No. 08-567

In The Supreme Court of the United States

AGRIPOST, LLC, a Florida limited liability company (successor by merger to Agripost, Inc.), and AGRI-DADE, LTD., a Florida limited partnership,
Petitioners,

v.

MIAMI-DADE COUNTY, a political subdivision of the State of Florida,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION

R. A. CUEVAS, JR.*
MIAMI-DADE COUNTY ATTORNEY
JAMES J. ALLEN
ASSISTANT COUNTY ATTORNEY
SUITE 2810
111 NORTHWEST FIRST STREET
MIAMI, FLORIDA 33128-1993
TELEPHONE: 305.375.5151
FAX: 305.375.5634

* *Counsel of Record*
Counsel for Respondent

February 26, 2009

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

1. Whether an owner of conditional, unusual-use zoning who declined to appeal a federal court order dismissing his federal claims as unripe under *Williamson County;* then litigated and lost his state inverse condemnation action, therein admitting that he was raising his identical federal claims as well; and then lost his federal takings claim action on preclusion grounds, can now claim that he is entitled to relitigate his federal takings claim anew?

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

CASES

CONSTITUTION

STATUTES AND ORDINANCES

RULES

CITIATIONS TO THE OPINIONS AND ORDERS BELOW[1]

Agripost, LLC v. Miami-Dade County, Florida, 525 F.3d 1049 (11th Cir. 2008). (Pet. App. A.)

Agripost, Inc. v. Metropolitan Miami-Dade County, 859 So. 2d 513 (Fla. 2003). (Pet. App. F.)

Agripost, Inc. v. Metropolitan Miami-Dade County, 845 So. 2d 918 (Fla. Dist. Ct. App. 2003). (Pet. App. E.)

Agripost, Inc. v. Metropolitan Miami-Dade County, 195 F.3d 1225 (11th Cir. 1999). (Pet. App. C.)

Agripost v. Metropolitan Dade County, No. 97-22049-CA-22 (June 22, 2001) (Order granting motion for final summary judgment). (Resp. App. A.)

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Constitution, Article IV, Section 1: "Full Faith and Credit shall be given in each State to the ... judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such ... Proceedings shall be proved, and the Effect thereof."

28 U.S.C. Section 1738: "[J]udicial proceedings ... shall have the same full faith and credit in every court

---

[1] Respondent includes this section principally because Petitioner inadvertently neglected to include reporter citations to the listed opinions.

within the United States and its Territories and Possessions as they have by law or usage in the courts of such State ...."

Respondent Miami-Dade County[2] respectfully requests that this Court deny Agripost's petition for writ of certiorari.

STATEMENT OF THE CASE[3]

In 1991, after Agripost had failed to comply with specific conditions to conditional, revocable, unusual-use zoning, the County revoked its zoning approval. Over the ensuing 18 years and in nine prior legal proceedings,[4] Agripost has sought reversal of that

---

[2] Miami-Dade County will be referenced hereafter as the "County." Petitioners are referenced herein as "Agripost." All record citations are to the record on appeal, and all emphasis is supplied unless otherwise noted. Citations and footnotes are generally deleted from block or lengthy quotations.

[3] Because this case involves a lengthy, complicated factual history, and Agripost's version is inaccurate and incomplete, the County submits its own Statement of the Case.

[4] The prior proceedings are referenced herein as follows:

a. *Agri-Dade, Ltd. v. Metro. Dade County, No. 91-214 AP (Fla. Cir. Ct.) ("Agripost II"). (Prior proceedings have referred to Concerned Citizens of Carol City, Inc. v. Dade County and Agripost, Inc., No. 87-139-AP (Fla. Cir. Ct. 1987) as "Agripost I" or "Concerned Citizens.")*

b. *Agri-Dade, Ltd. v. Metro. Dade County, 605 So. 2d 1272 (Fla. Dist. Ct. App. 1992) ("Agripost III").*

decision, as well as millions of dollars in damages. It has lost every time.

In November 1986 Agripost filed with the County a sworn application for unusual use zoning[5] to construct a plant to convert garbage to fertilizer.[6] Agripost chose to locate its plant on a 20-acre site adjacent to: (1) an elementary school in a residential neighborhood; (2) an institution for the learning

---

c. *Agripost, Inc. v. Metro. Dade County, No. 94-2031-CIV-DAVIS (S.D. Fla. filed 1994) ("Agripost IV").*

d. *Agripost, Inc. v. Miami-Dade County, 195 F.3d 1225 (11th Cir. 1999) ("Agripost V").*

e. *Agripost v. Metro. Dade County, No. 97-22049 (Fla. Cir. Ct. filed 1997) ("Agripost VI").*

f. *Agripost v. Miami-Dade County, 845 So. 2d 918 (Fla. Dist. Ct. App. 2003) ("Agripost VII").*

g. *Agripost v. Miami-Dade County, 859 So. 2d 513 (Fla. 2003) ("Agripost VIII").*

h. *Agripost, LLC v. Miami-Dade County, Case No. 04-21743-CIV-MARTINEZ/KLEIN (S.D. Fla. filed 2004) ("Agripost IX").*

i. *Agripost, LLC v. Miami-Dade County, 525 F.3d 1049 (11th Cir. 2008). ("Agripost X").*

[5] Unusual-use zoning allows the conduct of a particular use that is not allowed as of right within the underlying zoning district and may be conditional and revocable. (R25-561.)

[6] Agripost's fertilizer manufacturing process involved grinding 4,000 tons of garbage per week into small particles, and then causing a chemically enhanced decay. (R25-2422, 2514, 2290.) *See also Agripost V*, 195 F.3d at 1228 n.4.

disabled; and (3) an institution for disadvantaged women. The application was opposed by more than 600 area residents. (R25-2087-2116, 2119, 2139-2180, 2183, 2185.)

To induce the County to permit its facility in such a sensitive location, Agripost's sworn application represented unconditionally that the plant *could not* produce any "emissions or fumes," "odor problems," or "adverse environmental factors." Agripost represented that: a) all areas of the building would be odor free; b) no emissions or fumes would result; and c) no odor problems were anticipated because the waste-decomposition process employed was aerobic. (R25-2087-2116.)

