No. 22-1098

In The

Supreme Court of the United States

DAVID P. DEMAREST,

Petitioner,

v.

TOWN OF UNDERHILL,
a municipality and charter town, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the
U.S. Court of Appeals for the Second Circuit

**BRIEF AMICI CURIAE OF
PACIFIC LEGAL FOUNDATION AND
OWNERS' COUNSEL OF AMERICA
IN SUPPORT OF PETITIONER**

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QUESTIONS PRESENTED

The Court of Appeals refused to give retroactive effect to this Court's landmark decision in *Knick v. Township of Scott*, 139 S.Ct. 2162 (2019), which opened the federal courts to constitutional property litigation for the first time in 34 years. Compounding that error, the Court of Appeals refused to grant rehearing to consider the impact of the then pending decision in *Wilkins v. United States*, 143 S.Ct. 870 (2023), which ended up restricting the impact of statutes of limitation. In combination, the Court of Appeals' refusal to apply this Court's current law deprived Petitioner of property without just compensation and due process of law.

The questions presented are:

1. When *Knick* changed the world of takings litigation by allowing—for the first time since 1985—a property owner with a claim for unconstitutional taking of property to file suit in federal court, must that decision be applied retroactively, with the time to file suit tolled until the date *Knick* was decided, so as to give its benefit to property owners who had been precluded from suing in federal court before?

2. When *Wilkins* confirmed in the real property context that statutes of limitation are not jurisdictional but are merely claim processing tools, must lower courts now treat statutes of limitation as affirmative defenses to be proved at trial by the defendant?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

IDENTITY AND INTEREST OF AMICI CURIAE 1

INTRODUCTION AND SUMMARY OF ARGUMENT..................................2

REASONS FOR GRANTING THE PETITION.........4

I. *KNICK* REOPENED THE FEDERAL COURTHOUSE DOORS WRONGLY CLOSED BY *WILLIAMSON COUNTY*..........4

II. COURTS MUST BE EXTRAORDINARILY CAREFUL WHEN CATEGORICALLY BARRING THE SELF-EXECUTING RIGHT TO JUST COMPENSATION..............6

III. GOVERNMENTS AND LOWER COURTS NEED REMINDING THAT FEDERAL COURTS ARE OPEN TO TAKINGS CLAIMS..8

CONCLUSION..12

TABLE OF AUTHORITIES

Page(s)

Cases

Albery v. Reddig,
718 F.2d 245 (7th Cir. 1983) 10

Arkansas Game & Fish Comm'n v. United States,
568 U.S. 23 (2012) 2

Cedar Point Nursery v. Hassid,
141 S.Ct. 2063 (2021) 1, 7

Chevron Oil Co. v. Huson,
404 U.S. 97 (1971) 5, 8

Demarest v. Town of Underhill,
No. 2:21-cv-167, 2022 WL 911146
(D. Vt. Mar. 29, 2022)... 3

Dodd v. Hood River Cnty.,
136 F.3d 1219 (9th Cir. 1998) 9

Dolan v. City of Tigard,
512 U.S. 374 (1994) 6

EHOF Lakeside II, LLC v. Riverside Cnty. Transp. Comm'n,
826 F.App'x 669 (9th Cir. 2020) 10

First English Evangelical Lutheran Church of Glendale v. Los Angeles Cnty.,
482 U.S. 304 (1987) 7

Flanigan's Enters. v. Fulton Cnty.,
596 F.3d 1265 (11th Cir. 2010) 11

Gearing v. City of Half Moon Bay,
54 F.4th 1144 (9th Cir. 2022)
(cert. petition filed, docket no.
pending) (June 1, 2023))...................................... 10

