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P R O C E E D I N G S

(10:02 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument  
now in No. 04-340, San Remo Hotel v. the City and County  
of San Francisco.

Mr. Utrecht, is that --

ORAL ARGUMENT OF PAUL UTRECHT

ON BEHALF OF THE PETITIONERS

MR. UTRECHT: Yes, Your Honor.

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

The Ninth Circuit decision in this case should  
be reversed for three reasons.

The first reason is that the result is unfair  
and the rationale of the court is unfair.

JUSTICE O'CONNOR: Well, what are your --  
exactly what claims are -- is your client now raising in  
Federal court? I mean, we don't take a case to just  
decide if something is unfair. What are the precise  
claims your client is raising now in Federal court?

MR. UTRECHT: My client is making a facial and  
as-applied takings challenge to both the hotel conversion  
ordinance and the regulatory scheme of which it is a part.  
And that claim -- that Federal --

JUSTICE O'CONNOR: I somehow thought that your  
question had boiled down to whether there was issue

1 preclusion here. Am I wrong?

2 MR. UTRECHT: The issue before this Court is  
3 whether there's issue preclusion --

4 JUSTICE O'CONNOR: I'm talking about the issues  
5 in this Court.

6 MR. UTRECHT: Okay. The issue in this Court is  
7 whether the Federal takings claim should be precluded  
8 under issue preclusion by a State court judgment that did  
9 not decide the Federal takings claim and could not have  
10 decided the Federal takings claim.

11 JUSTICE SOUTER: Well, as I understand, I -- I  
12 would -- I will grant you that there are moments in the --  
13 in the Ninth Circuit opinion in which there seems to be a  
14 shift back and forth in the rhetoric between claim  
15 preclusion and issue preclusion. But as I understand what  
16 the Ninth Circuit held, it did not hold that your claim  
17 was necessarily out of court because of claim preclusion.  
18 It held that your claim failed because of the effect of  
19 issue preclusion on elements that were common, factual  
20 elements common to both the claim in the State court and  
21 the claim that you sought to bring in the Federal court.  
22 Am -- am I correct about that, about what the Ninth  
23 Circuit held?

24 MR. UTRECHT: The Ninth Circuit did limit its  
25 holding to issue preclusion. It did not rule on claim

1 preclusion.

2 JUSTICE SOUTER: Okay.

3 MR. UTRECHT: The other part of your question  
4 about whether it was based on factual determinations could  
5 not have been based on factual determinations. Instead,  
6 it was based on the prior State court determination that  
7 we did not state a claim -- state a cause of action under  
8 California law for State compensation.

9 CHIEF JUSTICE REHNQUIST: Well, the Supreme  
10 Court of California decided only the State constitutional  
11 question, did it not?

12 MR. UTRECHT: That's correct, Mr. Chief Justice.

13 And because of that, we have never had an  
14 opportunity to have our Federal takings claim decided on  
15 the merits. We believe that that undermines the Federal  
16 courts' primacy in deciding Federal questions,  
17 particularly Federal constitutional questions. We also  
18 believe --

19 JUSTICE O'CONNOR: Well, it was this Court's  
20 decision in the Williamson County case that led you and I  
21 assume other lawyers in these takings cases to return to  
22 State court and try to litigate everything. Isn't that  
23 right?

24 MR. UTRECHT: This Court in Williamson County  
25 said that before you could bring a Federal takings claim,

1     you had to go to State court and seek compensation under  
2     State law.

3             JUSTICE O'CONNOR:   And you haven't asked us to  
4     revisit that Williamson County case, have you?

5             MR. UTRECHT:   We have not asked that this Court  
6     reconsider the decision in Williamson County.

7             JUSTICE O'CONNOR:   Maybe you should have.

8             MR. UTRECHT:   Well, at this point I don't think  
9     that we can.   Perhaps we could have in 1998 when the Ninth  
10    Circuit applied the Williamson County case and ordered us  
11    to go to State court with our unripe Federal claims,  
12    unripe under this Court's holding in Williamson.

13            But I think that at this point the question  
14    before the Court is given that we've complied with the  
15    procedural requirements that this Court established in  
16    Williamson County, are we now precluded by issue  
17    preclusion in the second litigation that this Court  
18    ordered because of the State court compensation ruling.

19            JUSTICE SCALIA:   Mr. Utrecht, you -- you refer  
20    to the primacy of Federal courts.   I'm -- I'm not clear as  
21    to whether you are arguing for a different disposition  
22    where a suit is first brought in Federal court erroneously  
23    because there's been no exhaustion and then the plaintiff  
24    is sent back to State court from the situation in which a  
25    plaintiff does the right thing and goes to State court

1 immediately. Now, in that case, would -- would you still  
2 argue for primacy of the Federal court?

3 MR. UTRECHT: Absolutely, Your Honor. I think  
4 that what this Court established in Williamson County is a  
5 two separate litigation scheme. The first litigation  
6 concerns State compensation, and the second litigation  
7 concerns the Federal takings claim.

8 JUSTICE SCALIA: So -- so your case does not  
9 hinge on the fact that when the State court acted, there  
10 was a pending -- a pending Federal case asking for the  
11 Federal constitutional question to be resolved by a  
12 Federal court.

13 MR. UTRECHT: That's correct. I think that the  
14 Second Circuit got this issue correct in the Santini case  
15 when it concluded that whether you started in Federal  
16 court and were ordered to proceed to State court under  
17 Williamson County or you looked at the Williamson County  
18 case and said, I'm going to start in State court because  
19 that's what Williamson County says that I'm required to  
20 do, it doesn't matter. It shouldn't matter for purposes  
21 of issue preclusion on the Federal takings claim once it  
22 has been made ripe under the procedures required by  
23 Williamson County.

24 JUSTICE GINSBURG: Is it your position that  
25 issue preclusion doesn't apply at all, or that there was

1 no issue decided in the State court proceeding that  
2 carries over into the Federal proceeding? Which one is  
3 it? What -- you suggested -- you said, number one, no  
4 facts were found. The question was whether there was  
5 sufficient statements to survive a 12(b)(6) or its  
6 counterpart dismissal motion.

7 MR. UTRECHT: Our -- our primary position is  
8 that issue preclusion does not apply for the same reasons  
9 that this Court found that issue preclusion did not apply  
10 in England when you were required to do two separate  
11 litigations. The question of whether the Ninth Circuit  
12 correctly applied issue preclusion law -- we also raise  
13 that as our last argument in our opening brief, but our  
14 primary argument here today is that issue preclusion  
15 should not apply at all to Federal --

16 JUSTICE GINSBURG: And if it did -- if it did  
17 apply, what issues would be precluded?

18 MR. UTRECHT: In our position no issue should be  
19 precluded because under California law, which the Ninth  
20 Circuit was obligated to apply, only identical issues that  
21 are resolved under a different set of laws can be  
22 precluded in the second proceeding, and there was no  
23 identical issue finding by the Ninth Circuit. Instead,  
24 the Ninth Circuit applied its equivalent determination  
25 finding.



