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## **Appendix to Amicus Curiae Brief: Escondido Municipal Code § 29-104(g)**

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# FOREWORD: HOW FAR IS TOO FAR? THE CONSTITUTIONAL DIMENSIONS OF PROPERTY

*Roger W. Findley\**

Private property is the principal institution adopted by Western societies to allocate land and other scarce resources among private persons, as well as to provide individuals some security against governmental domination. The United States Constitution provides that private property shall not be taken for public use without just compensation.<sup>1</sup> However, the definitions of “property” and of what constitutes a “taking” are elastic, and have been expanded and contracted by the United States Supreme Court over the years.

In *Pennsylvania Coal Co. v. Mahon*,<sup>2</sup> decided by the Supreme Court in 1922, Justice Holmes said, “[t]he general rule . . . is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”<sup>3</sup> The continuing issue since that time has been, when does regulation go too far?

Two cases heard by the Supreme Court this term provided opportunities for the Court to give substantial guidance concerning the resolution of this issue. They are *Lucas v. South Carolina Coastal Council*<sup>4</sup> and *Yee v. City of Escondido*.<sup>5</sup> Briefly stated, the facts in these cases are as follows.

David Lucas purchased two vacant oceanfront lots zoned for single family houses. Thereafter, to combat erosion, South Carolina enacted a Beachfront Management Act limiting construction within the beach/dune system. As applied to the Lucas lots, the Act prohibits, through statutorily mandated setback lines, construction of any permanent structure other than a small deck or walkway. Lucas sued in the state court, claiming that the Act constituted a taking of his property without just

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1. U.S. CONST. amend. V.

2. 260 U.S. 393 (1922).

3. *Id.* at 415.

4. 404 S.E.2d 895 (S.C.), *cert. granted*, 112 S. Ct. 436 (1991).

5. 224 Cal. App. 3d 1349, 274 Cal. Rptr. 551 (1990), *review denied*, 1991 Cal. LEXIS 353 (Cal. Jan. 24, 1991), *aff'd*, 60 U.S.L.W. 4301 (U.S. Apr. 1, 1992).

compensation. The trial court agreed and awarded him \$1.23 million. However, the state supreme court reversed, holding that there is no taking when a state regulates land use to prevent a serious public harm.

John Yee owns a mobilehome park. In 1988 the City of Escondido adopted a rent control ordinance limiting the amount by which park owners could increase rents, even when tenants sell their mobilehomes. Under the California Mobilehome Residency Law, park owners are required to accept the successor tenants who purchase mobilehomes unless they lack financial ability to pay the rent or have demonstrated an unwillingness to comply with park rules. Yee filed suit in the state court, claiming that because of the ordinance, selling prices of used mobilehomes increased dramatically. He contended that the Escondido ordinance constitutes a "taking" because it enables selling tenants to capture for themselves the monetary value of living in the rent-controlled park, thereby working a transfer of this monetary interest from the park owner, who normally would capture the value through increased rent. The California trial and appellate courts rejected Yee's claim.

On April 1, 1992, the Supreme Court decided *Yee* but ducked the "regulatory taking" issue:

We granted certiorari on a single question pertaining to the Takings Clause: "Two federal courts of appeal have held that the transfer of a premium value to a departing mobilehome tenant, representing the value of the right to occupy at a reduced rate under local mobilehome rent control ordinances, constitute[s] an impermissible taking. Was it error for the state appellate court to disregard the rulings and hold that there was no taking under the fifth and fourteenth amendments?" This was the question presented by petitioners. It asks whether the court below erred in disagreeing with the holdings of the Courts of Appeals for the Third and Ninth Circuits in *Pine-wood Estates of Michigan v. Barnegat Township Leveling Board*, and *Hall v. City of Santa Barbara*. These cases, in turn, held that mobile home ordinances effected physical takings, not regulatory takings. Fairly construed, then, petitioners' question presented is the equivalent of the question "Did the court below err in finding no physical taking?"

Whether or not the ordinance effects a regulatory taking is a question *related* to the one petitioners presented, and perhaps *complementary* to the one petitioners presented, but it is not "fairly included therein." Consideration of whether a regulatory taking occurred would not assist in resolving whether a

physical taking occurred as well; neither of the two questions is subsidiary to the other. Both might be subsidiary to a question embracing both—Was there a taking?—but they exist side by side, neither encompassing the other.<sup>6</sup>

The Court held that there was no “physical taking” because the City of Escondido had not “require[d] the landowner to submit to the physical occupation of his land. . . . Petitioners voluntarily rented their land to mobile home owners.”<sup>7</sup>

At the time this Foreword was written, the Supreme Court had not yet decided *Lucas*. Perhaps that decision will shed some light on the regulatory taking issue.

It is unusual for a law review to publish briefs submitted to a court, even in important cases. However, there is good reason for doing so in this situation. On March 20, 1992, Loyola Law School presented the First Annual Fritz B. Burns Lecture. This lecture took the form of a debate between Professor Richard Epstein of the University of Chicago Law School and Professor Joseph Sax of the University of California at Berkeley School of Law. The debate was titled “The Constitutional Dimensions of Property: Rent Control, Coastal Management and Regulatory Takings.” The *Lucas* and *Yee* cases were the starting points for this debate between two of the country’s most vocal and preeminent scholars concerned with the constitutional dimensions of real property law. Professors Epstein and Sax were invited to participate in the debate, in part, because each of them had filed an *amicus curiae* brief in one of the cases. Those are the briefs which are herein presented.<sup>8</sup>

The briefs are offered as a “first installment” of the authors’ views on the legal issues involved in the two cases, including the still-open “regulatory taking” issue in *Yee*. In the next issue of the *Loyola of Los Angeles Law Review*, to be published in the fall of 1992, the same authors will present further discussions of these problems, in light not only of their Loyola debate but also of the Supreme Court’s decisions in the *Lucas* and *Yee* cases. Thus, while the briefs appearing herein do not present a direct clash of views between Professors Epstein and Sax—because they submitted briefs in different cases—the follow-up articles will do so.

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6. *Yee*, 60 U.S.L.W. at 4306 (alteration in original) (citations omitted).

7. *Id.* at 4303.

8. [Editor’s note: The briefs have been reprinted as submitted to the United States Supreme Court. They have not been changed to conform to usual law review citation form.]



# RUMINATIONS ON *LUCAS v. SOUTH CAROLINA COASTAL COUNCIL*: AN INTRODUCTION TO AMICUS CURIAE BRIEF

*Richard A. Epstein\**

In most circumstances I think that it is a useful convention to keep academic work separate from the controversies of the day. One consequence of this attitude is *not* to publish in law reviews briefs and other documents written to persuade courts to adopt certain positions. I have written such an amicus curiae brief for the Institute for Justice in one of the most important takings cases to come before the United States Supreme Court, *Lucas v. South Carolina Coastal Council*.<sup>1</sup> For a variety of reasons, I think that this brief should be published as an exception to the general rule set out above. This short introduction is designed to explain why.

The most obvious explanation is the importance of the *Lucas* case, which has been reflected in the large number of requests for copies of the brief. Since the Supreme Court has been involved in deciding takings claims, it has insisted on a line, not dictated by the text of the Takings Clause, between physical occupation and regulatory takings. Cases that fall into the former class are judged by fairly strict standards, so that the government usually loses and is required to pay compensation, unless it can offer a compelling justification for its decision to occupy the landowner's property. The Court's attitude on regulatory takings—including a wide range of restrictions on the use of land—has been precisely the opposite. The rational basis test imposes a standard of scrutiny so low that the Supreme Court has rebuffed virtually every effort made by property owners to require the State to pay compensation to offset the losses imposed by the regulation. *Lucas* is, in one sense at least, the ultimate test of this approach to regulatory takings. It involves a near—or total—wipeout of the value of the land, without effecting a physical occupation of the property. The very fact that the Supreme Court has granted certiorari in this case suggests that it may now be prepared to pull back from its well nigh categorical distinction between physical occupation

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1. 404 S.E.2d 895 (S.C.), *cert. granted*, 112 S. Ct. 436 (1991).

and regulatory taking, and require the State to pay compensation in some regulatory settings.<sup>2</sup>

There is a second reason as well. The most notable feature of the brief is that it takes an intermediate position between that claimed by Lucas himself and that taken by the environmental groups that have filed briefs in support of the South Carolina Coastal Council. It is always risky business to write an amicus brief attacking the theory upon which the party in interest on your side of the case has rested its entire case. Yet that is what I chose to do in this brief.

Lucas has taken the position that as long as the government regulation effects a total wipeout of the use value of the property, compensation is always required, no matter what justification the State puts forward for its action. To see how extreme this position is, consider the following illustration. Suppose that the only use for a parcel of land is as a dump site for waste materials, which leach into the soil and poison underground waters. According to Lucas's theory, the State would be required to pay full value to the owner of the dump site in order to shut it down. The more intense the use of the property in this way, the greater the external threat of harm, and the more the State has to pay in order to quell it. It is only when the wipeout of the landowner's use is partial, that the State may impose its restrictions on use without having to pay compensation. Lucas's position thus reflects a preoccupation with the individual case without regard to the overall structure of takings law. Lucas's categorical rule requiring compensation applies only to the narrow class of cases into which the South Carolina Beachfront Management Act (BMA)<sup>3</sup> falls.

I do not believe that any Justice of the Supreme Court will adopt Lucas's theory with respect to total wipeouts; nor do I think that any Supreme Court Justice *should* adopt a theory which has such extreme consequences that it leaves the State powerless to impose restrictions against conduct so obviously wrongful in both intention and consequence. But the position offered on the environmental side is every bit as extreme in the opposite direction. As developed, it takes the view that any occurrence of "serious public harm" is sufficient to impose any restriction on land use, however severe and complete. In practice this position allows for far more extensive regulation than might be apparent at

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2. This possibility seems somewhat less likely in light of the Supreme Court's strong adherence to this distinction in *Yee v. City of Escondido*, 60 U.S.L.W. 4301 (Apr. 1, 1992).

3. The Beachfront Management Act (BMA) is codified beginning at S.C. CODE ANN. § 48-39-270 (Law. Co-op. Supp. 1991). The BMA was amended in 1990. 1990 S.C. Acts 607. The amendment added §§ 48-39-250, -260.

first blush because of the very broad definition given to the phrase "serious public harm."

In this regard the modern environmental movement has replicated the degeneration of the "harm principle" originally developed in John Stuart Mill's *On Liberty*.<sup>4</sup> There Mill first announced that the only possible warrant for the restriction of the liberty of another human being was that he inflicted or threatened to inflict harm upon others. The great weakness of that principle is that, without qualification and by ceaseless extension, the harm exception swallows up virtually all exercises of individual liberty. So long as any person takes offense at what I do, then there is some external harm that can be said to justify the State restriction on my behavior. Speech critical of public officials can be suppressed; competition can be outlawed; and use of property that others find aesthetically displeasing can be banned. Every action has its own external-ity if we are prepared to look hard enough to find it.

The brief submitted on behalf of the Institute for Justice left me in the unaccustomed position of being a moderate, even though it followed the general lines of my *Takings* book,<sup>5</sup> which has often been attacked as being anything but moderate.<sup>6</sup> The purpose of the brief was to develop an account of harm to others that is broad enough to allow the State to regulate in the pollution case but narrow enough to prevent it from manufacturing some form of public harm in every other situation. In developing that argument I took the position that the State could impose regulations that were reasonably suited to stopping the commission of a common-law nuisance.

The law of nuisance is often quite complicated, for it not only in-

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4. JOHN STUART MILL, *ON LIBERTY* 119-20 (Henry Regnery Co. ed., 1949) (1859). Mill states:

The maxims are, first, that the individual is not accountable to society for his actions, in so far as these concern the interest of no person but himself. Advice, instruction, persuasion, and avoidance by other people if thought necessary by them for their own good, are the only measures by which society can justifiably express its dislike or disapprobation of his conduct. Secondly, that for such actions as are prejudicial to the interest of others, the individual is accountable, and may be subjected either to social or to legal punishment, if society is of opinion that the one or the other is requisite for its protection.

*Id.*

5. RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* chs. 8-9 (1985).

6. For some of the criticism, see *Symposium on Richard Epstein's Takings: Private Property and the Power of Eminent Domain*, 41 U. MIAMI L. REV. 1 (1986). For a flavor of some of the attacks, see Joseph L. Sax, *Book Review*, 53 U. CHI. L. REV. 279 (1986) (reviewing RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985)), and Mark Kelman, *Taking Takings Seriously: An Essay for Centrists*, 74 CAL. L. REV. 1829 (1986) (same).



volves limitations on various forms of physical invasions, but also on various forms of non-invasive conduct, as with reciprocal negative easements of support for neighboring land.<sup>7</sup> Looking at *Lucas* only as a nuisance case, it seems clear that the State must lose. The closest that one can come to any form of a common-law nuisance is the faint possibility that construction of a house somewhere on the sand dune will reduce the support for other portions of the dune so that it will be more exposed to destruction by wind and water. But because these structures are so fragile, and have been violently distended by natural forces even when there has been absolutely no construction on private lands, it is doubtful that private construction poses a serious threat of this sort to public lands, or even to the lands of the builder. The effects of human intervention are swamped by natural forces. A total injunction against land use (as opposed to some far more tailored restraint) thus seems wholly inappropriate for the circumstances.

As drafted, the brief limits the police power to the prevention of actions that amount to the commission of a nuisance. I wrote the brief in this fashion in response to the sparse record of the case below—itsself attributable to the very spartan nature of the plaintiff's theory that rested the claim for compensation on the single fact of a total wipeout by the government regulation. One of the difficulties of writing first before the Supreme Court is that sometimes it is not possible to anticipate all the arguments that will be arrayed against you. In this case, the first hint that I received that the case had taken an unsuspected turn came when I was interviewed by various members of the media, all of whom asked me to explain why it was permissible to build a house when it could be lifted up by a hurricane and cause damage to other persons and structures in the vicinity. As the briefs were filed on South Carolina's side of the case,<sup>8</sup> it became clear that this theme had vaulted into prominence as the centerpiece of the case. As I did not have an opportunity to respond to the challenge in the brief, I shall devote a few paragraphs to answer it here, if only for the public record.

First, it should be clear that the ends of the police power include the

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7. For a development of the nuisance theory that underlies this major proposition, see Richard A. Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*, 8 J. LEGAL STUDIES 49 (1979).

8. See, e.g., Brief of Nueces County, Texas et al. as Amici Curiae in Support of Respondent, *Lucas v. South Carolina Coastal Council*, 404 S.E.2d 895 (S.C.), cert. granted, 112 S. Ct. 436 (1991) (No. 91-453) (written chiefly by John Echeverria, General Counsel of the National Audubon Society). The brief was joined by two municipal conservation commissions in Massachusetts, six national conservation groups, two regional conservation groups and six leading coastal scientists.

prevention not only of common-law nuisances, but of other forms of threatened harm that are tortious in themselves. The most obvious is where the government forbids the storage of explosives in residential neighborhoods. The possible sudden blast is inconsistent with the gradual releases associated with ordinary nuisances, but the low probability of a massive harm deserves the same response as a high probability of a lesser harm. Similarly, during his comments in our debate, Professor Sax noted that it was appropriate for the State to order, without compensation, a private owner to pull down his own house when it threatened to topple over and cause harm to other people or other property. I could not agree more. Indeed an action by public officials ordering the destruction of the house is no new-fangled invention, but was well-established in classical Roman Law, with the so-called action for *damnum infectum*, or threatened injury. As emphasized in the brief the older conceptions have considerable staying power, even in the most modern of environmental settings.

Second, it is highly doubtful that Lucas's case falls within the expanded definition of the legitimate scope of the police power. One obvious point is that South Carolina's claim in this regard should be viewed with suspicion if any attention is paid to the statement of purposes that is contained in the BMA.<sup>9</sup> There are many purposes listed, including the preservation of open spaces for South Carolina citizens and out-of-state tourists. While these ends may be legitimate for the State to pursue upon payment of compensation, their conspicuous presence in several places in the statute undercuts the proposition that the BMA was passed in order to control the risk of hurricane damage. To be sure, the statement of statutory purposes is not conclusive on whether the statute advances legitimate ends. The Supreme Court has allowed land use restrictions to be salvaged in courts based on justifications that were not advanced by the legislature itself. At the very least, the constant reiteration of purposes that have nothing to do with harm prevention should place a heavy burden on South Carolina to show that this statute falls within the traditional conception of the police power.

Third, examining the incidence of the restriction provides additional ammunition against the BMA. The risk of hurricane damage is one that runs up and down the Carolina coast. Charleston itself was devastated by Hurricane Hugo not long ago. Yet people were allowed to rebuild in

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9. See S.C. CODE ANN. §§ 48-39-250, -260 (Law. Co-op. Supp. 1991); Richard A. Epstein, *Lucas v. South Carolina Coastal Commission*: Brief of the Institute for Justice as Amicus Curiae in Support of Petitioner, 25 LOY. L.A. L. REV. 1233 app. at 1254 (reprinting S.C. CODE ANN. §§ 48-39-250, -260 (Law. Co-op. Supp. 1991)).

