No. 15-1553

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PERFECT PUPPY, INC.,

Plaintiff - Appellant,

v.

CITY OF EAST PROVIDENCE, RHODE ISLAND,

Defendant - Appellee.

On Appeal from the United States District Court
for the District of Rhode Island
Honorable William E. Smith, District Judge

APPELLANT'S OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Appellant Perfect Puppy, Inc., hereby states that it has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

This case involves important and timely federal issues regarding whether an Ordinance banning pet stores unconstitutionally took the property of a licensed, pre-existing store and whether (and when) a property owner may litigate a violation of the Fifth Amendment's Takings Clause in federal court. Oral argument is appropriate and Perfect Puppy requests it.

JURISDICTIONAL STATEMENT

The district court had original jurisdiction of this federal constitutional takings case under 28 U.S.C. § 1331. On this basis, the City exercised removal jurisdiction under 28 U.S.C. § 1441. The district court properly took jurisdiction under both grants of power. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED

(1) Did the City's enactment of an Ordinance banning pet stores effect a per se taking of Perfect Puppy's property where the law destroyed Perfect Puppy's pre-existing business and the state license and lease on which the business rested?

(2) If the answer to issue number one is "no," should the district court have applied the multi-factor regulatory takings test set out in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978), before rejecting Perfect Puppy's facial takings claim?

(3) Is the prudential "state exhaustion" ripeness rule of *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 194-96 (1985), inapplicable to Perfect Puppy's as-applied takings claim, where the claim is already fit for review and applying the rule would result in improper, inefficient, and unnecessary piecemeal litigation?

INTRODUCTION

This appeal involves unconstitutional takings claims filed by a puppy store (Perfect Puppy) against the City of East Providence, Rhode Island (City), after the City enacted a law banning pet stores. The law destroyed Perfect Puppy's newly opened business, and the lease and state license on which the company relied to open its store.

Perfect Puppy responded by filing federal and state constitutional claims in state court. But the City timely removed the case to federal court. When Perfect Puppy amended its complaint to include state and federal takings claims, the City challenged the claims on the merits, but also asserted they were unripe in federal court under *Williamson County*'s prudential ripeness doctrine, 473 U.S. at 194-96, because Perfect Puppy had failed to fully exhaust state court procedures before the claims came to the federal forum.

The district court initially concluded that the Ordinance had not denied Perfect Puppy all economically viable use of its property. Addendum (Add.) to Opening Brief

at 19-20 n.11. On this basis, and without reviewing the Ordinance under the *Penn Central* takings test for governmental acts that destroy less than all use of property, the court rejected Perfect Puppy's facial takings claim. As for the as-applied claims, the court held these unripe under *Williamson County*'s "state exhaustion" ripeness requirement. Add. at 21-22. Incorrectly construing compliance with *Williamson County* as a jurisdictional requirement, the court held that Perfect Puppy had to go back to state court before it could argue its as-applied takings claim in federal court.

All these rulings were in error. Perfect Puppy, not the City, is entitled to summary judgment on its facial takings claim. The City may have authority to ban pet stores, but when its law eviscerates an existing business and the vested property interests on which it rests, it must pay just compensation. Alternatively, the court should order further facial takings review under *Penn Central*. Finally, for prudential reasons, *Williamson County*'s exhaustion rule does not bar federal review of Perfect Puppy's as-applied takings claim. That claim should be remanded to the district court for merits review.

STATEMENT OF THE CASE

A. Factual Background

1. The Perfect Puppy Business

Perfect Puppy is a family-owned and operated puppy sales business incorporated under the laws of Rhode Island. Joint Appendix (JA) at 24 ¶ 10. Its principal purpose is selling pure-breed puppies to the public. Perfect Puppy opened its first store in Scituate, Rhode Island. It currently has an additional store in Warwick, Rhode Island. *See* http://theperfectpuppyri.com/ (last visited July 7, 2015).

