1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - - - - - - - - - - - - -X

3 SAN REMO HOTEL, L.P., ET AL., :

4 Petitioners :

5 v. : No. 04-340

6 CITY AND COUNTY OF SAN :

7 FRANCISCO, CALIFORNIA, :

8 ET AL.

9 - - - - - - - - - - - - - - - -X

10 Washington, D.C.

11 Monday, March 28, 2005

12 The above-entitled matter came on for oral

13 argument before the Supreme Court of the United States at

14 10:02 a.m.

15 APPEARANCES:

16 PAUL UTRECHT, ESQ., San Francisco, California; on behalf

17 of the Petitioners.

18 SETH P. WAXMAN, ESQ., Washington, D.C.; on behalf of

19 the Respondents.

20

21

22

23

24

25

Alderson Reporting Company
1111 14th Street, NW Suite 400 1-800-FOR-DEPO Washington, DC 20005

1 C O N T E N T S

2 ORAL ARGUMENT OF PAGE

3 PAUL UTRECHT, ESQ.

4 On behalf of the Petitioners 3

5 SETH P. WAXMAN, ESQ.

6 On behalf of the Respondents 25

7 REBUTTAL ARGUMENT OF

8 PAUL UTRECHT, ESQ.

9 On behalf of the Petitioners 47

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 P R O C E E D I N G S

2 (10:02 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument

4 now in No. 04-340, San Remo Hotel v. the City and County

5 of San Francisco.

6 Mr. Utrecht, is that --

7 ORAL ARGUMENT OF PAUL UTRECHT

8 ON BEHALF OF THE PETITIONERS

9 MR. UTRECHT: Yes, Your Honor.

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

11 The Ninth Circuit decision in this case should

12 be reversed for three reasons.

13 The first reason is that the result is unfair

14 and the rationale of the court is unfair.

15 JUSTICE O'CONNOR: Well, what are your --

16 exactly what claims are -- is your client now raising in

17 Federal court? I mean, we don't take a case to just

18 decide if something is unfair. What are the precise

19 claims your client is raising now in Federal court?

20 MR. UTRECHT: My client is making a facial and

21 as-applied takings challenge to both the hotel conversion

22 ordinance and the regulatory scheme of which it is a part.

23 And that claim -- that Federal --

24 JUSTICE O'CONNOR: I somehow thought that your

25 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 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 that 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 Werdegar 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: No, 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. The factual
16 claims that we're making in Federal court are the same
17 factual claims that we made in the State court --
18 JUSTICE KENNEDY: Well, but is there precedent
19 that what is reasonable for the State constitution is
20 always reasonable for the Federal Constitution?
21 MR. UTRECHT: That --
22 JUSTICE KENNEDY: I mean, this is somewhat
23 different than simply a specific factual finding.
24 MR. UTRECHT: Well, in this particular case,
25 they found that the facts that we alleged did not give

1 rise to a right to compensation under State law. And this
2 Court in Williamson said once you've been denied
3 compensation in State court, once it's certain that the
4 State courts will not provide you relief under State law,
5 you have a ripe Federal takings claim.
6 At that point, the Federal courts must be able
7 to look at the factual questions underpinning the Federal
8 takings analysis, so that the questions of whether in fact
9 this law substantially advances a legitimate government
10 interest or it interferes unduly with the reasonable
11 investment-backed expectations under Penn Central, which
12 requires a detailed ad hoc factual analysis, that that
13 must be done by the Federal courts and cannot be precluded
14 by a State court determination that is not considering the
15 Federal questions at the time or -- and it cannot even
16 under this Court's decision in Williamson County -- cannot
17 consider the Federal question that's at issue.
18 The -- the city-- the city contends that -- that
19 a decision in our favor would result in --
20 JUSTICE STEVENS: May I interrupt? Because I'm
21 just not following one part of your argument. Are you
22 saying that the Pennsylvania analysis, the ad hoc
23 analysis, was not made in the State court?
24 MR. UTRECHT: No, I'm not saying that it was not
25 made. I'm saying that a State court disposed of that

