No. 11-1234

IN THE

Supreme Court of the United States

REDEVELOPMENT AUTHORITY OF THE COUNTY OF MONTGOMERY, PENNSYLVANIA, DONALD W. PULVER, GREATER CONSHOHOCKEN IMPROVEMENT CORP., AND TBFA PARTNERS, L.P.,
Petitioners,

v.

R & J HOLDING COMPANY AND RJ FLORIG INDUSTRIAL COMPANY, INC.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF NATIONAL LEAGUE OF CITIES, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL ASSOCIATION OF TOWNS AND TOWNSHIPS, UNITED STATES CONFERENCE OF MAYORS, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, PENNSYLVANIA DEPARTMENT OF COMMUNITY AND ECONOMIC DEVELOPMENT, PENNSYLVANIA ASSOCIATION OF HOUSING AND REDEVELOPMENT AGENCIES, COUNTY COMMISSIONERS ASSOCIATION OF PENNSYLVANIA, PENNSYLVANIA STATE ASSOCIATION OF BOROUGHS, PENNSYLVANIA STATE ASSOCIATION OF TOWNSHIP SUPERVISORS, AND SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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MOTION OF NATIONAL LEAGUE OF CITIES, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL ASSOCIATION OF TOWNS AND TOWNSHIPS, UNITED STATES CONFERENCE OF MAYORS, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, PENNSYLVANIA DEPARTMENT OF COMMUNITY AND ECONOMIC DEVELOPMENT, PENNSYLVANIA ASSOCIATION OF HOUSING AND REDEVELOPMENT AGENCIES, COUNTY COMMISSIONERS ASSOCIATION OF PENNSYLVANIA, PENNSYLVANIA STATE ASSOCIATION OF BOROUGHS, PENNSYLVANIA STATE ASSOCIATION OF TOWNSHIP SUPERVISORS, AND SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF

The National League of Cities, National Association of Counties, National Association of Towns and Townships, United States Conference of Mayors, International Municipal Lawyers Association, International City/County Management Association, Pennsylvania Department of Community and Economic Development, Pennsylvania Association of Housing and Redevelopment Agencies, County Commissioners Association of Pennsylvania, Pennsylvania State Association of Boroughs, Pennsylvania State Association of Township Supervisors, and Southeastern Pennsylvania Transportation Authority (collectively "*Amici*") hereby move, pursuant to Supreme Court Rule 37.2(b), for leave to file a brief *amicus curiae* in support of Petitioners. *Amici* are filing this motion

because we have been unable to secure consent from Respondents.* A copy of the proposed brief is attached.

As more fully explained under the "Identity and Interest of *Amici Curiae*" section of the attached brief, *Amici* consist of agencies, associations, and organizations representing state and local governments across the United States. *Amici* and their members are thus tasked with and serve as the primary driving force behind land-use regulation and economic redevelopment in this country. Consequently, *Amici* have a particular and compelling interest in seeing that the actions of states, counties, and other municipalities -- which are already subject to extensive control and review -- are not further delayed by expensive and protracted federal takings litigation.

This brief will assist the Court in determining whether to grant certiorari because *Amici* are well positioned to point out the importance of this case to governmental bodies, who, along with taxpayers, will shoulder the burden of the duplicative litigation provided by the United States Court of Appeals for the Third Circuit. Simply put, the Third Circuit's ruling will require cash-strapped state

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*Letters requesting consent were sent, via e-mail and overnight mail, to Petitioners and Respondents on May 10, 2012, May 14, 2012, and May 15, 2012. As of this date, Petitioners have consented to all *Amici*, but Respondents have refused consent, except as to the Pennsylvania Association of Housing and Redevelopment Agencies and International Municipal Lawyers Association. By letter dated May 2, 2012, counsel of record for Petitioners and Respondents received notice pursuant to Rule 37.2(a) that these *Amici* intended to file this brief.

and local governments to defend against expensive, *de novo* litigation in federal court, for no reason other than to provide plaintiffs with a second, federal bite at the apple. *Amici* cannot emphasize enough the detrimental impact that that decision will have on states, counties, and other municipalities.

Accordingly, *Amici* respectfully request that the Court grant leave to file the attached brief as *amici curiae*.

DATED: May 16, 2011

Respectfully submitted,

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IDENTITY AND INTEREST OF AMICI CURIAE[1]

The National League of Cities ("NLC"), founded in 1924, is the oldest and largest organization representing municipal governments throughout the United States. Working in partnership with 49 state municipal leagues, NLC serves as a national advocate for the more than 19,000 cities, villages, and towns it represents. Its mission is to strengthen and promote cities as centers of opportunity, leadership, and governance.

