ORIGINAL

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: HENRY G. CISNEROS, SECRETARY, UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, ET AL., Petitioners v. ALPINE RIDGE GROUP, ET AL.

CASE NO: 92-551

PLACE: Washington, D.C.

DATE: Tuesday, March 30, 1993

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IN THE SUPREME COURT OF THE UNITED STATES

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HENRY G. CISNEROS, SECRETARY, :
UNITED STATES DEPARTMENT OF :
HOUSING AND URBAN :
DEVELOPMENT, ET AL., :
Petitioners :
v. : No. 92-551
ALPINE RIDGE GROUP, ET AL. :

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Washington, D.C.

Tuesday, March 30, 1993

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:07 a.m.

APPEARANCES:

MICHAEL R. DREEBEN, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Petitioners.

WARREN J. DAHEIM, ESQ., Tacoma, Washington; on behalf of the Respondents.

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P R O C E E D I N G S

(11:07 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in Number 92-551, Henry Cisneros v. Alpine Ridge Group.

Spectators are admonished to remain silent while you're in the courtroom. The Court remains in session. Wait to talk till you get outside.

Mr. Dreeben.

ORAL ARGUMENT OF MICHAEL R. DREEBEN

ON BEHALF OF THE PETITIONERS

MR. DREEBEN: Thank you, Mr. Chief Justice, and may it please the Court:

This case involves a due process challenge to a Federal statute, section 801 of the HUD Reform Act, which revises the process for adjusting rents in the section 8 program. Section 8 provides federally subsidized housing for low-income tenants.

The Ninth Circuit held that the statute abrogates contract rights between section 8 project owners and the Department of Housing and Urban Development. The Court of Appeals therefore concluded that the statute is unconstitutional under the Due Process Clause of the Fifth Amendment.

In our view, that holding is wrong for three

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reasons:

First, the contract right on which the owners base their challenge to section 801, the right to be free of individual comparability studies when rents are adjusted, is not guaranteed by the contracts in question. As a result, the contract claim that forms the basis for the Due Process attack does not exist.

Second, even if the owners had the contract right that they claim, section 801 does not constitute a substantial impairment of that right within the meaning of this Court's cases.

And finally, even assuming that the impairment is substantial enough to warrant further inquiry, section 801 satisfies the Due Process Clause because Congress acted rationally and permissibly in reforming the rent adjustment process in the section 8 program both to reinstate the program's market rent premise and to impose uniform national standards.

Now, the starting point in this case is the assistance contracts that the project owners enter into with HUD or with the local intermediaries. Respondents' claim is that they have a contract right to automatic annual rent adjustments each year based on a published HUD formula.

They deny that under the contracts HUD can apply

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a cap to that adjustment based on the results of what has been called a comparability study, which is akin to an appraisal or a survey of local comparable rents at projects that do not receive Federal assistance.

In our view, the language of the contracts is dispositive. It appears on pages 4 and 5 of our brief.

Section 9 of the contract first provides for adjustments based on a published factor determined by HUD, but the contract goes on to provide what is called an overall limitation, and that limitation states: "Notwithstanding any other provisions of this contract, adjustments as provided in this section shall not result in material differences between the rents charged for assisted and comparable, unassisted units as determined by the Government."

Now, based on that provision, HUD conducted its comparability studies -- surveys of market rents at comparable properties. When HUD concluded that the adjustments that would be produced under the factor technique would produce rents that materially differed from those charged at the comparable units, it used the comparability studies as a cap.

In our view, the contract clearly authorizes this. The entire --

QUESTION: Well, Mr. Dreeben, now, was the

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decision of the Ninth Circuit basically that that provision should be read as requiring the Government to factor in those differences in the published formula?

MR. DREEBEN: That's correct, Justice O'Connor. The Ninth Circuit interpreted this overall limitation as a subordinate guideline for HUD to use in composing the factors, and in our view, that interpretation is wrong for several reasons. First, it's not justified by the plain language of the contract. The contract simply does not say that HUD must use this overall limitation as a methodology for composing the factors.

QUESTION: Well, read in light of the statute, could it be thought to be ambiguous to some extent as to whether they're going to make these comparability studies in the published formula or whether they're going to do it separately in a case-by-case basis?

MR. DREEBEN: The statute itself, in our view, is not ambiguous on the question of whether comparability studies are authorized.

QUESTION: No, I said was the contract ambiguous, read in light of the statute, which contemplated, apparently, that the Government could agree in these contracts to a formula approach to the adjustments?

MR. DREEBEN: No, I do not think that the

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contract is at all ambiguous read in light of the statute. The contract is, if anything, far clearer on this point than the statute.

The contract explicitly uses the words, "notwithstanding any other provisions of this contract," as a way of indicating that when there is a collision or a conflict between the provision dealing with published adjustment factors and the substantive standard that was animating this program -- namely, that rents shall not exceed market-level rents -- that the overall limitation provision takes precedence, and the words that are used there are crystal-clear on that point, I think.