1 claim without doing a factual trial, but simply based on
2 the allegations in the complaint.
3 JUSTICE STEVENS: Why -- now, why should that
4 not be binding on you if your allegations were, in fact,
5 insufficient under Penn Central?
6 MR. UTRECHT: The court did not find that they
7 were insufficient under Penn Central. The court found
8 that under State compensation law, which it believed was
9 congruent with this Court's decision in Penn Central --
10 JUSTICE STEVENS: Well, I can understand how you
11 should be free to argue that in fact the two rules are not
12 congruent, that there's broader recovery under the Federal
13 system. But if we decided that the two -- if we agreed
14 with them that they were congruent, then why should not
15 issue preclusion apply?
16 MR. UTRECHT: Issue preclusion should not apply
17 because it prevents the Federal courts from deciding the
18 Federal takings questions. If --
19 JUSTICE STEVENS: Yes, but -- but it's just a
20 conclusion from issues that have -- have been resolved on
21 which normally we would defer to the State court. Now,
22 why -- why shouldn't we defer here again?
23 MR. UTRECHT: You shouldn't defer here because
24 in Williamson County, you required that parties go through
25 two litigations.

1 JUSTICE STEVENS: Right.

2 MR. UTRECHT: And all the rules of res judicata

3 are designed to prevent two litigations and to require a

4 single litigation. It makes no sense, in the context of a

5 two-litigation system that this Court set up, to then

6 impose issue preclusion. Otherwise, Federal --

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

8 JUSTICE STEVENS: That doesn't make sense.

9 JUSTICE O'CONNOR: It isn't clear from

10 Williamson County that this Court envisioned two -- two

11 separate determinations of fact issues: one in State

12 court and one in Federal. That isn't clear from the face

13 of Williamson County. That was a case where it was

14 thought, at least, by members of the Court that the claims

15 in that case just weren't ripe yet.

16 MR. UTRECHT: Correct.

17 JUSTICE O'CONNOR: And I don't -- I didn't

18 understand it to set up parallel systems of factual

19 determinations.

20 MR. UTRECHT: It clearly set up parallel systems

21 of litigation. It did not discuss the question of what

22 happens in the second litigation, but I think that this

23 Court in England decided the proper solution to a

24 situation where the Federal law requires --

25 JUSTICE O'CONNOR: Well, England was an

1 abstention case and had to deal with the effect of 28 U.S.
2 Code 1738, the Full Faith and Credit Act. But I didn't
3 think that the England case just totally destroyed the
4 notion of full faith and credit --
5 MR. UTRECHT: The England case --
6 JUSTICE O'CONNOR: -- as -- as applied section
7 1738.
8 MR. UTRECHT: The England case held that when
9 you're required to do two separate litigations, the first
10 in State court and the second in Federal court as a result
11 of Pullman abstention, that in the second case there would
12 be no factual or legal issues that were decided in the
13 State court that would be preclusive in deciding the
14 Federal --
15 JUSTICE BREYER: My --
16 JUSTICE O'CONNOR: This is not a -- a Pullman
17 abstention case here.
18 MR. UTRECHT: As it comes to this Court, it is
19 not a Pullman abstention case.
20 JUSTICE O'CONNOR: No.
21 MR. UTRECHT: It is a case where Williamson
22 County has held that before you can bring your Federal
23 takings claim, you must first go to State court and obtain
24 a determination of whether you're entitled to
25 compensation.

