No. 11-50

In The
Supreme Court of the United States

ALTO ELDORADO PARTNERSHIP,
RANCHO VERANO, LLC, CIMARRON VILLAGE, LLC,
DENNIS R. BRANCH, and JOANN W. BRANCH,

Petitioners,

v.

THE COUNTY OF SANTA FE, NEW MEXICO,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit**

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether petitioners have presented compelling reasons to grant the Petition, where the Court of Appeals properly applied *Williamson County*'s state procedures rule, and that decision was consistent with decisions of the federal circuit courts of appeals.

II. Whether petitioners have presented compelling reasons to grant the Petition, where *Williamson County*'s state procedures rule is consistent with Article III jurisprudence and not in conflict with 42 U.S.C. § 1983.

III. Whether petitioners have presented compelling reasons to grant the Petition, where the conclusion of the Court of Appeals that *Nollan* is limited to its unique facts is consistent with the decisions of this Court.

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INTRODUCTION

Petitioners have presented no "compelling reasons" to grant the Petition for Writ of Certiorari. Sup. Ct. R. 10. Specifically, petitioners have failed to demonstrate that the opinion of the Tenth Circuit Court of Appeals is in conflict with decisions of this Court, that the courts of appeals generally have reached contradictory conclusions on the questions presented, or that the Tenth Circuit decided an important federal question that conflicts with a decision by a state court of last resort. *See* Sup. Ct. R. 10.

Instead, petitioners argue that a decision of this Court, *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), should be overruled, and another case, *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), should be recognized as creating a new cause of action under the Fifth Amendment. Petitioners apparently advance these arguments in order to avoid this Court's decision in *Lingle v. Chevron, U.S.A., Inc.*, 544 U.S. 528 (2005).

In *Williamson County*, this Court held that a claim pursuant to the Takings Clause of the Fifth Amendment to the United States Constitution is not ripe unless and until the litigant (i) obtains a final decision regarding the application of the ordinance or regulation to its property, and (ii) seeks and is denied just compensation in the state court system. *Williamson County*, 473 U.S. at 186, 199-200. It is undisputed that petitioners have not sought

compensation in the state courts for the taking which they allege exists, the second requirement of *Williamson County*. Both the District Court and the Court of Appeals found that *Williamson County* applied and the case was not ripe under Art. III.

In order to grant the relief requested by petitioners, this Court would not only have to overrule *Williamson County*, but also consider overruling *Lingle, First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), and *San Remo Hotel, L.P. v. City and County of San Francisco,* 545 U.S. 323 (2005), at a minimum. The only reason advanced by petitioners for such a drastic step is a new argument, advanced for the first time in the Petition, concerning tension between Article III and 42 U.S.C. § 1983, discussed in a concurring opinion in *San Remo*. This Court declined to overrule *Williamson County* in *San Remo* despite the concerns expressed by the concurring Justices, and this Court should not consider it in this case.

STATEMENT OF THE CASE

(1) As a condition of developing property, Ordinance No. 2006-02 of Santa Fe County, New Mexico requires a developer to produce homes for purchase by persons of low or moderate income. Enactment of the ordinance was necessary to remedy a severe shortage of affordable housing within the community. Developers of a minor project (a subdivision

containing between five and twenty-four lots) are required to provide sixteen percent of the housing within the development to persons of low or moderate income. Developers of a major project (a subdivision containing more than twenty-four lots) are required to provide thirty percent. Homes must be provided in four price ranges, called “maximum target housing prices,” so that persons of varying income may participate in the opportunity to own a home. (Pet. App. G-4, G-5)

To ameliorate the effect of the ordinance on developers, the ordinance provides valuable economic incentives. For example, increased density within the development is permitted so that a developer may profit from the sale of additional market price homes. A twenty percent increase in density over what is normally permitted may be approved on a case-by-case basis by applying to the Board of County Commissioners. Water rights that a developer might otherwise be required to provide are provided free of charge. Development fees and connection charges are waived. (Pet. App. G-11, G-12)

Alternative means of complying with the ordinance are provided. A developer may elect to meet its obligation by providing affordable units outside of the development. (Pet. App. G-14) A developer may make a cash payment equal to or greater than the cost of providing the affordable housing; the County will, in

such cases, provide the affordable housing.[1] The opportunity to provide affordable housing in another development or receiving property in the extraterritorial zone is also offered. (Pet. App. G-15)

