No. ____

In The
Supreme Court of the United States

THOMAS GEARING and
DANIEL GEARING,
Petitioners,

v.

CITY OF HALF MOON BAY,
Respondent.

On Petition for Writ of Certiorari to
the U.S. Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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Question Presented

Thomas and Daniel Gearing are categorically prohibited from building on residentially zoned vacant land that the City of Half Moon Bay prefers as an open space public park. They exercised their choice of forum by filing a lawsuit in federal court under 42 U.S.C. § 1983, alleging a regulatory taking in violation of the Fifth Amendment, and seeking just compensation, costs, and attorneys' fees. The City responded by filing an eminent domain lawsuit in state court that significantly limits the issues and the Gearings' remedies. The City then convinced the federal court to abstain from deciding the Gearings' first-filed federal lawsuit under *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941). As a result of the forthcoming state court decision to which federal courts are bound to give full faith and credit, 28 U.S.C. § 1738, the Gearings will be deprived of full just compensation as well as other recovery authorized by the Civil Rights Act.

The question presented is:

Whether federal courts may deprive takings claimants of their chosen forum by invoking the prudential *Pullman* abstention doctrine to require them to first litigate their claims in state court.

Parties to the Proceedings and Rule 29.6

Petitioners Thomas A. Gearing and Daniel Gearing were the plaintiffs and appellants below.

Respondent City of Half Moon Bay was the defendant and appellee below.

Related Proceedings

Gearing v. City of Half Moon Bay, No. 21-16688, U.S. Court of Appeals for the Ninth Circuit, Judgment filed and entered Dec. 8, 2022.

Gearing v. City of Half Moon Bay, No. 3:21-cv-01802-EMC, U.S. District Court for the Northern District of California, Order issued Sept. 13, 2021.

City of Half Moon Bay v. Gearing, No. 21-CIV-01560, Superior Court for the State of California, County of San Mateo, Complaint filed Mar. 23, 2021.

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Petition for a Writ of Certiorari

Thomas Gearing and Daniel Gearing respectfully petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Ninth Circuit.

Opinions Below

The decision of the Ninth Circuit Court of Appeals is published at 54 F.4th 1144 (9th Cir. 2022) and reprinted at Pet.App.1. The decision of the district court for the Northern District of California is unpublished and reprinted at Pet.App.14. The Ninth Circuit's order denying rehearing is unpublished and reprinted at Pet.App.41.

Jurisdiction

The lower courts had jurisdiction over this case under the Fifth Amendment to the United States Constitution, 42 U.S.C. § 1983, 28 U.S.C. § 1331 (district court), and 28 U.S.C. § 1291 (Ninth Circuit). The Ninth Circuit entered final judgment on Dec. 8, 2022, Pet.App.1, and denied a petition for rehearing on January 17, 2023. Pet.App.41. This Court has jurisdiction under 28 U.S.C. § 1254(1). Justice Kagan granted an extension of time to file a Petition for Writ of Certiorari up to and including June 1, 2023.

Constitutional and Statutory Provisions At Issue

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

42 U.S.C. § 1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

28 U.S.C. § 1331 provides, "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

Introduction and Summary of Reasons for Granting the Petition

Thomas Gearing owns five undeveloped lots of land in Half Moon Bay, California. His son, Daniel, owns one similar lot gifted to him by his grandmother. The lots are scattered across a bluff near the ocean, interspersed among other single-family-home-sized lots owned by dozens of individual landowners. Pet.App.44. For 40 years, the City refused any landowner's attempt to build a house *and* refused to purchase any of the properties for an open space public park. Pet.App.14–15; ER.25. On October 1, 2020, Thomas Gearing submitted an application to build residences on the lots. Pet.App.54; ER.47. The City categorically rejected the application because that part of town lacked a specific land use plan with established development standards for the area. Pet.App.54; ER.29. The City's rejection did not involve the interpretation of any ambiguous or unsettled state or local laws. Pet.App.65–66.

The rejection denied the Gearings productive use of their lots and effectively converted them to open space for the benefit of the public. The Gearings sued in federal court seeking just compensation for the taking. To thwart liability in that action, the City filed an eminent domain action in state court and successfully moved for abstention of the federal regulatory takings action under *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496, 498–99 (1941). Pet.App.3–4. The City deposited $91,000 "probable compensation" in state court, Pet.App.62, based on its appraisal of the lands' value as open space. This is a fraction of the value of residential lots or the amount of just compensation the Gearings would recover upon a successful regulatory takings claim. Pet.App.47.

This access-to-courts case asks the Court to address a *Pullman* abstention obstacle that frequently prevents property owners, but rarely victims of other constitutional violations, from seeking vindication of their constitutional rights in federal court. *See Knick v. Twp. of Scott*, 139 S.Ct. 2162, 2170 (2019) (overturning state court exhaustion requirement for federal takings claims to "restor[e] takings claims to the full-fledged constitutional status"); *Pakdel v. City and Cnty. of San Francisco*, 141 S.Ct. 2226, 2230 (2021) (Civil Rights Act provides a "guarantee" of "a federal forum for claims of unconstitutional treatment at the hands of state officials.") (cleaned up).

The Ninth Circuit treated the federal regulatory takings claims and the eminent domain action as if they are entirely separate. Pet.App.8–10. They are not. Courts calculate fair market value based on lawful regulations in effect at the time of the take.

Palazzolo v. Rhode Island, 533 U.S. 606, 625 (2001). California follows this rule: "Permitting recovery in eminent domain disregarding the zoning restriction combines in one action the right to recover compensation for both the inverse condemnation resulting from the disguised taking in the form of zoning and for the actual taking of the property." *City of San Diego v. Rancho Penasquitos Partnership*, 105 Cal.App.4th 1013, 1032 (2003). If the Gearings raise the constitutionality of regulations in the state action, their federal claims are precluded by *San Remo Hotel, L.P. v. City and Cnty. of San Francisco*, 545 U.S. 323, 335 (2005), when they return to federal court. The only way to preserve the federal constitutional claims is to not raise them in state court, which is what the Ninth Circuit says they should do. Pet.App.9. The decision below requires the Gearing to litigate in state court about whether $91,000 appropriately measures just compensation for open space and then litigate in federal court for additional compensation because the $91,000 amount was depressed by the unconstitutional regulations. By forcing the Gearings to litigate the City's eminent domain action on matters that cannot meaningfully narrow or resolve their constitutional claims, the courts below deprived the Gearings of the federal forum otherwise guaranteed by the Fifth Amendment, 42 U.S.C. § 1983, and 28 U.S.C. § 1331.