If there is any doubt about what the statute actually meant about it -- and I will concede that the statute is not as precise as the contracts -- the statute is entrusted to HUD to administer, and HUD, exercising the authority that any administrative agency has in this situation, has promulgated a regulation that is entitled, "Overall Limitation," and that sets forth that the comparability rule that is parallel to the statute and is parallel to the contracts is an overall limitation, and the agency has interpreted its authority under that rule as authorizing comparability studies.

Now, the owners in this case have made much of the fact that HUD did not in the very earliest years of

the program conduct comparability studies, but I think that claim really pales against the historical background here.

The program was enacted in 1974. The first published adjustment factor wasn't published until 1976, and when that factor was published, HUD recognized that there could be some problems with the factors, and those problems arose because they cover extremely wide areas.

Exact, precise, reliable market data is not available for every market locality in the country. HUD had to rely on information that they got from the Bureau of the Census and the Bureau of Labor Statistics, and it used that information as a means of devising what it believed would be generally accurate factors, but it recognized that the factors might need to be improved.

Two years later, in 1978, an internal HUD task force report noted that it is HUD's policy that field offices may adjust rents up or down based on the results of an individualized comparability study, and by 1981, HUD had found out that there were sufficient problems in certain areas that required the use of comparability studies in order to ensure that what Congress intended came to pass, namely, that the owners got annual rent adjustments that enabled them to keep pace with the movement of the market.

But in no situation were those adjustments designed to produce rents that were materially in excess of what comparable projects were experiencing in the area, with the one proviso that to the extent that there was any such initial difference when the contract rents were set, it would be preserved.

QUESTION: Well now, why did the Government concede in the Ninth Circuit that section 801 substantially impaired the contract?

MR. DREEBEN: Well, Justice O'Connor, I don't believe that the Government did concede that in any meaningful sense. We did not specifically raise a substantial impairment argument. We argued that the owners have no contract right to formula-based adjustments without the use of a comparability cap. We're arguing that here today.

In the alternative, we argued in the Ninth Circuit that even if there was an impairment of that contract right -- in other words, if the Ninth Circuit had been correct in its Rainier VIew decision -- that still didn't constitute a due process violation, and we gave many reasons for that.

We also, in the lower courts, addressed an alternative takings analysis that had been proffered by the respondents, and many of the elements involved in that

analysis run parallel to the claim we make today, which is that even if the Court were to disagree with us on the contract and find, contrary to our view, in the clear language of the contract that there was a contract right, as the Ninth Circuit saw it, even, still, the Federal statute at issue here doesn't constitute a substantial impairment of that contract right because the statute also preserves the same financial standard that was always in this program -- namely, comparable market rents.

It is respondents' burden, who are attacking the constitutionality of a Federal statute, to satisfy this Court that they have met every element of the test that the Due Process Clause requires, and in our view they have not met the burden of showing substantial impairment.

Now, the Ninth Circuit gave one other reason on the contract that I want to address. The Ninth Circuit concluded that if HUD's reading of the contract were accepted, the election by HUD of the use of a formula would be nullified. That holding does not follow from either the language of the contract or the language of the statute.

HUD continued throughout this program to use the formula as the primary mechanism for adjusting rents. It published the formulas every year, it applied them to the projects, but what it did do was to apply the overall

limitation as written.

Namely, if there was a conflict between the comparability determinations and the formula, then the comparability determination took precedence to the extent of the conflict, and that is not a nullification of the formula, it simply is a qualification on any adjustment that's available to an owner.

QUESTION: It used the proviso only after it had gone through the formulaic calculations.

MR. DREEBEN: That's exactly right, Chief Justice Rehnquist. The comparability survey is the last step of the process, and I think what makes it most clear that this is an independent requirement of the contract is that the contract itself provides two different mechanisms for adjusting rents each year.

First, it provides the factor method which we've been discussing.

Second, the contract provides for special adjustments that any owner can seek when he can show that operating costs at his project and similar projects, or at his project alone, have increased more rapidly than is taken into account by the general factor, and when that happens, he can apply for a specialized increase based on his project alone. If HUD agrees, he gets that increase, subject again to this cap.

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The cap applies overall. It comes at the end of the section dealing with the rent adjustments, and it governs both of the prior mechanisms for adjusting rent that the contract and the statute set forth.

QUESTION: Of course, if you have your formulas set unrealistically enough -- that is, high enough -- you would always have this case-by-case adjustment applicable, which would defeat the whole purpose of requiring the formula.

MR. DREEBEN: I think you're right, Justice Scalia, that if HUD really manipulated the adjustment factor in such a way so that it was never applicable, then this would be a very different case.

QUESTION: And Congress has required in the statute that there be the adjustment formula, right?

MR. DREEBEN: Yes, that's -- it required that there be either the use of comparisons of fair market rentals or a reasonable formula, and HUD elected the reasonable formula approach, but the point here is that the factors in general operation are not inaccurate.

The problem arises because the best information that HUD could get during this period covered broad areas. For example, there was one factor that governs the entire Washington, D.C. Metropolitan Area, which includes Montgomery County, Fairfax County, it includes a variety

of areas in which economic conditions are quite different from each other, and the factor may as an overall matter be working just fine for most of the projects that are located in that region.