The requirements of the ordinance may be *entirely waived* upon a showing of a hardship. Grounds for a finding of hardship include failure to qualify for any incentive provided in the ordinance. It may also include the situation where an alternative means of compliance cannot be used, because the project would be economically infeasible, or where complying with the ordinance would deprive a property owner of substantially all economic value of the property. (Pet. App. G-19)

The details of a developer's compliance with the ordinance is documented in an affordable housing agreement, which sets forth the results of what is essentially a negotiation with the County, and it must include items such as the incentives agreed upon, the developer's alternative means of complying with the ordinance, or the details of a waiver. (Pet. App. G-8 through G-9) Without negotiating such an agreement, it is not known and cannot be known whether a given development will be subject to the ordinance, to what

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[1] The cash payment is not $4.96 million as stated by petitioners in footnote 1 of the Petition; that allegation was made in the petitioners' Complaint and presumed true for purposes of the motion, but is a highly inflated number.

degree, or how the development will benefit from the various incentives.

(2) Several years after enactment of the ordinance, Alto Eldorado Partnership, Rancho Verano LLC, and Cimarron Village LLC, sought an injunction from the federal district court on multiple grounds, among them that the ordinance violated the Takings Clause. The County filed a motion to dismiss, and the district court dismissed the complaint as to the County (parallel claims against the City of Santa Fe were dismissed but not appealed).

The district court found that the court lacked subject matter jurisdiction over the takings claims; the remaining constitutional and supplemental claims were subsumed within the takings claims and also dismissed.

The district court cited to *Agins v. City of Tiburon*, 447 U.S. 255 (1980)*, Hodel v. Virginia Surface Mining and Reclamation Ass'n Inc.,* 452 U.S. 264 (1981), and *Williamson County,* and found petitioners' request for an injunction problematic. (Pet. App. C-15, C-16) *Citing Yee v. City of Escondido,* 503 U.S. 519 (1992), the Court held that facial claims are generally ripe when filed and need not comply with the first requirement of *Williamson County*. However, the court held that a facial claim must comply with the state procedures requirement of *Williamson County*. Since the state procedures requirement of *Williamson County* had not been complied with, the claims were dismissed as unripe.

(3) On appeal to the Tenth Circuit Court of Appeals, the decision of the district court was affirmed. (Pet. App. A) *See also Alto Eldorado Partnership v. County of Santa Fe,* 634 F.3d 1170 (10th Cir. 2011). The Court of Appeals analyzed decisions from several federal circuit courts of appeals and, finding no disagreement, agreed with the district court that the second requirement of *Williamson County* cannot be bypassed unless a state compensation remedy does not exist.[2]

Petitioners argued to the Court of Appeals that since the claim was for injunctive relief, not damages, *Williamson County*'s ripeness requirement should not apply. The Court of Appeals disagreed. The court found that *Lingle* had rendered obsolete the authority upon which petitioners relied, and reasoned that the allegations of the complaint amounted to an argument that the ordinance interfered with petitioners' property rights in an arbitrary or irrational manner. This, the court held, impermissibly sought to reinstate the "substantially advances" inquiry of *Agins* that had been abolished in *Lingle*. Finding no particular significance to petitioners' characterizations of the complaint as a "facial" attack, and reviewing many cases and finding them consistent with its

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[2] State law remedies exist in New Mexico. A New Mexico statute expressly permits the filing of a claim for inverse condemnation pursuant to NMSA 1978, § 42A-1-19 (1983). Art. II § 20 of the New Mexico Constitution, like the federal Constitution, proscribes taking of property without just compensation.

approach, the court ruled that *Williamson County* applied to the claims and the district court had properly dismissed the case. (Pet. App. A-7, A-8)

The Court of Appeals was unconvinced that the "unconstitutional conditions doctrine," relied on by petitioners, provided an independent basis to proceed. The court found that the interpretation of the unconstitutional conditions doctrine urged upon the court would create a loophole in *Lingle* by reviving the recently discredited inquiry into means and ends of *Agins*; the Court cautioned that *Nollan*, and *Dolan v. City of Tigard,* 512 U.S. 374 (1994), cannot be used to avoid *Williamson County* and its progeny. The court held that *Nollan* and *Dolan* do not support the proposition that characterizing a challenge as "facial" is relevant; the court noted that neither *Nollan* nor *Dolan* involved a facial challenge so reliance on those cases was questionable.