Whether and how *Pullman* abstention applies in takings cases are issues of increasing national importance. Since *Knick* reopened the federal courthouse door to takings plaintiffs, local governments have been seeking ways to force property owners back into state court, where they feel confident of obtaining lower awards of just compensation.

Counsel for Half Moon Bay, Matthew Zinn, leads this effort, promoting a strategy that urges local governments to make use of "several tools," including abstention, "to try to force claims, in whole or in part, back into state courts." Laura D. Beaton & Matthew D. Zinn, Knick v. Township of Scott*: A Source of New Uncertainty for State and Local Governments in Regulatory Takings Challenges to Land Use Regulation*, 47 Fordham Urb. L.J. 623, 625 (2020).

This Court should end this strategy that denies property owners a federal forum for their takings claims and the full value of just compensation. *See Axon Enterprise, Inc. v. Federal Trade Comm'n*, 143 S.Ct. 890, 911 (2023) (Gorsuch, J., concurring in judgment) (28 U.S.C. § 1331, providing that district courts "*shall*" have jurisdiction over civil actions arising under the Constitution, "is as clear as statutes get."). As Sixth Circuit Judge Kethledge observed: "Federal courts have a 'virtually unflagging' obligation to exercise the jurisdiction that Congress has given them. Congress has given us jurisdiction to hear these takings claims. Our constitutional order would be better served, I respectfully suggest, if we simply adjudicated them." *Lumbard v. City of Ann Arbor*, 913 F.3d 585, 592 (6th Cir. 2019) (Kethledge, J., concurring) (citation omitted).

The petition should be granted.

Statement of the Case

A. The Gearings' property

In 1993, Thomas Gearing's family purchased six undeveloped lots of land in an area of Half Moon Bay known as "West of Railroad," referring to a 32-acre area between Railroad Avenue and the coast.

Pet.App.15. The Gearings' two smallest lots are adjacent; the others are distributed across the bluff.

ER.74. The Gearings' lots are outlined in red.

The West of Railroad area sits approximately 150' above sea level with expansive ocean views. The unincorporated area was legally subdivided in 1905; and when the City incorporated in 1959, it accepted

the mapped streets as legal streets. The individual lots, 6000–7500 square feet in size and zoned for residential use, have been privately owned since 1907. Pet.App.45, 64; ER.69.

For approximately 40 years, the City has treated the West of Railroad area as a public recreation park offering public access to a coastal trail along the beach. Pet.App.15. The Gearings nonetheless paid property taxes on the lots with the expectation that they would one day be allowed to build single-family residential homes, per the zoning designation. Pet.App.16, 52, 65.

B. The City categorically refused to permit the Gearings to build homes on their land

Pursuant to state law and coastal regulations, the City adopted a Land Use Plan (LUP) in 1993 that provides:

> No development shall be permitted until an opportunity for acquisition and addition to the state beach has been allowed and the State Department of Parks and Recreation has indicated no intent to acquire. Such determination by the State Department of Parks and Recreation shall be made within one year after certification of the Land Use Plan.

LUP § 9.3.5; Pet.App.50. The regulation requires a landowner seeking to build in the West of Railroad area "to submit a master plan that analyzes the impact of the proposed development on the area's conservation and recreation zones. The city council and an environmental review board must then approve the plan." Pet.App.3, 49. In other words, a

property owner seeking to build on even one lot must submit a proposed master plan and environmental impact report for the entire 32-acre area,[1] subject to review and approval by multiple government agencies. Pet.App.64–66.

Meanwhile, California enacted the Housing Crisis Act of 2019 (known as SB 330)[2] to promote homebuilding by impelling local governments to act promptly on development applications. SB 330 prohibits a local agency from disapproving, or conditioning approval in a manner that renders infeasible, a housing development project for low or moderate income households unless the local agency makes specified written findings based on a preponderance of the evidence in the record. Cal. Gov't Code § 65589.5(a)(1)(A), (d). Citing this law, on October 1, 2020, the Gearings submitted an application to build houses on their lots. Pet.App.3. Twelve days later, the City informed the Gearings that it would not consider their application—or *any* application for development West of Railroad—because no master plan covered the area as required by LUP § 9.3.5. *Id*. When the Gearings sought to appeal this decision, the City told them no procedure exists to do so. Pet.App.17, 66.

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[1] *See* Local Coastal Land Use Plan, City of Half Moon Bay, App'x A A-3 (certified Apr. 15, 2021) (master plans "establish zoning regulations for the affected property(ies), including land use, density and intensity, design guidelines, and all other development standards such as height, setbacks and build-to lines, lot coverage and floor area ratios, parking, landscaping, and open space"), https://www.half-moon-bay.ca.us/DocumentCenter/View/3784/Full-Combined-2020-HMB-LCLUP.

[2] https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200SB330.

After categorically denying the Gearings' application, the City updated its LUP on October 20, 2020, purporting to allow some residential development West of Railroad but prioritizing public acquisition of property to preserve the blufftop area for habitat, coastal access, recreation, and scenic value. Pet.App.17–18. If acquisition is not possible, the LUP (both updated and original) contemplates potential "limited residential development" West of Railroad, but only following "complete replanning and re-platting of the area." Pet.App.47. The City's resolution excluded the Gearings' lots from the areas designated for potential development. Pet.App.16.

On December 22, 2020, the City notified the Gearings of their intent to appraise the lots to establish the fair market value for eminent domain acquisition, per the 2020 LUP update. Pet.App.18; Cal. Gov't Code § 7267.2. The appraisal came in at $91,000, and the City offered to purchase the Gearings' property for that amount. The Gearings declined, believing the amount of compensation to be unconstitutionally depressed by City actions that effected a regulatory taking.[3] The Gearings asserted that current market prices for similarly sized lots in Half Moon Bay ranged between $500,000 and $700,000. Pet.App.47.

C. The proceedings below

With the City refusing even to consider their building permit, no means of appeal, and without any

[3] The Gearings alleged that the City lowered the value of their lots by misrepresenting the existence of wetlands and sensitive habitats, physically invading the property, and clouding fee title by announcing its intent to condemn the property without initiating eminent domain proceedings. Pet.App.16.

related proceedings pending in state court, the Gearings exercised their choice of forum to sue the City for several constitutional violations in federal court on March 15, 2021, under 42 U.S.C. § 1983. In addition to due process and equal protection claims, the complaint alleged both regulatory and physical takings without just compensation. Pet.App.17.

The next day, five months after adopting the LUP update that officially designated the Gearings' land as an open space public park (as had been the case *de facto* for decades, Pet.App.15), the City adopted a Resolution of Necessity authorizing the City Attorney to acquire the Gearings' property by condemnation. Pet.App.18. On March 23, 2021, the City filed an eminent domain action in state court. Pet.App.4. The Gearings moved to stay the state court proceedings while the City filed a competing motion requesting possession of the property. Pet.App.1, 19. On September 2, 2021, the state court denied both the Gearings' motion and the City's motion. Pet.App.19. The state court proceedings are ongoing.

