No. 01-62

In the Supreme Court of the United States

CHESTER COX, JR., ET AL., PETITIONERS

v.

CITY OF WICHITA FALLS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

The first question presented arises both from a claim asserted below against the non-federal respondent, the City of Wichita Falls, Texas, and against the federal respondents. That question is:

Whether the court of appeals properly affirmed the ruling of the district court that a zoning ordinance enacted by the City Council of Wichita Falls, Texas, amending the City's prior zoning ordinance to regulate the use of lands in the vicinity of a military airfield and municipal airport, did not violate the Due Process and Equal Protection Clauses of the United States Constitution.

The second question arises only from a claim asserted against the federal respondents. That question is:

Whether the court of appeals properly affirmed the district court's ruling that the recommendation by the United States Air Force to local planning agencies concerning local land-use regulation in the vicinity of an Air Force base does not render the Air Force a "co-zoner" acting under color of state law to cause the deprivation of constitutional rights in violation of 42 U.S.C. 1983 (Supp. V 1999).

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OPINIONS BELOW

The per curiam order of the court of appeals (Pet. App. A1) is not reported. The district court's memorandum opinion and order granting summary judgment to the federal and non-federal respondents (Pet. App. A2-A21) is not reported. The district court's order denying petitioners' motion for relief from judgment, for leave to amend the complaint, and to add the State of Texas as a party (Pet. App. A23) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 9, 2001. The petition for a writ of certiorari was filed on July 9, 2001 (Monday, following a holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This action was brought by owners of real property living in proximity to Sheppard Air Force Base, which is located in north Texas approximately five miles north of the business district of the City of Wichita Falls, Texas, and some 15 miles from the Oklahoma state border. The western and southern portions of the base are located within the corporate limits of Wichita Falls, with the remaining base area located within unincorporated portions of Wichita County. See 1 U.S. Air Force, *AICUZ Study Amendment* 3 (May 1992) (*AICUZ Study*). Sheppard Air Force Base functions as a technical training center for the Air Force's Air Education and Training Command, which provides undergraduate pilot training for Euro-NATO Joint Jet Pilot Training students.

In 1977, the Department of Defense promulgated regulations to establish the Air Installations Compatible Use Zone (AICUZ) program for "achieving compatible use of public and private lands in the vicinity of military airfields" located within the United States, its territories, trusts and possessions. 32 C.F.R. 256.1(a). The regulations provide that the AICUZ for each military air installation shall consist of land areas "upon which certain uses may obstruct the airspace or otherwise be hazardous to aircraft operations," and land areas "which are exposed to the health,

safety or welfare hazards of aircraft operations." 32 C.F.R. 256.3(a).

To address accident potential, the regulations describe three zones to be used as "guidelines" for planning, which include: (1) the "Clear Zone," described as the area immediately beyond the end of the runway, "which possesses a high potential for accidents, and has traditionally been acquired by the Government in fee and kept clear of obstructions to flight"; (2) the Accident Potential Zone I (APZ I), which is "the area beyond the clear zone which possesses a significant potential for accidents"; and (3) the Accident Potential Zone II (APZ II), which is "an area beyond APZ I having a measurable potential for accidents." 32 C.F.R. 256.3(c)(2). The regulations address aircraft noise through the identification of noise zones for specified noise contour levels. 32 C.F.R. 256.3(d).

The regulations also address compatible land use, stating that the Department's policy "is to work toward achieving compatibility between air installations and neighboring civilian communities by means of a compatible land use planning and control process conducted by the local community." 32 C.F.R. 256.4(b)(1)(i). The regulations provide that land use compatibility guidelines will be specified for each zone. 32 C.F.R. 256.4(b)(1)(ii). The regulations state that "[t]he method of control and regulation of land usage within each zone will vary according to local conditions," and that the primary objective is to identify reasonable land use guidelines "which will be recommended to appropriate agencies who are in control of the planning functions for the affected areas." 32 C.F.R. 256.4(b)(1)(iii).[1]

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[1] The regulations state as to property acquisition that the first priority "is the acquisition in fee and/or appropriate restrictive

