

# TRANSCRIPT OF PROCEEDINGS

IN THE SUPREME COURT OF THE UNITED STATES

In the Matter of: )

RICHARD PENNELL AND TRI-COUNTY )  
APARTMENT HOUSE OWNERS )  
ASSOCIATION, )

Appellants )

v. )

CITY OF SAN JOSE AND CITY )  
COUNCIL OF SAN JOSE )

No. 86-753

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WASHINGTON, D.C. 20548

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IN THE SUPREME COURT OF THE UNITED STATES

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RICHARD PENNELL AND TRI-COUNTY           x  
  APARTMENT HOUSE OWNERS ASSOC.,        x  
                  Appellants,                x  
                  v.                            x  
CITY OF SAN JOSE AND CITY COUNCIL        x  
  OF SAN JOSE                                x  
-----x

No.86-753

Washington, D.C.  
Tuesday, November 10, 1987

The above-entitled matter came on for oral argument  
before the Supreme Court of the United States at 10:03 a.m.

APPEARANCES:

HARRY D. MILLER, ESQ., Oakland, California; on behalf of  
  Appellants.  
MRS. JOAN R. GALLO, ESQ., City Attorney, San Jose, California;  
  on behalf of Appellee.

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1           Our challenge in this case is based primarily on the  
2 "just compensation" clause in reliance on the Rule announced by  
3 this Court in both Agins and in the Nollan case. We do not  
4 challenge the one aspect of the Nollan rule; we do not  
5 challenge that we have been denied the economic viability of  
6 the use of our land.

7           We do challenge its provision under the other part of  
8 the Nollan test, and that is that this provision fails to  
9 substantially advance a legitimate state interest under the  
10 reasoning of the Nollan Decision, that is to say, that there is  
11 no cause and effect, no nexus between any conduct by the  
12 landlord and the hardship of the tenant or the necessity to  
13 provide financial assistance to a tenant.

14           QUESTION: Is there not some problem with the "just  
15 compensation" clause applying at all to this case? There  
16 really has been no taking, certainly in any physical sense, of  
17 your property.

18           MR. MILLER: There had been a taking of money, Your  
19 Honor. The way the ordinance works, if a landlord wants more  
20 than the rent that is otherwise provided by the mathematical  
21 formulas, he then establishes in his own mind what he believes  
22 is a reasonable rent, and he can then either petition the city  
23 to approve that additional rent as being reasonable, or in the  
24 alternative, the landlord can give a 30-day notice to the  
25 tenant, establishing this higher rent, and then the tenant has

1 the opportunity to file a petition with the city.

2 In either event, the hearing is held and the hearing  
3 officer looks at various factors -- the factors he looks at are  
4 primarily the economic factors from the point of view of the  
5 landlord; his rent, his expenses, et cetera -- how well he is  
6 maintaining the property, et cetera. Based upon those factors,  
7 the hearing officer establishes what rent would be reasonable  
8 under the circumstances.

9 Now let me use an example: assume after examining  
10 all those factors, the hearing officer determines that a  
11 reasonable rent for this unit would be \$400 a month. If the  
12 tenant -- if the unit is not occupied by a hardship tenant,  
13 then that would be the rent that the landlord could charge --  
14 the \$400.

15 However, if this unit is occupied by a hardship  
16 tenant, then he can reduce the rent to let us say, \$375. It is  
17 our position from that reduction of the rent from a reasonable  
18 figure of \$400 down to another figure of \$375 is a taking of  
19 the rent from the landlord.

20 QUESTION: But that is a very hypothetical situation.  
21 You are just attacking the ordinance on its face, are you not?  
22 You do not have any particular fact situation?

23 MR. MILLER: That is correct, Your Honor.

24 QUESTION: Is there any guarantee that that is how a  
25 hearing officer would handle that sort of an inquiry?

1 MR. MILLER: It is our position, Your Honor, that  
2 the lack of validity of this provision appears on the face of  
3 the ordinance and an application would not do anything to  
4 assist this Court in resolving this dispute.

5 The ordinance provides on its face expressly that the  
6 hearing officer must consider the financial ability of a tenant  
7 to pay. It is our position that that is a totally  
8 unconstitutional standard, that they cannot look at the  
9 tenant's ability to pay. It would be for example as if the  
10 ordinance provided that the hearing officer could consider the  
11 religion or political affiliation of a tenant.

12 QUESTION: Who do you represent?

13 MR. MILLER: We represent Mr. Richard Pennell who is  
14 a property owner of an apartment house and, more importantly,  
15 the Tri-County Apartment Owners Association, that is an  
16 unincorporated association of rental property owners.

17 QUESTION: But surely the ordinance is not  
18 unconstitutional with respect to those groups of people -- or  
19 let us assume that example of yours, I suppose that if the  
20 landlord could collect the \$400, it is not -- the ordinance is  
21 not unconstitutional as applied to him?

22 MR. MILLER: That is correct.

23 QUESTION: And it is only those landlords with  
24 hardship tenants?

25 MR. MILLER: Correct.

1 QUESTION: Well, do we have, I suppose by -- saying  
2 among your association members there are some landlords of  
3 hardship tenants?

4 MR. MILLER: That is correct, Your Honor. In fact,  
5 we are the supplier of goods and services. We supply units and  
6 we supply them to everyone. We supply them to both hardship  
7 and non-hardship tenants.

8 QUESTION: But even with respect to landlords with  
9 hardship tenants, the hearing officer is not obliged to reduce  
10 the rent below \$400?

11 MR. MILLER: That is correct, Your Honor.

12 QUESTION: So that how do we know that he ever would?

13 MR. MILLER: Because there is no constitutional way  
14 that the hearing officer could even consider tenant hardship.  
15 That is our position.

16 QUESTION: I know that is your position. It sort of  
17 has to be, I suppose.

18 MR. MILLER: There is no way that this can be applied  
19 constitutionally. It does not become more or less  
20 unconstitutional merely because it is applied.

21 QUESTION: Well, you just answered to the contrary in  
22 your example, if the landlord is allowed to collect \$400, there  
23 would be no problem.

24 MR. MILLER: That is correct, Your Honor, but this  
25 ordinance goes one step further.



1 QUESTION: But even if the landlord had a hardship  
2 tenant, if the hearing officer allowed the \$400, the statute  
3 would not be unconstitutionally applied to him.

4 MR. MILLER: That is correct, Your Honor.

5 QUESTION: In fact, taking it one step further, Mr.  
6 Miller, as I understand the supreme court of California's  
7 Opinion, the minimum that you can get has always got to give  
8 you a fair return on your investment.

9 MR. MILLER: That is the interpretation.

10 QUESTION: So that if they decided in your case that  
11 \$375 would not give you a fair return, then he would not be  
12 permitted to give the \$375?

