No. 16-16130

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TOUFIC AND EVA JISSER, AND THE TOUFIC,
AND EVA JISSER REVOCABLE TRUST,

Plaintiffs - Appellants,

v.

CITY OF PALO ALTO,

Defendant - Appellee.

On Appeal From the United States District Court
for the Northern District of California
Hon. Edward J. Davila, District Judge, Case No. 5:15-CV-05295 EJD

BRIEF OF *AMICUS CURIAE* LEAGUE OF CALIFORNIA CITIES IN SUPPORT OF DEFENDANT APPELLEE CITY OF PALO ALTO

Rick W. Jarvis
JARVIS, FAY, DOPORTO &
GIBSON, LLP
492 Ninth Street, Suite 310
Oakland, CA 94607
Telephone: (510) 238-1400
Facsimile: (510) 238-1404
Email: rick@jarvisfay.com

Attorneys for *Amicus Curiae*
League of California Cities

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Federal Cases

State Cases

Federal Statutes

State Statutes

Rules

PRELIMINARY STATEMENTS REQUIRED BY RULE 29(a)

In compliance with various procedural requirements of Rule 29(a) of the Federal Rules of Appellate Procedure, the League of California Cities ("the League") makes the following statements:

Parties' Consent to Filing *Amicus* Brief. Pursuant to Rule 29(a)(2), all parties have consented to the filing of this amicus brief.

Corporate Disclosure Statement. Pursuant to Rules 26.1 and 29(a)(4)(A) of the Federal Rules of Appellate Procedure, the League of California Cities is a non-profit corporation that does not offer stock and that has no parent corporation.

Authorship of *Amicus* Brief. Pursuant to Rule 29(a)(4)(E), this *amicus* brief was solely authored by the undersigned counsel working on a *pro bono* basis on behalf of the League, with the law firm of the undersigned counsel fully funding all preparation costs. No party's counsel authored any portion of this brief. No party or party's counsel, nor any other person, contributed any money that was intended to fund preparing or submitting the brief.

The League of California Cities' Identity. The League of California Cities is an association of 475 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all

regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance, for reasons further explained in the Introduction below.

INTRODUCTION AND INTEREST OF *AMICUS CURIAE*

Plaintiffs are owners of a mobilehome park in the City of Palo Alto, containing 96 occupied mobilehome spaces. Plaintiffs intend to close the park, which state and local law authorizes them to do only after analysis of and mitigation for impacts on their tenants, which mitigation shall not exceed the reasonable cost of relocation, as determined by the City.

As explained in the City's brief, both the U.S. Supreme Court and the Ninth Circuit have recognized the potentially devastating impacts such closures may have on mobilehome owners residing at such parks, given that mobilehomes are usually not really "mobile" but rather are permanently placed in parks and that such closures usually require owners to abandon their homes and lose all of their equity value, potentially resulting in their economic ruin. *See*, City's Answering Brief, at pp. 2-3, quoting *Yee v. City of Escondido*, 503 U.S. 519, 523 (1992), *Laurel Park Cnty., LLC v. City of Tumwater*, 698 F.3d 1180, 1185 (9th Cir. 2012) While Plaintiffs solely focus on their own property rights, they generally ignore the

competing property rights of their tenants that are also at stake, which rights Plaintiffs (or their predecessor owners of the park) voluntarily created by entering into lease agreements for each of the nearly 100 homes. Thus, the closure of a mobilehome park does not simply require an evaluation of the property rights of the owner in a vacuum, but rather the difficult balancing of the competing property rights of the owner and its tenants.

A property owner's decision to close its mobilehome park thus raises complex questions of law, fact, and policy with which every California municipality with such a park must wrestle. Indeed, California law mandates that *every* city and county must review the impacts on residents of any proposed mobilehome park closure in their jurisdiction, and authorizes them to impose conditions on such conversions to mitigate such impacts, not to exceed the reasonable costs of relocation. Cal. Gov. Code § 65863.7, subd. (e). Many of the League's member cities thus have ordinances similar to the City of Palo Alto's mobilehome park conversion ordinance at issue in this case.

In order to resolve these complex questions, cities often provide extensive, quasi-adjudicative administrative proceedings, such as those held by the City of Palo Alto in this case. Cities design these proceedings to ensure due process and fairness in the administrative decision-making process for all parties. And, when cities do invest the significant resources in providing such proceedings, California

law mandates that their final adjudicative decisions be given preclusive effect under the doctrines of res judicata and collateral estoppel. If such preclusive effect were not afforded, cities would have little incentive to invest their finite public resources in developing and adopting a formal process that is judicial in nature and consistent with due process. Such formal processes promote judicial economy by providing an efficient vehicle for reaching resolutions as an alternative to protracted litigation.

