No. 22-1191

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

PETITIONERS' REPLY BRIEF

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Introduction

Respondent City of Half Moon Bay does not dispute that the Ninth Circuit employs *Pullman* abstention regularly to force landowners with federal takings claims to litigate in state court. Nor does the City dispute that the Ninth Circuit considers land use matters to be a "per se" delicate issue of social significance that justifies abstention (Pet.19); that courts invoke *Pullman* abstention in takings cases more than in cases seeking vindication of other constitutional rights (Pet.18); that the application of *Pullman* has generated significant concern from this Court as well as many lower courts and legal scholars (Pet.32–34); that governments favor state court over federal court (Pet.4–5, 30–31); and that because of the injustice caused by the need to complete full state court litigation and all appeals prior to federal consideration of constitutional civil rights claims, this Court prefers certification to abstention (Pet.35).

The City's opposition hinges on obscuring the timing in this case and arguing that the state court eminent domain action will not touch the Gearings' federal constitutional claims. Neither is persuasive. The Court should take this case to reconsider *Pullman* abstention in light of the disarray among lower courts as to when it applies, and reverse the Ninth Circuit, which uses the doctrine as a virtual exhaustion requirement to delay—and effectively block—property owners from pursuing takings claims in federal court. Contrary to the longstanding trope, takings and property civil rights claims are not uniquely local matters beneath the comprehension and dignity of federal courts. Pet.20–21. Proper respect for federalism is accounted for by the

availability of certification of any discrete and truly unsettled state law issues to state court, without the need to wholly relegate federal civil rights claimants to state court.

Argument

I. The City Misstates Key Facts

The City claims the Petition "distorts the start date of the eminent domain process." BIO.7. The City conflates eminent domain "proceedings" with "the process of acquiring parcels." BIO.4. The operative date under California law for a taking by eminent domain is "commencement of the proceeding," Cal. Civ. Proc. § 1263.120 (which refers to filing a lawsuit), or when the government deposits the amount of "probable compensation" with the court. Cal. Civ. Proc. § 1263.110; *Mt. San Jacinto Cmty. College Dist. v. Superior Ct.*, 40 Cal.4th 648, 653 (2007). Preliminary steps cannot commit the government to condemning land. Moreover, acquiring the Gearings' property "as part of a broader program to acquire land along the City's coastal bluffs" to counter "severe erosion," BIO.6, makes no sense given that the Gearings' parcels are scattered from one end of the 32-acre bluff to the other, both north-to-south and beachfront-to-inland. Pet.6 (map); Pet.App.45.

For 40 years, the City treated the privately-owned 32-acre West of Railroad area as open space parkland without exercising its power of eminent domain. Pet.App.14–15; ER.25. As early as September 11, 2020, Thomas Gearing communicated his intention to file an inverse condemnation action in federal court to the City. ER.38 (describing "soon to be filed federal case"). In October 2020, the City responded that the

Gearings' application would not be considered because the LUP requires a specific plan, and invited them to meet with City personnel to "navigate the required processes." SER.37. Clearly no eminent domain proceedings were contemplated then. ER.28 (repeating invitation to meet); ER.30 (advising Gearing of requirements to submit a development application). Only after the Gearings filed their federal lawsuit did the City strategically deploy its eminent domain lawsuit to derail the Gearings' federal action. Pet.33; ER.71. The City admits it does not want to pay, BIO.8 ("The notion that public agencies will start voluntarily agreeing to takings and paying compensation to regulate land use is implausible."), an illegitimate approach. *Cf. Sheffield Dev. Co. v. City of Glenn Heights*, 140 S.W.3d 660, 680 (Tex. 2004).

An inverse condemnation lawsuit substantively mirrors an eminent domain lawsuit. *PennEast Pipeline Co., LLC v. New Jersey*, 141 S.Ct. 2244, 2255 (2021); *City of Oakland v. Oakland Raiders*, 32 Cal.3d 60, 67–68 (1982). Both are "but a means to the constitutional end of just compensation to the involuntary seller, the property owner.'" *People ex rel. Dep't of Transportation v. Southern Cal. Edison Co.*, 22 Cal.4th 791, 800 (2000) (citation omitted). Yet the City clearly does not want to litigate in federal court, claiming that "*Pullman* acts as a safeguard from strategic lawsuits." BIO.9. Why would federal litigation be a "strategic" benefit to the Gearings if they are entitled to as much compensation in state court as they would be in federal court? The City

doesn't say.[1] Perhaps it is because the Gearings must resolve their constitutional claims via motion in state court, BIO.15, depriving them of the jury trial they would receive in federal court. Pet.App.42.