Charleston but not on the Isle of Palm. Why? It surely cannot be because there is no hurricane risk. That risk is greatest where the population is most dense, that is, in Charleston itself. If the State allows thousands of homeowners to rebuild in Charleston, then it should allow homeowners to rebuild on the Isle of Palm. The selective nature of the building restriction speaks volumes about the actual purpose behind the BMA. It is not possible to return Charleston to its pristine condition, but it is possible to do that on the Isle of Palm. The reason the greater risk of hurricane damage was allowed while the smaller one was prohibited is that hurricane prevention is not part of the overall design of the BMA, which is aimed at entirely other ends.

Fourth, the scope of the restriction is far broader than necessary to achieve its end. The State, if concerned about the risk of hurricane damage, could have specified certain restrictions on the size and shape of the building, or the materials that it contained. The State could have required that storm cellars be included in the buildings to protect occupants. Or it could have ordered homeowners to pay clean-up costs if debris from their houses littered public beaches. These far more moderate restrictions would do relatively little to the private value from the use of the land, but would answer virtually all the concerns with hurricane damage. But none of these moderate restrictions were chosen because the purpose of the BMA was to hasten an environmental retreat. There is an abundance of overbreadth if the logic behind the statute is damage prevention. The concerns that led to its passage are conveniently downplayed or ignored.

Fifth, the transparent nature of the anti-hurricane rationale is made still clearer by considering the interest group politics that lay behind the passage of the BMA. The BMA was not a local ordinance passed by the people on the Isle of Palm for their own protection. It was passed at the state level and worked a total devastation of local interests. People whose lots were un-built had to keep them that way. People who had built on their lots were told, in effect, that they would be denied the right to rebuild if their houses were more than half destroyed by hurricanes. Everyone in the local community was made worse off by the regulation, even if some landowners were made worse off than others. No local ordinance could have passed if it had produced so grotesque a result. Yet passage at the state level was possible because the winners, members of the environmental groups who supported passage of the statute, did not have to bear any of the local losses. The people on the Isle of Palm were prepared to run the small risk of hurricane damage in order to reap the greater gains of home ownership. The negative shifts in real estate values

throughout the island are consistent with that story, and not with the story that the BMA was passed for the protection of the homeowners.

In sum, the ex-post rationale of hurricane prevention is belied by a closer examination of the structure of the BMA, the scope of its coverage, and the politics used to secure its passage. In principle, it might be appropriate for the Supreme Court to remand the case to the trial court to see whether the hurricane prevention rationale was the dominant motive behind the passage, or whether it was a last-minute pretext thrown together to justify a statute that could not be sustained by reference to its own state purposes. If such a remand is ordered, then it should place a heavy burden on the State. The strongest argument supporting this remand is that the peculiar posture of Lucas's argument made it impossible for the State to develop its anti-hurricane rationale. However, there is a strong sense that the remand is unnecessary because the information contained in the record before the Supreme Court makes quite clear the reasons that motivated the passage of the BMA. Here is a taking for public use, for which just compensation is required.<sup>10</sup>

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10. Even the original act, the South Carolina Coastal Zone Act of 1977—amended by the BMA—grants this. *See* S.C. CODE ANN. § 48-39-30(C) (Law. Co-op. 1987).



**In The  
Supreme Court of the United States  
October Term, 1991**

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**DAVID H. LUCAS,**

*Petitioner,*

v.

**SOUTH CAROLINA COASTAL COUNCIL,**

*Respondent.*

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**On Writ of Certiorari  
To the South Carolina Supreme Court**

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**BRIEF OF THE INSTITUTE FOR JUSTICE AS  
AMICUS CURIAE IN SUPPORT OF PETITIONER**

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## TABLE OF CONTENTS

INTEREST OF THE AMICUS .....	1236
CONDENSED STATEMENT OF FACTS AND SUMMARY OF PROCEEDINGS BELOW .....	1237
SUMMARY OF ARGUMENT .....	1239
ARGUMENT .....	1241
I. ANY RESTRICTION ON THE ORDINARY USE OF PROPERTY IMPOSED BY THE STATE IS A PARTIAL REGULATORY TAKING FOR WHICH COMPENSATION IS REQUIRED UNLESS A POLICE POWER JUSTIFICATION IS ESTABLISHED.....	1241
II. THE MARKET VALUE OF THE PROPERTY IN QUESTION AFFORDS THE PROPER MEASURE OF COMPENSATION FOR THE LOSS IN QUESTION.....	1243
III. THE SOUTH CAROLINA SUPREME COURT DID NOT RECOGNIZE THE DISTINCTION BETWEEN THE PUBLIC USE AND THE POLICE POWER REQUIREMENTS UNDER THE JUST COMPENSATION CLAUSE .....	1244
A. The South Carolina Supreme Court mistakenly used the generous standards of the public use requirement to bypass the more stringent standards for justification under the police power .....	1244
B. The anti-nuisance approach to the police power allows for a coherent analysis of the BMA that supports the anti-erosion provisions of the statute but invalidates the building prohibition .....	1248
IV. THE REQUIREMENT THAT SOUTH CAROLINA PAY JUST COMPENSATION IN THIS CASE FURTHERS AND DOES NOT RETARD INSTITUTIONS OF SOUND GOVERNANCE .....	1250
V. THE REMEDY AWARDED BY THE DISTRICT COURT IS INCORRECT BECAUSE IT DENIES THE STATE THE OPTION OF REPEALING THE RESTRICTIONS IN QUESTION UPON PAYMENT OF INTERIM DAMAGES UNDER THE <i>FIRST</i> <i>ENGLISH</i> Option .....	1252
VI. CONCLUSION .....	1252

TABLE OF AUTHORITIES

CASES

*Bamford v. Turnley*, 3 B & S 67, 122 Eng. Rep. 27 (Ex. 1862)..... 1246  
*Berman v. Parker*, 348 U.S. 26 (1954)..... 1245  
*Corporation of Birmingham v. Allen*, L.R. 6 Ch. D. 284 (C.A. 1877)..... 1246  
*Ensign v. Walls*, 323 Mich. 49, 34 N.W.2d 549 (1948)..... 1248  
*Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975)..... 1246  
*First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987)..... 1250  
*Gasque v. The Town of Conway*, 194 S.C. 15, 8 S.E.2d 871 (1940)..... 1241  
*Hadacheck v. Sebastian*, 239 U.S. 394 (1915)..... 1249  
*Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984)..... 1245  
*Head v. Amoskeag Mfg. Co.*, 113 U.S. 9 (1885)..... 1245  
*Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987)..... 1248  
*Kovacs v. Cooper*, 336 U.S. 77 (1949)..... 1246  
*Lucas v. South Carolina Coastal Council*, 404 S.E.2d 895 (S.C. 1991)..... 1245  
*Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893)..... 1243  
*Nollan v. California Coastal Commission*, 483 U.S. 825 (1987)..... 1250  
*Penn Central Transportation Co. v. City of New York*, 483 U.S. 104 (1978)..... 1248  
*Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922)..... 1240  
*Sturges v. Bridgman*, 11 Ch. D. 852 (1878)..... 1248  
*United States v. Armstrong*, 364 U.S. 40 (1960)..... 1251  
*United States v. Bodcaw Co.*, 440 U.S. 202 (1979)..... 1243  
*United States v. General Motors*, 323 U.S. 373 (1945)..... 1241

STATUTES

S.C. Code Ann. § 48-39-10 *et seq.*..... 1237

MISCELLANEOUS

W. Blackstone, *Commentaries* (1765)..... 1250  
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No. 91-453

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**In The  
Supreme Court of the United States  
October Term, 1991**

—◆—  
DAVID H. LUCAS,

*Petitioner,*

v.

SOUTH CAROLINA COASTAL COUNCIL,

*Respondent.*

—◆—  
**On Writ of Certiorari  
To the South Carolina Supreme Court**

—◆—  
**BRIEF OF THE INSTITUTE FOR JUSTICE AS  
AMICUS CURIAE IN SUPPORT OF PETITIONER**

—◆—  
**INTEREST OF THE AMICUS**

This brief is submitted by the Institute for Justice as amicus curiae. We have secured the consent of both parties to the filing of this brief and letters of consent have been filed with the clerk. The Institute supports the position of the petitioner in this case and urges reversal of the decision of the South Carolina Supreme Court.

The Institute for Justice is a non-profit, public interest legal foundation litigating and educating in the areas of economic liberty, property rights, and the First Amendment. One of the pillars of the Institute's program is securing full constitutional protection for private property rights threatened by government regulation.

The instant case could have a profound impact on the regulation of property throughout the country. Therefore, it directly implicates the

Institute's mission. Furthermore, the Institute believes that the analysis of a noted authority on property and takings law contained in this brief will assist the Court in addressing the constitutional issues involved in the case.

#### CONDENSED STATEMENT OF FACTS AND SUMMARY OF PROCEEDINGS BELOW

The complete statement of facts and the history of this litigation have already been presented by both parties. This brief summary of them is designed to highlight those facts and legal determinations that we believe are critical to the proper understanding and disposition of the case.

The plaintiff, David H. Lucas, purchased two undeveloped waterfront lots, Numbers 22 and 24, in the Wild Dunes development on the Isle of the Palms in Charleston County, South Carolina in December, 1986, paying \$455,000 for lot 22 and \$500,000 for lot 24. Lucas borrowed \$900,000 toward the purchase price from the North Carolina National Bank, secured by a mortgage on the two lots. At the time of the purchase both lots were zoned for single-family home development, and a similar home had at that time been built on lot 23, located between the two Lucas' lots, and on other similar lots along the beach. About eighteen months after purchase, Lucas' proposed development of the lots was thwarted by the Beachfront Management Act, S.C. Code Ann. §§ 48-39-10 et seq. 1988 (hereinafter BMA), passed by the South Carolina legislature on July 1, 1988 (Act 634), and administered by the State's Coastal Council. The BMA prohibited all new construction between the beach and certain setback lines. BMA § 280(A). The BMA also prohibited the reconstruction of existing houses that had been destroyed. One of the objects of the statute is to promote a "gradual retreat from the [coastal] system over a forty-year period." BMA § 280.

One immediate consequence of the BMA was to permanently deprive Lucas of the ability to use the property for its intended purpose, the construction of a single family home. South Carolina did not wrest from Lucas' possession of the land; nor did it deprive him of the power to sell the land, subject of course to the restrictions imposed by the BMA. The statute also allowed Lucas to use his property for recreational purposes (picnics and outings), and to pitch tents or erect other temporary structures on the land. Trial Transcript (hereinafter Tr. Trans.) at 16-25; 91-98. The BMA did not, however, relieve Lucas of any of the potential liabilities of a landowner, or of the taxes he had to pay on the land. South Carolina claimed that Lucas' two lots retained some residual value because he was allowed to make some limited use of them under the

BMA. Lucas testified that the lots had negative value because the value of the residual uses was lower than the cost of the liability insurance, and the real estate taxes remained unabated. (Tr. Trans. at 31.)

The trial judge found that the property had no market value after the imposition of the regulation, and that the regulation worked a "total taking of Lucas' two beach front lots." (Order of Trial Judge at 130.) He found Lucas is "entitled under both the State and Federal Constitutions to the payment of just compensation." *Id.* He further concluded that "since the State has totally acquired Lucas's property, it is entitled to a deed to the property free and clear of any encumbrances," a total condemnation of the property. *Id.* Accordingly, he ordered the state to pay: (1) compensation equal to the full market value of the lots without the restriction (which he found to be \$585,000 per lot), (2) the real estate taxes paid on the property from the time the BMA went into effect, and (3) interest on the mortgage, for a total of \$1,232,387.50, plus interest from the date of judgment. *Id.*

The South Carolina Supreme Court reversed the decision below and held that the regulations in question did not constitute a taking, even if they did wipe out the entire value of the property in question. *Lucas v. South Carolina Coastal Council*, 404 S.E.2d 895, 898 (S.C. 1991). In the view of the South Carolina Supreme Court, the regulation in question was, as the plaintiff admitted below, a valid exercise of the police power. The Court therefore allowed the state to impose the regulation without compensation. In its view Lucas made a fatal concession by acknowledging that the BMA "is properly designed to preserve the extremely valuable resource which is South Carolina's beaches." *Id.* at 896. From this, the South Carolina Supreme Court held that Lucas conceded "the validity of the legislative declaration of its 'findings' and 'policy,'" *id.* at 896, and conceded that "discouraging new construction in close proximity to the beach/dune area is necessary to prevent great public harm." *Id.* at 898. The Court deemed itself "bound by these uncontested legislative findings." *Id.* It then rejected Lucas' contention that so long as the landowner has been deprived of "all economically viable use" of his property, it has worked a 'taking' for which compensation is due, regardless of any other consideration." *Id.*

In a strong dissenting opinion, Judge Harwell refused to accept the proposition that South Carolina could regulate property to "oblivion" and found that while the taking was permissible for a public purpose, it was not designed to prevent any nuisance or noxious activities on the plaintiff's land, and that therefore compensation was required. *Id.* at 906.

## SUMMARY OF ARGUMENT

Amicus curiae urges this Court to reverse the decision of the South Carolina Supreme Court and to restore the condemnation award made by the trial judge below. In our view, the case should be understood as a standard takings case in which the state has deprived its owner of one of the indispensable attributes of ownership, the ordinary use of the property so owned. In reaching this conclusion, ownership should not be understood simply as the bare possession of a physical object, but as a set of complete and well defined rights over the property. As repeated decisions of this Court have recognized, ownership includes the right to possession, use, and disposition of the property in question, and that takings can occur even when the original owner of the property has been left, as here, in undisturbed possession of the land whose use has been regulated.

The massive restrictions on use in this case thus amount to a *prima facie* taking, which the state has to justify *or* provide compensation. In dealing with this question of justification, it is critical to distinguish, as the South Carolina Supreme Court did not, between two separate questions of takings jurisprudence: (1) whether the taking was for public use, and (2) whether the taking was justified under the police power. The radically different nature of these two inquiries is well revealed by the consequences that are attached to each. If the state cannot show that a taking is for public use, then it cannot proceed by the eminent domain power, but must (unless its actions be *ultra vires*) proceed by voluntary purchase. But if the public use requirement alone is satisfied, the taking can only go forward if just compensation is paid.

The police power functions in a wholly separate fashion—as a justification for taking the property, or for restricting its use *without* compensation—and can be established only by meeting requirements more stringent than those necessary to establish a public use, namely that the landowner's intended use of the property has caused or threatens to cause, a nuisance (public or private) which is appropriately neutralized by the land use restriction. Any broader conception of the police power allows the state, as agent of its citizens, to take without compensation property that the citizens themselves would have to purchase from the landowner.

The decision of the South Carolina Supreme Court is fatally flawed because, far from observing the structural distinction between public use and police power, the Court treated the two different conceptions as identical. South Carolina has advanced a large number of justifications for its stringent restriction on land use; some of these go to the protection of the beach against erosion, BMA § 250 (2)-(6). These provisions pre-

vent potential nuisances which, in principle, South Carolina should be able to prevent without the payment of compensation. Yet other justifications in the BMA, such as the promotion of tourism, and for the leisure of South Carolina citizens, BMA § 250(1)(b), (d), only identify public uses for which Lucas's land may be taken with just compensation. Lucas conceded below that the BMA amounted to a "laudable goal." *Lucas*, 404 S.E.2d at 896. The court erred by interpreting this statement to be a concession that his planned beachfront home should be treated as a nuisance or other noxious activity that South Carolina may restrain without compensation. This error arose from the court's failure to make the proper terminological distinctions.

Once the relevant distinctions become clear, the decision of the South Carolina Supreme Court should be reversed, but on a theory that is different from that on which the plaintiff requests relief. In his petition for certiorari, the plaintiff inexplicably disclaims the theory on which the trial judge entered a decision in his favor by insisting: "This petition does not concern the exercise of eminent domain. Petitioner concedes that no permanent physical occupation occurred here." (Petition for Certiorari at 5.) The absence of the physical occupation only shows that the case raises the issue of a regulatory, or partial taking, not that takings issues are absent. The massive restriction on land use, whether or not total, amounts to a taking of the property for which compensation is required in the absence of justification. South Carolina here has not offered *any* justification to show how the elimination of the construction on this property advances its legitimate end of controlling the erosion of the beachfront, which rests in public hands. South Carolina has been prepared to appropriate \$10,000,000 to the maintenance of the public beaches. (Tr. Trans. at 69.) If it wishes to expand the area of undeveloped land, it is free to do so, as long as it pays the owner the market value of the property. It is not sufficient to allow South Carolina to regulate because it wants to do so. "[A] strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal v. Mahon Co.*, 260 U.S. 393, 416 (1922) (per Holmes, J.), quoted by the dissent in *Lucas*, 404 S.E.2d, at 903.

## ARGUMENT

I. ANY RESTRICTION ON THE ORDINARY USE OF PROPERTY  
IMPOSED BY THE STATE IS A PARTIAL REGULATORY  
TAKING FOR WHICH COMPENSATION IS  
REQUIRED UNLESS A POLICE POWER  
JUSTIFICATION IS ESTABLISHED.