Meanwhile, in federal court, the City asked the district court to invoke *Pullman* abstention to halt the federal proceedings until the state court litigation concludes. In the Ninth Circuit, federal courts may abstain under this doctrine when:

> (1) the complaint touches a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open;
>
> (2) such constitutional adjudication plainly can be avoided if a definitive ruling on the state issue would terminate the controversy; and

(3) the possibly determinative issue of state law is doubtful.

Sinclair Oil Corp. v. Cnty. of Santa Barbara, 96 F.3d 401, 409 (9th Cir. 1996); Pet.App.20.

The Gearings opposed abstention, arguing that in light of *Knick*, 139 S.Ct. at 2168 (property owners need not exhaust state court proceedings before suing in federal court), and *Pakdel*, 141 S.Ct. at 2230 ("nothing more than *de facto* finality is necessary" to file a ripe takings claim in federal court), *Pullman* abstention is rarely if ever appropriate in federal takings cases because it effectively imposes a state exhaustion requirement. Pet.App.22–23. The crux of the Gearings' regulatory takings claim is whether the City destroyed their right to build residences on their lots without just compensation. If the Gearings are correct, the unlawful taking diminished the fair market value the City owes as compensation in the condemnation proceeding; it is a necessary component of the state court's valuation proceeding. Yet by combining both federal and state issues in the state court eminent domain action, the Gearings' federal claims are precluded if they return to federal court after all state court proceedings conclude. *San Remo*, 545 U.S. at 335; 28 U.S.C. § 1738.[4]

The district court ruled for the City, holding that the rationales underlying *Knick* and *Pakdel* had nothing to do with *Pullman* abstention and that the

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[4] When takings jurisprudence of the federal and state constitutions is "coextensive," as in California, *see Customer Co. v. City of Sacramento*, 10 Cal.4th 368, 379–80 (1995), then issue preclusion bars subsequent litigation of the federal takings claim after litigation of the state takings claim on the merits. *Heck v. Humphrey*, 512 U.S. 477, 488 n.9 (1994).

Gearings need not fear preclusion because (1) they are not *required* to address the regulatory takings issues in the state court eminent domain proceeding, and (2) even if they do, the Gearings informed the district court of their intention to return to federal court for adjudication of their federal claims, a maneuver permitted by *England v. La. State Bd. of Med. Exam'rs*, 375 U.S. 411, 421 (1964). Pet.App.24–25. Applying the *Pullman* factors, the district court first held that Ninth Circuit precedent categorizes land use regulation as a *per se* "sensitive area of social policy." Pet.App.29. It then held that SB 330 is "implicated," Pet.App.30, although it did not identify any provision of the lengthy legislation which, if interpreted one way or another, would narrow or eliminate the federal takings claim. Instead, the court merely noted that the "recently enacted" law "addresses complex land use problems," and that state courts should have the first opportunity to construe it. *Id.*

The Ninth Circuit affirmed in a published decision. The panel rejected the argument that *Knick* and *Pakdel* affected *Pullman* abstention primarily because *Knick* and *Pakdel* "address ripeness, which goes to *when a claim accrues* for purposes of judicial review…. Abstention, on the other hand, allows courts to stay claims that have *already* accrued." Pet.App.6. Even if *Knick* and *Pakdel* did broadly reject exhaustion requirements in the takings context, the court continued, the decisions would not compel rejection of the *Pullman* abstention doctrine in the Gearings' case because "eminent domain and regulatory takings suits compensate property owners for different injuries." Pet.App.8. Finally, the court held that the Gearings' *England* reservation keeps their regulatory takings claim intact for future federal

litigation. Pet.App.9. The court applied the *Pullman* factors and, for the same reasons as the district court, held that abstention was warranted. Pet.App.11–13.

Ultimately, the panel decision rests on an irreconcilable internal contradiction: It acknowledges that only lawful regulations are to be considered in the valuation process in the eminent domain action. Pet.App.12 (state court would necessarily construe any "regulations that encumber or otherwise apply to the Gearings' properties to decide proper compensation in the eminent domain action."). Yet the court simultaneously asserts that the Gearings' claims concerning the regulation's unlawfulness need not be litigated. Pet.App.8 ("even if the regulatory taking issue could be analyzed as part of the fair market value calculation in the eminent domain action, it need not be."). That is, the state court cannot determine whether the City's regulation should be considered in valuation of fair market value without examining whether it is constitutional, the precise issue presented in the first-filed federal court case. *See* ER.153 (state court noted that "federal claims arise from the City's pre-condemnation activity, which may be relevant to the determination of just compensation in this action.").[5]

The Gearings filed a petition for rehearing en banc, which was denied. Pet.App.41.

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[5] An *England* reservation cannot save federal claims intertwined with state claims. Jonathan Remy Nash, *The Uneasy Case for Transjuridictional Adjudication*, 94 Va. L. Rev. 1869, 1891 (2008).

Reasons For Granting the Petition

I. This Court Should Reconsider *Pullman* Abstention in Takings Cases Because It Prevents Property Owners from Obtaining the Full Measure of Just Compensation

A. The origins of *Pullman* abstention

In 1941, trains were America's primary mode of cross-country transportation. *Wisconsin Central Ltd. v. U.S.*, 138 S.Ct. 2067, 2070 (2018). Railroads contracted with the Pullman Company to staff passenger and freight cars. Pullman employed white conductors and black porters, training all of them to manage and maintain sleeping cars. Brief for the Appellees, *Railroad Comm'n of Texas v. The Pullman Co.*, No. 283, 1941 WL 40310, at *45–47 (Jan. 17, 1941). The Texas Railroad Commission issued an order requiring that only conductors preside over sleeping cars. Pullman sued and a three-judge district court held the order void on statutory grounds. *Pullman Co. v. Railroad Comm'n of Texas*, 33 F.Supp. 675 (W.D. Tex. 1940). The district court never addressed the discriminatory effect of the order under the Equal Protection Clause. The Commission and the union representing sleeping car conductors appealed directly to this Court, raising *only* the question of whether the Commission acted within the authority conferred by the state statute. Statement as to Jurisdiction, *Railroad Comm'n of Tex. v. The Pullman Co.*, No. 283, 1940 WL 46977, at *5 (Oct. 14, 1940).

After this Court accepted jurisdiction, the appellants' merits briefing omitted any reference to the Equal Protection Clause. Brief for Appellants, *Railroad Comm'n of Texas v. The Pullman Co.*, No.