Perfect Puppy does not acquire its dogs from "puppy mills." JA at 24 ¶ 10. It hand-selects its puppies from various breeders in the Northeast region, all of whom have at least been certified by the United States Department of Agriculture. Before buying any dog, Perfect Puppy's owners or employees personally inspect the animals and the breeding facilities to ensure the dogs have been raised humanely. http://vid.opengovideo.com/playvideo.asp?sFileName=http://video.clerkshq.com/RI_EastProvidence_CityCouncil_20140603, at 1:22:38-1:23:40 (last visited July 8, 2015).[1] When Perfect Puppy buys a dog, its owners or employees immediately transport the animal from the breeder to a Perfect Puppy store in Rhode Island. *Id.*

[1] This citation refers to video of testimony at the June 3, 2014, City Council hearing on the subject Ordinance. The video was incorporated into the record through the parties' Agreed Stipulation of Facts. *See* JA at 37 ¶ 8.

Every puppy sold by Perfect Puppy has been vaccinated and vetted for health issues. JA at 24 ¶ 10. Most puppies are sold (and leave the store) quickly, in part because Perfect Puppy faces little business competition in the greater Providence area. While the puppies are in the store, at least three employees are also present, cleaning and interacting with the puppies. http://vid.opengovideo.com/playvideo.asp?sFileName=http://video.clerkshq.com/RI_EastProvidence_CityCouncil_20140603 at 1:34:30. Due to its efforts and care, Perfect Puppy guarantees every puppy's health for two years. JA at 24 ¶ 10.

Still, like all pet stores, Perfect Puppy is subject to extensive regulation and inspection by the State of Rhode Island, through the Division of Agriculture in the Department of Environmental Management. JA at 68. Perfect Puppy has licenses from such agencies to operate. *Id*. at 50. It has never been fined or cited by the State or failed any State inspection.

Perfect Puppy is heavily involved in the local community, and regularly allows school groups and other youth organizations to come to its stores to enjoy and learn about the dog breeds in stock. *See* http://vid.opengovideo.com/playvideo.asp?sFileName=http://video.clerkshq.com/RI_EastProvidence_CityCouncil_20140603 at 1:16:20-1:17:00; *id.* at 1:30:40-1:31:15. Given the financial and community success of its initial store, it was natural that Perfect Puppy sought to open a new store.

2. The Leasing of Property for an East Providence Store

On April 26, 2014, Perfect Puppy executed a year-long lease for 2,800-square feet of retail business space at 1235 Wampanoag Trail, Suite 5B, East Providence, Rhode Island. JA at 43 ¶¶ 2-3. The lease obligated Perfect Puppy to pay the lessor $2,200 per month. *Id.* ¶ 4. In return, it gave Perfect Puppy the right to use the property "only for the purposes of a Puppy Sales store." JA at 44 ¶ 7.

Around the same time, Perfect Puppy applied to the State of Rhode Island for a license to operate the new store pursuant to Rhode Island General Laws § 4-19-5. JA at 76 (sample of license application). On May 21, 2014, the State issued the license. JA at 37 ¶ 5. This license allowed Perfect Puppy to operate a pet store at the new East Providence location. *Id.* On May 21, 2014, Perfect Puppy opened the store. JA at 37 ¶ 6. On May 29, 2014, the City conducted a building and fire inspection of Perfect Puppy's store, JA at 37 ¶ 9, which Perfect Puppy passed. JA at 74 ¶ 4.

3. The City Passes an Ordinance Banning Pet Stores

On May 20, 2014, the day before Perfect Puppy received its State license to operate a pet store in East Providence, the City Council introduced an "eleventh hour" ordinance designed to ban the sale of dogs or cats by any pet store or other retail establishment. JA at 37 ¶ 4. The Ordinance passed its first reading at the May 20, meeting but did not become effective then. *Id.* A second reading of the Ordinance occurred on June 3, 2014, after Perfect Puppy had its license and opened its store. At

the June 3rd meeting, the City Council held a public hearing on the Ordinance and formally approved it, over Perfect Puppy's protests. JA at 37 ¶ 7. The Ordinance thus became effective on June 3, 2014.

When the Ordinance passed, Perfect Puppy was the only pet store in East Providence. JA at 38 ¶ 13. The law rendered Perfect Puppy's lease and license useless and, ultimately, forced it to close the new store.

B. Judicial Procedure

In June, 2014, Perfect Puppy filed a lawsuit against the City in Rhode Island Superior Court. JA at 9-15. The complaint asserted that the Ordinance violated various federal and state law provisions. The City timely removed the complaint to the federal district court based on federal question jurisdiction arising from the federal constitutional claims. JA at 6. Perfect Puppy subsequently amended its complaint to add federal and state constitutional takings claims. JA at 26.