It is well recognized that property constitutes more than permanent physical objects that are the subject of external sensation. Instead private property refers to the complex of rights over a particular thing that the owner of that property enjoys against the entire world. The ordinary conception of property thus embraces far more than the right to naked possession of real property, and the associated right to exclude all other persons. It embraces the right to make ordinary use of the property in question, and to dispose of it by sale, lease, mortgage or other forms of voluntary exchange. Definitions of this sort have been recognized from every source. The standard dictionary definitions all embrace the three elements of possession, use, and disposition;<sup>1</sup> the definition is part and parcel of the accounts of property that are used by common lawyers<sup>2</sup> and political philosophers<sup>3</sup> and, most critical in the evaluation of takings cases, under the Takings Clause itself. Thus this Court has written in *United States v. General Motors* as follows:

The critical terms [of the takings clause] are "property," "taken" and "just compensation." It is conceivable that the first was used in its vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by the law. On the other hand, it may have been employed in a more accurate sense to denote the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it. In point of fact, the construction given the phrase has been the latter.<sup>4</sup>

Under this definition it is clear that there cannot be a watertight line drawn between those actions of the state that allow it to enter into pos-

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1. "Property: 2. Ownership or dominion; the legal right to the possession, use, enjoyment and disposal of a thing; a valuable legal right or interest in or to particular things." Funk & Wagnalls, *New Comprehensive International Dictionary of the English Language* 1011 (1982).

2. See A.M. Honore, "Ownership," in *Oxford Essays in Jurisprudence* 107 (1961).

3. See J. Tully, *A Discourse on Property: John Locke and His Adversaries* (1980).

4. *United States v. General Motors Corp.*, 323 U.S. 373, 377-78 (1945). South Carolina law contains an identical account of ownership. See *Gasque v. The Town of Conway*, 194 S.C. 15, 8 S.E.2d 871 (1940).

session, and those which regulate the way in which it is used by its private owner. The imposition of any restriction upon use, above and beyond those inherent in the law of nuisance, can ordinarily be done by private parties only if they purchase a restrictive covenant over the land in question. There is no reason in law or principle why the same individuals who in their private capacity are required to purchase this interest in land are in their public capacity allowed to take it by majority vote *for nothing*. The restrictions imposed upon Lucas' use of land under the BMA should be understood as a covenant in gross (that is, a covenant unattached to any dominant tenement) that is held by the public at large. It is quite sufficient for the protection of all public interests to allow the state to do what no private owner could do: compel the surrender of the covenant against the will of the person who owns the land. It is wholly unnecessary, and ultimately mischievous, to give any state the additional power to compel the surrender of the covenant without payment of any compensation for the loss in value, great or small, that is brought about by the restriction in question.

In his arguments throughout the case, Lucas has avoided one implicit consequence of this argument. Lucas takes the position that the regulation automatically requires full compensation where the restriction on use results in a total loss of value, but acknowledges that South Carolina is free to impose substantial restrictions on use where there is some residual use in question. In essence, Lucas has sought to develop a *per se* rule that deals with a wipe-out case but does not extend his theory to any case of partial restrictions. This approach is conceptually inadequate because it creates a gratuitous and unprincipled conceptual gulf between total restriction on use and massive partial restrictions.

The potential danger of Lucas' position is further revealed by a close examination of the underlying facts of the instant case. South Carolina introduced evidence that the value of the property was positive because the plaintiff, in addition to retaining the rights of possession and disposition, also retained the rights to use the land for recreation and for temporary structures. (Tr. Trans. 56.) The trial judge rejected that evidence because he believed that the market value of the property in question was zero. But suppose he believed that the value of these residual uses increased the value of the land to \$9,000 or one percent of its original cost, and a slightly smaller fraction of its present market value. Suppose also that the trial judge found that the residual tort liability and real estate taxes were tantamount to a lien of \$8,000 on the land, leaving the property with a net valuation of \$1,000. Under these circumstances, the proper approach is to hold that the plaintiff is entitled to the market

value of the property<sup>5</sup> less the residual value of the property in private use.<sup>6</sup>

Under the plaintiff's faulty approach the restriction on use would not, or at least might not, amount to a taking. In such a case, compensation, if owed at all, would be payable under some fluid and unprincipled balancing test. Yet if the value of the accumulated liens were \$10,000 (and thus exceeded the residual value in use), the plaintiff would be entitled to full compensation of the property in question. A shift of \$2,000 in the relative value of the residual uses and the ongoing tax and tort liabilities should alter the level of compensation only by the same \$2,000. It should not precipitate a huge swing in the recoverability of millions of dollars in compensation.

The proper rule is thus one of strict proportion: the greater the taking, the greater the restriction, then the greater the compensation that must be paid. The just compensation clause should induce the state to act responsibly in dealing with its citizens. It should not spur irresponsible brinkmanship by public officials, whereby small differences in valuation generate enormous differences in outcome.

## II. THE MARKET VALUE OF THE PROPERTY IN QUESTION AFFORDS THE PROPER MEASURE OF COMPENSATION FOR THE LOSS IN QUESTION.

In the course of its argument at trial, the Coastal Council adopted an alternative approach which is likely to be repeated on appeal. It urged that the property in question was subject to a serious erosion risk, and in fact had been under water for a substantial period of time during the past 40 years. (Tr. Trans. at 36-39.) His argument in effect, although not reached by the South Carolina Supreme Court, was that, even if the total restriction on use amounted to a taking, no compensation was owed be-

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5. The reference to the market value reflects the current state of the Supreme Court law, *Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893) (compensation only for the market value of the property taken); *United States v. Bodcaw Co.*, 440 U.S. 202 (1979), and ignores the important issue of compensation for the loss of subjective value in excess of market value.

6. Note that if the state leaves the individual owner with net liabilities, then it should pay compensation in excess of the fair market value. The right formula in all cases is the fair market value of the property taken, less value of property retained. If the value of the property equals zero, then the compensation is equal to its market value. But if the value of the property is negative, then the compensation owed equals the market value of the property taken plus the residual liabilities retained by the landowner. In the case at hand the trial judge avoided these valuation difficulties by ordering Lucas to deliver deed of title to South Carolina, thereby wiping out any residual liabilities. For the weaknesses of his approach, see Section V, *infra*.



cause the property was valueless for its intended use. No prudent person would build in light of the unstable conditions on the South Carolina Coast.

The chief mistake in this argument is that it eliminates the market value test of eminent domain and substitutes a bureaucratic determination of value that reflects the self-serving desire of public officials to create the impression that environmental regulation causes no serious private harm. But the Coastal Council's argument overlooks the fact that the dangers to Lucas' plot were evident to all persons who bought and sold property on the island (Lucas himself was a native islander and a real estate broker who had bought and sold between 1000 and 1500 properties on the island since he arrived on Palm Island in 1978-1979. (Tr. Trans. at 32-35.) The erosion and hurricane risks were well known to all persons who lived on the island.

The market valuations reflected the erosion risk. If that risk were zero, then the value of the property would doubtless have been far higher than it was. Indeed some portion of the high appreciation—by one estimate, at 56 percent per annum average over a 7 year period between 1979-1986 (Tr. Trans. at 44-45.)—was attributable to the perception that the island was "accreting" so that the risk of destruction by hurricane or weather was reduced as the size of the island expanded. Indeed, at trial the beach was a "football field away from the property line," which might be regarded as "ocean view" and perhaps not as "ocean front" property. (Tr. Trans. at 36, 38.)

Just because members of the Coastal Commission would not invest their own money on the island does not mean that other people are foolish or imprudent to do so. The market allocates resources to those persons who value a given asset the most, not those who value it least. That true market value, and not the arbitrary value assigned to it by government bureaucrats, is the proper measure of compensation.

### III. THE SOUTH CAROLINA SUPREME COURT DID NOT RECOGNIZE THE DISTINCTION BETWEEN THE PUBLIC USE AND POLICE POWER REQUIREMENTS UNDER THE JUST COMPENSATION CLAUSE.

- A. The South Carolina Supreme Court mistakenly used the generous standards of the public use requirement to bypass the more stringent standards under the police power.

The text of the just compensation clause contains an explicit reference to the public use requirement, but no reference at all to the police

power. The cardinal mistake made by South Carolina has been to analyze the case as though there were no distinction between the public use and the police power requirements under the clause. Yet it is imperative to make some distinction between the two. Thus suppose that South Carolina chooses to condemn the Lucas' property, and then to resell it at the same cost to Lucas' neighbor on plot 23. The police power justification is negated by the payment of compensation, so that the only unresolved issue is whether the taking for resale is a taking for a public use under the rules developed in *Berman v. Parker*, 348 U.S. 26 (1954) and *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984).

Even if this broad account of public use correctly identifies the occasions where state coercive power may be directed against individual citizens, it surely says nothing about whether compensation is owing when the state seeks to take or to regulate. When the state takes land for use as a highway or a post office, the presence of an unquestionable public use does not excuse it from its duty to pay compensation to the landowner. Or suppose, as was the case in the nineteenth century, that the state wishes to authorize a private party to flood the land of a neighbor in order to form a reservoir sufficient to operate a mill. See *Head v. Amoskeag Mfg. Co.*, 113 U.S. 9 (1885). Even though this Court held this taking was for a public purpose, the private party responsible for the flooding had to pay for the damage caused on land that was not occupied. Compensation and public use are determined by radically different tests.

The test for a public use today is any form of public benefit from the government action undertaken. But what about the police power? Here the traditional conception of the police power was tied to the commission of a common law nuisance, a point conceded by the South Carolina Supreme Court in *Lucas* itself. *Lucas*, 404 S.E.2d at 899. It might seem odd at first blush that the limits of state power to regulate could be determined, even in part, by the common law conceptions of nuisance that have been developed over the centuries in such radically different contexts. But the intimate historical connection between the law of nuisance and the proper scope of the police power remains in principle as vital and important today as it has ever been. In the private context, the defendant who creates a nuisance can be shut down without compensation, and without the need to purchase a restrictive covenant. Instead the owner of the private property must purchase the easement to cause damages. Nuisance law thus determines when one neighbor must compensate another for the restrictions imposed on the use of property. That is precisely the

same question that is asked when "the community" (a group of many neighbors) seeks to impose restrictions on some of its members.

The tests to determine what constitutes a nuisance at common law are often complex. See *Restatement (Second) of Torts* § 825ff. Thus normally a physical invasion is required, be it of smells, fluids, dust, gasses and the like. See, e.g., *Bamford v. Turnley*, 3 B & S, 67, 83, 122 Eng. Rep. 27, 32-3 (Ex. 1862) (Bramwell, B.). Yet in some instances low level nuisances are not regarded as actionable under the "live and let live" rule. In other circumstances, noninvasive conduct is regarded as a nuisance, as with the obligations of lateral support. See, e.g., *Corporation of Birmingham v. Allen*, L.R. 6 Ch. D. 284 (C.A. 1877) for an exceptionally clear statement of the relevant rules. In each of these cases the objective of the law is to resolve conflicts in ways that maximize the joint value of all resources owned by the parties to the dispute. And the rules of common law nuisance do that better than any alternative set of rules. Would neighboring landowners really prefer to be in an initial position in which *none* could develop property without the consent of all neighbors? Would they prefer to be in a position in which all are required to pay compensation for the trivial and repetitive nuisances that each inflicts on the other? Would they prefer to allow each to dig to the boundary of the land even though the land, natural growth, and houses on the adjacent plot may be damaged? In each case the set of mutual restrictions works to the benefit of both parties subject to the regulation.

When these rules are carried over to the law of eminent domain, their force cannot be gutted simply by a legislative determination that certain conduct is a nuisance, without any proof thereof. The entire structure of the just compensation clause would be frittered away if the state could take what it pleases when it pleases simply by declaring the prohibited use a "nuisance." This Court has never tolerated so casual and slippery a conception of nuisance in the first amendment area. Unsupported legislative declarations that certain forms of conduct are a nuisance are without constitutional weight. See *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975). The state must show, in accordance with traditional common law rules, that the noise and inconveniences caused by certain activities do rise to the level of common law public nuisance. See *Kovacs v. Cooper*, 336 U.S. 77 (1949). Certainly the legislature could not get around the prohibitions against taking by declaring X to be Y's debtor, and then allowing Y to collect the sum in question by an ordinary common law action. At every point the manipulation of common law categories must meet the tests of judicial scrutiny.

The legislature cannot evade its constitutional obligations by resorting to creative redefinitions. This single, but vital limitation on legislative power explains why the common law nuisance is an indispensable ingredient of the law of takings. The great difficulties with takings arise when individuals abandon the private remedies that they have against their neighbor and seek to obtain redress through the political process. In any constitutional system, the critical element is to make sure that political opportunism is not the reason for the resort to the political process. Thus if A and B by agreement between themselves could not condemn the property of C for their own use, then what additional powers should they obtain by appealing (in a three person society) to a 2 to 1 vote in the political arena? The use of the nuisance requirement means that the majority of two cannot convert a private loss into a public victory. It prevents, therefore, an illicit shift to the public sector that might overwhelm the system of property rights that establishes the relation of person to person.

But it may be protested that ours is not a society of small numbers but of millions. And so it is. Yet it is precisely for that reason that there is greater necessity today to enforce the limitations that the just compensation clause imposes on the political process. The basic inquiry has two parts. First, there is the question of why political majorities should be able to condemn *with compensation*. When we deal not with a majority of 2, but of 2,000 or 2,000,000 persons, it is not possible for them by unanimous voluntary agreement to coordinate their efforts to purchase needed property from the class of persons in the position of C. The temptation of individual citizens to free ride on their neighbors is too great.<sup>7</sup> Eminent domain allows the state to use its power of taxation and deliberation to organize the coalition that purchases property with tax revenues. Yet at the same time the just compensation clause prevents politics from allowing an end run around the compensation requirements normally applicable in private disputes. That additional restriction on government should not be imposed where the private parties can on their own initiative restrict land use without compensation. But it is required where private actors could not restrict as of right. The nuisance law determines that boundary in the private sphere, and to maintain the parity between the two systems, it must do so in the public sphere as well. A group that is not prepared to pay \$1,000 to purchase a restrictive covenant should not be allowed to get that self-same interest by spending \$500 in the political arena.

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7. See Cohen, *Holdouts and Free Riders*, 20 J. Legal Studies 351 (1991); M. Olson, *The Logic of Collective Action* (1965).

Private parties cannot restrict ordinary activities of landowners without compensating them; the state under the takings clause is subject to that same restriction. Private parties can enjoin a nuisance without compensation; the state as their representative has the same power.<sup>8</sup> Quite simply, no other test is available to determine when state action requires compensation and when it does not, as this Court itself has acknowledged. *See Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978). Indeed, any test, however delicately phrased, which seeks to answer the police power question by asking whether the restriction in question serves some legitimate state interest collapses the fundamental distinction between public use and police power that organizes this entire branch of law.

- B. The anti-nuisance approach to the police power allows for a coherent analysis of the BMA that supports the anti-erosion provisions of the statute but invalidates the building prohibition.

The power of this general approach is revealed by a closer analysis of the BMA. First, the BMA prevents any landowner along the beach from "armoring" the beachfront property. BMA § 250(5). That restriction should be sustained, and indeed is not challenged here. The normal ebb and flow of the tides are allowed to do their work. The beach will sometimes expand, at other times it will contract. But the construction of massive bulwarks on the beach will starve it of new sand and cause material physical damages to the beach and its long term health. In this limited respect, therefore, the BMA enjoins a nuisance that private landowners could commit against their neighbors, and, more importantly, against the public at large.<sup>9</sup> The prohibition of this kind of activity is appropriate by a simple test: the state is allowed to enjoin the activities

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8. For one illustration of the point, see *Hadacheck v. Sebastian*, 239 U.S. 394 (1915), where the Court allowed the state to enjoin the operation of a brickyard even though the neighbors came to the nuisance only after its operation was established. That is the identical result reached in the coming to the nuisance cases in the private law, where the injunction is similarly allowed. *See, e.g., Sturges v. Bridgman*, 11 Ch. D. 852 (1878); *Ensign v. Walls*, 323 Mich. 49, 34 N.W.2d 549 (1948); *Restatement (Second) of Torts*, § 840 C, D.

9. It is this test which explains the weakness of this Court's decision in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1985). There the Court did not recognize that the police power limitation, associated as it is with the law of nuisance, protects only *strangers* to the transaction. Since the landowners in *Keystone* sought to recover the support easement that they conveyed away, they should have been required to pay compensation to repurchase the same interest that they released. If private parties are not bound by their own consent, then the system of private property is always subject to destruction at the whim of the state.

that, should they result in harm, would entitle it to compensation as owner of the beach after the harm is done.

South Carolina in this case wishes to go further, and to prevent the construction of any ordinary single family dwelling on the property in question. But although the South Carolina Supreme Court speaks of the object of the statute as the prevention of "serious public harm," *Lucas*, 404 S.E.2d, at 898, the phrase is simply conclusory. The total ban on real estate development cannot be sustained by the arguments that justify the anti-armoring provisions. There is no showing that the construction of a house on a beachfront lot will increase the level of erosion of the beach, or that it will affect the stability of the land on which neighbors have constructed their own houses. At most South Carolina shows that it wants to restrain the construction on that property very much. The test that allows compensation above fails here, for if this were a private beach, its landowner could not stop construction unrelated to the erosion risk.