283, 1940 WL 46978 (Dec. 14, 1940); Brief of the Intervenors, M.B. Cunningham et al., *Railroad Comm'n of Tex. v. The Pullman Co.*, No. 283, 1940 WL 38024 (Dec. 18, 1940). The Pullman Company, as Appellee, argued primarily that the order lacked a rational basis and was unjustified under state law but also that the order violated the Equal Protection Clause. Brief for the Appellees at 45 ("Porters receive extra compensation for serving [as conductors]; and the order, if sustained, will deprive them of it, and hence denies to them due process and equal protection of the laws as guaranteed by the 14th Amendment."). In its Reply brief, the Commission emphasized the statutory nature of the case and noted that the "race question" could be resolved by Pullman itself, as the company retained the option of employing black conductors. Reply Brief for Appellants, *Railroad Comm'n of Tex. v. The Pullman Co.*, No. 283, 1941 WL 40311, at *16 (Feb. 1, 1941).

Against this backdrop, Justice Frankfurter issued a unanimous decision for the Court's seven participating members.[6] The opinion observed that the racial aspect of the case implicated "a sensitive area of social policy," but that the Court would avoid "the friction of a premature constitutional adjudication" that could result if it interpreted state statutes and decisions with which it had no inherent familiarity. *Pullman*, 312 U.S. at 500. The Court thus acknowledged a troubling discriminatory situation while postponing a decision on a matter that was neither decided by the lower court nor fully briefed in this Court. Despite this circumscribed holding, the

[6] Justice McReynolds retired and left a vacancy; Justice Roberts recused.

new abstention doctrine flourished and expanded, and now operates to regularly deprive civil rights plaintiffs—especially property owners—of a federal forum for constitutional claims.

B. This Court's variable use of *Pullman* abstention

By 1959, Justice Douglas lamented that *Pullman* abstention had "extended so far as to make the presence in federal court litigation of a state law question a convenient excuse for requiring the federal court to hold its hand while a second litigation is undertaken in the state court." *Harrison v. NAACP*, 360 U.S. 167, 180 (1959) (Douglas, J., dissenting). In *Harris Cnty. Comm'rs Court v. Moore*, 420 U.S. 77, 83 (1975), this Court remarked on the numerous occasions in which *Pullman* abstention sent federal litigants back to state court. The Court cautioned that because of the delays inherent in the abstention process and the danger that valuable federal rights might be lost in the absence of expeditious adjudication in federal court, abstention must be invoked only in "special circumstances." *Id.* at 83 (citing *Zwickler v. Koota*, 389 U.S. 241, 248 (1967), and *Baggett v. Bullitt*, 377 U.S. 360, 375–79 (1964)). *Cf. Axon*, 143 S.Ct. at 917 (Gorsuch, J., concurring) ("When you replace clear jurisdictional rules with a jumble of factors, the room for disagreement grows. The incentive to litigate increases. Years and fortunes are lost just figuring out where a case belongs."). Moreover, *Pullman* abstention always has been inappropriate when it "seemed unlikely that resolution of the state-law question would significantly affect the federal claim," *Moore*, 420 U.S. at 83–84, or "there is no ambiguity in the state

statute." *Zwickler*, 389 U.S. at 250–51; *Wisconsin v. Constantineau*, 400 U.S. 433, 439 (1971). In this case, SB 330 and the City's land use plan both express their requirements in unambiguous terms. Thus, state court review "would not obviate the need for decision of the constitutional issue or materially alter the question to be decided." *Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 306 (1979). The lower courts' musing about possible complications surpassed the "point … at which the possible benefits of abstention become too speculative to justify or require avoidance of the question presented." *Ohio Bureau of Emp. Servs. v. Hodory*, 431 U.S. 471, 481 (1977).

The federal judiciary's basic purpose and duty is protecting and vindicating federal constitutional rights. *See Kusper v. Pontikes*, 414 U.S. 51 (1973). Abstention doctrines are inherently troubling when they effectively bar Americans with federal constitutional and civil rights claims from pursuing vindication in federal courts. *Zwickler*, 389 U.S. at 248. In the takings context, relegating property owners to state court often means they cannot obtain full just compensation. *See Merritts v. Richards*, 62 F.4th 764, 776 (3d Cir. 2023) (Pennsylvania law does not permit adjudication of just compensation in a condemnation proceeding); *Landgate v. Cal. Coastal Comm'n*, 17 Cal.4th 1006, 1010 (1998), *id.* at 1039 (Brown, J., dissenting) (California does not pay just compensation for temporary takings arising out of two-year "normal delay" even when based on erroneous state action). Sometimes they cannot obtain just compensation at all. *See Ariyan, Inc. v. Sewerage & Water Bd. of New Orleans*, 29 F.4th 226, 232 (5th Cir. 2022) (Louisiana Constitution allows local

governments to refuse payment of state court just compensation judgments).

Pullman abstention cases also improperly rank the protections of the Bill of Rights: federal courts rarely abstain in First Amendment cases, while equally important constitutional rights are shunted to state court. *See City of Houston v. Hill*, 482 U.S. 451, 467 (1987) (collecting cases refusing abstention in First Amendment cases); *Jones v. Coleman*, 848 F.3d 744, 753 (6th Cir. 2017) (noting this Court's "strong aversion" to *Pullman* abstention in First Amendment cases); *Tran v. Dep't of Planning for Cnty. of Maui*, No. 19-00654, 2020 WL 3146584, *6–*7 (D. Haw. June 12, 2020) (dismissal of First Amendment claim "eliminates concerns about the propriety of *Pullman* abstention" for Fifth Amendment takings claim). There is no constitutional basis for this disparate treatment between takings claims and "challenges to municipal land-use regulations based on the First Amendment, or the Equal Protection Clause." *San Remo*, 545 U.S. at 350–51 (Rehnquist, C.J., concurring in the judgment). As in *Pakdel*, "the Ninth Circuit had no basis to relegate petitioners' claim 'to the status of a poor relation' among the provisions of the Bill of Rights." 141 S.Ct. at 2231 (citation omitted).

C. *Pullman* abstention in takings cases deprives property owners of just compensation

Takings claimants, like other civil rights plaintiffs, may invoke federal court jurisdiction under 42 U.S.C. § 1983 and 28 U.S.C. § 1331. *See Knick*, 139 S.Ct. at 2171; *Mitchum v. Foster*, 407 U.S. 225, 242 (1972) ("The very purpose of § 1983 was to interpose the federal courts between the States and the people, as

guardians of the people's federal rights...."); *Patsy v. Bd. of Regents*, 457 U.S. 496, 504 (1982) (no exhaustion requirement to bar or delay federal vindication of civil rights). Nonetheless, the Ninth Circuit routinely invokes *Pullman* abstention when (1) the complaint "touches a sensitive area of social policy;" (2) a "definitive ruling on the state issue would terminate the controversy;" and (3) the issue of state law is doubtful. *Sinclair Oil*, 96 F.3d at 409. The third factor is satisfied with a "minimal showing of uncertainty." *Patel v. City of Los Angeles*, 455 F.App'x 743, 744–45 (9th Cir. 2011) (citations omitted).