Harper v. Virginia Dep't of Taxation,
509 U.S. 86 (1993) 5

Hoehne v. Cnty. of San Benito,
870 F.2d 529 (9th Cir. 1989) 10

Horne v. Dep't of Agric.,
576 U.S. 350 (2015) 1

James B. Beam Distilling Co. v. Georgia,
501 U.S. 529 (1991) 5

Janus v. Am. Fed'n of State, Cnty. & Mun. Emps.,
138 S.Ct. 2448 (2018) 2

Knick v. Twp. of Scott,
139 S.Ct. 2162 (2019) .... i, 1, 3–10, 12

Koontz v. St. Johns River Water Mgmt. Dist.,
570 U.S. 595 (2013) 1

Monongahela Navigation Co. v. United States,
148 U.S. 312 (1893) 7

Murr v. Wisconsin,
582 U.S. 383 (2017) 1

Nollan v. California Coastal Comm'n,
483 U.S. 825 (1987) 1

Obergefell v. Hodges,
576 U.S. 644 (2015) 2

Ocean Palm Golf Club P'ship v. City of Flagler Beach, 861 F.App'x 368 (11th Cir. 2021) 3, 12

Pakdel v. City and Cnty. of San Francisco, 141 S.Ct. 2226 (2021) 1, 9, 10

Palazzolo v. Rhode Island, 533 U.S. 606 (2001) 1, 8

Phelps v. United States, 274 U.S. 341 (1927) 7

Railroad Commission of Texas v. Pullman Co., 312 U.S. 496 (1941) 10

Ralston v. San Mateo Cnty., No. 21-16489, 2022 WL 16570800 (9th Cir. Nov. 1, 2022) 11

Raskiewicz. v. Town of New Boston, 754 F.3d 38 (1st Cir. 1985) 10

Sackett v. EPA, No. 21-454, 2023 WL 3632751 (U.S. May 25, 2023) 1

San Remo Hotel, L.P. v. City & Cnty. of San Francisco, 545 U.S. 323 (2005) 3, 11–12

Scott v. Greenville Cnty., 716 F.2d 1409 (4th Cir. 1983) 10

Spence v. Zimmerman, 873 F.2d 256 (11th Cir. 1989) 9

Suitum v. Tahoe Reg'l Plan. Agency, 520 U.S. 725 (1997) 1

Tejas Motel, L.L.C. v. City of Mesquite,
63 F.4th 323 (5th Cir. 2023) 3, 12

Tyler v. Hennepin Cnty.,
No. 22-166, 2023 WL 3632754
(U.S. May 25, 2023) 1, 6

United States v. Clarke,
445 U.S. 253 (1980) 7

Wilkins v. United States,
143 S.Ct. 870 (2023) .... i, 1, 8

Williamson Cnty. Reg'l Planning Agency v. Hamilton Bank of Johnson City,
473 U.S. 172 (1985) 3–6, 10

United States Constitution

U.S. Const. amend. V 3–7

Statute

42 U.S.C. § 1983 9

Rules

S. Ct. R. 37.2 1

S. Ct. R. 37.6 1

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130 Yale L.J. 276 (2020) 2

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The Land Use Labyrinth: Problems of Land Use Regulation and the Permitting Process, released by the Regulatory Transparency Project of the Federalist Society (Jan. 8, 2020),
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IDENTITY AND INTEREST OF AMICI CURIAE[1]

Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt corporation organized for the purpose of litigating matters affecting the public interest in private property rights, individual liberty, and economic freedom. Founded over 50 years ago, PLF is the most experienced legal organization of its kind. PLF attorneys have participated as lead counsel in numerous landmark cases to defend the right to make reasonable use of property and the corollary right to obtain just compensation when that right is infringed. *See, e.g.*, *Tyler v. Hennepin Cnty.*, No. 22-166, 2023 WL 3632754 (U.S. May 25, 2023); *Sackett v. EPA*, No. 21-454, 2023 WL 3632751 (U.S. May 25, 2023); *Wilkins v. United States*, 143 S.Ct. 870 (2023); *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021); *Pakdel v. City and Cnty. of San Francisco*, 141 S.Ct. 2226 (2021); *Knick v. Twp. of Scott*, 139 S.Ct. 2162 (2019); *Murr v. Wisconsin*, 582 U.S. 383 (2017); *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595 (2013); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Suitum v. Tahoe Reg'l Plan. Agency*, 520 U.S. 725 (1997); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987). PLF also routinely participates in important property rights cases as amicus curiae. *See, e.g.*, *Horne v. Dep't of Agric.*, 576 U.S. 350 (2015);

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[1] Pursuant to Rule 37.2, PLF provided timely notice to all parties. Pursuant to Rule 37.6, amici curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

Arkansas Game & Fish Comm'n v. United States, 568 U.S. 23 (2012).