The National Association of Counties ("NACo") is the only national organization that represents county governments in the United States. NACo provides essential services to the nation's 3,068 counties through advocacy, education, and research.

The National Association of Towns and Townships ("NATT") is a national organization that provides technical assistance, educational services, and public policy support to local government officials for more than 13,000 communities throughout the United States.

The United States Conference of Mayors ("USCM"), founded in 1932, is the official non-partisan organization of all United States cities with populations of more than

1. Pursuant to this Court's Rule 37.6, *Amici Curiae* affirm that no counsel for any party authored this brief, in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici Curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. By letter dated May 2, 2012, counsel of record for Petitioners and Respondents received notice that *Amici* intended to file this brief.

30,000. There are over 1,200 such cities in the country today. Each of these cities is represented in the Conference by its chief elected official, the mayor.

The International Municipal Lawyers Association ("IMLA") is a non-profit, non-partisan professional organization with more than 2,500 members comprised of local government entities. Those entities include cities, counties, and subdivisions thereof. IMLA develops and advances solutions to important legal issues faced by local governments and represents their interests through *amicus* filings in this Court and other federal and state appellate courts.

The International City/County Management Association ("ICMA") is a nonprofit professional and educational organization of over 9,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. Its mission is to create excellence in local governance by advocating and developing the professional management of local governments throughout the world.

The Pennsylvania Department of Community and Economic Development ("DECD") is a Commonwealth agency which fosters opportunities for businesses to grow and for communities to succeed and thrive in a global economy. Its mission is to improve the quality of life for Pennsylvania citizens, while assuring transparency and accountability in the expenditure of public funds.

The Pennsylvania Association of Housing and Redevelopment Agencies ("PAHRA") is an affiliation of Pennsylvania's housing authorities, redevelopment

authorities, community development agencies, and nonprofit corporations. The purposes of PAHRA are to disseminate information relating to housing and community development; study and analyze national, state, and local legislation affecting housing and community development; provide a channel for the frequent exchange of ideas, experiences and innovations within the fields of housing and community development; and increase public understanding of the methods and objectives of housing and community development agencies.

The County Commissioners Association of Pennsylvania ("CCAP"), founded in 1886 as a largely volunteer group, is a state association empowered to discuss and resolve questions arising in the discharge of the duties and functions of the respective officers of Pennsylvania's counties and to provide uniform, efficient, and economical means of administering the affairs of Pennsylvania's counties.

The Pennsylvania State Association of Boroughs ("PSAB") is a non-profit, incorporated association that has been serving and advocating the interests of boroughs in the Commonwealth of Pennsylvania since 1911. A unified voice is provided by PSAB on matters of public concern to assist more than 16,000 elected and appointed officials of the 958 boroughs of the Commonwealth of Pennsylvania with providing effective local government for residents and taxpayers. Adjudication of this case shall have a substantial impact on the viable growth, development, and financial stability of boroughs in the Commonwealth of Pennsylvania.

The Pennsylvania State Association of Township Supervisors ("PSATS") has been providing services to and representing the interests of townships of the second class in the Commonwealth of Pennsylvania since 1921. There are 1445 townships of the second class in the Commonwealth of Pennsylvania. *See* 53 P.S. §55201 (explaining that, in Pennsylvania, second-class townships are those with less than 300 inhabitants per square mile).

Pursuant to its enabling statute, the Southeastern Pennsylvania Transportation Authority ("SEPTA") is a Commonwealth agency and an instrumentality of the Commonwealth. SEPTA's status as a Commonwealth party and agency of the Commonwealth of Pennsylvania has been recognized in appellate court decisions. SEPTA's enabling statute confers on it, among other things, the takings power.

Amici Curiae have a compelling interest in the issues presented by the instant case. State and local governments are charged with and serve as the primary driving force behind land-use regulation and economic redevelopment. The actions of state and local governments are already subject to extensive control and review. The decision by the Third Circuit will have a chilling effect on the ability and willingness of already cash-strapped state and local governments to take on land-use and redevelopment projects because of the fear of protracted and expensive federal litigation. It is simply unnecessary and unfair to foist upon state and local governments yet another round of duplicative litigation, when the state courts have already engaged in highly complex, fact-intensive analysis of the issues.