1 CHIEF JUSTICE REHNQUIST: I don't think that
2 Williamson County ever contemplated that you would have to
3 take your case all the way to the supreme court of the
4 State. Now, it may be that you had no choice once you got
5 into the State court.
6 MR. UTRECHT: I think that's correct, Mr. Chief
7 Justice. The Williamson County case says that you have to
8 go to State court and use the State procedures available
9 for State compensation. You cannot do that without going
10 through the appellate procedure provided by the State
11 courts --
12 CHIEF JUSTICE REHNQUIST: Do you think
13 Williamson County by its terms spoke of going to State
14 court and -- rather than just a State administrative
15 proceeding?
16 MR. UTRECHT: As -- as I read the Williamson
17 County opinion, it says that you have to use the State
18 procedures that are available to obtain compensation. And
19 the State procedures in California are an inverse
20 condemnation claim under State law, i.e., a State
21 compensation claim, which, as I read Williamson County --
22 and I think all the other practitioners of takings law
23 read Williamson County -- means that you have to go to
24 State court and ask for compensation before you can
25 proceed to Federal court.

1 Now, it is possible that a State could have an
2 administrative procedure instead of a judicial procedure
3 in order to decide takings claim -- rather, to decide
4 State compensation claims. If there were such an
5 administrative procedure for obtaining State compensation,
6 then that perhaps is what Williamson County envisioned
7 that you would follow. But I think Williamson County says
8 whatever procedure is provided by the State, you have to
9 exhaust that and obtain a denial from the State of your
10 right to compensation before you can proceed to Federal
11 court.
12 JUSTICE SCALIA: If you -- if you disagreed with
13 the resolution of an issue by the State court, which issue
14 would be determinative of your Federal claim, if we hold
15 against you here? Do you think you would have a right to
16 appeal that State court -- State supreme court resolution
17 of that issue to this Court?
18 MR. UTRECHT: No.
19 JUSTICE SCALIA: What -- what strikes me as
20 strange about this -- this system is -- is not leaving it
21 to the State courts to make these decisions. That's
22 perfectly fine. We do that all the time. But these are
23 decisions that are going to be conclusive on -- on a
24 Federal claim, and yet there's no way to -- to appeal from
25 the State supreme court here.

1 MR. UTRECHT: I think that's exactly the
2 problem. That was the problem we faced when the
3 California Supreme Court did not decide our Federal
4 claims. I think because they only decided our State
5 claims, we were not able to seek certiorari on the merits
6 from the State supreme court decision, and then I think
7 the procedure contemplated by this Court in Williamson
8 County was that you could return to Federal court with
9 your Federal claim once the State compensation claim --
10 CHIEF JUSTICE REHNQUIST: Didn't you seek to
11 reserve the Federal question in the -- in the State court
12 litigation?
13 MR. UTRECHT: We did reserve the Federal
14 question in the State court litigation.
15 I'd like to reserve the balance of my time.
16 CHIEF JUSTICE REHNQUIST: Very well, Mr.
17 Utrecht.
18 Mr. Waxman.
19 ORAL ARGUMENT OF SETH P. WAXMAN
20 ON BEHALF OF THE RESPONDENTS
21 MR. WAXMAN: Mr. Chief Justice, and may it
22 please the Court:
23 The respondents had a full and fair opportunity
24 to litigate every issue relevant to their Federal claims.
25 When they came to Federal court, they agreed that, with

1 one exception, all of the relevant issues, both the
2 ultimate issue of a reasonable relationship and all of the
3 predicate issues that we recited, as Justice Ginsburg
4 noted, at pages 10 and 11 of our brief, had already been
5 litigated.
6 They said that they -- there was one difference,
7 which is that they claimed that under the Fifth Amendment,
8 the level of scrutiny under a substantially advances
9 claim, which is what they were litigating, was the
10 Nollan/Dolan test of rough proportionality, not the more
11 deferential standard of review that the California Supreme
12 Court applied in its decision. And as to that issue, they
13 received a full litigation and adjudication on the merits
14 in the courts below. They petitioned this Court on that
15 substantive question.
16 CHIEF JUSTICE REHNQUIST: You say the courts
17 below. Are you talking about the California State courts
18 or the Ninth Circuit?
19 MR. WAXMAN: Mr. Chief Justice, here I was
20 referring to the district court and the Ninth Circuit
21 following the California Supreme Court's decision.
22 They came to the courts and said there's one
23 thing that's different. There's one element that's
24 different, and that is Nollan and Dolan. Heightened
25 scrutiny should apply to a financial exaction of this