To hold Agripost to its sworn representations, the County made its approval of the unusual use zoning conditional and revocable. Express conditions included the prohibition of any "nuisance." Agripost's President agreed to the conditions of revocability: "[W]e urge your approval of the unusual use with the conditions.... We are satisfied with those conditions." The County advised Agripost that the conditions would be strictly enforced. The County also entered into a contract with Agripost subject to the same conditions. The contract provided, *inter alia*, that the County would pay Agripost a "tipping fee" to process its garbage. Agripost was on notice that the consequence of violating conditions was revocation of the unusual-use approval. Miami-Dade County, Fla. Code § 33-311(j); (R25-564-65, 1141, 2290-92, 2195, 2199, 2205.)

Agripost joined the County in successfully defending the conditional approval in *Concerned Citizens,* an appeal of the zoning brought by opponents

of the plant. In obtaining affirmance, Agripost repeated its earlier representations, assuring the court that Agripost's system was "simple and reliable ... and environmentally safe." (R25-1577 n.3, 2507-2521.)

It was not. Evidence at subsequent public hearings would reveal that garbage particles were spewing into the atmosphere and being inhaled by school children; the children were suffering from asthma, vomiting, nosebleeds, and allergies; the schools were developing a black, slimy mold; and there was a "gagging," "horrible," and "unbearable" stench, which itself was a health threat. (R25-2415-16, 2429, 2674-78, 2681-82, 2863-94.)

In October 1990, the County's Department of Environmental Resource Management (DERM) notified Agripost that its plant was creating a public nuisance, and of a multitude of other violations of both the zoning and the contract. A month later, the Building and Zoning Director applied to revoke the zoning based upon violation of several conditions, including DERM's original prohibition of any nuisance. (R25-2933-2940, 4046-49.)

Agripost thereupon sought County Commission approval of several contract amendments, reneging upon its contractual "complete responsibility for any costs incurred because of changes in laws", and seeking substantial increases in the tipping fees payable by the County. Agripost also sought a vast plant addition and expansion (from 20 to 50 acres) onto adjacent public property at additional public expense. The proposal was in violation of contract provisions prohibiting substantial changes in the plant, any County financing, and in violation of

incorporated zoning conditions limiting the plant to the existing site. (R25-551, 1980-2020, 3707-09, 3711).

Agripost's expert admitted at the hearing that the plant's emissions were a nuisance, and insisted that its all-or-nothing ultimatum was the only way to fix it. The County Commission declined to approve the amendments, and told its department directors to proceed with the zoning revocation application. (R25-3706-07, 3716-18.)

The County's Zoning Appeals Board and the Commission conducted separate *de novo* public hearings on the application to revoke.[7] These hearings adduced evidence (much introduced by Agripost itself) of the horrific health and safety hazards described *supra,* all of which constituted violations of contract and zoning conditions. Agripost admitted it "did not make good on [its] promise"; it had created a "nuisance" to the public health or welfare. It conceded that, contrary to its earlier promises, there could be no such thing as an odor-free operation of this nature. Based on all of the foregoing, the zoning was revoked. (R25-559-572, 2413-14, 2685-86, 2727.)

Agripost appealed the zoning revocation to a Florida intermediate appellate court, claiming it had a right to cure the violations. *Agripost II.* The court rejected Agripost's claim, and the Florida District Court of Appeal denied certiorari. *Agripost III.*

Undaunted, Agripost filed an eight-count complaint in federal court. *Agripost IV.* The County moved for

---

[7] *See* County Code §§ 33-311, 33-313.

summary judgment based on the results of the prior litigation. The court dismissed Agripost's equal protection claim with prejudice; its procedural due process claim as barred by the *Rooker-Feldman* doctrine;[8] and its federal takings claim as unripe under *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). The Court declined to exercise supplemental jurisdiction over any of Agripost's state claims, including a state takings claim.

Both Agripost and the County appealed to the Eleventh Circuit Court of Appeals. *Agripost V.* Agripost soon withdrew its appeal, but the County pursued its own, arguing that the court should have granted its motion to dismiss the takings claim with prejudice. The Court of Appeals affirmed the dismissal of the federal takings claim for want of subject matter jurisdiction, but refused to entertain the appeal as to any state law claim. 195 F.3d at 1234, 1227, n.1.

Agripost then filed a four-count action in state court, alleging state inverse condemnation; breach of contract; discrimination; and a purportedly reserved federal inverse condemnation claim incorporating the Florida inverse condemnation claim. *Agripost VI.* The County moved for final summary judgment, arguing no taking had occurred as a matter of law. (R25-475.) The court granted the County's motion, finding that Agripost had no right to violate the conditions upon which the zoning approval was predicated and not

---

[8] So-called from the cases that announced the doctrine: *Rooker v. Fiduciary Trust Co.*, 263 U.S. 413 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

have that approval revoked: "This was "not part of [Agripost's] title to begin with," and does not give rise to a compensable taking. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027 (1992)." (Resp. App. A. at 12b.) The court further noted that "under the particular circumstances of this case, the County's exercise of its retained right to revoke because of Agripost's indisputable violation of conditions does not, as a matter of law, constitute a compensable taking."

The court also adjudicated the purportedly reserved federal takings claim on the same basis as the Florida takings claim.[9] *Id.* at 13b-14b. The court recognized the questionable nature of Agripost's purported reservation, but gave due deference to the federal courts with regard to any claim "lying *exclusively* within the jurisdiction of the federal courts which *could survive* the present litigation." *Id.* at 19b n.7.

Agripost appealed the summary judgment, but did not contest the Court's adjudication of its federal takings claim. *Agripost VII.* On oral argument, the appeals court directly asked Agripost whether it had asserted its federal takings claim in the state case. Agripost admitted that it had:

> *[T]hey are both asserted, both the federal and the state* .... [T]he predicate on which everything depended, Your Honor, was that they were *identical. So we have asserted the federal claim,*

---

[9] Agripost had framed its state takings claim in terms of federal law, alleging, for example, that the "revocation of the unusual use zoning resulted in depriving Plaintiffs, contrary to their reasonable investment-backed expectations, of all economically viable use of the leasehold." (R25-031.)

> but we know that as a practical matter that the State claim, which counts here—I mean, *it's going to be res judicata probably, the decision on the State claim. So that's what counts*.