(4) Petitioners filed a petition for rehearing en banc with the Tenth Circuit which the Court denied without comment on April 11, 2011. The Petition for Writ of Certiorari to this Court followed.

REASONS FOR DENYING THE PETITION

I. THE COURT OF APPEALS PROPERLY APPLIED *WILLIAMSON COUNTY*'S STATE PROCEDURES RULE, AND THAT DECISION WAS CONSISTENT WITH DECISIONS OF THE FEDERAL CIRCUIT COURTS OF APPEALS.

Williamson County's second ripeness rule requires that a person seeking to litigate in federal court on the basis of an alleged regulatory taking first seek and be denied compensation in state court before filing suit in federal court. *Williamson County*, 473 U.S. at 186.

Nothing in *Williamson County* limits its second ripeness rule to "as applied" claims or restricts the rule from being applied to a claim for injunctive relief. In fact the contrary is true. *All* of the eight courts of appeals that have considered this issue have applied the *Williamson County* second ripeness rule to facial claims, including the Tenth Circuit Court of Appeals in the present case.[3] These claims must be

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[3] *See Holliday Amusement Co. of Charleston v. South Carolina*, 493 F.3d 404 (4th Cir. 2007) (applied *Williamson County*'s state procedures rule to facial takings claim); *Equity Lifestyle Properties Inc. v. County of San Luis Obispo*, 548 F.3d 1184 (9th Cir. 2008) (*Williamson County*'s state procedures rule applies but lack of state procedures to seek compensation excused plaintiff from requirement); *County Concrete Corp. v. Twp. of Roxbury*, 442 F.3d 159 (3rd Cir. 2006) ("While the fact that appellants allege a facial Just Compensation Takings claim against the ordinance may save them from the finality rule, it

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first brought in state court under *Williamson County* unless the state has no procedure to grant compensation through its judicial process. *See* n.2.

As it is undisputed that petitioners have not sought compensation in the state courts, this case was correctly decided by the Court of Appeals and is particularly inappropriate for certiorari under Rule 10. Sup. Ct. R. 10.

A. *Nollan* did not create a new category of takings claim that would permit injunctive or declaratory relief in this case; any argument to the contrary has been foreclosed by *Lingle*.

There is no support in this Court's opinions for the position that *Nollan* creates a new category of takings claims which exempts litigants seeking an injunction against a Fifth Amendment taking from the *Williamson County* ripeness requirements.

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does not relieve them from the duty to seek just compensation from the state before claiming their right to just compensation under the Fifth Amendment has been violated."); *Asociacion de Subscripcion v. Flores Galarz*, 484 F.3d 1, 6 (1st Cir. 2007) (*Williamson County*'s state procedures rule applies but lack of a state remedy excused plaintiff from the requirement); *Severance v. Patterson*, 566 F.3d 490, 496-97 (5th Cir. 2009) ("Several other circuits have held to the contrary by applying *Williamson County* to claims seeking injunctive or declaratory relief."); *von Kerssenbrock-Praschma v. Saunders,* 121 F.3d 373, 379 (8th Cir. 1997); *Bickerstaff Clay Prods. Co. v. Harris County,* 89 F.3d 1481, 1490 (11th Cir. 1996). *See also Ramsey Winch v. Henry,* 555 F.3d 1199 (10th Cir. 2009).