1           But I think that the -- the real issue before  
2   this Court is not the California preclusion law question,  
3   but the real issue is whether this Court's decision in  
4   England should -- or the rationale of this Court's  
5   decision in England should be applied to the very similar  
6   circumstances raised by --

7           JUSTICE KENNEDY: Is -- excuse me. Is -- is it  
8   your position that there is an exaction here?

9           MR. UTRECHT: Yes, Your Honor.

10          JUSTICE KENNEDY: It -- are -- are you bound by  
11   a finding in the State court that there was no exaction,  
12   or was there no such finding?

13          MR. UTRECHT: I don't believe there was such a  
14   finding. I think that the California Supreme Court  
15   decided that the exaction met the State law compensation  
16   requirements and did not --

17          JUSTICE KENNEDY: Was the -- was the Ninth  
18   Circuit wrong in indicating that there was no exaction?  
19   That's the way I read its opinion.

20          MR. UTRECHT: I -- I don't read the Ninth  
21   Circuit's opinion as saying there was no exaction. I  
22   think the Ninth Circuit held that the exaction was imposed  
23   by legislation rather than by an administrative  
24   proceeding, and because of that, it was subject to a  
25   different standard than exactions imposed in

1 administrative proceedings.

2 But I think there's no question in this case  
3 that an -- an exaction was imposed and was actually paid.  
4 This is not a -- this is not a case where there's an issue  
5 about whether the exaction was imposed. The issues were  
6 what standard was used to review that exaction and whether  
7 the exaction was constitutional.

8 JUSTICE KENNEDY: But -- but the Ninth Circuit  
9 seemed to think that Dolan doesn't apply, and I take it  
10 that you would say that it does.

11 MR. UTRECHT: Well, I think this Court has not  
12 decided whether exactions imposed by legislation are  
13 treated differently than exactions imposed by  
14 administrative proceedings. The State court in this case  
15 determined that under State compensation law that  
16 mattered. But this Court has not decided that. The Ninth  
17 Circuit seemed to indicate that it was in general  
18 agreement with the California Supreme Court, but again,  
19 because it didn't actually decide the merits, it just  
20 decided that there was an equivalent determination under  
21 State law, it didn't get to the final question of whether  
22 this was an exaction and what the proper standard was.

23 JUSTICE SCALIA: And you don't want us get that  
24 -- to that question either, whether Dolan applies or not.

25 MR. UTRECHT: I did want this Court to get to

1    that question, but when this Court rejected question 2, I  
2    think this Court decided that it did not want to get to  
3    that question. But we -- and we did not brief that  
4    question because this Court did not grant certiorari on  
5    question number 2. But we definitely did want this Court  
6    to decide that question, and obviously, if -- since the  
7    Court can't decide it in this case, we would, obviously,  
8    want the Court to decide it in some other case, hopefully  
9    before this case is finally resolved in the courts.

10           JUSTICE GINSBURG: Mr. Utrecht, if I understand  
11    the respondents' brief correctly, there is on pages 10 and  
12    11 a whole list of issues that they say were determined --  
13    raised, litigated, and determined in the State court. So,  
14    for example, that the HCO's housing replacement fees bear  
15    a reasonable relationship to loss of housing, the use of a  
16    defined historical measure -- measurement point reasonably  
17    related to the HCO's -- and it goes on for a paragraph,  
18    citing issues that respondents say -- says were raised,  
19    litigated, and decided in the California Supreme Court.

20           MR. UTRECHT: I think that technically what the  
21    California Supreme Court decided was that our facts did  
22    not state a cause of action under State law. What they  
23    cite here as findings are actually discussions of the  
24    legal issues raised by the State court complaint under  
25    State law. They don't amount to a factual finding. There

1 was no trial. There was no summary judgment motion.  
2 There was no evidence presented on any of these points.  
3 These are --

4 CHIEF JUSTICE REHNQUIST: How did the case go  
5 up? On a motion to dismiss?

6 MR. UTRECHT: The case in State court went up on  
7 a motion to dismiss, which was granted by the trial court,  
8 reversed by the State court of appeal, and then affirmed  
9 by the California Supreme Court.

10 JUSTICE SOUTER: So, in effect, then maybe --  
11 are you saying this, that there is no issue preclusion  
12 here because the -- the ruling that there was no statement  
13 of a cause of action was, in fact, a disposition of the  
14 claim without there being any resolution of any fact issue  
15 upon which the claim might depend. Is that what you're  
16 saying? And therefore -- and -- and that is the reason  
17 why there is no issue preclusion? Is that your argument?

18 MR. UTRECHT: That's not the argument that we  
19 made in this Court. That is an argument that we made in  
20 the lower courts. The argument that we're making in this  
21 Court is rather that under the England case -- or rather,  
22 the rationale of the England case, there shouldn't be any  
23 issue preclusion whether or not the State courts made any  
24 factual findings. I don't think that the question as  
25 framed by Your Honor is presented by the briefs. I mean,

1 obviously, that was a contention of ours. We think that's  
2 a correct statement of how the case should have been  
3 resolved by the Ninth Circuit, but the Ninth Circuit  
4 instead chose not to look at that issue or not to decide  
5 the case on that issue, but instead to decide under its  
6 prior precedents of Dodd and Palomar, that issue  
7 preclusion applied and then applied its own formulation of  
8 the equivalent --

9 JUSTICE GINSBURG: But -- but isn't there an  
10 essential step to find out that there were issues?  
11 Because I think the way you're phrasing the question, it  
12 says, if there were issues decided, they weren't  
13 precluded. But if there are no issues, that's -- that's  
14 not what's involved in this case. The simplest ground on  
15 which you could knock out issue preclusion is that no  
16 issues were decided.

17 MR. UTRECHT: That would be a simple route to  
18 knocking out the case. The Ninth Circuit rejected that  
19 argument. That question did not seem cert-worthy and --

20 JUSTICE GINSBURG: What -- what were the issues  
21 that the Ninth Circuit thought were decided?

22 MR. UTRECHT: I can't quite tell. I think what  
23 the Ninth Circuit said was that because State law and  
24 Federal law on this question was similar, at least in the  
25 Ninth Circuit's understanding, that the State court

1 determination was an equivalent determination. Once they  
2 made that finding, that there was an equivalent  
3 determination under State law, the Ninth Circuit decided  
4 that the claim must be precluded by issue preclusion.