As a practical matter, the Ninth Circuit *always* holds that land use cases involve "a sensitive area of social policy." *Rancho Palos Verdes Corp. v. City of Laguna Beach*, 547 F.2d 1092, 1094 (9th Cir. 1976); R.S. Radford & Jennifer Fry Thompson, *The Accidental Abstention Doctrine: After Thirty Years, the Case for Diverting Federal Takings Claims to State Court Under* Williamson County *Has Yet to Be Made*, 67 Baylor L. Rev. 567, 599 (2015). The assumption underlying this practice is that federal judges are inherently less savvy regarding local politics and land use planning. Yet, "[i]f one assumes that background principles of state law are to be based largely on preexisting law rather than a freewheeling policy choice, then federal courts are as well-situated to make those determinations as state courts." Ann Woolhandler and Julia D. Mahoney, *Federal Courts and Takings Litigation*, 97 Notre Dame L. Rev. 679, 707 (2022). Moreover, "federal district judges also live in the communities where they preside—they don't exist in some federal ether—and, as leading citizens, may even better perceive local goings-on." Ilya Somin, Knick v. Township of Scott*: Ending a Catch-22 That*

Barred Takings Cases from Federal Court, 2019 Cato Sup. Ct. Rev. 153, 164.[7] *See also United States v. Hohri*, 482 U.S. 64, 74, n.6 (1987) ("[L]ocal federal district judges ... are likely to be familiar with the applicable state law...."); *Murr v. Wisconsin*, 137 S.Ct. 1933, 1946 (2017) ("State *and federal* courts have considerable experience in adjudicating regulatory takings claims.") (emphasis added); *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198, 204 (1956) ("Since the federal judge making those findings is from the Vermont bar, we give special weight to his statement of what the Vermont law is"). Indeed, many federal judges previously served on state courts. *See Hall v. Meisner*, 51 F.4th 185, 195 (6th Cir. 2022) (noting Sixth Circuit judge formerly served on the Michigan Supreme Court). Thus, there is little reason to assume that lower state courts—much less state appellate courts that may sit far from the community where the takings occurred—are more likely to correctly decide land use issues than regionally-based federal district courts. *See* Nestor M. Davidson and Timothy M. Mulvaney, *Takings Localism*, 121 Columbia L. Rev. 215, 221 (2021) ("[L]ocal governments can be parochial and exclusionary, and the immobility of property creates special

[7] In the district court below, most of the San Francisco-based judges graduated from Berkeley or Stanford law schools and practiced law in San Francisco and Oakland prior to ascending the bench. *See generally* U.S. Dist. Court, Northern Dist. of Cal., *Judges* (visited Mar. 15, 2023). Meanwhile, state court judges in California are elected, with all the potential biases that generates. Alicia Gonzalez and Susan L. Trevarthen, *Deciding Where to Take Your Takings Case Post*-Knick, 49 Stetson L. Rev. 539, 566 (2020).

vulnerabilities for owners in the local political economy.").

Federal courts have plenty of practice resolving local issues. They frequently adjudicate state law issues in diversity cases. *See Salve Regina College v. Russell*, 499 U.S. 225, 238 (1991) (appellate courts independently review district court rulings of state law); *Meredith v. City of Winter Haven*, 320 U.S. 228, 236 (1943) (Congress having adopted diversity jurisdiction, "we can discern in its action no recognition of a policy which would exclude cases from the jurisdiction merely because they involve state law or because the law is uncertain or difficult to determine."). They similarly analyze complex and politically fraught matters involving tribal lands. *Hodel v. Irving*, 481 U.S. 704, 712–13 (1987) (applying *Penn Central* to assess a requirement that title to land within Indian reservations escheat to the tribe upon a landowner's death); *Confederated Tribes of Colville Reservation v. U.S.*, 964 F.2d 1102, 1116 (Fed. Cir. 1992) (taking of water rights involved "complex issues of Indian land law" coupled with "fact-intensive takings jurisprudence seeking just compensation"). And federal courts competently evaluate local community standards in matters ranging from obscenity, *U.S. v. Various Articles of Obscene Merchandise, Schedule No. 1303*, 562 F.2d 185, 189 (2d Cir. 1977), to excessive jury awards, *Brown v. Freedman Baking Co., Inc.*, 810 F.2d 6, 11 (1st Cir. 1987). Zoning and other property rights-based disputes are no different. *See, e.g.*, *Boraas v. Village of Belle Terre*, 476 F.2d 806, 815 (2d Cir. 1973), *rev'd on other grounds*, 416 U.S. 1 (1974) (noting that district court "start[ed] by examin[ing]" the zoning ordinance with reference to "the interest of the local community

in the protection and maintenance of the prevailing traditional family pattern...."); *Congregation Kol Ami v. Abington Twp.*, 309 F.3d 120, 135 (3d Cir. 2002) (applying "meaningful review" to local zoning ordinance).

On the second and third factors, the Ninth Circuit engages in two maneuvers that inevitably result in abstention in land use cases. First, the court presumes that the existence of *any* state law issue presented concurrently with federal takings issues has the potential to change the contours of the litigation. *See, e.g.*, *Sederquist v. City of Tiburon*, 590 F.2d 278, 282 (9th Cir. 1978) (abstaining because plaintiff's takings claims rested on provisions of the California Constitution that are "mirror image[s]" of provisions in the United States Constitution and therefore court should decide under the state constitutional provision first).[8] The Ninth Circuit abstains if the government identifies a state law claim that might affect the litigation, *even if it was not raised*. *See, e.g., Santa Fe Land Improvement Co. v. City of Chula Vista*, 596 F.2d 838, 840 (9th Cir. 1979) (state courts might find that the city exceeded its authority based upon a state statute even though no party "specifically raise[d] the question."); *C-Y Dev. Co. v. City of Redlands*, 703 F.2d 375, 378 (9th Cir. 1983) (speculating that a state court might rule in favor of the landowner under a statute "[a]lthough C-Y has not raised the point....").

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[8] While this Court repudiated this theory in *Constantineau*, 400 U.S. at 437–39, Ninth Circuit courts still cite *Sederquist* for this proposition. Pet.App.13; *Maui Vacation Rental Ass'n, Inc. v. Maui Cnty. Planning Dep't*, 501 F.Supp.3d 948, 955 (D. Haw. 2020); *Windeler v. Cambria Comty. Water Dist.*, No. 17-8536, 2018 WL 7504406, at *5 (C.D. Cal. Mar. 12, 2018).

