No. 03-15853

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SAN REMO HOTEL L.P., et al.,
Plaintiffs-Appellants,

v.

CITY AND COUNTY OF SAN FRANCISCO, et al.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
(Hon. D. Lowell Jensen)

BRIEF OF *AMICI CURIAE* CALIFORNIA STATE ASSOCIATION OF COUNTIES, LEAGUE OF CALIFORNIA CITIES, and INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION IN SUPPORT OF DEFENDANTS-APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *Amici* California State Association of Counties, League of California Cities, and International Municipal Lawyers Association state that they are non-profit organizations that have no parent companies, subsidiaries, or affiliates that have issued shares to the public.

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INTEREST OF AMICUS CURIAE

Amici's members include local governments and local officials in California and throughout the United States. *Amici* have a compelling interest in the continued uniformity of the law regarding the appropriate forum for takings claims against local officials.

The California State Association of Counties (CSAC) is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee has determined that this case is a matter affecting all counties.

The League of California Cities is an association of all 478 California cities united in promoting the general welfare of cities and their citizens. The League's Legal Advocacy Committee is comprised of 24 city attorneys representing all 16 divisions of the League from all parts of the state. The committee monitors appellate litigation affecting municipalities and identifies those that are of statewide significance.

The International Municipal Lawyers Association (IMLA) is a non-profit, professional organization that has been an advocate and resource for local

government attorneys since 1935. IMLA members include attorneys from more than 1,400 cities, and IMLA serves as the legal voice for the nation's local governments.

All parties have consented to the filing of this brief.

ARGUMENT

The owners of the San Remo Hotel urge upon this Court a proposition that the U.S. Supreme Court and numerous circuit courts have consistently rejected—that takings claimants have an unfettered right to pursue their compensation claims in federal court.

San Remo has been challenging the constitutionality of San Francisco's hotel conversion ordinance (HCO) for a decade. After a federal district court rejected San Remo's initial claims, this Court vacated that ruling on San Remo's own motion and ordered abstention under *Railroad Commission of Texas v. Pullman Co*., 312 U.S. 496 (1941), in favor of state court proceedings. *San Remo Hotel v. City & County of San Francisco*, 145 F.3d 1095 (9th Cir. 1998).

Now, after fully litigating its claims and ultimately losing on the merits before the California Supreme Court, San Remo returns to this Court to seek a third bite at the same apple in direct contravention of the Full Faith and Credit Act and this Court's own precedent in *Dodd v. Hood River County* (*Dodd I*), 59 F.3d 852 (9th Cir. 1995) and *Dodd v. Hood River County* (*Dodd II*), 136 F.3d 1219 (9th

Cir. 1998). The *Dodd* cases and other circuit precedent already reject San Remo's argument that a takings claimant, in federal court after successfully reserving a federal claim in state court, can relitigate the precise issues decided by the state court.

As demonstrated in Section I below, San Remo cites no case from any circuit that compels this Court to abandon its well-considered precedent establishing that issue preclusion remains a bar to federal court. The Second Circuit's decision in *Santini v. Connecticut Hazardous Waste Management Service*, 342 F.3d 118 (2d. Cir. 2003), is aberrational and directly conflicts with the application of the Full Faith and Credit Act to relitigation of takings claims. Although takings claimants may successfully avoid claim preclusion by invoking the protection of *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964), that case provides no safe harbor from the doctrine of issue preclusion.

San Remo further argues that this Court should review its claims under the heightened scrutiny usually reserved for land dedication cases under *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). If, consistent with its own precedent, this Court applies issue preclusion, it need not reach the merits. Nevertheless, as shown in Section II, *Nollan*, *Dolan*, and subsequent Supreme Court cases strongly counsel against

applying heightened means-end scrutiny to impact fees and other legislative exactions that do not physically invade a landowner's property.

Finally, in Section III we note the importance of bringing takings litigation to a close after a claimant has had a full and fair opportunity to pursue redress in state court. Permitting wasteful relitigation of essentially the same dispute needlessly burdens the federal courts and undermines commendable municipal planning activities that benefit the public at large.

I. SAN REMO DOES NOT HAVE AN UNFETTERED RIGHT TO RELITIGATE ITS TAKINGS CLAIMS IN FEDERAL COURT.

A. The Full Faith and Credit Act Bars Relitigation of Issues Previously Decided in State Court.

Preclusion principles are fundamental to the effective functioning of the nation's court system. Claim and issue preclusion "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication." *Allen v. McCurry*, 449 U.S. 90, 94 (1980) (citing *Montana v. United States*, 440 U.S. 147, 153-54 (1979)). The doctrines not only reduce unnecessary litigation and bring needed finality to legal disputes, but they "also promote the comity between state and federal courts that has been recognized as a bulwark of the federal system." *Id.* at 95-96 (citing *Younger v. Harris*, 401 U.S. 37, 43-45 (1971)).