13 MR. MILLER: That is correct.

14 QUESTION: Yes.

15 MR. MILLER: But I think that I can show the Court  
16 that even though the \$375 in my example is an otherwise -- it  
17 meets the constitutional minimum rent, I believe I can show  
18 this Court that the city does not have the power or the  
19 authority to take away from us that increase that otherwise be  
20 determined to be reasonable.

21 QUESTION: What if I did it in reverse and said that  
22 if you had \$375 as a reasonable return, that if you had tenants  
23 who are multi-millionaires, you can charge them an extra \$10?

24 MR. MILLER: I think you would come out with the same  
25 result, Your Honor.

1 QUESTION: That would be unconstitutional too?

2 MR. MILLER: For the wrong reason: the City of San  
3 Jose could say that, "all you could have is \$375, and that is a  
4 fair and reasonable, and it meets the constitutional minimum."

5 What they cannot do is say you can have more but then  
6 take it away from you for the wrong reason. That is exactly  
7 what happened in Nollan and this Court said you could not do  
8 it.

9 QUESTION: What constitutional provision would my  
10 hypothetical violate if they said, "the normal rent is \$375 but  
11 if you have a very wealthy tenant, you can charge him an extra  
12 \$25?" Would that be clearly unconstitutional also?

13 MR. MILLER: Yes.

14 QUESTION: What portion of the Constitution would  
15 that violate?

16 MR. MILLER: I believe that would violate the "just  
17 compensation' clause under the same reasoning that we presented  
18 here, Your Honor. The wealth of the tenant is not a legitimate  
19 consideration in establishing the rent. If you are going to  
20 say that rich people can pay more than --

21 QUESTION: It is a legitimate consideration in  
22 establishing income tax rates.

23 MR. MILLER: Yes, Your Honor, we do have income tax  
24 rates that are based upon wealth.

25 QUESTION: Dentists sometimes take into account the

1 wealth of their patients, I think. And doctors and lawyers do.

2 MR. MILLER: There is a substantial difference,  
3 however.

4 QUESTION: What is the difference constitutionally?

5 MR. MILLER: Constitutionally what you have is a  
6 charge that is applied to everyone and is being applied  
7 equally. Here you have a charge that is being applied from one  
8 individual to another individual. A single landlord is  
9 selected at random and being told that he would have to reduce  
10 his rent to his tenant.

11 And I think your question raises a problem because  
12 this ordinance has been depicted in briefs and in newspapers as  
13 a "robin hood" type of an ordinance, taking from the rich and  
14 giving to the poor, and that is not the effect of this  
15 ordinance. The average landlord owns less than twelve rental  
16 units. Many landlords are hardworking people who have invested  
17 their money in small units to provide for their own security  
18 and their own retirement.

19 On the other hand, by the statistics of HUD, the  
20 median income in San Jose is over \$43,000. A tenant becomes  
21 automatically a "hardship tenant" under this ordinance if he is  
22 earning approximately \$34,000.

23 QUESTION: What about a state law that required  
24 lawyers to devote ten percent of their time to public service?

25 MR. MILLER: Yes, Your Honor, in California we had

1 such an ordinance.

2 QUESTION: This was unconstitutional.

3 MR. MILLER: This was held invalid in the Cunningham  
4 case under the "equal protection" clause, that a lawyer that  
5 was providing goods and services to the public cannot be  
6 required to provide pro bono services in civil suits, and in  
7 civil suits we have the public defender.

8 And for the same reason I believe this ordinance  
9 falls under the same province -- has the same problem.

10 QUESTION: Did you make this very argument before the  
11 California supreme court?

12 MR. MILLER: Which argument?

13 QUESTION: On the "just compensation" clause?

14 MR. MILLER: Yes. The "just compensation" clause.

15 QUESTION: Because I do not -- they recite that you  
16 concede that you do not rely on confiscatory rents.

17 MR. MILLER: Well, Your Honor, we made two arguments  
18 before the California supreme court. The first argument was  
19 that by definition, when the hearing officer establishes a  
20 reasonable rent, and then reduces it, we are being denied the  
21 constitutional minimum. The supreme court disagreed with us on  
22 that and we are not presenting that issue to the Court because  
23 we know that you will accept the California court's  
24 interpretation.

25 But our next position, which was actually pushed more

1 hard, was that even if we are receiving the constitutional  
2 minimum, that you cannot take away the excess for the wrong  
3 reason. We see no difference -- if there is a housing  
4 shortage, we agree that the police power --

5 QUESTION: Is that position in your brief filed with  
6 the California supreme court?

7 MR. MILLER: That we are -- that even if we are  
8 receiving minimum rent? Yes, Your Honor. That was their  
9 argument and their decision that, even though there is a fair  
10 and reasonable rent --

11 QUESTION: So they necessarily rejected that when  
12 they --

13 MR. MILLER: Yes, Your Honor.

14 QUESTION: Even if they did not seem to in their  
15 Opinion?

16 MR. MILLER: Well, they did in that --

17 QUESTION: They just talked about "equal protection."

18 MR. MILLER: Yes, they talked about "equal  
19 protection." I think you will find a footnote on "due  
20 process," and another provision, another passage where they  
21 talked about "just compensation."

22 Of course, in defense of our supreme court, they did  
23 not have the Nollan case in front of them when they made this  
24 decision, but they did have the Agins Rule.

25 We did not, in explanation, Your Honor, present the

1 argument as clearly focused, as we are now presenting it to  
2 this Court. We made the same arguments but not as clearly  
3 focused.

4 Having thought about this for such a long period of  
5 time, we boiled this case down to a very simple issue: the  
6 housing shortage --

7 QUESTION: MR. Miller, before you go on, just one  
8 more question on the standing: is it the case that a landlord  
9 who has a hardship tenant and wants to sell his property, the  
10 purchaser from him would be subject to the same ability of the  
11 California authorities to require the charging of a lower rent?

12 MR. MILLER: Yes, Your Honor.

13 QUESTION: He does not sell out from under that  
14 provision?

15 MR. MILLER: No, Your Honor.

16 QUESTION: So the asserted authority by the State  
17 of California does amount to in effect a sort of cloud on his  
18 title to the premises?

19 MR. MILLER: It definitely does, Your Honor.

20 QUESTION: It is an asserted ability of California to  
21 require that those premises, at least as long as this occupant  
22 is in them, will bring less income?

23 MR. MILLER: That is correct, Your Honor.

24 QUESTION: And might that affect the sale price that  
25 an individual is able to get for a unit that has a hardship

1 tenant?