Plaintiffs here seek to challenge quasi-judicial determinations made by the City of Palo Alto as to the appropriate mitigation for their park closure. As Plaintiffs acknowledge in their complaint, these determinations were the result of multiple contested public hearings at which Plaintiffs and their tenants actively participated, culminating in an administrative appeal hearing before the City Council. Plaintiffs contend that the Council's final decision resulted in a "regulatory taking" of its property rights, because such mitigation includes a requirement to pay their tenants an estimated $8,000,000 in relocation benefits, which amount Plaintiffs allege "bears little relationship to their tenants' 'reasonable cost of relocation.'" (Opening Brief, at p. 3.)

Under California law, Plaintiffs had the right to directly challenge the City Council's quasi-judicial decision by filing a petition for writ of mandate within 90 days of the decision. Said petition could have included a regulatory takings claim.

They did not do so, but rather allowed the statute of limitations for such a claim to lapse. (However, their tenants did timely file such a mandamus action, contending that the mitigation ordered by the City was not enough, and Plaintiffs are named real parties and active participants in that pending state court litigation.[1])

The District Court properly dismissed Plaintiffs' takings claim as unripe, based on their failure to seek compensation through available state procedures, as required under *Williamson County Regional Planning Com'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985) ("*Williamson County*"). In their Opening Brief, Plaintiffs do not dispute that California law provided them with adequate judicial procedures for seeking such compensation, but they nonetheless offer several inventive theories as to why this case should be exempted from complying with *Williamson County*. The City's Answering Brief rebuts these theories.

The League is filing this *amicus* brief to emphasize how exempting the present action from *Williamson County*'s ripeness requirement would create a direct conflict with established California caselaw as to the correct procedure for asserting a regulatory takings claim against local land use decisions, thereby creating much uncertainty and confusion both for public agencies and private

[1] Incidentally, the League is aware that the state court just issued a decision on December 21, 2016, in that pending action, granting the tenants' mandamus petition and ruling that the City Council's decision as to the sufficiency of mitigation was not adequately supported by evidence in its administrative record. *See* City's Motion to Take Judicial Notice, filed December 30, 2016, Ex. 2.

parties alike. While obviously of impact to other mobilehome park closures throughout the State, such a decision could also have broader consequences for other types of land use litigation involving developer challenges to conditions and other restrictions on development approvals.

ARGUMENT

A. The District Court properly dismissed Plaintiffs' regulatory takings claim as unripe under *Williamson County*, as Plaintiffs did not timely file a mandamus action challenging the City's quasi-judicial determination as to the appropriate amount of mitigation.

Plaintiff's lead argument is that the mitigation payments constitute a "private taking" of their money for which there is no public benefit, and thus that they cannot be constitutional even if compensated. For this reason, Plaintiffs argue that they do not need to ripen their claim by first seeking compensation in state court, citing to the Ninth Circuit's dicta in *Armendariz v. Penman*, 75 F.3d 1311, n. 5 (9th Cir. 1996) stating: "Because a 'private taking' cannot be constitutional even if compensated, a plaintiff alleging such a taking would not need to seek compensation in a state proceeding before filing a federal takings claim under the rule of *Williamson County*."

A fundamental problem with this argument is that Plaintiffs do not (and cannot) assert that the basic requirement that they mitigate the impacts of the park closure on their residents constitutes such a private taking. Instead, they are essentially only challenging the *amount* of the mitigation – as factually determined

by the City Council following extensive quasi-judicial proceedings – as being too high. However, under California law, the only proper way to challenge this factual determination is to file a timely petition for writ of mandate under Code of Civil Procedure section 1094.5. Plaintiffs cannot collaterally attack this administrative factual determination in a separate takings lawsuit filed after the statute of limitations for directly challenging it has expired. *Hensler v. City of Glendale*, 8 Cal.4th 1, 13-16, 19 (holding that a regulatory taking claim challenging a local development exaction must be filed within the limitations period for filing a mandamus claim challenging that exaction, and that "[a] California landowner, who believes that the application of a state statute or local ordinance limiting development to the owner's property works a taking, may not bypass the remedies the state has made available to avoid the taking.")