In *Lingle*, this Court undertook a comprehensive review of the current state of takings jurisprudence, and described the "three classes" of regulatory takings. Two were described as "relatively narrow categories" embodied in *Lorretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (direct physical occupation) and *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992) (deprivation of all economically beneficial use of property). The third category, where the great majority of regulatory takings cases exist, is governed by *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978). *See Lingle*, 544 U.S. at 538. There was no "fourth category" recognized, and the *Nollan-Dolan* "land-use exaction" was relegated to a parenthetical and described as a "special context." *Id.*

The "special context" of *Nollan* and *Dolan* has limited relevance to the present case. *Nollan* and *Dolan* were adjudicative decisions, where the government demanded that a landowner dedicate property to the government as a condition of obtaining a permit. *Lingle*, 544 U.S. at 546. The unconstitutional conditions imposed by the local governments in those cases were treated by the Court in *Lingle* as special situations, limited to their context – administrative adjudicative exactions.[4] *See also Tahoe-Sierra Pres.*

[4] The Court, in a parenthetical, added the following significant statement: "*[S]ee* also [*City of Monterey v.*] *Del Monte Dunes* [*at Monterey, Ltd.,* 526 U.S. 687, 702 (1999)] . . . (emphasizing

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Council, Inc. v. Tahoe Reg'l Planning Agency, 216 F.3d 764, 772 n.11 (9th Cir. 2000), *aff'd*, 535 U.S. 302 (2002) (noting that the *Nollan/Dolan* framework applies to "land-use decisions conditioning approval of development on the dedication of property to the public use" and is "inapposite to regulatory takings cases outside [this] context").

There are fundamental and obvious differences between the facts of this case and the facts of *Nollan* and *Dolan*, which were recognized by the Court of Appeals below. The case at hand involves a facial attack on an ordinance *that has not been applied to petitioners.* No application has been filed, no decision has been made by the local government, no exaction has occurred, no conditions of any sort have been proposed by the local government, and no remedy has been sought for the alleged taking through the state courts. A claim that the unconstitutional conditions doctrine is relevant ought to involve, at the very least, "conditions," constitutional or not. And the property interests exacted by the local governments in *Dolan* and *Nollan* were described as "the most fundamental of all property interests" and the exactions had "evicerat[ed] the owners' right to exclude others from entering and using [the] property" (*Lingle*, 544 U.S. at 539), considerations which are not present here.

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that we have not extended this standard 'beyond the special context of [such] exactions.')" *Lingle*, 544 U.S. at 547.

Petitioners' argument appears to be a tactic to force a large shift in the law that is not warranted by the facts of this case. *See, e.g.*, Siegel, "Exactions After *Lingle*: How Basing *Nollan* and *Dolan* on the Unconstitutional Conditions Doctrine Limits their Scope," 28 Stan. Envtl. L.J. 577, 589 (2009) ("A more expansive interpretation [of *Nollan*], as promoted by some property rights advocates and scholars, would return the Court – albeit in a more limited way – to the pre-*Lingle* world in which courts used the substantially advances takings test to second-guess governmental decisions.").

The expansion of *Nollan* and *Dolan* proposed here would open the proverbial floodgates to facial constitutional challenges to regulations and ordinances that place any condition on development of property. For example, if property owners were permitted to bring a facial claim pursuant to the Fifth Amendment of a zoning ordinance applicable to their property, the federal courts would essentially become zoning review boards. Such an expansion is not warranted under the facts of this case considering that the federal circuits are uniform in their application of *Williamson County* to these facts.

B. Petitioners seek to resurrect the "substantially advances" test that was abolished in *Lingle*.

This case is also particularly unsuited for certiorari because the basis of the injunctive relief

sought here is "the relationship between the County's affordable-housing condition and the impacts of residential subdivision or building" and the "means" chosen by the County to address the issue of affordable housing,[5] approaches to analyzing a regulation under the Fifth Amendment that were abolished in *Lingle*.

In *Lingle*, this Court explained that the "substantially advances" test of *Agins* was "derived from due process, not takings, precedents," and refused to recognize it as a fourth category of regulatory takings claim. *Lingle*, 544 U.S. at 541-42. The "substantially advances" test was described as a "means-ends test" whose goal is to determine whether regulation achieves a legitimate governmental purpose, not whether a taking has occurred. *Id.* at 544. The *Lingle* court abolished the test, holding that it is " . . . not a valid method of identifying regulatory takings for which the Fifth Amendment requires just compensation." *Id.* at 545.