The regulations require that each Military Department shall develop an AICUZ study for each air installation, which shall provide, among other things, "[r]ecommendations for work with local zoning boards, necessary minimum programs of acquisition, relocations, or such other actions as are indicated by the results of the Study." 32 C.F.R. 256.5(a)(8). On June 10, 1992, the Air Force issued an updated AICUZ study for Sheppard Air Force Base, designed to "assist the local communities and serve as a tool for future planning and zoning activities," by providing "recommendations" to "promote compatible land development in areas subject to aircraft noise and accident potential." 1 *AICUZ Study* 1. The study recommended that local planning agencies "[i]ncorporate AICUZ policies and guidelines into the existing and/or future comprehensive plans of the Cities of Wichita Falls and Burkburnett, and Wichita County," and "[a]dopt and/or modify existing zoning ordinances and subdivision regulations to support the compatible land uses outlined in this study." *Id.* at 28.

2. On December 20, 1994, the City of Wichita Falls enacted Ordinance No. 155-94. See Pet. App. A46-A73. The Ordinance states that its purpose is "to ensure protection of the utility of Sheppard Air Force Base/ Wichita Falls Municipal Airport and the public investment by the regulation of land uses in the vicinity" of the base where it has been determined that the base "is

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easements of lands within the clear zones whenever practicable." 32 C.F.R. 256.4(b)(2)(ii)(A). The program for acquisition outside the clear zone will be "first in Accident Potential Zones and secondly in high noise areas only when all possibilities of achieving compatible use zoning, or similar protection, have been exhausted and the operational integrity of the air installation is manifestly threatened." 32 C.F.R. 256.4(b)(2)(ii)(B).

an essential part of the City and surrounding cities and counties." *Id.* at A48. The Ordinance further states that its purpose is also "to protect the health, safety, and general welfare of the public where it is recognized that obstructions, aircraft accidents, and excessive noise have the potential for endangering or harming the lives and/or property of users or occupants of land in the vicinity" of the base. *Ibid.*

The Ordinance provides that airport zoning regulations "shall apply to all of the incorporated areas of the City of Wichita Falls and unincorporated areas which are located within a[n] Accident Potential Zone, Noise Zone or Height Restriction Zone as described herein." Pet. App. A48. The Ordinance identifies the Accident Potential Zone boundaries as those established by the AICUZ study. *Id.* at A52. It also provides that "[c]ompatible uses within each Accident Potential Zone are established as shown in the latest [1992] AICUZ study," and that "[o]nly compatible uses will be allowed." *Ibid.* The Ordinance similarly establishes noise zones and height restriction zones as shown in the AICUZ study. *Id.* at A52-A57.

3. Petitioners filed this action on June 27, 1996. Petitioners alleged that because there was no comprehensive zoning plan for the unincorporated area of Wichita County, the City's enactment of Ordinance No. 155-94 was not in accordance with a comprehensive zoning plan, and for that reason violated the Due Process and Equal Protection Clauses of the United States Constitution and the Texas State Constitution. Compl. for Declaratory J. 21. Petitioners also asserted that the federal respondents joined with the City of Wichita Falls "to create and cause the passage" of Ordinance No. 155-94, and thus were so-called "co-zoners," acting under color of state law to deprive petitioners of

constitutional rights in violation of 42 U.S.C. 1983.[2] *Id.* at 24.

The federal and non-federal respondents each moved for summary judgment. By memorandum opinion and order dated September 1, 1999, the United States District Court for the Northern District of Texas granted the motions, and dismissed this action with prejudice. Pet. App. A8-A21. With respect to petitioners' challenge to the City's enactment of Ordinance No. 155-94, the court held that the enactment was not unconstitutional. *Id.* at A10-A11.[3] The court also found that "enactment of the Ordinance was a proper exercise of the police power, and was rationally related to a legitimate government objective—to protect the lives and property of the users of the airport at Sheppard, to protect the lives and property of the occupants of the land in the vicinity of the airport at Sheppard, and to preserve Sheppard as a viable social and economic resource for the City." *Id.* at A13-A14.

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[2] Section 1983 states in relevant part: "Every person who, under color of any statute [or] ordinance * * * of any State * * *, subjects, or causes to be subjected, any citizen of the United States * * * to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress." 42 U.S.C. 1983 (Supp. V 1999).