But for particular projects, it might be quite out of line, and it was to deal with that particularized problem that HUD adopted the comparability survey technique, it was not as a method of circumventing or abandoning the factors as a whole.

The Ninth Circuit seemed to read it that way, but the record really doesn't support any such claim, and there really has never been a claim in this case that HUD on a wholesale basis disavowed factors. It continues to publish them, and it's attempting to perfect them all the time.

QUESTION: Do we have any idea what percentage of the projects were reevaluated in this fashion?

MR. DREEBEN: The record does not show that, and I don't think that there have been reliable statistics that would be publicly available that would show that kind of information.

But again, I don't think that the respondents have ever claimed that at any point HUD ceased to publish the factors. The Federal Register reveals that they did, and they haven't attempted to claim that most or any

substantial component of the projects that are governed by the factors didn't get the factor increase.

Now, in the alternative, and only if this Court concludes, contrary to the language of the contract, that the Ninth Circuit is somehow correct and what HUD was required to do was not apply the comparability survey directly but to work it into the factors, or to revise the factors in response to a comparability survey, then our alternative submission is that section 801 of the HUD Reform Act does not substantially impair the rights that the respondents had under their contracts.

QUESTION: May I just ask on 801, at the time Congress passed 801, was the Ninth Circuit the only one to have ruled on whether HUD could use comparability studies, or had there been other courts, district courts in other circuits, that had ruled on the point?

MR. DREEBEN: Justice Kennedy, to my knowledge the Ninth Circuit was the only Federal court, the only court to rule on this issue.

There have since the passage of section 801 been three other courts -- the Court of Federal Claims and two district courts -- that have analyzed the constitutionality of section 801, and all three of those courts found that, as we submit, the owners never had a contract-based right to adjustment-formula increases free

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from comparability caps, and they therefore terminated the constitutional analysis at that point.

When Congress confronted the situation, Rainier View was the only Federal court to have ever held that comparability caps could not be used. The district court in that very case had agreed with HUD that comparability caps could be used, but had held that HUD hadn't implemented them properly, there hadn't been national standards -- all of those were administrative law claims which the district court conceptualized under the guise of the Due Process Clause, but the basic thrust was, HUD hadn't done it right.

The Ninth Circuit, on the basis of its reading of the contract language against the background of the statute, announced for the first time that no, HUD, you may not use comparability studies.

Where that left HUD was in an anomalous position. HUD had not, over the years, changed adjustment factors to respond to imbalances that it discovered when it did comparability studies, and under the Ninth Circuit's ruling, the owners were in a position to claim the full adjustment factor increase for each year, the full measure of it, with no comparability constraint, because HUD had misunderstood the way that comparability had to be used, at least as the Ninth Circuit saw it.

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So Congress confronted a situation in which a program that had always been designed to keep rents in line with the market, subject to these adjustment procedures, now had projects in it that could claim the benefit of adjustments that would put it far in excess of the market, and these adjustments would amount to windfalls in the truest sense, because they resulted only because the agency had misunderstood what its financial obligations were under the contracts when it readjusted rents.

Faced with that situation, and faced with the fact that the Rainier View decision was on the books, this Court had denied certiorari, the program had to function effectively as a Nationwide program, and it was now subject to disparate standards, Congress enacted section 801 as a mechanism to restore the basis for adjusting rents going forward and to try to rectify the problems it had identified going backward.

Now, retroactively, what Congress did was to raise the rents of the section 8 project owners who had been limited by comparability studies or who had not actually requested rental adjustments because they feared that they would get negative adjustments through comparability studies, and HUD said that as to -- Congress said that as to those owners, the full factor shall be

applied to increase their rents, but only to the portion of the rents not used for debt services.

So Congress determined to adjust their rents upward to the extent that those rents were affected by operating cost increases, but not to the extent that they were used to cover debt service, which of course hadn't gone up during that period. They may well have gone down, since refinancing is an option.

Congress also provided a floor of 30 percent of the full factor adjustment to make sure that no project owner was really left with just a nominal supplementary payment, and again, Congress did that as a means of rectifying what it perceived as well-founded criticisms of the comparability process, yet at the same time, Congress was unwilling to sanction a full windfall adjustment factor as the owners saw it.

Simultaneously, Congress decided to reform the program going forward on a prospective basis by requiring HUD to do, in essence, as the first level response to rent problems, rent adjustment problems, to do what the Ninth Circuit said -- adjust the factors if you can, construct a modified adjustment factor based on a smaller market area than the large, original going-in adjustment factor, and use comparability studies to achieve that result, and that surely is not an impairment of the contract right even as

respondents claim it, because that's what the Ninth Circuit said HUD was supposed to do.

Only if that fails, and HUD determines that it cannot construct a modified adjustment factor, or even if it does so, the adjustment factor that it constructs fails to achieve the goal of comparability, HUD is then authorized to use another means of employing comparability studies to get to its ultimate objective.

At most, in our view, that is a tinkering with the process and procedure that does not constitute a substantial impairment, because it leaves the owners' financial rights intact and it changes only the way that a comparability study can be used.