SUMMARY OF ARGUMENT

In 2005, the Supreme Court of the United States settled a decades-long debate about whether an *England* reservation could thwart the application of the Full Faith and Credit Act, 28 U.S.C. §1738 (2012)(hereafter the "FFCA"), and the doctrines of claim and issue preclusion that it encompasses. In *San Remo Hotel, L.P. v. City & County of San Francisco*, 545 U.S. 323 (2005), the Court held that, when a plaintiff adjudicates a takings dispute in state court, as required by *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), it cannot, by asserting an *England* reservation in state court, avoid the application of the preclusion doctrines if it later files the same takings claims under federal law in federal court. *See San Remo*, 545 U.S. at 338 ("Federal courts . . . are not free to disregard 28 U.S.C. §1738 simply to guarantee that all takings plaintiffs can have their day in federal court.").

In *R & J Holding Co. v. Redevelopment Authority of Montgomery County*, 670 F.3d 420 (3d Cir. 2011), however, the United States Court of Appeals for the Third Circuit held that neither claim- nor issue-preclusion barred Respondents from re-litigating their federal takings claims in a second proceeding in federal court following a *Williamson County*-directed state court adjudication of the same takings claims. *See id.* at 428-30. This decision conflicts with this Court's decision in *San Remo*, the FFCA, the rulings of other circuits, and the foundational principles of preclusion, comity, and federalism. It also adds to the uncertainty in the lower courts concerning the preclusive effect of a state court judgment on a later instituted federal takings lawsuit. But the most troubling

aspect of the Third Circuit's decision from the perspective of elected officials and taxpayers is that it will require already overburdened state and local governments to shoulder more expensive, more protracted, and duplicative takings litigation. Such a scheme will only hamper state and municipal efforts at economic redevelopment and local land-use planning at a time when it is needed most.

Instead of the clear rule crafted by this Court in *San Remo*, state and local governments now face uncertainty and continued gamesmanship by potential takings claimants as a tool for the advancement of their interests. Confronted with such daunting expenses and lengthy litigation, already cash-strapped governmental bodies will be chilled in their efforts to effectuate necessary community development and responsible land-use plans. Such a result is simply contrary to the long-established, and recently clarified, rules of taking.

REASONS FOR GRANTING REVIEW

I. The Third Circuit's Decision Implicates Exceptionally Important And Recurring Issues of Preclusion, Comity, And Federalism, Which, If Left Unresolved, Will Significantly Impair The Ability Of State And Local Governments To Engage In Economic Redevelopment.

The Fifth Amendment to the United States Constitution prohibits the taking of private property without just compensation. *See* U.S. Const. amend. V. Section 1983 of the Judicial Code, 42 U.S.C. §1983 (2012), imposes liability on persons -- including, by judicial construction, municipalities and other state agencies -- who, under

color of state law, deprive others of rights secured by the United States Constitution and federal laws. *See id.* Thus, under these provisions, a municipality's alleged taking of private property raises a federal question, which confers jurisdiction on federal courts. *See* U.S. CONST. art. III, §2; 28 U.S.C. §1331 (2012).

For the past twenty-five years, however, the Supreme Court of the United States has significantly limited access to federal courts in takings cases, *see, e.g.*, *DLX, Inc. v. Kentucky*, 381 F.3d 511, 519-21 (6th Cir. 2004) (positing that "[t]he availability of federal courts to hear federal constitutional takings claims has often seemed illusory"), thereby "delegat[ing] to state courts the primary responsibility for policing land use regulation." Stewart E. Sterk, *The Demise of Federal Takings Litigation*, 48 WM. & MARY L. REV. 251, 252 (2006). In *Williamson County*, the Court held that takings claimants must first "seek compensation through the procedures the State has provided" before proceeding with a takings claim in federal court. *Williamson County*, 473 U.S. at 186. Then, in *San Remo Hotel*, the Court held that there is no exception to the FFCA, and the issue- and claim-preclusion doctrines it encompasses, when, pursuant to *Williamson County*, a plaintiff adjudicates a takings dispute in state court. *See San Remo Hotel*, 545 U.S. at 347.[2]

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2. *See generally* Josh Patashnik, *Bringing a Judicial Takings Claim*, 64 STAN. L. REV. 255, 268 (2012) ("The combination of *Williamson County*'s state-litigation requirement and *San Remo Hotel*'s application of preclusion principles to takings claims means that there can be no regulatory takings litigation challenging state and local land use regulation in federal district court." (citation and quotation marks omitted)).