1 sort. The California Supreme Court disagreed under
2 California law. We want to litigate that issue here, and
3 they did. The district court ruled against them on the
4 merits. The Ninth Circuit ruled against them on the
5 merits. They petitioned this Court in question 2. This
6 Court denied review.
7 In all other respects, their claims -- their
8 case under their Federal claims, which were not claim-
9 precluded, were, as the district court found, quote, based
10 on the exact same facts and circumstances argued before
11 the State courts.
12 Now, they -- their case here boils down -- and
13 it's quite clear from their reply brief, and Mr. Utrecht
14 has reaffirmed it -- to an argument that this Court's 1963
15 decision in England ought to be extended to the Williamson
16 County context. Now, I believe that England is
17 distinguishable -- highly distinguishable from the facts
18 or the circumstances of a Williamson County remand for any
19 number of reasons that I can explain.
20 But ultimately my point is this. England is
21 fatal to them. If England were extended to this
22 circumstance, they would lose, and that is because in
23 England, the Court was entirely clear that as to the State
24 law issue that the Supreme Court said should be presented
25 to the Louisiana courts first for determination, there was

1 no doubt that issue preclusion was going to apply to that.
2 The question was whether or not principles of preclusion
3 would bar them from coming back to Federal court
4 otherwise.
5 In other words, in England, the question --
6 there was a challenge by chiropractors to a State law that
7 said chiropractors have to go to medical school or
8 something like that. A Federal complaint was raised under
9 1983, saying that violates our Fourteenth Amendment
10 rights. That's wrong. The Supreme Court said, well, wait
11 a minute. We're not sure that the Louisiana law covers
12 chiropractors, and if it doesn't, we can avoid the Federal
13 constitutional question. So we're going to, in effect,
14 certify to the Louisiana courts the question, the State
15 law question, whether chiropractors are covered.
16 Now --
17 CHIEF JUSTICE REHNQUIST: Well, I mean, they
18 didn't really certify it.
19 MR. WAXMAN: No. They used -- they -- they
20 abstained under the Pullman doctrine which, as this Court
21 has explained, is a procedure that is akin to the
22 certification process where States use it.
23 But in any event, no one -- when -- no one would
24 have thought for a moment that having gone to litigate
25 that State law issue in State court, if they had lost,

1 England -- the chiropractors could come back and say,
2 okay, we think that we shouldn't have to comply with this
3 law for two reasons: one, because we're not covered by
4 the law even though the Louisiana courts thought so; and
5 two, if we were, the Fourteenth Amendment would prohibit
6 it.
7 They -- the question on which you granted review
8 is limited to those issues, and there is a fair question
9 on the record in this case whether any of those issues are
10 really before the Court now. But as to those issues, for
11 which Williamson County requires that a party resort first
12 to State procedures, whether issue preclusion applies, and
13 the -- the extension of England by analogy to this would
14 dictate the answer yes. It may not apply if -- if you
15 extend England to all other types of issues that a party
16 may litigate along with their Williamson County ripening
17 exercise. But the very determination that Federal law
18 requires them to obtain under State law, prior to stating
19 a ripe Federal constitutional claim, of course, gets issue
20 preclusion.
21 Now, the question was asked --
22 JUSTICE O'CONNOR: Do you think it's open to us
23 to reconsider aspects of Williamson County in this case?
24 MR. WAXMAN: I don't think -- well, I would have
25 to take a very deep breath before I told the Court that it