Had the tenants themselves not filed a timely mandamus challenge to the City's factual determination as to the appropriate amount of mitigation, that determination would be deemed final and binding in all future litigation under the doctrines of res judicata and collateral estoppel, reflected in California's doctrine of exhaustion of judicial remedies. That doctrine "is a form of res judicata, of giving collateral estoppel effect to the administrative agency's decision, because that decision has achieved finality due to the aggrieved party's failure to pursue the

exclusive *judicial* remedy for reviewing administrative action." *Briggs v. City of Rolling Hills Estates*, 40 Cal.App.4th 637, 646 (1995).

> The doctrine of exhaustion of judicial remedies is invoked where there has been a quasi-judicial adjudication by an administrative tribunal, whether in the public or private context. It requires a party aggrieved by such a decision to petition for relief in mandate in order to challenge the administrative action or findings before filing a legal action so as to prevent the adverse action or findings on issues actually litigated from taking on preclusive effect.

Y.K.A. Indus., Inc. v. Redevelopment Agency of City of San Jose, 174 Cal.App.4th 339, 355 (2009). The purpose of this doctrine "is to prevent an aggrieved party from being able to avoid the preclusive effects of an adverse administrative action by simply forgoing the right to judicial review by failing to proceed in mandate." *Id.* at 356. The doctrine applies where there has been "a prior administrative proceeding" which "possessed the requisite judicial character such that res judicata or collateral estoppel principles may be fairly invoked against a claimant in a later action."

> Indicia of proceedings undertaken in a judicial capacity include a hearing before an impartial decision maker; testimony given under oath or affirmation; a party's ability to subpoena, call, examine, and cross-examine witnesses, to introduce documentary evidence, and to make oral and written argument; the taking of a record of the proceeding; and a written statement of reasons for the decision.

Pacific Lumber Co. v. State Water Resources Control Bd., 37 Cal.4th 921, 944 (2006).

The facts alleged in the complaint demonstrate that the City held such a quasi-judicial proceeding here, including multiple public hearings, repeated testimony by Plaintiffs and their tenants, multiple rounds of briefing by their respective attorneys, a statement of decision by the hearing officer, and appellate proceedings before the City Council. See generally, ER 20-21, ¶¶ 45-53. Under these circumstances, California courts apply the doctrine of exhaustion of judicial remedies to preclude the filing of regulatory takings claims against local adjudicative land use decisions. *See, e.g.*, *Briggs*, *surpa*, 40 Cal.App.4th at 645-648 (finding plaintiff estopped from asserting regulatory taking claim challenging condition imposed upon adjudicative development permit issued by city in administrative hearing process before planning commission and city council where plaintiff failed to seek timely judicial review of that decision via mandamus); *see also*, *Hensler*, *supra*, 8 Cal. 4th at 28 (explaining that the limitations period "operates less as a limitations period and more as a time limit for seeking review of the ruling of another tribunal … .")

As the Ninth Circuit has recognized, "Supreme Court decisions require federal courts to give state court judgments the same full faith and credit they would have in the state's own courts by applying the preclusion law of the state in which the judgment was rendered." *Plaine v. McCabe*, 797 F.2d 713 (9th Cir. 1986), citing *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S.

373 (1985); 28 U.S.C. § 1738. This principle extends to unchallenged quasi-judicial administrative decisions to which California courts would accord collateral estoppel effect. "When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose." *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 422 (1966); *see also, B&B Hardware, Inc. v. Hargis Industries, Inc.*, __ U.S. __, 135 S.Ct. 1293, 1302-1303 (2015) ("[I]ssue preclusion is not limited to those situations in which the same issue is before *two courts*. Rather, where a single issue is before a court and an administrative agency, preclusion also often applies."). Thus, in *Plaine v. McCabe*, the Ninth Circuit upheld a district court decision "giving collateral estoppel effect" to an administrative decision by the California Corporations Commissioner "because under California law, both the standard for giving collateral estoppel effect to administrative judgments and the traditional criterial for applying collateral estoppel are present." 797 F.2d at 720.

This analysis of res judicata and collateral estoppel principles further illustrates why the *Williamson County* ripeness rule properly applies to Plaintiffs' regulatory takings claims. The gravamen of Plaintiffs' taking claim is based on a direct challenge to the City's factual calculation of the *amount* of the appropriate mitigation. Under California procedural law (which is entitled to full faith and

credit in federal court), Plaintiffs may not assert a collateral challenge to that quasi-judicial determination without bringing a timely mandamus action to challenge it.