2 MR. MILLER: It definitely will. By reducing the  
3 rent you reduce the value by definition. And that tenant  
4 potentially can stay there until he dies, because as long as he  
5 does not default, he has a right to remain in possession.

6 QUESTION: And that cloud is effective whether or not  
7 you know in advance whether in fact the hearing officer will  
8 reduce it? The mere risk of his reducing it makes that unit  
9 less valuable.

10 QUESTION: You mean if a unit is leased for a term of  
11 years that the tenant can hold over indefinitely at the lower  
12 rent by virtue of this law?

13 MR. MILLER: Yes ma'am.

14 QUESTION: He cannot be evicted?

15 MR. MILLER: That is correct. Except for default.

16 QUESTION: Notwithstanding the existence of a  
17 leasehold period that has expired?

18 MR. MILLER: That is correct, Your Honor. There are  
19 anti-eviction provisions in the ordinance which we are not  
20 attacking, however I think it impacts on the effect. We can  
21 only evict a tenant -- it is worded somewhat difficult, but  
22 somewhat in effect they can only evict a tenant for a default.

23 QUESTION: Are you arguing, then, this is like a  
24 physical taking or is it a regulatory taking?

25 MR. MILLER: It has an aspect of physical, Your

1 Honor.

2 QUESTION: Well, which is it? How do we know?

3 MR. MILLER: We consider it as a hybrid, Your Honor.  
4 It is not a pure regulation test as in Agins or MacDonald. And  
5 it is not a pure, physical possession, as in Loretto. Rather  
6 it is a hybrid, as in Nollan. Nollan was a regulatory case.  
7 However, because the public was given the right to pass back  
8 and forth on the easement, it also has an aspect of physical  
9 possession. And we have the same. We admit that this is a  
10 price regulation as such, but the Nollan test should apply  
11 because it also has the aspect of the physical possession. The  
12 tenant is given this possessory life estate and, because it  
13 affects possession, it is our belief that, under the Nollan  
14 standard, it is intermediate scrutiny standard, it should also  
15 apply to this case because we have the similar aspect of  
16 physical occupation by the tenant.

17 QUESTION: The majority of the supreme court of  
18 California, in answering one of your contentions, said that the  
19 "City of San Jose could elect to regulate only landlords with  
20 hardship tenants." And thereby achieve the same results. Do  
21 you disagree with that statement?

22 MR. MILLER: I agree, Your Honor, but make sure we  
23 define what we are talking about. If there is adequate  
24 justification that there was a shortage of low-rent housing,  
25 but there was an adequate supply of high-rent housing, I see no



1 problem under the police power for them to rent, to regulate,  
2 only low rent housing. What they cannot do is regulate  
3 housing, the price of housing based upon the income of the  
4 tenant.

5 QUESTION: But would that not be very much what they  
6 were doing if they regulated only low rent housing?

7 MR. MILLER: No, Your Honor. Anyone can occupy low  
8 rent housing, without any basis of what type of income they  
9 earn, anyone -- if they say "all units of \$500 or less we will  
10 regulate," and there was a shortage of such units, I would have  
11 no problem with that. But if they say "we are only going to  
12 regulate those units for people with certain income they are  
13 now telling the landlord that "you have to subsidize this  
14 tenant because of what he earns."

15 QUESTION: Why is one permissible and another not in  
16 your view?

17 MR. MILLER: Because you cannot regulate --  
18 establish, price regulation based upon the consumer's ability  
19 to pay, Your Honor. Let us take for example a grocery store:  
20 if a grocery store is offering goods at a reasonable price, he  
21 has a right to charge a reasonable price to the consumer,  
22 regardless of the consumer's ability to pay. We do not tell  
23 the groceryman that he has to reduce the price of his milk  
24 because the customer cannot afford to pay. We recognize that  
25 the ability to pay is a public problem.

1 QUESTION: You can tell the grocer that he has to  
2 raise the price of his milk above what he wants to charge?

3 MR. MILLER: Yes, Your Honor. That is the Nebbia  
4 line of cases.

5 QUESTION: If you could require him to raise it, why  
6 can you not require him to lower it?

7 MR. MILLER: The justification for Nebbia v. Bordens,  
8 that line of cases, Your Honor, gave a justification for a  
9 general regulation just as you have a justification for a  
10 general rent control ordinance. What they said in Nebbia was  
11 that "we have a problem of oversupply and this oversupply is  
12 causing destructive competition. In order to protect the  
13 public we have to maintain a minimum price so that the supplier  
14 can maintain a minimum profit." That was to protect the  
15 public, just like rent control.

16 QUESTION: But what if the legislature, the city  
17 council, says, "we have a problem of starvation: there are a  
18 lot of people that cannot afford to buy milk -- " you know,  
19 there you are talking about eight cents -- but now let us say  
20 \$1.80 or something? "So we are going to say that you have to  
21 sell it at \$1.60."

22 MR. MILLER: And I would say that would be  
23 unconstitutional, Your Honor. My reasoning is this --

24 QUESTION: No, you would not. You would not say that  
25 if they did it for everybody, would you?

1 MR. MILLER: I misunderstand the question. I  
2 understood the --

3 QUESTION: I understood your position to be that the  
4 state could not require a lower price across the board.

5 MR. MILLER: Yes, they can.

6 QUESTION: Not conditional upon what the economic  
7 status of the particular purchaser is.

8 MR. MILLER: Thank you, Justice Scalia. I  
9 misunderstood your question, Mr. Chief Justice.

10 QUESTION: I am not so sure you did. I think maybe  
11 Justice Scalia has qualified it.

12 [Mirth.]

13 MR. MILLER: I do believe, Your Honor, that because  
14 of market conditions the grocer is able to charge -- because of  
15 market conditions, the groceryman was able to charge let us say  
16 \$1.80 for his milk and that was an unreasonable price because  
17 of market conditions, that the state could come in and say "we  
18 will regulate all milk at \$1.50."

19 What they could not do is say, "you can charge anyone  
20 in the population \$1.50, but if a customer comes in and he  
21 cannot afford to pay \$1.50, you have to lower your milk to  
22 \$1.35. We have always recognized that the assistance of our  
23 impoverished citizens is a public burden. We are not saying  
24 that we should not be helping those who need help. That is not  
25 the question. The question is, who is to provide that

1 assistance? We are suggesting that it is the public burden,  
2 and they cannot select randomly different individuals to  
3 provide that financial aid.

4           What we do, for example, with the grocery store, is  
5 we say, "groceryman, you do not have to reduce your rent below  
6 what is reasonable; we help the impoverished by providing food  
7 stamps. Just like we tell the druggist, 'you do not have to  
8 reduce the price -- the reasonable price -- for your  
9 medications.' If someone cannot afford your medications, we  
10 provide medicare."