Owners' Counsel of America (OCA) is a national not-for-profit organization of lawyers dedicated to the principle that the right to own and use property is "the guardian of every other right" and the basis of a free society. *See* James W. Ely, *The Guardian of Every Other Right: A Constitutional History of Property Rights* (3d ed. 2008). OCA's invitation-only members work to advance, preserve, and defend private property rights in eminent domain, inverse, and regulatory taking cases. OCA member attorneys have been involved in landmark property law cases in nearly every jurisdiction nationwide, including in this Court. They have also published widely in the area of eminent domain and property rights. As lawyers on the front lines of eminent domain and property rights law, OCA brings a unique perspective to this case. OCA understands not only takings jurisprudence, but the practical application of takings law to the myriad of factual circumstances that often drive decisions and legal precedent.

INTRODUCTION AND SUMMARY OF ARGUMENT

The case at bar, along with several of this Court's recent decisions, have "reignited the retroactivity debate" about whether a rule announced by this Court applies only to future cases, or also to disputes arising in the past. Samuel Beswick, *Retroactive Adjudication*, 130 Yale L.J. 276, 279–80 (2020) (citing *Janus v. Am. Fed'n of State, Cnty. & Mun. Emps.*, 138 S.Ct. 2448 (2018), *overruling Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977); *Obergefell v. Hodges*, 576 U.S. 644, 675 (2015)). Between 1985 and 2019, the

"state procedures" ripeness rule wrongly barred property owners from raising their federal civil rights takings claims in federal court. *See Williamson Cnty. Reg'l Planning Agency v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). In *Knick*, this Court did not announce a new rule opening federal courts to Fifth Amendment civil rights claims for the first time. Rather, the Court righted the ship that *Williamson County* had upended, restoring property rights to a procedural status on equal footing with other constitutional and civil rights. *Knick*, 139 S.Ct. 2162.

The district court ignored *Knick* because Petitioner had litigated his claim against the Town in state court, even though *Williamson County* gave him no other choice of forum, and he was limited by Vermont law to abuse-of-discretion review. The courts below assumed that because "a state court is fully competent to adjudicate federal constitutional claims," it is of no constitutional moment today whether Petitioner voluntarily brought his federal claims in state court, or whether he was forced to do so. *Demarest v. Town of Underhill*, No. 2:21-cv-167, 2022 WL 911146 (D. Vt. Mar. 29, 2022). The Second Circuit refused to apply *Knick* retroactively, treating the now-overruled *Williamson County* rule as a jurisdictional bar. Pet. App. 7.

This petition and other decisions of the Courts of Appeals add property rights to the unsettled retroactivity question in need of this Court's attention. *See Tejas Motel, L.L.C. v. City of Mesquite*, 63 F.4th 323, 334 (5th Cir. 2023) (the *San Remo* "Catch-22" applies to claimants who were forced to file their takings claims in state court when the *Williamson County* rule was in effect); *Ocean Palm*

Golf Club P'ship v. City of Flagler Beach, 861 F.App'x 368, 371 (11th Cir. 2021) (res judicata bars property owners forced by *Williamson County* into state courts from raising takings claims in federal court, despite *Knick*).

Amici curiae make three main points. First, the usual limitations governing when a new rule of law announced by this Court applies retroactively must be tempered, because *Knick* did not impose a new rule, but rebalanced what *Williamson County* had made wrong. Second, the self-executing nature of the Just Compensation Clause requires a remedy for takings, and cuts against rigid application of legislative restrictions—such as statutes of limitations—on the ability of injured owners to seek compensation. Finally, this Court should be eliminating procedural barriers to consideration of property rights claims on the merits, including the crabbed reading the courts below gave the statute of limitations.

