

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

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WASHINGTON, D.C. 20543

CAPTION: JOHN K. YEE, ET AL., Petitioners V.

CITY OF ESCONDIDO, CALIFORNIA

CASE NO: 90-1947

PLACE: Washington, D.C.

DATE: January 22, 1992

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 JOHN K. YEE, ET AL., :

4 Petitioners :

5 v. : No. 90-1947

6 CITY OF ESCONDIDO, CALIFORNIA :

7 - - - - -X

8 Washington, D.C.

9 Wednesday, January 22, 1992

10 The above-mentioned matter came on for oral
11 argument before the Supreme Court of the United States at
12 11:03 a.m.

13 APPEARANCES:

14 ROBERT J. JAGIELLO, ESQ., Lake Arrowhead, California; on
15 behalf of the Petitioners.

16 CARTER G. PHILLIPS, ESQ., Washington, D.C.; on behalf of
17 the Respondent.

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1 PROCEEDINGS

2 (11:03 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in No. 90-1947, John K. Yee v. City of Escondido.

5 Mr. Jagiello, you may proceed.

6 ORAL ARGUMENT OF ROBERT J. JAGIELLO

7 ON BEHALF OF THE PETITIONERS

8 MR. JAGIELLO: Mr. Chief Justice, and may it
9 please the Court:

10 The tenant who sold the coach to Mrs. Morrison
11 in the Azul case got \$77,000 for a \$5,000 coach. And we
12 proved that trial in that case that it was the direct
13 result of vacancy control, could not have occurred without
14 vacancy control, and all the legal arguments in the world
15 can't disguise that fact.

16 Now how did it happen? It happened because the
17 rent control ordinance gives two sets of rights in the
18 property to the tenant in residence. The first are
19 possessory, and the second relate to rents. What are
20 those possessory rights? The right to occupy at a reduced
21 rate in perpetuity, and secondly, the right for the first
22 time to sell that right without the consent of the
23 landlord to an incoming tenant. With respect to the
24 rents, the tenant receives the right to increase the
25 rents, to collect the increase, and to keep the proceeds

1 so collected.

2 QUESTION: Do you think the ordinance requires
3 the owner of the property to rent in perpetuity?

4 MR. JAGIELLO: Yes, it --

5 QUESTION: Can't the landlord decide just not to
6 use the property for this purpose anymore?

7 MR. JAGIELLO: No, not effectively. It's not a
8 practical alternative. The reality is --

9 QUESTION: Well, is that what the ordinance
10 says, or you say it's just impractical?

11 MR. JAGIELLO: No, what happens is that there's
12 a State system for going out of business that, in
13 conjunction with local ordinances, precludes that
14 alternative as a practical reality. For example, I'm in a
15 case where we have finished 4 years of administrative
16 hearings where we've just gotten the administrative
17 record, and the condition that they imposed to going out
18 of the business was that we pay the in-place value,
19 exactly the harm that we're talking about here. And now
20 we've got 3 or 4 more years of litigation while we try to
21 contest the constitutional validity of imposing a
22 condition of that nature upon us as a condition for our
23 going out of business. It's not a practical alternative.

24 QUESTION: Anyway, that's the State law that --

25 MR. JAGIELLO: Well, it happens --

1 QUESTION: It's not the ordinance.

2 MR. JAGIELLO: No, but it happens to be the case
3 that the local agency is given the right under State law
4 to impose the conditions, and it's the local agency that
5 then does impose the conditions.

6 QUESTION: But it will be a practical
7 alternative if you win this other case, which I'm sure you
8 expect to win, right?

9 MR. JAGIELLO: I would have come all the back
10 here in about 7 years, Your Honor.

11 QUESTION: But we really don't know that it's
12 not a practical alternative. You assert that it ought to
13 be a practical alternative. You're asserting that in
14 another case.

15 MR. JAGIELLO: I know that right now nobody's
16 gotten out of business, and that we've been litigating it
17 for 4 years.

18 QUESTION: But if you win, everybody will know
19 it is a practical alternative.

20 MR. JAGIELLO: If we win in this case or the
21 subsequent case?

22 QUESTION: Well, both of them.

23 (Laughter.)

24 MR. JAGIELLO: If we win in this case, we'll
25 short-cut the other one because we will have established

1 that they didn't have the right to impose that condition.
2 It is an unconstitutional taking.

3 But we're talking about a transfer of rights
4 here. This is not the garden-variety police power case
5 that --

6 QUESTION: Is that other case in the appellate
7 courts or still before the agency?

8 MR. JAGIELLO: We just got the administrative
9 record 4 years down the line, Your Honor, so we're filing
10 in the lower courts in California at this moment.

11 QUESTION: It's not a reported case, then?

12 MR. JAGIELLO: Not at this time, it is not.

13 We're talking about a transfer of rights, not a
14 garden-variety police-power case where there's a
15 diminution of the value of the property. This is out and
16 out expropriation of real property rights and a transfer
17 to a favored group of citizens.

18 QUESTION: Mr. Jagiello, why don't you slow down
19 a little bit in your presentation. I think we could
20 follow you more easily.

21 Did this case go to trial?

22 MR. JAGIELLO: No, this case did not. It's a
23 pleadings case.

24 QUESTION: A demurrer was sustained?

25 MR. JAGIELLO: Correct. And we're here on the

1 pleadings. And as a consequence, we have to look to the
2 pleadings. Those are the facts that are properly before
3 the Court. And what do the pleadings tell us? That an
4 ordinance was passed, the tenants were given the right to
5 occupy at a reduced rate. They can sell that right for
6 the first time to an incoming tenant. That they do sell
7 it and that they receive a profit when they sell it by
8 selling the coach for more than it's worth, and that
9 premium value represents the value of the interest of
10 property that are transferred under the ordinance.

11 What is the city's defense to this claim?
12 Stripped of its sociology, it's basically this: that the
13 tenants own a portable structure which they bring onto my
14 client's land on wheels. While it's parked on my client's
15 land, they put it on jacks. And when it gets old enough,
16 or if it becomes obsolescence and the tenant decides to
17 remove it, they put wheels under it again and they haul it
18 off.

19 And the city says, under the circumstances, this
20 is such a unique relationship that we are justified in
21 creating thousands of estates in land in transferring the
22 value to the tenants who own the portable structures.

23 And what are the justifications given for this
24 -- that is (1) it preserves low- and moderate-income
25 housing, and (2) it protects the investment. We need to

1 examine this claim from a number of perspectives. First,
2 three Federal courts of appeal have held this to be a
3 physical taking because it is. The local ordinance
4 requires that we renew and that we cannot terminate any
5 leases for present tenants as well as prospective tenants.

6 QUESTION: Would you describe exactly what it is
7 that is the physical taking here? Because I have a little
8 trouble grasping that.

9 MR. JAGIELLO: Yes, Your Honor, the ordinance by
10 itself achieves this effect. You have -- prior to the
11 passage of the ordinance, the park owner has effective
12 ability to control who will get an invitation onto his
13 land. And if I could put this in context, it is the
14 Florida Power case that says it's the invitation that
15 makes the difference.

16 And Loretto tells us the invitation has to be
17 offered by someone who has the authority to give the
18 invitation. As this Court will recall in Loretto, the
19 prior owner -- the cable company was not a stranger to the
20 premises. The prior owner had given consent to be there.
21 Then Mrs. Loretto came on, bought the property, looked
22 around, told the cable company we're revoking your
23 invitation. And under those circumstances, this Court had
24 no problem in finding that continued occupancy under
25 compulsion of the law, was a physical per se taking.

1 Exactly the same thing occurs here. The owner
2 remains the same, the tenants are different, and the
3 departing tenant who doesn't have the right but for the
4 law invites the incoming tenant in, who's then an
5 interloper with a Government license, and the ordinance
6 causes the owner to become disabled from controlling that
7 access. And the way --

8 QUESTION: So you say the incoming tenant is the
9 one who is physically occupying the property against the
10 will of the owner, corresponding to the cable company in
11 Loretto?