Despite these rulings, courts continue to struggle with the effect of an *England* reservation -- a device that, in the wake of *Williamson County*, plaintiffs regularly employed to try to preserve their ability to litigate federal takings claims after state court determinations, but which has since been rendered essentially null and void by *San Remo Hotel*[3] -- when a federal court has not previously abstained from resolving the federal claims under *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941). *Compare*, *e.g.*, *Los Altos El Granada Investors v. City of Capitola*, 583 F.3d 674, 684-86 & n.3 (9th Cir. 2009) (determining that an *England* reservation forestalls claim, but not issue, preclusion where, in the absence of a *Pullman* abstention, a plaintiff is forced to litigate in state court by the exhaustion requirements of *Williamson County*),[4] *with*, *e.g.*, *Knutson v. City of Fargo*, 600 F.3d 992, 998 (8th Cir.) (concluding that, in a non-*Pullman*-abstention scenario, the plaintiffs' attempted reservation of their right to adjudicate their federal takings claim in federal court did not prevent the application of issue-preclusion principles), *cert. denied by*,

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3. *See*, *e.g.*, J. David Breemer, *You Can Check Out But You Can Never Leave: The Story of Sam Remo Hotel -- The Supreme Court Relegates Federal Takings Claims to State Courts Under a Rule Intended to Ripen the Claims for Federal Review*, B.C. Envtl. Aff. L. Rev. 247, 258-61, 275 (2006).

4. *See also Agripost, LLC v. Miami-Dade County*, 525 F.3d 1049, 1055 (11th Cir. 2008) ("Although the Supreme Court's reasoning in *San Remo Hotel* seems to undercut much of the support for [*Jennings v. Caddo Parish School Board*, 531 F.2d 1331 (5th Cir. 1976) (*per curiam*)] and [*Fields v. Sarasota Manatee Airport Authority*, 953 F.2d 1299 (11th Cir. 1992)], we need not decide now whether they have been implicitly overruled to the extent that they would permit the reservation of federal claims in non-*Pullman* situations.").

131 S. Ct. 357 (2010), and *Edwards v. City of Jonesboro*, 645 F.3d 1014, 1020 (8th Cir. 2011) (holding that, outside of the context of a *Pullman* abstention, the plaintiff did not avoid claim preclusion by "reserving" his federal takings claims for a later federal suit).

No case is more illustrative of this point than *R & J Holding*. Indeed, the Third Circuit itself observed that:

> *England* reservations have been permitted outside the *Pullman* context, including in cases sent to state court to fulfill the ripeness requirements of *Williamson County*. But the availability of an England [sic] reservation in the *Williamson County* context has been called into question by [*San Remo Hotel*], in which the Supreme Court held that plaintiffs could not rely on *England* to avoid the bar of issue preclusion in a takings case.

R & J Holding, 670 F.3d at 428 (citation omitted). But rather than address the continued viability of *England* within the *Williamson County* setting, an issue squarely before the court, the Third Circuit opted instead to ignore the matter altogether. *See id.* Inexplicably, the Third Circuit then proceeded to premise its ruling on the *England* reservation, holding that Petitioners' failure to object to the reservation during the state court proceedings acted to forestall the application of claim preclusion in the subsequently instituted federal takings litigation. *See id.* at 428-29.

The Third Circuit's ruling on issue preclusion also is unprecedented. Prior to *R & J Holding*, the courts of appeals uniformly held that issue preclusion attaches to

state court judgments in *Williamson County*-directed proceedings that resolve takings claims under state law. *See Edwards*, 645 F.3d at 1020; *Knutson*, 600 F.3d at 997-98; *Agripost*, 525 F.3d at 1055 & n.6; *cf. Downing/Salt Pond Partners, L.P. v. R.I. & Providence Plantations*, 643 F.3d 16, 21 (1st Cir.) ("Under the *Williamson County* ripeness rules a plaintiff might be precluded from ever bringing a takings claim in federal court if the substance of the federal claim is litigated in state court."), *cert. denied by*, 132 S. Ct. 502 (2011). The Third Circuit departed from this precedent, reasoning that Respondents' federal-takings lawsuit was not barred by the doctrine of issue preclusion because "[t]he parties never actually litigated the federal constitutionality of the Pennsylvania Eminent Domain Code and the state courts never actually decided it." *R & J Holding*, 670 F.3d at 430.[5]

In so holding, and as aptly noted by Petitioners, the Third Circuit rendered a decision in conflict with *San Remo Hotel*, the FFCA, the rulings of other circuits, and the foundational principles of preclusion, comity, and federalism. It also added to the uncertainty regarding the preclusive effect of a state court judgment on a later instituted federal takings lawsuit. Further, the Court of Appeals provided plaintiffs with a roadmap to circumvent *Williamson County* and *San Remo Hotel*, thus affording them a second bite at litigating a state-court adjudicated takings claim in federal court.