II. Alleged Ambiguities in State Law Do Not Support Abstention

The City argues that its ultimate liability for a taking or its condemnation of the Gearings' land may be inextricably bound up with the meaning of SB 330, which it alleges to be uncertain and best worked out in state court. BIO.13 ("the state court could provide the federal court with a definitive interpretation of SB 330 and how it interacts with the LUP's specific plan requirement"). SB 330 amended the forty-year-old Housing Accountability Act (HAA). Cal. Gov. Code § 65589.5 *et seq*.[2] Because anti-development fervor dominates many California communities, "the Legislature has amended the law repeatedly in an increasing effort to compel cities and counties to approve more housing." *Save Lafayette v. City of Lafayette*, 85 Cal.App.5th 842, 850 (2022).

Pullman abstention allows federal courts to defer to state courts on *difficult* unsettled matters of state law. *Growe v. Emison*, 507 U.S. 25, 32 (1993); *Joiner v. City of Dallas*, 380 F.Supp. 754, 763 (N.D. Tex.),

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[1] In *Paxton v. Longoria*, a state official argued that a statute's ambiguity justified *Pullman* abstention but once in state court, he agreed with the opposing party's interpretation, leaving the state court nothing to interpret. 646 S.W.3d 532, 541–42 (Tex. 2022).

[2] The statutes were first enacted in 1982 and acquired the official name in 2006. *Schellinger Bros. v. City of Sebastopol*, 179 Cal.App.4th 1245, 1253 n.9 (2009) (HAA formerly known as "Anti-NIMBY statute").

("To engineer a *Pullman* abstention the anticipated collision between state and federal sovereigns must be significant, not picayune, and its likelihood must be real, not fanciful."), *aff'd mem.*, 419 U.S. 1042 (1974). The interaction of local laws and the HAA portends no special difficulty; state courts have decided many such cases unanimously. *See, e.g.*, *Honchariw v. Cnty. of Stanislaus*, 200 Cal.App.4th 1066, 1070–77 (2011); *Hoffman Street, LLC v. City of W. Hollywood*, 179 Cal.App.4th 754, 768 (2009). Since the lower court's abstention in this case, state courts have applied the HAA as amended by SB 330, and, with one exception not relevant here,[3] easily discerned its terms. *See Save Livermore Downtown v. City of Livermore*, 87 Cal.App.5th 1116, 1125–26 (2022) (considering whether city complied with plain language of HAA; no ambiguities noted); *Save Lafayette*, 85 Cal.App.5th at 854 (application deemed complete under HAA, city's general plan, and zoning standards in effect at the time). If a significant question remains as to the meaning of the HAA, this Court and other Circuits prefer certification over abstention to more promptly obtain answers from a state's highest court. *Arizonans for Off. Eng. v. Ariz.*, 520 U.S. 43, 75 (1997); *Grace Ranch, L.L.C. v. BP Am. Production Co.*, 989 F.3d 301, 315 (5th Cir. 2021) (If "the court cannot escape an unresolved state-law question, certification offers a neat solution. But if the issue never arises, the federal court has not hastily abdicated its jurisdiction.").

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[3] *Reznitskiy v. Cnty. of Marin*, 79 Cal.App.5th 1016, 1037 (2022), interpreted "housing development project" to include more than one single-family residence; a project must include at least two units (as the Gearings' proposals did).

At bottom, though, SB330 is a distraction because the Gearings' application was denied based *solely* on the nonexistence of an LUP-mandated "specific plan" governing the entire 32-acre area, ER.99, regardless of the HAA. ER.146–47; Pet.App.54, 65. The LUP requires any property owner seeking a building permit to develop a specific plan covering the entire 32-acre area, and the final decision at issue in this case turns on that policy. Pet.7–8; Pet.App.3, 54, 64–65.

The Ninth Circuit's application of *Pullman* abstention reflects an outdated view that federal courts should defer to state courts when constitutional claims involve laws or regulations affecting land use. No such requirement exists, *Wisconsin v. Constantineau*, 400 U.S. 433, 439 (1971), nor would such a requirement be good policy. Arthur L. Corbin, *The Laws of the Several States*, 50 Yale L.J. 762, 775 (1941) ("When the rights of a litigant are dependent on the law of a particular state, the court of the forum must do its best (not its worst) to determine what that law is. It must use its judicial brains, not a pair of scissors and a paste pot."). Compare the court's disdain for takings cases with its refusal to abstain in *non-takings* cases. For example, in *Slidewaters LLC v. Washington State Dep't of Labor and Industries*, 4 F.4th 747, 761 (9th Cir. 2021), the court refused to abstain in a challenge to COVID-19 business closure orders on rulemaking and separation of powers grounds, because the resolution of the state law issues was insufficiently "uncertain." Yet in property rights cases, 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) (citation omitted). This Court should address the misuse of

Pullman abstention to consign property rights cases, but rarely other types of constitutional cases, to state courts.