One of the oldest provisions in the federal code, the Full Faith and Credit Act, 28 U.S.C. § 1738,[1] requires federal courts to "give the same preclusive effect to a state-court judgment as another court of that State would give." *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518, 523 (1986) (citing *Migra v. Warren City*

[1] The statute, in pertinent part, reads as follows: "The records and judicial proceedings of any court of any *** State (of the United States) *** shall have the same full faith and credit in every court within the United States and its Territories and possessions as they have by law or usage in the courts of such State *** from which they are taken." 28 U.S.C. § 1738 (1994).

School Dist. Bd. of Educ., 465 U.S. 75, 81 (1984) (same)). No court has the discretion to ignore 28 U.S.C. § 1738.

The fallacy of San Remo's alleged entitlement to a federal forum for its takings claims is laid bare in *Allen v. McCurry*. Citing the Full Faith and Credit Act, the *Allen* Court barred relitigation under 42 U.S.C. § 1983 of a criminal defendant's Fourth Amendment search and seizure claim that had been previously adjudicated in state court proceedings. The Court specifically rejected the "generally framed principle that every person asserting a federal right is entitled to one unencumbered opportunity to litigate that right in a federal district court." 449 U.S. at 100. The Court reasoned:

> [N]othing in the language or legislative history of § 1983 proves any congressional intent to deny binding effect to a state court judgment or decision when the state court, acting within its proper jurisdiction, has given the parties a full and fair opportunity to litigate federal claims, and thereby has shown itself willing and able to protect federal rights.

Allen, 449 U.S. at 103-04 (footnotes and citation omitted).

Following *Allen*, this Court repeatedly recognized the preclusive effect of state court decisions under the Full Faith and Credit Act. *See, e.g., Dodd I*, 59 F.3d at 861 ("[The act] requires that federal courts 'give a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered.'" (quoting *Migra*, 465 U.S. at 81)); *Southeast Resource Recovery Facility Auth. v. Monteney Int'l Corp.*, 973 F.2d 711, 714 (9th

Cir. 1992) (holding that a California court order compelling arbitration has preclusive effect in federal court under the Full Faith and Credit Act).[2]

Where plaintiffs have "fully litigated a necessary issue in the course of the state proceedings," rules of preclusion prevent the litigants from taking "a second bite at the same apple." *Dodd II*, 136 F.3d at 1227; *see also Dodd I*, 59 F.3d at 863. This principle applies even when the challenge to the state court decision involves federal constitutional issues because "state courts are as competent as federal courts to decide federal constitutional issues." *Worldwide Church of God v. McNair*, 805 F.2d 888, 891 (9th Cir. 1986) (citing *Allen*, 449 U.S. at 105).

Williamson County v. Hamilton Bank, 473 U.S. 172 (1985), requires that before bringing a takings claim in federal court, a claimant must obtain a final decision from state authorities as to the use of the property and seek compensation in state court if the state provides an appropriate remedy. The notion, however, that a landowner who loses on the merits or is awarded inadequate compensation in state court can necessarily seek redress in federal court is clearly mistaken in light of the Full Faith and Credit Act and the numerous court decisions that have

[2] This case clearly meets the criteria for issue preclusion established under California law. City's Br. at 33-34.

invoked rules of preclusion to bar relitigation of takings claims in federal district court.[3]

Although San Remo disputes that well-established preclusion principles should bar relitigation of its claims, there is nothing fundamentally unfair or inappropriate about denying litigants another bite at the takings apple. Other federal constitutional claimants regularly are required to litigate those claims in state court or state administrative tribunals. *See, e.g., SGB Fin. Servs., Inc. v. Consolidated City of Indianapolis-Marion County*, 235 F.3d 1036, 1038 (7th Cir. 2000) ("*Williamson County* is just one among many federal doctrines routing suits to state court."); *England*, 375 U.S. at 469 (Douglas, J. concurring) (citing numerous examples). As this Court held in *Palomar Mobilehome Park Ass'n v. City of San Marcos*, 989 F.2d 362 (9th Cir. 1993), "We are compelled to conclude that res judicata bars Palomar's claims in federal district court, despite the requirements of *Williamson*." *Id.* at 365. *Accord Peduto v. City of N. Wildwood*,

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[3] Although *Williamson County* is sometimes characterized as a ripeness case, Professors Juergensmeyer and Roberts explain the importance of rejecting the ripeness label to avoid misleading takings claimants:

> Viewing the matter through the lens of ripeness, one expects a suit to lie in federal court after doing what is required in state court. Yet, engaging in the process necessary to give rise to the claim also terminates it. The ripeness label is misleading and its continued use by courts is unfortunate.