(R25--3/3/03 3d DCA Tr. at 19-21.)

The appeals court affirmed the summary judgment based upon the unique facts of the case, particularly Agripost's ultimatum to the County. *Agripost VII*. The Court noted, "In the context of a federal inverse condemnation claim, ... when a government entity acts to create property rights yet retains the power to alter those rights, the property right is not considered 'private property,' and the exercise of the retained power is not considered a 'taking' for Fifth Amendment purposes." 845 So. 2d at 920. The court concluded that the County had the right to reject a proposal that would have required the County to pay Agripost more money to cure the odor problem. *Id.* at 920-21. Agripost's petition for review in the Florida Supreme Court was denied. *Agripost VIII*. As in *Agripost V,* Agripost did not seek certiorari review in this Court.

Instead, Agripost filed *Agripost IX*, a second federal action "asserting the [same] federal takings claim asserted" in *Agripost IV,* and "reassert[ing]" the federal claim which had been asserted in and adjudicated in *Agripost VI and VII*. The County moved for final summary judgment based on lack of subject matter jurisdiction under the *Rooker-Feldman* doctrine, issue preclusion, and claim preclusion.

Simultaneously, *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005), was pending before this Court. Agripost was aware of its

potential significance. It first moved to delay consideration of the County's motion, because "*San Remo ... is certain to have a significant impact on the instant case*." After this Court issued its opinion in *San Remo,* Agripost then sought a "Final Adjournment of Oral Argument ... or, in the Alternative, for Leave to Withdraw as Counsel." (R52.) The court denied Agripost's request. (R39, 52, 58.)

Unable and unwilling to argue against *San Remo* in good faith, Agripost then withdrew its request for oral argument. (R60-2.) Agripost did not submit any written argument against the application of *San Remo*. The lower court then granted the County's motion on the papers. (R60, 62.)

In granting final summary judgment, the court expressly based its judgment on claim preclusion. It found that *San Remo* foreclosed Agripost's purported attempt to reserve the right to proceed in federal court, particularly since the federal claim had been expressly decided by the state court. Although the court found it unnecessary to decide the question of issue preclusion, it nevertheless found that its elements had been met as well. The Court also ruled that to the extent Agripost was challenging the propriety of the state court order, that challenge would violate the *Rooker-Feldman* doctrine. (R62.)

The Court of Appeals affirmed. *Agripost X.* It recognized that this Court's reasoning in *San Remo* "seems to undercut much of the support for *Jennings*[10]

---

[10] *Jennings v. Caddo Parish Sch. Bd.,* 531 F.2d 1331 (5th Cir. 1976) (stating in dicta that plaintiff could have made an express

and *Fields*."[11] 525 F.3d at 1055. The Court concluded that summary judgment for the County was proper, because a competent state court had found that Agripost did not have a compensable property interest. *Id.* at 1056. Thus, under applicable Florida issue preclusion law, Agripost's federal takings claim necessarily failed.[12]

The Appeals Court expressly rejected Agripost's argument that Florida takings law diverged from federal takings law. It noted that Agripost itself had argued in *Agripost VII* that state takings law "'is governed by *Lucas*,' acknowledging that the state and federal law on the relevant takings issues are coextensive." 525 F.3d at 1049. In addition, the state court of appeals had previously held that the law on this issue was the same. 845 So. 2d 918, 920. The Eleventh Circuit concluded that "it is sufficiently clear under Florida law that Agripost's use of the publicly owned land was 'not part of [its] title to begin with,' *Lucas,* 505 U.S. at 1027, because it did not own the land and because its use was deemed noxious." The Court of Appeals summarized, "Agripost's real gripe here is that the state court erred, but that of course is

---

reservation of her federal constitutional claim in state court to avoid claim and issue preclusion).

[11] *Fields v. Sarasota Manatee Airport Auth.*, 953 F.2d 1299 (11th Cir. 1992) (stating that a plaintiff who litigates in state court because of the rule in *Williamson County* can make an express reservation of his Takings Clause claim as an exception to state law claim preclusion principles that would apply under Section 1738).

[12] The court therefore found it unnecessary to decide whether *San Remo* could or should be extended to claim preclusion.

not a defense to collateral estoppel." 525 F.3d at 1055 n.6.

The court also was careful to distinguish the posture of the case before it from *Agripost V*. In the latter, the Court of Appeals had refused to find that the *zoning* proceedings culminating in *Agripost II* precluded Agripost from pursuing a takings claim. In contrast, *Agripost IX* based its application of preclusion not on *Agripost II,* but rather on Agripost's *inverse condemnation action* brought as part of *Agripost VI*, in which the state court

> made a *de novo* ruling on the merits, concluding that because Agripost was *determined to have* violated the conditions of its unusual use permit—a fact that is undisputed—Agripost no longer had a valid, compensable property interest in that use, whether or not the violations amounted to a nuisance under other principles of Florida property law.

Id. at 1056 n.7.

REASONS FOR DENYING THE PETITION

Agripost does not present a compelling reason for granting its Petition. It does not assert circuit conflict, or any other reason listed in Rule 10. Rather, and with little regard for the factual history of this case, Agripost belatedly expresses disagreement with *Williamson County*'s ripeness requirement, and with the Appeal Court's wholly correct application of preclusion.

Part I of the County's response demonstrates why this case is directly and properly controlled by preclusion, and why the Court of Appeals therefore decided the case correctly. Part II demonstrates why Agripost's arguments not only have no applicability to the facts of this case, but are legally deficient as well.

I. THE PETITION SHOULD BE DENIED, BECAUSE THE COURT OF APPEALS CORRECTLY DETERMINED THAT AGRIPOST CANNOT RELITIGATE ITS FEDERAL TAKINGS CLAIM.

A. There Is No Compensable Taking Based Upon Revocation of a Conditional Revocable Zoning Approval for an Isolated Use, Where the Revocation Resulted from the Violation of Conditions and the Creation of a Public Nuisance.

This is hardly a "typical" takings case. Agripost owned no land; it had only conditional revocable zoning and sub-leasehold rights for a single isolated unusual use of state-owned lands. Agripost had agreed that its lease of state lands was terminable upon the cessation of waste processing and that its building "would become the State's property without payment of compensation." (R1-4). Agripost's zoning approval and right to use public lands were always held subject to Agripost not violating any of numerous conditions, including the prohibition against an offensive odor nuisance.