11           And before the San Jose ordinance came along, what we  
12 said was, "Tenant, if you cannot afford to pay a reasonable  
13 rent, a rent that has already been reduced by rent control, if  
14 you cannot afford to pay a reasonable rent, we will provide for  
15 you a Section 8 subsidy." What they are trying to do is the  
16 City of San Jose is trying to take a public burden to those who  
17 need assistance and try to shift that burden onto the  
18 individual.

19           QUESTION: Mr. Miller, what about rate regulation?  
20 Could a public utility commission require the supplier of  
21 electricity to charge a higher price to industry, just as  
22 industry may pay a higher tax rate, and a lower price to the  
23 homeowner?

24           MR. MILLER: Yes, Your Honor, in fact, I think there  
25 are some rate regulations that have done something similar to

1 that.

2 QUESTION: What is the difference?

3 MR. MILLER: The difference is you are taking it and  
4 applying it across all the consumers.

5 QUESTION: No, well, all the consumers -- all the  
6 consumers who are less able to pay large sums of money for  
7 their utility bills.

8 MR. MILLER: In the rate cases, Your Honor, with  
9 either working with a utility, which is a monopoly, or if you  
10 are talking about a gas rate case, which is a near-monopoly,  
11 you have a situation where you do not have normal market forces  
12 operating. The state comes in and says, "we have given you a  
13 permit to operate a monopoly and there are certain things we  
14 can tell you to do. One of the things is we can tell you what  
15 kind of prices you can charge, and we can tell you that we are  
16 going to require you to reduce those charges to certain  
17 consumers and not to others." But that charge is spread out  
18 over everyone.

19 San Jose is not --

20 QUESTION: But by hypothesis it is not spread out  
21 over everyone. It is a higher rate to those who are better  
22 able to pay, namely the very large users. But maybe it does  
23 not exactly work that way. But I am using this as a  
24 hypothetical.

25 MR. MILLER: Yes, I agree, Your Honor, except with

1 the utility, one supplier is supplying thousands of people.

2 QUESTION: Well, one landlord is renting apartments  
3 to thousands of tenants, and some of them are better able to  
4 pay than others. We just make a different kind of  
5 classification.

6 MR. MILLER: But keep in mind, Your Honor, this  
7 ordinance is not based upon an ability to pay.

8 QUESTION: But you are saying it is constitutionally  
9 impermissible to take ability to pay into account?

10 MR. MILLER: That is correct. I agree.

11 QUESTION: But you would not contend that it was  
12 unconstitutional in the rate regulation context to take ability  
13 to pay into account, say, as a class, homeowners are less able  
14 to pay than factory owners, is that constitutionally  
15 impermissible?

16 MR. MILLER: No it is not, Your Honor. Whenever the  
17 state gives --

18 QUESTION: Mr. Miller, you can make a utility give  
19 its services for free, can you not? A regulated public  
20 utility? In fact, many of them do. Cable systems provide  
21 their services for free to municipalities and are required to.

22 MR. MILLER: That is correct, Your Honor. It is  
23 perfectly --

24 QUESTION: But that would be a "taking" for a private  
25 person would it not, to require it give it away for free?

1           MR. MILLER: That is a distinction, Your Honor. If  
2 it was a public utility where the state is given a monopoly  
3 permit, you can pay one thing. But you cannot go out to the  
4 private entrepreneur and do the same thing. That is not our  
5 economic system. It just will not go.

6           QUESTION: Is there anything in your argument that  
7 would not knock out rent control as such?

8           MR. MILLER: No, Your Honor. Rent control is well-  
9 established as a valid exercise of the "police power."  
10 Whenever there are those circumstances where a housing shortage  
11 permits rents to go too high, the state has a right to come in  
12 and protect itself. No, Your Honor, this goes one step  
13 further.

14          QUESTION: It involves that, does it not?

15          MR. MILLER: Yes, it is a rent-control ordinance.

16          QUESTION: But if it involves rent it controls rent.

17          MR. MILLER: Yes, but it is controlling it for the  
18 wrong reason and on the wrong basis. The rest of the  
19 ordinance, Justice Marshall, we are not attacking. The rest of  
20 the ordinance that looks into what is a reasonable rent for the  
21 landlord we have no problem with. If they did not add this one  
22 provision that says, "landlord, you have to reduce your rent  
23 merely because this one tenant cannot afford to pay." That is  
24 our challenge.

25          This is a very important question: it is important

1 because there are over 200 jurisdictions in this country that  
2 have rent control ordinances and if the California decision is  
3 allowed to stand, you can be sure that they are going to  
4 follow. But more importantly, in California --

5 QUESTION: How do you know you can be sure? It may  
6 not be a fairly wise ordinance because it may discourage the  
7 rental of units to low income people.

8 MR. MILLER: And it will, Your Honor.

9 QUESTION: So I am not sure you are right there and  
10 people will follow it for that reason.

11 MR. MILLER: All right, Your Honor, the next step is  
12 in California, every rent control ordinance that I am aware of  
13 -- and there are between 40 and 50, all provide that the  
14 hearing officer can take into consideration "any relevant  
15 factor." And if this California supreme court Opinion stands,  
16 then those jurisdictions, which I think is about all, then the  
17 hearing officer can thereafter take into consideration the  
18 tenant's ability to pay, and more importantly, we will not even  
19 know it, because we do not know what goes through the hearing  
20 officer's mind necessarily in establishing this rent.

21 QUESTION: You are just saying they may be doing it  
22 already?

23 MR. MILLER: We hope not, but one last point, if the  
24 Court please: we are not only challenging this ordinance under  
25 the "just compensation" clause, but also under the "equal



1 protection" clause. We find no difference in this case between  
2 that and the unanimous decision of this Court in Webb's  
3 Pharmacy. In Webb's Pharmacy the interpleaded funds were filed  
4 with the Clerk of the Court. The Clerk did not have to put  
5 those into an interest-bearing account. So that there was no  
6 requirement or constitutional right for the depositor to have  
7 interest.

8 But then the state said, "when you put it into an  
9 interest-bearing account, we can take the interest and use it  
10 for a public purpose." And we say that is the same thing they  
11 are doing here in San Jose. They do not have to give us the  
12 higher rent. What they cannot do is allow the higher rent and  
13 then take it for a public purpose, the public purpose being to  
14 support the underprivileged.

15 I think the same philosophy would follow from your  
16 Decision in Marino, which was another "equal protection" where  
17 food stamps were denied to persons who were living to another  
18 unrelated person. There is no -- this Court held that there is  
19 no correlation between the taking, the fact that they were  
20 unrelated persons, and food stamps. And although there is no  
21 constitutional right to food stamps, you cannot give them and  
22 then take them away for the wrong reason. And that is  
23 substantially our argument.