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5. *But see R & J Holding*, 670 F.3d at 435 (Nygaard, J., dissenting) (finding the district court's dismissal of Respondents' federal takings claim proper on preclusion grounds because their "Fifth Amendment taking claim is, in every respect, the *de facto* condemnation claim raised and dismissed in state court").

For state and local governments, however, the consequences that will flow from the Third Circuit's decision are far from academic. The scheme provided for by the Third Circuit will have a profound impact on states and municipalities by ensuring expensive, protracted, and duplicative takings litigation in federal court. Such *de novo* litigation (or, more precisely, relitigation) is problematic because it will further deplete the already scarce tax dollars and resources available to cash-strapped state and local governments. It also stands to frustrate government planning efforts and community development. Moreover, it threatens to chill appropriate land-use regulation by states, counties, and local municipalities. In short, the Third Circuit's ruling will only exacerbate the challenges that governmental bodies already face when undertaking economic redevelopment.

Accordingly, this Court should grant certiorari to prevent the harmful results that will emanate from the Third Circuit's decision below.

A. The Third Circuit's Ruling Will Require Cash-Strapped State And Local Governments To Defend Against Expensive, *De Novo* Litigation In Federal Court, For No Reason Other Than To Provide Plaintiffs With A Second, Federal Bite At The Apple.

It is widely accepted that condemnation for redevelopment purposes is a public good, with widespread and critical benefits. *See*, *e.g.*, George Lefcoe, *After Kelo, Curbing Opportunistic TIF-Driven Economic Development: Forging Ineffectual Blight Tests; Empowering Property Owners and School Districts*,

83 Tul. L. Rev. 45, 46 (2008) (acknowledging the long held view that "[l]ocal governments undertake economic development projects to pump up the local tax and job rolls, enhance urban infrastructure . . ., and advance planning norms" (footnote omitted)).[6] Indeed, the use of eminent domain is often essential to assemble a critical mass of property needed for development in metropolitan

6. *See also Grimm v. City of Pittsburgh*, 279 A.2d 379, 381 (Pa. Cmwlth. 1971) ("The entire theory of redevelopment is premised on the fact that in the long run the current expenditures of various monies by the Federal, State and local governments, although costly in the initial stages, will, in the long run, prove beneficial to the citizens of a community, both from a sociological and an economic point of view."). *See generally State ex rel. W. Va. Citizens Action Group v. W. Va. Econ. Dev. Grant Comm.*, 580 S.E.2d 869, 893 (W. Va. 2003) ("The legislature apparently believes that downtown redevelopment districts will promote the vitality of retail business areas within municipalities, serve as an effective means for restoring and promoting retail and other business activity within said districts, will benefit municipalities by increasing the tax base within said downtown redevelopment district and will stimulate economic growth and job creation." (citation and quotation marks omitted)); *Daniels v. Area Plan Comm'n of Allen County*, 306 F.3d 445, 462 (7th Cir. 2002) ("In Indiana, local governments may designate areas 'economic development areas' and establish redevelopment commissions based on findings that increased development in the region will promote employment, attract a new business enterprise, increase the property tax base, improve diversity of the economic base and create other similar benefits."); *Landmarks Preservation Council of Ill. v. City of Chi.*, 531 N.E.2d 9, 12 (Ill. 1988) (reciting the legislative finding that "the public benefits of the redevelopment of block 37 as reflected by the expected incremental tax revenues to be generated within the redevelopment project area, expanded employment opportunity and revitalized economic activity, significantly outweighs the architectural or aesthetic value of the McCarthy Building" (citation and quotation marks omitted)).

areas because "market failures make it impossible for the private sector to do the job alone." Br. of *Amicus Curiae* Nat'l League of Cities, *et al.* in *Kelo v. City of New London*, 2005 WL 166931, at *19 (U.S. Jan. 21, 2005).

According to one commentator, the reason for this phenomenon, at least as it relates to vacant property, is that:

> [T]he neighborhoods where most vacant property lies encompass some of the weakest real estate markets in the metropolitan region, [and thus,] the market return on private investment is not sufficient to make large-scale rehabilitation and new construction activities feasible in most of these neighborhoods. Private capital, the resource that had funded housing development in urban neighborhoods during the industrial-age boom years, is not available in sufficient supply to address the conditions of vacancy and abandonment that exist today. For these reasons, local government [must] take the lead in mobilizing available municipal resources[.]