In *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), this Court rejected as "quite simply untenable" the suggestion that a taking is

established simply by showing that a landowner has been denied the ability to exploit a particular property interest. *Id.* at 130. This rule follows from the fact that a regulatory taking is based upon the denial of "*all* economically beneficial or productive use of land," *Lucas*, 505 U.S. at 1015, not of a single strand from the rights bundle, which may be fragmented infinitely. When Agripost violated the conditions attached to its limited "strand," Agripost lost whatever right it might have had to constitutional takings compensation.

One has no right to compensation for what one does not own. As this Court put it in *Lucas,* compensation is not required "if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." 505 U.S. at 1027. Because the right to violate zoning conditions and *not* have the zoning revoked was never part of Agripost's title to begin with under "background principles" of state law,[13] the revocation did not give rise to a compensable taking. *Lucas*, 505 U.S. at 1029, 1030, 1031.

In granting Agripost's conditional unusual use, the County retained the power to revoke if Agripost violated conditions. "[W]hen a government entity acts to create property rights yet retains the power to alter those rights, the property right is not considered 'private property,' and the exercise of the retained

---

[13] *See, e.g.*, *Smalleylogics Corp. v. Dade County*, 176 So. 2d 574, 577, 578 (Fla. Dist. Ct. App. 1965) ("The gist of Plaintiffs' complaint is that it has a substantial vested property right in the [conditional] non conforming use .... [One] cannot now claim that he can violate the conditions without forfeiting his right to the conditional non-conforming use.")

power is not considered a 'taking' for Fifth Amendment purposes." *Democratic Cent. Comm. of the Dist. of Columbia Bar v. Washington Metro. Area Transit Comm'n*, 38 F.3d 603, 606-607 (D.C. Cir. 1994); *see also Marine One, Inc. v. Manatee County*, 898 F.2d 1490 (11th Cir. 1990) (no protected property right in Florida to a permit to build or develop on *public* land).

The zoning revocation was predicated primarily upon violation of the zoning condition prohibiting a nuisance. Even Agripost has previously recognized that under both State and federal law, the prohibition of a common law nuisance does not result in a compensable taking, even as to an unconditional fee owner. It follows *a fortiori* that there can be no compensable taking where one's limited revocable approvals to use public lands are expressly conditioned on not creating a nuisance.

B. In *Agripost VI*, Agripost Could Not and Did Not Reserve a Right to Relitigate its Federal Claim

Notwithstanding the conditional, revocable nature of its property interest, and the adjudications that the County's revocation due to Agripost's violations of those conditions was *not* a taking, Agripost steadfastly and consistently squirms to avoid the effect of those decisions, and therefore of the Full Faith and Credit doctrine.[14] 28 U.S.C. Section 1738 has long been understood to encompass the doctrines of claim

---

[14] Agripost does not even include the constitutional and statutory foundations for the Full Faith and Credit doctrine in its list of involved constitutional provisions and statutes.

preclusion and issue preclusion, "because without it, an end could never be put to litigation." *San Remo*, 545 U.S. at 336 (quoting *Hopkins v. Lee*, 6 Wheat. 109, 114, 5 L.Ed. 218 (1821)).

1. Agripost could not have reserved a right to litigate its federal takings claim in federal court.

Agripost seeks to avoid the Full Faith and Credit doctrine by arguing that it was entitled to reserve its right to litigate its federal claim under *Fields v. Sarasota Manatee Airport Authority*, 953 F.2d 1299 (11th Cir. 1992). *San Remo* makes clear that, except in a narrow class of cases different from this one, such an attempted reservation is invalid.

In *San Remo,* this Court held that when a takings claimant seeks just compensation in state court pursuant to *Williamson County*, he will be precluded in a subsequent federal action from further litigation of issues that were adjudicated by the state court. Agripost vainly attempts to distinguish *San Remo* from its own situation, but the cases are far more alike than different. Like Agripost, San Remo Hotel had first sued in federal court, alleging a federal taking. The district court found the takings claim unripe. *Unlike* Agripost, San Remo Hotel appealed. The determination of unripeness was affirmed, but *Pullman* abstention was ordered as to plaintiffs' facial challenge. The Hotel then filed a takings action in state court, but, like Agripost, "phrased [its] state claims in language that sounded in the rules and standards" of federal takings jurisprudence. The state trial court dismissed the complaint, and the California Supreme Court affirmed the dismissal. The California

high court noted that the Hotel had reserved its federal claims, but because the state had "construed the [federal and state takings] clauses congruently," the court analyzed the state takings claim under both state and federal law. Like Agripost, the Hotel did not seek a writ of certiorari from this Court. Instead, it filed an amended complaint in federal district court, which found the claim precluded. The Ninth Circuit affirmed.

This Court rejected the Hotel's argument that when a Section 1983 takings claimant is required to resort to state court, the claimant should be able to avoid the operation of Section 1738 by making an *England*[15] reservation on the state court record. Rather, an *England* reservation procedure is limited to cases in which the federal court invokes *Pullman*[16] abstention. In a *Pullman* abstention situation, the plaintiff has properly invoked federal court jurisdiction in the first instance, but abstention is necessary for the state court to address a distinct, antecedent state–law issue.

Importantly, this Court noted that "[*Pullman*] made it perfectly clear that the effective reservation of a federal claim was dependent on the condition that plaintiffs take *no* action to broaden the scope of the state court's review beyond decision of the antecedent state law issue." *San Remo* at 340. The Court therefore found the Hotel's attempted reservation ineffective, because "by broadening their state action ... to include

---

[15] *England v. Louisiana State Bd. of Medical Exam'rs*, 375 U.S. 411 (1964).

[16] *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941).

their 'substantially advances' claims, petitioners *effectively asked the state court to resolve the same federal issues they asked it to reserve." Id.*

The Court explained that federal courts may not create exceptions to Section 1738 for policy reasons. "Even when the plaintiff's resort to state court is involuntary and the federal interest in denying finality is robust, we have held that Congress 'must "clearly manifest" its intent to depart from § 1738.'" *Id.* at 345 (quoting *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 477 (1982)). Consequently, the Court applied its "normal assumption that the weighty interests in finality and comity trump the interest in giving losing litigants access to an additional appellate tribunal .... The purpose of the *England* reservation is *not to grant plaintiffs a second bite at the apple in the forum of their choice." San Remo* at 346.