24 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Miller.

25 We will now hear from you, Ms. Gallo.

1 ORAL ARGUMENT OF JOAN R. GALLO, ESQ.

2 ON BEHALF OF APPELLEES

3 MS. GALLO: Thank you, Mr. Chief Justice, and may it  
4 please the Court:

5 It seems to me that Appellants predicate their  
6 opposition to the ordinance on a number of incorrect  
7 assumptions, that there is only one rational purpose for rent  
8 control, and that is to correct a non-competitive market. It  
9 seems to me that there are a number of possible purposes for  
10 rent control, including for example, as an anti-inflationary  
11 measure. Even where an ordinance, as ours is, is directed at a  
12 housing shortage, it can be directed towards correcting the  
13 social ills which result from the exploitation of the housing  
14 shortage, not just the market imbalance itself.

15 In our case the social ill that we are attempting to  
16 address is the dislocation of tenants in possession. Not only  
17 does that kind of dislocation negatively impact the individual  
18 tenant, but it also affects the community as a whole. If you  
19 develop a pattern of residential instability, it undermines the  
20 neighborhood sense of unity.

21 Also today we increasingly find that homelessness  
22 which results from the escalating market rate of rents is an  
23 increasing problem for our city. The city has a variety of  
24 other programs which address the problem of finding affordable  
25 housing for low and medium income tenants who are looking for

1 housing. This particular regulation is addressed at protecting  
2 those who are already in possession of the unit. The tenant  
3 hardship provision directly and substantially furthers that  
4 purpose. It prevents the landlords from taking unfair  
5 advantage of housing shortage at the expense of those tenants  
6 who are on limited and fixed incomes.

7 QUESTION: But you take the position that it is  
8 perfectly valid for the city to require a landlord with let us  
9 say ten units to perhaps be asked to allow a particular income,  
10 a low-income tenant, to remain indefinitely in the premises at  
11 a rent which is lower than the reasonable rent that has been  
12 allowed for other tenants generally in the same building, is  
13 that right?

14 MS. GALLO: The ordinance -- yes, essentially, with  
15 some exceptions. It is hard to say "yes," because I think  
16 there are certain assumptions --

17 QUESTION: But it could work that way?

18 MS. GALLO: To the extent that your question is "is  
19 the landlord permitted to free himself from the constraints of  
20 rent control by evicting a tenant, he cannot.

21 QUESTION: At the end of a term he cannot and might  
22 have to keep this person indefinitely who happens to be a  
23 hardship tenant?

24 MS. GALLO: He can evict the tenant for any reason  
25 other than the evasion of the rent control ordinance. And the

1 tenant hardship provision.

2 QUESTION: Well, that does seem to be requiring the  
3 landlord to assume a public burden, does it not?

4 MS.GALLO: It does not to me, because he continues --  
5 I think that the problem is the assumption that there is a  
6 reasonable rent and he is not entitled to that reasonable rent.  
7 What he -- what we are doing is limiting an excessive rent, and  
8 we are limiting it more stringently in that situation. Any  
9 landlord may at any time have a hardship tenant. Any hardship  
10 tenant may at any time leave. We do have a vacancy decontrol  
11 provision that allows the landlord to set the rent at market  
12 rate whenever the unit is voluntarily vacated.

13 QUESTION: Could the city require grocers to sell to  
14 hardship people at a lower price than to others?

15 MS. GALLO: The answer to that I think is "yes," if  
16 there is a proper purpose. In my mind probably a proper  
17 purpose would limit that to necessary items. And if the store  
18 -- if there was an administrative system that assured the  
19 storekeeper a fair return, I think that there is no problem.  
20 It is very similar to the lifeline type of situation that  
21 appears in the utility context, or we do that with a variety of  
22 services that are provided, like garbage services, where you  
23 have to give the elderly and low-income people an opportunity  
24 for a lifeline service.

25 QUESTION: Ms. Gallo, what about seeing this problem

1 of the hardship tenants and to meet that same problem the State  
2 of California passed a law that said that, "anyone who lives  
3 next door to an impoverished person has an obligation to help  
4 that person out," and make up the difference in the rent?

5 QUESTION: I do not see that in that situation there  
6 is a connection.

7 QUESTION: So we are just quibbling about whether the  
8 connection is close enough, is that right?

9 MS. GALLO: I think that very much at the heart of  
10 the argument is --

11 QUESTION: There has to be a relationship between the  
12 person you are putting the burden on and the nature of the  
13 hardship, is there not?

14 MS. GALLO: There has to be a rational relationship  
15 between the purpose of the regulation and the person who is  
16 being regulated.

17 QUESTION: Well, no. It is not just the purpose of  
18 the regulation. It is the evil that is sought to be  
19 eliminated, is it not?

20 MS. GALLO: Well, I think we are saying the same  
21 thing. I think in our case the purpose of the ordinance is to  
22 protect tenants in possession from excessive rents charged by  
23 their landlords, but that is evil.

24 QUESTION: You could protect them against excessive  
25 rents in a lot of ways such as making their next-door neighbor

1 who is well-off, make up the difference, and you say that would  
2 be no-good?

3 MS. GALLO: Because I do not think that there is a  
4 rational connection with the next-door neighbor.

5 QUESTION: And you think it is a rational connection  
6 that I happen to be the landlord who rented to let us say an  
7 affluent person who loses a lot of money in the stork market  
8 and and whose income goes below \$30,000. That means that I am  
9 somehow responsible for his hardship?

10 MS. GALLO: I do not think that you are responsible  
11 for his hardship. And I do not think under the terms of our  
12 ordinance, the hearing officer would be likely to find that to  
13 be the kind of unreasonable severe financial hardship. But I  
14 do think that since we could impose a lower rent ceiling for  
15 all landlords to allow many landlords to further exploit the  
16 housing shortage while limiting that exploitation in the case  
17 where the tenants were likely to be dispossessed by that fact,  
18 is a logical and rational distinction.

19 QUESTION: What troubles me is that with respect to  
20 all landlords, with respect to all rent control in general, you  
21 can easily say that the reason for the inability of the public  
22 at-large to get affordable housing is the fact that all  
23 landlords are charging too much money taking advantage of a  
24 temporary shortage or whatever other rationale you might want  
25 to use. There is a connection between the lack of affordable

1 housing and what the landlords are doing. There is a cause and  
2 effect relationship, but there is no cause and effect  
3 relationship whatever between the hardship of a particular  
4 individual and the landlord who happens to have been renting  
5 his apartment to that individual, either before or after the  
6 individual went into the hardship level.