John Kromer, *Vacant-Property Policy and Practice: Baltimore and Philadelphia*, The Brookings Institution Center on Urban and Metropolitan Policy, at 1 (Oct. 2002), https://www.fels.upenn.edu/sites/www.fels.upenn.edu/files/Vacant_Property_Policy_and_Practice_Baltimore_and_Philadelphia_0.pdf.

But for urban waterfront communities like Conshohocken, Pennsylvania, which is located thirteen miles northwest of downtown Philadelphia and situated

along the banks of the Schuylkill River, economic redevelopment has proven to be a key tool for state and local governments seeking to revitalize those areas. As explained by one observer,

> [W]aterfront redevelopment holds forth the promise of creating a unique draw that will bring people back to the city and create a sense of community[,] place[,] and history. . . . [W]aterfront redevelopment is valuable not only in its own right, but also as a catalyst for renewing the entire urban landscape. Indeed, many Smart Growth advocates herald waterfront redevelopment as the centerpiece of a city's urban renewal plans.

Lisa Grow Sun, *Smart Growth in Dumb Places: Sustainability, Disaster, and the Future of the American City*, 2011 BYU L. Rev. 2157, 2176 (2011) (footnote omitted); *see also* Br. of *Amicus Curiae* Nat'l League of Cities, *et al.* in *Kelo v. City of New London*, 2005 WL 166931, at *19 (finding that urban waterfront redevelopment "breathes new life into abandoned waterfront factories, warehouses, and shipyards rendered obsolete by economic change").

Not surprisingly then, the Supreme Court of the United States has repeatedly extolled the benefits of economic redevelopment, stating that "[p]romoting economic development is a traditional and long-accepted function of government," *Kelo v. City of New London*, 545 U.S. 469, 484 (2005), and that "regulation of land use is perhaps the quintessential state activity." *FERC v. Mississippi*, 456 U.S. 742, 767 n. 30 (1982); *see also Berman v. Parker*, 348 U.S. 26, 35 (1954) ("Property

may of course be taken for [blighted-area] redevelopment which, standing by itself, is innocuous and unoffending. . . . If owner after owner were permitted to resist these redevelopment programs on the ground that his particular property was not being used against the public interest, integrated plans for redevelopment would suffer greatly.").

Economic redevelopment, though, is not without its costs. A 1992 survey of municipal officers found that, in the previous two years, "litigation costs [rose] at a rate far in excess of the inflation rate" in most cities. Susan A. Macmanus, *The Impact of Litigation on Municipalities: Total Cost, Driving Factors, and Cost Containment Mechanisms*, 44 SYRACUSE L. REV. 833, 834 (1993). Among the leading factors that respondents identified as causing the increase was "an explosion in the non-traditional use of civil rights statutes -- most important, section 1983 of the Civil Rights Act of 1971 -- to include cases involving such areas as zoning and land development." *Id.* at 836-37 (quotation marks and citation omitted). In fact, seventy-percent of those surveyed listed inverse-condemnation actions as among those cases which contributed most to their rising litigation costs. *See id.* at 839-40, 850.

It is not difficult to surmise why these cases cost so much, given that they entail lengthy, highly-detailed, and fact-sensitive inquires, and often require the use of outside counsel and expensive expert witnesses. *See id.* at 840; *cf. San Remo*, 545 U.S. at 347 (noting the "complex, factual, technical, and legal questions relating to zoning and land-use regulations"). Inverse-condemnation actions also typically do not end upon the conclusion of a state-court trial, but only after an appeal is resolved, which can take several years.

Indeed, this case exemplifies the burden of defending against a takings lawsuit. For the past sixteen years, Petitioners have been entrenched in a legal battle with Respondents over the attempted condemnation of Respondents' property. *See R & J Holding*, 670 F.3d at 424-26 (reciting the factual and procedural history of this case); *see also R & J Holding Co. v. Redevelopment Auth. of Montgomery County*, 2009 WL 4362567, at *1-4 (E.D. Pa. Nov. 30, 2009) (same), *rev'd by*, 670 F.3d 420 (3d Cir. 2011). Petitioners' redevelopment efforts have spawned four lawsuits (two filed in state court and two filed in federal court), four appeals (two lodged with the Pennsylvania Commonwealth Court and United States Court of Appeals for the Third Circuit, respectively), one Petition for Allowance of Appeal to the Pennsylvania Supreme Court, and one Petition for Writ of Certiorari to this Court. Over this period, Petitioners have expended considerable resources, both in terms of tax dollars and manpower, in defending against these actions, and yet the litigation lives on. Simply put, this nearly two-decade-old litigation has exacted a substantial toll on Petitioners, as it would on any condemning authority. *See generally* Madeline Reed, *Sea Walls and the Public Trust: Navigating the Tension Between Private Property and Public Beach Use in the Face of Shoreline Erosion*, 20 Fordham Envtl. L. Rev. 305, 334 (2009) (positing that, even when "the government wins regulatory takings cases, it still loses, as tax dollars and vital resources are expended in litigation that has no long-term benefit").