878 F.2d 725, 728 (3d. Cir. 1989) ("Appellants have exhausted their state claims, which, under *Williamson,* is a necessary predicate to their federal cause of action; but in doing so, they received a full and fair adjudication of their constitutional claims against the City in state court. Due process guarantees them no less, but entitles them to no more.").[4]

B. This Court's *Palomar* and *Dodd* Decisions Compel Application of Issue Preclusion to San Remo's Claims.

This Court has repeatedly applied the preclusion principles discussed above to bar relitigation of takings claims in federal district court. In *Palomar*, the California Supreme Court affirmed a demurrer of a landowner challenge to a rent control ordinance. When the landowner refiled in federal court on the same facts, the district court dismissed the case on grounds of claim preclusion, and this Court affirmed, stating that "to the extent that [a demurrer] adjudicates that the facts alleged do not establish a cause of action, it will bar a second action on the same

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JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, LAND USE PLANNING & CONTROL LAW 451 (1998).

[4] By choosing to reserve its federal claims, San Remo may be barred from seeking certiorari on the merits for lack of federal question jurisdiction. San Remo Br. at 28. But it was San Remo's own voluntary choice to litigate only its state claims in state court. San Remo's argument that takings claimants can never obtain U.S. Supreme Court review is belied by the simple fact that the vast majority of U.S. Supreme Court takings cases were direct challenges to state court decisions. *See, e.g.*, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Nollan*, 483 U.S. 825; *Dolan*, 512 U.S. 374. To preserve a chance at certiorari, takings claimants should fully litigate their claims in state court.

facts." *Palomar,* 989 F.2d at 363 (citing *Crowley v. Modern Faucet Mfg. Co.*, 282 P.2d 33, 34 (Cal. 1955) (same)).

San Remo's attempt to distinguish *Palomar*'s holding that federal takings claims can be barred "despite the requirements of *Williamson*" is misleading and unpersuasive. San Remo argues that, unlike in the case at bar, Palomar "'fully litigated its federal constitutional claims,'" and the state court "'expressly addressed Palomar's federal constitutional claims as well as the state claims.'" San Remo Br. at 28 (quoting *Palomar,* 989 F.2d at 365). In fact, as this Court made clear, Palomar did not expressly plead federal claims and the court did not decide them. *Palomar,* 989 F.2d at 365. The *Palomar* Court noted that "California, as most states, recognizes that the doctrine of res judicata will bar not only claims actually litigated in a prior proceeding, but also claims that could have been litigated." *Id.* (citing *Busick v. Workmen's Comp. Appeals Bd*., 500 P.2d 1386, 1392 (Cal. 1972)). The Court went on to say "[e]ven if the superior court did not fully consider the federal constitutional claims, review by a state appellate court provides a litigant with adequate opportunity to litigate its claims and satisfies due process." *Id*. at 365 n.1 (citing *DiAngelo v. Illinois Dep't of Public Aid*, 891 F.2d 1260 (7th Cir. 1989)).

San Remo's argument that *Palomar*—and by extension *Williamson County*—is irreconcilable with *City of Chicago v. International College of*

Surgeons, 522 U.S. 156 (1997), is easily refuted. *College of Surgeons* does not even cite *Williamson County*, let alone alter its requirements. The Supreme Court rarely modifies its cases so obliquely. *Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000) ("This Court does not normally overturn, or so dramatically limit, earlier authority *sub silentio*.).

Indeed, the Eighth Circuit in *Kottschade v. City of Rochester*, 319 F.3d 1038 (8th Cir. 2003), recently rejected this very argument. *College of Surgeons* "addresses only the question of federal-question jurisdiction over a ripe takings claim." *Id.* at 1040. "The Supreme Court has not explicitly overruled or modified the ripeness requirements laid out in *Williamson* in the context of takings cases." *Id.*; *accord Santini,* 342 F.3d at 129 n.6 ("If the Supreme Court had intended to overrule the ripeness requirement of *Williamson County*, it would have said so explicitly."). Moreover, subsequent to deciding *College of Surgeons,* the Court expressly reaffirmed *Williamson County*'s state-court requirement. A federal court "cannot entertain a takings claim under § 1983 unless or until the complaining landowner has been denied an adequate postdeprivation remedy." *City of Monterey v. Del Monte Dunes at Monterey, Ltd*., 526 U.S. 687, 721 (1999); *accord id.* at 710 (citing *Williamson County*).

Palomar did not involve an *England* reservation, but as this Court made clear in the *Dodd* cases, an *England* reservation protects against claim preclusion

only. Issue preclusion and the Full Faith and Credit Act could still bar relitigation of takings claims in federal court.

In the *Dodd* cases, this Court attempted to "strike a delicate balance between the interest of the defendant and of the courts in bringing litigation to a close and the interest of the plaintiff in the vindication of a just claim." *Dodd I*, 59 F.3d at 862. In *Dodd I*, this Court acknowledged that application of 28 U.S.C. § 1738 could bar relitigation of the Dodds' takings claims but nonetheless allowed the Dodds to avoid claim preclusion pursuant to an *England* reservation. The *Dodd* court never promised takings claimants an unfettered right to return to federal court, cautioning that "the question of issue preclusion is still very much in this case." *Id.* at 863. Left to be decided was whether the Oregon Supreme Court's decision on the Dodds' takings claims was "an equivalent determination under the federal taking clause so as to invoke the doctrine of issue preclusion." *Id.* The Dodds were thus forewarned that they could only avoid preclusion where state compensation procedures were inadequate.