12 MR. JAGIELLO: Certainly the incoming tenant you
13 could obviously argue in a typical rent control case,
14 which this is not, that it's the holdover tenant as well.
15 But the incoming tenant has been invited onto the premises
16 by the departing tenant. He doesn't have the authority to
17 extend the invitation. Before the ordinance was passed,
18 the park owner had the power and the right to control who
19 would get an invitation onto his property because he would
20 exercise that control by insisting that the incoming
21 tenant agree to rental terms. And if that incoming tenant
22 did not agree to the rental terms, the park owner had
23 every right not to allow him onto the property or to
24 extend the invitation.

25 QUESTION: Is every anti-discrimination

1 ordinance a taking of property, then?

2 MR. JAGIELLO: No, it's not, Your Honor, and
3 we're not claiming --

4 QUESTION: But that's what they do. They say
5 you can't keep people off your property or out of your
6 business just because you don't like their race, religion,
7 or nationality. Is that taking?

8 MR. JAGIELLO: We're certainly not claiming that
9 kind of right here.

10 QUESTION: I guessed you weren't, but tell me
11 why it's any different.

12 MR. JAGIELLO: Because there are overriding and
13 overarching values that are to be served.

14 QUESTION: It becomes a taking if there's an
15 overarching -- it ceases to become a taking if there's an
16 overarching value? I thought it was still a taking.

17 MR. JAGIELLO: Well, it can be the case, of
18 course, that the person is there on the premises, but I
19 believe that we finally decided there are purposes that
20 are so substantial and overarching that we can require
21 that people be treated without being discriminated
22 against.

23 QUESTION: Well, we've never held, so far as I
24 know, Mr. Jagiello, that where you're talking about a
25 physical taking, that the governmental purpose made any

1 different at all -- any difference at all, however
2 magnificent it may have been or however poor it may have
3 been. We -- I don't believe we've ever used governmental
4 purpose as a basis for evaluating whether there's been a
5 physical occupation.

6 MR. JAGIELLO: Well, that's true. And in terms
7 of determining --

8 QUESTION: Then how does your answer to Justice
9 Scalia make any sense?

10 MR. JAGIELLO: Well, the problem that I'm facing
11 here is we are facing two fundamental kinds of rights that
12 collide with each other, and that case is not the case
13 that's presently before the Court. And so I can't resolve
14 in an instant the colliding of those particular rights. I
15 don't know how that will come down when that becomes an
16 issue.

17 QUESTION: Well, can't you say that in an
18 anti-discrimination ordinance, something like an ordinary
19 rent control ordinance limits the authority of the
20 landowner. He can't charge exactly what he wants but --
21 in a rent control case. But that -- we've upheld ordinary
22 rent control as not anything like a physical occupation.

23 MR. JAGIELLO: Correct. And this is absolutely
24 unlike ordinary rent control because here the owner of the
25 property loses the ability to decide who's going to occupy

1 his property. The tenant in a typical rent control case
2 does not have the power to determine the identity of the
3 new tenant, to set the terms of the occupancy in terms of
4 its rent, nor do they have the right to sell the -- the
5 right to occupy at a reduced rate.

6 QUESTION: Well, to a large extent, that's true
7 in the anti-discrimination ordinance. Is the difference
8 the loss in value to the owner?

9 MR. JAGIELLO: No, it's not. In the case of the
10 physical taking, it could well be the case that there'd be
11 insignificant loss of value, and it still would be a
12 physical taking. The difference is that we're making --

13 QUESTION: So we're not concerned here with the
14 extent to which the economic expectations and the economic
15 real values of the owner are affected?

16 MR. JAGIELLO: Well, we're concerned, of course,
17 if we look at it as a regulatory taking, which I'll
18 discuss in a few minutes, but we are not concerned with it
19 if it's viewed, as the three lower courts of appeal viewed
20 it, as physical taking, because there the economic
21 consequences are not particularly relevant in resolving
22 the issue of whether or not the -- the conduct is
23 unconstitutional.

24 QUESTION: Also, can I ask one question? It's
25 sort of a background question. As I understand it, some

1 of the restrictions that make ownership costly in this
2 area are imposed by a statute, the California Mobilehome
3 Residency Law. And I understand you haven't challenged
4 that statute. Is it your position that if that statute
5 were repealed entirely that you would still have just as
6 strong a case?

7 MR. JAGIELLO: Oh, of course, because the
8 ordinance itself provides for rent control and eviction
9 control. It states that we cannot refuse to renew, nor
10 can we terminate any lease for present tenants or any
11 prospective purchasers as to all spaces not covered by the
12 Mobilehome Park Residency Law. So that if tomorrow, or 2
13 hours ago, the State Mobilehome Park Residency Law were
14 repealed, the ordinance itself would accomplish exactly
15 the same end.

16 Now --

17 QUESTION: I don't see how the rent control has
18 anything to do with your taking claim. Is that an
19 essential part? I mean, wouldn't it be a taking whether
20 or not they fixed the rents?

21 MR. JAGIELLO: You mean and they allowed the
22 tenant --

23 QUESTION: They just say people in -- people
24 that are currently occupying you must allow to continue to
25 occupy, and you can't turn down future tenants for -- you

1 know.

2 MR. JAGIELLO: If they said that, you may have
3 just a physical taking on that basis. But we have a
4 different mechanism that works here. After the ordinance
5 is passed, the park owner is no longer free to tell the
6 incoming tenant I will invite you on to these premises, if
7 but only if we come to an agreement on rental terms. And
8 if we do not, prior to the passage of the ordinance, the
9 park owner has the right to tell the tenant not to come
10 on. That changes. Once the ordinance is passed, the
11 tenant for the first time is vested with the absolute
12 right to invite the tenant on without a veto power of any
13 kind over the park owner, and the landowner is stripped of
14 his right and his power --

15 QUESTION: Well, it's --

16 MR. JAGIELLO: -- to condition his consent.

17 QUESTION: Excuse me. It's not absolute, is it?
18 I mean, he has the right to refuse if he has reason to
19 believe or reason to prove -- the basis to prove that the
20 new tenant probably won't or cannot pay the rent, or won't
21 otherwise abide by the rules of the park. So it's not an
22 absolute right.

23 MR. JAGIELLO: That's correct, and I stand
24 corrected on that. There are those -- mild -- modern --
25 strike that -- minor abilities on the part of the park

1 owner to still control who comes on. But the plain fact
2 is that the massive loss of control that he experienced by
3 being able to say to somebody, unless we come to terms
4 that are agreeable, you can't come on has been transferred
5 to the tenant, and the park owner himself has been
6 stripped of his right and his power.

7 . QUESTION: But in an ordinary rent control
8 ordinance, which you say you don't challenge, and which
9 the court has upheld, the landowner, the landlord does not
10 have the right to insist on rental terms that he wishes to
11 impose.

12 MR. JAGIELLO: But what he can do is he can
13 still distribute the benefits in a variety of ways. He
14 could give the apartment with its rent control benefits to
15 his friends, to his relatives. He controls the
16 distribution of the benefits, and he doesn't have to
17 accept onto premises any particular tenant as long as he
18 has a reasonable and nondiscriminatory basis for doing so.

19 But here, the landlord can no longer exclude.
20 He has lost the right to exclude, and the ordinance
21 transfers that right, and thus, it's a physical taking.

22 With respect to the --

23 QUESTION: To whom was that right transferred?

24 MR. JAGIELLO: It was transferred to the tenant,
25 Your Honor, who now has the right to determine who comes

1 in by selling his coach.

2 QUESTION: So the transfer is between landlord
3 and tenant, not with the City of Escondido.

4 MR. JAGIELLO: The City of Escondido didn't get
5 the transfer; it causes the transfer. It didn't get the
6 transferred value.