HUD always had the right to conduct a comparability study. The Ninth Circuit never disagreed with that, so there's no additional procedural burden put upon the owners by having to be involved in a comparability study. The only question is whether HUD can properly use that study as a second-level response in order to make sure that the factors are achieving the goal of comparability.

The final issue in this case arises only if the Court were to find that there is a contract right and a substantial impairment of that right, and that is the question of whether, notwithstanding those two findings,

both of which we would disagree with, the impairment is sufficiently substantial to warrant its invalidation under the Due Process Clause.

This Court has not, since the 1930's, invalidated a Federal law on the ground that it had impaired contract rights between the Government and a private party under the Due Process Clause, and we submit that this is not an occasion on which that very strong medicine is warranted.

The section 8 program is, at its base, designed to use public funds in order to provide low-income housing through the mechanism of private owners providing the housing and receiving subsidies from HUD.

Two features of this program are critical. The first is that owners are to get rent adjustments each year in order to accommodate changes in the market, and the second feature is that the system was never designed to give the owners above-market rents that would reward them for in effect not being as efficient as the private sector in providing the housing, again subject to the condition that initial differences in the setting of the rents would not be abolished.

Now, the Ninth Circuit's ruling upset the statutory scheme in two distinct ways, and we've discuss them both. The first is that it made it impossible to

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have a Nationwide, uniform system for adjusting rents.

Neither Congress nor HUD was willing to acquiesce in what it believed was a wrong decision and bad public policy, and therefore neither Congress nor HUD wanted to extend the Rainier View approach to the entire Nation, so you had a result of a Nationwide system that was no longer functioning under uniform, sound criteria.

And the second feature of the legal terrain that Congress objected to was that, even where factor-based increases could not achieve the goal that Congress had set for them -- namely, providing fair, reasonable increases each year that were not in excess of comparable rents -- HUD would have been required to grant such increases, and those results were simply unacceptable in the context of a social welfare program that had the purpose of providing subsidized housing for low-income tenants, not to give windfalls to their landlords, and section 801 responded to the situation to put the program back on track.

It restored uniformity to the program's operation, and as we've discussed it did that in large measure by accepting the owners' complaints about the way in which comparability studies were conducted, and it required HUD to put out regulations that would rectify prior deficiencies, and it also reinstated and made applicable retroactively the market rent premise of the

program so that owners would not be the beneficiaries of HUD's mistake -- HUD's failure to recalibrate the factors to the local submarkets in light of comparability, a mistake that would not have been appreciated before the Ninth Circuit's ruling, and HUD did not appreciate.

In our view, those purposes are legitimate and substantial and, in light of the relatively modest impairments that could be said to occur in this case, the rent adjustment mechanisms of section 801 do not infringe the Due Process owners' rights and the constitutionality of section 801 should be upheld.

QUESTION: Mr. Dreeben, could I ask you a couple of questions about your first point? Do you acknowledge that this contract should be interpreted, in the case of ambiguity, against the Government?

MR. DREEBEN: No, Justice Scalia, we don't, for two reasons.

First, that the case -- the United States v. Seckinger, from which that test is drawn, requires that the alternative readings both be reasonable and practicable as well as finding the existence of an ambiguity in the contract, and in our view it would not be a reasonable and practicable alternative to require HUD to adjust the adjustment factors in light of comparability studies if in fact adequate data does not exist to allow

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HUD to do that, and the result would be the contradiction of the statutory mandate of comparability.

So first of all, we don't think that the bare bones of that particular canon are satisfied, even assuming ambiguity, which we disagree with.

The second reason is that this is not simply a naked commercial contract in which the Government went out to purchase widgets. It is a contract that's enacted against the background of a regulatory scheme.

In large measure, the contracts parallel the statutory language, the statutes have been implemented through regulations, the owners knew that this was a program administered by an administrative agency, and in the comparable case of United States v. Fulton, this Court gave deference first to the agency's construction of the statute, and then it applied the same meaning to identical language that was incorporated into a contract.

QUESTION: Well, you're -- you're not saying Chevron applies to the contract.

MR. DREEBEN: Chevron doesn't apply to the contract, Chevron --

QUESTION: You're saying it applies to the statute and somehow gets parlayed into the contract.

MR. DREEBEN: That's correct. When the agency used identical language in the contract that had been used

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in the statute, the agency's interpretation of the statute becomes relevant, otherwise you could have a dysjunction between the same language when contained in the contract document and the regulations. In one case you'd apply the agency's construction --

QUESTION: Well, that's just to say that the agency should be careful when it draws up the contracts.

MR. DREEBEN: I agree, and in this case I think the agency has been careful and has made it unambiguous, but the other principle that applies here is that a party that seeks to apply a right against the Government and to foreclose the exercise of the Government's power to make sure that its programs are working right should also get unambiguous language in its favor, and by no stretch of the imagination did the owners get an unambiguous right to above-market rents when the comparability studies show that the factors just aren't working in that particular case.

If I can --

QUESTION: Is Fulton cited in your brief?

MR. DREEBEN: Fulton is cited in our reply brief, Chief Justice Rehnquist, at --

QUESTION: If it's in your reply brief --

MR. DREEBEN: Page 5. It's on page 5 of our reply brief.

I'd like to reserve the balance of my time.