South Carolina's own stated purposes are vintage public use arguments, wholly irrelevant to the more difficult task of regulation *without* compensation. Thus if the state wished to take land for a highway on the ground that it would benefit tourism and the leisure of its own citizenry, certainly it would have to pay compensation. If it wanted to take the soil from an adjacent landowner to nourish the beach for the benefit of tourism and the leisure of its own citizenry, it would still have to pay compensation. If it wants to obtain a restrictive covenant over private land for the benefit of tourism and its own citizenry it again has to pay. There is no enormous gulf between the justifications that are required of the state when it occupies property and that are required of it when it restricts, in whole or in part, the use of that property by a private landowner. Tourism and local leisure, which fail in the former case, also fail in the latter.

The arguments just advanced differ in important ways from those put forward by Lucas. Lucas argues that as long as the taking is total, the question of justification need not be considered at all. Yet no balanced theory of takings could be that protective of private property against the legitimate claims of the state. If the sole use of the landowner's property is as a brickyard, as was the case in *Hadacheck v. Sebastian*, 239 U.S. 394 (1915), it seems odd to say that the question of whether the state must compensate in order to enjoin a nuisance depends on whether the landowner can salvage some small value from the alternative use of his own land. As long as there is no overbreadth in the regulation, as long as some less restrictive alternative is not available to

the state, then the total wipe-out is fully justified *but only in a nuisance case*, just as if the private neighbors had been able to obtain an ordinary injunction to the same effect, without the payment of compensation.

The proper analysis of the justification question thus mirrors that of the initial takings question. There is no magic in a total (as opposed to a partial) restriction on use; if the anti-nuisance justification supports the injunction, then so be it. If it does not, then the state must pay for what it takes. The reason why Lucas is entitled to the compensation awarded by the trial judge is simple. The state did not remotely offer any anti-nuisance justification for prohibiting the construction of the ordinary single family home.

#### IV. THE REQUIREMENT THAT SOUTH CAROLINA PAY JUST COMPENSATION IN THIS CASE FURTHERS AND DOES NOT RETARD INSTITUTIONS OF SOUND GOVERNANCE.

The restoration of the trial court's award of full compensation to Lucas will continue the reversal in the law of takings that was begun in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987). Yet there is every reason to welcome the shift, not because it protects the provincial interests of property owners against the welfare of the public at large, but because the protection of property against deprivations from the state is the surest way to advance the general public welfare.

In order to see why, it is important to remember a truth that has been evident from Blackstone's day, namely, "the public good is in nothing more essentially interested, than in the protection of every individual's private rights. . . ." 1 W. Blackstone, *Commentaries* 139 (1765). Within that calculus the welfare of *all* citizens of the state has to be taken into account, not merely of those who benefit from the restriction. Whether the land-use restrictions of South Carolina wipe out Mr. Lucas and people similarly situated, or cause them substantial financial loss, or merely cause them smaller inconvenience, those losses, great or small, count as much in the social calculus as the gain to any other person. That each person counts for one and only one is a cardinal principle of political philosophy and constitutional interpretation, and the claims of landowners cannot simply be brushed aside in some headlong rush to satisfy majority will no matter how worthy the cause.

But how are these interests to be taken into account? In effect, South Carolina claims that it has considered all the interests, public and private, when it has passed legislation, and that deference is afforded its

considered judgment. But if Lucas is in the minority, what guarantee is there that the majority has considered his interest on a par with its own? And what possibility does this Court have of superintending the legislative process to determine whether his interest has been given its full deserved weight in the social process? The very reason why we have a constitution, why we have a takings clause, is because we know from history that legislative majorities, unless constrained by judicial power, can and will misbehave by favoring those who have political power over those who do not. This Court cannot be a constant council of revision to pass on the soundness of each and every piece of legislation by examining it afresh on its merits. But where property has been taken for public use, it can require that the state pay full compensation so that it is assured that individual interests sacrificed receive their full measure of protection.

Over and over again this Court has recognized that where statutes disproportionately affect on a select group, they are constitutionally suspect because they require private parties to bear in full the costs that should in justice be borne by society as a whole. *See, e.g., United States v. Armstrong*, 364 U.S. 40, 49 (1960). The concern here is not only with equity, but also with the preservation of the overall productive capacities of society as a whole. If the South Carolina legislature need not compensate Lucas and others similarly situated for their losses, then it will ignore these costs in making the social calculus. The implicit subsidy that this Court will confer on state legislatures will have the same deleterious social consequences in this context that other subsidies have in other contexts. It will lead to excessive levels of the subsidized activity, in this instance too much government, for too little gain. The functional purpose of the takings clause is to eliminate any potential divergence between private and social costs, to knock out the subsidy that induces the state to undertake projects that impoverish the citizenry as a whole while benefiting some select fraction of it.

No one, least of all Lucas who lives along the beach and understands its fragile nature, disputes that there should be public expenditures for the maintenance of valuable and irreplaceable resources that are now in public hands. Indeed South Carolina has already appropriated by general bond issue \$10,000,000 for the maintenance and nourishment of the beach. Yet there is no reason to believe that the draconian sanctions at work on Lucas provide a public benefit remotely equivalent in value to the loss that it causes. All environmental causes are not of equal importance and of equal dignity. The one way South Carolina could prove the importance that it attaches to adding a restrictive covenant over the Lu-



cas land to its chain of beachfront properties is to pay for it. That is what this Court should do by reversing the order of the South Carolina Supreme Court and restoring the judgment of the trial court below.

V. THE REMEDY AWARDED BY THE DISTRICT COURT IS  
INCORRECT BECAUSE IT DENIES THE STATE THE OPTION  
OF REPEALING THE RESTRICTIONS IN QUESTION  
UPON PAYMENT OF INTERIM DAMAGES  
UNDER THE *FIRST ENGLISH* OPTION.

At the conclusion of the hearing, the trial judge, having properly adjudged that the BMA worked a taking of Lucas' property, ordered the state to pay full compensation in exchange for a fee interest in the property. This rule is in error because it forces South Carolina to make enormous expenditures for interests in real property which it may not wish to acquire once its constitutional obligations are clear. Nor should this Court believe that once it declares the restrictions in issue a taking that South Carolina is committed to acquiring title to all of the unbuilt coast. Quite the contrary, once it has become clear that South Carolina has taken Lucas' property, it should be left the option to return it to him, paying him only the damages for the *interim* taking under the *First English* doctrine. At that point the state can reconsider whether it wishes to go through with the taking contemplated under the original BMA once its obligation to compensate has been established. The solution proposed here surely benefits both parties, for Lucas now enjoys the return of his land, while South Carolina regains control over its budget.

VI. CONCLUSION.

The judgment of the South Carolina Supreme Court should be reversed. Judgment should be entered that the BMA works a taking of Lucas's land, and the state should have the option of either keeping the land and paying full market value, or of removing the regulation and compensating Lucas for his loss of interim use.

Respectfully submitted,

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## APPENDIX

## SECTION 48-39-30. LEGISLATIVE DECLARATION OF STATE POLICY.

- (A) The General Assembly declares the basic state policy in the implementation of this chapter is to protect the quality of the coastal environment and to promote the economic and social improvement of the coastal zone and of all the people of the State.
- (B) Specific state policies to be followed in the implementation of this chapter are:
  - (1) To promote economic and social improvement of the citizens of this State and to encourage development of the citizens of this State and to encourage development of coastal resources in order to achieve such improvement with due consideration for the environment and within the framework of a coastal planning program that is designed to protect the sensitive and fragile areas from inappropriate development and provide adequate environmental safeguards with respect to the construction of facilities in the critical areas of the coastal zone;
  - (2) To protect and, where possible, to restore or enhance the resources of the State's coastal zone for this and succeeding generations;
  - (3) To formulate a comprehensive tidelands protection program;
  - (4) To formulate a comprehensive beach erosion and protection policy including the protection of necessary sand dunes;
  - (5) To encourage and assist state agencies, counties, municipalities and regional agencies to exercise their responsibilities and powers in the coastal zone through the development and implementation of comprehensive programs to achieve wise use of coastal resources giving full consideration to ecological, cultural and historic values as well as to the needs for economic and social development and resources conservation.
- (C) In the implementation of the chapter, no government agency shall adopt a rule or regulation or issue any order that is unduly restrictive so as to constitute a taking of

property without the payment of just compensation in violation of the Constitution of this State or of the United States.

- (D) Critical areas shall be used to provide the combination of uses which will insure the maximum benefit to the people, but not necessarily a combination of uses which will generate measurable maximum dollar benefits. As such, the use of a critical area for one or a combination of like uses to the exclusion of some or all other uses shall be consistent with the purposes of this chapter.
- (E) It shall be the policy of the State to coordinate the coastal planning and management program effort with other coastal states and organizations of coastal states.

**SECTION 48-39-250. LEGISLATIVE FINDINGS REGARDING THE COASTAL BEACH/DUNE SYSTEM.**

The General Assembly finds that:

- (1) The beach/dune system along the coast of South Carolina is extremely important to the people of this State and serves the following functions:
  - (a) protects life and property by serving as a storm barrier which dissipates wave energy and contributes to shoreline stability in an economical and effective manner;
  - (b) provides the basis for a tourism industry that generates approximately two-thirds of South Carolina's annual tourism industry revenue which constitutes a significant portion of the state's economy. The tourists who come to the South Carolina coast to enjoy the ocean and dry sand beach contribute significantly to state and local tax revenues;
  - (c) provides habitat for numerous species of plants and animals, several of which are threatened or endangered. Waters adjacent to the beach/dune system also provide habitat for many other marine species;
  - (d) provides a natural healthy environment for the citizens of South Carolina to spend leisure time which serves their physical and mental well-being.

- (2) Beach/dune system vegetation is unique and extremely important to the vitality and preservation of the system.
- (3) Many miles of South Carolina's beaches have been identified as critically eroding.
- (4) Chapter 39 of Title 48, Coastal Tidelands and Wetlands, prior to 1988, did not provide adequate jurisdiction to the South Carolina Coastal Council to enable it to effectively protect the integrity of the beach/dune system.

Consequently, without adequate controls, development unwisely has been sited too close to the system. This type of development has jeopardized the stability of the beach/dune system, accelerated erosion, and endangered adjacent property. It is in both the public and private interests to protect the system from this unwise development.

- (5) The use of armoring in the form of hard erosion control devices such as seawalls, bulkheads, and riprap to protect erosion-threatened structures adjacent to the beach has not proven effective. These armoring devices have given a false sense of security to beachfront property owners. In reality, these hard structures, in many instances, have increased the vulnerability of beachfront property to damage from wind and waves while contributing to the deterioration and loss of the dry sand beach which is so important to the tourism industry.
- (6) Erosion is a natural process which becomes a significant problem for man only when structures are erected in close proximity to the beach/dune system. It is in both the public and private interests to afford the beach/dune system space to accrete and erode in its natural cycle. This space can be provided only by discouraging new construction in close proximity to the beach/dune system and encouraging those who have erected structures too close to the system to retreat from it.
- (7) Inlet and harbor management practices, including the construction of jetties which have not been designed to accommodate the longshore transport of sand, may deprive downdrift beach/dune systems of

their natural sand supply. Dredging practices which include disposal of beach quality sand at sea also may deprive the beach/dune system of much-needed sand.

- (8) It is in the state's best interest to protect and to promote increased public access to South Carolina's beaches for out-of-state tourists and South Carolina residents alike.
- (9) Present funding for the protection, management, and enhancement of the beach/dune system is inadequate.
- (10) There is no coordinated state policy for post-storm emergency management of the beach/dune system.
- (11) A long-range comprehensive beach management plan is needed for the entire coast of South Carolina to protect and manage effectively the beach/dune system, thus preventing unwise development and minimizing man's adverse impact on the system.

#### SECTION 48-39-260. POLICY STATEMENT.

In recognition of its stewardship responsibilities, the policy of South Carolina is to:

- (1) protect, preserve, restore, and enhance the beach/dune system, the highest and best uses of which are declared to provide:
  - (a) protection of life and property by acting as a buffer from high tides, storm surge, hurricanes, and normal erosion;
  - (b) a source for the preservation of dry sand beaches which provide recreation and a major source of state and local business revenue;
  - (c) an environment which harbors natural beauty and enhances the well-being of the citizens of this State and its visitors;
  - (d) natural habitat for indigenous flora and fauna including endangered species;
- (2) create a comprehensive, long-range beach management plan and require local comprehensive beach management plans for the protection, preservation, restoration, and enhancement of the beach/dune system. These plans must promote wise use of the

- state's beachfront to include a gradual retreat from the system over a forty-year period;
- (3) severely restrict the use of hard erosion control devices to armor the beach/dune system and to encourage the replacement of hard erosion control devices with soft technologies as approved by the South Carolina Coastal Council which will provide for the protection of the shoreline without long-term adverse effects;
  - (4) encourage the use of erosion-inhibiting techniques which do not adversely impact the long-term well-being of the beach/dune system;
  - (5) promote carefully planned nourishment as a means of beach preservation and restoration where economically feasible;
  - (6) preserve existing public access and promote the enhancement of public access to assure full enjoyment of the beach by all our citizens including the handicapped and encourage the purchase of lands adjacent to the Atlantic Ocean to enhance public access;
  - (7) involve local governments in long-range comprehensive planning and management of the beach/dune system in which they have a vested interest;
  - (8) establish procedures and guidelines for the emergency management of the beach/dune system following a significant storm event.

SECTION 48-39-280. FORTY-YEAR RETREAT POLICY.

- (A) A forty-year policy of retreat for the shoreline is established.

**In The  
Supreme Court of the United States  
October Term, 1991**

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John K. Yee and Irene Yee, *et al.*  
*Petitioners,*

v.

The City of Escondido,  
*Respondent.*

---

ON WRIT OF CERTIORARI TO THE  
FOURTH APPELLATE DISTRICT, DIVISION ONE,  
COURT OF APPEAL FOR THE STATE OF CALIFORNIA

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**BRIEF OF GOLDEN STATE MOBILEHOME OWNERS  
LEAGUE, INC., NATIONAL FOUNDATION OF  
MANUFACTURED HOMEOWNERS, AND DESIGNATED  
MOBILEHOME OWNERS ASSOCIATIONS AS AMICI CURIAE  
IN SUPPORT OF RESPONDENT**

Amici Curiae submit this brief with the written consent of all parties filed with the Clerk of the Court.

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## TABLE OF CONTENTS

INTEREST OF AMICI CURIAE .....	1265
SUMMARY OF ARGUMENT .....	1266
ARGUMENT .....	1268
I. THE TECHNOLOGICAL INNOVATION OF THE MOBILEHOME REQUIRED THE STATE OF CALIFORNIA TO DEFINE THE RESPECTIVE RIGHTS OF THE PARK OWNER AND THE MOBILEHOME OWNER AS CO-PROPRIETORS IN THIS UNIQUE FORM OF HOME OWNERSHIP.....	
A. California Has the Authority To Define the Mobilehome Owners' Estate in Their Homes .....	1268
B. The State Has Responded to the Peculiarities of the Mobilehome Market by Allocating Important Property Rights to the Homeowners.....	1270
1. Mobilehomes Are the Predominant Form of Unsubsidized Affordable Housing in the United States .....	1270
2. Mobilehome Owners Are Uniquely Vulnerable to Losing the Investment in Their Home .....	1272
a. The Mobilehome Owners' Substantial Investment in Their Homes and Scarcity of Alternative Locations Limit Their Options .....	1272
b. Rent Control Is a Response to Scarcity; It Is Not Responsible for Scarcity.....	1273
c. In the Absence of Regulation, Park Owners Have Exercised Their Substantial Economic Power To Drive Mobilehome Prices Down, Leaving the Homeowner With a Worthless Investment .....	1274
II. STATE LAW PROTECTS THE PROPERTY INTEREST OF MOBILEHOME OWNERS FROM SIGNIFICANT DIMINUTION BY PARK OWNERS .....	
A. The Mobilehome Owner as Co-Proprietor, Not Ordinary Tenant .....	1275
B. The Escondido Ordinance, Consistent With State Law, Protects the Mobilehome Owner's State-Defined Property Right While Guaranteeing the Park Owner a Reasonable Return on Its Investment .....	1277

- 1. Escondido’s Vacancy Control Ordinance Is a Logical Extension of State Law ..... 1277
- 2. The Escondido Ordinance Does Not “Unreasonably Impair” the Park Owner’s Right to the Use of Its Property..... 1279
- III. CALIFORNIA’S LEGISLATIVE RESPONSE TO THE DEFINITIONAL PROBLEM POSED BY MOBILEHOME OWNERSHIP IS ENTIRELY CONSISTENT WITH THE RESPONSE OF OTHER JURISDICTIONS TO SITUATIONS OF DIVIDED OWNERSHIPS ..... 1280
- IV. ESCONDIDO’S VACANCY CONTROL ORDINANCE SATISFIES THE CONSTITUTIONAL REQUIREMENTS DEMANDED OF REGULATORY ENACTMENTS ..... 1282
  - A. Contrary to Petitioners’ Claim, Escondido’s Vacancy Control Ordinance Confers Substantial Advantages Upon Successor Homeowners..... 1283
  - B. The So-Called Windfall to Incumbent Homeowners Is a Common Benefit Enjoyed by All Incumbents When Government Creates or Redefines Property Rights ..... 1284
- V. THE ESCONDIDO VACANCY CONTROL ORDINANCE DOES NOT CONSTITUTE A PHYSICAL INVASION TAKING UNDER THE *LORETTO* DOCTRINE..... 1284
  - A. The Escondido Ordinance Does No More To Transfer a Possessory Interest in Property Than Do Any of the State Provisions ..... 1284
  - B. The Crucial Element in *Loretto* Was the Absence of a Voluntary Opening of the Property to Possessory Use by Others ..... 1285
- CONCLUSION ..... 1286