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[5] "Alto's taking claim . . . challenges . . . the relationship between the County's affordable-housing condition and the impacts of residential subdivision or building." (Appellants' Opening Brief, Court of Appeals, at p. 20) "Alto's taking claim . . . assumes arguendo that the provision of affordable housing is a legitimate end. Instead, the crux of Alto's takings claim is that the means chosen to effect that end – i.e., forcing subdivision and building permit applicants to provide affordable housing – is unlawful under the Takings Clause." (Appellants' Reply Brief, Court of Appeals, at p. 8)

The Court of Appeals rightfully found that petitioners' complaint was "not a facial claim challenging the validity of the [ordinance]." (Pet. App. A-8). Rather, the claim was described as being " . . . unlike the facial claims at issue in the cases on which [petitioners] rely, which concern instead the now-defunct substantially advances claims under the Takings Clause." *Id.*

Petitioners' complaint is nothing more than "a probe of the regulation's underlying validity" and a challenge to the "reasonableness of the means" chosen by the Board of County Commissioners in enacting the ordinance. Try as they might to hang their hat on *Nollan*, their argument is nothing more than a reincarnation of *Agins*, in direct contravention of *Lingle*, all to avoid *Williamson County,* and should be rejected as such.

C. Injunctive and declaratory relief is an inappropriate remedy in this case.

After *Lingle*, a claim that a regulation does not serve a valid public purpose or a claim that a regulation's ends aren't justified by the means are not takings claims, but instead substantive due process claims. Equitable relief may be appropriate to challenge the validity and reasonableness of the ordinance in due process. But, where the regulation is assumed to be valid and made in pursuit of a valid

public purpose,[6] the only inquiry is whether the regulation is a taking of property and, if so, whether the government paid just compensation. If the regulation is not valid, no amount of compensation will authorize the government action, and the claim is not a takings claim. If it is a takings claim, *Williamson County* applies, unless an exception authorized by *Williamson County* exists.

Several cases decided prior to *Lingle* suggested that a facial challenge is immediately ripe for review.[7] As this Court has since repudiated *Agins* and its "substantially advances" test, the language from these earlier cases is no longer valid. Injunctive relief

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[6] New Mexico law is conclusive that the ordinance advances a legitimate state interest. *See*, *e.g.*, *Albuquerque Commons Partnership v. City of Albuquerque*, 2006-NMCA-143, 140 N.M. 751, 149 P.3d 67 (upholding mandatory minimum density requirements in a mixed-use PUD), *rev'd on other grounds*, 2008-NMSC-025, 144 N.M. 99, 184 P.3d 411 (on procedural due process grounds for lack of a hearing). Petitioners have conceded that the ordinance advances a legitimate governmental purpose. Appellants' Reply Brief, Court of Appeals, at p. 8.

[7] In *Suitum v. Tahoe Regional Planning Agency,* 520 U.S. 725 (1997) (an as-applied regulatory takings case), this Court applied the first prong of *Williamson County*. In a footnote, this Court found that such facial challenges " . . . are generally ripe the moment the challenged regulation or ordinance is passed." *Suitum,* 520 U.S. at 736, n.10. The footnote refers to *Agins.* Similarly, *dicta* in a footnote in *San Remo* stated that the facial challenge was ripe pursuant to *Yee* where " . . . we held that facial challenges based on the 'substantially advances' test need not be ripened in state court. . . ." *San Remo,* 545 U.S. at 340, n.23.

makes sense in the context of a due process challenge, but it makes no sense when the inquiry concerns whether property has been taken and how much just compensation is owed.

Moreover, a claim of facial constitutionality limits the review of the court to the four corners of the ordinance to determine whether a taking has occurred and can be raised only when it appears on the face of the ordinance that it cannot be constitutionally applied under any circumstances. *U.S. v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.E.2d 697 (1987). *See also Tahoe-Sierra,* 535 U.S. 302 (heavy burden on landowners to show that the mere enactment of the regulations effected a facial taking). Such challenges "face an uphill battle" to survive. *Keystone Bituminous Coal Co. v. Benedictus*, 480 U.S. 470 (1987). Here, the County ordinance expressly permits a complete waiver of its requirements, negating any claim to facial unconstitutionality and making this case particularly unsuitable for certiorari.

II. *WILLIAMSON COUNTY*'S STATE PROCEDURES RULE IS CONSISTENT WITH ARTICLE III JURISPRUDENCE AND NOT IN CONFLICT WITH 42 U.S.C. § 1983.