7 MS. GALLO: I think the connection is with the effect  
8 of letting the landlord take the maximum rent -- we are  
9 allowing the landlord to have a rent that is well-above what is  
10 constitutionally mandated. And to say to that landlord that  
11 the effect of your taking advantage of the housing shortage,  
12 that is not an increment of rent that the landlord has an  
13 entitlement to constitutionally. He is entitled  
14 constitutionally to a fair return.

15 QUESTION: He is not taking advantage of the housing  
16 shortage any more. You have eliminated his taking advantage of  
17 the housing shortage when you have reduced his rent to what you  
18 say is a reasonable rent for everyone. At that point the  
19 housing shortage is out of the question. All you are  
20 addressing from there on is the poverty of this particular  
21 individual for which the landlord is no more responsible than  
22 anyone else in the world.

23 MS. GALLO: I do not think so because what you are  
24 assuming because what you are allowing the landlords in the  
25 case of non-hardship tenants to take what is the reasonable

1 rent, and I do not think that there is such a thing as "the  
2 reasonable rent." I think we have an unusually generous  
3 ordinance that allows landlords to maximize their profits to a  
4 great extent, much more than other rent control ordinances.  
5 And what we are saying is, "we will allow you to do that to the  
6 extent your use of your property does not create a problem or a  
7 hardship for somebody else. I think the word "hardship" comes  
8 in two senses. One is we are labelling the financial need of  
9 the tenant. But I think it is also the hardship which is  
10 imposed on the tenant when the landlord maximizes his profit at  
11 literally the expense of the tenants. I think you can look at  
12 any price or rent control or rate regulatory ordinance as a  
13 shifting of the benefit from the producer to the consumer. To  
14 that extent, all of the price regulation creates a subsidy of  
15 the consumer by the producer. We are saying in most cases  
16 that, "landlord, you can really have the vast majority of the  
17 increment of rent increase that you would like to have, except  
18 to the extent that it is going to be harmful. And to that  
19 extent we limit it to some extent. But at all points, we  
20 assure you the fair return on the value of your property,"  
21 which is a very generous method of calculating fair return.

22           The ordinance, when you look at the ordinance as a  
23 whole and you see that the landlord once he rents a new unit  
24 and sets the rate at market rate value, the following year can  
25 raise the rent up to eight percent and not even be subject to



1 a hearing. Eight percent, I think, probably provides him with  
2 fair return. He can, however, impose a greater increase. And  
3 as you have been told, he can do that by simply noticing the  
4 tenants. The increase will be subject to a hearing only for a  
5 tenant that files and asks for a hearing.

6 At that hearing the hearing officer is required to  
7 allow the landlord to pass through all of his costs of capital  
8 improvement, operating and maintenance, and rehabilitation;  
9 plus the landlord receives five percent. He can also pass  
10 through certain of the cost of debt service. It seems to me  
11 that if the ordinance stopped here it would be facially valid,  
12 but the ordinance allows the hearing officer to grant an even  
13 greater increase if it is reasonable under the circumstances.

14 QUESTION: But absent the ordinance the hearing  
15 officer would --- the landlord, might be able to charge what  
16 the market might permit him to charge a lot more than the  
17 hearing officer would allow him after passing all these things  
18 through.

19 MS. GALLO: That is correct. Certainly it is the  
20 rent control ordinance and certainly it is intended --

21 QUESTION: So it keeps rents generally down below  
22 what they would be if there were a free market?

23 MS. GALLO: That is correct.

24 I think it is a mistake to talk about a "free" market  
25 in the area of rental housing. I think that the local

1 government limits that market considerably at all times based  
2 on various land use and environmental constraints. There is  
3 never a time when the free market works "freely" in this area.

4 I think it is also important to stress that the  
5 hearing officer in determining whether there is an increment of  
6 rent that can be charged above the other tests in the ordinance  
7 is required to ensure the fair return on the value of the  
8 property. When it comes to the balancing test, he balances a  
9 variety of factors to determine what is a reasonable rent under  
10 the circumstances. He may or may not determine that a  
11 particular tenant that -- excuse me -- a proposed increase  
12 constitutes an unreasonably severe hardship to the tenant, and  
13 even if he makes that determination, he may or may not limit  
14 that increment of rent. He is required to look at all of the  
15 circumstances, including what the market rate rents are;  
16 including also what the past history of rent increases or the  
17 unit have been.

18 There is no particular formula mandated for  
19 determining fair return. A "fair return" appears to be the  
20 "reasonable cost to the landlord plus a fair profit." I do not  
21 believe that it is the "maximum possible return," and I do not  
22 believe, as Appellants argue, that it is the "return he would  
23 receive in the absence of a housing shortage."

24 QUESTION: I presume if they could do this for  
25 hardship tenants they could do it for, let us say, the elderly?

1 Could they require, you know, give a hearing officer discretion  
2 to reduce it for the elderly?

3 MS. GALLO: For the elderly if there were  
4 circumstances -- a totality of circumstance.

5 QUESTION: For police officers who are notoriously  
6 ill-paid? Or simply the municipality wants to encourage people  
7 to enlist in the police and instead of giving them a higher  
8 salary they just give them this break on housing, would that be  
9 all right?

10 MS. GALLO: I do not think that that would be all  
11 right because I do not --

12 QUESTION: Why? I am a landlord who has chosen to  
13 rent to a police officer just like these people are landlords  
14 who have chosen to rent to those who are in a hardship status.

15 MS. GALLO: I think that the purpose here is not to  
16 give money to the tenants. The purpose here is to prevent  
17 society from having the problems that come from the dislocation  
18 of the tenant in possession. I am not sure that I can  
19 articulate a purpose other than the purpose that you have  
20 articulated for a special rule for police officers.

21 QUESTION: Well, but certainly the ordinance also  
22 relieves any urge that the municipality might have to subsidize  
23 the low-income people? You can certainly subsidize these  
24 people.

25 MS. GALLO: I think that the city has a wide variety

1 of programs that are possible and our city is perhaps in the  
2 forefront of a variety of programs that go to providing  
3 affordable housing for tenants. I do not think that that is --  
4 there is a particular program or only one particular way that  
5 a legislative body can determine to address certain problems.  
6 The problem here we feel is the dislocation of these particular  
7 tenants. And that is a problem which is addressed by one  
8 regulatory scheme that we have provided.

9 I think that with regard to the question of  
10 reasonable rents, I want to point out that the utility cases  
11 have developed a concept of a "zone of reasonableness. That  
12 zone is bordered at the producer's end, with the producer's  
13 interest against confiscation and at the consumer end of the  
14 continuum, by the consumer's interest against exorbitant rates.  
15 Rates can be limited anywhere within that continuum above the  
16 lowest reasonable rate. Our zone is bordered well-above the  
17 lowest reasonable rate because the landlord is guaranteed a  
18 fair return on the value of the property.

