

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: PFZ PROPERTIES, INC., Petitioner V.

RENE ALBERTO RODRIGUEZ, ET AL.

CASE NO: 91-122

PLACE: Washington, D.C.

DATE: February 26, 1992

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 PFZ PROPERTIES, INC., :

4 Petitioner :

5 v. : No. 91-122

6 RENE ALBERTO RODRIGUEZ, ET AL. :

7 - - - - - X

8 Washington, D.C.

9 Wednesday, February 26, 1992

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States at
12 10:56 a.m.

13 APPEARANCES:

14 THOMAS RICHICHI, ESQ., Washington, D.C.; on behalf of the
15 Petitioner.

16 VANESSA RAMIREZ, ESQ., Assistant Solicitor General of
17 Puerto Rico, San Juan, Puerto Rico; on behalf of the
18 Respondents.

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1	C O N T E N T S	
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3	THOMAS RICHICHI, ESQ.	
4	On behalf of the Petitioner	3
5	VANESSA RAMIREZ, ESQ.	
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1 PROCEEDINGS

2 (10:56 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in No. 91-122, PFZ Properties, Inc. v. Rene Alberto
5 Rodriguez, et al.

6 Mr. Richichi. Am I pronouncing your name
7 correctly?

8 MR. RICHICHI: That's correct, Mr. Chief
9 Justice.

10 ORAL ARGUMENT OF THOMAS RICHICHI

11 ON BEHALF OF THE PETITIONER

12 MR. RICHICHI: Mr. Chief Justice, and may it
13 please the Court:

14 The matter before you involves the deprivation
15 of a landowner's right to pursue a use of his property, a
16 use which was approved more than 15 years ago by the
17 Planning Board of Puerto Rico and upheld on the merits by
18 the Puerto Rican courts. The deprivation occurred in
19 August of 1988 when senior officials of the Puerto Rican
20 Permits Authority, that is the respondent ARPE, denied PFZ
21 a construction permit and dismissed its project.

22 PFZ alleges that the dismissal is actionable
23 under 42 USC section 1983 and that it deprived PFZ of a
24 protected interest under the due process clause of the
25 Fourteenth Amendment and that it was a result of behavior

1 by officials acting under color of state law which was not
2 rationally leaded to a legitimate state objective.

3 The conduct which gave rise to PFZ's claim was
4 the deliberate refusal by ARPE to review and process a set
5 of construction drawings which PFZ had submitted to the
6 agency in order to obtain a construction permit. This was
7 accompanied by the dismissal of ARPE's project based on
8 the deliberate review of another different set of drawings
9 which ARPE knew to be the wrong drawings.

10 QUESTION: Mr. Richichi, let me make sure I
11 understand where you're drawing your facts from. The
12 district court granted a motion to dismiss.

13 MR. RICHICHI: That's correct. We are here
14 under 12(b)(6).

15 QUESTION: And therefore, ordinarily we would
16 take the well pleaded facts in the complaint.

17 MR. RICHICHI: That's correct, Your Honor.

18 QUESTION: There was a pretrial order entered,
19 was there not, specifying --

20 MR. RICHICHI: That is correct, Mr. Chief
21 Justice.

22 QUESTION: What is your position with respect to
23 whether that order may be relied on or not for facts in
24 deciding the legal questions?

25 MR. RICHICHI: Mr. Chief Justice, it is well

1 settled law that the pretrial order acts as an amendment
2 to the original amended complaint and is in effect a
3 pleading in and of itself. We raised that issued on a
4 rehearing with the court of appeals. It said that because
5 that issue had not been raised originally in the briefs
6 before the court that it was not going to consider that in
7 its determination. However, it said in the alternative
8 that had it looked at the pretrial order that its opinion
9 would not have changed.

10 I think the Court is free to consider the
11 pretrial order if it deems that it in fact has amended the
12 complaint in connection with the well settled law. We do
13 not think you need to go that far in order to rule in our
14 favor.

15 QUESTION: So you are now drawing your statement
16 of facts that you make to us, then, from the pretrial
17 order as well as from the complaint?

18 MR. RICHICHI: Well, the pretrial order -- we
19 would rely on the amended complaint, Mr. Chief Justice.
20 The pretrial order does reflect the state of the record
21 when the case was dismissed, and therefore in drawing
22 reasonable inferences in favor of the plaintiff we believe
23 that it is context and does provide guidance as to what
24 reasonable inferences were appropriate.

25 QUESTION: That is not to me an entirely

1 satisfactory answer to my question. You're stating that
2 certain facts happened. The Planning Board deliberately
3 read the wrong set of plans.

4 MR. RICHICHI: That's correct.

5 QUESTION: Is all of that derived simply from
6 the amended complaint, or are you relying at least in part
7 on the pretrial order?

8 MR. RICHICHI: Some of the facts that we have
9 relied upon are reflected in the pretrial order. They are
10 also reflected in the admissions that have been made in
11 the papers before this Court and before the court of
12 appeals, but we believe the amended complaint is
13 sufficient to state a claim.

14 QUESTION: Well, it may be sufficient to state a
15 claim, but when you give us these statement of facts are
16 you relying on anything that can only be divined from the
17 pretrial order? Well, don't --

18 MR. RICHICHI: No, I don't believe so. I
19 believe these facts are reflected in the amended complaint
20 and the reasonable inferences that can be drawn therefrom.