The parties then stipulated to certain facts, JA at 37, and proceeded to file cross motions for summary judgment. DE 10-11. The court held a hearing on October 30, 2014. On March 31, 2015, it issued an order and opinion granting the Town's motion for summary judgment and denying Perfect Puppy's motion. *See* Add.

The court's order dismissed all of Perfect Puppy's claims, with the exception of the as-applied takings claims, which the court remanded to state court. The court rejected the facial takings claims on the basis that "Plaintiff has not demonstrated that

the enactment of the ordinance categorically deprives its property of any economically viable use." Add. at 20 n.11. It held the as-applied takings claims unripe in federal court, without reaching the merits. Add. at 23.

The court specifically held that Perfect Puppy's as-applied takings claim was unripe under *Williamson County*, 473 U.S. at 194-96, and progeny, because Perfect Puppy had not been denied just compensation in state court, under state law, before its claim came to the district court. Add. at 22. The court further held that it did not matter that Perfect Puppy was only in the federal court because the City had elected to remove the case from the original state court locus. *Id.* at 21. Viewing compliance with the state exhaustion requirement as a federal jurisdictional rule, the court remanded the claim to state court. *Id.* at 23.

Perfect Puppy timely appealed. The only claims before this Court are Perfect Puppy's federal and state (facial and as-applied) takings claims.

SUMMARY OF ARGUMENT

The district court correctly held that Perfect Puppy's facial takings claim is ripe for immediate review in federal court, but it erred in its analysis of the claim. Initially, the court wrongly concluded that Perfect Puppy's facial claim failed the per se "denial of all economically beneficial use" test set out in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1017-19 (1992). Since enactment of the Ordinance destroyed Perfect Puppy's property interest in its license, lease, and business, it effected a per se

taking, and Perfect Puppy is entitled to summary judgment on its facial regulatory takings claims. But even if this is not the case, the district court erred in dismissing the facial takings claim without any analysis of the claim under the multi-factor *Penn Central* takings test. Therefore, if this Court concludes there was no per se, *Lucas* taking, it should remand the facial claim for *Penn Central* analysis.

On the as-applied takings claim, the district court wrongly held the claim unripe under *Williamson County*. It viewed *Williamson*'s state litigation ripeness rule as a jurisdictional hurdle, but it is not; it is a prudential concept only. *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 728 (2010) (holding that *Williamson County* is not jurisdictional); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 734 (1997). This means federal courts have discretion to dispense with state court exhaustion in appropriate circumstances. It is proper for this Court to use that discretion here because imposing the state exhaustion ripeness requirement does nothing to crystalize Perfect Puppy's takings claim for review and causes inefficient and wasteful piecemeal litigation. This Court should accordingly hold Perfect Puppy's as-applied takings claim exempt from the state litigation ripeness requirement

in this case.[2] It should remand that claim to the district court for merits review—along with the facial takings claim in the event *Penn Central* analysis is necessary.

ARGUMENT

I

PERFECT PUPPY IS ENTITLED TO SUMMARY JUDGMENT ON ITS FACIAL TAKINGS CLAIM BECAUSE THE ORDINANCE DESTROYED ITS BUSINESS; ALTERNATIVELY, THE CLAIM SHOULD BE REMANDED FOR *PENN CENTRAL* ANALYSIS

A. The Takings Framework

Many federal takings cases involve both procedural ripeness issues and merits questions as to whether the challenged governmental action rises to the level of a taking requiring just compensation. This case is no different. To understand why the district court erred on both points of analysis, it is necessary to briefly review the relevant standards.

1. Takings Ripeness Under *Williamson County*

In *Williamson County*, the Supreme Court articulated two ripeness hurdles to federal judicial review of certain as-applied takings claims. First, it held that a federal takings claim will not ripen until the government "has reached a final decision regarding the application of the [challenged] regulations to the property at issue." 473

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[2] The district court declined to address the as-applied takings claim on the merits, passing only on the "state litigation" ripeness issue. Perfect Puppy accordingly limits its arguments to that ripeness issue.