7 We can also look at takings as a continuum, with
8 Loretto on the one end and Agins on the other, and ask
9 ourselves, where we have an expropriation of the right to
10 impose rent increases, collect the rent increases, and
11 keep them, and transfer that right over to the departing
12 tenant, have we reached that point that Hodel v. Irving
13 tells us, that we have a fundamental attribute of property
14 which is expropriated or extinguished? We believe so, and
15 it's a taking.

16 Let's look at Mrs. Morrison's case again. The
17 tenant got \$77,000, which with a cap rate of 10, comes out
18 to about \$650 a month. Her rent was \$340. He took
19 two-thirds of the rent due to the property, pocketed it,
20 and left the premises. And we submit that under those
21 circumstances, that is an out and out expropriation of
22 property and a taking under the Fifth Amendment.

23 QUESTION: But is that different -- I can
24 remember back many years ago during rent control when the
25 tenant could get a lot of money for the furniture when

1 there would be a new tenant coming in.

2 MR. JAGIELLO: Sell the refrigerator.

3 QUESTION: Is that basically different?

4 MR. JAGIELLO: It looks a lot like it. That
5 it's key money -- that's what it was called in an
6 apartment context, and generally rendered illegal.

7 QUESTION: Did that constitute a taking in that
8 context?

9 MR. JAGIELLO: It sure did.

10 QUESTION: It did.

11 MR. JAGIELLO: Yes.

12 And with respect to --

13 QUESTION: What about price controls on theatre
14 tickets. Let's assume a municipality does that and the
15 tickets can't be sold above \$20. And of course, they're
16 immediately scalped for \$100 if there's a scarcity of
17 them. Is that a taking of property?

18 MR. JAGIELLO: Conceivably it could be. I think
19 you have to look at the purpose.

20 QUESTION: You have the same -- it's the same
21 thing that you're talking about here, isn't it?

22 MR. JAGIELLO: Yes, if you look at the purpose,
23 because the purpose is not served of keeping the prices
24 down to the \$10 or whatever the limit was, \$20, on the
25 tickets. Absent a justifying purpose --

1 QUESTION: Any regulation that enables somebody
2 else other than the person who without the regulation
3 would make the profit to make the profit is a taking.

4 MR. JAGIELLO: Not necessarily. Here we have
5 other elements. We've got a transfer of an interest in
6 real property in order to create then the value or the
7 wealth. And that transfer of the interest in real
8 property, that is the right to determine who will occupy
9 it, and an elimination of the right to exclude, makes it
10 fundamentally different than just a price control kind of
11 case.

12 And that's why rent control in this context, in
13 a mobile home park context, involves the transfer of real
14 property interest to people who have personal property.

15 QUESTION: Would the constitutionality be saved
16 if the city went ahead and regulated the -- the price of
17 the sale of the homes? Put a ceiling on it so that the
18 tenant couldn't get it.

19 MR. JAGIELLO: No, it wouldn't. You'd still
20 have the physical taking. It's the departing tenant who
21 can determine --

22 QUESTION: So the profit by the tenant is not a
23 part of your case, then.

24 MR. JAGIELLO: It is a part of our case, but if
25 we -- to address the hypothetical --

1 QUESTION: If you eliminate it by putting a
2 ceiling on, it doesn't solve the problem.

3 MR. JAGIELLO: No, but if you -- I'm just
4 addressing the hypothetical. And that is if you put a
5 limit on the price, you would still have a physical taking
6 because the departing tenant still determines who's
7 invited onto the property, and the owner has lost the
8 power to exclude.

9 Now, under Nollan, we have a -- the test is
10 substantially advanced: a legitimate governmental
11 interest. What is the governmental interest in Mrs.
12 Morrison's case, when a tenant takes \$77,000, puts it in
13 his pocket, and leaves the premises forever burdened with
14 the additional cost of occupancy? I submit there is no
15 public purpose, and if you do it 1 time or 3,000 times, a
16 private purpose does not become a public purpose.

17 But the city also gives us two other reasons.
18 One is to preserve low- and moderate-income housing.
19 That's by and large disappeared from the briefs. We've
20 had two trials on the issue. We proved to the trial
21 court's satisfaction that it --

22 QUESTION: I thought this came up on demurrer.

23 MR. JAGIELLO: Yes, this case did come up on
24 demurrer, Your Honor. I'm referring to the facts in the
25 Azul case, which were noted in the --

1 QUESTION: The what case?

2 MR. JAGIELLO: The Azul Pacifico v. the City of
3 Los Angeles.

4 QUESTION: The Ninth Circuit case?

5 MR. JAGIELLO: Yes, Your -- that's correct, Your
6 Honor.

7 QUESTION: So, when you speak of Mrs. Morrison,
8 you're not talking about a party to this case.

9 MR. JAGIELLO: I'm talking about the example
10 used by Judge Kazinsky in his decision to illustrate the
11 core problem of the case, that there's a massive transfer
12 or wealth to a departing tenant who owns a depreciating
13 asset.

14 And so --

15 QUESTION: Was that based on a trial transcript
16 there?

17 MR. JAGIELLO: Yes, it was. I took her
18 deposition, Your Honor, and what occurred was that she
19 testified she bought the coach. I asked her --

20 QUESTION: All I wanted to find out was whether
21 it was based on a trial transcript. I've now found that
22 out.

23 MR. JAGIELLO: Okay, fine. Thank you, Your
24 Honor.

25 QUESTION: So why is it relevant in this case?

1 MR. JAGIELLO: Because it show what happens in
2 fact, as what is alleged in theory in this case. We were
3 thrown out on the pleadings. We never had an opportunity
4 to prove the facts, but the Azul case provided us with the
5 factual context we need to show how this actually occurs,
6 as opposed to just stating that it occurs as a matter of
7 theory.

8 QUESTION: You've said twice, I think, that
9 three courts of appeals agree with you?

10 MR. JAGIELLO: That's correct. Two Ninth
11 Circuit decisions and the Third Circuit in Pinewood v. --

12 QUESTION: Well, that's not three courts of
13 appeals, that's just two.

14 MR. JAGIELLO: Okay. Two courts of appeal. Two
15 different panels at two different times in the Ninth
16 Circuit.

17 QUESTION: Well, maybe the Ninth Circuit is
18 different.

19 (Laughter.)

20 MR. JAGIELLO: Okay. It could be. When I
21 appear before the different panels, sometimes, it seems
22 like it.

23 In any event, they -- the purpose is to preserve
24 low- and moderate-income housing, we're told. And all of
25 a sudden that pretty much has disappeared because we

1 demonstrated that didn't occur. So --

2 QUESTION: You -- every time -- you say there's
3 been a massive transfer of wealth. Except for the
4 adjective massive, there's always a transfer of wealth
5 whenever there's price control. That's the object of
6 price control.

7 MR. JAGIELLO: That's correct, but what you
8 don't --

9 QUESTION: So every price control does what
10 you're talking about. I mean, the consumer gets wealth
11 which he would otherwise be out.

12 MR. JAGIELLO: But he doesn't get an estate in
13 the provider's land. They didn't give him a life estate
14 in a bottling company. I mean, the reality is that -- I
15 was thinking about Keystone case for a while, and I said,
16 well, there's a possible argument for transfer of wealth.
17 The house if it's up is worth a lot more than it falls in
18 a hole. But they didn't give the owner of the house the
19 right to and mine the coal. It didn't give the owner of
20 the house the right to go and occupy the mine. The fact
21 is that this of necessity involves the creation of an
22 estate in land of another and transfers the wealth of that
23 land to the tenant.

24 And the argument that they then advance is that
25 this is justified because it protects the tenant's

1 investment. That raises at least two factual questions to
2 which we're entitled to a trial. One is, what is the
3 extent of the investment? Ninety-six percent of the
4 coaches in California are 10 to 50 years old. Many of
5 them cost \$5,000 brand new. And if we have a chance to a
6 trial, we'll prove that a lot of the coaches have no
7 significant investment at all.