These burdens promise to become heavier if the Third Circuit's decision is permitted to stand. That is because *R & J Holding* invites federal courts to disregard the FFCA, as well as the claim- and issue-preclusion principles that it

embodies, where, as here, a plaintiff attempts to relitigate his or her federal takings claims in a second proceeding in federal district court following a *Williamson County*-directed state court adjudication of the same takings claims, in derogation of this Court's precedent. *See R & J Holding*, 670 F.3d at 428-30. And as a consequence, plaintiffs will now have a second bite at litigating a state-court adjudicated takings claim in federal court.[7]

Although this scheme will further drain the limited resources available to state and local governments, *see*, *e.g.*, "The Economy and the States: Less of a Drag," THE ECONOMIST 74 (Jan. 7, 2012) (describing the budgetary,

7. To the extent that it could be argued that the Third Circuit's ruling represents a factual anomaly, as it is premised, in part, on Petitioners' failure to object to Respondents' assertion of an *England* reservation, *see R & J Holding*, 670 F.3d at 428-29, such a view is misguided. If history serves as any indication, the Third Circuit's decision will likely be the first in a long line of cases in which federal courts assert a supposed independent state-law basis to avoid the claim- and issue-preclusion principles encompassed in the FFCA. *Cf.*, *e.g.*, Breemer, *supra* note 3, B.C. ENVTL. AFF. L. REV. at 256-61 (observing that, in the wake of *Williamson County* and the subsequent trend of municipalities combining its ripeness requirement with preclusion doctrine embodied in the FFCA to eliminate federal takings litigation from federal court, landowners began to develop strategies for preserving the right to litigate takings claims in federal court, which most federal courts endorsed). *Cf. generally Santini v. Conn. Hazardous Waste Mgmt. Serv.*, 342 F.3d 118, 130 (2d Cir. 2003) ("It would be both ironic and unfair if the very procedure that the Supreme Court required [the plaintiff] to follow before bringing a Fifth Amendment takings claim -- a state-court inverse condemnation action -- also precluded [the plaintiff] from ever bringing a Fifth Amendment takings claim."), *abrogated by*, *San Remo Hotel, L.P. v. City & County of S.F.*, 545 U.S. 323 (2005).

labor, and revenue shortfalls that almost all state and local governments have faced since 2007),[8] small municipalities, which, historically, have limited funds at their disposal, will presumably suffer the most harm as a result of the Third Circuit's decision. According to a recent report from the United States Senate, 90 percent of American municipalities have less than 10,000 people, and as such, cannot afford a full-time municipal lawyer. *See* S. Rep. No. 105-242, at 44-45 (1998). For these municipalities, defending a single takings lawsuit will give rise to debilitating costs. Thus, many small municipalities may decide that it is simply too expensive to engage in economic redevelopment in the wake of *R & J Holding* -- which sanctions duplicative takings litigation -- thereby harming the community at large.[9] *Cf. Kelo*, 545 U.S. at 484 ("Promoting economic development is a traditional and long-accepted function of government.").

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8. *See also* Joseph N. DiStefano, "Local Governments are Still Under Financial Pressure," PHILA. INQUIRER A15 (Jan. 10, 2012) (quoting one prominent financial analyst as stating that, "We may still be in the early innings of the deterioration in municipal finances"). *See generally* Thomas Ruppert, *Reasonable Investment-Backed Expectations: Should Notice or Rising Seas Lead to Falling Expectations for Coastal Property Purchasers?*, 26 J. LAND USE & ENVTL. L. 239, 241 (2011) ("Even when takings claims fail, the time and expense of litigating the issue can dramatically impact the regulating entity as many, particularly with the current economic situation, already lack funds for basic operations.").

9. The same is true of financially distressed municipalities, which, in Pennsylvania, total twenty in number. *See*, *e.g.*, Jan Murphy, "Pennsylvania Declares Harrisburg 'Financially Distressed,'" PATRIOT-NEWS (Dec. 15, 2010).