QUESTION: Very well.

Mr. Daheim.

ORAL ARGUMENT OF WARREN J. DAHEIM

ON BEHALF OF THE RESPONDENTS

MR. DAHEIM: Mr. Chief Justice, and may it please the Court:

One might ask why a person would build a four-unit apartment specially designed for the handicapped and the elderly in the town of Froid, Montana, a town of less than 400 people located in a remote corner of that State. That's one of the projects in this lawsuit.

And the answer is, they built that project because HUD made certain promises, and HUD made those promises in writing, a writing that was drawn by the Government attorneys, a writing which specifically said it was assignable for financing purposes, a writing that specifically provide -- provided that the Government's policies were backed by the full faith of the United States Government.

One of those promises, and the reason why we are here today, was a written promise of annual rent adjustments based on factors published annually in the Federal Register together with the basis of those factors, so that all you had to do was look in the Federal

Register, you got your factor, if it was 5 percent you multiplied that by last year's rents, and there you were for the coming year.

There was no hassle, there was no ambiguity, you didn't have to have a friend at HUD, you didn't have to worry about having an enemy at HUD.

Uncontested affidavits in this case show that these plaintiffs would never have entered into these contracts without that provision. If they had had a clue that somehow HUD was claiming the right, as they did have under section 236, to apply a subjective, project-by-project, unpublished method, they would have run out of the room. This project never would have gotten off the ground.

QUESTION: Well, the clue was in subsection --

MR. DAHEIM: Pardon?

QUESTION: The clue was in subsection (d), wasn't it? You may or may not want to read it the way your brother does, but there is a clue that there's something there that you better worry about, isn't there?

MR. DAHEIM: The Ninth Circuit didn't read it that way. The owners didn't read it that way. The lenders didn't read it that way. HUD did not read it that way for almost 7 years, Your Honor.

QUESTION: Well, why -- as a textual matter, why

is the Government's reading wrong?

MR. DAHEIM: All that does -- what it does not say, Your Honor -- what it clearly does not say is what the statute does now say, and that is that if our factors -- if there's something wrong with the factors that we picked, we can then flip to a different method, a project-by-project subjective --

QUESTION: No, but what about just the text of the contractual terms. What is the nub of your argument that the Government is wrong?

I know you say --

MR. DAHEIM: Well --

QUESTION: The point of the contractual term is that it is indicating the way you ought in effect to construe other possible contractual terms, but what textually supports you in a phrase that begins, "Notwithstanding any other provision of this contract"?

MR. DAHEIM: By the rule, Your Honor, that says you should first make every attempt to harmonize the language, and if you harmonize that language with the beginning language, which says that we have a factor system, that language is easily harmonized, and --

QUESTION: Well, it may -- I guess the problem that I'm having with your position is, I think you're reading the language, "Notwithstanding any other

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provision," as if it read, "In construing any other provision," and it seems to me that by beginning with a "notwithstanding any other" it's a classic example of a kind of override language, which is the way the Government's reading it.

MR. DAHEIM: That language is necessary to find out what those factors are supposed to be.

The first paragraph simply talks about factors. They could be -- if with nothing more, I guess they could be the price of rice, the price of cattle, the price, for instance, of what's happening in operating expenses, for instance, and that, incidentally, was a position that the Government tried to take in 1983, and the Congress told them it was wrong.

QUESTION: Well, I will grant you that there is -- that one of the difficulties in applying the automatic adjustment language is the fact that it doesn't explain on its face what's going to be the basis for the adjustment, but coming back to the text that concerns me, aren't we dealing here with something which, at least on its face, is couched in terms of an override of something else as opposed to a construction of something else?

MR. DAHEIM: Well, that's, of course, buying the Government's language of the word "override," and the word "override" is not in there. The word "trump" is not in

there.

QUESTION: Well, the word "notwithstanding any other provision" is in there, and I am suggesting that I think we usually read this as a kind of -- as a kind of trump, in your term, and why isn't it?

MR. DAHEIM: Webster's Dictionary defines "notwithstanding" as "however," which is a very soft word. It does not define it as meaning "trump," Your Honor. That is a -- there is nothing project-specific in that language as there is in the preceding special adjustment section. The special --

QUESTION: Why is the special adjustment section project-specific? Mr. -- I mean, it doesn't look it to me, and Mr. Dreeben at least represented that the adjustments are calculated and published, I guess I should say, on an area basis rather than a project basis.

MR. DAHEIM: They're published on an area basis. For instance California right now has 13 different factors.

QUESTION: Yes, but in any case, they are not project-specific.

MR. DAHEIM: Oh, no, never were intended -- I --

QUESTION: Maybe I misunderstood you. I --

MR. DAHEIM: That was the whole purpose of this, was to get away, among other things, from section 236,

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which was project-specific, so that what I'm saying here under the special adjustments, it's clearly project-specific. It uses the contract term for the units. In other words, it uses the word, "contract units." You don't see that in the overall limitation. It says, "owners."

The special adjustment is not for general operating expenses, as counsel for the Government indicated, it's for something very specific, and that is, if you are affected, your specific project is affected by taxes and utilities that are out of line for the area and so forth, then you can apply.