Petitioners argue that the second requirement of *Williamson County* is inconsistent with 42 U.S.C. § 1983. Petitioners ask this Court to overrule the case. Because this argument was not raised below, it is waived. *See Stolt-Nielsen S.A. v. Animalfeeds*

International, 08-1198, ___ U.S. ___, 130 S.Ct. 1758, n.2 (April 27, 2010); *Sprietsma v. Mercury Marine,* 537 U.S. 51, 56, n.4 (2002). Respondent requests that this Court decline to address this argument raised for the first time in the Petition. *TRW, Inc. v. Andrews,* 534 U.S. 19, 34 (2001).

Petitioners' argument that *Williamson County* is inconsistent with 42 U.S.C. § 1983 depends on an assumption that § 1983 gives plaintiffs an unlimited right to assert claims in federal court. However, this Court has repeatedly held this is not so. "[I]ssues actually decided in [a] valid state-court judgment may well deprive plaintiffs of the 'right' to have their federal claims relitigated in federal court." *San Remo,* 545 U.S. at 342, *citing Migra v. Warren City School Dist. Bd. of Ed.,* 465 U.S. 75, 84 (1984) and *Allen v. McCurry*, 449 U.S. 90, 103-104 (1980). "This is so even when the plaintiff would have preferred not to litigate in state court, but was required to do so by statute or prudential rules." *San Remo*, 545 U.S. at 342, *citing Allen*, 449 U.S. at 104. In *Allen*, this Court criticized and 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." *Id.* This Court emphatically stated that "no such authority is to be found in §1983." *Id.*

Petitioners complain that *Williamson County* unfairly singles out Fifth Amendment right claimants by requiring them to first submit to state court jurisdiction before bringing their claims in federal court

while no other federal right claimant is required to do so. However, this Court has repeatedly placed limits on litigants' ability to bring § 1983 claims in federal court. *See Fair Assessment in Real Estate Assn., Inc. v. McNary,* 454 U.S. 100, 116 (1981) (federal claimants are barred by the principals of comity from asserting § 1983 actions against the validity of state tax systems in federal courts and instead must seek protection of their federal rights by state remedies, provided that those remedies are plain, adequate, and complete); *Juidice v. Vail,* 430 U.S. 327, 337 (1977) (the *Younger* abstention doctrine calls for dismissal of a § 1983 federal action where claimants were accorded an opportunity to fairly pursue their constitutional claims in the state proceedings); *Hudson v. Palmer*, 468 U.S. 517, 533 (1984) (deprivation of property by a state employee is not an actionable due process claim if a meaningful state post-deprivation remedy is available); and *D.C. Court of Appeals v. Feldman*, 460 U.S. 462, 486-487 (1983) (a federal district court may not review decisions rendered by the highest court of a state even if those challenges allege that the state court action violates federal law if the federal law claims are "inextricably intertwined" with the state court decision).

There are sound reasons to require Fifth Amendment claimants to first submit to state court jurisdiction. Unlike the general "pool of all federal rights claimants," there is no federal claim under the Fifth Amendment unless the state fails to provide just compensation. Because New Mexico provides a

post-deprivation cause of action under both statutory and constitutional law, petitioners have suffered no constitutional injury until the state has had the opportunity to make just compensation and refused. *See City of Monterey v. Del Monte Dunes at Monterey, Ltd.,* 526 U.S. 687, 710 (1999) ("[H]ad an adequate post deprivation remedy been available, Del Monte Dunes would have suffered no constitutional injury from the taking alone."). Without compliance with the state procedures rule of *Williamson County*, there is no taking suffered and no failure to provide just compensation, and no case or controversy as required by Article III of the Constitution.[8]

The present case illustrates this point well. Not only have petitioners failed to seek compensation through the state inverse condemnation law or state constitution, they have failed to seek a necessary precondition for doing so – application of the challenged ordinance by the government to a particular property. The County ordinance at issue has built-in discretionary provisions that may be applied, including the possibility of a complete waiver of its requirements upon a showing of a hardship. Without having an application and an administrative process, it is not known and cannot be known whether a given