5 JUSTICE GINSBURG: Well, issue preclusion does  
6 extend to questions of law, as well as fact.

7 MR. UTRECHT: It does extend to questions of  
8 law. The problem, of course, is that the State court  
9 question of law that was decided was whether our -- we  
10 were entitled to compensation under State compensation  
11 law. The State court did not decide whether we were  
12 entitled to just compensation under the Fifth Amendment.

13 JUSTICE SCALIA: I thought they said that their  
14 -- their compensation law was congruent with ours?

15 MR. UTRECHT: The California Supreme Court did  
16 say that its compensation law --

17 JUSTICE SCALIA: What do you -- what do you  
18 think that means?

19 MR. UTRECHT: I think that means that the  
20 California Supreme Court would like to believe that its  
21 law is congruent with this Court's decisions.

22 I think that, in fact, the California Supreme  
23 Court does not follow this Court's precedents in this area  
24 of law, and I think we actually argued the first time that  
25 we were in front of the Ninth Circuit, that it was futile

1 to go to State court precisely for that reason. That  
2 argument was also rejected by the Ninth Circuit. I think  
3 that it cannot be that the State courts are going to be  
4 the -- our final arbiter of whether their law is in fact  
5 congruent with Federal law or not. It left either to this  
6 Court --

7 CHIEF JUSTICE REHNQUIST: What do you understand  
8 the word congruent to mean?

9 MR. UTRECHT: I think congruent means that it's  
10 equivalent. I think -- I think the Ninth Circuit's view  
11 of an equivalent determination is that it's close. It's  
12 close enough for government work, perhaps.

13 (Laughter.)

14 JUSTICE BREYER: What -- what is the claim you  
15 want to make? That is, my reading of the California State  
16 court opinion says you came into their court and you said,  
17 look, this ordinance in San Francisco violates the Fifth  
18 Amendment, I guess, because it doesn't make any sense.  
19 The -- there's no good basis, no sound basis for requiring  
20 us to pay a fee in order to convert rooms. Anyway, the  
21 room isn't a house. Anyway, it makes no sense as applied  
22 to us. Anyway, they admit they just want to raise  
23 revenue. Anyway, we're going to give the tenant a place  
24 to live for the rest of his life. All right. Those were  
25 the claims.

1                   And in each case, the California Supreme Court  
2   said you're wrong.  You're wrong because it does help  
3   preserve rooms, because it does have a reasonable purpose  
4   in a city that's crowded, because the tenant who's there  
5   for life might move out, and we want to keep the room even  
6   if he moves out because he dies.  And anyway, it's not an  
7   issue of whether your case is special.  This makes sense  
8   as a general rule.

9                   All right?  They decided it.  You raised it.  
10  They decided it.

11                  Now, what else is it you want to raise in  
12  Federal court?

13                  MR. UTRECHT:  I think that what's important is  
14  the very beginning of your question.  You said that we  
15  said in State court that it violated the Fifth Amendment.

16                  JUSTICE BREYER:  I don't know if you said it.  I  
17  just said that that is what I read in the California  
18  Supreme Court opinion that Justice Werdegarr wrote.  And so  
19  what I'm asking you is whether they should have or whether  
20  they shouldn't have, they did seem to decide those five  
21  issues.  And so my question to you is, what else do you  
22  want to raise?

23                  MR. UTRECHT:  The California Supreme Court  
24  decided whether those legal propositions were relevant  
25  under the State constitution and the State compensation --



1 JUSTICE BREYER: I thought it decided a  
2 different thing. I thought that it decided that in part  
3 that was the reason for their decision. But the reason  
4 they reached their decision is they thought on each of  
5 those five matters that the City of San Francisco had a  
6 reasonable legislative purpose for its ordinance.

7 MR. UTRECHT: And they made that decision under  
8 State law. They -- they --

9 JUSTICE BREYER: Just as, suppose, for example,  
10 they had decided that the hotel clerk or the temporary  
11 manager did speak English, and in fact, he was a scholar  
12 of English. And suppose that that had been the key matter  
13 for its decision of State law. I take it, if you came  
14 into Federal court, even if the issue were quite  
15 different, you would be bound by that factual  
16 determination.

17 That's why I'm asking you. It seems to me here  
18 they have decided matters of whether there was a  
19 reasonable purpose or not for this particular ordinance  
20 and as applied to you. Now, what else do you want to  
21 raise in Federal court that was not encompassed by what I  
22 just described?

23 MR. UTRECHT: In the hypothetical that Your  
24 Honor gave of a factual determination that the clerk spoke  
25 English well, that fact under the England case and under

1 England's rationale would be subject to relitigation in  
2 Federal court in the Pullman context. And we believe that  
3 there's no significant difference between our context and  
4 the Pullman context.

5 I do recognize that that is contrary to the  
6 normal rules of res judicata. The normal rules of res  
7 judicata are designed to prevent exactly what this Court  
8 decided should be -- should happen --

9 JUSTICE BREYER: But am I right? I'm just  
10 trying to narrow the issue in my mind. Am I right you  
11 want to raise one, two, three, four, or five of those  
12 issues that I just described and nothing more?

13 MR. UTRECHT: The factual claims --

14 JUSTICE BREYER: Am I right about that?

15 MR. UTRECHT: Yes, Your Honor.

16 JUSTICE BREYER: Thank you.

17 MR. UTRECHT: The factual claims that we're  
18 making in Federal court are the same factual claims that  
19 we made in the State court --

20 JUSTICE KENNEDY: Well, but is there precedent  
21 that what is reasonable for the State constitution is  
22 always reasonable for the Federal Constitution?

23 MR. UTRECHT: That --

24 JUSTICE KENNEDY: I mean, this is somewhat  
25 different than simply a specific factual finding.

1           MR. UTRECHT: Well, in this particular case,  
2   they found that the facts that we alleged did not give  
3   rise to a right to compensation under State law. And this  
4   Court in Williamson said once you've been denied  
5   compensation in State court, once it's certain that the  
6   State courts will not provide you relief under State law,  
7   you have a ripe Federal takings claim.

8           At that point, the Federal courts must be able  
9   to look at the factual questions underpinning the Federal  
10  takings analysis, so that the questions of whether in fact  
11  this law substantially advances a legitimate government  
12  interest or it interferes unduly with the reasonable  
13  investment-backed expectations under Penn Central, which  
14  requires a detailed ad hoc factual analysis, that that  
15  must be done by the Federal courts and cannot be precluded  
16  by a State court determination that is not considering the  
17  Federal questions at the time or -- and it cannot even  
18  under this Court's decision in Williamson County -- cannot  
19  consider the Federal question that's at issue.