Second, even when the California Supreme Court *already ruled* on a relevant state-law question, the Ninth Circuit has invoked *Pullman* abstention because the court might change its mind. *Bank of Am. Nat'l Trust & Sav. Ass'n v. Summerland Cnty. Water Dist.*, 767 F.2d 544, 547 (9th Cir. 1985). Subsequent panels are bound to follow these precedents, even when acknowledging that, under any sensible analysis, there is no reason to abstain. *See Pearl Inv. Co. v. City and Cnty. of San Francisco*, 774 F.2d 1460, 1465 (9th Cir. 1985); *Sinclair Oil*, 96 F.3d at 410 (invoking *Pullman* abstention because the land use plan challenged as a Fifth Amendment taking "has not yet been challenged in the state courts"). In short, the Ninth Circuit doesn't like takings cases and encourages district courts within that Circuit to find reasons not to decide them.[9]

D. *Pullman* abstention → *Williamson County* → *Pullman* abstention again

Until 1985, *Pullman* abstention was the doctrine of choice for federal courts, especially the Ninth Circuit, to push constitutional takings plaintiffs into state court. *See, e.g.*, *Newport Invs., Inc. v. City of Laguna Beach*, 564 F.2d 893, 895 (9th Cir. 1977); *Rancho Palos Verdes Corp.*, 547 F.2d at 1095; *Sederquist*, 590 F.2d at 282–83. Because *Pullman* abstention is discretionary, some takings claimants were able to stay in federal court, at least in some

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[9] The Ninth Circuit is not alone. Gregory Overstreet, *The Ripeness Doctrine of the Taking Clause: A Survey of Decisions Showing Just How Far Federal Courts Will Go to Avoid Adjudicating Land Use Cases*, 10 J. Land Use & Envtl. L. 91, 92 (1994) (many federal courts classify takings cases as "simply too burdensome").

parts of the country. But *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194 (1985), ensured that *all* takings claimants were forced to pursue their federal constitutional claims in state court to "ripen" their claims.

The fundamental nature of *Pullman* abstention and *Williamson County* ripeness operate in exactly the same way, ultimately depriving many property owners of just compensation for taken property. *See* Barry Friedman, *Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts*, 104 Colum. L. Rev. 1211, 1270 n.185 (2004) ("*Williamson County* is ... in all practical respects an abstention doctrine rather than a ripeness doctrine."); Steven J. Eagle, *Regulatory Takings* 1061 (3d ed. 2005) (*Williamson County*'s purported ripeness rules "are, at least in part, an example of abstention principles."). *See also Knick*, 139 S.Ct. at 2188–89 (Kagan, J., dissenting) (noting connection between *Williamson County* and *Pullman* abstention); *Nickerson v. Thomson*, 504 F.2d 813, 817 (7th Cir. 1974) (equating abstention with exhaustion).

Commentators, including counsel for Half Moon Bay, similarly recognize the linkage. *See* David A. Dana, *Not Just a Procedural Case: The Substantive Implications of* Knick *for State Property Law and Federal Takings Doctrine*, 47 Fordham Urb. L.J. 591, 614 (2020) (noting that federal courts "might revert to pre-*Williamson County* abstention practices" but suggesting reasons why this was not inevitable); Matthew Zinn, counsel of record for Amicus Br. of National Governors Ass'n, et al., *Knick v. Twp. of Scott*, No. 17-647, 2018 WL 3769957, at *6 (Aug. 6,

2018), urged the Court not to "trade" *Williamson County*'s state proceedings requirement for "ad hoc abstention." One panel of the Ninth Circuit suggested that courts should rethink *Pullman* abstention in light of *Knick* in an appropriate case. *EHOF Lakeside II, LLC v. Riverside Cnty. Transp. Comm'n*, 826 F.App'x 669, 670 (9th Cir. 2020) (mem.). But the district court rejected this suggestion, Pet.App.23, and the denial of the petition for rehearing en banc suggests that the Ninth Circuit may never do so. This Court should address when, if ever, federal courts should employ *Pullman* abstention to relegate property owners' Fifth Amendment takings claims to state court where they may be deprived of full just compensation.

II. Lower Courts Conflict as to Whether and When *Pullman* Abstention Applies in Land Use Cases

This Court has rarely addressed *Pullman* abstention in takings cases. In *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 236 (1984), the Court did *not* abstain because *Pullman* abstention, "the exception, not the rule," is limited to uncertain questions of state law, and there was no such uncertain question. The Court *did* abstain under *Pullman* in *San Remo*, 545 U.S. at 335, because state court resolution of takings claims brought under the state constitution were interpreted "coextensively with federal law," and therefore the property owners were precluded from raising the federal issues in federal court, despite attempts to reserve their rights to do so. The Court noted the unfair results of the "*San Remo* preclusion trap" in *Knick*, but has not overruled or limited *San Remo*. 139 S.Ct. at 2167, 2174, 2179 (this trap "should

tip us off that the state-litigation requirement rests on a mistaken view of the Fifth Amendment.").

This Court's limited guidance has resulted in lower courts adopting wildly divergent approaches to whether and when *Pullman* abstention is appropriate in takings cases. *See* Carl E. Brody, Jr., *Abstention in the Federal Courts: A Suggested Bifurcated Standard of Review to Create Procedural Reliance Where States and Localities Regulate Constitutionally Protected Activity*, 13 St. Thomas L. Rev. 539, 539–40 (2001) (federal courts abstain in an "inconsistent and ambiguous manner").

A. Circuit courts apply inconsistent tests to determine when *Pullman* abstention applies

The Circuit courts apply from one to eight factors to determine when *Pullman* abstention applies, and vary widely from the original formulation of the doctrine. The Third and Tenth Circuits adhere most closely to the *Pullman* itself. *See Chez Sez III Corp. v. Township of Union*, 945 F.2d 628, 631 (3d Cir. 1991). However, if all three circumstances are present, Third Circuit courts weigh additional factors such as "the availability of an adequate state remedy, the length of time the litigation has been pending, and the impact of delay on the litigants." *Artway v. Attorney Gen. of N.J.*, 81 F.3d 1235, 1270 (3d Cir. 1996). The Tenth Circuit phrases the third factor as whether "an incorrect decision of state law by the federal court would *hinder* important state law policies." *Kansas Judicial Review v. Stout*, 519 F.3d 1107, 1118–19 (10th Cir. 2008) (emphasis added).