21 QUESTION: May I just be sure of one thing? The
22 amended complaint you're referring to is at page 131 of
23 the Appendix? There's only one amended complaint, is that
24 right?

25 MR. RICHICHI: That's correct.

1 QUESTION: And where is the pretrial order?

2 MR. RICHICHI: I do not believe the pretrial
3 order was made part of the Appendix by the parties.

4 QUESTION: So we really don't want to rely on
5 that, then, if we can't have it before us.

6 MR. RICHICHI: Right. PFZ had timely filed the
7 required drawings in February of 1982 for ARPE's
8 processing and review. ARPE did not act on the drawings
9 until 6 years later, and then only after PFZ had sued the
10 agency. Reviewing the wrong drawings, senior ARPE
11 officials concluded, 6 years after the fact, that PFZ had
12 not submitted any construction drawings in 1982 and having
13 missed the deadline for submission the entire project
14 would be dismissed. PFZ submits that this deliberate
15 action cannot be construed to be rationally related to a
16 legitimate state purpose.

17 QUESTION: Well now, you're relying here on a
18 substantive due process violation?

19 MR. RICHICHI: That's correct, Justice O'Connor.

20 QUESTION: We didn't grant cert, I guess, on any
21 procedural due process issue.

22 MR. RICHICHI: We requested that the Court
23 review this case because of the procedural due process
24 violations that we have alleged below. The Court declined
25 to accept that issue, so we are here on the substantive

1 due process issues. But yes, we alleged procedural --

2 QUESTION: Well, on the substantive due process
3 issue do you have to allege a property right in receiving
4 the permit, the construction permit?

5 MR. RICHICHI: We believe that there is a
6 property right that is protected and falls within the due
7 process component --

8 QUESTION: To receive the construction permit?

9 MR. RICHICHI: The property --

10 QUESTION: A right to receive the construction
11 permit?

12 MR. RICHICHI: I would articulate it
13 differently, Justice O'Connor.

14 QUESTION: Well, would you answer my question
15 and then you can articulate whatever you want? Is there a
16 right to receive a construction permit under Puerto Rico
17 law?

18 MR. RICHICHI: Yes, there is.

19 QUESTION: And what is that law? Could I have
20 the citation, please?

21 MR. RICHICHI: That was cite -- the law that was
22 cited was in our reply brief at Note 5, page 4, and it
23 indicates that when the Planning Board has acted and
24 approved a project there is a vested right that accrues,
25 that's 23 Laws of Puerto Rico Annotated, section 71. I

1 believe the full citation is in our brief at Note 5, page
2 4. The Planning Board, having made the policy
3 determination that the use was approved, the ministerial
4 function of the permitting agency was to issue the permit
5 and effectuate that use. If the permit was not issued,
6 then the rights that were granted by the Planning Board
7 had no effect. Therefore, in answer to your question, in
8 this particular circumstance we would say that there is a
9 property right. We would also --

10 QUESTION: And you say that the law that you
11 cite makes clear that there is no discretion at that stage
12 in granting the permit? That you have a right to receive
13 the construction permit?

14 MR. RICHICHI: Yes. The -- if the required
15 drawings are --

16 QUESTION: That it's ministerial only.

17 MR. RICHICHI: That is correct. In fact I would
18 point out that under the current regulations and current
19 law, as the respondents point out in their brief, these
20 drawings are not even reviewed before a permit is issued
21 by the agency, although the agency does reserve that right
22 to do it on a spot basis. But the task is such that the
23 agency no longer even reviews these drawings. The
24 engineer just certifies that they are appropriate.

25 QUESTION: And I take it this substantive due

1 process inquiry does not depend upon any showing that
2 there was a taking of property? And by that I mean a
3 taking of the real property that is in question.

4 MR. RICHICHI: Justice O'Connor, if we're
5 talking about a taking within the meaning of the Fifth
6 Amendment --

7 QUESTION: No, that's Justice Kennedy.

8 MR. RICHICHI: I'm sorry. I apologize to the
9 Court. Justice Kennedy, I was thinking of my answer. The
10 due process clause is distinct from the takings clause and
11 we would submit that in this particular instance there are
12 two different potential claims. The one that has been
13 asserted is the due process claim, the difference being
14 that as the Court pointed out in the first English
15 opinion, takings involves otherwise proper conduct by the
16 government which interferes with property. Here we are
17 talking about misconduct, and in that sense we do not
18 believe that the complaint that we have alleged involves a
19 takings claim. Not that one couldn't be presented, but
20 under these circumstances we are talking about misconduct
21 and that implicates the due process clause.

22 QUESTION: I take it inverse condemnation can
23 sometime arise from improper governmental action, under
24 the takings clause?

25 MR. RICHICHI: The Court has said that, in the

1 takings context, that sometimes regulation can go too far
2 if there is an improper exercise of the police power. But
3 I think the Court has also made clear that there can be an
4 improper exercise of the police power with respect to a
5 substantive due process claim, and in this particular
6 instance we believe that there was an improper exercise of
7 the police power in an adjudicatory setting and that
8 implicates the due process clause.

9 QUESTION: As I recall the court of appeals'
10 opinion in this case, they did not agree with you as to
11 your submission as to the law of Puerto Rico, that that
12 law was so flat out ministerial that it would, that you
13 had a substantive right to a permit once your development
14 project had gotten to the stage it did.