20           The -- the city-- the city contends that -- that  
21  a decision in our favor would result in --

22           JUSTICE STEVENS: May I interrupt? Because I'm  
23  just not following one part of your argument. Are you  
24  saying that the Pennsylvania analysis, the ad hoc  
25  analysis, was not made in the State court?

1           MR. UTRECHT: No, I'm not saying that it was not  
2     made. I'm saying that a State court disposed of that  
3     claim without doing a factual trial, but simply based on  
4     the allegations in the complaint.

5           JUSTICE STEVENS: Why -- now, why should that  
6     not be binding on you if your allegations were, in fact,  
7     insufficient under Penn Central?

8           MR. UTRECHT: The court did not find that they  
9     were insufficient under Penn Central. The court found  
10    that under State compensation law, which it believed was  
11    congruent with this Court's decision in Penn Central --

12          JUSTICE STEVENS: Well, I can understand how you  
13    should be free to argue that in fact the two rules are not  
14    congruent, that there's broader recovery under the Federal  
15    system. But if we decided that the two -- if we agreed  
16    with them that they were congruent, then why should not  
17    issue preclusion apply?

18          MR. UTRECHT: Issue preclusion should not apply  
19    because it prevents the Federal courts from deciding the  
20    Federal takings questions. If --

21          JUSTICE STEVENS: Yes, but -- but it's just a  
22    conclusion from issues that have -- have been resolved on  
23    which normally we would defer to the State court. Now,  
24    why -- why shouldn't we defer here again?

25          MR. UTRECHT: You shouldn't defer here because

1 in Williamson County, you required that parties go through  
2 two litigations.

3 JUSTICE STEVENS: Right.

4 MR. UTRECHT: And all the rules of res judicata  
5 are designed to prevent two litigations and to require a  
6 single litigation. It makes no sense, in the context of a  
7 two-litigation system that this Court set up, to then  
8 impose issue preclusion. Otherwise, Federal --

9 JUSTICE O'CONNOR: But it isn't --

10 JUSTICE STEVENS: That doesn't make sense.

11 JUSTICE O'CONNOR: It isn't clear from  
12 Williamson County that this Court envisioned two -- two  
13 separate determinations of fact issues: one in State  
14 court and one in Federal. That isn't clear from the face  
15 of Williamson County. That was a case where it was  
16 thought, at least, by members of the Court that the claims  
17 in that case just weren't ripe yet.

18 MR. UTRECHT: Correct.

19 JUSTICE O'CONNOR: And I don't -- I didn't  
20 understand it to set up parallel systems of factual  
21 determinations.

22 MR. UTRECHT: It clearly set up parallel systems  
23 of litigation. It did not discuss the question of what  
24 happens in the second litigation, but I think that this  
25 Court in England decided the proper solution to a

1 situation where the Federal law requires --

2 JUSTICE O'CONNOR: Well, England was an  
3 abstention case and had to deal with the effect of 28 U.S.  
4 Code 1738, the Full Faith and Credit Act. But I didn't  
5 think that the England case just totally destroyed the  
6 notion of full faith and credit --

7 MR. UTRECHT: The England case --

8 JUSTICE O'CONNOR: -- as -- as applied section  
9 1738.

10 MR. UTRECHT: The England case held that when  
11 you're required to do two separate litigations, the first  
12 in State court and the second in Federal court as a result  
13 of Pullman abstention, that in the second case there would  
14 be no factual or legal issues that were decided in the  
15 State court that would be preclusive in deciding the  
16 Federal --

17 JUSTICE BREYER: My --

18 JUSTICE O'CONNOR: This is not a -- a Pullman  
19 abstention case here.

20 MR. UTRECHT: As it comes to this Court, it is  
21 not a Pullman abstention case.

22 JUSTICE O'CONNOR: No.

23 MR. UTRECHT: It is a case where Williamson  
24 County has held that before you can bring your Federal  
25 takings claim, you must first go to State court and obtain

1 a determination of whether you're entitled to  
2 compensation.

3 CHIEF JUSTICE REHNQUIST: I don't think that  
4 Williamson County ever contemplated that you would have to  
5 take your case all the way to the Supreme Court of the  
6 State. Now, it may be that you had no choice once you got  
7 into the State court.

8 MR. UTRECHT: I think that's correct, Mr. Chief  
9 Justice. The Williamson County case says that you have to  
10 go to State court and use the State procedures available  
11 for State compensation. You cannot do that without going  
12 through the appellate procedure provided by the State  
13 courts --

14 CHIEF JUSTICE REHNQUIST: Do you think  
15 Williamson County by its terms spoke of going to State  
16 court and -- rather than just a State administrative  
17 proceeding?

18 MR. UTRECHT: As -- as I read the Williamson  
19 County opinion, it says that you have to use the State  
20 procedures that are available to obtain compensation. And  
21 the State procedures in California are an inverse  
22 condemnation claim under State law, i.e., a State  
23 compensation claim, which, as I read Williamson County --  
24 and I think all the other practitioners of takings law  
25 read Williamson County -- means that you have to go to

1 State court and ask for compensation before you can  
2 proceed to Federal court.

3 Now, it is possible that a State could have an  
4 administrative procedure instead of a judicial procedure  
5 in order to decide takings claim -- rather, to decide  
6 State compensation claims. If there were such an  
7 administrative procedure for obtaining State compensation,  
8 then that perhaps is what Williamson County envisioned  
9 that you would follow. But I think Williamson County says  
10 whatever procedure is provided by the State, you have to  
11 exhaust that and obtain a denial from the State of your  
12 right to compensation before you can proceed to Federal  
13 court.

14 JUSTICE SCALIA: If you -- if you disagreed with  
15 the resolution of an issue by the State court, which issue  
16 would be determinative of your Federal claim, if we hold  
17 against you here? Do you think you would have a right to  
18 appeal that State court -- State Supreme Court resolution  
19 of that issue to this Court?

20 MR. UTRECHT: No.

21 JUSTICE SCALIA: What -- what strikes me as  
22 strange about this -- this system is -- is not leaving it  
23 to the State courts to make these decisions. That's  
24 perfectly fine. We do that all the time. But these are  
25 decisions that are going to be conclusive on -- on a



1 Federal claim, and yet there's no way to -- to appeal from  
2 the State Supreme Court here.

3 MR. UTRECHT: I think that's exactly the  
4 problem. That was the problem we faced when the  
5 California Supreme Court did not decide our Federal  
6 claims. I think because they only decided our State  
7 claims, we were not able to seek certiorari on the merits  
8 from the State Supreme Court decision, and then I think  
9 the procedure contemplated by this Court in Williamson  
10 County was that you could return to Federal court with  
11 your Federal claim once the State compensation claim --

12 CHIEF JUSTICE REHNQUIST: Didn't you seek to  
13 reserve the Federal question in the -- in the State court  
14 litigation?