Dodd II applied issue preclusion after holding that Oregon and federal law were identical in determining whether a *per se* taking occurred under *Lucas,* 505 U.S. at 1003. Citing *Allen*, 449 U.S. at 104, the court gave full faith and credit to the state court's determination of this issue. *Dodd II*, 136 F.3d at 1228. By contrast, after finding that Oregon law differed from federal law on whether a

taking occurred under the multi-factored inquiry of *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), the court addressed the merits of that claim and ultimately rejected it. *Id.* at 1229-30.

San Remo falsely asserts that *Dodd II* is "premised on the prior holding that *England* did not apply in that case because there had been no *Pullman* abstention order." San Remo Br. at 25 (citing *Dodd*, 59 F.3d at 862-63). The *Dodd I* court split the Dodds' takings claims to avoid claim preclusion, noting that it "need not confront the Dodds' attempt to avert the pains of preclusion law through use of an *England* reservation, which typically is available to litigants that are in state court 'involuntarily' as a result of *Pullman* abstention by the federal court." *Dodd I*, 59 F.3d at 862-63. The Dodds, however, did attempt to reserve their federal claims in state court, *id.* at 857, and it is this very reservation that the court in *Dodd II* considered in applying issue preclusion.

> Dodds' previous reservation of this federal takings claim under the doctrine of *England v. Louisiana State Bd. of Med Exam'rs*, [does not] prevent operation of the issue preclusion doctrine. Because the Dodds were effectively able to reserve their claim for federal court, the reservation doctrine does not enable them to avoid preclusion of issues actually litigated in the state forum.

Dodd II, 136 F.3d at 1227 (citations omitted). It is simply inaccurate to say *Dodd II* is premised on a holding that *England* did not apply.

In short, this Court and other circuit courts have consistently applied the "full faith and credit" statute to takings claims in federal court after adjudication

under state procedures. This Court has carefully preserved a federal forum for property owners by allowing a reservation of a federal claim and, where a reservation is made, relaxing the rule of claim preclusion. At the same time, this and other courts have refused to permit wasteful federal court relitigation of issues fully and fairly resolved in a state forum.

The *Dodd* and *Palomar* cases have succeeded in creating a "delicate balance" (59 F.3d at 862) among the interests of claimants, defendants, and the courts themselves. There is no reason to upset that balance here. San Remo would have this Court abandon its well-reasoned precedent to improperly permit all takings claimants a second or even third bite at the apple. This Court's admonition in *Palomar,* 989 F.2d at 365, applies with equal force: "While every litigant deserves his or her day in court, few deserve two." *Id.*

C. The Second Circuit's Decision in *Santini* Is Aberrant, Wrong, and Irrelevant.

San Remo encourages this Court to abandon its own precedent in favor of a new issue preclusion exception created by the Second Circuit in *Santini v. Connecticut Hazardous Waste Management Service*. The *Santini* court first held that because state law prohibited the developer in that case from litigating his federal claim in state court, claim preclusion should not apply. 342 F.3d at 130. Then, in a striking departure from settled precedent, the court ruled takings claimants generally can avoid both claim and issue preclusion altogether by

reserving their federal takings claims when first litigating in state court. *Id.* at 130 n.7. San Remo offers no compelling reason why this Court should depart from the established standards of *Palomar* and *Dodd* in order to adopt this novel position, which sets the *Santini* court apart from other circuits.

The *Santini* court acknowledged this circuit's ruling in *Dodd* that "[u]nder traditional notions of collateral estoppel * * * the state court's adverse judgment will often preclude the plaintiff's subsequent Fifth Amendment takings claim." *Santini,* 342 F.3d at 127. Futhermore, the court noted that "most of the circuits to have addressed this issue have declined to create an exception to render res judicata and collateral estoppel inapplicable in this situation." *Id.* at 127-28 (citations omitted). For example, the Third Circuit concluded that "the *Williamson* ripeness requirement is insufficient to preclude application of res judicata and collateral estoppel principles in this case." *Wilkinson v. Pitkin County Bd. of County Comm'rs*, 142 F.3d 1319, 1324 (10th Cir. 1998). In "part[ing] ways with most of [its] sister circuits," the *Santini* court knowingly created a new issue preclusion exception out of whole cloth. *Santini*, 342 F.3d at 128.

Santini involved a significant fact not present here; the Connecticut Supreme Court held in *Melillo v. City of New Haven*, 732 A.2d 133 (Conn. 1999), that takings claimants are not entitled to litigate federal takings claims in state court "because of the existence of a legally sufficient [compensation] procedure" under

that state's constitution. *Id.* at 143 n.28. Santini was thus required under *Williamson County* to seek compensation in state court, but the state court refused to hear his federal claims.