The First Circuit finds *Pullman* abstention appropriate only when "substantial uncertainty exists over the meaning of the state law in question, and ... settling the question of state law will or may well obviate the need to resolve a significant federal constitutional question." *Batterman v. Leahy*, 544 F.3d 370, 373 (1st Cir. 2008). The Fourth Circuit, by contrast, abstains almost as frequently at the Ninth, asking only whether "there is (1) an unclear issue of state law presented for decision (2) the resolution of which may moot or present in a different posture the federal constitutional issue such that the state law issue is 'potentially dispositive.'" *Educ. Servs., Inc. v. Md. State Bd. for Higher Educ.*, 710 F.2d 170, 175 (4th Cir. 1983).

The Fifth Circuit allows *Pullman* abstention when only *one* factor is present: either (1) whether the disposition of a state law question could eliminate or narrow the scope of the federal constitutional issue; or (2) whether the state law question presents difficult, obscure or unclear issues of state law; or (3) whether a federal decision could later conflict with subsequent state court resolutions concerning the same state laws or regulations, engendering more confusion. *Mireles v. Crosby Cnty.*, 724 F.2d 431, 433 (5th Cir. 1984). Yet Eighth Circuit courts use a seven-factor balancing analysis, considering the nature of both the right and necessary remedy; available state remedies; whether the challenged state law is unclear; whether the challenged state law is fairly susceptible to an interpretation that would avoid any federal constitutional question; and whether abstention will avoid unnecessary federal interference in state operations. *Beavers v. Ark. State Bd. of Dental Exam'rs*, 151 F.3d 838, 841 (8th Cir. 1998). The

interference factor in turn requires consideration of whether there is a pending state action, and whether the case involves procedures and policies of special state interest. *George v. Parratt*, 602 F.2d 818, 822 (8th Cir. 1979).

B. Circuit courts conflict as to whether *Pullman* abstention applies in takings cases

These widely divergent tests are reflected in the conflicts among the Circuits in takings cases. Two Circuits have refused to apply *Pullman* abstention in takings cases. In *Clajon Production Corp. v. Petera*, 70 F.3d 1566, 1576 (10th Cir. 1995), the Tenth Circuit held that a court may not avoid considering ranchers' takings claims concerning licensing limits on the right to hunt surplus game on the ranchers' land even though the state had not addressed the existence of a property right to hunt. The court held that, given the reasonableness of a property right to hunt, the state's failure to argue for abstention, and the delay that would result from abstention, the court was obligated to consider constitutional claims brought under Section 1983. *Id. See also Lehman v. City of Louisville*, 967 F.2d 1474, 1478 (10th Cir. 1992) (no abstention in takings case because determination of whether the property owner had a property interest under the zoning ordinances would "in no way 'upset sensitive state programs.'").

The First Circuit also rejected *Pullman* abstention in *Fideicomiso de la Tierra del Cano Marin Pena v. Fortuno*, 604 F.3d 7, 17 (1st Cir. 2010). In that case, the plaintiff alleged that its property was taken for private use in violation of the Fifth Amendment. The court noted many "bitterly contested" questions of

Puerto Rico law, such as whether the Fideicomiso was a public or private entity, whether the subject land was considered private property, and whether the territorial commission could legally transfer public agencies' lands. *Id.* But the First Circuit considered these to be ancillary questions; the case turned on whether the challenged statute took property for "public use," a question of federal constitutional law fully appropriate for federal court resolution. *Id.*

On the other side of the conflict, in addition to the Ninth Circuit below, the Fourth Circuit applied *Pullman* abstention to a takings claim in *Meredith v. Talbot Cnty.,* 828 F.2d 228, 232 (4th Cir. 1987). The court held that abstention was appropriate because a newly enacted state law had not been interpreted by state's trial or appellate courts, and if the state court granted an injunction sought by developers, that result would eliminate the need to determine the federal constitutional questions as to whether a taking occurred.

While partially dependent on the nature of the underlying facts, these Circuit courts demonstrate the range of willingness (or not) to allow federal takings claims to proceed in federal court.

III. The Constitution Protects Property Rights, Not Government Convenience

A. Civil rights plaintiffs with takings claims are entitled to choose their forum

If the demise of *Williamson County* means that property owners flock to federal court for relief from uncompensated takings, that indicates that state courts are underprotecting property rights, the

precise circumstance in which the Civil Rights Act authorizes claimants to proceed in federal court. The Ninth Circuit's premise that federal court enforcement of federal constitutional rights necessarily interferes with local policy or decision-making misunderstands of the role of the federal court in administering the Section 1983 remedy. No local government has the right or discretion to disregard the Constitution. *Owen v. City of Independence*, 445 U.S. 622, 647–48 (1980) ("the municipality's 'governmental' immunity is obviously abrogated by the sovereign's enactment of a statute making it amenable to suit. Section 1983 was just such a statute."). In these situations, federal court review does not interfere with local policy choices or discretion. *Id.* at 649–50. *See also* Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 Yale L.J. 71, 77 (1984) ("If Congress intended that the federal courts exercise a particular jurisdiction, either to achieve substantive legislative ends or to provide a constitutionally contemplated jurisdictional advantage, a court may not, absent constitutional objections, repeal those jurisdictional grants.").[10]

There are practical consequences to the choice of forum in this case. Federal court offers greater ability to obtain just compensation than state court. The

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[10] Congress rarely defers to judicial discretion as to when federal courts should decline to hear federal cases, enacting multiple statutes to limit federal court jurisdiction *See* Redish, *Abstention*, 94 Yale L.J. at 81 (citing the Anti-Injunction Act, 28 U.S.C. § 2283, the Three-Judge Court Act, 28 U.S.C. § 2284, the statutory branch of the habeas corpus exhaustion requirement, 28 U.S.C. § 2254(b), the Tax Injunction Act, 28 U.S.C. § 1341, and the Johnson Act, 28 U.S.C. § 1342).

decision below acknowledges this, explaining that the Gearings would be compensated only for the land as valued under the regulations, and would need to pursue additional compensation caused by the regulatory taking effected by those regulations in federal court. Pet.App.8–9. What a waste of judicial resources! The effect of the regulations and the valuation can both be decided by the federal district court considering the Gearings' constitutional takings claim, while the state court eminent domain proceeding must pretend that the Gearings aren't challenging the regulations that deprived them of any economically viable use of their property.