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[8] "The ripeness doctrine is 'drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction.'" *National Park Hospitality Assn. v. Dept. of Interior,* 538 U.S. 803, 808 (2003), *citing Reno v. Catholic Social Services, Inc.,* 509 U.S. 43, 57, n.18 (1993).

development will be subject to the ordinance, to what degree, or how it will benefit from the various incentives. This Court has stated in *Lingle* and *First English* that the proper remedy for a taking is compensation, and the government has the option to leave an ordinance in place and pay compensation, or to withdraw the ordinance and pay for a temporary taking.[9] Without having the benefit of the state court inverse condemnation process to adjudicate remedies and give the government the options described in *First English*, it cannot be known whether a compensable taking will or will not occur. These factors argue in favor of a ripeness requirement that requires these matters to be sorted out before a federal court filing.

Another reason to defer to state decision-making is the fact that state courts are uniquely qualified to address these matters: "State courts are fully competent to adjudicate constitutional challenges to local land-use decisions. Indeed, state courts have experience in resolving the complex factual, technical, and legal questions related to zoning and land-use regulations." *San Remo Hotel*, 545 U.S. at 347. As stated by

[9] "This Court has recognized in more than one case that the government may elect to abandon its intrusion or discontinue regulations. [citations omitted] [A] governmental body may acquiesce in a judicial determination that one of its ordinances has effected an unconstitutional taking of property. . . ." *First English*, 482 U.S. at 317.

this Court in *Suitum v. Tahoe Reg'l Planning Agency,* 520 U.S. 725, 738-39 (1997):

> Leaving aside the question of how definitive a local zoning decision must be to satisfy *Williamson County*'s demand for finality, two points about the requirement are clear: it applies to decisions about how a takings plaintiff's own land may be used, and it responds to the high degree of discretion characteristically possessed by land-use boards in softening the strictures of the general regulations they administer. As the Court said in *MacDonald*[, *Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986)], "local agencies charged with administering regulations governing property development are singularly flexible institutions; what they take with the one hand they may give back with the other." 477 U.S., at 350. When such flexibility or discretion may be brought to bear on the permissible use of property as singular as a parcel of land, a sound judgment about what use will be allowed simply cannot be made by asking whether a parcel's characteristics or a proposal's details facially conform to the terms of the general use regulations.

If New Mexico courts had an opportunity to hear petitioners' claim that the ordinance creates a taking of their property, the state court decision may obviate the need for consideration of the federal constitutional claims; if the claims are later made in federal court after adjudication in state court, the state court proceedings would provide relevant factual development

that would assist the federal courts in their Fifth Amendment inquiry.[10]

III. THE CONCLUSION OF THE COURT OF APPEALS THAT *NOLLAN* IS LIMITED TO ITS UNIQUE FACTS IS CONSISTENT WITH THE DECISIONS OF THIS COURT.

The Court of Appeals, in determining that *Nollan* and *Dolan* were not helpful to resolve the issues in this case, observed that *Nollan* and *Dolan* represent administrative, as opposed to legislative, decision-making. The deference given to legislative decision-making made a comparison between *Nollan* and *Dolan*'s administratively imposed exactions and the facts of this case problematic.

Petitioners object to this approach and argue for a broad application of *Nollan*, claiming that the administrative/legislative distinction, and therefore the proper application of *Nollan*, has not been consistently addressed in the state courts. Petitioners concede that the federal courts of appeals that have addressed the issue have consistently held that *Nollan* and *Dolan* do not apply to legislative actions.

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[10] *See Moore v. Sims,* 442 U.S. 415, 429-430 (1979) ("Almost every constitutional challenge . . . offers the opportunity for narrowing constructions that might obviate the constitutional problem and intelligently mediate federal constitutional concerns and state interests.").

The cases cited by petitioners on this point were decided prior to 2005, when *Lingle* made it clear that *Nollan* and *Dolan* were limited to their facts and are a unique context. By eliminating the "substantially advances" test, *Lingle* clearly rejected the idea that the Takings Clause should be interpreted to permit judicial usurpation of legislative decision-making. The Court in *Lingle*, finding the lack of deference to the governmental proceedings below "remarkable," also noted that " . . . the reasons for deference to legislative judgments about the need for, and likely effectiveness of, regulatory actions are by now well established. . . ." *Lingle*, 544 at 545.