15 MR. RICHICHI: I think the -- as I recall the
16 opinion, Mr. Chief Justice, what the court of appeals said
17 was they were assuming the existence of the property
18 right, and even assuming the existence of the property
19 right under Puerto Rican law that they did not feel that
20 there was a claim that had been stated. So as far as the
21 court below was concerned, both the district court and the
22 court of appeals assumed the existence of a property
23 right.

24 QUESTION: Of the type of property right which
25 Justice O'Connor questioned you about, do you think?

1 MR. RICHICHI: That is -- well, I don't think
2 the court was that specific, but I have to assume that
3 that's what they're referring to when they said we assume
4 the existence of a property right.

5 QUESTION: Well, the court of appeals actually
6 said more than that. It said it isn't all that clear
7 whether there's a property right or not under Puerto Rican
8 law.

9 MR. RICHICHI: I believe that's correct.

10 QUESTION: And do you suppose that, do you
11 suppose the -- is it open in this Court? Is the question
12 open in this Court as to whether there is a property right
13 under Puerto Rican law in the construction permit, or do
14 we have to -- is the only issue before us is if there is a
15 property right, was it taken?

16 MR. RICHICHI: I think the only issue is the
17 latter, if there was a property right, was it taken. This
18 Court has said in the State of Washington v. Roberge that
19 the right to devote one's land to a legitimate use is
20 property within the protection of the Constitution. The
21 Court has more recently said in the Nollan case that the
22 right to build on one's property is not even remotely
23 something along the lines of a government benefit, that
24 there is a right to build on one's property. And that one
25 arose in the constitutional context.

1 QUESTION: Well, stated that flatly, that there
2 is a right to build on one's property, I mean you have to
3 add any number of qualifications to that. There is not a
4 right to build an 8-story office building on property
5 that's zoned for a single-family residence.

6 MR. RICHICHI: That is exactly correct, Mr.
7 Chief Justice. The protected right here at issue derives
8 from the ownership of the land since the right to use the
9 land is one of the most basic sticks in the bundle of land
10 ownership. The -- Puerto Rico, in the statutes that we
11 have cited, recognizes the right to build on one's
12 property and recognizes the right to make use of one's
13 property.

14 QUESTION: Well, Mr. Richichi, I'm having
15 trouble seeing where you draw the line between the
16 property right that you are now describing, I think you're
17 describing, and the property right which you described in
18 answer to Justice O'Connor's question, because I
19 understood your answer to her question to be that the
20 property right you claimed, the denial of which you claim
21 was the property in the permit, you had a right to get
22 that permit and that was denied.

23 And yet as I read your allegations, principally
24 those sort of 36 through 40 in the complaint, I read them
25 as referring to an underlying or antecedent right that I

1 think you are talking about now the right to use one's
2 land. And in answer to Justice O'Connor's question I
3 thought you were narrowing the inquiry and saying no, the
4 right here is just the right to get the permit, having
5 fulfilled certain conditions under Puerto Rico law.

6 But now it seems to me that you're arguing what
7 I thought your complaint argued, an underlying right to
8 use one's property, permit system or no permit system.
9 Which is it?

10 MR. RICHICHI: It is the right that you have
11 described, the underlying right to use one's property.
12 What I was pointing out in response to Justice O'Connor's
13 inquiry was that there is also a property right under
14 Puerto Rican law. But the right upon which we rely is the
15 underlying right to use one's land --

16 QUESTION: Okay.

17 MR. RICHICHI: -- and we believe that the Court
18 has indicated that is within the protection due process
19 clause.

20 QUESTION: And you, would you -- I think you
21 agree but I want to be sure, that your complaint does not
22 set out allegations from which on its face, if we accept
23 them, one could say that you had claimed a substantive
24 entitlement to this particular permit. Your claim rather
25 is they just didn't process it right. They delayed and

1 therefore they denied me the underlying right. Is that a
2 fair characterization?

3 MR. RICHICHI: I think it goes to more than
4 delay, because there was a denial of the permit after a
5 legitimate use had been recognized.

6 QUESTION: But you don't, you don't claim in
7 express terms in your complaint that you had on the merits
8 met every condition necessary to get that permit. That's
9 not what you're relying on.

10 MR. RICHICHI: I believe we do indicate, if the
11 Court needs to go that far we did indicate that the
12 required drawings had been submitted such that a permit
13 could issue. So to the extent --

14 QUESTION: Then I guess you're claiming both
15 kinds of rights.

16 MR. RICHICHI: We believe we should prevail on
17 both rights, that's correct. If it's the right that you
18 have identified or if it's the right that Justice O'Connor
19 has identified, we believe they are both present in this
20 instance. And we would submit that in using or making use
21 of the land that Puerto Rico can subject us to legitimate
22 restrictions under the police power, but that police power
23 is in and of itself subject to legitimate restrictions
24 that have been recognized under the due process clause,
25 and that in fact is where we believe the right has arisen,

1 and we believe --

2 QUESTION: May I ask this question?

3 MR. RICHICHI: Yes.

4 QUESTION: To the extent that you're relying on
5 your response to Justice O'Connor, the specific right to
6 have specific drawings of the project approved, why isn't
7 a state law remedy an adequate protection for that? Why
8 do you have to come into Federal court to get that right
9 protected?