The petition should be granted.

REASONS FOR GRANTING THE PETITION

I. *KNICK* REOPENED THE FEDERAL COURTHOUSE DOORS WRONGLY CLOSED BY *WILLIAMSON COUNTY*

This Court's decision in *Knick*, 139 S.Ct. 2162 (2019), indeed represented a "sea change" in the availability of a federal court forum for federal civil rights claims seeking vindication of the fundamental right of private property ownership. *See* Brian T. Hodges, Knick v. Township of Scott, PA*: How a Graveyard Dispute Resurrected the Fifth Amendment's Takings Clause*, 60 Santa Clara L. Rev. 1, 3 (2020) ("[*Knick*] marks a sea change in the U.S.

Supreme Court's interpretation of the Fifth Amendment and promises to have a significant impact on the development of takings law and litigation practices nationwide[.]"). Most critically, the Court did not announce a new rule of law but simply overruled a bad one. *Knick* therefore did not represent a novel direction in the law, but a return to stasis. The decision *re*opened the federal courthouse doors that *Williamson County* had wrongly slammed shut and represented a return to the *status quo ante Williamson*. It was a step in the direction of restoring the right to private property to its coequal status with other civil rights.

Consequently, the usual limiting tests to determine the retroactivity of a newly announced civil decision—a question that has sharply divided this Court—should not be applied rigidly here. *Compare James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 535 (1991) (opinion of Souter, J., joined by Stevens, J.) (presumption of non-retroactivity), *with Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 97 (1993) (this Court's rulings on federal law "must be given full retroactive effect in all cases still open on direct review and as to all events"). Moreover, the longstanding rule about whether a new decision is applied retroactively is primarily a matter of equity should govern here. *See Chevron Oil Co. v. Huson*, 404 U.S. 97, 106 (1971) ("Finally, we have weighed the inequity imposed by retroactive application, for '[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity.'") (citation omitted). *Williamson County*'s state-procedures ripeness rule—not the rule

that preceded it—was the *actual* radical departure from equal treatment for all civil rights claimants. *See Knick*, 139 S.Ct. at 2169–70 ("The state-litigation requirement relegates the Takings Clause 'to the status of a poor relation' among the provisions of the Bill of Rights.") (quoting *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994)). It was *Williamson County*, not *Knick*, that announced a "new" rule—a rule that should never have been imposed in the first place. *Id.* at 1270 ("Fidelity to the Takings Clause and our cases construing it requires overruling *Williamson County* and *restoring* takings claims to the full-fledged constitutional status the Framers envisioned when they included the Clause among the other protections in the Bill of Rights.") (emphasis added).

II. COURTS MUST BE EXTRAORDINARILY CAREFUL WHEN CATEGORICALLY BARRING THE SELF-EXECUTING RIGHT TO JUST COMPENSATION

The self-executing nature of the Just Compensation Clause requires a remedy for takings even where one is not prescribed by law, and this fact weighs heavily against a court's rigid application of legislative restrictions—e.g., statutes of limitations--on the ability of injured owners to seek constitutionally-mandated compensation. This is the plain meaning of the Fifth Amendment's fundamental limitation on sovereign power—that when government takes private property for public use, it must compensate. This Court has repeatedly emphasized this, including in this most recent term. *See Tyler v. Hennepin Cnty.*, No. 22-166, 2023 WL 3632754, at *4 (U.S. May 25, 2023) (states do not have entirely free rein to define what "private property" in

the Fifth Amendment refers to); *Cedar Point*, 141 S.Ct. at 2077 (government's obligation to compensate owners when it takes property is not an "empty formality, subject to modification at the government's pleasure"); *Phelps v. United States*, 274 U.S. 341, 343 (1927) ("Under the Fifth Amendment plaintiffs were entitled to just compensation, and ... the claim is one founded on the Constitution.").