19 At the other end of the continuum, the concern is to  
20 prevent the consumer against rates which are unreasonable under  
21 the circumstances, and tenant hardship is just simply one of  
22 the circumstances that is taken into effect. I believe that  
23 there has been no taking in this case because, as Appellants  
24 agree, there has been no denial of the viable economic use of  
25 the property and I believe that the property advances a

1 legitimate state interest. There are no facts; there are no  
2 factual allegations in this case to enable the traditional ad-  
3 hoc analysis. It seems to me, however, that the economic  
4 impact under the circumstances of our ordinance where the  
5 landlord is assured a fair return on the value of his property  
6 will not be --

7 QUESTION: You keep saying that. That is a good test  
8 for public utilities. You have to assure public utilities  
9 that. But that is not the test of whether there has been a  
10 taking by the government or not, is it? The mere fact that you  
11 are left with a fair return? I assume that if I own property,  
12 I am entitled to get as much of a return as the market will  
13 give me. If the government limits me without just reason to a  
14 fair return you would say that there has been on taking. No  
15 constitutional violation.

16 MS. GALLO: I think you have both ends of the test.  
17 One is the legitimate purpose and the other is the economic  
18 viability. I think that all regulation, or most regulation,  
19 limits the return. Certainly our zoning regulations limit the  
20 return that property owners would otherwise receive. I think  
21 that is the test once you have established that there is a  
22 legitimate state interest, and I think that there is a  
23 legitimate state interest in preventing the dislocation of  
24 tenants who are in possession due to the landlord's taking  
25 advantage of the housing shortage.

1           QUESTION: That may be. My only point is you do not  
2 establish that that is so simply by the fact that a fair rate  
3 of return is provided. That is not the end of the inquiry.

4           MS. GALLO: I think that there are two tests, and I  
5 think that we meet them both. But I think once you take as I  
6 do the fact that we have met the first test, of the state  
7 interest, I think the rest of your analysis is really an  
8 analysis of economics and I think that the FCC v. Florida Power  
9 Corporation case which this Court decided last Term, really is  
10 very, very much on point. In that case, the rates charged were  
11 actually rolled back. It was not simply a limiting of future  
12 increases, but literally a rollback of rates.

13           This Court found in fact that, because the rates were  
14 not confiscatory, that the ordinance could, or the regulation,  
15 could stringently limit the amount of money that was charged.  
16 I think that certainly the City of San Jose does have an  
17 ordinance that transfers benefits and burdens but as the  
18 California supreme court said, "oil price and rent control  
19 operates in the same fashion." I do not think that ours is  
20 really distinguishable.

21           I think if you look at it the way we do, what we are  
22 doing is preventing the landlord from unfairly profiting from  
23 the market condition at the expense of the tenants. And I  
24 think the fact that we allow him --

25           QUESTION: Excuse me. It is not unfair any more once

1 you have the initial reduction. At that point you have handled  
2 the problem of the housing shortage. The problem that remains  
3 after that -- once you make the initial reduction along -- on  
4 the basis of all of the factors except the hardship factor, you  
5 have eliminated the problem of unfair benefit to the landlord.  
6 You have eliminated the housing shortage problem. What remains  
7 after that is a poverty problem, is that not right? I mean,  
8 the ordinary factors take care of excessively high rents.

9 MS. GALLO: Depending on the circumstances of the  
10 tenant, I do not see that the hearing officer takes the other  
11 factors and balances them and then comes up with what is a  
12 reasonable rent.

13 QUESTION: But that is a poverty factor. That is a  
14 poverty factor, not a landlord gouging the public factor,  
15 right?

16 MS. GALLO: It is the determinant of how far we will  
17 allow him to gouge. I think that once you get beyond the value  
18 of the fair return on the value of the property, we are  
19 allowing gouging, and in some cases we are allowing more  
20 gouging, not that we are requiring a reduction.

21 QUESTION: The California supreme court, as I  
22 understand it, had found it unconstitutional for California --  
23 I guess it was a state law -- to require children to pay the  
24 expenses of care for their impoverished parents in mental  
25 institutions? And they found that unconstitutional?

1 MS. GALLO: That is correct.

2 QUESTION: Do you disagree with that Decision?

3 MS. GALLO: I do not disagree with that Decision, but  
4 I agree with the California supreme court that that Decision is  
5 not applicable here. And that our situations are very  
6 distinguishable. I think in those situations there is no  
7 general connection. We have here a rent control program.  
8 Appellants have agreed that rent control is permissible. We  
9 have the option of a much more stringent rent control ordinance  
10 and we are merely looking at the degree of return which will be  
11 permitted within that zone of reasonableness. I think that  
12 from the perspective of "equal protection" that these kinds of  
13 distinctions are allowed. I think that the controlling case is  
14 New Orleans v. Dukes. I think that it is not essential that  
15 all people be treated with mathematical exactness.

16 QUESTION: Ms. Gallo, before you sit down, I want to  
17 be sure -- are you continuing to raise any issue about the  
18 standing of Pennell?

19 MS. GALLO: I have very mixed feelings about the  
20 standing of Mr. Pennell. I have been unable to find any case  
21 directly on-point. I think that standing is determined at the  
22 time the jurisdiction is established for this court. But on  
23 the other hand, I cannot find any way in which we have been  
24 disadvantaged or the situation has changed for us with Mr.  
25 Pennell coming in and out of ownership in the City of San Jose.



1 I think that if Mr. Pennell has standing, we have never felt  
2 that it was necessary to reach the standing of the Association.

3 QUESTION: What if we thought it was necessary? What  
4 do you think about it then?

5 MS. GALLO: Then I would urge you not to find that  
6 there is standing for the Association. I think that this is  
7 the kind of case where the association is asking for an  
8 advisory opinion.

9 QUESTION: What you are really saying is that they  
10 should not be able to attack the ordinance on its face?

11 MS. GALLO: That is correct.

12 QUESTION: They should be -- wait until there is an  
13 applied --

14 MS. GALLO: That is correct.

15 QUESTION: Did Mr. Pennell ever claim to have a  
16 hardship tenant?

17 MS. GALLO: Nowhere in the Record did Mr. Pennell  
18 claim to have a hardship tenant.

19 QUESTION: So as far as he is concerned, I suppose  
20 you would have the same argument: he is not entitled to attack  
21 the ordinance on its face?

22 MS. GALLO: I think that our "standing" argument is  
23 very much a species of our "ripeness" argument. I think in the  
24 absence of a concrete case, we really do not know how the  
25 ordinance will operate, and that has created a problem for us.