1 was not open to the Court to reconsider just about
2 anything that touched on it. I think it would be --
3 JUSTICE O'CONNOR: It -- frankly, it isn't clear
4 to me that the Court ever contemplated just cutting off
5 any determination in Federal court of takings claims in
6 the way that it seems to work out by application of
7 Williamson County.
8 MR. WAXMAN: Let me explain why I think it would
9 be imprudent for the Court to resolve it and then explain
10 why I think it's fair to say that the Court didn't
11 consider one way or the other principles of preclusion in
12 application of the Full Faith and Credit Act in Williamson
13 County.
14 JUSTICE O'CONNOR: Well, it's clear we didn't.
15 So now we're faced with the consequences of that, and it
16 looks to me like the lower courts have run pretty far with
17 Williamson County. So what's a takings claimant supposed
18 to do?
19 MR. WAXMAN: Well, I think it would be imprudent
20 to decide -- I -- I think that the Court will have to
21 elaborate on the Williamson County requirement and how the
22 procedures work. I hope, after all the preparation for
23 this argument, I'll be able to participate in some way in
24 that debate because it's a really interesting question.
25 But it's not presented here because even if you were to

1 reconsider Williamson County, even if you were to overrule
2 it, it wouldn't affect the outcome here.
3 We know two things are true in this case,
4 whatever Williamson County means doesn't mean or shouldn't
5 mean. Every issue relevant to the Federal constitutional
6 claims was fully and fairly litigated in this case, and we
7 also know that under --
8 CHIEF JUSTICE REHNQUIST: Well, now, wait a
9 minute. You don't mean that the Fifth Amendment question
10 was fully and fairly litigated in the Supreme Court of
11 California.
12 MR. WAXMAN: No. The Supreme Court of
13 California said that it was not deciding the Federal --
14 the Fifth Amendment Federal constitutional question. But
15 they -- they concede that all of the issues that make up
16 the -- the Federal constitutional question were fully and
17 fairly litigated in the California courts except the
18 question of whether the Fifth Amendment, as opposed to the
19 California takings provision, is entitled to --
20 CHIEF JUSTICE REHNQUIST: Well, what --
21 MR. WAXMAN: -- to Nollan and Dolan. And that
22 was litigated here.
23 CHIEF JUSTICE REHNQUIST: What preclusion law do
24 you apply? The Ninth Circuit apparently applied Oregon
25 preclusion law.

1 MR. WAXMAN: The -- it's -- the Full Faith and
2 Credit Act requires that you -- requires that you apply
3 the preclusion law of the State that rendered the judgment
4 to which --
5 CHIEF JUSTICE REHNQUIST: Which would be
6 California.
7 MR. WAXMAN: Which would be California. And I
8 do think, with respect, Mr. Chief Justice, that the
9 California Supreme Court -- I'm sorry -- the Ninth Circuit
10 made clear that it was applying California preclusion law.
11 It cited the California Supreme -- a -- California
12 authorities, and it correctly recited the elements of the
13 California preclusion law in this regard.
14 It did make reference to its prior determination
15 in Dodd v. Hood River, which was an Oregon case, in which
16 the Ninth Circuit decided that an England reservation in
17 the Williamson County context was effective with respect
18 to claim preclusion but not issue preclusion. And in that
19 respect -- and this I think goes back to Justice
20 O'Connor's question about, you know, what -- what could we
21 have been thinking or not thinking in Williamson County --
22 the -- the Dodd case provides a pretty good example.
23 At the time this Court decided Williamson
24 County, many, probably most States did not have a
25 substantive takings jurisprudence that was akin to the

