach was uncertain. However, since the Ninth Circuit had made clear in *Carson Harbor Village* that a plaintiff had to test state procedures even in the face of "serious concerns about the adequacy" of the procedures, *id.* at 830, Honchariw filed in state court on the basis of *Kavanau*, arguing that the set-aside of the disapproval qualified as step one sufficient to support a later taking claim under the usual 5-year statute of limitations for inverse condemnation.

But the California court of appeal declined to interpret *Kavanau* as loosening the basic *Hensler* requirement that step two required a final judgment establishing a compensable taking in step one, or at least some other constitutional violation. A set-aside alone was insufficient. Since his 2012 filing did not qualify for the 2-step procedure under *Hensler*, the court held the claim untimely because not filed within 90 days of the 2009 disapproval. *Honchariw, Ttee II*, at 15.

D. Honchariw Exhausted Possible Procedures in an Accepted Timely Manner.

There was no available and adequate remedy. Honchariw could not comply with the possible loosening of *Hensler* under *Kavanau* because he did not have a ripe due process or taking claim under *Williamson* at disapproval.

The decision below backstopped its holding that the taking claim was ripe in 2009 with the suggestion that even if the claim did not ripen until approval in 2012, the court of appeal had signaled that Honchariw's December 2012 filing was too late. Thus he was still barred from federal court for failing to exhaust state remedies:

> "[t]he California Court of Appeal's 2015 decision observed that even if the inverse condemnation claim did not ripen until the Board's 2012 approval, Honchariw did not file his inverse condemnation claim until after the 90-day limitation period had expired. *See Honchariw*, 238 Cal.App.4th at 15. The district court thus correctly held that there was a failure to exhaust state law remedies."

Appendix A at App. 4. But this overstates the court of appeal opinion and misleads. The court of appeal recognized that there was never a window for a timely filing in 2012, whether or not the claim only ripened in 2012, except under the 2-step exception. *Honchariw, Ttee II*, at 14. A filing within 90 days would still have been 3 years too late unless it qualified under the 2-step exception, and the court of appeal held the 2-step

procedure unavailable without a final judgment of a compensable taking, or other constitutional claim, in step one.

The decision below referred to a modification made by the court of appeal upon Honchariw's request for a rehearing. The court denied the request but modified its opinion by appending an afterthought in the context of the 2-step procedure:

> "*[a]lternatively, even if the exception applied and the statute of limitations did not begin to run until the Board's May 22, 2012 approval of the project*, Honchariw's inverse condemnation complaint was untimely because it was filed in December 2012, well after the 90 days allowed by section 66499.37." (*ital. added*)

Honchariw, Ttee II, at 15. Of course, the assumptions were inherently incompatible. If Honchariw had a 90-day window in 2012 to file on the postulate that his claim only ripened then, he could not have complied with the court of appeal's requirement of a final judgment of taking (or deprivation of due process) in 2009.

But even putting that aside, any requirement to file step two within 90 days of ripening introduced an "out-of-the-blue" retroactive requirement for Honchariw that itself made California procedures unavailable and inadequate as applied to him. The court of appeal offered its afterthought without citation. The appropriate period for step two had been broadly acknowledged in such circumstances to be the statute of limitations for the underlying claims – 5 years for inverse

condemnation. This was the only appropriate framework where a challenged administrative action had already been set aside.

On its face § 66499.37 is narrowly directed at administrative action of an agency, board, or legislative body:

> "Any action or proceeding to attack, review, set aside, void, or annul the decision of an advisory agency, appeal board, or legislative body concerning a subdivision, or of any of the proceedings, acts or determinations taken, done, or made prior to the decision, or to determine the reasonableness, legality, or validity of any condition attached thereto, including, but not limited to, the approval of a tentative map or final map, shall not be maintained by any person unless the action or proceeding is commenced and service effected within 90 days after the date of the decision. Thereafter all persons are barred from any action or proceeding or any defense of invalidity or unreasonableness of the decision or the proceedings, acts, or determinations."

As with the many other very short statutes of limitations requiring prompt challenge to administrative regulation on any grounds, *Hensler*, at 28, the purpose for imposing a very short limitations period in preemption of the more normal limitations periods of years for taking, due process, and other claims was the perceived need to allow local agencies prompt notice of claims so that they could review and, if necessary,

adjust challenged action to avoid or minimize damages. *Hensler* explained at 27-28:

> "The purpose of statutes and rules which require that attacks on land-use decisions be brought by petitions for administrative mandamus, and create relatively short limitation periods for those actions, and actions which challenge the validity of land use statutes, regulations, and/or decisions, is to permit and promote sound fiscal planning by state and local governmental entities. As the Court of Appeal explained in *Patrick Media Group, Inc. v. California Coastal Comm.*, *supra*, 9 Cal.App.4th 592, 612: 'The requirement that challenges to administrative actions constituting takings be brought initially by administrative mandamus assures that the administrative agency will have the alternative of changing a decision for which compensation might be required'."