10 MR. RICHICHI: Well, in response to that
11 question we believe that this Court has indicated under
12 Zinnermon that the Federal remedy is supplementary so that
13 we are not required in the substantive due process context
14 to first make use of state remedies, and we would submit
15 that that is the appropriate rule. I believe one circuit
16 has --

17 QUESTION: But you did resort to state remedies,
18 didn't you?

19 MR. RICHICHI: Yes, we did, Justice White.

20 QUESTION: And you were turned down.

21 MR. RICHICHI: We sought reconsideration before
22 the agency advising them, as the court below said
23 unequivocally, that they had reviewed the wrong drawings.
24 The agency proceeded to review the exact same wrong
25 drawings and affirm its opinion. We then sought

1 discretionary review before the Puerto Rican courts of
2 that administrative decision, and the Puerto Rican courts
3 declined to exercise their discretionary review. So we
4 did have a final decision. We sought administrative
5 reconsideration, that was denied --

6 QUESTION: You even, you went to the supreme
7 court too, didn't you?

8 MR. RICHICHI: That was a different
9 circumstance. Yes, we did. Previously we had been to the
10 supreme court with respect to the Planning Board approval
11 and the supreme court approved the Planning Board's
12 approval, and that was some 10 years before. This matter
13 has been, we have been seeking to develop and pursue this
14 property for almost 30 years now.

15 QUESTION: But maybe you're not required to
16 exhaust. I understand your argument there, but are you in
17 effect saying to us that your right is so clear that if we
18 had gone into state court we clearly would have won?

19 MR. RICHICHI: No. We could not have won
20 because the record was corrupted. The Puerto Rican courts
21 exercise discretionary review which only looks to issues
22 of law, excepting the administrative record, on the basis
23 of what has been presented by the agency. In that
24 particular circumstance the agency looked at the wrong
25 drawings and said these are the correct drawings. It is

1 undisputed that they cannot be --

2 QUESTION: But then you filed an action in the
3 Puerto Rican circuit court, or whatever the name of the
4 tribunal is, making these allegations, didn't you, that
5 they had looked at the wrong drawings?

6 MR. RICHICHI: We did bring an action in the
7 Puerto Rican court asking them to exercise their
8 discretionary review.

9 QUESTION: And they just didn't give you any
10 judicial relief at all, or did they rule on the merits
11 that they had looked at the right drawings?

12 MR. RICHICHI: The, it is -- I would compare the
13 procedure to petitioning for certiorari before this Court
14 and it being denied. There is nothing indicated, just the
15 case is not going to be heard. That's its discretionary
16 review, and that is my understanding of the decision that
17 was rendered.

18 We believe that, as I have mentioned, that the
19 Court in the land use context, going back as far as the
20 seminal decision in Euclid and related cases, Nectow and
21 the State of Washington v. Roberge which we have cited,
22 has recognized that the use of one's property, one's land
23 specifically in this instance, is something which falls
24 within the protection of the Constitution. We believe it
25 is --

1 QUESTION: It sounds like you're trying to make
2 a takings claim dressed up as a due process claim. I'm
3 still confused about what it is you're claiming. It's
4 just, it is totally unclear to me what it is you're really
5 claiming here and what property you say has been taken,
6 and what is the nature of the claim.

7 MR. RICHICHI: Justice O'Connor, we do not
8 allege that any property has been taken. We have alleged
9 that a property right protected by the due process clause
10 has been deprived. Again I would draw the distinction
11 between the taking and the deprivation, I think --

12 QUESTION: Is absolute the right to develop the
13 property as proposed by your clients?

14 MR. RICHICHI: No, it is not an absolute right.
15 It is a right to pursue a legitimate use which is subject
16 to reasonable restrictions under the police power. When
17 the Planning Board exercised its discretion --

18 QUESTION: Well, what you really quarrel with is
19 that you didn't get adequate procedural due process.
20 That's what really sounds to me like you're saying, that
21 Puerto Rico, the Constitution requires Puerto Rico if they
22 are going to deny you a permit to review it and have some
23 reason for the denial.

24 MR. RICHICHI: I would respectfully disagree.
25 We could have -- in this particular instance we could have

1 had all the due process, procedural due process we wanted.
2 If they continued to look at the wrong drawings and
3 decided to act as arbitrarily as they did and to say we're
4 looking at this and it is something other than what it is,
5 all the procedural due process, all the hearings in the
6 world ultimately would not have helped us.

7 What we're complaining about here is an act of
8 deprivation. We had a right which had been recognized by
9 the Planning Board to develop that property. It was
10 upheld by the Puerto Rican courts on the merits, and the
11 Puerto Rican supreme court. When we went to the
12 ministerial agency and said here are the required drawings
13 and we, that's as we have alleged in the complaint, the
14 agency, under its directive, was to review those and if
15 they were the required drawings it was to issue the
16 permit.

17 QUESTION: Well, was it still open under Puerto
18 Rican law to Puerto Rico to set aside this area for some
19 kind of wildlife preserve or something of the sort?

20 MR. RICHICHI: Puerto Rico certainly could have
21 enacted legislation to do that. The governor is empowered
22 under certain circumstances to exercise his emergency
23 powers if he thinks there is a danger to the public. And
24 in this particular instance the legislature neither acted
25 nor did the governor exercise his emergency powers.

1 QUESTION: That would have required a taking of,
2 a condemnation of your land if they're going to turn it
3 into a wildlife reserve.