1 Federal standard. For example, California itself, New
2 York didn't provide compensation for regulatory takings at
3 all. In those States, there would be no question of
4 either claim or issue preclusion because in the course of
5 deciding whether or not compensation was due under State
6 law, there would be few, if any, common issues decided.
7 Now, as the Ninth Circuit explained in Dodd v.
8 Hood River, Oregon recognizes -- in the context of
9 regulatory takings, recognizes an Agins type claim, that
10 is where you are completely denied all economic value to
11 your -- I'm sorry -- a Lucas claim, but they don't
12 recognize the Penn Central standard. They don't provide
13 compensation unless you are denied all economic value.
14 JUSTICE STEVENS: Mr. Waxman, can I ask you this
15 question? Supposing the California court had decided the
16 Federal -- the Federal Fifth Amendment question or in the
17 -- the England supposing the Louisiana State court had
18 decided the Fourteenth Amendment question, would there be
19 issue preclusion on that issue in -- in that -- in that
20 sequence?
21 MR. WAXMAN: Issue preclusion or claim
22 preclusion?
23 JUSTICE STEVENS: Either one.
24 MR. WAXMAN: I think the answer is there -- if
25 England -- if the England decision were extended to the

1 Williamson County context, there would not be claim
2 preclusion. We think it shouldn't be extended, and
3 therefore if they litigated both their State claim and
4 their Federal claim in State court, we think they would be
5 barred both by issue and claim preclusion.
6 JUSTICE SCALIA: Of course, they could have come
7 up here, though. I mean, maybe that was their mistake in
8 not making their Federal claim in the California court.
9 The California court would have denied their State claim,
10 presumably denied their Federal claim, and -- and both
11 could have come up here I suppose. Or -- or would the
12 California's -- would California's determination of the
13 State questions preclude a separate determination of the
14 Federal questions?
15 MR. WAXMAN: I -- I don't -- I don't think so,
16 Justice Scalia. I think it was certainly open to them and
17 the -- the Ninth Circuit, in its first opinion, made clear
18 that it was open to them, when they went -- when they did
19 their Williamson County ripening, to also litigate the
20 Federal constitutional question. And in that instance, if
21 they lost in the California courts, of course, they could
22 have petitioned. They couldn't -- if they lost on the
23 State constitution, the court would have had to reach the
24 Federal constitutional question as well.
25 But I think, Justice Scalia, more to your point

1 about what actually happened here, I think that a very
2 good argument -- I -- I don't think that there's really
3 much doubt that if they had petitioned for certiorari from
4 the California Supreme Court decision, you could easily
5 have granted review under Zacchini and Michigan v. Long
6 and Ruiz because the California Supreme Court said, to be
7 sure we are deciding only the State constitutional
8 question. We are not ruling on the Fifth Amendment. But
9 they made very clear that, whatever congruent means --
10 they made very clear that they looked to this Court's
11 statements and expositions about the meaning of the Fifth
12 Amendment to construe the claims the same.
13 And as this Court said in Ohio v. Reiner, I
14 think 2 years ago, when a State court's interpretation of
15 State law has been influenced by an accompanying
16 interpretation of Federal law, we may review. And in
17 fact, if you think about it, think of almost every takings
18 case that you've decided since Williamson County. With
19 the exception of the Tahoe compact cases, they are all
20 from State court decisions. Lucas, Palazzolo, First
21 English, Nolan and Dollan, Yee, Pennell, McDonald, San
22 Diego, they are all --
23 JUSTICE KENNEDY: Monterey -- Monterey Dunes was
24 from the United States district court.
25 MR. WAXMAN: Yes, because that was a case --

1 that's the other one that I was thinking of this morning.
2 That was a case that was filed in the district court and
3 litigated in the district court. And it raises a real
4 anomaly about whether or not this case even really
5 presents the question on which you granted review because
6 their -- the theory that they have pursued in State court
7 and at this round in Federal court is that there is a
8 takings violation under both the State and the Federal
9 Constitution under the so-called substantially advances
10 prong. Their complaints allege a Penn Central violation,
11 but their briefs in the lower court -- in the lower
12 Federal courts in this proceeding and in the State courts
13 don't discuss Penn Central at all, as the California
14 Supreme Court in footnote 14 of its opinion explained.
15 So if this is just a substantially advances
16 claim, it raises the question, number one, whether in the
17 context of legislation, there is a substantially advances
18 prong in the Fifth Amendment, a question that you're --
19 you're asked -- that you are presumably addressing in
20 Lingle v. Chevron. If there is, it raises the separate
21 question posed by this Court's decision in Yee whether
22 that is a claim for compensation.
23 In other words, what this Court said in Yee is
24 when you challenge, under the Fifth Amendment, legislation
25 on the grounds that it doesn't substantially advance a