Once a decision is set-aside, the rationale to preempt the normal limitations period for claims disappears. The rationale is entirely inapposite where, as here, there is no further action to be taken. By timely set-aside, the disapproval had been vacated, and no continuing claim for just compensation could accrue. Honchariw was not challenging the 2012 approval, or any of its conditions, so that decision did not trigger a 90-day *Hensler* limitations period. There were no further grounds to preempt the normal limitations period for a taking, due process, or other claim, and nothing in *Hensler* directs that a claim for just compensation

after a set-aside of challenged action was itself subject to yet another 90-day limitations period.

The appropriate limitations period in similar circumstances had already been recognized by California courts as the statute of limitations for the underlying claim. After recognizing that a challenge to administrative action there had to be filed by petition for writ of mandate within 60 days, the court in *Patrick Media Group, Inc. v. California Coastal Comm.*, 9 Cal.App.4th 592 (1992), acknowledged that if a claimant had not joined an inverse condemnation action with a timely mandamus action, he had the usual limitations period of 5 years to file a claim for damages: "If the claimant initially filed only a mandamus action, he or she has five years from the effective time of the taking to file an inverse condemnation action. (citation omitted)." *Id.* at 614. *Patrick* was favorably cited in *Hensler*, *e.g.*, at 28-29.

This was echoed in authoritative California treatises at the time, *e.g.*:

> "When challenging land use regulations . . . , the practitioner should examine the regulatory scheme for any special statute of limitations. In *Hensler* [cite omitted], the supreme court held the 90-day limitation period of Govt. Code § 66499.37 applied to the property owner's challenge of a city's restrictions on that owner's plan to build a planned residential development. . . . *Hensler* did not require that the inverse suit for a taking be filed within 90 days; it could be filed at the same

> time as the invalidation action or later. See *Kavanau* [cite omitted]."

CEB, 2 Condemnation Practice in California (3d ed. Supp. October 2012) § 16.4. It went on to sanction the path taken by Honchariw:

> "The California Supreme Court in *Kavanau* [cite omitted] held that when the owner brings a timely action to set aside a regulatory action, a claim for damages may, but need not, be joined. The damages claim may be brought separately after a successful challenge. This is an exception to the general rule against splitting claims. It further clarifies that *Hensler* [cite omitted] did not demand that the inverse takings claim be filed within the short statute of limitations for challenging a decision under the Subdivision Map Act. The required first step can proceed to conclusion and a later suit for compensation is proper."

Id. at § 16.13 p.997.

Honchariw proceeded on that basis. That the County would argue that the 90-day *Hensler* limitations period was applicable not just upon disapproval but then somehow again after set-aside and approval, and the California court of appeal accept the argument in afterthought, demonstrates the unreasonable, uncertain, and inadequate, indeed ragtag, nature of California procedures. Holding Honchariw to such an ad hoc standard would be a retroactive limitation upending precedent and treatise understanding and would itself render California procedures unavailable and

inadequate as applied to him. As noted in comparable circumstances in *TwoRivers v. Lewis*, 174 F.3d 987 (9th Cir. 1999), quoting *Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994), "Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and conform their conduct accordingly." *Id.* at 995.

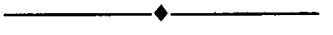
It is bad enough that the procedures are so ragtag. To worsen matters, claimants who seek to navigate the landscape may find themselves in a minefield. When Honchariw filed his complaint in state court on the directive in *Carson Harbor Village* that even an uncertain remedy had to be exhausted, the County sought to bludgeon counsel with a motion for sanctions under Cal. Code Civ. Proc. § 128.7 for filing "a frivolous complaint." Upon denial in the trial court, the County cross-appealed. The court of appeal also declined to impose liability, *Honchariw, Ttee II*, at 5, itself struggling with the issues, but the costs and chilling effect are of course real.

III. THE DECISION BELOW DENIED HONCHARIW AND WILL SERVE TO DENY SIMILARLY-SITUATED CLAIMANTS THEIR CONSTITUTIONAL RIGHTS TO CLAIM JUST COMPENSATION FOR A TAKING AND DAMAGES FOR DEPRIVATION OF DUE PROCESS.

This is exigent. Under the California court of appeal decision, there is no available and adequate remedy under California procedures for a taking claim

arising out of a subdivision (or other administrative) 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. While the California procedures for taking claims may work for ripe claims, as was the case in *Hensler*, almost 25 years later a claimant with a taking claim which ripens after expiration of the 90-day *Hensler* limitations period is still left without a remedy. Under the decision below, there is now no remedy in the federal courts either. It is past time to declare the right of California claimants such as Honchariw to full access to the federal courts without the unnecessary and wasteful need for state court litigation – possibly having to run the gauntlet of threatened sanctions under Cal. Code Civ. Proc. § 128.7 – unless and until California procedures are remedied. This cannot stand.

Moreover, the holding of the decision below that a due process claim is ripe upon a single disapproval in subdivision proceedings denies a remedy for due process claims where, in normal course, a final, definitive decision is not reached for the permitted development of property until after the expiration of the § 1983 limitations period. This, too, cannot stand.



CONCLUSION

The Court should grant the Petition for Writ of Certiorari.

DATED: July 26, 2018

Respectfully submitted,

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