The involuntariness of Santini's presence in state court coupled with the vagaries of Connecticut law arguably created a unique situation. This Court need not address whether the Second Circuit was correct in creating a new rule for such a circumstance, because in the case at bar, San Remo *voluntarily* litigated its claims in state court. Op. at 22. San Remo itself raised the *Pullman* objection that led this Court to vacate the district court's prior decision. *San Remo,* 145 F.3d at 1104-05. Because San Remo could have litigated its federal claims in state court, and chose not to do so, there is no reason to adopt the *Santini* rule.

San Remo disputes the district court's holding on this point, San Remo Br. at 24-26, but as the Supreme Court made clear in *Allen*, it makes no difference that the plaintiff's forum for litigating the claim was imposed upon him.

> There is, in short, no reason to believe that Congress intended to provide a person claiming a federal right an unrestricted opportunity to relitigate an issue already decided in state court simply because the issue arose in a state proceeding in which he would rather not have been engaged at all.

Allen, 449 U.S. at 104.

The *Santini* court says in dictum in a footnote that its issue preclusion exception should apply equally to other states in the circuit that "permit property

owners to bring state and federal takings claims simultaneously." *Santini*, 342 F.3d at 130 n.7. This footnote contains no explanation whatsoever of why an *England* reservation should be so extended, stating only that its result is "consistent with *England*." *Id.* In fact, nothing in *England* compels such a ruling, and neither San Remo nor the *Santini* court cites a single decision in support of this extension. This Court is under no obligation to adopt a view so contrary to its own precedent.

Most importantly, the *Santini* court neglects to even acknowledge that its ruling might conflict with the Full Faith and Credit Act. Even assuming *arguendo* that the unique circumstances of Connecticut law justify creating a *Santini* reservation when federal claims cannot be litigated in either federal or state court, the Second Circuit offers no justification for overturning decades of preclusion precedent to apply this concept to situations where, as here, state courts are "willing and able to protect federal rights." *Allen*, 449 U.S. at 104.

Palomar and the *Dodd* cases balance the respective burdens on the parties and pay proper respect to the Full Faith and Credit Act. This Court should not abandon its well-reasoned precedent in favor of the non-binding and ill-considered logic of the Second Circuit.

II. The California Supreme Court Applied the Appropriate Level of Scrutiny for Adjudicating San Remo's Takings Claims.

In the event this Court considers the merits of San Remo's takings claims, it should review the HCO under a rational basis standard.[5] Contrary to San Remo's assertion, San Remo Br. at 41-42, whether to apply heightened scrutiny to legislatively-imposed exactions is no longer an open question, if it ever was. Indeed, San Remo's brief identifies not a single circuit court opinion that would justify extending *Nollan/Dolan* scrutiny to the case at bar.

Three reasons counsel against application of heightened scrutiny to the HCO. First, the very words of *Nollan*, *Dolan*, and *City of Monterey v. Del Monte Dunes, Ltd.,* 526 U.S. 687 (1999), limit use of the essential nexus and rough-

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[5] *Amicus* Pacific Legal Foundation (PLF) argues that issue preclusion should not apply because the California Supreme Court reviewed the HCO under a rational basis standard that is incompatible with federal standards for reviewing Fifth Amendment claims. Far from applying a "lesser" standard, the California constitution actually protects a broader range of property interests than the Federal constitution. California Const. art. I §19. "By virtue of including 'damage[]' to property as well as its 'tak[ing]' the California clause 'protects a somewhat broader range of property values' than does the corresponding federal provision." *San Remo Hotel v. City & County of San Francisco*, 27 Cal.4th 643, 664 (2002) (citations omitted). Aside from that difference, the California court has consistently "construed the clauses congruently." *Id.* Relying as it did both on state and federal court rulings, the California court's analysis of San Remo's takings claim warrants application of issue preclusion. Moreover, as this section demonstrates, PLF's assertion that a higher standard of review is required under federal law is simply incorrect. The overwhelming weight of federal court precedent counsels against application of *Nollan/Dolan* scrutiny to exactions like that at issue here. The California Supreme Court's standard of review thus does not provide a basis for avoiding issue preclusion.

proportionality tests to required dedications. The *Nollan* Court was particularly concerned with cases that involve land dedications, because "the right to exclude [others is] 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" 483 U.S. at 831 (quoting *Loretto v. Teleprompter Manhattan CATV Corp*., 458 U.S. 419, 433(1982)). *Dolan* likewise distinguishes dedication cases from other land use/zoning cases, because land use dedications are "not simply a limitation on the use petitioner might make of her own parcel, but a requirement that she deed portions of the property" to the government. 512 U.S. at 385.