8 And as well, what we've got is a question: can
9 an end be reached? If you're going to substantially
10 advance an end, it presumes that the end can be
11 accomplished. And we submit, and expert testimony will be
12 offered, you cannot stop a wasting asset from
13 depreciating. It's of the very nature of it, and this
14 ordinance and their justification for it requires that you
15 revoke the laws of economics as they relate to personal
16 property.

17 QUESTION: I'm still a little puzzled
18 on -- assuming that rent control is permissible, what
19 would cure the constitutional violation that you see? The
20 right to pick a tenant and charge him whatever you want?
21 Or the right to just pick a different tenant that you
22 happen to like his looks better or something?

23 MR. JAGIELLO: What cures the problem in this
24 case is to permit the park to raise rent at the time of
25 sale so that they --

1 QUESTION: But then you're attacking rent
2 control, period.

3 MR. JAGIELLO: No, I'm not. What it does is
4 that's the technique and device that the owner has
5 available to select the identity of the incoming tenant,
6 as well as to capture -- there were two sets of
7 rights -- to capture the rights to rents which are
8 otherwise transferred to party in tenant.

9 QUESTION: But the heart of your case, then, is
10 the inability of the landlord to raise the rent when
11 there's a change in the occupancy.

12 MR. JAGIELLO: No, there are two elements to my
13 case. But that will solve the problem. The element of
14 the case --

15 QUESTION: Well, I'm just wondering if it would
16 be constitutional for the city say the same rent shall
17 apply after a change of ownership but you can put in any
18 tenant you want to. Would that be constitutional or
19 unconstitutional?

20 MR. JAGIELLO: That's -- that, it seems to me,
21 is getting closer to a constitutional result, as long as
22 you can choose the tenant, if I understand the
23 hypothetical.

24 QUESTION: Even though you get no monetary
25 benefit out of the choice then? What the monetary loss?

1 MR. JAGIELLO: As -- because the tenant as a
2 consequence -- I presume that part of it also is that the
3 tenant cannot raise -- cannot sell the coach for more than
4 it's worth. Was that part of the hypothetical?

5 QUESTION: The hypothetical simply is that you
6 may pass on any tenant you want, the qualification of the
7 tenant, but you may not raise the rent upon the transfer
8 of ownership.

9 MR. JAGIELLO: Right. That would still be
10 unconstitutional because, as I said, there two classes of
11 rights: possessory interests and the rights to rents
12 which are real property.

13 QUESTION: But under my hypothetical, how is
14 that different from any other rent control ordinance?

15 MR. JAGIELLO: You can select the tenant --
16 because the tenant in a typical apartment situation cannot
17 sell the right to occupancy. And as I understand your
18 hypothetical, the tenant can still charge more for the
19 coach than he would be able to without the --

20 QUESTION: Why can't he sell? He says, I'll
21 leave -- says the tenant, I will leave -- I'm willing to
22 give up my apartment so you can rent it if you give me
23 \$5,000.

24 MR. JAGIELLO: Generally --

25 QUESTION: That sort of thing used to happen

1 during rent control in New York, Washington, Chicago.

2 MR. JAGIELLO: Well, it's been made illegal in a
3 lot of places where we've got new generation rent controls
4 as a public purpose that the legislation wanted to serve.

5 QUESTION: And I'm assuming always that the rent
6 control enables you to get a fair return on your
7 investment.

8 MR. JAGIELLO: Well, that's not the case. What
9 happens that -- in this case, for example --

10 QUESTION: But don't we have to assume it's the
11 case because the ordinance provides for a fair return?

12 MR. JAGIELLO: Well, provides for a fair return,
13 but it also contains a provision that rents are rolled
14 back 2-1/2 years. So I don't know how you get fair return
15 by rolling back rents 2-1/2 years.

16 QUESTION: Well, do we assume that the rent
17 control is invalid because the rents are not high enough?

18 MR. JAGIELLO: I am not making that argument --

19 QUESTION: So don't we have to assume they are
20 high enough to give you a return on your capital?

21 MR. JAGIELLO: Well, the plain fact is they are
22 not high enough. And we've got a 2-1/2-year rollback.

23 QUESTION: Well, you didn't raise that in your
24 petition. You didn't claim in your petition for
25 certiorari that the -- you didn't get a fair return on the

1 profit.

2 MR. JAGIELLO: Absolutely. It's never been part
3 of the case. And --

4 QUESTION: Well, why bring it in now?

5 MR. JAGIELLO: I thought I was asked a
6 question --

7 QUESTION: You're going to win nothing if you
8 bring it in now. I mean, even you win the case, you're
9 going to have a decision that it's not constitutional to
10 fail to provide a fair return on the investment. That's
11 not a big deal.

12 MR. JAGIELLO: Well, I was --

13 QUESTION: We've said that before.

14 MR. JAGIELLO: I thought I was responding to a
15 question, frankly, Your Honor. And --

16 QUESTION: You say that the county has no
17 public -- the public purpose that the county asserts that
18 it has, and I'd like to hear you tell me why that isn't
19 true, is that it is really just counteracting what would
20 be a market imperfection. And that is, when a tenant
21 leaves, or wants to leave, it's very expensive to cart off
22 this mobile home that isn't worth very much money anywhere
23 else, and hence, the landlord can in effect, extract from
24 the would be departing tenant a payment in order to obtain
25 the profit from that inconvenience.

1 MR. JAGIELLO: Well, first of all, you know,
2 this case is here on the pleadings, and those aren't the
3 facts that are part of the record, and they hypothesize
4 that as a purpose. But the reality is that the coach has
5 a certain value, a box value, that's determined by
6 traditional methods of evaluation, like the Kelley Blue
7 Book, and that box value is obtainable whether it's on the
8 pad or off the pad. But that's all the tenant owns.

9 So the maximum exposure that the tenant faces,
10 as pointed out in Hirsch v. Hirsch article, is the cost of
11 moving. And the cost of moving, if it turns out to be
12 \$1,500, translates into a \$12.50 rent increase per month.
13 That's the maximum leverage that the landlord has over the
14 tenant under those circumstances. And for that, you don't
15 give a \$77,000 estate in land in order to protect against
16 that kind of overreaching, which is what is occurring
17 under the present rent control ordinances.

18 I think as well, and somewhat on point there, is
19 that their argument also is a new wrinkle that high rents
20 cause distress sale prices. What the reality is that in
21 fact what we have found, the only systematic study is
22 Hirsch v. Hirsch, that no coaches are selling for below
23 Blue Book value anywhere in the State of California but
24 for two rural jurisdictions, where the plentitude of space
25 is apparently puts a down pressure on the selling price of

1 coaches.

2 But secondly, as a matter of logic, the park
3 owner can only raise rents at the time of sale. He wants
4 the sale to occur and, as a consequence, would facilitate
5 the sale.

6 And third, it violates the close-fit notions of
7 Nollan in any event because if you're concerned about the
8 park owner depressing prices so that he can buy the coach,
9 pass a law that says something like the park owner can
10 only buy at Blue Book value and not less. Or, if you're
11 concerned about a third person coming in, say to the third
12 person -- or say to the park owner, you can only charge
13 rents that are charged in comparable spaces in areas that
14 are near us in non-rent-controlled environments.

15 QUESTION: Now let me just make sure -- so it
16 would be constitutional for the State to pass a statute
17 saying that no more than the Blue Book value can be
18 charged?

19 MR. JAGIELLO: No, you can't buy for less than
20 the Blue Book value if you're the park owner in order to
21 avoid the sales --

22 QUESTION: Suppose my statute -- you have a
23 statute which says the tenant can charge no more than the
24 Blue Book value.