After this Court decided *San Remo*, Agripost's trial counsel attempted to withdraw, withdrew his request for oral argument, and otherwise did not attempt to argue against its applicability to *Agripost IX.* Clearly, Agripost there recognized that its attempted *England* reservation was invalid, because *Agripost VI* was not one of that narrow class of cases filed in state court after a *Pullman* abstention. In addition, Agripost, like San Remo Hotel, had framed its complaint in *Agripost VI* in federal terms. Agripost similarly argued to the state trial court in terms of federal law: "Under the seminal decision of *Lucas v. South Carolina Coastal Council*, governmental action which "denies all economically beneficial or productive use of land" is a taking of property which requires just compensation."Agripost's argument was no different

on appeal in *Agripost VII,* relying extensively on *Lucas* and other federal takings cases.

Agripost has now changed its tune. Its attempt to distinguish *San Remo* is fatally tardy; it is well established that this Court does not decide questions not raised or involved in the lower court.[17] *See, e.g., Youakim v. Miller,* 425 U.S. 231, 234 (1976); *United States v. Mendenhall,* 446 U.S. 544, 551–52 n.5 (1980). In addition, the assorted distinctions it attempts to manufacture do not affect in the least the applicability of *San Remo* to the present case.

Agripost alternatively attempts to avoid *San Remo* by arguing that it was entitled to rely on the "settled law" of *Fields*, and it should therefore somehow be "exempt" from *San Remo*. Not surprisingly, Agripost offers no authority for that proposition. *San Remo* was not new law; it simply recognized that prior judicial attempts to "legislate" around the Full Faith and Credit doctrine were invalid. Since Agripost is hoisting this flag for the very first time in this Petition, it is an inappropriate basis for granting certiorari.

Even before *San Remo,* the scope and impact of *Fields* was uncertain. Indeed, the *Fields* court itself acknowledged that it was "unsure of whether we would reach the same result as that reached by the *Jennings* [*v. Caddo Parish School Bd.*, 531 F.2d 1331 (5th Cir.

---

[17] In stark contrast to Agripost's present deathbed conversion regarding *San Remo*, the County consistently argued in both *Agripost IX* and *X* that Agripost's attempted *Fields* reservation was prohibited under the Full Faith and Credit doctrine.

1976)] court were the issue before us as a matter of first impression."[18] 953 F.2d at 1306-07. Moreover, the *Fields* court found that the homeowners had failed to make a reservation that would avoid application of "res judicata" principles. *Id.* at 1309.

Agripost's attempted reservation was invalid for another reason: It had inextricably intertwined the relitigation of its state takings claim with its state contract claim.[19] Because the contract claim is not even arguably subject to a *Fields* reservation, the takings claim is "doubly" precluded, *i.e.*, by both the state takings adjudication and the state contract adjudication. Moreover, as discussed *infra* at 24, *Rooker-Feldman* establishes that the federal district court lacked subject matter jurisdiction to reach any contract "issue" decided by the state courts. This fact alone renders all of Agripost's *Williamson* and *San*

---

[18] *Jennings* involved a civil rights claim by a teacher who had been fired by the local school board. In a one-page, per curiam opinion, the Fifth Circuit held that because her claims had already been litigated in the state court, the federal district court was barred from reconsidering them. The court added in *dicta* that "[u]nder *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411 (1964), however, had appellant wished to reserve her constitutional claims for subsequent litigation in federal court, she could have done so by making on the state record a reservation to the disposition of the entire case by the state courts." *Jennings* at 1331. As the Eleventh Circuit noted in *Fields*, a subsequent Fifth Circuit decision "severely questioned the continuing validity of *Jennings*." *Fields* at 1305 n.4 (citing *Lewis v. East Feliciana Parish Sch. Bd.*, 820 F.2d 143, 146 n.1 (5th Cir. 1987)).

[19] Notwithstanding the State court adjudications in *Agripost VI* and *Agripost VII*, Agripost persisted throughout *Agripost IX* in relying on a purported *contractual* right to cure.

Remo complaints irrelevant, and alone justifies denying its Petition.

2. When Agripost did not appeal the adjudication in *Agripost VI* of its federal takings claim, and conceded on oral argument in *Agripost VII* that it was litigating its federal claim, it effectively withdrew any purported reservation.

Both before and after *San Remo*, it was clear that an *England* reservation must be express, explicit, and unequivocal. *See, e.g., Geiger v. Foley Hoag L.L.P. Retirement Plan*, 521 F.3d 60 (1st Cir. 2008); and *Anderson v. Charter Twp. of Ypsilanti*, 266 F.3d 487, 497 (6th Cir. 2001) (holding reservation invalid where party based argument on takings law from United States Supreme Court as well as state court). Even assuming *arguendo* that such a reservation were theoretically possible, Agripost struck out on all three requirements.

The Court of Appeals in *Agripost IX* assumed for the sake of argument that Agripost had properly reserved its right to litigate its federal claim in federal court. 525 F.3d at 1055. The record reveals that its purported reservation was anything but express and unequivocal. Although Agripost's complaint in *Agripost VII* contained language indicating that it "intended" to reserve its federal takings claim for prosecution in the federal district court, that language was unclear.[20] In

---

[20] The complaint stated that "Plaintiffs' federal inverse condemnation *is* brought under 42 U.S.C. § 1983 and the Fifth

addition, this ambiguous reservation was negated by Agripost's own conduct and statements as the cause progressed. Agripost submitted the federal claim for adjudication to the state court in *Agripost VI*, and that court adjudicated the claim.[21] The state trial court noted Agripost's equivocation on the subject, stating that it did not reach any "non-Florida claim lying *exclusively* within the jurisdiction of the federal courts which could survive the present litigation."