[3] The court noted that petitioners were not challenging the constitutionality of the Texas Local Government Code, which the court found imposed no requirement that airport zoning regulations be incorporated into a comprehensive zoning ordinance. Pet. App. A9-A10 & n.5 (citing Texas Loc. Gov't Code Ann. § 241.015 (West 1999)). The court also found that the Code "specifically extends the extraterritorial jurisdiction of municipalities (such as the City), giving municipalities (such as the City) authority to extraterritorially zone certain areas near airports which are outside the political subdivision." Pet. App. A10 n.6.

The court also rejected petitioners' assertion that the federal respondents acted under color of state law to deprive petitioners of constitutional rights in violation of 42 U.S.C. 1983 (Supp. V 1999). Pet. App. A15-A16. The court held that petitioners' Section 1983 claim "fails because there is an absence of a valid constitutional claim." *Id.* at A16. The court found as to the AICUZ program that "[a]s much as Plaintiffs do not want to recognize this fact, AICUZ studies are planning efforts." *Id.* at A19. The court stated that the AICUZ studies "do not control or regulate the use of private lands, and the determination to permit or restrict development or use of private lands is left to the local jurisdiction." *Ibid.* The court found that the Department of Defense, "like any other citizen and landowner, has the right to request local governments to make zoning changes," and that fact "does not magically transform the requests into unconstitutional actions." *Id.* at A19-A20. The court therefore concluded that the federal petitioners are not "co-zoners," "since the authority to permit or restrict development or use of private land is left to the local jurisdiction." *Id.* at A20.

On November 2, 1999, petitioners filed a motion for relief from judgment, seeking to reopen the case to add the State of Texas as a defendant, and to add a new cause of action asserting that the Texas Local Government Code is unconstitutional. Mot. for Relief from J. 2; First Am. Compl. for Declaratory J. 27. The district court denied the motion by order dated July 14, 2000. Pet. App. A23.

4. On April 9, 2001, the United States Court of Appeals for the Fifth Circuit unanimously affirmed the district court's decision in an unpublished per curiam order. Pet. App. A1.

ARGUMENT

The unpublished decision below is correct and does not conflict with any decision of this Court, of any other court of appeals, or of any state court of last resort. Accordingly, further review is unwarranted.

1. Petitioners assert (Pet. 3, 7-8) that because there is no "comprehensive" zoning plan for the unincorporated, rural portion of Wichita County in which they reside, the Ordinance is unconstitutional under *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926), and its progeny. Petitioners further contend that the court of appeals' summary affirmance of the district court's decision creates a conflict not only with *Euclid* and other decisions of this Court but also with a decision of the United States Court of Appeals for the Eighth Circuit, and the decisions of a number of state courts of last resort. Petitioners misread the relevant authorities.

To be sure, members of this Court have at times alluded to the importance of a comprehensive plan when zoning is at issue. However, closer examination of the language relied on by petitioners demonstrates that to the extent that zoning in the absence of a comprehensive plan poses problems, this Court's concern has been with "'reverse spot' zoning: that is, a land-use decision which *arbitrarily* singles out a *particular parcel* for different, less favorable treatment than the neighboring ones." *Penn Cent. Transp. Co.* v. *City of New York*, 438 U.S. 104, 132 (1978) (emphasis added); see also *id.* at 139-140 (Rehnquist, J., dissenting) (distinguishing landmark designation of individual parcels from previously approved zoning in which neighboring properties are similarly restricted because restriction is applied to all property in a designated area). The constitutional concern is with arbitrary singling out

of particular parcels or other arbitrary government action, not with the lack of a comprehensive plan *vel non*. See, *e.g.*, *Village of Willowbrook* v. *Olech*, 528 U.S. 562 (2000). Nothing in the Constitution requires a local government to adopt a comprehensive zoning plan, if it avoids arbitrary or irrational action.