The logical conclusion to be drawn from these statements is that impact fees and non-possessory development conditions are not subject to *Nollan/Dolan*. Indeed, no other circuits "have interpreted [*Nollan*] as changing the level of scrutiny to be applied to regulations that do not constitute a physical encroachment on land." *Commercial Builders of N. California v. City of Sacramento,* 941 F.2d 872, 874 (9th Cir. 1991) (finding no taking where a "purely financial exaction" was reasonably related to the activity against which the fee is assessed," *id.* at 876). As the Tenth Circuit held in *Clajon Production Corp. v. Petera*, 70 F.3d 1566 (10th Cir. 1995):

> Given the important distinctions between general police power regulations and development exactions, and the resemblance of development exactions to physical takings cases, we believe that the

> "essential nexus" and "rough proportionality" tests are properly limited to the context of development exactions.

Id. at 1578-79; *accord Texas Manufactured Hous. Ass'n v. Nederland,* 101 F.3d 1095, 1105 (5th Cir. 1996) (rejecting heightened scrutiny because "the Nederland Ordinance does not 'extract benefits' from [the plaintiff] in the *Nollan* sense of requiring some dedication of property").

Dolan does not alter this analysis. In *Garneau v. City of Seattle*, 147 F.3d 802 (9th Cir. 1998), two judges of this Court separately concluded that the heightened scrutiny of *Nollan* and *Dolan* should not apply to an ordinance requiring landlords to pay a portion of the relocation expenses of displaced low-income tenants. *Id*. at 820 (Williams, J.); *Id.* at 811-12 (Brunetti, J.); *accord Harris v. City of Wichita*, 862 F. Supp. 287, 294 (D. Kan. 1994), *aff'd*, 74 F.3d 1249 (10th Cir. 1996) ("The Supreme Court's decision in *Dolan* was based on the facts of that case, namely that the City had required a dedication of property as a condition for granting a redevelopment permit.").

The Supreme Court subsequently resolved any remaining doubt as to the reach of the *Dolan* test in *Del Monte Dunes*. There, the Court unanimously confirmed that rough-proportionality review under *Dolan* is limited to the narrow context of compelled dedications of property: "[W]e have not extended the rough-proportionality test of *Dolan* beyond the special context of exactions – land-use decisions conditioning approval of development on the dedication of property to

public use." *Del Monte Dunes*, 526 U.S. at 702; *accord*, *id.* at 723 (Scalia, J., concurring); *id.* at 733 (Souter, J., dissenting, joined by O'Connor, Ginsburg, and Breyer, JJ.). *See also Krupp v. Breckenridge Sanitation District*, 19 P.3d 687, 697 (Colo. 2001) ("The plain language of [*Del Monte Dunes*] suggests that a *Nollan*/*Dolan* analysis is appropriate in the narrow circumstance where the government conditions development on the forfeiture of private property for public use."); *Bonnie Briar Syndicate, Inc. v. Town of Mamaroneck*, 721 N.E.2d 971 (N.Y. 1999) ("[In] limiting [the 'rough proportionality' test's] application to those cases involving exactions, the Supreme Court necessarily rejected the applicability of the 'essential nexus' inquiry to general zoning regulations as well.").

Despite this precedent, San Remo urges this Court to adopt the reasoning of *Seawall Associates v. New York*, 542 N.E.2d 1059 (N.Y. 1989), which applied the rough proportionality test to strike down that state's hotel conversion ordinance. The New York Court of Appeals, however, overruled *Seawall* in *Bonnie Briar*. New York's high court recognized that *Seawall* opened the door for broader means-end scrutiny under the Takings Clause in light of then "considerable disagreement as to the reach of [*Nollan* and *Dolan*]," *id*. at 975, but the court then expressly repudiated the *Seawall* approach, ruling that *Del Monte Dunes* has "finally resolved" the matter by limiting such scrutiny to *Nollan/Dolan* dedications

of property. *Id*. at 975-76. The *Bonnie Briar* ruling cuts the heart out of *Seawall*, and this Court should not adopt its reasoning here.

Eastern Enterprises v. Apfel, 524 U.S. 498 (1998), also strongly counsels against expansion of the *Nollan* and *Dolan* means-end tests to impact fees and other compelled monetary expenditures of the kind at issue here. In that case, five justices retreated from a general means-ends inquiry as a takings liability standard and held that the Takings Clause does not apply to government actions that simply impose a financial obligation upon the claimant without affecting an identified property interest. Justice Kennedy's concurring opinion characterized the means-end inquiry as "in uneasy tension with our basic understanding of the Takings Clause," and concluded that, "the more appropriate constitutional analysis arises under general due process principles rather than under the Takings Clause." *Id*. at 545. Similarly, Justices Breyer, Stevens, Souter, and Ginsburg concluded in dissent that the reasonableness of government action is governed by the Due Process Clause, not the Takings Clause: "[T]he plurality views this case through the wrong legal lens. The Constitution's Takings Clause does not apply." *Id*. at 554. *See also Unity Real Estate Co. Hudson,* 178 F.3d 649, 658-59 (3d Cir. 1999) ("Five justices, however, rejected the idea that a law that imposed only a financial burden without identifying a particular property right could ever constitute a

taking" and lower courts "are bound to follow the five-four vote against the takings claims ***").