## TABLE OF AUTHORITIES

## CASES

	Page
<i>Adkins v. Children's Hosp.</i> , 261 U.S. 525 (1923) .....	1286
<i>Aquarian Foundation, Inc. v. Sholom House, Inc.</i> , 448 So. 2d 1165 (Fla. Ct. App. 1984) .....	1280
<i>Azul Pacifico, Inc. v. Los Angeles</i> , — F.2d — (9th Cir. 1991) 91 Daily Journal D.A.R. 13599 (1991) .....	1271
<i>Block v. Hirsch</i> , 256 U.S. 135 (1921) .....	1279
<i>Board of Regents of State Colleges v. Roth</i> , 408 U.S. 564 (1972) .....	1266, 1268
<i>Bonelli Cattle Co. v. Arizona</i> , 414 U.S. 313 (1973) .....	1284
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<i>Duke Power Co. v. Carolina Environmental Study Group</i> , 438 U.S. 59 (1978) .....	1268
<i>Duquesne Light Co. v. Barasch</i> , 488 U.S. 299 (1989) .....	1279
<i>FCC v. Florida Power Corp.</i> , 480 U.S. 245 (1987) .....	1286
<i>Fred F. French Inv. Co. v. City of New York</i> , 39 N.Y.2d 587, 350 N.E.2d 381 (1976) .....	1286
<i>Hawaii Housing Authority v. Midkiff</i> , 467 U.S. 229 (1984) .....	1281
<i>Kaiser Aetna v. United States</i> , 444 U.S. 164 (1979) .....	1280, 1286
<i>Laguna Royale Owners Association v. Darger</i> , 119 Cal. App. 3d 670 (1981) .....	1280
<i>Lancy v. Clifford</i> , 54 Me. 487 (1867) .....	1269
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<i>Pennell v. City of San Jose</i> , 485 U.S. 1 (1988) .....	1279
<i>PruneYard Shopping Center v. Robins</i> , 447 U.S. 74 (1980) .....	1267, 1268, 1269, 1279, 1285
<i>Sherman v. Mertz</i> , 42 Cal. App. 3d 769 (1974) .....	1274
<i>State v. Shack</i> , 58 N.J. 297, 277 A.2d 369 (1971) .....	1269, 1277
<i>Stewart v. Gorter</i> , 16 A. 644 (Md. 1889) .....	1281
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<i>Webb's Fabulous Pharmacies, Inc. v. Beckwith</i> , 449 U.S. 155 (1980) .....	1268, 1279
<i>West Coast Hotel Co. v. Parrish</i> , 300 U.S. 379 (1937) .....	1268

## STATUTES AND REGULATIONS

16 U.S.C. § 20e (West 1991) .....	1281
Leasehold Reform Act of 1967, section 1(1); <i>Halsbury's Laws of England</i> , 4th Ed. (Butterworths 1981 & Supp. 1990) .....	1281

## State Laws

Az. Stat. Ch. 11, § 33-1416 (West 1990) .....	1271
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Vt. Stat. Ann. tit. 10, § 6237 (1984) .....	1282
Vt. Stat. Ann. tit. 10, § 6240 (Supp. 1991) .....	1282

### *California Civil Code*

§ 798 et seq. ....	1267
§ 798.17(a) .....	1267
§ 798.19 .....	1276
§ 798.55 .....	1275
§ 798.55(b) .....	1275
§ 798.56 .....	1275
§ 798.58 .....	1275
§ 798.72 .....	1275
§ 798.73 .....	1275, 1276
§ 798.74 .....	1276
§ 798.77 .....	1276
§ 798.8 .....	1275
§ 798.9 .....	1275

### *Municipal Codes and Ordinances*

Chula Vista Municipal Code § 16.16.010 .....	1278
City of Fresno Ordinance No. 87-170 .....	1278
Escondido Municipal Code § 29-104(g) .....	1277
Laguna Beach Municipal Code § 1.12.010 .....	1278
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No. 90-194

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**In The  
Supreme Court of the United States  
October Term, 1991**

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John K. Yee and Irene Yee, *et al.*  
*Petitioners,*

v.

The City of Escondido,  
*Respondent.*

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**On Writ of Certiorari to the  
Fourth Appellate District, Division One,  
Court of Appeal for the State of California**

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**BRIEF OF GOLDEN STATE MOBILHOME OWNERS LEAGUE,  
INC., NATIONAL FOUNDATION OF MANUFACTURED  
HOMEOWNERS, AND DESIGNATED MOBILEHOME  
OWNERS ASSOCIATIONS AS AMICI CURIAE IN SUPPORT  
OF RESPONDENT**

Amici Curiae submit this brief with the written consent of all parties filed with the Clerk of the Court.

**INTEREST OF AMICI CURIAE**

Amici curiae are eleven state mobilehome owner associations and the national organization of mobilehome owners. The membership of each association is substantial. The Golden State Mobilhome Owners League, Inc., for example, is a nonprofit California corporation of some 200,000 persons living in nearly 100,000 mobilehomes throughout California. Amici's members live in mobilehome parks and pay monthly rent to the park owner for the space on which their home resides.

Amici curiae have a substantial interest in the continuing ability of local governments to enact ordinances that protect their property interest in their home. A large percentage of amici's homeowner members are

retired Americans on fixed incomes or low and moderate income families for whom the mobilehome is the only feasible means of home ownership. The members of the amici organizations have made a substantial investment in their homes and in improvements to the space on which their homes are located. This investment can be rendered worthless if petitioners' effort to invalidate Escondido's Rent Protection Ordinance is successful.

### SUMMARY OF ARGUMENT

Petitioners' challenge to Escondido's Rent Protection Ordinance ("Ordinance") implicates far more than a single municipality's effort to control rents in mobilehome parks: it challenges the entire body of California State law that has developed in response to the economic and technological innovation of the mobilehome.

The modern factory-built home that can be transported to a small site and permanently installed, without all the infrastructure of a conventional single family home, is a technological and economic breakthrough in the provision of affordable owner-occupied housing. "[T]he mobile home must be regarded as a genuine innovation, meeting needs which conventional housing has left unsatisfied."<sup>1</sup> Indeed, it has been called a "Revolution in American Housing";<sup>2</sup> mobilehomes are the only kind of housing that many moderate-income American families can reasonably afford.<sup>3</sup>

There is no traditional property rule to govern the "genuine innovation" of the modern mobilehome. Unlike a conventional tenant's fixtures or a commercial tenant's improvements, it is a distinctively American innovation linked to the American dream of home ownership. In actual operation, the economics of this new type of housing required a legally innovative split estate where one party owned the dwelling and another owned the underlying land. This form of property ownership gave park owners considerable economic power over mobilehome owners and posed questions that had not previously presented themselves in the setting of modern home ownership.

The novelty of such separate ownership required the state to exercise its authority to define the respective rights of the co-proprietors. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972); *Munn v. Illinois*, 94 U.S. 113, 134 (1877). That is exactly what the State of California ("State") did over a period of several decades by enacting

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1. Wallis, *Wheel Estate* (1991) at 20.

2. Drury, *Mobile Homes, The Unrecognized Revolution in American Housing* (1972).

3. Wallis, *supra* note 1 at 14.

numerous laws to protect mobilehome owners' equity investment in their homes.<sup>4</sup> Those laws, which define the property rights of park owners and homeowners in mobilehome parks, recognize the homeowners' entitlement to a property interest that reflects the price the home would sell for, with security of tenure in its location.

In turn, the State found that the park owners' economic power to deprive homeowners of their equity in their homes resulted from the limited supply of mobilehome spaces and the homeowners' "sunk" investment on-site, and was not a protectable property interest. The State's definition of the respective property rights of the mobilehome owners and park owners was well within its authority to define property rights in a new situation so long as it did not unreasonably impair the park owner's use of its property. *PruneYard Shopping Center v. Robins*, 447 U.S. 73, 83 (1980). Escondido's Ordinance, like that in jurisdictions throughout California and the United States, implements these state laws in a form that they explicitly authorize.<sup>5</sup>

Petitioners claim that the Escondido law results in a physical taking of their property because it transfers a possessory interest of the park owner (the right to occupy the property in its park at below market rates) to the homeowner and it allows the homeowner to market this interest. Specifically, petitioners challenge the provisions of the Escondido Ordinance that preclude park owners from automatically raising rents whenever a mobilehome is sold in place. Petitioners also allege this provision violates their right to substantive due process because it is not rationally related to a legitimate government interest.

Properly framed, this is a definition of property case, not a taking case. The appropriate starting point for resolving this property dispute is to ask whether California, when faced with this new form of property ownership, had the authority to protect the equity investment of mobilehome owners by allowing them to sell their home with security of tenure in its location. The second issue that this Court must address then, is whether Escondido's Ordinance is consistent with the State's definition of those property rights. Amici respectfully submit that the Court should answer both questions in the affirmative and uphold the constitutionality of the Escondido Ordinance.

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4. California law governing mobilehomes is codified in California Civil Code section 798 et seq. (West 1983 and Supp. 1991).

5. Cal. Civ. Code section 798.17(a) allows a mobilehome owner to demand a rent-controlled tenure of twelve months or less whenever a local government adopts an ordinance or initiative measure establishing a maximum amount that a park owner may charge a mobilehome owner for rent.



## ARGUMENT

**I. THE TECHNOLOGICAL INNOVATION OF THE MOBILEHOME REQUIRED THE STATE OF CALIFORNIA TO DEFINE THE RESPECTIVE RIGHTS OF THE PARK OWNER AND THE MOBILEHOME OWNER AS CO-PROPRIETORS IN THIS UNIQUE FORM OF HOME OWNERSHIP.****A. California Has the Authority To Define the Mobilehome Owners' Estate in Their Homes.**

New forms of ownership, new technologies, and new economic and material conditions in a state generate changes in the rules of real property law. The principle is as old as the Union; in the Eighteenth Century "some of our states quickly took advantage of their newly acquired independence to abolish all feudal tenures by legislative fiat."<sup>6</sup> "In a changing world, it is impossible that it should be otherwise." *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926) (zoning not a violation of property rights).

States have power to enact laws that respond to technological and economic changes. *Munn v. Illinois*, 94 U.S. at 134. "Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . ." *Board of Regents of State Colleges v. Roth*, 408 U.S. at 577. The State is not compelled to leave the parties to whatever physical or economic power one has over the other, or to leave them to whatever they can obtain by contract. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 392 (1937).

The state's power to define property interests is not unlimited. It may not "unreasonably impair" an owner's use of his property, *PruneYard Shopping Center v. Robins*, 447 U.S. at 83, intrude on the "sphere of private autonomy," *id.* at 93 (concurring opinion), or simply abrogate common law remedies. *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 88 (1978). Nor may the state simply transform private property into public property. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980) (declaring invalid the transfer of interest on private interpleader funds to public accounts). So long as it respects these precepts and does not, in the absence of changed circumstances, reverse a "usual and general rule" of property, the state is and must be free to adapt to new circumstances.

There are numerous examples throughout our history of legislative

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6. Vance, "The Quest for Tenure in the United States," 33 *Yale L.J.* 248, 249 (1924).

and judicial responses to technological and economic innovations. Thus, the invention of the airplane led to a change in the common law definition of property through recognition of navigable airspace. *United States v. Causby*, 328 U.S. 256, 260-61 (1946). Modern timber harvesting diminished riparian rights and created a public right of passage by developing the floating log test of navigability in place of the common law rule that only ship traffic demonstrated navigability. *Lancy v. Clifford*, 54 Me. 487, 491 (1867). The modern company town and the contemporary shopping center brought modifications in the law of trespass. *Marsh v. Alabama*, 326 U.S. 501 (1946) (access to company town); *State v. Shack*, 58 N.J. 297, 277 A.2d 369 (1971) (access to migratory farm workers on employer's land); *PruneYard Shopping Center v. Robins*, 447 U.S. at 82 (political soliciting in shopping center).

The new and unique form of property ownership created by the modern mobilehome presented the State of California and its local governments with a circumstance they had never before encountered. The economic necessities of low cost homeownership required that a mobilehome be sited on land owned by another, where it did not have security of tenure. Park owners, because of this split estate, the limited supply of mobilehome spaces, and the homeowners' "sunk" investment on-site, obtained a controlling economic power over the equity of mobilehome owners in their home.

The property interest that petitioners claim was taken by the Escondido Ordinance is the product of the park owner's economic power over homeowners. That power grows out of immobility, not out of the natural force of supply and demand, and is thus a species of monopoly after the fact. The interest claimed by the park owners represents their power to deprive mobilehome owners of their equity investment in their homes; it is not a constitutionally protected property right. Since the beginning of the modern mobilehome era and the emergence of the split estate, California, like other states in this country where mobilehomes comprise a significant portion of the affordable housing stock, has determined that the right of sale with security of tenure in its location resides in the homeowner.<sup>7</sup> Because the park owners never possessed the interest they now claim, the Escondido Ordinance has taken nothing from petitioners.

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7. See *infra* note 57, and accompanying text.

**B. The State Has Responded to the Peculiarities of the Mobilehome Market by Allocating Important Property Rights to the Homeowners.**

**1. Mobilehomes Are the Predominant Form of Unsubsidized Affordable Housing in the United States.**

Nothing illuminates the conflict in this case better than the phrase petitioners have chosen to describe the mobilehome: They call it "depreciable personal property." (Brief for Petitioners (hereinafter "Brief"), at 28.) For 12.5 million Americans, a mobilehome is their dwelling; for people of modest means, old and young, a mobilehome is the only home they can hope to own.<sup>8</sup> Manufactured housing accounted for almost 36 percent of all single-family homes sold in the United States in 1981, and for the vast majority of those sold for under \$50,000.<sup>9</sup> Older Americans on fixed incomes and more than 80 percent of young households who do not own a home already can only afford to buy a mobilehome.<sup>10</sup>

For young and old, home ownership with an equity interest is strongly desired. The rental apartment is not a satisfactory alternative because it meets none of the four basic norms of Americans' housing preferences: ownership, detached dwelling, private outdoor space, and conventional construction.<sup>11</sup> In contrast, the mobilehome meets three of those criteria. Not surprisingly, therefore, rental apartments and owner-occupied mobilehomes are distinct markets.

Contrary to petitioners' assertions, the modern mobilehome is not a depreciating asset. The average mobilehome, like the average site-built home, retains its value over decades. It is a dwelling that is maintained, improved, and cared for just like conventional site-built homes and that "appreciate[s] in value when properly located, maintained, and cared for."<sup>12</sup> The only difference is that the owners are on average less affluent,

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8. A study by the California Department of Housing and Community Development ("HCD") estimates that families earning only 50 to 80 percent of the median income in their area could afford to buy a mobilehome. HCD, *Incentives for New Family Mobilehome Parks in California* (hereinafter "Incentives") (1986) at 6.

9. Baar, "The Right to Sell the 'Im'mobile Manufactured Home in its Rent Controlled Space in the 'Im'mobile Home Park: Valid Regulation or Unconstitutional Taking?," 24 *Urban Lawyer* No. 2 (forthcoming Winter 1992), citing *Report of the President's Commission on Housing* (1982) at 85-86.

10. Nutt-Powell, *Manufactured Homes* (1982) at 67. In Escondido, a mobilehome on-site costs about one-third to one-quarter of the price of a conventional site-built home. Compare sales data from Berlin Research Corporation, *Mobile Home Sales Report* (1991) to "Southland Home Prices for San Diego County," *Los Angeles Times* (November 17, 1991).

11. Tremblay & Dillman, *Beyond the American Housing Dream: Accommodation to the 1980's* (1983) at 14.

12. "Better Way to Appraise Mobile Homes," *Banking* (October 1978) at 118.

often because they are retired and living on pensions. The average age of mobilehome owners in Escondido is 64.4 years.<sup>13</sup> In 1988 the median family income of Escondido mobilehome owners was \$15,500.<sup>14</sup>

Modern mobilehomes, many as large as 1400 square feet,<sup>15</sup> cost tens of thousands of dollars retail and homeowners invest thousands more in improvements and landscaping, as well as placement on their site. In 1988 the average retail cost of a double-wide mobilehome in California was \$40,000.<sup>16</sup> Purchasers buy and move into well-maintained homes that are often well over twenty years old, going back to the beginning of the era of the modern, larger mobilehomes.<sup>17</sup>

The single example cited by Judge Kozinski in *Azul Pacifico, Inc. v. Los Angeles*, — F.2d —, — (9th Cir. 1991), 91 Daily Journal D.A.R. 13599 (1991), and repeatedly cited by petitioners (Brief, at 10, 14, 20) of an individual who bought a mobilehome on-site and scrapped it, is a highly unusual situation. As with site-built homes, the overwhelming majority of mobilehomes are bought to be lived in, and the sellers have a substantial equity investment to protect. By isolating the extremely atypical case of "one Mrs. Morrison," the opinion in *Azul Pacifico* suggests that the home itself is worthless. Exactly the opposite is the case. Almost all mobilehomes are sold in place as sound dwellings to buyers who will live in them.<sup>18</sup>

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Mobilehome prices appreciate in states even without rent control. HCD, *Manufactured Housing for Families: Innovative Land Use and Design* (hereinafter "*Manufactured Housing for Families*") (1986) at 13-15 showing rapid appreciation of mobilehome prices in Arizona even though the state preempts rent control; see Az. Stat. Ch. 11 § 33-1416 (West 1990).