Interestingly, after the '89 amendment, they subsequently amended it again in 1990, and that's -- that provision now provides for additional special adjustments if you're running into problems in your project with drugs, and they use specifically the word, "project by project."

QUESTION: Well, I -- maybe I've missed a point along the way. Are you agreeing that the overall limitation, that (d) is in fact a limitation on special adjustments that can be made under (c)?

MR. DAHEIM: Oh, yes.

QUESTION: Okay.

MR. DAHEIM: Under both.

QUESTION: If (d) is a limitation on (c), why isn't it equally a limitation on (b), because the language of (d) starts out by saying, notwithstanding any other provisions, in the plural, adjustments as provided in this section shall not result in material difference, and those adjustments include both the special adjustments under (c), and the automatic adjustments under (b).

So if you agree that (d) is an override to (c), why aren't you committed to agreeing that it's an override to (b)?

MR. DAHEIM: I -- it's used in conjunction with both. It's a guide for both. This is language that you find in the statue itself. To begin with, that is a statute that covers more than one program. It covers not only the new construction program --

QUESTION: Well, just the contract for a minute. I'm trying to understand the terms of the contract, and if (d) is couched in the plural, if its possible referents are (c) and (b), and you agree that (d) functions as an override to (c), or a trump to (c), however you want to put it, why aren't you committed to the conclusion that it also functions likewise with respect to (b)?

MR. DAHEIM: I think it operates differently with respect to the two. With respect to the special adjustments, once again, I would not say that it is an

override. It's a guide to whoever is making those determinations.

It seems to me that the Secretary would have -- it's giving the Secretary a certain amount of latitude. You look at it one way with respect to what is that latitude in the factors, and secondly it seems to me that that Secretary can even go above those factors and make a separate project-by-project determination of what is a material difference when they're faced with an issue on a project-by-project basis of whether they should get a special adjustment because of the tax situation in that -- for that project.

QUESTION: But that's not a notwithstanding thought, it really isn't. That's a -- you know, by the way, in doing it, do it this way. You wouldn't convey that thought by saying, notwithstanding what we've said about the adjustments. You'd say -- you'd say, I don't know, in the course of making those adjustments is what you'd say. You wouldn't say, notwithstanding.

I mean, you say it means "however." I think it means, "despite" -- despite those adjustments, and you're saying, it doesn't really mean "despite," it means "in the process of."

That's basically what you say it means, right?

MR. DAHEIM: That's exactly right, they can --

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they -- pardon?

QUESTION: Webster's says that "notwithstanding" has several meanings, and one of them is "despite," and that is as a preposition rather than as an adverb like you would use it.

MR. DAHEIM: Well, it -- once again, back to the Ninth Circuit's position on this. HUD wants to treat this language as saying these factors are coming out of -- off the wall. They seem to be -- they're totally unrelated to their factors that they themselves select.

They select these factors -- it seems the most logical meaning of that language is that when you are selecting those factors, and clearly they can select the factors and make those determinations, they can come up with subareas, whatever subareas they think are appropriate, but having made that decision, that's where this thing is functional.

Now, actually, it's sort of strange, because the Government -- another branch of the Government was here last week arguing basically my position in another case, saying that we have a framework. My Lord, how can we go to ad hoc, standardless determinations after the fact?

Now, that's exactly the position that they are arguing for here, ad hoc positions without a standard whatsoever, and that's what they did. They didn't publish

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regulations on it. It was at the whim of the local office, and if there was anything that these owners were paranoid about, and with good reason in retrospect, was being subjected to a project-by-project subjective analysis.

Now, we can sit here 20 years afterwards and pick the bones on this stuff, but this language does not give a clue that they can depart from their own factors and on an individual basis go on out and tell you now you're not only not going to get your factors, but let's quit using the word "cap" -- they cut the rents out there.

Now, that was the position. Our position was the same position as HUD had for 7 years. They published regulations on it. They told their local offices how to deal with -- if they were having problems out there --

QUESTION: You say it's their position. You mean they just -- they would say they just didn't invoke (d). Is there anything to say that they thought (d) meant what you say it means, other than the fact that they didn't choose to use it?

MR. DAHEIM: Well, not only did they publish regulations, they published a handbook telling their local offices how to do it, and I'm suggesting in the affidavits we filed, Your Honor, that that's -- they were giving seminars and telling the owners that that's what it meant.

And in '81, when the program's dead, when politically it's unpopular, when it's not a production device any more, with these owners now trapped into these 20-year contracts, then's when they come along and say, we can sit in our office, call around, and if we can find some rents cheaper than yours, we can cut your rents.

Now, how you get that out of this contract that should be construed in favor of the owners, not the Government who drafted it -- as I say, what is very revealing is that now under 801, when they wanted to make something clearer, they did make it clearer, and now that statute reads that if the Secretary, after publishing all of these factors, then finds that applied to a particular project -- the words particular project -- then they can use an alternate methodology.

Well now, if that was in there, we wouldn't be here, because you wouldn't have a program.

For 7 years, the economic and marketing analysis division of HUD each year -- and these fellows are experts -- carefully selected factors and areas for this country.