U.S. at 186. This is known as the "final decision" requirement. Second, the Court stated (in dicta) that an as-applied takings claimant must also generally seek and be denied just compensation through state procedures before a federal takings claim is fit for federal court review. This is often called the state court exhaustion or "state litigation" rule. *Id.* at 192-94; *San Remo Hotel, L.P. v. City & County of San Francisco*, 545 U.S. 323, 348-52 (2005) (Rehnquist, C.J., concurring).

Williamson County's state litigation doctrine was once considered to be a federal jurisdictional predicate. But that view is no longer credible. In its recent takings cases, the Supreme Court has repeatedly made clear that *Williamson County* articulates only prudential ripeness hurdles, not jurisdictional barriers. *See Stop the Beach Renourishment, Inc.*, 560 U.S. at 728 (holding that *Williamson County*'s state court exhaustion concept is not jurisdictional); *Horne v. Dep't of Agric.*, 133 S. Ct. 2053, 2062 (2013) (recognizing that *Williamson County* "is not, strictly speaking, jurisdictional").

Here, the City has not raised a ripeness problem arising from *Williamson County*'s first, "final decision" ripeness prong. Add. at 20. The issue is waived.[3] *See Stop the Beach Renourishment, Inc.*, 560 U.S. at 728. In any event, it is apparent that the challenged Ordinance is effective, imposes penalties for its violation, and includes

[3] Given *Williamson County*'s prudential character, the failure to raise one of its ripeness doctrines amounts to a waiver of that doctrine. *See Stop the Beach Renourishment, Inc.*, 560 U.S. at 728.

no variance provision. JA at 40-41. *See Asociacion De Subscripcion Conjunta Del Seguro De Responsabilidad Obligatorio v. Flores Galarza*, 484 F.3d 1, 15 (1st Cir. 2007) (enactment of a statute amounted to final decision). Thus, there is no finality issue. The only potential ripeness question arises from the second, state court exhaustion, rule.

2. Regulatory Takings Standards

Ripe takings claims are adjudicated under standards that vary depending on whether the challenged action is a physical invasion of property or a regulatory restriction on the use of property. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538-39 (2005). Regulations causing a physical invasion are per se unconstitutional, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434-35 (1982). Property regulations that do not physically invade property may still violate the Takings Clause if they "go too far" in restricting the use and enjoyment of private property. *Lingle*, 544 U.S. at 537-38 (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)).

The Supreme Court has established a two-step approach to gauge whether a restriction on use and enjoyment of property indeed exceeds permissible limits. *Flores Galarza*, 484 F.3d at 27. Courts initially ask whether the challenged regulation denies a property owner "all economically beneficial use[]" of property. *Lucas*, 505 U.S. at 1017-18. If so, the regulation is per se unconstitutional, regardless of the

purposes of the regulation, or the circumstances under which the property owner acquired the property. *Id.* Regulations that strip private property of all economic value or which leave the owner with only a "token" interest" violate *Lucas*' "denial of all economically beneficial use" test. *Palazzolo v. Rhode Island*, 533 U.S. 606, 631 (2001).

If the regulation deprives property of less than all use or value, *Lucas*' per se analysis does not apply, but the restriction may still cause a compensable taking under a multi-factor, balancing approach. *Penn Central*, 438 U.S. at 124; *Lingle*, 544 U.S. at 538. In that approach, courts weigh (1) the economic impact of a property restriction, (2) with particular emphasis on the extent to which the restriction interferes with the property owner's distinct investment-backed expectations, and (3) the character of the governmental action. *Id.*

B. Enactment of the Ordinance Effected a Per Se Taking and, Therefore, Perfect Puppy, Not the City, Is Entitled to Summary Judgment on the Facial Takings Claim

As the district court recognized, Perfect Puppy necessarily raises a facial takings claim in seeking a declaration, JA at 26, that enactment of the Ordinance caused a taking of its property. *See Asociacion de Suscripcion Conjunta del Seguro de Responsabilidad Obligatorio v. Juarbe-Jimenez*, 659 F.3d 42, 48 (1st Cir. 2011) (noting that a facial takings claim is "a claim that the mere enactment of a statute constitutes a taking" and that it often seeks equitable relief). The lower court also

correctly acknowledged that such a claim is not impeded by *Williamson County*'s ripeness rules. *San Remo Hotel*, 545 U.S. at 345-46; *Suitum*, 520 U.S. at 736 n.10 (" 'facial' challenges to regulation are generally ripe the moment the challenged regulation or ordinance is passed"); *Flores Galarza*, 484 F.3d at 14. But the court erred in its merits analysis in holding that enactment of the Ordinance did not effect a per se taking of Perfect Puppy's interests in its lease, license and business.