13. San Diego Association of Governments, *City of Escondido Mobile Home Needs Survey* (1988) at 5.

14. *Id.* By comparison, the 1990 median income for all households in the San Diego area was \$37,900. San Diego Association of Governments, *City of San Diego Mobile Home Needs Survey* (hereinafter "*San Diego Mobile Home Needs Survey*") (1990) at 9.

15. Anderman, *The Manufactured Housing Alternative* (1981) at 13; *San Diego Mobile Home Needs Survey*, *supra* note 14 at 14.

16. *Manufactured Housing for Families*, *supra* note 12 at 7-8. This amount does not include transportation and setting on site.

17. Recent published sales figures for Escondido show many transfers of mobilehomes that were built in the early to mid-1960's, and many more that date to the early 1970's. Berlin Research Corporation, *supra* note 10.

18. HCD, *Mobilehome Parks in California* (1986) at 19, stating that more than 90 percent of mobilehomes that are sold remain in the park.

2. *Mobilehome Owners Are Uniquely Vulnerable to Losing the Investment in Their Home.*

a. *The Mobilehome Owners' Substantial Investment in Their Homes and Scarcity of Alternative Locations Limit Their Options.*

Mobilehome owners are in a unique, and uniquely vulnerable, position. They cannot pack up and leave when rents rise. Their homes sit on land owned by someone else—a pervasive necessity of the economics of the mobilehome as affordable housing. Even if vacant spaces were available (there are virtually none in much of California),<sup>19</sup> the cost of moving a sizeable mobilehome is between \$10,000 and \$12,000.<sup>20</sup> A mobilehome thus has considerably more value if it can remain on-site than if it must be moved elsewhere. This fact permits the “opportunistic behavior” that is created whenever one party is obliged by circumstances to make an immobile capital investment on the land of another.<sup>21</sup> This power may be called opportunistic monopoly, or monopoly after the fact. Once the mobilehome is installed on its pad, the unprotected homeowner will submit to above-market rents simply to avoid the cost of moving. The park owner’s power to capture for himself those sunk investment costs is an undeserved windfall called “quasi rent.” Even Hirsch & Hirsch speak of this monopoly profit potential as a “hold up” of the incumbent mobilehome owner.<sup>22</sup>

Scarcity increases the mobilehome owner’s vulnerability. The virtual absence of vacant pads means the homeowner has nowhere to move. He is thus vulnerable not only to loss of moving costs, but to the entire equity in his home if he has no entitlement to security of tenure for himself or for a successor in his location. If there were no scarcity, the mobilehome owner could move and at least protect his investment, minus the cost of moving. But where there are no vacant sites available, scarcity permits a park owner to drive the home’s price down to salvage, ordinarily only a few thousand dollars.<sup>23</sup> What usually is a source of appreciation becomes, for the mobilehome dweller, a trap.

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19. Pad vacancies are about 3 percent state wide and near zero in many California communities. *Mobilehome Parks in California*, *supra* note 18 at 17.

20. Wallis, *supra* note 1 at 15.

21. O. Williamson, *Market and Hierarchies: Analysis and Anti-Trust Implications* (1975).

22. Hirsch and Hirsch, “Legal-Economic Analysis of Rent Controls in a Mobile Home Context: Placement Values and Vacancy Decontrol,” 35 *U.C.L.A. L. Rev.*, 389, 436 (1988).

23. Note: “Mobile Home Parks and Connecticut’s Regulatory Scheme; A Takings Analysis” (hereinafter “Mobile Home Parks and Connecticut’s Regulatory Scheme”), 17 *Conn. L. Rev.* 811, 815 and n.19 (1985).

b. *Rent Control Is a Response to Scarcity; It Is Not Responsible for Scarcity.*

Rent control did not create scarcity in the mobilehome market; it was a response to scarcity largely created by restrictive zoning and the landowner power it generated. "As urban areas grew, [cities] annexed the parks along with everything else . . . the only land zoned for [mobilehome parks] was often what they already occupied."<sup>24</sup> Although total exclusion is often barred by legislation and the courts, new laws permitting mobilehomes to be placed on land zoned for residential use produce virtually no results, as land prices are too high to make the use of such large tracts economical.<sup>25</sup>

Scarcity persists because other, higher density uses are more profitable than mobilehome parks, whether or not there is rent control.<sup>26</sup> For example, if controlled rents limit return to 8 percent, while uncontrolled rents would produce a 12 percent return, profit maximizing landowners will still reject mobilehome parks in favor of high rise apartments or office buildings which can produce a 15 percent return. Where land prices are high, mobilehomes are unlikely to be built.<sup>27</sup> For that reason, few new mobilehome parks are being built in Southern California and it is unlikely that new mobilehome parks will be built on any land in Escondido.<sup>28</sup> The decline in the number of new mobilehome parks in California over the last several decades is attributable fundamentally to increased demand for high density uses, not to rent control.

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24. Wallis, *supra* note 1 at 16; see also "Manufactured Housing: The Invalidity of the 'Mobility' Standard," 19 *The Urban Lawyer* 367 (1987).

25. HCD, *Local Government Mobilehome and Mobilehome Park Policies in California* (hereinafter "*Local Government Policies*") (1986) at 13; Comment: "California Government Code Section 65852.3: Legislature Prohibits Exclusion of Mobile Homes on Single-Family Lots," 16 *U.C.D.L. Rev.* 167 (1982).

26. Rent control was cited in a survey of local governments in California as the reason for not submitting a mobilehome park development application in only one percent of the cases. Lack of suitable land, costs, economics, and poor demand were dominant considerations. *Local Government Policies, supra* note 25 at 31.

27. "New parks must compete against higher intensity alternatives." *Incentives, supra* note 8 at 17. Where county land prices are high, the distribution of mobile home parks is low. State of New Jersey Legislative Study Commission, *Report and Recommendations of the Mobile Home Study Commission* (October 1980) at 93.

28. Escondido already has 31 mobilehome parks, and while homeowners may place mobilehomes on individual lots, none of the vacant residential property is zoned for mobilehome parks.

c. *In the Absence of Regulation, Park Owners Have Exercised Their Substantial Economic Power To Drive Mobilehome Prices Down, Leaving the Homeowner With a Worthless Investment.*

The history of park owner abuses of their economic power over mobilehome owners has been documented over the years.<sup>29</sup> For example, park owners charged entrance and exit fees, required homeowners to buy their homes from the parkowner or a specified dealer, and rejected new tenants without the payment of a fee.<sup>30</sup>

Park prohibitions of on-site sales allowed park owners to evict current homeowners and collect entrance fees from incoming homeowners—with disastrous consequences for the evicted homeowners.

[T]he evicted homeowner must not only move himself but must also move his home. The owner, in effect, faces the options of abandoning the home, attempting to sell it, or moving it into storage until a new pad is obtained. All of these options may destroy the homeowner's equity in his unit . . . [T]he mobilehome park owner may have strong incentives to evict his tenants whenever possible.<sup>31</sup>

Exemptions from this prohibition could be purchased, with prices—even in 1973—varying between \$250 and \$2,700.<sup>32</sup>

The legislative staff analysis for the 1973 California bill that prohibited forced removal of mobilehomes upon sale noted:

it is alleged that the management often obtains a very large commission for directing purchasers to the tenant, which the tenant must pay if he wants the new purchaser to be able to move into the park.<sup>33</sup>

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29. Manheim, "Tenant Eviction Protection and the Takings Clause," 1989 *Wisc. L. Rev.* 925, 965, n. 224; "Mobile Home Parks and Connecticut's Regulatory Scheme," *supra* note 23 at 815-816; *Ware v. Trailer Mart, Inc.*, 623 F.2d 1150 (6th Cir. 1980) (requiring purchase of mobilehome from park owner is violation of Section 4 of the Clayton Act, 15 U.S.C. § 15); *Sherman v. Mertz*, 42 Cal. App. 3d 769 (1974) (kickbacks on profits from sale of mobilehomes a restraint of trade).

30. "Tyranny in Mobile-home Land," *Consumer Reports* (July 1973) at 441. See also *Suburban Mobile Homes v. AMFAC Communities*, 101 Cal. App. 3d 532 (1980) (requirement that mobilehomes could only be purchased from specified dealers violated California's anti-trust laws).

31. Vernon, Note: "Mobilehomes: Present Regulation and Needed Reform," 27 *Stanford L.Rev.* 159, 167 (1974).

32. "Tyranny In Mobile-home Land," *supra* note 30 at 441.

33. Senate Local Government Committee, *Staff Analysis*, Assembly Bill 702, Wilson (amended August 14, 1973).

These abuses allowed park owners to monetize their power over homeowners.

## II. STATE LAW PROTECTS THE PROPERTY INTERESTS OF MOBILEHOME OWNERS FROM SIGNIFICANT DIMINUTION BY PARK OWNERS.

### A. The Mobilehome Owner as Co-Proprietor, Not Ordinary Tenant.

For more than twenty years the State of California has been legislating to "protect the investment of mobilehome owners" against abuses of economic power by park owners.<sup>34</sup> Owners of mobilehomes, as co-proprietors with a large capital investment, were found to be needful of "unique protection" both during their tenure and upon sale.<sup>35</sup> The legislature formalized its treatment of the mobilehome owner's co-proprietorship by explicitly substituting the term "homeowner" for the word "tenant" in the mobilehome residency law.<sup>36</sup>

The first problem to which the legislature attended was the practice of evicting homeowners to install someone who had bought a mobilehome from the park owner. In 1969 legislation imposed notice requirements on eviction<sup>37</sup> and two years later prohibited eviction for the purpose of making a space available for a homeowner who purchased the home from the owner of the park.<sup>38</sup>

Although they lost the power to evict in order to install their own buyer, park owners could achieve the same economic benefits by imposing charges on mobilehome sellers and their buyers.<sup>39</sup> In 1972 the State blocked this stratagem by prohibiting entry charges on new homeowners and transfer charges as a condition of sale by incumbent homeowners.<sup>40</sup> A year later the law extended the protections against eviction by prohibiting termination of the tenancy of incumbent homeowners except for cause.<sup>41</sup> During the same year, the legislature barred park owners from requiring mobilehomes to be removed upon sale, another device by

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34. Press Release dated May 17, 1973 by Assemblyman Bob Wilson, sponsor of the original law now codified at Cal. Civ. Code § 798.73, 1973 Cal. Stat. ch. 785, § 1. (In each of the ensuing statutory references, the current codified version may be somewhat different from the original law.)

35. 1975 Cal. Stat. ch. 146, § 1, now codified at Cal. Civ. Code § 798.55.

36. California Civil Code §§ 798.8 and 798.9.

37. 1969 Cal. Stat. ch. 1500, § 1, codified at Cal. Civ. Code § 798.55(b).

38. 1971 Cal. Stat. ch. 1143, § 1, codified at Cal. Civ. Code § 798.58.

39. See *supra* notes 29 to 33 and accompanying text.

40. 1972 Cal. Stat. ch. 1001, § 1, codified at Cal. Civ. Code § 798.72.

41. 1973 Cal. Stat. ch. 351, § 1(d), codified at Cal. Civ. Code § 798.56.



which the park owner could have devalued the home of incumbent homeowners.<sup>42</sup> A legislative staff report explaining the 1973 bill noted:

A second issue is past abuse of park operators who have exercised almost complete control over the sites and even what dealer would sell the mobilehome to be installed in the park. Because of few parks in only a few communities, operators [park owners] would require purchase from a specific dealer, and that they have exclusive right to control resale. They charged excessive fees and frequently did little to market the home. Homeowners took a bath on resale.<sup>43</sup>

In 1975 the legislature assured a qualified purchaser the right to take over the pad on which the home was sited. Despite all the laws previously enacted, if the park owners could nonetheless refuse tenancy to all purchasers, they would still be able to compel a sale to themselves or on terms that would make the mobilehome unsalable to anyone else. Without protection against rejection of purchasers, park owners could circumvent all the State laws enacted to protect the homeowner's investment in his mobilehome.

The law had previously provided that park owners had "the right to require prior approval of a purchaser if the mobilehome will remain located in the mobilehome park or other facility."<sup>44</sup> In the law of June 28, 1975, the legislature added this crucial passage:

. . . provided, however, that the approval of a purchaser cannot be withheld if the purchaser as a prospective tenant has the financial ability to pay the rent and charges of the park. . . .<sup>45</sup>

With this provision, the State recognized definitively the property right of an incumbent homeowner to sell his home with security of tenure in its location. Implicit in the State's action is its refusal to elevate the economic power of park owners to the status of a protected property interest.<sup>46</sup>

California law recognizes the centrality of homeowner commitment to value in those things that determine neighborhood and locational quality, including investment in improvements and upkeep, maintenance

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42. 1973 Cal. Stat. ch. 785, § 1, codified at Cal. Civ. Code § 798.73.

43. Urban Development & Housing Committee, *Memo on AB 702*, Wilson (May 15, 1973).

44. 1973 Cal. Stat. ch. 785, § 1, codified at Cal. Civ. Code § 798.74.

45. 1975 Cal. Stat. ch. 146, § 3, codified at Cal. Civ. Code § 798.74.

46. California, in recognition of the unequal bargaining power of the mobilehome owner and park owner, prohibits the waiver of its mobilehome owner protection laws. Cal. Civ. Code §§ 798.19, 798.77.

of structures, landscaping, participation in neighborhood activities, and duration and stability of ownership. All of these conditions demand involvement by homeowners and they all add to the value of mobilehomes in place. The homeowner has an equity interest in the estate. Indeed, a Los Angeles study found that the investment of the average mobilehome owner in his home is triple the investment of the park owner in the space on which the home resides.<sup>47</sup>

California's determination of property interests was both reasonable and appropriate.

Property rights serve human values. They are recognized to that end, and are limited by it. *Title to real property cannot include dominion over the destiny of persons the owner permits to come upon the premises.*

*State v. Shack*, 277 A.2d at 372 (emphasis added).

**B. The Escondido Ordinance, Consistent With State Law, Protects the Mobilehome Owner's State-Defined Property Right While Guaranteeing the Park Owner a Reasonable Return on Its Investment.**

Although State law does not explicitly impose any limit on the amount of rent the park owner can demand from the new homeowner, a limit to some reasonable amount is necessarily implicit in the 1975 provision requiring park owners to accept a qualified purchaser. The provision would be a nullity if a park owner could approve prospective tenants only on condition that they pay a prohibitively high rent (a rent, for example, that would only be affordable if the price of the mobilehome had dropped to salvage value). Escondido's Ordinance implements the homeowner's state-recognized property right by limiting the required rent to a "just, fair, and reasonable" amount. Escondido Municipal Code § 29-104(g) (*see* Joint Appendix ("J.A.") at 25).

**1. Escondido's Vacancy Control Ordinance Is a Logical Extension of State Law.**

The aim of the Escondido Ordinance's vacancy control provision, as well as the ordinances of numerous other local governments in California and elsewhere,<sup>48</sup> is to protect mobilehome values from decline by limiting

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47. City of Los Angeles Rent Stabilization Division, Community Development Department, *Mobilehome Parks Under Rent Stabilization* (1985) at 11, 33.

48. Local governments throughout California have instituted mobilehome rent control, even where they do not have apartment rent control. These governments repeatedly cite the scarcity of mobilehome pad vacancies, the difficulty and cost of moving a mobilehome, and the ability of park owners to take advantage of this situation as the reason for implementing rent

the rental prices park owners can exact from new buyers. An unlimited power to drive rents up is an unlimited power to drive mobilehome prices down—until they reach scrap or salvage value, which is virtually nil even for the most expensive homes.<sup>49</sup>

Petitioners' claim that exorbitant rent increases are unlikely because park owners have no incentive to "deter listings and sales" is flatly wrong. (Brief, at 29.) Park owners have *every* incentive to deter sales and listings—to everyone but themselves. That is exactly what they have done; indeed, that is the power they claim. Arguing in their brief before the Court of Appeal, petitioners stated that without rent control, "the landlord could raise the rent to prohibitive levels and as a practical matter has both the right and the power to compel the removal of the tenant." Appellants' Opening Brief at 1.

The history of California's mobilehome park legislation shows that park owners have used their power over eviction, over access to land, and over future rents, to position themselves as the sole agents for, or buyers of, mobilehomes that are for sale in their parks.<sup>50</sup> Over fifty mobilehome owners in Salinas, California complained that park owners improperly rejected prospective buyers. Several homeowners reported that after they were unable to sell their homes to an outside buyer, the park owner bought the homes at below market value and then sold the homes at a profit.<sup>51</sup>

Unless a seller can guarantee his buyer that the mobilehome will not have to be removed from the premises, that the buyer will be accepted as a park resident, and that the buyer will be protected against prohibitive entry fees, transfer fees, and rents when he moves in, a homeowner has no way to protect his investment in the home. This is true whether or not the law prohibits the sale of the home to the park owner. Even where park owners do not engage in abusive rent practices, large increases in rent decrease the value of the mobilehome, and threaten the equity investment of the homeowner. The prospect of continued, unpredictable

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control. See, e.g., Chula Vista Municipal Code § 16.16.010; Morgan Hill Municipal Code § 5.36.010; Laguna Beach Municipal Code § 1.12.010; City of Fresno Ordinance No. 87-170; Salinas Municipal Code § 17.1-1. The Escondido Ordinance is similar to many of these other laws. J.A. at 21.