25 MR. JAGIELLO: I don't know if that would be

1 constitutional because what I think would occur there is
2 that the tenant would argue that you -- the ordinance
3 creates the power for somebody else to take their property
4 for less than its value. I mean, it's conceivable. But,
5 you know, it looks like a typical rent control case or
6 price control case to me. I suspect it's a constitutional
7 exercise of power.

8 QUESTION: But in that case, your clients would
9 not receive this value that you're complaining that you've
10 lost here.

11 MR. JAGIELLO: Within the context of a mobile
12 home coach, that's correct that they wouldn't have the
13 monetized rents transferred to the departing tenant, but
14 they would have lost their right to control occupancy,
15 they would have lost the right to exclude. So there's
16 still a taking, even though you control the price of the
17 coach, and it can't be sold for more than Blue Book value.

18 QUESTION: So that it would still be a taking,
19 even if under the rental agreement the tenant as a matter
20 of contract could not sell for more than the Blue Book
21 value when the tenant left. You'd still say there was a
22 taking here.

23 MR. JAGIELLO: No, it depends on what the
24 provisions of the lease were with respect to assignment
25 and a variety of matters like that.

1 QUESTION: Well, what if the only relevant
2 provision were the limitation on sale price to Blue Book
3 value, other things being equal? Other things being equal
4 to what you've alleged, would you still say there was a
5 taking?

6 MR. JAGIELLO: Has the tenant -- does the lease
7 agreement provide that the tenant has the right to assign
8 or not assign? Is that written in lease as well? I don't
9 know because I'm looking at who has the right to
10 decide --

11 QUESTION: Well, I presume the tenant can do
12 exactly what the tenant can do now, except the tenant
13 cannot reap the windfall.

14 MR. JAGIELLO: It still would be
15 unconstitutional if what occurs is that we are limited to
16 controlling the access to the property because we no
17 longer have the ability to essentially act as a veto power
18 by requiring a rental agreement from a new, incoming
19 tenant before they come in.

20 In any event, what you can't do --

21 QUESTION: I think you've answered the question,
22 Mr. Jagiello. Your time has expired.

23 MR. JAGIELLO: Thank you, Your Honor.

24 QUESTION: Mr. Phillips, we'll hear now from
25 you.

1 ORAL ARGUMENT OF CARTER G. PHILLIPS

2 ON BEHALF OF THE RESPONDENT

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

5 Petitioners' counsel has explicitly conceded,
6 both prior to this appearance and here before the Court
7 today, that if this case involved merely rent control,
8 there would be no serious constitutional issue posed.
9 Petitioners, prior to this argument, seemed to have
10 conceded because they did not challenge the State statute
11 itself, that California's residency law, which requires
12 park owners to permit homeowners to sell their homes in
13 place and to lease those properties to an incoming home
14 purchaser, is itself not unconstitutional. I assume that
15 concession to have been based on the Connecticut decisions
16 that this Court has summarily affirmed in the past.

17 QUESTION: I understood him to say that the same
18 -- essentially the same provision was in the rent control
19 ordinance, and that's why he didn't challenge the statute.
20 Do I misunderstand that?

21 MR. PHILLIPS: He did say that. The problem
22 with that argument, Justice Stevens, is that the rent
23 control in Escondido simply fills in interstitially where
24 the State statute otherwise doesn't control. So by its
25 own force, at least as things stand right now, that there

1 is no provision that you could enforce through city law to
2 guarantee the hold over tenants' rights under those
3 circumstances. Those rights are derived from the State
4 law. It's only in those areas where there's no homeowner
5 subletting --

6 QUESTION: He told me the case would be just as
7 strong if they repealed the statute, and you're saying
8 that he just hasn't read the whole ordinance.

9 MR. PHILLIPS: Well, the problem if they repeal
10 the statute is then you have a statutory interpretation
11 question of what it means to say that where the
12 protections of the State law do not apply. And if they
13 don't apply because it doesn't exist, I don't know what
14 the city would do with that particular circumstance.

15 QUESTION: Well, it's one thing to talk about
16 someone -- your opponent's concessions. It's another
17 thing to argue your own case. I think you really argue
18 your own case now. What you're saying is perhaps that he
19 should have conceded, but I agree with Justice Stevens. I
20 don't think he did.

21 MR. PHILLIPS: Fair enough. Although I don't
22 read him to have challenged in any of his briefs directly
23 and exclusively the notion that the holdover tenancy
24 provisions that are embodied in the State law are by
25 themselves unconstitutional. Certainly no -- as I

1 understood his argument, he was saying that there are
2 these two -- two courts of appeals who have reached these
3 conclusions, neither of which has been prepared to condemn
4 the holdover provisions by themselves. And in fact, the
5 Ninth Circuit expressly recognized that that's a very
6 different case. So -- but you may be right. It's not a
7 concession, but it seems to me settled law at this stage,
8 that those two forms of regulation are clearly
9 permissible.

10 Where petitioners, I think, now urge the Court
11 to draw the constitutional line is when these two forms of
12 otherwise perfectly permissible regulation overlap. And
13 in that case, their argument is that this is no longer
14 even a more serious regulatory takings issue under the
15 Fifth Amendment, but that these two forms of regulation
16 are mystically converted into an occupation of physical
17 property, and therefore, requires per se condemnation
18 under the Constitution.

19 There are two fundamental flaws in the
20 petitioners' arguments that will be the main theme of my
21 argument today. First, the presence of more than one form
22 of regulation by a governmental entity may complicate the
23 regulatory takings analysis, but it does not convert the
24 regulatory scheme into an occupation or into physical
25 invasion. And it seems to me it particularly does not

1 raise any more serious constitutional concerns here, with
2 each layer of regulation is designed to protect a segment
3 of the society that is clearly requiring protection by the
4 Government because they are unable economically to protect
5 themselves.

6 This leads me to the second flaw in the
7 petitioners' argument. And that is that they do not have
8 a legally protected property interest that they claim to
9 have been taken. I heard counsel today indicate that
10 there's an estate in land, that there's a property right,
11 that there's a massive shift in economic resources. I
12 heard all of those things. What I never heard from him is
13 what it is that was taken. What is that property interest
14 that the State would recognize --

15 QUESTION: Well, I thought he said it was the
16 right to exclude others from his property --

17 MR. PHILLIPS: But, he has --

18 QUESTION: -- the owner's property.

19 MR. PHILLIPS: Well, he has -- he does say --

20 QUESTION: I understood that was what he said
21 was taken.

22 MR. PHILLIPS: Well, I didn't understand him
23 even actually to have said that. All I heard him say was
24 in more general terms. I do think it's fair to say from
25 his brief that there has been an argument that a right to

1 exclude from the property is a problem. Of course, the
2 difficulty that that poses is that that same right to
3 exclude would create problems in the civil rights laws,
4 and yet he conceded quite plainly that at least on an
5 occupational theory, that those provisions are in no sense
6 placed into jeopardy. And it's simply impossible to
7 reconcile an argument that says that those statutes are
8 clearly permissible, those occupations, in quote, not
9 troublesome at all, and yet this one, which involves
10 simply sort of economic regulation, is suddenly rendered a
11 per se unconstitutional act.

12 QUESTION: I think the argument he's trying to
13 run, I must -- as I understand it, is that it's one thing
14 to eliminate a right to exclude. It's one -- it's another
15 thing to take it from me and give it somebody else. That
16 somehow the latter constitutes a taking even though the
17 former doesn't. And what has effectively occurred here is
18 that the right and the economic value of that right has
19 not just been eliminated, but it's been taken from the
20 park owner and given to the tenant.

21 MR. PHILLIPS: And that's an interesting
22 observation, Justice Scalia, because it's not clear to me
23 he really does say that because in response to a number of
24 questions about what would happen if that amount were then
25 controlled subsequently, what would the outcome be. That

1 way -- so there is no transfer of money from the mobile
2 home owner -- or mobile park owner to the
3 homeowner-tenant. And he said, well, that doesn't
4 eliminate the problem. So that's not a central element of
5 the case at some points. At other points it is a central
6 element of the case.