1. Perfect Puppy's Takings Claims Rest on Protected Property Interests

The Court will likely have to address the City's contention that Perfect Puppy's interests are not "property" for constitutional purposes before proceeding to the merits of the facial takings claim. But the issue should not detain the Court long, because the City's position is easily refuted.

For purposes of a takings claim, private property interests are primarily defined by state law. *Lucas*, 505 U.S. at 1030; *Flores Galarza*, 484 F.3d at 27. Here, Rhode Island law controls. Under that law, a licensed business is a constitutionally protected property interest. *Leone v. Town of New Shoreham*, 534 A.2d 871, 874 (R.I. 1987) ("Licenses granted by the government represent property."); *Tillinghast v. Town of Glocester, R.I.*, 456 A.2d 781, 784-85 (R.I. 1983) (licensed campground owners had constitutionally protected property interest in "in their business and its continuation"); *28 Prospect Hill St., Inc. v. Gaines*, 461 A.2d 923, 925 (R.I. 1983) ("A licensee . . .

has a property interest in its business and its continuation which entitles it to the benefits of due process . . . .") (citing *Tillinghast*, 456 A.2d 781).

"As a general proposition, a leasehold interest is [also] property, the taking of which entitles the leaseholder to just compensation for value thereof." *Sun Oil Co. v. United States*, 215 Ct. Cl. 716, 769-70, 572 F.2d 786, 818 (1978). This proposition also holds true under Rhode Island law; *i.e.*, a leasehold is a form of private property. *Bric's Market, Inc. v. State*, 253 A.2d 590 (R.I. 1969); *Agras v. State Bd. of Public Roads*, 184 A. 505 (R.I. 1936).

Here, Perfect Puppy entered a lease to operate a "Puppy sales store," a lawful business at the time, before the City enacted its Ordinance. JA 37 ¶ 3. It also applied for and received a state license for the store, and opened the store, before the City enacted the Ordinance. *Id.* ¶¶ 6-7. Perfect Puppy's interests are "property" for purposes of its takings claims. *Tillinghast*, 456 A.2d at 784-85; *28 Prospect Hill*, 461 A.2d at 925; *cf. United Nuclear Corp. v. United States*, 912 F.2d 1432, 1437 (Fed Cir. 1990) (leasehold interest was property for purposes of a takings claim).

2. Enactment of the Ordinance Destroyed Perfect Puppy's License and Business

" 'In the takings context, the basis of a facial challenge is that the very enactment of the statute has reduced the value of the property or has effected a transfer of a property interest.'" *Guggenheim v. City of Goleta*, 638 F.3d 1111, 1119 (9th Cir.

2010) (en banc) (quoting *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 688 (9th Cir. 1993)). Although this type of takings claim can be difficult, Perfect Puppy meets the test under the *Lucas* standard, as the Ordinance stripped Perfect Puppy's lease, license and East Providence store of all use and viability.

The City does not deny that enactment of the Ordinance overrode and nullified Perfect Puppy's state-issued license to operate a "pet store" in East Providence. It does not and cannot claim that the license maintained some use after the City passed the Ordinance.

The Ordinance had the same destructive effect on the store's pre-existing lease. That lease was specifically and exclusively for a "Puppy sales store." JA at 37 ¶ 3; *id.* at 44 ¶ 7. Enactment of the Ordinance prohibited Perfect Puppy from "offer[ing] for sale" or "sell[ing] any live dog . . . in any pet store, retail business or other commercial establishment located in the City of East Providence," JA at 40. The law thus voided Perfect Puppy's lease, forcing it to pack up its store and abandon the business. Accordingly, the Ordinance caused a per se taking of Perfect Puppy's property interests.[4] *Whitney Benefits, Inc. v. United States*, 926 F.2d 1169, 1172-76 (Fed. Cir. 1991) (enactment of a mining statute caused a taking where it denied

[4] Perfect Puppy's per se, "denial of all economically beneficial use" claim does not require a loss of all property *value*. *Lost Tree Village Corp. v. United States*, 787 F.3d 1111, 1117-18 (Fed. Cir. 2015). But even if it did, this would simply raise a fact issue that precludes summary judgment for the City.

plaintiffs all economically viable use of property); *Browning-Ferris Industries of St. Louis, Inc. v. City of Maryland Heights, Mo.*, 747 F. Supp. 1340, 1348 (E.D. Mo. 1990) (denial of a license to continue pre-existing landfill caused a taking).