Beyond this, the date of the taking for purposes of the state eminent domain action is different than the date of the taking for purposes of the federal inverse condemnation action. The date of the take for the state's eminent domain action is the date the City deposited $91,000 with the court: March 23, 2021. Pet.App.62. The date of the take in the federal inverse condemnation takings case is months earlier, when the City denied the Gearings' application on October 13, 2020. The date of the take determines the amount of just compensation. *Knick*, 139 S.Ct. at 2177. *Cf. U.S. v. Dow*, 357 U.S. 17, 25 (1958) (disapproving of government "manipulations" to the date of the take). By forcing the Gearings into state court, the City also immunizes itself from paying the Gearings' attorneys' fees because there is no fee-shifting statute in California eminent domain actions comparable to 42 U.S.C. § 1988.[11]

[11] The eminent domain statute provides for fee shifting in limited circumstances, and assumes waiver of the *England* reservation. Cal. Civ. Proc. § 1268.610; *see White Mountain Apache Tribe v.*

B. Government uses abstention as a means to grind down property owners with endless litigation

The City could have invoked eminent domain at any time to purchase the property for open space. Only when faced with an inverse condemnation claim for just compensation in federal court did the City seek to significantly reduce its costs by forcing the Gearings into a state court action on the City's own terms. This precludes the Gearings from challenging the regulations that depressed their lots' value, lest they be forever foreclosed from federal court review under *San Remo*. *See also Allen v. McCurry*, 449 U.S. 90, 101, 103–04 (1980) (Section 1738 gives state court adjudications of federal constitutional issues preclusive effect in federal courts); *Tejas Motel, L.L.C. v. City of Mesquite by and through Bd. of Adjustment*, 63 F.4th 323, 334 (5th Cir. 2023) (same).

When the Gearings filed their federal lawsuit, no state court proceedings related to the property were pending.[12] *See Bell v. Hood*, 327 U.S. 678, 681 (1946) ("the party who brings a suit is master to decide what

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Williams, 810 F.2d 844, 854 (9th Cir. 1985) (Section 1988 fees not available when plaintiffs decline to press federal constitutional claims in state court after *Pullman* abstention).

[12] This fact distinguishes this case from those where *plaintiffs* seek to evade the state appellate process by filing a parallel action in federal court. *See* James C. Rehnquist, *Taking Comity Seriously: How to Neutralize the Abstention Doctrine*, 46 Stan. L. Rev. 1049, 1065–68 (1994) (favoring a "first-filed" rule in which the litigation in parallel cases proceeds in the forum in which the first lawsuit was filed); *Antosh v. Village of Mount Pleasant*, No. 22-0117, 2023 WL 2465920, at *5–*6 (E.D. Wis. Mar. 10, 2023) (noting "utter gamesmanship" exhibited by plaintiffs to avoid state appellate process).

law he will rely upon"). Only after the Gearings filed their regulatory takings claim in federal court did the City counterpunch with an eminent domain lawsuit to evade federal constitutional review and the full amount of just compensation the Gearings are due. This Court should not countenance such self-dealing governmental machinations at the expense of property owners seeking vindication of constitutional rights. *See Arrigoni Ent., LLC v. Town of Durham,* 136 S.Ct. 1409 (2016) (Thomas and Kennedy, JJ., dissenting from denial of certiorari) (procedural bar from federal court "inspired gamesmanship"); *Lapides v. Board of Regents*, 535 U.S. 613, 621 (2002) (decrying state's manipulation of legal doctrine "to achieve unfair tactical advantages").

Being forced to participate in state court proceedings, through all appeals, before returning to federal court is untenable and unjust. *See Carroll v. City of Mount Clemens*, 139 F.3d 1072, 1080 (6th Cir. 1998) (Moore, J., concurring and dissenting) (lamenting "the glacial pace" of state court proceedings and noting that "[p]rinciples of fairness dictate that when a party alleges a violation of her constitutional rights, a speedy resolution is required."); Redish, *Abstention*, 94 Yale L.J. at 90 ("*Pullman* abstention may, as a practical matter, so severely delay the exercise of federal jurisdiction that it acts as a significant deterrent to the resort to federal court."); Martha A. Field, *Abstention in Constitutional Cases: The Scope of the* Pullman *Abstention Doctrine*, 122 U. Pa. L. Rev. 1071, 1085 (1974) (substantial delay occurs due to "shuttling" between federal and state court).

Because time is money, these delays present a steep financial burden on already-injured property owners. Timothy V. Kassouni, *The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights*, 29 Cal. Western L. Rev. 1, 11 (1992) ("The time and money required to comply with myriad ripeness requirements will prevent most middle-class property owners from pursuing their constitutional right to just compensation [and] make substantive review virtually impossible"); *Moore*, 420 U.S. at 89 (Douglas, J., dissenting) (after *Pullman* abstention, rejected plaintiffs "would necessarily have to be very rich … or else be financed by some foundation—to pay the expense of [the resulting] long, drawn-out litigation."); *Jones*, 848 F.3d at 750 ("*Pullman* abstention results in significant financial and time burdens on the parties and acts almost as an exhaustion requirement").

The potential for delay is exacerbated because the City can force property owners to litigate the eminent domain action and then, if the price turns out to be too high, the City can walk away, having forced the property owner to expend considerable resources on litigation that resolves nothing and requires additional litigation for the injury done to the property during the later-abandoned action. *Cf. Dow*, 357 U.S. at 26 (if government commences then abandons an eminent domain action, the property owner still may pursue just compensation for the duration of the temporary take). In this context, government advocacy for federal court abstention is just another tool to devise an impossible maze for property owners and avoid constitutional review of restrictive land use regulations. *See* James V. DeLong, *Property Matters: How Property Rights are Under Assault – and Why*

You Should Care 297 (1997) ("The name of this game is transaction costs.").

Because of the recognized injustice wrought by these delays, when a legitimate need exists for state courts to interpret state law, this Court prefers certification to state high courts over *Pullman* abstention that sends civil rights plaintiffs to state trial courts. *Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43, 75–80 (1997); *Expressions Hair Design v. Schneiderman*, 581 U.S. 37, 57 (2017) (Sotomayor and Alito, JJ., concurring in the judgment) (because "[a]bstention is a blunt instrument," "[c]ertification offers a more precise tool"). *See also* Judith S. Kaye & Kenneth I. Weissman, *Interactive Judicial Federalism: Certified Questions in New York*, 69 Fordham L. Rev. 373, 380 (2000) (former Chief Justice of the New York Court of Appeals recognized the delay and expense caused by abstention, concluding that "abstention was not an effective solution to the problem of federal courts seeking to ascertain state law."). Yet the Ninth Circuit continues to use *Pullman* abstention as a cudgel to beat property owners back into state court, depriving them of a federal forum to pursue their constitutional takings claims for just compensation. If a local government takes private property without paying for it, that government has violated the Fifth Amendment and it doesn't create needless friction for federal courts to say so. *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 195 (1959). This Court should reconsider the role, if any, of *Pullman* abstention in constitutional takings cases.

Conclusion

This Court should grant the petition.

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Respectfully submitted,

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