7 It seems to me that we have here a fairly
8 slippery legal theory. And I submit to you that the
9 reason you have a slippery legal theory is that you're
10 trying to take what ought to be analyzed under a regulatory
11 takings theory -- these are regulations, there may be more
12 than one, but they are, at core, regulations -- and trying
13 to slip them into an occupation theory. And the reason he
14 has to do that is because he's challenged this ordinance
15 on its face.

16 Now, we can listen about Mrs. Morrison, and we
17 certainly heard a lot about her both here and in briefs
18 prior to this case, and we can talk about whether or not
19 it's possible to get out of running a mobile park --
20 mobile home park, and we can talk about whether or not the
21 rents are just and reasonable. But the truth is
22 petitioners chose to bring their challenge facially. They
23 chose to make this an occupation or physical invasion case
24 because they require per se condemnation --

25 QUESTION: At point do you say they chose to do

1 that, Mr. Phillips? Certainly their complaint in the
2 superior court just said a Fifth Amendment taking. It
3 didn't opt for one theory or another. And the complaint
4 was sustained, demurrer was sustained without leave to
5 amend.

6 MR. PHILLIPS: As -- my reading of their
7 complaint, frankly, is that it is a much more focused
8 complaint than what you described, Mr. Chief Justice.
9 They describe in fairly close detail the legal reasoning
10 of the Court in Hall. It follows in the wake of Hall, and
11 it sounds very much like Hall. They had in mind physical
12 occupation theory. But even if they didn't abandon it at
13 that point -- although it's still a facial challenge. It
14 remains a facial challenge.

15 There's no basis upon which to go and examine
16 these property interests in an individualized context,
17 because there's no individual chain -- individual claim.
18 I mean, you can't say that a statute that guarantees fair,
19 just, and reasonable rates is facially unconstitutional
20 because we may not get them.

21 QUESTION: Well, but you said a moment ago in
22 your argument that the purpose of the -- one of the
23 purposes of the statute was to give benefits to people who
24 were economically needful of them. Now, you know, perhaps
25 that's something -- that's an issue that might have been

1 tried, isn't it?

2 MR. PHILLIPS: Well, I -- with all respect, no,
3 Your Honor, I don't believe that's an issue for trial.
4 Because if the State government or the local government
5 makes a judgment that there are individuals within their
6 jurisdiction who require protection -- and that is
7 precisely what this initiative and ordinance were designed
8 to accomplish, and there's no dispute about that part of
9 it; that's what it was intended to accomplish -- it is not
10 the providence of a jury years later to conclude, based on
11 economic theories propounded by the petitioners and their
12 hired counsel to say that the legislature was wrong.

13 QUESTION: You say that is not subject to any
14 sort of review in the courts. That that determination by
15 the legislature --

16 MR. PHILLIPS: I don't say that it's not subject
17 to review by the courts. What I say is it's not subject
18 to factual adjudicatory review by the courts. That is,
19 the legislative judgments of course are open for this
20 Court to analyze, just as the Court has analyzed a whole
21 host of legislative actions, and that --

22 QUESTION: On the rational basis --

23 MR. PHILLIPS: -- the question is the standards.

24 QUESTION: -- the rationale basis for
25 implementing those judgments, no? I mean, at least, even

1 if you don't take testimony, it is certainly open to say
2 that this is irrational. That there is no way that a
3 legislator that had the objective in mind, which you
4 express, would have chosen this as a means to do it.
5 Isn't that argument at least open?

6 MR. PHILLIPS: The means, the relationship
7 between --

8 QUESTION: No rational basis.

9 MR. PHILLIPS: I think it is much more difficult
10 for me to envision the notion that a jury would come back
11 after the fact and conclude that the evidence before the
12 legislators was insufficient to support the legislative
13 judgment and that that's a basis upon which to declare
14 legislative acts unconstitutional.

15 I do agree with you that under Nollan and other
16 takings cases that look for a substantial relationship
17 between the means and the ends chosen, that is subject to
18 a serious inquiry. But again, that's not a jury's
19 inquiry; that is for this Court to undertake. And
20 therefore, it is appropriate to dismiss a complaint at the
21 outset if that court made the judgment that the means-ends
22 relationship was adequate. And that analysis, of course,
23 is subject to subsequent review by this Court. I have no
24 quarrel about that.

25 I don't think, however, the question of whether

1 or not there is a legitimate State interest is a jury
2 issue. As read -- as I read Williams -- Williamson v. Lee
3 Optical, Justice Douglas speaking for the Court
4 hypothesized interests that would not be served.

5 QUESTION: Will you tell us how the means-ends
6 relationship is adequate here?

7 MR. PHILLIPS: Absolutely. Let me say, as a
8 sort of initial matter, it is far from clear to me that
9 the Nollan issue has been preserved and in this case at
10 all. This case came up on a physical occupation theory,
11 and I don't perceive Nollan, which looks to the
12 substantiality of the State's interest and the fit as part
13 of a physical occupation theory. So I interposed that
14 objection initially.

15 But as it happens, the Nollan inquiry in this
16 context seems to me relatively simple. We have a group of
17 residents within the city of Escondido who have placed a
18 tremendous investment. Now Mr. Jagiello can demean that
19 investment if he chooses to by saying it's merely
20 thousands -- a few thousand dollars one way or the other,
21 but the truth is for people who are in the average age of
22 64, a few thousand dollars is a significant investment, I
23 think.

24 QUESTION: Suppose you had a scheme in which the
25 State was a required party to any negotiation. And if the

1 tenancy is sold, the landowner gets the Blue Book value of
2 his improvements and the State gets the balance. Would
3 that be lawful?

4 MR. PHILLIPS: And the State takes that money?

5 QUESTION: Yes.

6 MR. PHILLIPS: For its own purposes.

7 QUESTION: The State takes this premium.

8 MR. PHILLIPS: That sounds sort of strikingly
9 like Webb's -- Fabulous Pharmacy to me, where the interest
10 of the State is unrelated to the money that it happens to
11 be taking, that it doesn't serve any purpose, certainly
12 not a fee, for the benefit of providing the kind of
13 arbitral arrangement --

14 QUESTION: Well, it's related and in the extent
15 to which a premium is going to be paid. It's not going to be
16 given as a windfall to the property owner, if the State
17 considers it a windfall, and it used the money for parks
18 and schools, et cetera.

19 MR. PHILLIPS: It is reasonably clear to me that
20 under Nollan the State would have to -- well, I mean
21 that's -- that may be close -- that's a close question
22 under Nollan, whether or not --

23 QUESTION: Well, isn't the reason that it's a
24 close case is because that there is a property interest
25 that's being affected by this regulation? And the

1 question is whose property interest it is.

2 MR. PHILLIPS: No, I don't believe it's a
3 property interest that's being affected by the regulation
4 any more than in the Interpleader case. You say there's a
5 property interest that's being affected. There's an
6 economic interest that's being affected. Sure, there is a
7 transfer of wealth. But that doesn't answer the takings
8 issue of whether or not there is a protected property
9 right that we have to deal with in a particular way.

10 So I don't know. I don't think it's -- that the
11 natural conclusion that you draw, Justice Kennedy, follows
12 from that particular premise.

13 To get back, Justice Scalia, to the nexus. So
14 we're talking --

15 QUESTION: Basically what I might be telling you
16 is why a rational means of solving the \$1,500 to \$2,000
17 problem of -- that it takes to move the trailer somewhere
18 else or to sell it somebody who will move it, why, in
19 order to do that, you have to place a system that allows
20 somebody to reap a \$77,000 premium in some cases.

21 MR. PHILLIPS: Sure. Okay. That's no problem.
22 The -- it --

23 QUESTION: (Inaudible).

24 (Laughter.)