The City argues, however, that Perfect Puppy could have still utilized the lease by selling puppy "supplies" in its store, instead of puppies. But the lease is clear that it is for engaging in "puppy sales," not for peddling dog toys. JA at 44 ¶ 7. Moreover, the idea that Perfect Puppy could viably operate a puppy supply store in a City outlawing puppy sales is not credible. Such an endeavor would not be economically viable.[5]

In any event, the City's strained interpretation of the lease does not account for the Ordinance's independent, destructive effect on Perfect Puppy's *state license*. That license was not for pet supplies—no Rhode Island Department of Agriculture, Animal Health Section, license is needed for that activity. The license was for the sale of live animals. JA at 76. So, regardless of the Ordinance's effect on the lease (it destroyed it), the law took Perfect Puppy's property in the license.

[5] To the extent the viability of alternative uses for the lease is at issue, the issue is factual and disputed and, therefore, cannot be a basis for summary judgment for the City.

C. If There Was No Per Se Facial Taking, the Lower Court Erred in Failing To Apply *Penn Central* and the Court Should Remand the Case for That Analysis

If the district court correctly held there was no per se taking of Perfect Puppy's property interests through enactment of the Ordinance, it still erred in dismissing the facial takings claim without any analysis of the Ordinance under *Penn Central*. It is clear that, in this Circuit, a property owner may assert a facial *Penn Central* claim. *See Philip Morris, Inc. v. Reilly*, 312 F.3d 24, 35-45 (1st Cir. 2002) (en banc) (applying *Penn Central* factors to a facial takings claim against a tobacco disclosure statute); *id*. at 49-50 (Selya, J., concurring) (applying reasonable investment backed expectations factor); *cf. Connolly v. Pension Ben. Guar. Corp*, 475 U.S. 211, 225 (1986) (applying *Penn Central* to facial takings claim against pension liability statute); *Cienega Gardens v. United States*, 331 F.3d 1319, 1337-38 (Fed. Cir. 2003) (applying *Penn Central* to facial claim against a statute that prohibited mortgage pre-payment). It is also clear that Perfect Puppy made a *Penn Central* argument below. JA at 26 ¶ 28 (alleging Ordinance interferes with Plaintiff's "reasonable expectation[s]"); *see also* DE 11, at 15.

Therefore, after the district court (wrongly) rejected the facial *Lucas* claim, it was not finished; it should have applied *Penn Central*, considering the economic effect of the Ordinance, its effect on Perfect Puppy's distinct investment-backed expectations in its license, lease, and business, and the character of the City's action.

United Nuclear Corp., 912 F.2d at 1435-38; *Cienega Gardens*, 331 F.3d at 1337-38. Since it failed to do so, this Court should remand the facial takings claim for a *Penn Central* inquiry if it concludes that the *per se* takings theory fails.[6]

II

WILLIAMSON COUNTY'S STATE COURT EXHAUSTION RULE DOES NOT APPLY TO PERFECT PUPPY'S AS-APPLIED CLAIM BECAUSE IT IS ALREADY FIT FOR REVIEW AND REQUIRING MORE STATE LITIGATION IS INEFFICIENT, UNNECESSARY, AND HARMFUL

In contrast to the facial claim, the district court rejected Perfect Puppy's as-applied takings claim on procedural, ripeness grounds. The court specifically held it could not adjudicate the as-applied claim until Perfect Puppy went back to state court and unsuccessfully sought compensation under Rhode Island law. Add. at 22-23. This was wrong.