B. The Third Circuit's Decision Will Further Delay The Planning Efforts Of State And Local Governments, Causing A State Of Uncertainty Which Will Unduly Burden Regulators And Developers.

The further takings litigation endorsed by the Third Circuit not only will be expensive -- it will also be protracted. The duplicative federal litigation would presumably commence with a new complaint, followed by additional (albeit needless) discovery and a new round of pre-trial motions. Briefing, arguing, and resolving the dispositive motions in the additional takings litigation likely will take months, if not years, to complete. And in those cases in which the matter proceeds to a second trial, state and local governments would likely have to defend against a subsequent appeal, which, like dispositive motions, often persists for months and even years. *See*, *e.g.*, *W.J.F. Realty Corp. v. Town of Southampton*, 220 F. Supp. 2d 140, 142-45 (E.D. N.Y. 2002) (describing the eleven-year history of an ongoing state- and federal-takings challenge to a local land-use regulation and the Long Island Pine Barrens Protection Act).

In the interim, government planning efforts once again will be put on hold until the duplicative takings litigation is resolved. Other decisions, such as approval of zoning permits and land-use regulations, will be suspended, pending the outcome of the lawsuit. As explained by one group of States, "[f]or communities, the delay in the final determination regarding use of a major parcel of land can mean a long wait for other related development efforts[;] [a]nd since a large development project can significantly affect the character of the entire community, delay has

far-ranging repercussions." Br. of *Amicus Curiae* New York, *et al.* in *San Remo Hotel, L.P. v. City & County of S.F.*, 2005 WL 508091, at *17 (U.S. Mar. 1, 2005). [10]

C. The Third Circuit's Ruling Threatens To Chill Appropriate Land-Use Regulation By States, Counties, And Local Municipalities.

In the end, the mere possibility of takings litigation threatens to chill appropriate land-use regulation by governmental bodies. Specifically, in those instances where reasonable land-use controls are likely to invite extensive and time-consuming litigation, states, counties, and local municipalities will be hesitant to implement them. In fact, the Department of Justice ("DOJ") recently recognized the potential for just such an adverse effect. In opposing a proposed congressional effort to expand federal jurisdiction over takings claims, the DOJ found that expanding federal jurisdiction would:

> [S]hift dramatically the balance of power between developers and State and local officials

10. Even if the takings case is ultimately decided in favor of the condemning authority, it may need to significantly alter its redevelopment plans to account for intervening events, only further delaying the process. *See*, *e.g.*, Dennis Schmelzer, *Takings for Granted: The Convergence and Non-Convergence of Property Law in The People's Republic of China and the United States*, 19 Duke J. Comp. & Int'l L. 133, 155-56 (2008) (explaining that, while City of New London eventually won the right to take the properties of several holdouts through litigation, "by the time the city was able to defeat the challenges to the taking, builders who once considered projects [had] moved on, deterred by the controversy" (citation and quotation marks omitted)).

> by handing developers a powerful new weapon in their negotiations with community officials: the threat of premature and potentially expensive Federal court litigation. This new weapon could well be used to disrupt State procedures designed to protect public health, safety, public resources and the environment. Confronted with the prospect of a potentially costly and time-consuming Federal court lawsuit, State and local officials would feel new pressure to approve land use proposals to avoid litigation, even if the proposed use might harm neighboring property owners and the community at large.

H.R. Rep. No. 106-518, at 39 (2000); s*ee also* Br. of *Amicus Curiae* Cmty. Rights Council, *et al.* in *San Remo Hotel, L.P. v. City & County S.F.*, 2005 WL 508089, at *5 (U.S. Mar. 1, 2005) ("Developers commonly use litigation, or the mere threat of litigation, as a tool for advancing their interests in land use negotiations.").

Again, the Third Circuit's ruling will exacerbate these consequences. Given the potential for expensive, protracted, and duplicative federal takings litigation in federal court, many state and local governments will approve land-use regulations and economic-development plans that avoid litigation, even if the community could be better served by alternative proposals.

CONCLUSION

Plaintiffs should not be afforded a second bite at litigating a state-court adjudicated takings claim in federal court, in violation of the FFCA and this Court's precedent. Such a scheme will force state and local governments to bear the burden of expensive, protracted, and duplicative takings litigation in federal court. This, in turn, will deplete the already scarce tax dollars and resources available to states, counties, and other municipalities and hamper their efforts at economic redevelopment and local land-use planning at a time when it is needed most. Accordingly, this Court should grant review to address the harmful consequences that will emanate from the Third Circuit's decision in *R & J Holding*.

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