III. The *England* Reservation Cannot Protect the Gearings' Federal Claims

The City relies on the *England* reservation to suggest that abstention causes no harm to the Gearings. BIO.12–13. Untrue. First, the City ignores *San Remo Hotel, L.P. v. City and Cnty. of San Francisco*, 545 U.S. 323 (2005), which eviscerates the *England* reservation if the state court touches any aspect of the federal claims. *Id.* at 338, 340 (*England* reservation depends on plaintiffs taking "no action to broaden the scope of the state court's review beyond decision of the antecedent state-law issue"). *See also Ocean Palm Golf Club P'ship v. City of Flagler Beach*, 861 F.App'x 368, 371 (11th Cir. 2021) (barring takings claim per *San Remo*). Here, valuation cannot be determined without considering whether the City may legally refuse any development of the Gearings' property. Pet.App.12; *City of Perris v. Stamper*, 1 Cal.5th 576, 599, 605 (2016) (valuation depends on "lawful legislative and administrative restrictions on property" including governmental actions that effect an unconstitutional taking); Pet.13.[4] Second, property owners dare not risk being deemed to have abandoned or waived intertwined federal claims, and falling into the "preclusion trap." *See Knick v. Township of Scott*, 139 S.Ct. 2162, 2167 (2019) ("the guarantee of a

[4] Attempts to separate the issues into federal and state components serves mostly to deplete judicial and landowners' resources. Pet.32–35; *cf.* Malcolm M. Feeley, *The Process is the Punishment* (1992).

federal forum rings hollow for takings plaintiffs, who are forced to litigate their claims in state court").

IV. *Pullman* Abstention Often Deprives Property Owners of Full Compensation for Takings

The City relies on *Creel v. City of Atlanta*, 399 F.2d 777 (5th Cir. 1968), as exemplifying the "long history" of federal court abdication of jurisdiction in property rights cases. BIO.9–10.[5] As discussed in the Petition, and undisputed by the City, *Pullman* abstention was the doctrine of choice for federal courts to kick constitutional takings claims into state courts prior to *Williamson County*. Pet.23–25. *Creel*, decided in 1968, fits this model, requiring the plaintiff effectively to exhaust state court remedies prior to proceeding in federal court. *Id.* at 779 ("the principal and essential issue is one properly for determination by the state courts"). *See also Jones v. Coleman*, 848 F.3d 744, 750 (6th Cir. 2017) (*Pullman* abstention "acts almost as an exhaustion requirement"). Even so, *Creel* is distinguishable because the state court eminent domain proceedings were well underway when the property owner filed his inverse condemnation lawsuit in federal court. *Creel*, 399 F.2d at 778. *See also Donohoe Const. Co., Inc. v. Md.-Nat'l Capital*

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[5] *Creel* does not cite *Pullman*. Because the Court identified no state law requiring interpretation by state courts to narrow or resolve the federal issues, some courts believe *Creel* applied *Burford* abstention, *Cumberland Farms, Inc. v. Sch. Dist. of Phila.*, No. 91-5260, 1992 WL 30481 (E.D. Pa. Feb. 14, 1992), or *Younger* abstention. *Broadway 41st St. Realty Corp. v. N.Y. State Urban Dev. Corp.*, 733 F.Supp. 735, 742 (S.D.N.Y. 1990). *See also Ahrensfeld v. Stephens*, 528 F.2d 193, 198–200 & n.11 (7th Cir. 1975) (*Creel* combined *Pullman* and *Younger* abstention doctrines).

Park and Planning Comm'n, 398 F.Supp. 21, 29 (D. Md. 1975) (describing this fact as "the lynch pin" necessary to reconcile *Creel* with *Pullman* abstention). In *Creel*, the Fifth Circuit expressed concern that if both lawsuits proceeded simultaneously, "he would be entitled to an award of damages in both courts, one for the remnant value of his fee simple interest and the other for antecedent damages caused by the flights which had already depressed and virtually destroyed the value of his land." *Id.* at 779.