A. The State Litigation Rule Is Prudential and Discretionary

As previously noted, the Supreme Court has recently clarified that *Williamson County*'s state exhaustion ripeness doctrine is prudential and not a jurisdictional rule. Many recent federal circuit decisions have clearly and explicitly adopted this formulation. *See, e.g.*, *Sherman v. Town of Chester*, 752 F.3d 554, 561 (2d Cir. 2014); *Sansotta v. Town of Nags Head*, 724 F.3d 533, 545 (4th Cir. 2013); *Rosedale*

[6] If this Court desires to conduct a *Penn Central* analysis here, Perfect Puppy requests the opportunity to submit a short (5 page) letter brief on the issue.

Missionary Baptist Church v. New Orleans City, 641 F.3d 86, 88-89 (5th Cir. 2011). This Court has also occasionally described *Williamson County* as a prudential doctrine.[7] *See Flores Galarza*, 484 F.3d at 13 (noting *Williamson* imposes " 'two independent prudential hurdles' " to "a takings claim against state entities in federal court") (quoting *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 733-34 (1997)).

The prudential understanding of *Williamson County* is significant because, unlike with jurisdictional rules, "'[p]rudential considerations of ripeness are discretionary.' " *McClung v. City of Sumner*, 548 F.3d 1219, 1224 (9th Cir. 2008) (quoting *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1142 (9th Cir. 2000)). Federal courts can waive prudential barriers when it appears wise to do so. *See Washlefske v. Winston*, 234 F.3d 179, 182 (4th Cir. 2000) (the prudential ripeness issue is whether the court "s*hould* exercise federal jurisdiction"); *Lehn v. Holmes*, 364 F.3d 862, 870 (7th Cir. 2004) (prudential analysis considers whether, "'as a matter of judicial self-restraint *it seems wise* not to entertain the case' " (quoting 13 Wright,

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[7] This Circuit's past precedent is mixed. While many decisions describe *Williamson County*'s doctrine as jurisdictional, this is not a universal conclusion. *See Flores Galarza*, 484 F.3d at 13 (adopting prudential understanding). To the extent there is a lack of clarity, the most recent Supreme Court decisions on the issue resolve it by affirming the prudential understanding and rejecting the jurisdictional view. Accordingly, this Court should make clear that *Williamson County* is now a prudential rule only in this Circuit.

Miller & Cooper, Federal Practice & Procedure § 3531 at 345 (2d ed. 1984)) (emphasis added)).

To the point here, the prudential nature of the state litigation rule means federal courts "'may determine that in some instances, the [state litigation] rule should not apply and we still have the power to decide the case.'" *Sherman*, 752 F.3d at 561 (quoting *Sansotta*, 724 F.3d at 545). In weighing this discretion, courts often consider the hardship to the parties, fitness of the issues and judicial economy. *See generally*, *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967). This framework finds expression in the takings context through the principle that ripeness cannot require " 'piecemeal litigation or otherwise unfair procedures.' " *Town of Nags Head v. Toloczko*, 728 F.3d 391, 399 (4th Cir. 2013) (quoting *San Remo Hotel*, 545 U.S. at 346).

B. The State Litigation Requirement Does Not Apply to Perfect Puppy's Takings Claims

This is an appropriate case for this Court to exercise its discretion to decline to apply the state litigation rule, as all relevant prudential ripeness factors—the fitness of the issues, judicial economy and hardship to the parties—weigh against enforcement of the rule.

Initially, the takings issue in this case is fit for review. The challenged Ordinance is effective, it has adversely impacted Perfect Puppy, and the City has

resisted compensation. Thus, there is no reason rooted in the need for issue or fact development that supports more state litigation. Indeed, "[t]here will not be a more 'concrete' dispute between the parties if the case is remanded to state court [under *Williamson*]—just the same dispute in a different courtroom." *Yamagiwa v. City of Half Moon Bay*, 523 F. Supp. 2d 1036, 1109 (N.D. Cal. 2007). Since the only question left here is the legal consequences of the City Ordinance, the claims are justiciable now. *Washlefske*, 234 F.3d at 182 (declining to withhold review under *Williamson County*'s exhaustion rule because "the finality of the State's position has not been questioned; the statute's language is clear and its impact upon [plaintiff] is uncontroverted."); *see also*, *Verizon New England, Inc. v. Int'l Bhd. of Elec. Workers Local No. 2322*, 651 F.3d 176, 189 (1st Cir. 2011) (finding claim ripe because it did not involve "a hypothetical act that may or may not occur in the future").