15 MR. UTRECHT: We did reserve the Federal  
16 question in the State court litigation.

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

18 CHIEF JUSTICE REHNQUIST: Very well, Mr.  
19 Utrecht.

20 Mr. Waxman.

21 ORAL ARGUMENT OF SETH P. WAXMAN

22 ON BEHALF OF THE RESPONDENTS

23 MR. WAXMAN: Mr. Chief Justice, and may it  
24 please the Court:

25 The respondents had a full and fair opportunity

1 to litigate every issue relevant to their Federal claims.  
2 When they came to Federal court, they agreed that, with  
3 one exception, all of the relevant issues, both the  
4 ultimate issue of a reasonable relationship and all of the  
5 predicate issues that we recited, as Justice Ginsburg  
6 noted, at pages 10 and at 11 of our brief, had already  
7 been litigated.

8           They said that they -- there was one difference,  
9 which is that they claimed that under the Fifth Amendment,  
10 the level of scrutiny under a substantially advances  
11 claim, which is what they were litigating, was the  
12 Nollan/Dolan test of rough proportionality, not the more  
13 deferential standard of review that the California Supreme  
14 Court applied in its decision. And as to that issue, they  
15 received a full litigation and adjudication on the merits  
16 in the courts below. They petitioned this Court on that  
17 substantive question.

18           CHIEF JUSTICE REHNQUIST: You say the courts  
19 below. Are you talking about the California State courts  
20 or the Ninth Circuit?

21           MR. WAXMAN: Mr. Chief Justice, here I was  
22 referring to the district court and the Ninth Circuit  
23 following the California Supreme Court's decision.

24           They came to the courts and said there's one  
25 thing that's different. There's one element that's

1 different, and that is Nollan and Dolan. Heightened  
2 scrutiny should apply to a financial exaction of this  
3 sort. The California Supreme Court disagreed under  
4 California law. We want to litigate that issue here, and  
5 they did. The district court ruled against them on the  
6 merits. The Ninth Circuit ruled against them on the  
7 merits. They petitioned this Court in question 2. This  
8 Court denied review.

9           In all other respects, their claims -- their  
10 case under their Federal claims, which were not claim-  
11 precluded, were, as the district court found, quote, based  
12 on the exact same facts and circumstances argued before  
13 the State courts.

14           Now, they -- their case here boils down -- and  
15 it's quite clear from their reply brief, and Mr. Utrecht  
16 has reaffirmed it -- to an argument that this Court's 1963  
17 decision in England ought to be extended to the Williamson  
18 County context. Now, I believe that England is  
19 distinguishable -- highly distinguishable from the facts  
20 or the circumstances of a Williamson County remand for any  
21 number of reasons that I can explain.

22           But ultimately my point is this. England is  
23 fatal to them. If England were extended to this  
24 circumstance, they would lose, and that is because in  
25 England, the Court was entirely clear that as to the State

1 law issue that the Supreme Court said should be presented  
2 to the Louisiana courts first for determination, there was  
3 no doubt that issue preclusion was going to apply to that.  
4 The question was whether or not principles of preclusion  
5 would bar them from coming back to Federal court  
6 otherwise.

7 In other words, in England, the question --  
8 there was a challenge by chiropractors to a State law that  
9 said chiropractors have to go to medical school or  
10 something like that. A Federal complaint was raised under  
11 1983, saying that violates our Fourteenth Amendment  
12 rights. That's wrong. The Supreme Court said, well, wait  
13 a minute. We're not sure that the Louisiana law covers  
14 chiropractors, and if it doesn't, we can avoid the Federal  
15 constitutional question. So we're going to, in effect,  
16 certify to the Louisiana courts the question, the State  
17 law question, whether chiropractors are covered.

18 Now --

19 CHIEF JUSTICE REHNQUIST: Well, I mean, they  
20 didn't really certify it.

21 MR. WAXMAN: No. They used -- they -- they  
22 abstained under the Pullman doctrine which, as this Court  
23 has explained, is a procedure that is akin to the  
24 certification process where States use it.

25 But in any event, no one -- when -- no one would

1 have thought for a moment that having gone to litigate  
2 that State law issue in State court, if they had lost,  
3 England -- the chiropractors could come back and say,  
4 okay, we think that we shouldn't have to comply with this  
5 law for two reasons: one, because we're not covered by  
6 the law even though the Louisiana courts thought so; and  
7 two, if we were, the Fourteenth Amendment would prohibit  
8 it.

9           They -- the question on which you granted review  
10 is limited to those issues, and there is a fair question  
11 on the record in this case whether any of those issues are  
12 really before the Court now. But as to those issues, for  
13 which Williamson County requires that a party resort first  
14 to State procedures, whether issue preclusion applies, and  
15 the -- the extension of England by analogy to this would  
16 dictate the answer yes. It may not apply if -- if you  
17 extend England to all other types of issues that a party  
18 may litigate along with their Williamson County ripening  
19 exercise. But the very determination that Federal law  
20 requires them to obtain under State law, prior to stating  
21 a ripe Federal constitutional claim, of course, gets issue  
22 preclusion.

23           Now, the question was asked --

24           JUSTICE O'CONNOR: Do you think it's open to us  
25 to reconsider aspects of Williamson County in this case?

1           MR. WAXMAN: I don't think -- well, I would have  
2 to take a very deep breath before I told the Court that it  
3 was not open to the Court to reconsider just about  
4 anything that touched on it. I think it would be --

5           JUSTICE O'CONNOR: It -- frankly, it isn't clear  
6 to me that the Court ever contemplated just cutting off  
7 any determination in Federal court of takings claims in  
8 the way that it seems to work out by application of  
9 Williamson County.

10          MR. WAXMAN: Let me explain why I think it would  
11 be imprudent for the Court to resolve it and then explain  
12 why I think it's fair to say that the Court didn't  
13 consider one way or the other principles of preclusion in  
14 application of the Full Faith and Credit Act in Williamson  
15 County.

16          JUSTICE O'CONNOR: Well, it's clear we didn't.  
17 So now we're faced with the consequences of that, and it  
18 looks to me like the lower courts have run pretty far with  
19 Williamson County. So what's a takings claimant supposed  
20 to do?