Agripost's conduct during the state court appeal was even clearer. First, Agripost never appealed the propriety of the state court's adjudication of its federal claim. Second, on oral argument Agripost directly stated that the federal claim was being asserted:

> *[T]hey are both asserted, both the federal and the state*.... [T]he predicate on which everything depended, Your Honor, was that they were identical. So we have asserted the federal claim,

---

Amendment of the United States Constitution. It *asserts* that ...." Following this language, the federal taking claim of the state court complaint repeated verbatim the identical substantive language of the state taking claim. As discussed *supra* at 8, the state court adjudicated the federal claim against Agripost on the same grounds as it adjudicated the identical Florida taking claim.

[21] Agripost's federal taking claim did not lie exclusively within federal court jurisdiction, and was properly adjudicated by the state court. *Feldman*, 460 U.S. at 483 n.16 ("[W]e have noted the competence of state courts to adjudicate federal constitutional claims."); *San Remo*, 545 U.S. at 347 ("State courts are fully competent to adjudicate constitutional challenges to local land-use decisions. Indeed, state courts undoubtedly have more experience than federal courts do in resolving the complex factual, technical, and legal questions related to zoning and land-use regulations.").

> but we know that as a practical matter that the State claim, which counts here—I mean, it's going to be res judicata probably, the decision on the State claim. So that's what counts.

Thus, despite its arguments in the Petition to the contrary, Agripost is bound by its prior ambiguous allegations, the state court adjudication, its failure to appeal that adjudication, and its ultimate oral concession to the Florida Appellate Court. Having failed to preserve expressly, explicitly, and unequivocally any purported right to litigate federal claims, Agripost's petition based on any such alleged reservation must be denied.

C. *Agripost IX* Was Properly Decided on the Basis of Issue Preclusion.

Although the district court in *Agripost IX* based its decision expressly on claim preclusion, it alternatively found Agripost's claim barred by *Agripost VI* under the doctrine of issue preclusion,[22] and the Appeals Court affirmed on that latter basis. Agripost does not dispute that conclusion here, except to contend that *Agripost V* established that the County could not raise preclusion in *Agripost VI*.

---

[22] Under Florida law, issue preclusion applies if, in the prior proceeding, (1) the issues were identical; (2) there was a full and fair opportunity to litigate them; (3) they were critical and necessary to the prior determination; (4) the parties are identical; and (5) the issues were actually litigated. *Dep't of Health and Rehab. Servs. v. B.J.M.*, 656 So. 2d 906 (Fla. 1995); *Mobil Oil v. Shevin*, 354 So. 2d 372 (Fla. 1977).

As recognized by the Appeals Court, Agripost's position is flawed in several respects. First, and most fundamentally, the state court decisions in *Agripost VI* and *Agripost VII* were *not* based on preclusion. In rejecting Agripost's inverse condemnation claim, the trial court clearly stated: "Plaintiffs are not entitled to inverse condemnation damages for the revocation of a conditional revocable zoning approval as a result of their own violation of conditions .... Plaintiffs have no right to violate the conditions upon which the zoning approval was predicated and not have the approval revoked where such action was justified." (R25-1148).

Second, Agripost distorts *Agripost V*. That opinion only found that the appellate review in the prior zoning revocation appeal "was limited to one question: whether the Board's revocation of Agripost's permit was justified. The lower court was not called upon to determine whether there had been a Fifth Amendment taking." 195 F.3d at 1232. Neither *Agripost VI* nor *Agripost VII* adjudicated the takings claim based upon the prior adjudication in *Agripost II*. Each court made an independent de novo adjudication of the takings claim based upon the unique, unalterable facts contained in those records, including Agripost's creation of a nuisance and its insistence that expansion and increased County funding was the only cure.

D. The Court of Appeals Properly Affirmed the District Court's Summary Judgment Under the *Rooker-Feldman* Doctrine.

The district court's decision was also alternatively based on the *Rooker-Feldman* doctrine. Because Agripost has not challenged the application of *Rooker-*

Feldman, this is yet another reason its Petition should be denied.

For Agripost to obtain any relief now would clearly implicate *Rooker-Feldman*, because any relief for Agripost would operate effectively to invalidate the state court judgments in *Agripost VI* and *Agripost VII*. Those decisions each independently adjudicated that Agripost had no valid takings claim and no valid contract claim. *Feldman*, 460 U.S. at 486-87.[23] This Court recently ruled that *Rooker-Feldman* is confined to cases that are "brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005); *see also San Remo*, 545 U.S. at 351(noting that "even if preclusion law would not block a litigant's claim, the Rooker-Feldman doctrine might") (Rehnquist, C.J., concurring.).

In that context, it is the obligation upon a State court litigant to raise federal issues in the State court:

> Moreover, the fact that we may not have jurisdiction to review a final state-court

---

[23] Federal courts are particularly sensitive to this issue in land use cases, because "zoning provides one of the firmest and most basic of the rights of local control," *Stansberry v. Holmes*, 613 F.2d 1285, 1288 (5th Cir. 1980), and because it is particularly "not the function of federal district courts to serve as zoning appeals boards." *Nasser v. Homewood*, 671 F.2d 432, 440 (11th Cir. 1982) (citing *South Gwinnett Venture v. Pruitt*, 491 F.2d 5, 6 (5th Cir. 1974)).

> judgment because of a petitioner's failure to raise his constitutional claims in state court does not mean that a United States District Court should have jurisdiction over the claims. By failing to raise his claims in state court a plaintiff may forfeit his right to obtain review of the state-court decision in any federal court. This result is eminently defensible on policy grounds. We have noted the competence of state courts to adjudicate federal constitutional claims....

Feldman, 460 U.S. at 482 n.16. Of course, not only could Agripost's federal claim have been raised in the state court, it was in fact raised. The trial court expressly adjudicated it in *Agripost VI*, and, at oral argument in *Agripost VII*, Agripost's counsel acknowledged that fact. Additionally, the issue before the federal court was "inextricably intertwined," with the state court adjudications. *See Feldman*, 460 U.S. at 486. As the late Justice Marshall explained:

> [A] federal claim is inextricably intertwined with the state court judgment if the federal claim succeeds only to the extent that the state wrongly decided the issues before it. Where federal relief can only be predicated upon a conviction that the state court was wrong, it is difficult to conceive the federal proceeding as, in substance, anything other that a prohibited appeal of the state court judgment.

Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 25 (1987) (Marshall, J., concurring). Clearly, for this Court to allow Agripost to litigate in a federal forum whether its Fifth Amendment rights were violated would

necessarily require the invalidation of the state judgments in several respects. Most fundamentally, the ruling that no compensable taking occurred is totally inconsistent with Agripost's complaint, and any result in Agripost's favor would without question therefore be "inextricably intertwined" with that ruling. Therefore, this Court has no jurisdiction to entertain Agripost's claim, because to do so would improperly invade the state court judgments. Since the issue has now been decided in the state court, any relief given in the present action to Agripost would necessarily call into question the validity of those judgments, a conflict expressly barred under *Rooker-Feldman*.

II. THERE IS NEITHER CONFLICT NOR CONFUSION BETWEEN *WILLIAMSON COUNTY*, *CITY OF CHICAGO*, AND *SAN REMO*.

Refusing to let the facts of this case get in the way of its argument, Agripost steadfastly contends that this case gives this Court the ideal opportunity to resolve "conflict and confusion" caused by *Williamson County*; *City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997); and *San Remo*. As the County has demonstrated *supra*, the lengthy and complicated history of this case demonstrates that it is certainly *not* an appropriate case to resolve any such alleged conflict or confusion, even if any existed. To the contrary, not only is this case unique and extraordinarily fact-based, but it also demonstrates the *validity and wisdom* of exercising federal restraint and allowing state courts to define the property interests at stake, and to determine whether they were taken in the first instance. In addition, as the County

now demonstrates, any "conflict and confusion" is largely illusory.

A. *Williamson County* Was Properly Decided.

Petitioner resurrects the same objections to *Williamson County* repeatedly asserted and rejected in *San Remo*[24] and other petitions. *Williamson County* held respondent's takings claim unripe for two independent reasons: a) respondent had refused to request a variance, and the government therefore had not reached a final decision regarding the application of certain regulations to the property; and b) respondent had not sought compensation by bringing an inverse condemnation action in state court for an alleged taking of property.

Petitioner and the amici supporting him rail against the state litigation requirement in *Williamson*. They overlook that the requirement is a product of the plain language of the Takings Clause: "[N]or shall property be taken for public use, without just compensation." Thus, the Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation. 473 U.S. at 194. If the government has provided an adequate process for obtaining compensation, and if resort to that process "yield[s] just compensation," then the property owner "has no claim against the Government" for a taking. *Id.* at 194-95 (quoting *Ruckelshaus v. Monsanto Co.*,

---

[24] Indeed, much of Agripost's Argument is *identical* to an amicus brief submitted in support of the losing side in *San Remo*. *See* Brief of Amicus Curiae Franklin P. Kottschade in Support of Petitioners, 2005 WL 176431.

467 U.S. 986, 1013, 1018 n.2 (1984)).[25] Indeed, in *Monsanto,* this Court held that takings claims against the Federal Government are premature until the owner has availed himself of the process provided by the Tucker Act. *Id.* at 1016-20. By Agripost's reasoning, there is no basis for that decision, either.

Agripost complains that it "finds itself unable to seek relief for the violation of its federal rights in any court." (Pet. at 31.) Agripost ignores the fact that its right under the Fifth Amendment is wholly dependent a) on the nature of its property interest under state law; b) on a determination under state law of whether that interest was taken; and c) if and only if it suffered a taking of its property interest, whether the state provided just compensation.

Indeed, *all* of Agripost's grievances about *Williamson County* are misplaced, because the real question in this case was whether the County's action constituted a taking. The answer to this question was quite properly deferred to the state court, inasmuch as it required the application of state property law.

---

[25] *See also Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 297 n.40 (1981) ("an alleged taking is not unconstitutional unless just compensation is unavailable"); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 315 (1987) (the Takings Clause "is designed not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of otherwise proper interference amounting to a taking."); *Suitum v. Tahoe Reg. Planning Agcy.*, 520 U.S. 725, 734 (1997) (state-litigation requirement "stems from the Fifth Amendment's proviso that only takings without 'just compensation' infringe that Amendment").

Agripost argues that "there is nothing in the 5th Amendment directing that the only place to seek that determination (of a violation) is in state court." (Pet. at 17.) As pointed out *supra* and in *Williamson*, the very nature of and limits on Agripost's Fifth Amendment right necessarily compel that conclusion. Moreover, the time for Agripost to have made that argument was back in 1997, when the district court in *Agripost IV* dismissed its claim as unripe. Agripost initially did appeal, but then withdrew it, apparently electing to take its chances in state court. Having lost, it cannot now complain.

B. *City of Chicago* Did Not Address Takings.

Agripost next suggests that *City of Chicago* is wholly at odds with *Williamson County*. It expresses disbelief that this Court could ignore *Williamson County* in ruling that the City was entitled to remove from state to federal court an action that sought review of a Chicago Landmarks Commission decision not to allow demolition of a designated historical landmark.

Agripost misunderstands the procedural history of *City of Chicago*. While the initial complaints removed to federal court included federal takings claims,[26] they

---

[26] In their takings claim, the Chicago plaintiffs contended that the Landmarks Ordinance's standard for economic hardship was facially unconstitutional, because it required an applicant to prove that denial of the permit would result in the loss of all reasonable and beneficial use of or return from the property. They further argued that it operated as a "taking" because it barred implementation of redevelopment plans adopted before designation of the property as historic. *Int'l Coll. of Surgeons v.*

contained other federal claims as well, including due process and equal protection claims, obviously not subject to *Williamson County*. Thus, Agripost is wrong when it argues that the *City of Chicago* plaintiffs "could *not* have sued the City of Chicago in federal court." (Pet. at 23.)

In addition, defendants moved early on to dismiss those claims on the merits. The District Court granted the motion, stating:

> Plaintiffs had not alleged that the Landmarks Ordinance had deprived them of *all* reasonable and beneficial use of or return from the property, and "mere disappointed expectations do not amount to an unconstitutional "taking."[3]
>
> [3] Because plaintiffs' "takings" claims are dismissed for failure to state a claim, the court does not consider defendants' argument that plaintiffs' failure to pursue a state court inverse condemnation action renders the claims "unripe" for adjudication.