Enforcing state litigation ripeness is not only unnecessary to crystalize the takings issue, it is antithetical to judicial economy. Takings ripeness does not sanction "piecemeal litigation," *San Remo Hotel*, 545 U.S. at 346, and the waste of litigant and judicial resources that results. But that is exactly what will happen if *Williamson County* applies here. The pleadings, evidence, and record on Perfect Puppy's takings claims were developed and filed in federal court. If Perfect Puppy must go back to state court, it will have to duplicate the same litigation process. Moreover, the facial and as-applied claims would be split up. While the former would proceed on a federal

track, the latter would be stuck in state court. Yet, after any required state litigation is over, Perfect Puppy will likely bring the ripened as-applied claims right back to the federal court—the same one where it is now.

Such a back-and-forth system of "piecemeal litigation" is highly inefficient and unwise, but most of all, it is simply not required. *Toloczko*, 728 F.3d at 399 ("This is a proper case to exercise our discretion to suspend the state-litigation requirement of *Williamson County*. In the interests of fairness and judicial economy, we will not impose further rounds of [state] litigation on the Toloczkos."); *Sansotta*, 724 F.3d at 548 (Declining to apply *Williamson County* in part because "we are wary of . . . the associated unnecessary costs of litigating in multiple forums.") (citing Fed. R. Civ. P. 1[8]). And it is unnecessary, as the federal court is fully capable of deciding mature state and federal takings claims, like those here. *Id.* at 545. In fact, the federal court, not state court, is "the chief . . . tribunal[] for enforcement of federal rights." *McNeese v. Board of Ed. for Community Unit School Dist. 187, Cahokia, Ill.*, 373 U.S. 668, 672 (1963). It would conserve resources to allow the federal court to resolve the takings dispute now.

Finally, it would impose undue hardship on Perfect Puppy to send the takings claims back to state court for state law litigation. Perfect Puppy has already been to

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[8] Rule one of the Federal Rules of Civil Procedure states the rules "should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding."

both state and federal court; indeed, it ended up in federal court only because the City removed the case out of state court. Applying *Williamson County* state litigation rule now simply serves to whipsaw Perfect Puppy between courts without a hearing, draining its resources, and potentially causing its takings claims to die by procedural attrition. *See Martin v. Franklin Capital Corp.*, 546 U.S. 132, 140 (2005) ("The process of removing a case to federal court and then having it remanded back to state court delays resolution of the case, imposes additional costs on both parties, and wastes judicial resources."). Such burdens weigh against application of *Williamson County*. *Sherman*, 752 F.3d at 564; *Athanasiou v. Town of Westhampton*, 30 F. Supp. 3d 84, 89 (D. Mass. 2014).

In short, the prudential principles underlying *Williamson County* justify waiving the state litigation rule for Perfect Puppy's as-applied takings claim. Of course, the City may argue that it is unfair to bar it from invoking the rule, but this is meritless. When the City removed the case, it understood it was acceding to federal review, and the possibility of an amended complaint. When it confronted Perfect Puppy's takings claims, it moved to address them on the merits in the federal court. DE 10 at 19-23. The City could have raised any traditional ripeness defense, such as *Williamson County*'s final decision rule, if it thought the claim was too speculative to adjudicate now. But it did not. Add. at 20. It faces no harm, then, if it is required to face the takings claims in the federal court.

It bears repeating that *Williamson County*'s state litigation rule is not a jurisdictional barrier. Since there is no good prudential reason for applying the rule here, Perfect Puppy's as-applied takings claim is ripe. The Court should remand that claim, along with the facial claim, if necessary, for further litigation under *Penn Central* or otherwise.

CONCLUSION

This Court should reverse and remand the case for further proceedings on the merits.

DATED: July 16, 2015.

Respectfully submitted,

LESLEY S. RICH
J. DAVID BREEMER

By /s/ J. David Breemer
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DATED: July 16, 2015.

/s/ J. David Breemer
Attorney for Plaintiff - Appellant

CERTIFICATE OF SERVICE

I hereby certify that on July 16, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system.

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I further certify that one of the participants in this case is not a registered CM/ECF user. I have mailed the foregoing document by First-Class Mail, postage prepaid, to the following non-CM/ECF participant:

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ADDENDUM

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