Nor do the state and federal court cases cited by petitioners support the proposition offered, and the "split of courts" that is claimed simply does not exist. *Town of Flower Mound v. Stafford Estates*, 135 S.W.3d 620 (Tex. 2004) concerned an administrative exaction after a lengthy review process of the cost of street construction (not property) in the context of a development approval. The Texas Supreme Court, under *state law* (and refusing relief under 42 U.S.C. § 1983), found a taking. *Home Builders Association of Central Arizona v. City of Scottsdale*, 187 Ariz. 479, 930 P.2d 993 (1997) concerned a water resource development fee, which was held *valid* by the Arizona Supreme Court. In the process, the Arizona Supreme Court noted that courts " . . . must accord municipalities considerable deference and upset their legislative decisions only if they are shown to be arbitrary and without factual justification." *Id.* at 997-8. Although

the fee imposed by the City of Scottsdale was analyzed against *Dolan*, the court specifically found *Dolan* to be "distinguishable" because " . . . the Scottsdale case involves a generally applicable *legislative* decision by the city. . . ." *Home Builders*, 930 P.2d at 1000. *McClung v. Town of Sumner*, 548 F.3d 1219 (9th Cir. 2008), the only cited case that was not decided prior to *Lingle*, is also a puzzling reference because the court in that case (involving a local government's regulation that required a storm drain be upgraded as a condition of a development permit) was held not to be a taking but a voluntary implied contract. In any event, the Ninth Circuit analyzed the case under *Penn Central*, not *Nollan*, so its usefulness for the cited proposition is questionable. *Garneau v. City of Seattle*, 147 F.3d 802 (9th Cir. 1998) involved a challenge to a Washington statute that required landlords to pay relocation expenses of displaced low-income tenants. The court analyzed the statute as an asserted unconstitutional condition under *Agins*, but found *no regulatory taking*, noting that "[t]he *Dolan* analysis cannot be applied in facial takings cases. . . ." *Garneau*, 147 F.3d at 811.

In the present case, the Court of Appeals observed that *Nollan* and *Dolan* involved adjudicatory exactions by the local government. Because the cases did not involve a challenge to an ordinance of general application, the court, consistent with this Court's characterization of *Nollan* and *Dolan* as a "special context," found the cases of little relevance. The Court observed that cases like *Nollan* and *Dolan* are

best analyzed as physical takings cases, in which the permanent physical invasion is the easement exacted in the context of a land use approval. (Pet. App. A-14) The Court of Appeals was unwilling to apply the special context of *Nollan* and *Dolan* to a claim without an exaction or a special condition, or to draw large principles from cases of limited scope and relevance.

Petitioners finally assert that *state* law decisions have applied *Nollan* and *Dolan* to cases that do not involve an exaction of real property; once again the cases cited pre-date *Lingle*. (Pet. App. A-22) As before, many of the cases cited involve fully adjudicated applications before the local government. While some cases involve an exaction of fees from a developer or require construction of infrastructure, the cases are "as applied" and none involve a facial attack on an ordinance. In *Smith v. Town of Mendon*, 4 N.Y.3d 1, 822 N.E.2d 1214, 789 N.Y.S.2d 696 (N.Y. 2004), the property dedication at issue was not considered to be an exaction pursuant to *Dolan* ("[N]either the Supreme Court nor this Court has classified more modest conditions on development permits as exactions."). In *Trimen Development Cp. v. King County*, 877 P.2d 187 (Wash. 1994), a park development fee was affirmed, with no discussion of *Nollan* or *Dolan*. In *Sea Cabins v. City of Myrtle Beach*, 345 S.C. 418, 548 S.E.2d 595 (2001), a homeowners association claimed inverse condemnation of a fishing pier by reason of a requirement of public access, but a finding that no taking occurred was affirmed by the state

Supreme Court and the case was decided on zoning grounds.

Nollan and *Dolan* do not positively correlate with the facts of this case, the state court cases all predate *Lingle* and in most cases do not support the propositions advanced and certainly cannot be said to create a split of authority amongst the state courts, and accordingly there is no compelling reason to grant the petition for certiorari on this point.

CONCLUSION

For the above reasons, the petition for certiorari in this case should be denied.

Respectfully submitted,

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