1 I do think that we argued against the "ripeness in  
2 general" in that our "standing" argument is a species of that,  
3 but in addition, I think it is inappropriate for an association  
4 of this sort to be able to bring essentially a taking claim. A  
5 taking claim needs the kind of analysis that depends on at  
6 least allegations with regard to particular situations. The  
7 taking is not in general, it is in specific. And we have felt  
8 disadvantaged all along in our inability to look at a concrete  
9 situation and be able to explain how the ordinance would  
10 operate.

11 QUESTION: What if the ordinance says that the  
12 landlord can charge a higher rent unless the landlord is Black?

13 MS. GALLO: That is an unconstitutional purpose.

14 QUESTION: Why would you not say, "well, wait to see  
15 if that provision is applied. It is at the discretion of the  
16 hearing officer to rule out facial challenge," would you not?

17 MS. GALLO: I would allow a facial challenge in that  
18 situation but not under the taking clause. What we are really  
19 talking about at that point is the "equal protection" argument.

20 QUESTION: Well, is not an "equal protection"  
21 argument being made here?

22 MS. GALLO: The "equal protection" argument is being  
23 made here but the gravamen, I think as the Appellant said, is  
24 the "taking" argument. Thank you very much.

25 CHIEF JUSTICE REHNQUIST: Thank you very much, Ms.

1 Gallo.

2 Mr. Miller, you have four minutes remaining.

3 ORAL ARGUMENT BY HARRY D. MILLER, ESQ.

4 ON BEHALF OF APPELLANTS -- REBUTTAL

5 MR. MILLER: Thank you, Mr. Chief Justice. I will  
6 make it short. I think I would like to address Justice White's  
7 question on the facial challenge, as I can see his concern: I  
8 see no distinction on a facial challenge where the challenge is  
9 under the "equal protection" or under "just compensation." The  
10 question is whether or not on its fact there is any possible  
11 way for this standard to be applied in a constitutional manner.  
12 If we assume for a moment --

13 QUESTION: But do we have anybody in front of us who  
14 is a landlord of property with a hardship tenant who would  
15 benefit from this statute?

16 MR. MILLER: Yes, Your Honor. We represent over half  
17 of the residential rental units in the City of San Jose.

18 QUESTION: Well, there are no allegations that I have  
19 seen that say, "we have hardship tenants and we are affected by  
20 this statute."

21 MR. MILLER: We allege that we have -- represent  
22 owners who are subject to the ordinance. As I say, we  
23 represent most of the residential unit owners in the city and  
24 we have many hardship tenants.

25 QUESTION: Being "generally subject to it" is not the

1 same as "having units with hardship tenants," though, is it  
2 not? Because absent that there would be no application of the  
3 statute? The ordinance?

4 MR. MILLER: That is true, Your Honor, but of all the  
5 hardship tenants in the City of San Jose, we necessarily have  
6 many of them since we are the suppliers of housing in the City  
7 of San Jose. So necessarily if they are going to live  
8 somewhere, they have to live in our units.

9 QUESTION: Yes, but if even a landlord with a  
10 hardship tenant, if the hearing officer in your example you  
11 used before, said a reasonable rate would normally be \$400, and  
12 you have a hardship tenant, he could still leave it at \$400.

13 MR. MILLER: Yes he would, Your Honor.

14 QUESTION: And that would be a constitutional  
15 application, you told me before.

16 MR. MILLER: Yes, Your Honor.

17 QUESTION: So you cannot say that this ordinance is  
18 incapable of constitutional application.

19 MR. MILLER: It is if he is ever at any time going to  
20 consider the hardship of the tenant in making his decision.  
21 What, if you leave this decision stand, Your Honor, you are  
22 saying is that there is an unconstitutional law that is never  
23 going to be applied. The only way that we can stop this from  
24 ever being applied unconstitutionally is to remove it from the  
25 Order. That is the only possible way.

1                   QUESTION: Yes, but I take it your only ground for  
2 saying that, I suppose is that it is just unconstitutional  
3 under this ordinance to take wealth into consideration.

4                   MR. MILLER: Correct. Poverty. Yes, Your Honor?

5                   QUESTION: Even though the consideration of poverty  
6 never leads to anyone's rent being changed in a particular  
7 case?

8                   MR. MILLER: It may not, Your Honor, I agree with  
9 that. However, there is no possible way they could even  
10 consider the factor and why should this Court leave an  
11 unconstitutional --

12                   QUESTION: Well, suppose -- that you came up to this  
13 Court with a tactical case that had happened. The hearing  
14 officer says, "Landlord A has no hardship tenant. He gets  
15 \$400. Landlord B, same identical property, hardship tenant,  
16 but I am going to give him \$400 too?" Nothing wrong -- nothing  
17 anybody can do about that to say it is unconstitutional, is  
18 there?

19                   MR. MILLER: Not unless you say the hearing officer  
20 -- just the fact that the hearing officer could --

21                   QUESTION: But it passes through his mind?

22                   MR. MILLER: -- could have took wealth into  
23 consideration and it did not make any difference to him.

24                   QUESTION: But just the fact that that factor may be  
25 taken into consideration invalidates this ordinance on its

1 face, is that it?

2 MR. MILLER: The problem is that there have been many  
3 times that we may not even know, Your Honor. Can I use an  
4 analogy? Let us --

5 QUESTION: Mr. Miller, is that all -- are there not a  
6 lot of existing ordinances out there that permit any variety of  
7 factors to be taken into account? Are then not also  
8 unconstitutional? Because they may be doing the very thing you  
9 are objecting to?

10 MR. MILLER: If they are sub rosa applying the  
11 standard, that would be correct.

12 QUESTION: And that would make the ordinance on its  
13 face unconstitutional because they are permitted sub rosa to do  
14 that.

15 MR. MILLER: Without this Opinion of the California  
16 supreme court, it would not be anything invalid on its face.  
17 It is only when the ordinance expressly says that this they  
18 must do. They are required to consider the hardship.

19 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Miller. The  
20 case is submitted.

21 [Whereupon at 11:00 the case in the above-entitled  
22 matter was submitted.]

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REPORTER'S CERTIFICATE

DOCKET NUMBER: 86-753

CASE TITLE: RICHARD PENNELL AND TRI-COUNTY APARTMENT HOUSE OWNERS v. CITY OF SAN JOSE AND CITY COUNCIL OF SAN JOSE  
HEARING DATE: November 10, 1987

LOCATION: Washington, D.C.

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the UNITED STATES SUPREME COURT, and that this is a true and accurate transcript of the case.

Date: November 10, 1987

*Margaret Daly*  
\_\_\_\_\_  
Official Reporter

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