In addition to that -- and I would suggest that you look at the back of our response to the Government's petition for cert, in which we published those methodologies from '80 and '81, to give some flavor of how

carefully they went through those -- that exercise. They were statistically accurate.

They tell their local field offices, starting in 1976 when they first published these factors -- they publish the factors, and they tell the public, look, maybe there's a better way to do this. Let's have your suggestions. The next year they come out and they revise 24 CFR 888.202 to say to the local offices once again, if these factors are not good for your area, publish another factor, and that's what they can do, and of course that's what they have been doing.

And then after 7 years, when they don't need this program any more for these people, and they're trapped into it, all of a sudden they start making these ad hoc and capricious studies, and once again I would refer you to appendix A of our brief that gives an example of the process that was described by an MAI as farcical. Farcical.

QUESTION: Well, it's not as though there's any presumption of accuracy given to these studies that they conduct, right? I mean, I understand it costs you money, I suppose, to contest their comparability studies, but what is the status of the comparability studies? Doesn't HUD have to bear the burden of establishing that the regular standard factors do not provide adequate rent?

MR. DAHEIM: No. You have -- you have no -- what happened -- and they didn't send appraisers out. I mean, that's -- they didn't send appraisers. They call around and they get cheaper rents and they tell you, and then they say, you can challenge it.

They have no procedures for challenging the thing. You'd go up there, and I went up there -- I brought a court reporter up there. They wouldn't let me cross-examine anybody. You're in front of the person who just cut your rents, arguing that they made a mistake, and where do you go from there?

You bring an MAI appraiser in. They don't have to listen to that appraiser, and they didn't listen to these appraisers. You're completely at their mercy.

QUESTION: Well, I can't believe you don't have a -- don't -- you have no right to have an administrative law judge determine the accuracy of this?

MR. DAHEIM: No. There was nothing. They had no regulations, they had no system, they had nothing. They still don't have it. They finally, after almost 4 years after 801, under which they were supposed to publish regulations for comparability within 6 months, they finally in October of last year finally published some proposed ones.

I understand they're having such big problems

already, they still haven't published final regulations --

QUESTION: Well, then -- then --

MR. DAHEIM: But that doesn't give you any procedure.

QUESTION: Then you come into district court when your rent is cut, and you say that the Government hasn't established that in fact the adjustments resulted in material differences, and the burden would be on HUD to establish that it does, wouldn't it?

MR. DAHEIM: I would not think so, Your Honor.

QUESTION: But that wasn't the basis on which the Ninth Circuit decided in your favor --

MR. DAHEIM: No. No, absolutely.

QUESTION: The insufficiency of review procedures.

MR. DAHEIM: That's exactly right. The trial court did. We went on with the trial court, and the trial court found that what they were doing was completely standardless and violated the Due Process Clause. That was not appealed. Well, it was appealed, but that appeal was dropped by the Government.

The Ninth Circuit basically said, look, the statute provided for an objective, or formula system, and a market studies system, and we're not going to let you go through the back door now after having made that election,

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and that's how it's construed, the so-called overall limitation.

Going on to the -- assuming the contract right, after that HUD said we will now comply with that in the Ninth Circuit. Of course, they didn't. They went to Congress and they had this provision tacked on to the housing reform bill of 1989, which basically, in essence, tells the Ninth Circuit they're wrong, and gives these people who have already been victimized by HUD approximately 30 percent of what they were entitled to, and prospectively tells HUD that they can do now, again in the future, what the Ninth Circuit has now told them they cannot do.

QUESTION: They made a new contract.

MR. DAHEIM: They made a new contract, absolutely. Absolutely. If -- first of all, this right is vested, and that goes into the -- basically, the --

QUESTION: 30 percent -- you would get 30 percent of what you would have claimed under the formula forever.

MR. DAHEIM: Well, what -- well, that's until they publish their new regulations, and since those still aren't out, you would continue to get only 30 percent until whenever these new regulations come out, finally.

QUESTION: Well --

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MR. DAHEIM: That's sort of a shorthand. What they specifically said is that you will get your factor, but not on the full dollar amount of the rent. You will get it on the full dollar amount less your mortgage amount.

So in other words, the only person who gets the full factor amount is if you're mortgage-free, if you're debt-free. If you've got a 70 or 80 percent mortgage on there, you get the factor only based on your 20 percent. I mean, where they came up with that, it's -- that isn't, in fact, irrational. The response is irrational. If they were dealing with bad factors, you would go on out Nationwide and talk about -- and have some response that addressed these factors.

I mean, even if you were talking about windfalls in some kind of a way, you would do like they did in '76, when the oil prices went up, and in some rational basis try to determine who got windfalls and who didn't, but this thing is completely irrational. All it concentrates on are these poor folks who already had this process imposed upon them.

Let me get back to Justice Scalia's comment once again on the process, because I want to talk again -- and I gave this example of this fellow in Froid, Montana, to give some kind of a feel that this isn't some big city

thing.

That guy in Froid is a member of this class because he could afford to be part of a hundred people. He couldn't afford to challenge HUD, and they know it. You can't get an appraiser, you can't get an attorney, you can't go through that process, and that was supposed to be the beauty of this thing.