4 MR. RICHICHI: That would have required
5 otherwise proper conduct, Mr. Chief Justice, as this Court
6 said, and that is not what was present here. If Puerto
7 Rico wants to take that property they certainly can do it
8 by legitimate means. However, what happened here were
9 that senior officials acted arbitrarily and in violation
10 of the law, and with what can only be believed to be bad
11 faith, and denied us a permit.

12 QUESTION: What is your best case for the
13 proposition that the bad faith manipulation of procedural
14 processes constitutes a substantive violation?

15 MR. RICHICHI: I think there is bad faith
16 manipulation of procedures in this case because Puerto
17 Rico did not --

18 QUESTION: But what's your best case from this
19 Court, if there is one, indicating that that kind of
20 manipulation constitutes not a procedural due process
21 violation but a substantive due process violation?

22 MR. RICHICHI: I would return to my response to
23 Justice O'Connor's inquiry which I think was the same. No
24 matter what procedures were provided, in this particular
25 circumstance we were not going to get a permit because

1 they were going to look at the wrong drawings and say that
2 you had never submitted the correct drawings. So it's not
3 a matter of procedure. The, this is perhaps the easiest
4 case and the most blatant case of arbitrary conduct to
5 understand. They simply refused to look at what was in
6 front of them and called it something else.

7 QUESTION: Well, based on that statement, what
8 is your, what's the clearest authority from this Court
9 that supports your position?

10 MR. RICHICHI: I think this Court has laid out
11 the standard for evaluating that quite clearly in Ewing.

12 QUESTION: But Mr. Richichi, you have been asked
13 to cite a particular case, what is your best case. You
14 have been asked three times now.

15 MR. RICHICHI: I think Ewing lays out the
16 standard to be applied in that particular instance, and
17 the Euclid, Nectow, and State of Washington cases all,
18 State of Washington v. Roberge, all recognize that there
19 is a protected interest within the due process clause.
20 Ewing was an 8 to 1 decision by this Court in which it
21 laid out the standards, and it indicated that bad faith,
22 the lack of a genuine decision I think was at the heart of
23 the Court's decision there, and I think that is present
24 here without a doubt. There was not a genuine decision --

25 QUESTION: Weren't those all cases where the

1 allegation was that there was a taking under the takings
2 clause?

3 MR. RICHICHI: No, Ewing was a, specifically a
4 case in which this Court assumed that there was a
5 substantive due process protected property interest, and
6 in that case what the Court said was there is, if there is
7 a question as to whether the decision, the adjudicatory
8 decision was genuine, if there is a question as to whether
9 it's in good faith, if there is a question as to whether
10 judgment was in fact exercised by the decision-makers,
11 then you would have, you would meet the test for a due
12 process violation.

13 QUESTION: What's the name of the other party in
14 the Ewing case?

15 MR. RICHICHI: I'm sorry, it's the Board of
16 Regents of the University of Michigan v. Ewing. I
17 apologize, --

18 QUESTION: It's a case in which we rejected the
19 substantive due process --

20 MR. RICHICHI: That's correct.

21 QUESTION: It isn't cited in the Table of
22 Authorities.

23 MR. RICHICHI: I'm looking in the brief.

24 QUESTION: I don't see it here.

25 MR. RICHICHI: It is a case which --

1 QUESTION: This is your best case and it's not
2 cited?

3 MR. RICHICHI: With the Court's indulgence. I
4 am sorry. It's principally -- I apologize to the Court.
5 It's Regents of the University of Michigan --

6 QUESTION: Oh, regents.

7 MR. RICHICHI: -- and it is a principally relied
8 upon case we have cited passim throughout the brief.

9 QUESTION: Thank you.

10 MR. RICHICHI: That is the case that we would
11 point out, we would point to which establishes the
12 standard. Just briefly, if I can describe Ewing, there
13 the Court assumed the existence of a property interest.
14 It was a claim that there was a right to university
15 enrollment, and I think what the Court says, we don't know
16 if that rises to the level of due process, but we will
17 present the standard. And we think we fit within that
18 standard.

19 QUESTION: Mr. Richichi, who are the senior
20 officials that you, that are involved here that you claim
21 acted arbitrarily or in bad faith?

22 MR. RICHICHI: This is the administrator of the
23 agency who is no longer there, there is a gentleman also
24 who was the regional administrator who is now the deputy
25 administrator, and certain other assistant administrators,

1 all senior officials of ARPE.

2 QUESTION: Mr. Richichi, if instead of having
3 the equivalent of cert denied when you went into the
4 Puerto Rican courts the court had taken the case, it
5 considered your claim that they looked at the wrong
6 drawings and had rejected you in bad faith for that reason
7 and had said no. They looked at the right drawings. We
8 find that as a fact, and based on the right drawings they
9 had a right to reject the permit that you were asking for,
10 deny the permit that you were asking for. And you leave
11 the court saying the court got it wrong, the drawings were
12 the wrong ones and if they had looked at the right ones we
13 would have been entitled to the permit. Would you have a
14 substantive due process claim to bring here or to bring
15 into a Federal court?

16 MR. RICHICHI: If I understand the hypothetical
17 correctly, I believe we would, because the remedy under
18 the due, under section 1983 is supplementary, it is not
19 derivative, and therefore if in fact there has been
20 misconduct, and this is just the sort of thing that 1983
21 was intended to prevent, if there has been misconduct by
22 the state and you can't get a fair hearing within the
23 state, then you have access to the Federal remedy. So --

24 QUESTION: But you're calling a fair hearing an
25 unfair hearing, what could also and I think would normally

1 be described as a claimed erroneous hearing. Most people
2 who get turned down think there is something wrong, and
3 that does not make it an unfair hearing.