49. "Mobile Home Parks and Connecticut's Regulatory Scheme," *supra* note 23 at 815 and n.19.

50. See *supra* notes 29 and 33 and accompanying text.

51. *Survey of Mobile Homeowners in Salinas*, Legal Services for Seniors, Salinas, California (1990) at 3. See also "Judge Hammers Landlord's Attorney for \$25K," *Santa Barbara Independent* (April 11, 1991) at 11 (indicating that park owner at one mobilehome park proposed rental increase of 100 percent—from \$300 to \$600).

rent increases can make a mobilehome unmarketable.<sup>52</sup> Unlike ordinary landlords, park owners need not worry about sluggish sales or vacancies. The mobilehomes remain on the land; no matter how long it takes to sell them, and whether they are occupied or vacant, homeowners must continue to pay rent to the park owners.

Moreover, steady increases in rent above the consumer price index can have significant adverse impacts on current mobilehome owners—especially older homeowners on fixed income—regardless of their impact on the value of the home. Cities throughout California have reported large rent increases in recent years.<sup>53</sup> For homeowners living on fixed incomes, rent increases above the consumer price index quickly exceed their financial resources.

The Escondido Ordinance is one important element in the long-standing effort to secure the property right of mobilehome owners in the value of their homes. The Ordinance simply implements State law on a local level by ensuring that park owners cannot circumvent the purpose behind the State law by charging exorbitant rents to prospective tenants. Without this protection, park owners could reject all new homeowners through rent increases.

## 2. The Escondido Ordinance Does Not “Unreasonably Impair” the Park Owner’s Right to the Use of Its Property.

In implementing the homeowner’s property right, the Escondido Ordinance protects the park owner’s right against unreasonable impairment (*PruneYard*, 447 U.S. at 83) by providing for a reasonable return on investment, which is all that the Constitution demands. *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 305, 310 (1989). The Escondido Ordinance makes no *ipse dixit* reversal of a usual and general property rule, *Webb’s Fabulous Pharmacies*, 449 U.S. at 164, for it merely imposes rent control, a permitted limitation on landowners since 1921. *Block v. Hirsch*, 256 U.S. 135 (1921); *Pennell v. City of San Jose*, 485 U.S. 1 (1988).

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52. *Manufactured Housing for Families*, *supra* note 12 at 14.

53. Rents in petitioners’ parks increased by 28-30 percent between 1986 and 1988; the consumer price index during that time rose by only 7.5 percent. U.S. Department of Labor, Bureau of Labor Statistics, *Consumer Price Index, San Diego, California* (August 15, 1991) at 1. See also Baar, *Mobile Home Ownership in Fremont* (1991) at 11 (in one example rents increased by 354 percent between 1972 and 1991, while consumer price index during that same time rose by only 242 percent); *Survey of Mobile Homeowners in Salinas*, *supra* note 51 at 1 (indicating that average annual rents increased at two to three times the consumer price index). Generally, rental housing prices increase at only 65 percent of the consumer price index. *Id.*

Nor can park owners claim the ordinance deprives them of a reasonable investment-backed expectation. *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979). Any of the devices by which park owners could drive mobilehome prices down to salvage value, such as the power to evict, remove, deny qualified successors, or charge excessive rents, are not constitutionally protected property interests. Petitioners' economic interest is derived from two forms of monopoly power: one resulting from the scarcity of land available for mobilehome park development and the other gained as a result of the homeowner's sunk investment in his home. "No one has a legitimate claim of entitlement to monopoly profits." *Chicago, Milwaukee, St. Paul & Pacific R. Co. v. United States*, 799 F.2d 317, 327 (7th Cir. 1986) (Easterbrook, J.). The State has determined that this power to exploit does not represent a property interest of the park owner.

### III. CALIFORNIA'S LEGISLATIVE RESPONSE TO THE DEFINITIONAL PROBLEM POSED BY MOBILEHOME OWNERSHIP IS ENTIRELY CONSISTENT WITH THE RESPONSE OF OTHER JURISDICTIONS TO SITUATIONS OF DIVIDED OWNERSHIPS.

When new forms of divided ownership have appeared, the states have had to define property rights appropriate to the circumstances. Condominium ownership is the most familiar example. It raises an analogous problem to that of the mobilehome owner and park owner and it has generated similar rules. While a condominium association is not a landlord seeking rent, it can and does have interests distinct from those of a single homeowner, and it also has economic power because of the sunk investment of the homeowner. When a condominium owner wishes to sell his unit and is subject to the approval of the condominium board, courts hold that the necessary approval may not be withheld except upon reasonable grounds, such as the financial capacity of the buyer.<sup>54</sup> Where the board is allowed to exercise a right of refusal, it is obliged to provide a buyer at an equally favorable price. *Chianese v. Culley*, 397 F. Supp. 1344 (S.D.Fl. 1975). The board cannot use its powers of refusal to devalue, or capture for itself, the value of the condominium unit.

Another analogous situation arose in Hawaii, where large landowners refused to sell land and required that homes be sited on their land under lease. The state enacted a land condemnation plan whereby the

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54. See, e.g., *Aquarian Foundation, Inc. v. Sholom House, Inc.*, 448 So.2d 1166 (Fla. Ct. App., 1984); *Laguna Royale Owners Association v. Darger*, 119 Cal. App. 3d 670 (1981).

underlying land was acquired from landowners at fair market value and resold to homeowners. *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 234 n.2 (1984). The novel question for the state then was what part of the total, in a split estate, belonged to the landowner, and what part to the homeowner. *Id.* at 244. Under Hawaii law, the landowner is not entitled to everything that its power position would have allowed it to capture in a scarce marketplace; instead, Hawaii attributed to the homeowner the value of his property investment by way of his improvements and enhancements of both the lot and the neighborhood. Hawaii Rev. Stat. Ann. Title 28 § 516-1 (Supp. 1989) (defining "owner's basis").

Both the United States and England faced a similar problem that grew out of landowner practices in the Nineteenth Century. In England, many landowners refused to sell their land, and homeowners were obliged to build their homes on another's land under 99 year leases. As those leases reached termination in the Twentieth Century, homeowners were threatened with having to "remove" their buildings, which effectively meant selling to the landowners at scrap value. Parliament responded with legislation permitting the homeowners either a 50-year lease extension, or a right to purchase the underlying land, at governmentally-approved prices, rather than the price the landowner could have exacted as a result of the homeowner's sunk investment. The purpose, and result, of the legislation was to protect the homeowner's investment value against landlord economic power.<sup>55</sup>

In some American states, statutes granted lessees with similar long term leases a non-waivable right to buy the underlying property in fee. The statute set a reasonable price for the property, although it was a lower price than the landlord could exact as a result of his economic power over the homeowner. The American law, recognizing the homeowner's right to realize the investment value of his home in place, set a maximum price the landlord could demand. *Stewart v. Gorter*, 16 A. 644 (Md. 1889).<sup>56</sup>

As the preceding examples show, jurisdictions have followed various approaches in determining the incidents belonging to each of the coproprietors. In each case, the jurisdiction has diminished the economic power of the unregulated landowner in favor of the homeowner, while

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55. *Leasehold Reform in England and Wales*, presented to Parliament by the Minister of Land and Natural Resources by Command of Her Majesty (H.M.S.O., Feb., 1966) at 4-5, describing the proposal that became the Leasehold Reform Act of 1967, section 1(1); *Halsbury's Laws of England*, Vol. 27 ¶ 1001, 4th Ed. (Butterworths 1981 & Supp. 1990).

56. See also 16 U.S.C. § 20e (West 1991) (United States must compensate companies operating businesses in National Parks for loss of their structures if government terminates their concession contract).

guaranteeing it a just, fair, and reasonable return on investment. California and Escondido have done no more through their recognition of the property rights of the mobilehome owner and the park owner.<sup>57</sup>

#### IV. ESCONDIDO'S VACANCY CONTROL ORDINANCE SATISFIES THE CONSTITUTIONAL REQUIREMENTS DEMANDED OF REGULATORY ENACTMENTS.

Although this is a definition of property case, the Escondido Ordinance plainly survives scrutiny under this Court's regulatory taking standards. There is a legitimate interest in protecting homeowner values; the state may define homeowner values to include locational value, as well as investment and improvement value over and above salvage value. Moreover, homeowner values are and have been diminished by the behavior of park owners; there is thus a nexus between the harm caused by park owners and the remedy that both the state legislation and local ordinance have fashioned.

The remedy that the State and City of Escondido have chosen, affording homeowners locational value by means of statutorily-created rights of tenure and transfer in location, and by limiting charges that could thwart realization of those rights, is tightly fitted to the harm.<sup>58</sup> Indeed, the remedy achieves precisely the purpose of mobilehome policy; the intended beneficiaries of the law are in fact benefitted—both incumbent and future owners—in the form of stabilized home values and opportunities to accrue enhancement value upon sale. Insofar as certain beneficiaries (incumbent homeowners) realize an additional benefit, that is a necessary and inevitable result of new laws and legal interpretations, whether they result from legislation or from judicial decision.

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57. California's approach to the split ownership situation is similar to the approach taken throughout the United States. Many states require that park owners give homeowners renewable leases. Mass. Gen. Laws Ann. ch. 140 § 32J (West 1979 & Supp. 1991); Vt. Stat. Ann. tit. 10, § 6237 (Equity 1984 & Supp. 1991); Pa. Stat. Ann. tit. 68 § 398.3 (West 1984 & Supp. 1991). Three other states permit a selling homeowner to transfer his lease to the purchasing homeowner and prohibit the park owner from rejecting the purchaser except for an inability to pay rent, refusal to follow park rules, or evidence of illegal use of the mobilehome. Mass. Gen. Laws Ann. ch. 140 § 32M (West 1979); Vt. Stat. Ann. tit. 10, § 6240 (Equity 1984 & Supp. 1991); R.I. Gen. Laws § 31-44-4(f) (Michie 1982 & Supp. 1991).

58. The alternative suggested by petitioners is no alternative at all. (Brief, at 29.) They simply propose the repeal of vacancy control laws, which would defeat the precise and legitimate purpose that the Escondido Ordinance seeks to achieve.

**A. Contrary to Petitioners' Claim, Escondido's Vacancy Control Ordinance Confers Substantial Advantages Upon Successor Homeowners.**

Petitioners argue that successor mobilehome owners obtain no benefit from the law, suggesting that all the benefit is captured and carried away by the incumbent homeowner-seller. (Brief, at 23-24.) This contention is erroneous.

Even if the sales price of mobilehomes were to rise immediately after the imposition of vacancy control, there would be substantial benefits to each new generation of buyers.<sup>59</sup> Where new owners improve and maintain their mobilehomes, or enhance the quality of the neighborhood, they will be able to realize the increased value of their home and its environs when they sell. If new residents could not assure their buyers, in turn, the right to tenancy at a controlled price, the park owner would be able to capture such added value over and above the value of the home when the homeowner bought it. The law thus assures homeowners the ability to realize the benefits of what they put into the property when they decide to sell.

The law also frees purchasing homeowners from instability arising from strategic behavior on the part of the park owner. Park owners sometimes underprice the rental amount for a pad for their own reasons (for example, they may seek to ward off additional government regulation of their industry).<sup>60</sup> Insofar as home prices and rentals are complementary, home prices will rise during such a period. One who buys during a period of rental underpricing will pay a higher home price. Later, when it comes time to sell, park owners may be charging maximum rents and home prices will then fall. The homeowner caught in such circumstances will have bought high, but have to sell low. While home prices always vary to some extent with market conditions, most homeowners are not forced into a speculative market, where—in order to invest wisely in their homes—they must be skillful guessers about landlord pricing and turnover strategies. In the absence of vacancy control, park owners have an incentive to promote turnover in tenancies, which in turn promotes instability. Vacancy control laws reduce speculative risk and import stability into the mobilehome market.

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59. Some buyers will find that mobilehome prices do not rise automatically to absorb the economic value of vacancy control. Where mobilehome sales are sluggish, eager sellers may keep prices down to attract buyers quickly. Nor are people always rational maximizers. In such cases, buyers will benefit from controlled rental prices.

60. Hirsch and Hirsch, *supra* note 22 at 445.



**B. The So-Called Windfall to Incumbent Homeowners Is a Common Benefit Enjoyed by All Incumbents When Government Creates or Redefines Property Rights.**

The fact that homeowners in place at the time of the law's enactment receive a special benefit is inevitable and constitutionally irrelevant. (Brief, at 25-28.) When a law changes or creates new rights, incumbent owners obtain an additional benefit beyond what their successors get, simply because they are in place at the time of the law's enactment.

For example, owners of property along the California coast who bought their land at a cost reflecting the prospect of a beach access easement received a windfall because they were in place when this Court invalidated a similar easement in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). Their property values would rise to reflect the economic value of the new legal rule. When they sell their properties, they will reap the capitalized value of that change.

As property rules inevitably change, or as new technology results in new property interests, incumbent owners who are in the right place at the right time reap a special gain from the change. See e.g., *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977) (overruling property rule of *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313 (1973)).

**V. THE ESCONDIDO VACANCY CONTROL ORDINANCE DOES NOT CONSTITUTE A PHYSICAL INVASION TAKING UNDER THE LORETTO DOCTRINE.**

**A. The Escondido Ordinance Does No More To Transfer a Possessory Interest in Property Than Do Any of the State Provisions.**

The claim that the Escondido Ordinance in conjunction with the California Mobilehome Residency Law is a taking of a "possessory interest in the realty" of the park owner sweeps extraordinarily broadly. (Brief, at 14.) Each of the State law protections, enacted over twenty years, creates in the mobilehome owner a present possessory interest in the realty of the park owner, an interest the homeowner did not have by lease or contract. Each provision empowers the homeowner to exercise those rights at a price below that at which the park owner would have voluntarily granted such rights. Unless it is assumed that park owners could have thwarted all those laws by charging some exorbitant rent as a condition of their exercise, the Escondido Ordinance no more constitutes a taking within the meaning of *Loretto v. Teleprompter Manhattan CATV*

*Corp.*, 458 U.S. 419 (1982), than do any of the State laws. All the Escondido Ordinance adds is the right of a purchasing homeowner to pay the same rent for the space as the seller, while still allowing a reasonable return to the park owner.

It is true that not all the State laws relate to the sale of the mobilehome on-site. Some rights under the State law, such as the protection against eviction, are vested in the incumbent resident. But there is no rational basis for distinguishing, as a matter of constitutional taking doctrine, between a right to sell the mobilehome to another and the right to have one's own tenancy extended. In each case, the purpose of the State law is to protect the investment value of the mobilehome against the efforts of the park owner to drive down the price of the home to salvage value. That concern is identical whether the owner remains, sub-leases, or sells.

The right to occupy land permanently is indeed something that California law gives to mobilehome owners and that must be given if mobilehome value is to be protected at all. For where there is nowhere to move such homes, an order to move is effectively an order to turn the home over to the park owner at its salvage value. The right to occupy land at less than the rent the park owner chooses to charge is equally necessary to protect against the park owner's capacity either to appropriate the home for himself or to charge rents that render the mobilehome worthless. The right granted the mobilehome owner to "market" the right of occupancy is simply a grant to the homeowner of the right to alienate his property.

Insofar as these rights are, in part at least, rights that ordinary tenants do not have, the answer is that mobilehome owners are not ordinary tenants. They are co-proprietors. To characterize them merely as tenants is not only to slight the authority of the State to give definition to property rights under novel circumstances, it is to give no constitutional weight to the needs of a homeowner whose home is sited on the land of another as a matter of economic necessity.

#### **B. The Crucial Element in *Loretto* Was the Absence of a Voluntary Opening of the Property to Possessory Use by Others.**

Nothing in *Loretto* or any other physical invasion case compels or even suggests the result urged on this Court by petitioners and their supporters. The crucial distinction between this case and *Loretto* is the presence here of a voluntary act on the part of the park owner opening his property to the possession of others. That act may come in the form of property that has been opened to the general public, *Prune Yard Shopping*

*Center v. Robins*, 447 U.S. 74, or property that is occupied under a contractual relationship between the landowner and the persons on whose behalf the challenged law has been invoked. *FCC v. Florida Power Corp.*, 480 U.S. 245 (1987).

Where there is no such voluntary act, a landowner is entitled to be left to the exclusive possession, peace and quiet, and privacy that is a central element of a property right.<sup>61</sup> *United States v. Causby*, 328 U.S. 256; *Nollan v. California Coastal Commission*, 483 U.S. 825. Where a landowner has opened private land only to those who pay (who have a contractual relationship with him), the state cannot compel him to convert it to a public facility, opening it also to those who do not pay. *Kaiser Aetna v. United States*, 444 U.S. 164. *Fred F. French Inv. Co. v. City of New York*, 39 N.Y.2d 587, 350 N.E.2d 381 (1976). But a property owner who has entered into a contractual relationship with another to possess his land cannot claim the right to dictate the terms of that relationship free of all government regulation, and subject only to the bargained-upon terms that unconstrained bargaining would produce between the parties. Such a result would constitute a throwback to the discredited doctrine of freedom of contract articulated in *Coppage v. Kansas*, 236 U.S. 1 (1915) and *Adkins v. Children's Hospital*, 267 U.S. 525 (1923).