The Gearings agree this is a problem, and urge this Court to consider whether *Pullman* abstention provides the best solution when, unlike in *Creel*, the *federal* lawsuit is the first filed. A "first filed" rule eliminates potential friction while reflecting the Constitution's neutrality as to whether constitutional claims are redressed in state or federal court. *See* James C. Rehnquist, *Taking Comity Seriously: How to Neutralize the Abstention Doctrine*, 46 Stan. L. Rev. 1049, 1111 (1994). Plaintiffs with constitutional claims have a right to choose their forum and if any litigation should be stayed, it should be the later-filed state lawsuit.

The Fifth Circuit in *Creel* further justified abstention by noting that the state constitutional takings provision "is more favorable to condemnees" and the court was confident that Creel could be fully compensated. Here, the official date the proceedings began was when the City deposited "probable" compensation of $91,000 on March 23, 2021, Pet.App.62, while the inverse condemnation taking ripened when the City denied the Gearings' building application five months earlier, Pet.App.54, thus

ensuring that the Gearings cannot be fully compensated in state proceedings.

The City searches hard for cases showing that property owners needn't fear resolution of takings claims in California courts, citing four that it describes as "rul[ing] against local agencies in land use cases" and "unsympathetic to cities' restrictions on housing development." BIO.17. That these are the City's best examples of pro-property rights cases in California courts speaks volumes. *Jenkins v. Brandt-Hawley*, 86 Cal.App.5th 1357, 1383 (2022), is a malicious prosecution/anti-SLAPP case that, within that context, notes that construction of a single-family residence is categorically exempt from a state environmental law. There was no takings claim. Similarly, *Ruegg & Ellsworth v. City of Berkeley*, 63 Cal.App.5th 277, 286 (2021), lacks any takings claim, instead granting a petition for writ of mandate when a city failed to comply with the HAA's requirements for "streamlined, ministerial approval of affordable housing." *Cal. Renters Legal Advoc. & Educ. Fund v. City of San Mateo*, 68 Cal.App.5th 820, 855 (2021), also lacks any constitutional claims, instead holding that a city failed to comply with the plain terms of the HAA. *Cal. Renters* recognizes that the HAA unambiguously supports the development of housing and objective criteria for land use decisions. *See id.* at 830, 845, 851 (HAA requires cities to "promulgate standards that are not so malleable that reasonable minds could differ on whether they are met."), 854.

Only *Lockaway Storage v. County of Alameda*, 216 Cal.App.4th 161 (2013), involved a successful takings claim when Alameda County voters approved an initiative that the county interpreted to require

halting Lockaway's building of a storage facility that was already underway in development. 216 Cal.App.4th at 168. The court held that the initiative, which exempted developments in progress, was "not ambiguous" and plainly applied to the Lockaway development. *Id.* at 181. The court described the county's arguments as "back[ing] away from a straightforward and logical interpretation of Measure D to suit its interests in this appeal," *id.*, and found the county's actions "manifestly unreasonable" with a "devastating economic impact on Lockaway" that "deprived Lockaway of a meaningful opportunity to attempt to protect its property rights." *Id.* at 186–87. In short, Alameda County appears to be a bad role model for Half Moon Bay and the fact that the City can cite *one* court, in *one* case, in *ten years*, that called out a local government for a regulatory taking offers little comfort to property owners seeking constitutional vindication for takings in state court.

V. This Important Issue Is Cleanly Presented

As noted, the misuse of *Pullman* abstention to force takings claimants predated *Williamson County*, particularly in the Ninth Circuit. *See* Note, *Land Use Regulation, the Federal Courts, and the Abstention Doctrine*, 89 Yale L.J. 1134, 1142–43 nn.54, 55 (1980) (California-based federal courts abstained in "nearly every" land use case since 1970 by "judicial manipulation" of the "uncertain-state-law requirement," refused to hear cases with "a difficult set of facts," and abstained where the state constitutional provisions mirrored the Fifth Amendment, despite this Court's repudiation of that theory in *Constantineau*, 400 U.S. at 437–39). Now, with *Knick* reopening the courthouse doors, *Pullman*

has regained supremacy as federal courts' and municipalities' preferred method to avoid federal adjudication of constitutional rights. *See* Ann Woolhandler & Julia D. Mahoney, *Federal Courts and Takings Litigation*, 97 Notre Dame L. Rev. 679, 682 (2022) ("The demise of *Williamson* suggests that the federal courts … will more actively use abstention doctrines to reduce *Knick*'s impact.").

This Court should determine whether and how *Pullman* applies in takings cases.

Conclusion

The petition for writ of certiorari should be granted.

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