25 MR. PHILLIPS: It is not simply the \$2,000

1 transport fee that costs. I mean, the truth is it's also
2 \$10,000 to \$15,000 transportation. But it's the entire
3 investment in their home that's at risk at that point in
4 time. They bought the home, they paid for it, and now
5 they're being told by the park owner, you can't go with
6 it. Take your home elsewhere if you want to leave.
7 That's fine. Go take that home. Well, you can't pay to
8 take that home, so you --

9 QUESTION: But that's a circular argument.
10 You're assuming that that's a value that's his. And
11 that's the whole issue in the case.

12 MR. PHILLIPS: That's a value that's whose? I'm
13 sorry, Justice Kennedy.

14 QUESTION: The tenants.

15 MR. PHILLIPS: But -- you mean the investment in
16 his own home? Of course that's a value that's his.

17 QUESTION: Well, that's -- no, that's the issue
18 in the case.

19 MR. PHILLIPS: I don't believe (inaudible), with
20 respect.

21 QUESTION: At the time he signed the tenancy, it
22 was a tenancy for, I take it, a number of years, which has
23 now expired, and the question is whether or not the State
24 can by its laws extend that tenancy and extend the right
25 to sell it so that the economic value that's given by the

1 law is just and is constitutional.

2 MR. PHILLIPS: But this Court has in a whole
3 host of areas involving economic relationships held that
4 those economic relationships in order to serve important
5 State interests must continue on beyond the terms of the
6 contracts. I don't think there is an argument to be made
7 at this point that suddenly in this context where it seems
8 to me the State's interest is, if anything, is more
9 substantial to protect these particular homeowners, that
10 they cannot go on and require this kind of protection.

11 QUESTION: But I'm assuming that absent any
12 State regulation, he could not have this premium because
13 the landlord would have a veto. So you can't just say
14 that he has this -- the tenant, he or she, has this
15 investment. That's the whole issue in the case. The only
16 reason he does is because the pattern of regulation that's
17 now before this Court for review.

18 MR. PHILLIPS: Maybe we're talking about two
19 different kinds of investments. The investment I'm
20 talking about is the investment in the mobile home and
21 purchasing that home in the first instance and placing it
22 into the park and the improvements and the investments in
23 making those improvements. That is sunk-cost investment
24 that a mobile home owner has put down.

25 Now that mobile home owner wants to leave. He's

1 picked up a job someplace else, may have passed away. In
2 any event, has no particular continuing interest in
3 continuing to reside in that mobile home. The problem at
4 that stage is the mobile home park owner is in a position
5 to exploit that situation and say, we're not going to
6 allow anybody else in here at any reasonable rental rate.
7 Which means that the mobile home owner has one of two
8 choices. Either walk away from the substantial amount of
9 money they've placed into their home, or agree to sell it
10 to the park owner at a distress sale. And that was as
11 much recognized, frankly, by Judge Kazinsky's opinion in
12 the Ninth Circuit that -- as any part of the problem.

13 So that is the investment I'm talking about.
14 That is the problem that we need to solve. Now the
15 question is how do you solve that? And do you have to
16 come up with a least restrictive means for solving that
17 problem?

18 QUESTION: No, no, but the fact that there is a
19 pretty easy means, namely requiring payment of no less
20 than the Blue Book value if the tenant leaves the thing on
21 the premises. That's one way to do it. Now, the way you
22 do it is to say the tenant can sublease to anybody he
23 wants at whatever rental he wants, and keep the proceeds.

24 MR. PHILLIPS: Well, no. The problem with the
25 theory there, of course, is that there is no frozen

1 rentals. The park owner is always entitled to a fair,
2 just, and reasonable rental. And if Mrs. Morrison
3 exercises --

4 QUESTION: Yes, but the tenant is entitled to
5 more than a fair, just, and reasonable rental. He's
6 entitled to keep whatever he wants out of the transaction.

7 MR. PHILLIPS: He's entitled to keep whatever he
8 can get out of the transaction. The fact that someone has
9 made a poor judgment, and I would submit that if Mrs.
10 Morrison lived in Escondido, it would be a poor judgment
11 to purchase a home in a situation where the
12 landowner -- the park owner remains free to seek and
13 obtain fair, just, and reasonable increases in his rents
14 and to depart from being a park owner and thereby
15 jeopardize that portion of the investment. It seems to
16 me, that's just a poor judgment on her part.

17 QUESTION: You seem to think that there's a
18 pretty close correlation between fair, just, and
19 reasonable and market price, and there certainly isn't.
20 And that's the whole purpose of price controls.

21 MR. PHILLIPS: I agree with that.

22 QUESTION: The tenant is getting the market
23 price, which very often is quite a bit above what --

24 MR. PHILLIPS: But the point -- the question, as
25 I understand the takings clause, is not what someone else

1 is getting, the question is what has the park owner or the
2 landlord lost. And as I view it, he's lost nothing to
3 which he is entitled. He lost a right to have -- he's
4 lost the right to exploit rents above a fair, just, and
5 reasonable level. But I know of nothing in State law that
6 precludes that.

7 QUESTION: I wasn't talking about the takings
8 clause immediately, I was asking you to explain why this
9 is reasonable regulation. If we're just approaching it as
10 an ordinary regulatory taking case, something that has
11 deprived an individual of the value of his property. Why
12 is this a reasonable regulation at all?

13 MR. PHILLIPS: It seems to me a mistake to
14 divorce the ultimate inquiry of reasonableness from the
15 ultimate purpose of the takings clause. If what we're
16 looking at is not so much worry about the individual
17 homeowner, but the overall interrelationships among these
18 parties, I don't see how it become irrational simply to
19 allow certain -- to allow for a certain windfall.

20 QUESTION: And you say that --

21 MR. PHILLIPS: Any more than it's irrational --
22 I'm sorry, Chief Justice.

23 QUESTION: And you say that so long as the
24 landlord is getting a fair return on the value of his
25 investment, the State can let the windfall, or require the

1 windfall to go somewhere else.

2 MR. PHILLIPS: Absolutely. Just as in any kind
3 of a usury law. I mean, you have your money, you are
4 going to go out in the marketplace and obtain whatever you
5 can as a return on it. The market allow you to go however
6 high you are. But for years it's been well recognized, I
7 think, that usury laws are perfectly legitimate means by
8 which to regulate the relationships between those parties.

9 QUESTION: Because there's no readily imaginable
10 means by which you could achieve the same result without
11 that effect. But here there is. If the result -- if the
12 purpose is what you say it is, this is a ridiculous way to
13 achieve that purpose, to permit this enormous wealth
14 transfer. You have to do it for the purpose of the usury
15 laws, but I don't see why you have to do it here.

16 MR. PHILLIPS: Justice Scalia, I'd -- what I
17 guess I have difficulty with is the assumption that
18 somehow the statute is in its way designed to provide for
19 this huge windfall. It may be a side consequence that in
20 some instances, one extreme instance -- that's the only
21 one that's been identified -- there may be some who get a
22 windfall.

23 QUESTION: But I thought that's the whole
24 theory --

25 MR. PHILLIPS: But --

1 QUESTION: But that's the whole theory of your
2 argument, that it's designed to protect these homeowners
3 who are in this position, the tenancy owners.

4 MR. PHILLIPS: That's true. It's designed to
5 protect them because there are other market conditions
6 that will restrict their relationship between the current
7 homeowner and a successor homeowner. Now that makes
8 perfect sense. I don't see why the legislature is not
9 permitted to allow the ordinary market relationships
10 between homeowner-purchaser -- or homeowner-seller and
11 homeowner-purchaser to restrict those kinds of profits
12 that you identify as so worrisome. I think that that's a
13 perfectly rational basis for the legislature to go.