4 MR. RICHICHI: I understand --

5 QUESTION: And it seems to me in my hypo the
6 State of Puerto Rico, the Commonwealth of Puerto Rico is
7 assuming that you have a property interest there subject
8 to adjudication, and it is giving you process to
9 adjudicate it. You are dissatisfied with the result, and
10 you may even be right that they are wrong, but would that
11 state a substantive due process violation simply to say
12 they got it wrong?

13 MR. RICHICHI: No. Mere mistakes, errors in
14 judgment, or where there is not some deliberate attempt to
15 deprive us of the right through an arbitrary, through
16 arbitrary means not rationally related to a legitimate
17 purpose --

18 QUESTION: Then -- I'm sorry.

19 MR. RICHICHI: Under those circumstances, if
20 it's a mistake or a good faith error or some misjudgment,
21 then I don't think we would have stated a due process
22 claim.

23 QUESTION: Then does your claim therefore here
24 boil down to the fact that they did not give you any
25 process at all and instead simply denied your opportunity

1 to appeal on the merits?

2 MR. RICHICHI: That would be part of it, but we
3 were denied -- there was a decision by the agency denying
4 us a use. I don't know if I would look to the appeal as
5 where the action, the complained of action occurred.

6 QUESTION: Thank you, Mr. Richichi.

7 Ms. Ramirez, we'll hear from you.

8 ORAL ARGUMENT OF VANESSA RAMIREZ

9 ON BEHALF OF THE RESPONDENTS

10 MS. RAMIREZ: Thank you, Mr. Chief Justice, and
11 may it please the Court:

12 I would like to start my exposition going back
13 to what Justice Souter was asking Mr. Richichi. This case
14 from the very beginning has dealt with his claim, with
15 petitioner's claim that he has a property interest in a
16 construction permit. It has -- if we look at the record
17 of the case all throughout the briefings, from the
18 district court on to the court of appeals, never ever did
19 petitioner rely on these zoning cases from the beginning
20 of the century. There is no mention of Nectow, no mention
21 of the Roberge case, no mention of Village of Euclid.

22 This has always been considered by both courts
23 below as a claim that the denial of a construction permit
24 violated both his due process right, procedural due
25 process right, his rights to substantive due process, and

1 his equal protection rights. So I don't think there is
2 anything in the amended complaint that would lead us to
3 believe that he is arguing anything other than he has a
4 right to a construction permit. And our position is that
5 he has not cited to any statute or any regulation or any
6 provision in Puerto Rico law to demonstrate, that is he
7 has not pressed the argument that because he did as the
8 statute provided he was anywhere near the moment where he
9 could get a permit.

10 QUESTION: Well, Ms. Ramirez, I asked this
11 question and was referred, I believe, to Note 5 on page 4
12 of the reply brief and the citation to certain laws and
13 regulations in Puerto Rico that the petitioner says make
14 clear that ARPE, if that's what we're calling it, lacked
15 any discretion other than to determine whether the
16 construction drawings had been assembled and submitted,
17 and that they were required by Puerto Rican law to grant
18 the permit.

19 MS. RAMIREZ: Well, it is not correct as a
20 matter of law, Your Honor. The only -- I don't have it in
21 my memory what issue he was citing in the reply brief. Of
22 course this is after we made a comment in our respondents'
23 brief that he had not pressed an argument that he could
24 derive the property interest from state law. And he is
25 citing to what he calls history, history of the statute.

1 But the only, conceivably the only statute in
2 Puerto Rico, the only disposition of positive law that he
3 could rely on is the one that was examined by the district
4 court in opinion and order, it is page 481 in the Joint
5 Appendix. It says ARPE shall issue the corresponding
6 permit based on the compliance with the regulation
7 provided in this section, and that is 23 Puerto Rico Laws
8 Annotated, section 42c.

9 Again our argument is we have to indulge the
10 petitioner with all favorable inferences that will derive,
11 reasonably derive from his pleadings, because the
12 procedural stance of the case will be on a motion to
13 dismiss.

14 He, the petitioner has studiously avoided to
15 recite the facts of what happened after he made an
16 original submission of plans to ARPE. The complaint has a
17 chronological recitation of facts coming from the Planning
18 Board, which is a different agency, but when he goes to
19 ARPE and he gets preliminary approval for effect of
20 construction drawings he does not, there are no
21 allegations from which we could derive the idea that the
22 permit process was somehow so far along or he has
23 progressed through the progressive steps so that ARPE
24 would have no discretion to withhold the permit.

25 QUESTION: Well, is it your view that ARPE has a

1 wide range of discretion in reviewing construction
2 drawings whether to grant the permit or not, even when the
3 Planning Board has issued its approval?

4 MS. RAMIREZ: Yes, Your Honor, that is our
5 position and in our brief in response, respondents' brief,
6 this is, we cited to the precise statutory provisions that
7 should indicate to the Court that ARPE is a separate
8 agency. The Planning Board will approve the use of land
9 for, of undeveloped land for certain purposes. It gives
10 out the site permits.

11 But ARPE has been delegated with all the powers
12 to decide how you are going to subdivide your land, the
13 subdivision part, which is where construction drawings get
14 into. You have to subdivide your lands in such a way, and
15 this is why you require ARPE to require the endorsements
16 of so many public bodies, so many commonwealth agencies.