What is more, any requirement of a "comprehensive plan" or that regulation be "comprehensive" does not demand, as petitioners would have it, that all the property in a given municipality or county be regulated simultaneously, by one massive enactment, or treated identically. Rather, to the degree the requirement exists, it means that any regulation must be imposed in accordance with a plan that takes account, rationally and not arbitrarily, of the needs and interests of the locality as a whole. See *Penn Central*, 438 U.S. at 132. Here, petitioners do not complain that the Ordinance singles out individual parcels to be burdened, and more importantly, petitioners point to no irrationality or arbitrariness in the decision of the City Council to treat areas in the immediate vicinity of a military airfield and municipal airport differently from areas not endangered or affected by the activities at the airfield.

Petitioners also rely on *Gorieb* v. *Fox*, 274 U.S. 603 (1927), Justice Stevens' concurrence in *Moore* v. *City of East Cleveland*, 431 U.S. 494, 513 (1977), and Justice Stevens' dissent in *City of Eastlake* v. *Forest City Enter., Inc.*, 426 U.S. 668, 680 (1976). These opinions offer no support for petitioners' understanding of "comprehensive zoning." To the contrary, they mention the word "comprehensive," but to the degree they discuss comprehensiveness, they indicate that comprehensiveness does not have the meaning or significance that petitioners claim it does. See *Gorieb*, 274 U.S. at 607 ("We think it entirely plain that the reservation of

authority in the present ordinance to deal in a special manner with * * * exceptional cases is unassailable upon constitutional grounds."); *Moore*, 431 U.S. at 513-514 (Stevens, J., concurring) (using word "comprehensive" but not defining or discussing term; noting that *Euclid* affirmed police power of city to create and implement a comprehensive plan in addition to "abat[ing] a specific use of property which proved offensive"); *City of Eastlake*, 426 U.S. at 681-683 (Stevens, J., dissenting) (noting that "no matter how comprehensive a zoning plan may be, it regularly contains some mechanism for granting variances, amendments, or exemptions for specific uses of specific pieces of property"; distinguishing "comprehensive citywide plan" adopted by "legislative action" from "decision of particular issues involving specific uses of specific parcels"); see also *id.* at 690-691 & n.12.

Essentially, petitioners confuse the Court's consideration of the comprehensiveness of a regulation with the ultimate inquiry: whether the restriction at issue is arbitrary or discriminatory and lacks rational basis. See *Euclid*, 272 U.S. at 389 (sustaining ordinance because "[i]t cannot be said that the ordinance * * * 'passes the bounds of reason and assumes the character of a merely arbitrary fiat'") (quoting *Purity Extract & Tonic Co.* v. *Lynch*, 226 U.S. 192, 204 (1912)). Petitioners make no argument that the Ordinance lacks rational basis—in any event, such an argument could not succeed. The Ordinance states that it "helps to protect the health, safety and general welfare of those living or working on or around Sheppard Air Force Base," that it is "in conformance with the intent of the City of Wichita Falls as a viable social and economic resource for the City and the North Central Texas area" (Pet. App. A46), and that it provides for uses in

the vicinity of the airport that are safe and compatible with the presence of the airport (Pet. App. A52-A53, A57-A60). Accordingly, the district court properly found the Ordinance to be "rationally related to a legitimate government objective—to protect the lives and property of the users of the airport * * *, to protect the lives and property of the occupants of the land in the vicinity * * *, and to preserve Sheppard as a viable social and economic resource for the City." Pet. App. A13-A14.

The decision below does not conflict with the decision of the United States Court of Appeals for the Eighth Circuit in *Women's Kansas City St. Andrew Society* v. *Kansas City*, 58 F.2d 593 (1932). There, the court of appeals voided a restriction on a single parcel as arbitrary and unreasonable where the owner of the parcel wished to use the house already existing on the parcel as a home for elderly women. See *id.* at 606. The court explained that in refusing permission for the elderly women's home, the city was not "following out any general plan embodied in the ordinance" (*id.* at 605), but instead was "restricting * * * districts to particular classes of residents," which is not part of the police power that undergirds zoning ordinances (*id.* at 603). Petitioners do not contend that the Ordinance denied residence "to particular classes" of persons or was otherwise arbitrary or could only have been enacted to serve an illegitimate purpose.