21          MR. WAXMAN: Well, I think it would be imprudent  
22 to decide -- I -- I think that the Court will have to  
23 elaborate on the Williamson County requirement and how the  
24 procedures work. I hope, after all the preparation for  
25 this argument, I'll be able to participate in some way in







1 County, many, probably most States did not have a  
2 substantive takings jurisprudence that was akin to the  
3 Federal standard. For example, California itself, New  
4 York didn't provide compensation for regulatory takings at  
5 all. In those States, there would be no question of  
6 either claim or issue preclusion because in the course of  
7 deciding whether or not compensation was due under State  
8 law, there would be few, if any, common issues decided.

9 Now, as the Ninth Circuit explained in *Dodd v.*  
10 *Hood River*, Oregon recognizes -- in the context of  
11 regulatory takings, recognizes an *Agins* type claim, that  
12 is where you are completely denied all economic value to  
13 your -- I'm sorry -- a *Lucas* claim, but they don't  
14 recognize the *Penn Central* standard. They don't provide  
15 compensation unless you are denied all economic value.

16 JUSTICE STEVENS: Mr. Waxman, can I ask you this  
17 question? Supposing the California court had decided the  
18 Federal -- the Federal Fifth Amendment question or in the  
19 -- the *England* case supposing the Louisiana State court  
20 had decided the Fourteenth Amendment question, would there  
21 be issue preclusion on that issue in -- in that -- in that  
22 sequence?

23 MR. WAXMAN: Issue preclusion or claim  
24 preclusion?

25 JUSTICE STEVENS: Either one.

1           MR. WAXMAN: I think the answer is there -- if  
2 England -- if the England decision were extended to the  
3 Williamson County context, there would not be claim  
4 preclusion. We think it shouldn't be extended, and  
5 therefore if they litigated both their State claim and  
6 their Federal claim in State court, we think they would be  
7 barred both by issue and claim preclusion.

8           JUSTICE SCALIA: Of course, they could have come  
9 up here, though. I mean, maybe that was their mistake in  
10 not making their Federal claim in the California court.  
11 The California court would have denied their State claim,  
12 presumably denied their Federal claim, and -- and both  
13 could have come up here I suppose. Or -- or would the  
14 California's -- would California's determination of the  
15 State questions preclude a separate determination of the  
16 Federal questions?

17           MR. WAXMAN: I -- I don't -- I don't think so,  
18 Justice Scalia. I think it was certainly open to them and  
19 the -- the Ninth Circuit, in its first opinion, made clear  
20 that it was open to them, when they went -- when they did  
21 their Williamson County ripening, to also litigate the  
22 Federal constitutional question. And in that instance, if  
23 they lost in the California courts, of course, they could  
24 have petitioned. They couldn't -- if they lost on the  
25 State constitution, the court would have had to reach the

1 Federal constitutional question as well.

2 But I think, Justice Scalia, more to your point  
3 about what actually happened here, I think that a very  
4 good argument -- I -- I don't think that there's really  
5 much doubt that if they had petitioned for certiorari from  
6 the California Supreme Court decision, you could easily  
7 have granted review under *Zacchini* and *Michigan v. Long*  
8 and *Ruiz* because the California Supreme Court said, to be  
9 sure we are deciding only the State constitutional  
10 question. We are not ruling on the Fifth Amendment. But  
11 they made very clear that, whatever congruent means --  
12 they made very clear that they looked to this Court's  
13 statements and expositions about the meaning of the Fifth  
14 Amendment to construe the claims the same.

15 And as this Court said in *Ohio v. Reiner*, I  
16 think 2 years ago, when a State court's interpretation of  
17 State law has been influenced by an accompanying  
18 interpretation of Federal law, we may review. And in  
19 fact, if you think about it, think of almost every takings  
20 case that you've decided since *Williamson County*. With  
21 the exception of the *Tahoe compact* cases, they are all  
22 from State court decisions. *Lucas*, *Palazzolo*, *First*  
23 *English*, *Nolan* and *Dollan*, *Yee*, *Pennell*, *McDonald*, *San*  
24 *Diego*, they are all --

25 JUSTICE KENNEDY: *Monterey* -- *Monterey Dunes* was

1 from the United States district court.

2 MR. WAXMAN: Yes, because that was a case --  
3 that's the other one that I was thinking of this morning.  
4 That was a case that was filed in the district court and  
5 litigated in the district court. And it raises a real  
6 anomaly about whether or not this case even really  
7 presents the question on which you granted review because  
8 their -- the theory that they have pursued in State court  
9 and at this round in Federal court is that there is a  
10 takings violation under both the State and the Federal  
11 Constitution under the so-called substantially advances  
12 prong. Their complaints allege a Penn Central violation,  
13 but their briefs in the lower court -- in the lower  
14 Federal courts in this proceeding and in the State courts  
15 don't discuss Penn Central at all, as the California  
16 Supreme Court in footnote 14 of its opinion explained.

17 So if this is just a substantially advances  
18 claim, it raises the question, number one, whether in the  
19 context of legislation, there is a substantially advances  
20 prong in the Fifth Amendment, a question that you're --  
21 you're asked -- that you are presumably addressing in  
22 Lingle v. Chevron. If there is, it raises the separate  
23 question posed by this Court's decision in Yee whether  
24 that is a claim for compensation.

25 In other words, what this Court said in Yee is

1    when you challenge, under the Fifth Amendment, legislation  
2    on the grounds that it doesn't substantially advance a  
3    legitimate government objective, this Court said, that's  
4    not a claim for compensation. That is a claim that the  
5    ordinance be struck down and not applied. And that's what  
6    they're litigating here.

7               Now, they have -- and so the question is if it's  
8    not a claim for compensation, is it subject to Williamson  
9    County ripening? Why should you have to go to State  
10   court?

11              So there are a lot of this -- the Conference of  
12   State Chief Justices have filed an amicus brief in support  
13   actually of us in this case, saying we don't see that the  
14   facts of this case present the question on which you  
15   granted review. I think it's fairer to say it's not clear  
16   because the petitioners did challenge this ordinance not  
17   only on its face, but as applied. And although the  
18   district court below found that it wasn't a real as-  
19   applied challenge because they couldn't in any meaningful  
20   way distinguish themselves from the other 500 residential  
21   hotels in San Francisco, all of whom are concededly  
22   subject to the hotel conversion ordinance. At least I  
23   suppose in theory, there is some claim for compensation  
24   for the temporary period in which they were subject to the  
25   hotel conversion ordinance.

1           So I -- I don't know. I -- you granted cert in  
2   the case. We'd like to get the -- the question answered,  
3   but I think the reason this long disquisition, Justice  
4   Kennedy, about Del Monte Dunes is in Del Monte Dunes, it  
5   was a substantially advance claim, and I think it was  
6   thought that there was no need to engage in Williamson  
7   County ripening.