Lastly, the "sine qua non" of *Nollan/Dolan* review is the risk that the government will exploit a landowner's desire for a land-use permit by using discretionary authority to demand an unfair exaction unrelated to the proposed land use.[6] San Remo argues that rational basis review would "enable a city to put zoning up for sale with no fear of judicial scrutiny." San Remo Br. at 49. In reality, the HCO raises no risk of unfair "leveraging" because, contrary to the assertions of San Remo and PLF, no hotel has been singled out for individualized, discretionary treatment by the government.

First, the HCO applies equally to 500 hotels containing more than 18,000 units. *San Remo*, 27 Cal.4th at 669 n.12. Second, the City has a wide range of programs to address the shortage of affordable housing. In 1996, the City's voters approved $100,000,000 in bonded indebtedness to fund affordable housing. During the past five years, the City has raised 100% of the authorized amount. *See* S.F. Resolution Nos. 1079-97 ($20 million), 378-99 ($20 million), 463-00 ($20

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[6] *Ehrlich v. City of Culver City*, 12 Cal.4th 854, 869 (1996) ("It is the imposition of land-use conditions in individual cases, authorized by a permit scheme which by its nature allows for both the discretionary deployment of the police power and an enhanced potential for its abuse, that constitutes the sine qua non for application of the intermediate standard of scrutiny formulated by the court in *Nollan* and *Dolan*."); *accord Santa Monica Beach, Ltd. v. Superior Court,* 19 Cal.4th 952, 966-67 (1996).

million), 343-01 ($40 million). In addition, the City raises millions of dollars each year for affordable housing from the Community Development Block Grants, Public Housing Operating Funds, tourist hotel taxes, and many other programs. *See* S.F. 2000 Consolidated Plan at 89-109. The City also requires large residential projects to provide affordable units, and large commercial projects to pay a fee or contribute land for affordable housing. S.F. Plan. Code §§ 313 *et seq*.

In short, the City has not singled out San Remo and other residential hotels to solve the City's affordable housing deficit. Through taxes and bonds that affect all taxpayers, the City generates the bulk of the revenue to provide new affordable housing. The City spreads the cost among those currently providing affordable housing, commercial developers who generate the need for housing, and the taxpayers who benefit from living in a community that promotes affordable housing.

Cities and counties have come to expect that fees imposed on a general class of property owners will be given appropriate deference by the courts. At least 38 California cities impose similar restrictions on residential hotels. *See The California Planners' 1996 Book of Lists,* Governor's Office of Planning and Research, State of California (1996), at 50. Indeed, the overwhelming majority of U.S. municipalities impose impact fees or other exactions. *See, e.g.,* Douglas T. Kendall & James E. Ryan, *"Paying" for the Change,* 81 VA. L. REV. 1801, 1802

(1995) ("[I]t is not surprising that the use of exactions has become increasingly popular."); Vicki Been, *"Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine,* 91 COLUM. L. REV. 473, 481 & n. 42 (1991) (noting almost 90% of all communities in the United States impose impact fees or other exactions). San Remo's approach would seriously undermine municipalities' ability to assess impact fees to address the economic burdens caused by new development, including the need for new roads, schools, parks, sewers, and water treatment facilities.

In the sage words of the California Supreme Court: "Extending *Nollan* and *Dolan* generally to all government fees affecting property value or development would open to searching judicial scrutiny the wisdom of myriad government economic regulations, a task the courts have been loath to undertake pursuant to either the takings or due process clause." *San Remo,* 27 Cal.4th at 672. If this Court permits San Remo to relitigate its claims in federal court, it should not further sweeten the apple by applying such an unwarranted level of scrutiny.

III. Allowing Takings Claimants a "Second Bite at the Apple" Would Unnecessarily Burden Courts and Municipalities and Undermine Legitimate Zoning and Planning Efforts.

A. Federal Courts Are Not Zoning Boards of Appeal

Takings claimants who litigate their claims before state courts pursuant to the requirements of *Williamson County* are not automatically entitled to return to

federal court, even if they have attempted to reserve their federal claims. While this may seem counterintuitive to claimants like San Remo who remain unsatisfied by the state court's adjudication of their claims, it achieves the finality necessary for municipal planning efforts to proceed and reflects longstanding principles of comity between federal and state courts.

Federal appellate courts have long acknowledged their limited role in land use disputes. As this Court has repeatedly recognized, "[t]he Courts of Appeals were not created to be 'the Grand Mufti of local zoning boards,'" *Dodd v. Hood River County*, 136 F.3d 1219, 1230 (9th Cir. 1998) (citing *Hoehne v. County of San Benito*, 870 F.2d 529, 532 (9th Cir. 1989)); *accord Raskiewicz v. Town of New Boston*, 754 F.2d 38, 44 (1st Cir. 1985) ("Federal courts do not sit as a super zoning board or a zoning board of appeals."); *Sylvia Dev. Corp. v. Calvert County,* 48 F. 3d 810, 828 (4th Cir. 1995) ("Resolving the routine land-use disputes that inevitably and constantly arise among developers, local residents, and municipal officials is simply not the business of the federal courts.").