17 And the reason this project has not gotten off
18 the ground is because the petitioner refuses to comply
19 with ARPE manual of procedures which says you must bring
20 construction drawings approved by all the, endorsed by all
21 the pertinent agencies. And one of these agencies is the
22 Environmental Quality Board who has been asking since 1974
23 for the filing of an environmental impact statement. And
24 petitioner refuses to do it because he believes that once
25 he got approval to develop the land in that site among the

1 manuals he does not have to comply with that.

2 QUESTION: The court of appeals didn't decide
3 the case on the basis of an argument that you're making
4 now. The court of appeals said well, let's just, we'll
5 just assume that there is a property interest --

6 MS. RAMIREZ: That is correct, Your Honor.

7 QUESTION: -- in this construction permit.
8 Nevertheless, there is no denial of, there is no
9 substantive due, no violation of substantive due process
10 because just refusing to live up to state law doesn't
11 state a claim.

12 MS. RAMIREZ: That's correct, Your Honor.

13 QUESTION: Now, are you defending the court of
14 appeals' basis for denying the substantive due process
15 claim or not?

16 MS. RAMIREZ: I agree that the court below,
17 although it was very skeptical that the petitioner had
18 acquired an entitlement to the permit protected under the
19 due process clause, they assumed for all purposes of the
20 argument that --

21 QUESTION: All right, now let's assume there is
22 a property right in the construction permit --

23 MS. RAMIREZ: What the court of appeals --

24 QUESTION: Now, do you defend the court of
25 appeals' decision that nevertheless there is no valid

1 substantive due process claim?

2 MS. RAMIREZ: I defend it, Your Honor, because
3 something more than an allegation of a 5-year delay must
4 be shown, must be shown, because otherwise this is how a
5 substantive due process is so marvelous --

6 QUESTION: Well, the court of appeals --

7 MS. RAMIREZ: Everything becomes constitutional.

8 QUESTION: The court of appeals said well, even
9 if ARPE, or whoever it was, even if there was a violation
10 of state law --

11 MS. RAMIREZ: State law, yes.

12 QUESTION: -- state law, Puerto Rican law, that
13 doesn't necessarily entitle this developer to relief.

14 MS. RAMIREZ: The standard which the first
15 circuit was using is one that this is not enough.
16 Something more is needed than merely an allegation that
17 they have illegally departed from state law or state
18 procedures. And I defend that standard.

19 QUESTION: You defend that, but you also say
20 that you have another ground, namely that there wasn't any
21 property interest at all.

22 MS. RAMIREZ: Oh, yes, but this is because they
23 assume the property interest. The opinion from the court
24 below also did the same.

25 QUESTION: I take it as a respondent you are

1 saying you can affirm based on the fact, based on the fact
2 that there is no property interest at all in the
3 construction permit.

4 MS. RAMIREZ: The court could do it as a matter
5 of law, but the problem is that when this case comes to
6 this Court it is different. It is no longer the
7 construction permit itself, although that is the precise
8 question in which this Court has granted certiorari. It
9 comes now with a claimed right recognized by this Court in
10 early zoning decisions that says that the landowner has a
11 right to develop his land to any legitimate use.

12 Now, our view now is that as far as petitioner
13 is relying on those zoning cases for that proposition, it
14 is because he is trying to supply the deficiencies in the
15 pleading which should have been where are the statutory
16 provisions in Puerto Rico or the positive law from where I
17 can show the Court that I derived a right to a
18 construction permit.

19 QUESTION: Ms. Ramirez, this perhaps follows up
20 on Justice White's -- the sentence, the last sentence in
21 the court of appeals' treatment of the substantive due
22 process claim says even assuming that ARPE engaged in
23 delaying tactics and refused to issue permits for the
24 Vacia Talega project based on considerations outside the
25 scope of its jurisdiction under Puerto Rico law, such

1 practices without more do not raise to the level of
2 violations of the Federal Constitution under a substantive
3 due process label. So, if we're going to review that
4 judgment we have to make the same assumptions that the
5 court of appeals did, I think.

6 MS. RAMIREZ: That is correct, Your Honor, and
7 that -- yes, we are defending the standard from the policy
8 of U.S. courts, but this is because they assumed the
9 existence of the property interest. It is correct. The
10 thing is --

11 QUESTION: May I just raise a question here?
12 They not only assumed the existence of a property
13 interest, but they also assumed, I guess this is what
14 paragraph 38 of the amended complaint says, they assumed
15 that there were deliberate, totally unjustified delays in
16 processing. It was an arbitrary refusal to process.
17 Didn't they make that assumption too?

18 MS. RAMIREZ: I think the court of appeals did
19 not go beyond the pleadings. It limited itself to the
20 allegations in the amended complaint, and it, there's a
21 footnote on page 1 of the court of appeals' opinion that
22 says we know that the district court went beyond the
23 pleadings and got into the pretrial facts, but we are not
24 going to go beyond that.

25 So the claim that is here before the Court

1 arises from paragraph 37 in the amended complaint, and
2 that's page 1137 in the Joint Appendix, and to that effect
3 both courts assumed that there had been what could be
4 called an undue delay because the plans had been filed 6
5 years ago. But there is nothing about pretextual review,
6 nothing about political considerations or improper
7 motives. None of that is pleaded in the amended
8 complaint. And if we're going to use the standard of
9 review that requires us to look at the propriety of the
10 granting of a motion in our favor under 12(b)(6), we are
11 asking the Court to limit itself to the amended complaint,
12 the allegations. And finally as a matter of law they
13 raise the substantive due process claim.