8           JUSTICE SOUTER: Let's take a -- may I -- may I,  
9   in effect, approach it with a simpler example, which --  
10   which is not this case, but I -- I just want to know how  
11   -- how the -- the systems work together.

12           Let's assume that, in fact, a -- a Lucas kind of  
13   claim had been involved, and the -- the State courts said  
14   we understand Lucas. We're applying Lucas. And in point  
15   of fact, following the Lucas standard, there are plenty of  
16   uses that are still left on this land, so that there's no  
17   taking under -- under Lucas. And let's assume that they  
18   -- they go through the State system. They lose. They  
19   don't petition here for cert. Instead, they go into the  
20   -- the district court with a Fifth Amendment claim.

21           Is it open to them in the district court to make  
22   this argument? Don't apply issue preclusion to our Lucas  
23   claim. The Lucas -- to -- to the -- to the  
24   determinations, the reasonable use determination in -- in  
25   Lucas. Don't do it because although the State court

1   purported to be applying Lucas, it really was not. It was  
2   not following the Lucas standard. It was applying  
3   something much more favorable to the State. And  
4   therefore, any determination on that issue should not get  
5   preclusion here. We ought to be able to litigate de novo  
6   even though, on the face of it, we seemed to have  
7   litigated the Lucas issue and the State court decided it.  
8   Could they make that argument? And -- and if it were  
9   sound, would -- would preclusion principles give way?

10           MR. WAXMAN: At most -- I mean, they could  
11   certainly make the argument. At most, preclusion would  
12   give way on the ultimate Lucas question, not all of the  
13   subsidiary issues that were resolved en route to that  
14   determination, issues akin to the ones that we recited at  
15   pages 10 and 11 of our brief. That is, if the district --  
16   if the State court finds, you know, that the property is  
17   in such and such a place and on such and such a year, this  
18   thing happened or that the ordinance, as it applied, had  
19   this effect or that effect, there certainly would be no  
20   possible argument that issue preclusion wouldn't apply  
21   because they -- those were necessary determinations and  
22   they had a full and fair opportunity to determine it.

23           As to the ultimate issue, this would be -- the  
24   Full Faith and Credit Act directs the Federal court to ask  
25   what would the law of California say about this. If they

1     tried to then bring their Federal constitutional Lucas  
2     theory in State court, would issue preclusion or claim  
3     preclusion principles bar a second bite at the litigation  
4     apple? The answer ordinarily -- and you've asked me to  
5     assume that the tests that they have -- they purport to be  
6     stating the Federal standard. Ordinarily the answer would  
7     be no if the argument simply is they made a mistake.

8             I mean, that's -- that's what happens in issue  
9     preclusion. That's what in Allen v. McCurry and -- and  
10    all of the cases in which this Court has applied full  
11    faith and credit, Kremer and -- and -- I'm forgetting the  
12    names of the other cases. The argument was, yes, they  
13    thought they were adjudicating rights under the Fourth  
14    Amendment, but they were wrong, and issue preclusion  
15    shouldn't apply.

16            I'm -- I'm qualifying my answer a little bit  
17    because I do think that if you came to Federal court and  
18    said, look, this was a sham or they -- they -- their  
19    analysis was so skewed that it can't fairly be said that  
20    they were really applying the Federal standard, something  
21    like, you know, the -- the AEDPA standard now that -- that  
22    you get review if it's an -- not just an incorrect  
23    determination, but a wholly unreasonable application of  
24    law or fact. Then I think you would look and see, well,  
25    would a State court say, well, that's right. I mean, if



1 your allegation is that they were so far off the  
2 reservation that it really wasn't a determination of that  
3 issue, I think you get a new review. I mean, I do  
4 think --

5 JUSTICE KENNEDY: Well, was there an  
6 allegation --

7 JUSTICE SOUTER: I guess in the --

8 JUSTICE KENNEDY: -- at any point here -- was  
9 there an allegation at any point here that the State  
10 procedures were inadequate to protect property rights?

11 MR. WAXMAN: No, to the contrary. Not only --  
12 there's no Pullman issue presented in this case, but the  
13 procedural posture of this case demonstrates, if anything,  
14 a full-throated appeal to the State courts. They --

15 JUSTICE KENNEDY: Well, it's not so much that  
16 there weren't appellate procedures, but that the procedures  
17 and the variance procedures and -- and a multiplicity of  
18 agencies here were just so complex that it amounted to an  
19 -- inadequate remedies to protect against a taking.

20 MR. WAXMAN: There have been absolutely no such  
21 allegations made in this case. And I think a -- I think  
22 that the San Remo would have to concede that although  
23 there was a plethora of litigation in the State courts and  
24 in the lower Federal courts about the zoning  
25 determinations and whether a conditional use permit was or

1    wasn't required, the -- the hotel conversion ordinance,  
2    the ordinance that requires the payment of this in lieu  
3    fee, applies across the board to all residential hotels  
4    based -- wherever they're located in the city, whether  
5    they're in a historic district or not and whether they  
6    have to be rezoned or not.  It was a simple,  
7    straightforward question about whether an ordinance that  
8    says if you run a residential hotel or you have  
9    residential rooms that you have certified as of the date  
10   the ordinance was enacted and you want to change them  
11   permanently to full-time tourist use, you have to bring an  
12   equivalent number of units on line or you have to pay an  
13   in lieu fee to the city's building fund.

14               And they made a challenge, like many people  
15   have, that substantively that violates the Federal and  
16   State takings clause.  That is a taking of private  
17   property without just compensation.  But it applies to all  
18   the residential hotels in the city wherever they're  
19   located, regardless of whether they need variances or --  
20   or anything like that.

21               Now, in this case they went first to the  
22   Superior Court in San Francisco and they filed an  
23   administrative mandamus claim challenging the zoning  
24   determination that was made in their case because they're  
25   in a historic district.  And at the same time, they went

1 to the Federal court and they raised all of their takings  
2 claims with respect to the ordinance and the zoning  
3 issues. They got a preliminary injunction in Federal  
4 court which was then -- but then lost a summary -- they  
5 had summary judgment issued against them on all the  
6 substantive -- all the claims in their case.

7           When they came to the Ninth Circuit, they asked  
8 the Ninth Circuit to abstain under Pullman because they  
9 had this municipal law question pending in the superior  
10 court. It had been pending for 5 years, and that might  
11 somehow obviate or change the constitutional question.  
12 And they then went to -- they -- the -- the Ninth Circuit  
13 noted that it was rather unusual for the plaintiff to be  
14 invoking Pullman abstention and certainly to be doing so  
15 for the first time on appeal after losing in the district  
16 court, but nonetheless, the Ninth Circuit said fine.