Given the federal courts' antipathy to deciding land use cases, it is somewhat surprising that takings claimants like San Remo continue to insist on litigating in federal district court. The Seventh Circuit perhaps put it best:

> Federal courts are not zoning boards of appeals. This message, oft-repeated, has not penetrated the consciousness of property owners who believe that federal judges are more hospitable to their claims than are state judges. Why they should believe this we haven't a clue;

> none has ever prevailed in this circuit, but state courts often afford relief on facts that do not support a federal claim.

River Park, Inc. v. City of Highland Park, 23 F.3d 164, 165 (7th Cir. 1994).

B. Increasing Municipal Litigation Costs Chill Legitimate Zoning and Planning Efforts.

Amici do not seek to deny a forum to landowners with legitimate constitutional grievances, but neither can municipalities engage in the "commendable task of land use planning," *Dolan,* 512 U.S. at 396, if they are subject to a decade or more of expensive and duplicative litigation each time they enact a significant new planning ordinance. Numerous studies demonstrate how municipal litigation costs have soared in recent years, due in no small part to the "explosion in the non-traditional use of civil rights statutes * * * to include cases involving such areas as zoning and land development." Susan A. Macmanus, *The Impact of Litigation on Municipalities: Total Cost, Driving Factors, and Cost Containment Mechanisms*, 44 SYRACUSE L. REV. 833, 834 (1993) (citations omitted).[7]

[7] The survey of the membership of the International Municipal Lawyers Association (formerly the National Institute of Municipal Law Officers) found that more than half the jurisdictions reported litigation cost increases of 10 percent or more during the study period; 19.3 percent reported increases of 30 percent; and for 6.6 percent of respondents, the rate of increased costs was more than 50 percent. 48.2 percent of the respondents cited land use and zoning cases as "contributing most to their rising litigation costs over the past three years," *Id.* at 839-40.

If municipal governments cannot count on the courts to apply traditional preclusion principles to ensure limitations on relitigation of constitutional claims, many municipalities might choose to settle winnable cases or allow development to proceed despite the public interest against it. *See id.* at 838, 842 (noting that 81.4 percent of survey respondents "acknowledge they settle at least some of their 'winnable' cases just to save money."); David S. Mendel, *Determining Ripeness of Substantive Due Process Claims Brought by Landowners Against Local Governments*, 95 MICH. L. REV. 492, 494 n.9 (1996) (noting the same settlement incentive).

Likewise, a California Research Bureau study found that cities that have been sued for takings are twice as likely to report having changed their regulatory behavior as those that have not been sued. *See* DANIEL POLLAK, HAVE THE U.S. SUPREME COURT'S 5TH AMENDMENT TAKINGS DECISIONS CHANGED LAND USE PLANNING IN CALIFORNIA? 27 (California Research Bureau 2000). The report concluded that "takings objections, litigation threats, and even lawsuits have become a common aspect of land use planning discussions." *Id*. at 75. Another survey found that proliferation of constitutional land use litigation and continued debate over compensation principles,

> have made legislators and administrators . . . hesitant to adopt new regulatory programs. . . . As one official explained, lawmakers who foresaw an increased risk of litigation would be more likely to weaken the regulatory programs that they adopted by, for example, including

> broader grandfather clauses; yet the weaker the program, the less effective it becomes.

Lynda L. Butler, *State Environmental Programs: A Study in Political Influence and Regulatory Failure*, 31 WM. & MARY L. REV. 823, 830-31 (1990). Permitting takings claimants another round of litigation in the federal courts will only add to the cost of defending against these lawsuits and could seriously hinder future municipal planning efforts.

San Remo's "general distrust of the capacity of the state courts to render correct decisions on constitutional issues" simply does not support the proposition that there is a "universal right to litigate a federal claim in a federal district court." *Allen,* 449 U.S. at 105. Sound public policy favoring municipal planning, finality in legal adjudication, and the limited the role of federal courts in land use disputes supports application of preclusion principles to takings cases.

Conclusion

In holding that takings claimants are entitled to only one bite at the apple, this Court has struck a "delicate balance" between the interest of municipalities and courts in limiting duplicative litigation and the desire of landowners for an appropriate forum in which to seek compensation for alleged constitutional injuries. That balance serves the public interest, and San Remo has not demonstrated why it should be upset. The decision of the federal district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief of *Amici Curiae* California State Association of Counties, League of California Cities, and International Municipal Lawyers Association in support of Defendant-Appellees, the City and County of San Francisco, were served via first class mail, postage prepaid, this 12th day of November, 2003, on the following:

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Pursuant to Rule 25(d)(2) of the Federal Rules of Appellate Procedure, I certify that the foregoing brief was mailed to the clerk of the court by first class mail, postage prepaid on this 12th day of November, 2003.

_____
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