The decisions of state courts of last resort cited by petitioners also present no conflict with the court of appeals' decision at issue here. To the extent that the cited cases even discuss comprehensiveness, the courts have focused only on the singling out of individual parcels, and have maintained that zoning restrictions should fail only if they are arbitrary, discriminatory, or

otherwise illegitimate or irrational. See *Amcon Corp.* v. *City of Eagan*, 348 N.W.2d 66, 74 (Minn. 1984) (noting that amendments are required to conform to a "previously existing comprehensive plan" in order to avoid "arbitrary or capricious exercise of the zoning power" and "invalid spot zoning"); *Hadley* v. *Harold Realty Co.*, 198 A.2d 149, 153 (R.I. 1964) (stating that the "concept of comprehensiveness in zoning ordinances * * * requires only that the * * * regulations reflect the necessary relation between the pertinent exercise of the zoning power and the grounds upon which the police power of the state may properly be exercised"); *ibid.* (noting that not every case in which a parcel is singled out for different treatment constitutes illegal "spot zoning"); *State ex rel. Henry* v. *City of Miami*, 158 So. 82, 83 (Fla. 1932) (holding that municipality "was not confined to the passage of one comprehensive ordinance, zoning the entire territory of the city"); *id.* at 85 (Davis, C.J., concurring in result) ("The constitutional necessity is not for a single comprehensive ordinance or statute but for some general comprehensive plan * * * [which does] not leave consent to withhold approval as to particular persons or properties to the whim or caprice of the officials."); *Gordie Boucher Lincoln-Mercury Madison, Inc.* v. *City of Madison Plan Comm'n*, 503 N.W.2d 265, 272 (Wis. 1993) (not specifying meaning of comprehensiveness); *Udell* v. *Haas*, 235 N.E.2d 897, 900 (N.Y. 1968) (addressing ordinance regulating two parcels of land owned by same person and noting that "statutory requirement that zoning conform to a 'well-considered plan' or 'comprehensive plan'" exists because "consideration must be given to the needs of the community as a whole * * * for the benefit of the community as a whole following * * * calm and deliberate considera-

tion"); *East Lands, Inc.* v. *Floyd County*, 262 S.E.2d 51 (Ga. 1979) (spot zoning of one parcel would violate statute requiring that zoning be done in accordance with comprehensive plan where restriction would be arbitrary or discriminatory); *Hewitt* v. *County Commissioners*, 151 A.2d 144, 150 (Md. Ct. App. 1959) (spot zoning is invalid where it is "arbitrary and unreasonable" but is valid if it is "in accord and in harmony with the comprehensive zoning plan and is done for the public good"); *id.* at 151 (defining comprehensive plan as "a general plan to control and direct the use of land and buildings * * * so as to accomplish * * * the most appropriate uses * * * consistent with the public interest and the safeguarding of the interests of the individual property owners").

Only one state high court case cited by petitioners even offers support for their position, and that case is a 1923 case that addresses the issue only in dicta. In *State ex rel. Carter* v. *Harper*, 196 N.W. 451 (Wis. 1923), the Supreme Court of Wisconsin *upheld* a zoning restriction prohibiting a dairy plant operator from building an addition onto his business premises. The court looked to whether the ordinance had "any reasonable tendency to promote the public morals, health, or safety, or the public comfort, welfare, or prosperity." *Id.* at 454. In doing so, the court distinguished cases invalidating ordinances restricting only a limited portion of a municipality in which regulatory power "depended upon a petition or an expressed wish of the people" from those involving "a broad comprehensive plan involving the entire city * * * to promote the welfare of the city as a whole." *Id.* at 455-456. The court also noted in passing that in a prior case, a statute had been invalidated because it "was enacted purely for the protection of the state capitol, and that,

as the state could not take private property to be used as a site for its capitol, no more could it limit the use of property for the protection of the capitol." *Id.* at 453. The language on which petitioners rely therefore does not represent the holding of the case. More importantly, even if there is tension between the decision below and *Harper*, the unpublished decision below does not create a split in the precedential authorities. Any tension between an unpublished decision and a 1923 Wisconsin Supreme Court decision, moreover, does not create a pressing need for the Court's review.