This Court consistently describes the Just Compensation Clause as "self-executing," meaning that government is obligated to provide—and property owners are entitled to seek—just compensation without invoking any particular statute or state court procedures. *See, e.g.*, *Knick*, 139 S.Ct. at 2171; *United States v. Clarke*, 445 U.S. 253, 257 (1980). In other words, the Constitution "of its own force" … "furnish[es] a basis for a court to award money damages against the government," notwithstanding sovereign immunity. *First English Evangelical Lutheran Church of Glendale v. Los Angeles Cnty.*, 482 U.S. 304, 316 n.9 (1987) (quotation omitted). *See also* 1 Laurence H. Tribe, *American Constitutional Law* § 6-38, at 1272 (3d ed. 2000) (observing, based on *First English*, that the Takings Clause "trumps state (as well as federal) sovereign immunity").

As this Court holds, the question of what compensation is "just" is a uniquely judicial decision, not subject to determination by the legislature. *See Monongahela Navigation Co. v. United States*, 148 U.S. 312, 327 (1893):

> The legislature may determine what private property is needed for public purposes; that is a question of a political and legislative character.

> But when the taking has been ordered, then the question of compensation is judicial. It does not rest with the public, taking the property through Congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation.

Statutes of limitations—arbitrary legislative limitations on the validity of claims—are therefore in direct tension with this Court's admonition that there is no "expiration on the Takings Clause." *Palazzolo v. Rhode Island*, 533 U.S. 606, 627 (2001) ("Future generations, too, have a right to challenge unreasonable limitations on the use and value of land."). Any restrictions on the self-executing right to compensation must be viewed through an extraordinarily careful lens, especially when applying statutes of limitations, which wipe out even constitutional claims based merely on the passage of time. As this Court recently emphasized in *Wilkins*, applying statutes of limitations mechanically to categorically bar a claim (as the courts below did here) should in general be avoided. *Wilkins*, 143 S.Ct. at 872. This rule is even more critical where, as here, a judicially created statute of limitations is applied rigidly, so that a "self-executing" constitutional claim is forever lost without any consideration of the circumstances and equity. *See Huson*, 404 U.S. at 106.

III. GOVERNMENTS AND LOWER COURTS NEED REMINDING THAT FEDERAL COURTS ARE OPEN TO TAKINGS CLAIMS

This petition does not stand in isolation and must be viewed as part of a larger picture. After *Knick* knocked out the requirement to pursue state

procedures and reopened the federal courts to takings claims, governments did not go quietly into that good night. Instead, they have been crafting new strategies and are actively searching for ways to continue to dodge federal court review. *See*, *e.g*., Laura D. Beaton & Matthew D. Zinn, Knick v. Township of Scott*: A Source of New Uncertainty for State and Local Governments in Regulatory Takings Challenges to Land Use Regulation*, 47 Fordham Urb. L.J. 623, 625 (2020) (After *Knick*, the authors—government lawyers—advocate to make use of "several tools," "to try to force claims, in whole or in part, back into state courts."). These strategies seek to avoid federal court review of takings claims and retrench the procedural barriers to federal court review of federal takings claims this Court has been addressing and eliminating. *See Knick*, 139 S.Ct. at 2170 ("And the property owner may sue the government at that time in federal court for the 'deprivation' of a right 'secured by the Constitution.'") (quoting 42 U.S.C. § 1983); *Pakdel*, 141 S.Ct. at 2230 (only "de facto" ripeness is necessary and presents the same "relatively modest" requirement applicable to other civil rights claims).