Int'l Coll. of Surgeons v. City of Chicago, Nos. 91 C 1587 & 91 C 5564, 1992 WL 6729, *4 (N.D. Ill. Jan. 10, 1992). Whether the district court got the analysis backward or not, there is no indication in any of the available briefs that either side raised the taking ruling on appeal to the Seventh Circuit. Petitioner City of Chicago obviously did not raise it before this Court,

---

City of Chicago, Nos. 91 C 1587 & 91 C 5564, 1992 WL 6729, *3 (N.D. Ill. Jan. 10, 1992).

since it had prevailed below on the takings claim. Since Respondent did not file a cross petition, it is clear that the issue simply was not presented.

Thus, Agripost's contention that this Court "accurately and sensibly concluded that 5th Amendment cases are properly brought in federal court in the first instance" (Pet. at 24) is disingenuous; this Court reached no such conclusion and was never even presented with that issue. Agripost is similarly disingenuous when it argues that this "Court held [in *City of Chicago*] that a municipal defendant could remove *such a 5th Amendment* claim from state court for federal litigation." (Pet. at 9.) There was no such holding, because no such issue was ever before the Court.

C. *San Remo* is not Confusing.

Agripost is on equally shaky ground in trying to paint *San Remo* in "confusing" colors. Agripost seems to have forgotten that it took the position below that *San Remo* was "certain to have a significant impact on the instant case." It fails to explain how it now finds *San Remo* confusing, but did not in *Agripost VIII* or *Agripost IX*. And Agripost simply ignores the controlling holding of *San Remo*: there can be no exception—not even in takings cases—to the rule that the Full Faith and Credit Statute precludes litigation of issues adjudicated by state courts.

This Court found no reason to "create an exception to the full faith and credit statute, and the ancient rule on which it is based, in order to provide a federal forum for litigants who seek to advance federal takings claims that are not ripe until the entry of a final state

judgment denying just compensation." 545 U.S. at 337. More broadly, this Court recognized that "this is not the only area of law in which we have recognized limits to plaintiffs' ability to press their federal claims in federal courts." *Id.* at 347. Requiring a takings plaintiff to pursue state compensation remedies was justified because "[s]tate courts are fully competent to adjudicate constitutional challenges to local land-use decisions" and "undoubtedly have more experience than federal courts do in resolving the complex factual, technical and legal questions relating to zoning and land-use regulations."[27] *Id.*

Agripost, naturally echos Chief Justice Rehnquist's concurring opinion suggesting a reconsideration of *Williamson County* in the "appropriate case." But Agripost incongruously ignores the fact that, just like the petitioner in *San Remo,* Agripost never challenged the correctness of *Williamson County* below. Just as in *San Remo,* resolving any purported *Williamson County* issue here could not possibly help Agripost, because it already went to state court and lost. Clearly, if the Court were inclined to reconsider *Williamson County* at all, the only potentially "appropriate case" would be a case in which the property owner challenged at the outset an order to repair to state court. Only in that posture could "resolving the issue" benefit a petitioner. From any perspective, this collateral, belated challenge by Agripost is *not* the "appropriate case."

---

[27] State property law provides the guiding principles in taking cases. *Lucas*, 505 U.S. at 1029 (need for reference to "the restrictions that *background* principles of the State's law of property and nuisance already place upon land ownership" to determine if regulatory act results in taking).

More fundamentally, whereas the *San Remo* concurrence suggested future reconsideration of whether a plaintiff must first seek *compensation* in state court, the issue for Agripost was not compensation, but whether there was a taking in the first place. Indisputably, in light of *Lucas* and *First English* among many others, *that* issue is indeed best left to the state courts to address. The state-litigation requirement does not weaken a property owner's entitlement to just compensation. Rather, it enforces the language of the Takings Clause by holding that a constitutional violation occurs only when a property owner has had its property taken *and* has been denied just compensation. It respects the role of state courts and legislatures in ensuring the availability of adequate remedies. Moreover, it still allows a federal remedy if a state fails to meet its constitutional obligation to provide an adequate just compensation remedy after having taken property. *First English*, 482 U.S. at 314-16.

This Court has noted that there is "scant precedent" for limiting takings claims to federal court. *San Remo*, 545 U.S. at 347. The state-litigation requirement is entirely consistent with the central role of state law in determining whether regulatory action results in a taking, and the confidence placed in state courts to enforce constitutional rights in our federal system. *Allen v. McCurry*, 449 U.S. 90, 105 (1980).

Petitioners argue that *San Remo's* enforcement of the Full Faith and Credit Act turns *Williamson County* into "a jurisdictional trap, rather than [a] ripeness prerequisite." That is not so. As the record clearly reveals, Agripost suffered no such trap. Their hypothetical assertions run directly contrary to this

Court's "emphatic reaffirmation ... of the constitutional obligation of the state courts to uphold federal law, and its ... confidence in their ability to do so." *Allen v. McCurry*, 449 U.S. 90, 105 (1980) (*citing Stone v. Powell*, 428 U.S. 465, 494 n.35 (1976)).

Agripost concludes bizarrely by contending, without supporting authority, that because it chose not to appeal *Agripost IV,* and instead chose to go to state court, it "should not be bound by *San Remo*." (Pet. at 30-31.) It continues, "This case was initially brought in federal court, and there it should have stayed." As the County has shown, it was perfectly correct for the state courts to decide the state issues involved in Agripost's claim, but if Agripost indeed believed that it should have remained in federal court, then it needed to have made that argument over ten years ago in response to *Agripost IV*.

CONCLUSION

As this Court concluded in *San Remo,* "the weighty interests in finality and comity trump the interest in giving losing litigants access to an additional appellate tribunal ... [and] a second bite at the apple in the forum of their choice." 545 U.S. 345-46. It was entirely proper for competent state courts at both the trial and appellate levels to have determined that Agripost did not suffer a taking. Federal courts properly found that Agripost could not have reserved the right to relitigate those claims. The record further shows that they *did* not unequivocally reserve that right. The County therefore respectfully requests that this Court DENY Agripost's Petition.

Respectfully submitted,

R. A. CUEVAS, JR.*
Miami-Dade County Attorney
James J. Allen
Assistant County Attorney
Suite 2810
111 Northwest First Street
Miami, Florida 33128-1993
Telephone: 305.375.5151
Fax: 305.375.5634

**Counsel of Record*
Counsel for Respondent Miami-Dade County