17           And they then went to State court, and they  
18 pressed not only their pending municipal law question, but  
19 they also made their takings claims under Penn Central and  
20 under the substantially advance prong both as applied and  
21 both facial under the State constitution. And they  
22 received a full and fair hearing on those claims in the  
23 superior court, in the court of appeal where they won, and  
24 in the California Supreme Court where they ultimately lost  
25 4 to 3. There -- I don't believe there is any argument

1 made or available in this case that there was a denial of  
2 a full and fair opportunity to litigate those issues as to  
3 which preclusion is required.

4 JUSTICE GINSBURG: But they said there was no  
5 litigation because it was just decided. They didn't plead  
6 enough to state a claim for relief.

7 MR. WAXMAN: Well, the -- the California Supreme  
8 Court decision makes clear at page 113a of the petition  
9 appendix that it decided the takings claims, the  
10 substantially advance claims, on a demurrer and that they  
11 decided it, therefore, based on the factual allegations of  
12 the complaint, matters subject to judicial notice, of  
13 which there were many, and facts and circumstances that  
14 were not disputed.

15 I mean, it -- there's no such thing, I don't  
16 believe, as the resolution of a legal claim in which no  
17 issues are decided. There were plenty of issues decided  
18 in this case.

19 JUSTICE SOUTER: Decided but not litigated. I  
20 mean, the -- the problem is that -- that claim preclusion  
21 normally assumes that the issue is, in fact, litigated.

22 MR. WAXMAN: Well --

23 JUSTICE SOUTER: And his -- he's arguing it was  
24 not.

25 MR. WAXMAN: The -- the issue of whether or not

1 the hotel -- whether or not the -- San Francisco's hotel  
2 conversion ordinance was reasonably related to the city's  
3 objective was litigated with a vengeance. It was  
4 litigated to the point of dozens, if not hundreds of pages  
5 in the State court.

6 The State court -- the State courts made a  
7 number of subsidiary findings leading to their conclusion  
8 that, both on its face and as applied, the hotel  
9 conversion ordinance was reasonably related to the city's  
10 legitimate objective of retaining low-cost rental housing  
11 for the elderly, the disabled, and the poor.

12 JUSTICE SOUTER: Tell me how that statement that  
13 you just made, fully litigated, squares with the fact that  
14 -- I thought you said a moment ago it was decided on a  
15 demurrer.

16 MR. WAXMAN: It's --

17 JUSTICE SOUTER: I'm -- I'm confused here.

18 MR. WAXMAN: It's the application of law to  
19 fact. What the Court decided -- this Court said, I think  
20 in Yee --

21 JUSTICE SOUTER: But you're -- you're saying  
22 that the facts were -- were independently developed before  
23 the demurrer was filed and granted?

24 MR. WAXMAN: Yes. The -- the courts were asked  
25 to take judicial notice of a number of things. They --

1 JUSTICE SOUTER: So it was not decided simply on  
2 pleadings.

3 MR. WAXMAN: No.

4 JUSTICE SOUTER: Okay.

5 MR. WAXMAN: I mean, what the court --

6 CHIEF JUSTICE REHNQUIST: A demurrer --

7 MR. WAXMAN: I'm sorry.

8 CHIEF JUSTICE REHNQUIST: A demurrer is decided  
9 on the pleadings, isn't it?

10 MR. WAXMAN: Well, it -- what the court said --  
11 and I think this is a -- what the California Supreme Court  
12 said at page -- I think it was page 113a and they also  
13 reiterate this point at page 139a, footnote 12 -- is this  
14 is a demurrer. So we take -- we accept as true the  
15 allegations of the complaint. Plus, we take judicial  
16 notice of all the things that the parties asked us to take  
17 notice of, which are matters of public record, of which  
18 there were many, many, many in this case, including, for  
19 example, the fact that every year from 1990 -- well, every  
20 year from the -- from 1983 on, when they took over  
21 operation of this property, they filed with the city an  
22 annual report that listed that, A, the determination that  
23 all 62 of their rooms were for residential use and then  
24 explained -- and then stated out the exact number of rooms  
25 by quarter that were, in fact, used by -- for long-term

1 residences and those that, during the summer months, were  
2 used for tourist use.

3           The court took judicial notice of that, as it  
4 was appropriate, en route to its decision -- this is a  
5 subsidiary issue I suppose -- that the conversion of this  
6 hotel to full-time tourist use would, in fact, cause a  
7 loss in the stock of available affordable housing. That  
8 was an issue that was determined in this case. And the  
9 ultimate question decided by the court was a mixed  
10 question. It was the application of law to fact, as this  
11 Court explained, I think in Yee, is characteristic of  
12 substantially advances claims.

13           Thank you very much.

14           CHIEF JUSTICE REHNQUIST: Thank you, Mr. Waxman.

15           Mr. Utrecht, you have 4 minutes remaining.

16                       REBUTTAL ARGUMENT OF PAUL UTRECHT

17                       ON BEHALF OF THE PETITIONERS

18           MR. UTRECHT: Thank you, Your Honor.

19           There's no question that Williamson County  
20 creates problems. The Ninth Circuit in this case did not  
21 just issue a Pullman abstention order the first time we  
22 were there. They dismissed our as-applied claims as  
23 unripe. It dismissed our facial claim based on economic  
24 viability as unripe. So we're squarely within the context  
25 contemplated by Williamson County; i.e., we proceeded in

1 State court with our State compensation claim in order to  
2 ripen the Federal claim.

3 The city acknowledges, as a result of that, that  
4 there's no claim preclusion. And this Court's decision in  
5 Migra says that if there's a reason not to apply claim  
6 preclusion, there should also be a reason not to apply  
7 issue preclusion, that there should be an exception for  
8 both or an exception for neither.

9 In this case, in addition to acknowledging an  
10 exception for claim preclusion, Mr. Waxman also  
11 acknowledged that if the State court was, as I -- my notes  
12 show, so far off the reservation, the Federal court could  
13 revisit the question. The problem, of course, with so far  
14 off the reservation is that might be a good test for this  
15 Court to adopt, but if the city's position is correct,  
16 this Court does not have that opportunity. This Court is  
17 stuck with whatever law the State imposes under issue  
18 preclusion. So this Court is not free, if the city is  
19 correct, to create some special exception.

20 I think the only basis for finding a separate  
21 exception in this case is the one that this Court set out  
22 in England. I see no reason that it shouldn't be extended  
23 to this circumstance.

24 Unless there are any questions, I have nothing  
25 further.



1 CHIEF JUSTICE REHNQUIST: Thank you, Mr.

2 Utrecht.

3 The case is submitted.

4 (Whereupon, at 11:00 a.m., the case in the  
5 above-entitled matter was submitted.)

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