And the lower courts continue to go along, accepting the old trope that it is somehow beneath the dignity of federal judges to consider cases in which a claimant is seeking to vindicate the civil right of private property ownership. *See, e.g*., *Dodd v. Hood River Cnty*., 136 F.3d 1219, 1230 (9th Cir. 1998) (federal courts do not sit as "super zoning boards") (citation omitted); *Spence v. Zimmerman*, 873 F.2d 256, 262 (11th Cir. 1989) ("We stress that federal courts do not sit as zoning boards of review and should be most circumspect in determining that constitutional rights are violated in quarrels over

zoning decisions."); *Hoehne v. Cnty. of San Benito*, 870 F.2d 529, 532 (9th Cir. 1989) (federal appeals courts were not created to be "the Grand Mufti of local zoning boards"); *Raskiewicz. v. Town of New Boston*, 754 F.3d 38, 44 (1st Cir. 1985) ("this court has repeatedly said that federal courts do not sit as a super zoning board or a zoning board of appeals"); *Albery v. Reddig*, 718 F.2d 245 (7th Cir. 1983) (federal appeals court should not become accustomed to idea that constitutional rights are implicated in quarrel over zoning rules); *Scott v. Greenville Cnty.*, 716 F.2d 1409 (4th Cir. 1983) (federal courts are reluctant to act in cases where government claims they are sitting as zoning boards of appeal). That game is still afoot, even though *Knick* eliminated the requirement to chase state procedures beyond a relatively modest decision applying the offending regulations to the claimant's property. And *Pakdel* called into serious question *Williamson County*'s "final decision" ripeness requirement. Since then, governments have been searching relentlessly for the "new" *Williamson County*.

First, federal courts are being urged to prudentially abstain under *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 498 (1941). One example: the Ninth Circuit approved of *Pullman* abstention to avoid ruling on a federal regulatory takings claim after the government filed a state court eminent domain action, on the grounds that land use planning is "a sensitive area of social policy." *See, e.g.*, *Gearing v. City of Half Moon Bay*, 54 F.4th 1144, 1150 (9th Cir. 2022) (cert. petition filed, docket no. pending) (June 1, 2023)). *See also EHOF Lakeside II, LLC v. Riverside Cnty. Transp. Comm'n*, 826 F.App'x 669 (9th Cir. 2020). These courts never explain why questions of land use are more "sensitive" where local

regulations are alleged to infringe on property rights, than when those same regulations infringe on some other constitutional right. *See, e.g.*, *Flanigan's Enters. v. Fulton Cnty.*, 596 F.3d 1265 (11th Cir. 2010) (challenging ordinance prohibiting alcohol sales at nude dancing establishments).

Next, the "final decision" requirement is not being applied "modestly" in a search for de facto *ripeness*—as in every other civil rights case—but as de facto *exhaustion*. *See, e.g.*, *Ralston v. San Mateo Cnty.*, No. 21-16489, 2022 WL 16570800, at *2 (9th Cir. Nov. 1, 2022) (rejecting as unripe a takings claim because the County's decision informing the owners that no development is allowed on their property was merely the Planning Director's "personal opinion"). *See also* Anastasia Boden, *et al.*, *The Land Use Labyrinth: Problems of Land Use Regulation and the Permitting Process*, *released by the Regulatory Transparency Project of the Federalist Society* 21 (Jan. 8, 2020), https://regproject.org/wp-content/uploads/RTP-State-and-Local-Working-Group-Paper-Land-Use.pdf. (concluding that nationwide "there is always the potential for a [land use] authority to, in effect, deny authorization to begin a project indefinitely without ever giving a definitive answer on a permit application"). Wielding their discretion as weapons, land use regulators "can effectively move the goalposts with ever-new demands for redesign after redesign. ... This can be maddening for an individual trying to navigate the system on his own. But it's frustrating even with outside help." *Id.* at 22.

Finally, as in the case at bar, the preclusion trap from *San Remo Hotel, L.P. v. City & Cnty. of San Francisco*, 545 U.S. 323 (2005), continues to be

employed. *See, e.g.*, *Tejas Motel*, 63 F.4th at 334 ("*San Remo* is still good law."); *Ocean Palm Golf Club P'ship*, 861 F.App'x at 371 ("The *Knick* Court did not overrule or otherwise modify its precedent in *San Remo*.").

CONCLUSION

The writ of certiorari should be granted.

DATED: June 2023.

Respectfully submitted,

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