Let's get the private sector to go on out and do what we bungled. We bungled it with public housing, we bungled it under section 23 where we tried to manage these projects, we bungled it under section 236 and wound up having to take these things back.

It was a process where the owner was supposed to make money or lose money. The owner was supposed to go on out and get his own financing, so if the project goes into default the Government doesn't wind up with it, and the only way they could sell that was to tell these owners, we're going to give you a rent adjustment process that we're not going to have our finger in.

QUESTION: And they -- I suppose you'd say they weren't about to listen to suggestions that the contract terms ought to be changed because, say this man in Froid -- does that mean -- that's F-o -- F-r --

MR. DAHEIM: F-r --

QUESTION: -- o-i-d?

MR. DAHEIM: F-r-o-i-d.

QUESTION: That's cold, isn't it?

MR. DAHEIM: Pardon?

QUESTION: Cold in French.

MR. DAHEIM: Oh, I'm sorry, I talked to the owner and he said it was Froid. He lives up in Plentywood, by the way.

(Laughter.)

QUESTION: Well, I suppose that if this man in Froid could have hired a lawyer and he read that contract, he certainly should have a -- he certainly should have wondered about that notwithstanding clause, and he -- it probably wouldn't have done him a bit of good to suggest to HUD we ought to take that provision out. I guess Froid -- I guess HUD would say, take it or leave it.

MR. DAHEIM: Well, I mean, he just wouldn't have gone into the program.

QUESTION: Yes.

MR. DAHEIM: And our evidence is that nobody would have gone into this program, because that was the essence -- that was the essence of that program.

I do want to respond to the issue on deference, however --

QUESTION: Go ahead.

MR. DAHEIM: Because it was raised before.

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First of all, Seckinger says that you do give deference to the customer and not the Government, who, of course, draws the contract.

City of Fulton, which they -- they're spouting Chevron in their primary brief. I respond to it obviously as inapplicable, and then of course they come back in their reply brief when I can't answer it and put in the City of Fulton.

The City of Fulton, however, is not applicable for two or three reasons. Number 1, it seems, Your Honor, that the contract did nothing more than mirror that statute. This contract does something more than mirror the statute. It has a choice in the contract.

Number 2, in Fulton, they said that there was no other evidence of what the parties' intent was. Here there is other evidence. We hav affidavits, we have their position, we have the regulations on the thing, and thirdly, Your Honor, you'd have to ask what -- deference to what? Their position has moved three times, and now Congress has said there is a fourth position that you should adopt, and they still haven't adopted it.

QUESTION: Mr. Daheim --

MR. DAHEIM: Yes.

QUESTION: Do you agree with Mr. Dreeben that this has not been a general revision of everybody's rents?

I mean, is it just spotty, or have they done this in such a thoroughgoing fashion that you can say that the annual adjustment factors don't really mean anything any more?

MR. DAHEIM: Mr. Dreeben is right, there's nothing in the record to indicate that.

My understanding is, I mean, it's pretty much whatever the local offices -- if you wanted to be a hero, you went out and did it.

QUESTION: Has the program, you say, been discontinued?

MR. DAHEIM: Pardon? No, the program has not -- it's just not used any more. It's still there, but it hasn't really been used since '81 as a major vehicle for production any more.

They -- in '81 they made some other changes to the thing that really cut -- they made it a limited dividend program, for instance, and they -- then they did start to also furnish some mortgages. It becomes a tax shelter program which was not the program that it started out to be and not the program under which this contract was drafted.

Well, as long as I still have a couple of minutes here, I will go on with the -- on the constitutional side, they asked on -- was there a substantial impairment. That is a mixed question of law

and fact. That's something that's determined at the trial level.

We put in affidavits. If they had some complaints about that, if they had some objection to that, they should have objected at that time. We could have had a trial. For instance, in the U.S. Trust v. New Jersey, they had an extensive trial. You build a record as to whether or not it is substantial.

We claim it's substantial because it was not only a material inducement, it was a critical inducement. That seems to be the rule under Worthen v. Kavanaugh, under the El Paso-Simmons case.

How substantial is it? I don't think the Government could contest the fact that these owners would simply not have entered into this contract without this provision.

Finally, on purpose, we think that whatever the level of scrutiny, we think it should be careful, at least, because the Government is here dealing with its own contracts, but on -- even on a rational basis analysis, the Government cannot do this simply to save money, and that is basically their only reason.

The only other reason they now give is uniformity, which is a euphemism for saying that we want to be able to break our contract with everybody.

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If there are no further questions, I thank this Court very much.

QUESTION: Thank you, Mr. Daheim.

Mr. Dreeben, you have a minute remaining.

MR. DREEBEN: Thank you, Mr. Chief Justice. We will waive rebuttal.

CHIEF JUSTICE REHNQUIST: Very well. The case is submitted.

(Whereupon, at 12:04 p.m., the case in the above-entitled matter was submitted.)

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Henry G. Cisneros, Secretary, United States Department of Housing and Urban Development, et al., Petitioners v. Alpine Ridge Group, et al.

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BY Ann Marie Federico

(REPORTER)