14 QUESTION: But may I interrupt again? Supposing
15 it's a fair reading of the complaint to say (a) we had a
16 property interest here, and (b) we had an application that
17 was on file in 1982 and they, for no reason at all,
18 refused to process it for 6 years. They weren't corrupt,
19 they weren't, whatever it was, they just arbitrarily said
20 we are not going to process this. Isn't that, on that
21 state of facts does that violate substantive due process?

22 MS. RAMIREZ: Your Honor, substantive due
23 process, if it is conduct that shocks the conscience, a
24 5-year delay I would say does not shock the conscience.
25 It is so open. It is so --

1 QUESTION: Is that the question as you see it,
2 then, whether a government agency can sit on its hands for
3 5 or 6 years without any reason at all, they just aren't
4 going to do their work, whether that shocks the conscience
5 or not?

6 MS. RAMIREZ: Well, Your Honor --

7 QUESTION: Is that the issue?

8 MS. RAMIREZ: -- within the substantive due
9 process context, but the petitioner was mentioning the
10 Ewing case, Regents of University v. Ewing, and this is
11 the case that most closely resembles our case in the sense
12 that because we're not dealing here with application of a
13 means-ends analysis to a piece of legislation, which was
14 what was involved in the zoning cases, what do you have?
15 You have somebody who is unsatisfied with an adjudication,
16 and the only case that comes to my memory is this Regents
17 case, the Ewing case, where this Court, and I believe the
18 decision was unanimous, the Court unanimously assumed the
19 property interest in the continued enrollment in the
20 medical program, then went on to assume that there was a
21 substantive due process claim, that that kind of property
22 qualified for protection under the substantive compartment
23 of the due process clause, and they turned the case into a
24 procedural one. It is judicial review to see whether
25 there are facts that would reasonably support the decision

1 that was made so that it cannot be called arbitrary.

2 So if there is a case where substantive due
3 process and procedural due process overlap, this will be
4 the case. This will be the case. He would need an
5 adjudication to be satisfied that what happened was not
6 arbitrary, that there was some grounds for the decision,
7 and the problem is that he did not get an adjudication on
8 the merits. So they deprived, the courts of Puerto Rico
9 did not give him a chance to appeal on the merits because
10 they denied discretionary review, which does not mean that
11 he doesn't have other adequate state remedies.

12 QUESTION: He says he has no other state remedy,
13 and you say he does have a state remedy?

14 MS. RAMIREZ: Well, he does. He can go into
15 court --

16 QUESTION: An action to make them look at the
17 right drawings?

18 MS. RAMIREZ: -- he has tort damages, and accuse
19 Mr. Rodriguez. The only person here, the only respondent
20 here is Mr. Rodriguez. The allegations have been going on
21 that there is this conspiracy at ARPE, that high level
22 officials were involved. The only respondent here is Mr.
23 Rodriguez. And all of the pleadings in the complaint even
24 sound like respondent superior, that he should answer
25 because he was ARPE's chief, which is a defense that we

1 promoted in the courts below.

2 We really don't -- what he, what petitioner is
3 proposing now would throw away what we understand has been
4 the analysis that this Court does when it is presented
5 with a substantive due process claim. You need to find a
6 fundamental interest, you need to allege an interest that
7 is fundamental in the sense that it is a liberty interest
8 either deeply rooted in the nation's history or tradition
9 or because it is implied in the concept of order liberty.

10 Petitioner is admitting that it does not have a
11 fundamental interest. This he admitted in his brief. Now
12 in his reply brief at page 11, Note 19 he admits that he
13 does not have a liberty interest. So what do we have? Is
14 this the kind of property interest that qualifies for
15 substantive due process protection? Why should he rely on
16 the Court's early zoning decisions? It would be axiomatic
17 to say that a landowner has a right to use his land or
18 devote it to any legitimate use. That's only axiomatic.

19 The Court did say, though, they say that, but it
20 was said in another context when you were, when the Court
21 was examining, according to the economic due process
22 substantive theories, the substance of legislation, the
23 substance of an ordinance, the substance of a piece of
24 legislation, and saying well, it is or not arbitrary and
25 capricious. So he has the Court already doing a

1 referendum for his property right.

2 The Court has already said it, and I would be in
3 an awful position if I would have to argue to Your Honors
4 that the Court has never recognized a property interest in
5 a landowner's desire or wish to devote his land to any
6 legitimate use. So there must be something else involved
7 here. And if we don't have a fundamental interest and if
8 he doesn't have a liberty interest which has been
9 qualifying for protection under the due process clause,
10 then I don't know what he has unless it is a claim that
11 there has been a wrongful adjudication of his claim, which
12 sounds to me like procedural due process.

13 If there are no more questions.

14 QUESTION: Thank you, Ms. Ramirez.

15 MS. RAMIREZ: Thank you, Your Honors.

16 CHIEF JUSTICE REHNQUIST: The case is submitted.

17 (Whereupon, at 11:44 a.m., the case in the
18 above-entitled matter was submitted.)
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

NO. 91-122 - PFZ PROPERTIES, INC., Petitioner V.

RENE ALBERTO RODRIGUEZ, ET AL.

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