To the extent that Plaintiffs argue that they are not challenging the City's factual determination of the *amount* of mitigation, but instead that *any* mitigation payments constitute an improper "private taking," such a claim is without merit. As the Supreme Court held in *Kelo v. City of New London*, 545 U.S. 469, 480 (2005), such a "private taking" claim must be rejected so long as the exaction is made for any "public use," a term the Court has defined "broadly, reflecting [the Court's] longstanding policy of deference to legislative judgment in this field." A federal court should "not substitute its judgment for a legislature's judgment as to what constitutes a public use 'unless the use be palpably without reasonable foundation.'" *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 241 (1984), quoting *United States v. Gettysburg Elec. Ry. Co.*, 160 U.S. 668, 680. "The role of the judiciary in determining whether [the takings] power is being exercised for a public purpose is an extremely narrow one." *Berman v. Parker*, 348 U.S. 26, 32 (1954). As the Third Circuit explained:

> Examples from the Supreme Court's cases demonstrate the breadth of permissible public purposes under the Public Use Clause. The Court has indicated that economic revitalization constitutes a public purpose for a taking, even if the revitalization program involves transfers of property to private parties. *Kelo*, 545 U.S. at 489-90, 125 S.Ct. 2655; *Berman*, 348 U.S. at 33-34, 75 S.Ct. 98. Similarly, the state and federal governments may validly transfer property from one private party to another in order to correct market failures. *Midkiff*, 467 U.S.

> at 243, 104 S.Ct. 2321; *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1014-15, 104 S.Ct. 2862, 81 L.Ed.2d 815 (1984).

Carole Media LLC v. New Jersey Transit Corp., 550 F.3d 302, 310 (3d. Cir. 2008).

Ironically, Plaintiffs cite to the Third District's decision in *Carole Media* for its holding that *Williamson County*'s ripeness rule does not apply to a "Public Use Clause" claim for private taking. But they ignore that the court still upheld a district court's dismissal of the claim on the ground that there was an adequate public use, applying the deferential standard summarized above. *Id.*, at 309-312.

Obviously, California has a legitimate public purpose in ensuring that impacts of mobilehome park closures on tenants are fairly mitigated, given (for example) that homelessness affects the public as a whole, and not just the individuals experiencing homelessness. This public purpose is reflected in its regulation of mobilehome park conversions, which includes mandates that park owners prepare a report analyzing the impacts of such closures, and that the local jurisdictions review such reports prior to approving such closures. Cal. Gov. Code § 65863.7. And cities themselves likewise have legitimate public purposes in adopting local mobilehome park conversion ordinance such as the City of Palo Alto's.

CONCLUSION

When a mobilehome park owner seeks to close its park, California law imposes on cities and counties the challenging responsibility of reviewing and

determining the reasonable relocation costs the owner should pay to mitigate that impact on its displaced tenants. The City of Palo Alto fulfilled that responsibility here with an extensive quasi-judicial administrative proceeding that included multiple public hearings, the submission of testimony and extensive other evidence by all interested parties, several rounds of briefing by the parties' counsel, and a final appeal to the City Council. Any party dissatisfied with the Council's final decision had the right to file a timely mandamus action in court to seek judicial review, and such a mandamus challenge could have included (or been joined with) an inverse condemnation claim. But the owners did not have the right to allow the limitations period for challenging that decision to lapse, and to instead file a belated regulatory takings challenge collaterally attacking that quasi-adjudicative decision, based on a contention that the City factually over-calculated the amount of mitigation. The district court below properly applied *Williamson County* to hold that Plaintiffs did not adequately ripen their claim by seeking relief in state court. The judgment of dismissal should be affirmed.

Dated: January 6, 2016

JARVIS, FAY, DOPORTO & GIBSON, LLP

By: *s/* Rick W. Jarvis
Attorneys for Amicus Curiae
LEAGUE OF CALIFORNIA CITIES

CERTIFICATE OF COMPLIANCE WITH FRAP 29(5)

I certify that this brief complies with the length limits permitted by FRAP 29(5). The brief is 3,606 words, and the type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

Dated: January 6, 2016

JARVIS, FAY, DOPORTO & GIBSON, LLP

By: *s/* Rick W. Jarvis
Attorneys for Amicus Curiae
LEAGUE OF CALIFORNIA CITIES

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on January 6, 2017.

Participants in the case who are registered CM/ECF users will be served by appellate CM/ECF system.

s/ Rick W. Jarvis