2. Petitioners assert (Pet. 18-21) that because the United States Department of Defense implemented an AICUZ program to make planning recommendations for compatible land use around air installations, the Department became a "co-zoner" with local zoning authorities in Wichita Falls, acting "under color of" state law to deprive petitioners of constitutional rights under Section 1983.[4] Petitioners point to not a single reported authority for that extraordinary theory.[5]

To the contrary, courts have consistently recognized with respect to land use compatibility recommendations developed pursuant to the AICUZ program that AICUZ reports "are advisory only" and "the determination to [take action] is ultimately left to the local jurisdiction." *Stephens* v. *United States*, 11 Cl. Ct. 352, 363 (1986); *Blue* v. *United States*, 21 Cl. Ct. 359, 362 (1990) ("AICUZ studies are for advisory purposes

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[4] Neither the United States nor one of its Departments is a "person" that is subject to suit under Section 1983. See *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58 (1989) (neither State nor state officer acting in official capacity is a "person" under Section 1983).

[5] There is, of course, no need to consider this issue at all if the first question presented is answered in the negative.

only," and the "authority to permit or restrict development or use of private lands is left to the local jurisdiction."); cf. *Branning* v. *United States*, 654 F.2d 88, 95 (Ct. Cl. 1981). Moreover, courts have rejected the notion that efforts by federal agencies to persuade local planning agencies, including by providing compatible land use recommendations such as those formulated as part of the AICUZ program, are improper or render the United States liable for any taking that may result from local zoning decisions. See, *e.g.*, *De-Tom Enters., Inc.* v. *United States*, 552 F.2d 337, 339-340 (Ct. Cl. 1977); *NBH Land Co.* v. *United States*, 576 F.2d 317, 318-319 (Ct. Cl. 1978); *Blue* v. *United States*, 21 Cl. Ct. at 362; *Lynch* v. *United States*, 221 Ct. Cl. 979 (1979); *Persyn* v. *United States*, 32 Fed. Cl. 579, 585 (1995).

The conclusions of the courts that have addressed this issue are in conformity with this Court's decision in *Griggs* v. *Allegheny County*. 369 U.S. 84 (1962). In *Griggs*, this Court addressed a claim of a taking of an air easement by a county, which owned and maintained the airport at which the flights in question landed and took off. The plaintiff argued that the United States was the proper defendant because the airport had been designed and constructed in accordance with the rules and regulations of the Civil Aeronautics Administration (CAA) as part of a National Airport Plan, which provided for the CAA Administrator to make grants for airport development. The Court rejected that argument:

> We think * * * that respondent, * * * the promoter, owner, and lessor of the airport, was * * * the one who took the air easement in the constitutional sense. Respondent decided, subject to the approval of the C.A.A., where the airport would be

> built, what runways it would need, their direction and length, and what land and navigation easements would be needed. The Federal Government takes nothing; it is the local authority which decides to build an airport *vel non*, and where it is to be located.

Id. at 85, 89.

In the leading case directly on point, *De-Tom Enterprises*, a landowner in the vicinity of March Air Force Base in California asserted a Fifth Amendment takings claim against the United States on the theory that the Air Force prevented him from obtaining a zoning change that would have permitted the property to be developed for high-density residential purposes. 552 F.2d at 340. At the hearing before the local zoning board, only the Air Force had appeared in opposition to the landowner's application for a zoning change. The Air Force witness testified that if the area adjacent to the base was developed for high-density residential use, noise complaints "might ultimately compel the Air Force to curtail, or perhaps discontinue, operations at the base," and the Air Force noted that it was expending some $70 million per year on base operations. *Id.* at 341.

The Court of Claims held that if the landowner's position "is that the Air Force necessarily took plaintiff's property (in the constitutional sense) simply by persuading the County Board not to change the zoning of the property, we must reject such a claim on its merits." 552 F.2d at 339. The Court concluded that it is the local entity "which adopts, and has the power to adopt, the allegedly injurious course, and the federal agency (here the Air Force) is only playing the role of

an influential affected landowner trying to persuade the county body to accept its position." *Id.* at 339-340.

Petitioners point to no conflict with any court on this question, and, indeed, petitioners "do not assert that *De-Tom* was decided in error." Pet. 20. The holding of the lower courts that the federal respondents were not "co-zoners" with the City and did not act unconstitutionally in making recommendations to the City does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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