14 In the landlord-tenant relationship the
15 imbalance is so great that some restraint has to be placed
16 on it. In the homeowner-home purchaser relationship the
17 market will work in a way that will constrain them. And I
18 don't believe that it is a basis in any kind of rational
19 relationship analysis or substantial nexus analysis that
20 converts it back over into the -- into something else.

21 The -- it's important, though, I think, having
22 now spent a fair amount of time talking about Nollan and
23 having started with the argument that Nollan isn't really
24 -- I don't think -- in this case, I don't think it was
25 preserved below. Cert. petition doesn't cite Nollan.

1 Cert. petition doesn't cite Penn Central. I don't believe
2 any of that stuff is properly before the Court.

3 To turn back to the question of physical
4 occupation, if only to identify what it seems to me are
5 the clear flaws in the argument that mere regulation can
6 be magically converted into physical occupation. In this
7 case, it seems to me clear that there are four very
8 serious problems with petitioners' basic argument. One,
9 there is no occupation. The landlord decides to go into
10 the business of offering these properties for rent. That
11 was his choice. He has the choice to get out of that
12 business if he chooses to do so.

13 QUESTION: How realistic is that choice, do you
14 think, able to get out?

15 MR. PHILLIPS: On the face of the statute, that
16 choice seems to me perfectly realistic because it has a
17 reasonable notice requirement to allow the tenants to find
18 alternative housing arrangements. And the only -- the
19 only impediments are the ordinary zoning and land use
20 restrictions that would otherwise apply to any property.
21 So as a practical matter, I don't think that's -- that
22 that's that serious an impediment. And the truth is in
23 most of these cases, and it's true with the appraiser's
24 report that petitioners' own appraiser put forward, the
25 highest and best use for this property, frankly, is as

1 mobile home park. So I don't think that's an obstacle.
2 But at minimum, there is no occupation.

3 Second, this is not a physical act. I mean, the
4 physical occupation cases this Court's identified in the
5 past -- in Loretto, you have the hang -- the wall
6 mountings that are on there. You can physically see it.
7 In Pumpali you can see the flooding waters. Those are all
8 physical acts that the Government authorized in one way or
9 another that destroyed the economic value. This is a very
10 different kind of an animal. This is an economic
11 regulation that looks not like the physical taking.

12 Third, the kind of trial that the petitioners
13 call for in this case looks very different to me than what
14 I would expect for per se analysis. Questions about what
15 are the property values, between when you have one set of
16 regulatory arrangements or another set of regulatory
17 arrangements, and do mobile homes appreciate or depreciate
18 in value, are not the kinds inquiries that I ordinarily
19 associate with a per se kind of analysis. They look like
20 a regulatory type of analysis.

21 And finally, I don't think petitioners have in
22 any way justified, at least in my mind, why it is that the
23 Court would take what has heretofore been a, I think,
24 reasonably useful physical occupation rule that per se
25 condemns certain activities and completely create the same

1 inexactness and uncertainty that's necessarily inherent in
2 the regulatory takings doctrine as the Court recognized in
3 Penn Central.

4 QUESTION: And it's your position, Mr. Phillips,
5 that the regulatory takings aspect of the Fifth Amendment
6 was not raised below, and shouldn't be considered here?

7 MR. PHILLIPS: That's correct, Mr. Chief
8 Justice. I don't believe that it is in this case at this
9 point. However, for the reasons that I discussed earlier,
10 I believe there's no question that at least on a --
11 certainly on a facial level we would prevail on that
12 theory.

13 QUESTION: If we don't decide those issues, I
14 suppose you'd just be back right away, and they'd just
15 re-raise them?

16 MR. PHILLIPS: Well, I'd hope I wouldn't have to
17 racing back in. Mr. Jagiello may be back --

18 QUESTION: I mean, they'll still be fighting
19 about the ordinance, though, on those grounds.

20 MR. PHILLIPS: On those grounds.

21 QUESTION: Yeah.

22 MR. PHILLIPS: I suppose that's right. Although
23 no one has, up to now -- no lower court that has struck
24 down statutes on pure Nollan grounds -- as I said, in the
25 court of appeal's most recent opinion, it analyzed whether

1 or not the protection for this specific homeowner --
2 satisfied the substantial nexus test in Nollan, and at
3 least that court was prepared to hold that it clearly did.

4 QUESTION: Well, it's also easier to justify the
5 sustaining of a demurrer without leave to amend where
6 you're talking about a claim of physical occupation than
7 you are when you're talking about an invalid regulatory
8 taking, I would think.

9 MR. PHILLIPS: I think that would generally be
10 the case, depending on the nature of the facial challenge
11 that you --

12 QUESTION: Suppose the facial challenge is to a
13 rent control ordinance, Mr. Phillips, in which there are
14 limits put on the rent that the landlord can charge, but
15 no limits whatever upon the rents that the tenants can
16 charge in subleasing. Would that be a valid ordinance?
17 Do you think it would be challengeable on its face?

18 MR. PHILLIPS: You mean as an unfair --

19 QUESTION: Well, I don't know what it is. But
20 it just seems very strange to me that the State says we
21 have some interest that we're furthering by preventing
22 landlords from charging more than a certain amount, but
23 their tenants can sublease for whatever they want. Now
24 what possible State interest would that achieve?

25 MR. PHILLIPS: In that context, I'm not sure

1 that there is one. But in my context there is one because
2 the difference here is I have a captive seller -- I mean,
3 a captive individual. The tenant is a captive trying to
4 sell that home. Whoever is asked to come in to purchase
5 that home subsequently is not captive. There's a whole
6 market out there for those people to deal with. And that
7 market can constrain the amount that the --

8 QUESTION: But that's contradicted by the fact
9 that you have price controls. If there's a whole
10 competitive market out there, I don't understand that.

11 MR. PHILLIPS: Well, there are alternatives. If
12 a -- if someone asks --

13 QUESTION: No so many that the State doesn't the
14 State doesn't think it necessary to have price controls.

15 MR. PHILLIPS: But see, it's the choice of the
16 State to decide where there's a problem. I think this
17 city is permitted to make the choice that it sees a more
18 serious difficulty by a park owner imposing his will,
19 essentially, on a mobile home owner at the time of sale
20 than it is worrying about whether the mobile home owner
21 will be able to take advantage of the situation in selling
22 to another market. There -- to another purchaser. In
23 that situation, there is a whole wide range of markets out
24 there to chose from. No one has to buy a mobile home.
25 Once you own a mobile home and it's on a lot, you then

1 have that sunk investment.

2 That difference seems to me a perfectly rational
3 way to distinguish between your cases. Now your
4 sublet --

5 QUESTION: If the State believed that, it
6 wouldn't have price controls. It would say, hey, we don't
7 need price controls because there are a lot of options.
8 The market will take care of that. You don't have to live
9 in a mobile home. You can live somewhere else. We don't
10 need price controls.

11 The very -- the very decision to impose price
12 controls shows that that's not true.

13 MR. PHILLIPS: But the problem -- but that's
14 not -- the question here is not the general rationality of
15 the price controls. The question here is the general
16 rationality of distinguishing, at least as I understand
17 your question, is distinguishing between the unique
18 protections afforded to the mobile home owner and the
19 protections not afforded to the mobile home seller -- or
20 the mobile home buyer -- the -- the second buyer, I'm
21 sorry. And my argument is that their market situation is
22 very different.

23 Now, you can say that you don't think that their
24 market situation is very different, but it sounds to me
25 like the kind of legislative judgment that traditionally,

1 at least, this Court has been extremely deferential to. I
2 think the court of appeal was in this case, and I would
3 urge the Court to affirm.

4 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
5 Phillips.

6 The case is submitted.

7 (Whereupon, at 12:02 p.m., the case in the
8 above-entitled matter was submitted.)

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CERTIFICATION

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NO. 90-1947 - JOHN K. YEE, ET AL., Petitioners V.

CITY OF ESCONDIDO, CALIFORNIA

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BY Michelle Sanders

(REPORTER)