Any extension of *Loretto* to invalidate regulation of contractual possessory relationships would make all sorts of conventional regulation constitutionally suspect as takings. Even if a rule were limited to some notion of a "marketable" possessory right it would be very far-reaching. Laws recognizing rights to sublease or to assign a lease would be vulnerable as takings, since such rights compel the landowner to accept an imposed new tenant at a set price. In fact, unreasonable withholding of permission to sublease can be an illegal restraint on alienation.<sup>62</sup> This is the sort of prospect the Court recognized when in *FCC v. Florida Power Corp.*, 480 U.S. at 252, it drew a distinction between voluntarily initiated "invitations" and those that are imposed by government. "[I]t is the invitation . . . that makes the difference."

## CONCLUSION

There are no factual disputes in this case which merit a trial. Amici

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61. Unlike *Loretto*, where the owner had not consented to the invasion of his property by the Teleprompter cable, here the only physical objects on the park owner's property are mobilehomes to which the park owner has no objection. Indeed it is in consequence of such "invasions" that he makes his living.

62. New York Real Prop. Law, § 226-b (West 1989 & Supp. 1991); Restatement (Second) of Property, § 15.2(2) (1977 & Supp. 1991).

do not disagree with the economic theory that motivates petitioners' action: mobilehome prices and rents are complementary. The fact that mobilehome prices increase when rents are controlled, however, does not deprive park owners of any constitutionally protected interest. Moreover, it is precisely this relationship that makes controlling rents a rational response to the need to protect mobilehome owners' equity investment in their homes.

Because most mobilehomes in reality must be occupied on the land of another, the formulaic rule urged by the petitioners—no sale of the right to occupy the land of another—would deny mobilehome owners any claim to their property rights. Neither *Loretto* nor any other case decided by this Court calls for such an outcome. Even accepting every allegation in petitioners' complaint as true, the Escondido Ordinance does not violate any of petitioners' constitutional rights.

For all of the reasons stated herein, amici respectfully request that this Court affirm the decision of the California Court of Appeal.

Respectfully submitted,

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## APPENDIX

AN ORDINANCE OF THE CITY OF ESCONDIDO  
ESTABLISHING MOBILEHOME RENT PROTECTION

1. *Definitions.* For the purposes of this ordinance, the following words, terms, and phrases shall be defined as follows:

(a) Board shall mean the Mobilehome Park Rental Review Board of the City of Escondido.

(b) Capital improvement shall mean the installation of new improvements and facilities and/or the replacement or reconstruction of existing improvements and facilities which consist of more than ordinary maintenance and/or repairs.

(c) Department shall mean the Community Development Department of the City of Escondido.

(d) Mobilehome shall mean a vehicle designed and equipped for human habitation and which is used as the principal place of habitation for the occupants thereof.

(e) Mobilehome park shall mean any area of land within the City of Escondido where two (2) or more mobilehome spaces are rented, or held out for rent, to accommodate mobilehomes used for human habitation.

(f) Mobilehome space shall mean the site within a mobilehome park intended, designed, or used for the location or accommodation of a mobilehome and any accessory structures or appurtenances attached thereto or used in conjunction therewith.

(g) Owner shall mean the owner or operator of a mobilehome park or an agent or representative authorized to act on said owner's or operator's behalf in connection with the maintenance or operation of such park.

(h) Rehabilitation work shall mean any renovation or repair work completed on or in a mobilehome park which was performed in order to comply with the direction or order of a public agency, or to repair damage resulting from fire, earthquake, or other casualty.

(i) Rent shall mean the consideration paid for the use or occupancy of a mobilehome space.

(j) Rental increase shall mean any increase in rent charged by an owner to a tenant, including but not limited to lease offers, lease renewal offers, and increase in monthly rents.

(k) Tenancy shall mean the right of a tenant to use or occupy a mobilehome space.

(l) Tenant shall mean a person who has a tenancy in a mobilehome park.

2. *The Mobilehome Park Rental Review Board.* (a) The City Council of the City of Escondido shall serve as the Mobilehome Park Rental Review Board.

(b) The Board shall establish the time of any hearings or meetings held pursuant to this Ordinance and such hearings or meetings shall be held in the City Hall as often as the Board determines to be necessary to discharge its duties hereunder.

(c) Three (3) members shall constitute a quorum for the purpose of conducting a hearing or meeting. Decisions of the Board shall be made by a majority vote of the members present.

(d) The duties and responsibilities of the Board shall include the hearing of all rent increase applications and determine either to approve or disapprove a rent increase in the manner provided for herein.

3. *Base Rent.* Except as hereinafter provided, an owner shall not demand, accept, or retain rent for a mobilehome space exceeding the rent in effect for said space on January 1, 1986. If a previously rented mobilehome space was not rented on January 1, 1986, the owner shall not demand, accept, or retain rent for said space exceeding the rent in effect during the last month the space was rented prior to January 1, 1986. If a mobilehome space is rented for the first time after January 1, 1986, the owner shall not demand, accept, or retain rent for said space exceeding the rent first charged for the space. No owner shall send a notice containing the specific amount of a proposed rental increase prior to receiving approval of a rent increase from the Board. Except as herein provided, an owner shall not demand, accept or retain rent exceeding the rent in effect on January 1, 1986, for a mobilehome space that was not regulated by this section prior to January 1, 1986. If such mobilehome space was not rented on January 1, 1986, the owner shall not demand, accept or retain rent for said space exceeding the rent in effect during the last month the space was rented prior to January 1, 1986.

4. *Permitted Rent Increases Based Upon an Application Approved by the Board.* (a) An owner may file with the Depart-

ment a rent increase application for one or more mobilehome spaces for approval by the Board.

(b) An application for a rent increase pursuant to this section shall be filed upon a form prescribed by the Department and shall be accompanied by the payment of a fee which will be determined by the Board; provided, however, that no fee shall be charged for applications filed within the first one hundred eighty (180) days after the effective date of this Ordinance. Said application shall specify the address of the mobilehome park, the space number or numbers for which rent is requested to be increased, the amount of the requested rent increase, and the facts supporting the requested increase. The applicant shall produce at the request of the Department any records, receipts, reports, or other documents that the Department may deem necessary for the Board to make a determination whether to approve a rent increase. The application shall be made under penalty of perjury and supporting documents shall be certified or verified as requested by the Department.

(c) Upon receipt of a rent increase application, the Department shall mail a notice to the affected tenants at the mobilehome spaces designated in the application, informing them of the receipt of such application, the amount of the requested rent increase, a brief summary of the owner's justification for the request, any supporting documents which may be inspected at the City Hall, the tenant's right to submit written statements, photographs or other documents relating to the application within thirty (30) days after the date the notice is mailed, and the address where such statements or documents may be mailed or delivered.

(d) The Department shall determine within thirty (30) days after receipt of a rent increase application whether said application is complete. If the Department determines that said application is not complete, it shall notify the applicant in writing as to what additional information is required.

(e) A copy of each rent increase application shall be provided to each member of the Board after such application is determined to be complete. The Board shall hold a hearing on said application within sixty (60) days after such determination is made except as provided in subsection (i). Notice of the time, date, and place of the hearing shall be mailed to the applicant

and the affected tenants at the mobilehome spaces designated in the application at least ten (10) days prior to the hearing.

(f) At the hearing, the applicant and the affected tenants may offer any testimony that is relevant to the requested rent increase. The applicant and affected tenants may offer documents, written declarations, or other written evidence for the first time at the hearing only if good cause is shown why such evidence was not filed with the Department prior to the hearing. Formal rules of evidence shall not be applicable to such proceedings. Except as provided in subsection (j), within fifteen (15) days after the close of the hearing, the Board shall make its determination, pursuant to the standards established by subsection (g) of this section, approving or disapproving a rent increase for the mobilehome space or spaces specified in the rent increase application.

(g) The Board shall approve such rent increases as it determines to be just, fair and reasonable. The Board shall consider the following factors, in addition to any other factors it considers relevant, in making such determination.

(1) Changes in the Consumer Price Index for All Urban Consumers in San Diego Metropolitan Area published by the Bureau of Labor Statistics.

(2) The rent lawfully charged for comparable mobilehome spaces in the City of Escondido.

(3) The length of time since either the last hearing and final determination by the Board on a rent increase application or the last rent increase if no previous rent increase application has been made.

(4) The completion of any capital improvements or rehabilitation work related to the mobilehome space or spaces specified in the rent increase application, and the cost thereof, including such items of cost, including materials, labor, construction interest, permit fees, and other items as the Board deems appropriate.

(5) Changes in property taxes or other taxes related to the subject mobilehome park.

(6) Changes in the rent paid by the applicant for the lease of the land on which the subject mobilehome park is located.

(7) Changes in the utility charges for the subject



mobilehome park paid by the applicant and the extent, if any, of reimbursement from the tenants.

(8) Changes in reasonable operating and maintenance expenses.

(9) The need for repairs caused by circumstances other than ordinary wear and tear.

(10) The amount and quality of services provided by the applicant to the affected tenant.

(11) Any existing written lease lawfully entered into between the applicant and the affected tenant.

(h) The Board may provide that an increase in rent or a portion of an increase in rent granted by the Board be limited to the length of time necessary to allow the park owner to reasonably amortize the cost of a capital improvement, including interest. Such increase granted as a result of the capital improvement shall not continue beyond the time necessary for reasonable amortization of the cost of such improvement.

(i) Notice of the Board's determination shall be mailed to the applicant and all affected tenants at the mobilehome spaces designated in the application. The determination of the Board shall be final.

(j) In the event that the Board is unable to act and make its final determination on a completed rent increase application within the time limitations prescribed by subsection (d)-(f) of this Section, and after the thirty (30) days for the tenant to file statements or documents in opposition to the application under subsection (c) shall have expired, the Board may approve such interim rent increase for the mobilehome space or spaces specified in said application which clearly appears to be warranted when the factors set forth in subsection (g) of this Section are considered, based upon the facts stated in the application, any written statements or documents filed with the Department by the affected tenants, and any other facts known to the Board. An approved interim rent increase shall expire on either (1) the last day of the month within which the Board makes its final determination disapproving a rent increase, or (2) the effective date of a rent increase which is approved by a final determination of the Board.

(k) The time within which the Board may conduct a hearing as provided in subsection (e) or make its determination as provided in subsection (f) may be extended twice by the

Board for periods of time not to exceed sixty (60) days each if the Board approves an interim rent increase pursuant to subsection (j).

(l) *Fees.* A tenant whose tenancy is not regulated by the provisions of the Mobilehome Residency Law shall not be charged a fee for anything other than rent or utilities with the exception of incidental reasonable charges for services actually rendered.

6. *Permissible Reasons for Terminating or Refusing to Renew a Tenancy.* (a) A tenancy which is not subject to the provisions of the Mobilehome Residency Law shall not be terminated nor shall its renewal be refused, except for one or more of the following reasons:

(1) Failure of the tenant to comply with a local ordinance or State law or regulation relating to mobilehomes within a reasonable time after the tenant receives a notice of noncompliance from the appropriate governmental agency.

(2) Conduct by the tenant, upon the mobilehome park premises, which constitutes a substantial annoyance to other tenants.

(3) Failure of the tenant to comply with reasonable rule or regulation of the mobilehome park. No act or omission of the tenant shall constitute such failure to comply unless and until the owner has given the tenant written notice of the alleged rule or regulation violation and the tenant has failed to adhere to the rule or regulation within seven (7) days.

(4) Nonpayment of rent, utility charges, or reasonable incidental service charges.

(5) Condemnation of the mobilehome park.

(6) Change of Use of the Mobilehome Park, provided that the provisions of Subsection (f) of Section 798.56 of the California Civil Code are followed.

(A) The owner gives the tenant written notice of the proposed change twelve (12) months or more before the date of the proposed change.

(B) The owner gives each proposed tenant whose tenancy will commence within twelve (12) months of the proposed change written notice thereof prior to the inception of his tenancy.

(b) Notice of termination or refusal to renew must be

given in writing in the manner prescribed by Section 1162 of the Code of Civil Procedure at least sixty (60) days prior to the termination date of the tenancy. Said notice shall state the date the tenancy terminates, the reason for the termination or refusal to renew, and the specific facts upon which the owner is relying.

7. *Refusal of Tenant to Pay Illegal Rent.*

A tenant may refuse to pay any rent in excess of the maximum rent permitted by this Ordinance. The fact that such unpaid rent is in excess of the maximum rent shall be a defense in any action brought to recover possession of a mobilehome space for nonpayment of rent or to collect the illegal rent.

8. *Remedies.* (a) Any person who demands, accepts or retains any payment of rent in violation of the provisions of this Ordinance shall be liable in a civil action to the person from whom such payment is demanded, accepted or retained for damages in the sum of three (3) times the amount by which the payment or payments demanded, accepted, or retained exceed the maximum rent which could be lawfully demanded, accepted, or retained together with reasonable attorney's fees and costs as determined by the Court.

(b) Any person violating any of the provisions of this Ordinance shall be guilty of a misdemeanor and shall be punishable in the manner provided by Section 1-13 of the Escondido Municipal Code.

9. *Severability.* If any section, subsection, sentence, clause, phrase or portion of this Ordinance is for any reason held invalid or unconstitutional by any court of competent jurisdiction, such portion shall be deemed a separate, distinct and an independent provision and such decision shall not affect the validity of the remaining portion thereof.

ORDINANCE NO. 88-50 AN URGENCY ORDINANCE OF THE  
CITY COUNCIL OF THE CITY OF ESCONDIDO,  
CALIFORNIA, CLARIFYING THE MOBILE HOME RENT  
PROTECTION ORDINANCE CONCERNING THE  
TREATMENT OF LONG TERM LEASES AFFECTING  
CURRENT AND NEW TENANTS

The City Council of the City of Escondido, California, in order to clarify the ordinance of the City of Escondido Establishing Mobilehome Rent Protection (the "Rent Protection Ordinance") DOES HEREBY ORDAIN as follows:

SECTION 1. For the purpose of implementing the Rent Protection Ordinance the term "Tenant" shall be understood to mean not only a person who has an existing tenancy in a mobilehome park but also a person who has purchased or is in the process of purchasing or otherwise acquiring a mobilehome that will remain at that particular park.

SECTION 2. Leases in excess of 12 months shall be treated as follows:

(a) Before any rental agreement or lease in excess of 12 months is offered to any tenant, it must first be submitted to the Rent Review Board (the "Board") for review to determine if it complies with the terms of the Rent Protection Ordinance. It shall not be offered to the tenant until the proposed lease or rental agreement has been approved by the Board.

(b) Before any rental agreement or lease in excess of 12 months is executed by the tenant the owner must (1) offer the tenant the option of a rental agreement for a term of 12 months or less, (2) provide the tenant with a copy of the Rent Protection Ordinance, and (3) inform the tenant both orally and in writing that if the tenant signs a lease or rental agreement with a term in excess of 12 months which has been reviewed and approved by the Board in accordance with the provisions of the Rent Protection Ordinance, the lease or rental agreement may not be subject to the terms and protections of the Rent Protection Ordinance.

(c) A lease or rental agreement in excess of 12 months executed by a tenant shall not be exempt from the Rent Protection Ordinance unless it complies with each and every requirement in Civil Code Section 798.17(a) through (c) for exemption for such leases or rental agreements offered to "homeowners."

SECTION 3. This ordinance shall take effect immediately after the date of its adoption.

SECTION 4. *Separability*. If any section, subsection, sentence, clause, phrase or portion of this ordinance is for any reason held invalid or unconstitutional by any court of competent jurisdiction, such portion shall be deemed a separate, distinct and independent provision and such holding shall not affect the validity of the remaining portions hereof.

SECTION 5. That all ordinances, or parts of ordinances, in conflict herewith are hereby repealed.

SECTION 6. That the City Clerk is hereby directed to certify to the passage of this ordinance and cause the same, or a summary prepared in accordance with Government Code Section 36933, to be published one time within 15 days of its passage in the Times Advocate, a newspaper of general circulation, printed and published in the City of Escondido.

#### DECLARATION OF URGENCY

Certain park owners are informing prospective mobilehome purchasers that the purchaser must sign a long term lease as a condition of the park owner's approval of the sale. As a result purchasers and prospective purchasers of mobilehomes in Escondido could be denied the benefits of the Mobilehome Control Protection Ordinance. In addition the actions of these park owners are causing substantial hardships to current mobilehome owners. Some current mobilehome owners have jobs waiting for them out of state, and escrows on other residences that are about to close but the actions of these park owners have discouraged and frustrated sales of their mobilehomes. Other current homeowners, particularly those who are elderly, are very concerned and worried that if a long term lease is required that they also will be unable to sell their mobilehomes. This situation has the potential to cause, if it has not already caused, adverse effects on the health and welfare of Escondido citizens. Therefore in order to prevent any additional hardships and adverse affects on the health and welfare of Escondido citizens it is necessary to immediately clarify the fact that the Mobilehome Rent Protection Ordinance was intended to provide protection not only for existing mobilehome owners but also for purchasers and prospective purchasers of mobilehomes in the City of Escondido.