1 legitimate government objective, this Court said, that's
2 not a claim for compensation. That is a claim that the
3 ordinance be struck down and not applied. And that's what
4 they're litigating here.
5 Now, they have -- and so the question is if it's
6 not a claim for compensation, is it subject to Williamson
7 County ripening? Why should you have to go to State
8 court?
9 So there are a lot of this -- the Conference of
10 State Chief Justices have filed an amicus brief in support
11 actually of us in this case, saying we don't see that the
12 facts of this case present the question on which you
13 granted review. I think it's fairer to say it's not clear
14 because the petitioners did challenge this ordinance not
15 only on its face, but as applied. And although the
16 district court below found that it wasn't a real as-
17 applied challenge because they couldn't in any meaningful
18 way distinguish themselves from the other 500 residential
19 hotels in San Francisco, all of whom are concededly
20 subject to the hotel conversion ordinance. At least I
21 suppose in theory, there is some claim for compensation
22 for the temporary period in which they were subject to the
23 hotel conversion ordinance.
24 So I -- I don't know. I -- you granted cert in
25 the case. We'd like to get the -- the question answered,

1 but I think the reason this long disquisition, Justice
2 Kennedy, about Del Monte Dunes is in Del Monte Dunes, it
3 was a substantially advance claim, and I think it was
4 thought that there was no need to engage in Williamson
5 County ripening.
6 JUSTICE SOUTER: Let's take a -- may I -- may I,
7 in effect, approach it with a simpler example, which --
8 which is not this case, but I -- I just want to know how
9 -- how the -- the systems work together.
10 Let's assume that, in fact, a -- a Lucas kind of
11 claim had been involved, and the -- the State courts said
12 we understand Lucas. We're applying Lucas. And in point
13 of fact, following the Lucas standard, there are plenty of
14 uses that are still left on this land, so that there's no
15 taking under -- under Lucas. And let's assume that they
16 -- they go through the State system. They lose. They
17 don't petition here for cert. Instead, they go into the
18 -- the district court with a Fifth Amendment claim.
19 Is it open to them in the district court to make
20 this argument? Don't apply issue preclusion to our Lucas
21 claim. The Lucas -- to -- to the -- to the
22 determinations, the reasonable use determination in -- in
23 Lucas. Don't do it because although the State court
24 purported to be applying Lucas, it really was not. It was
25 not following the Lucas standard. It was applying

1 something much more favorable to the State. And
2 therefore, any determination on that issue should not get
3 preclusion here. We ought to be able to litigate de novo
4 even though, on the face of it, we seemed to have
5 litigated the Lucas issue and the State court decided it.
6 Could they make that argument? And -- and if it were
7 sound, would -- would preclusion principles give way?
8 MR. WAXMAN: At most -- I mean, they could
9 certainly make the argument. At most, preclusion would
10 give way on the ultimate Lucas question, not all of the
11 subsidiary issues that were resolved en route to that
12 determination, issues akin to the ones that we recited at
13 pages 10 and 11 of our brief. That is, if the district --
14 if the State court finds, you know, that the property is
15 in such and such a place and on such and such a year, this
16 thing happened or that the ordinance, as it applied, had
17 this effect or that effect, there certainly would be no
18 possible argument that issue preclusion wouldn't apply
19 because they -- those were necessary determinations and
20 they had a full and fair opportunity to determine it.
21 As to the ultimate issue, this would be -- the
22 Full Faith and Credit Act directs the Federal court to ask
23 what would the law of California say about this. If they
24 tried to then bring their Federal constitutional Lucas
25 theory in State court, would issue preclusion or claim

1 preclusion principles bar a second bite at the litigation
2 apple? The answer ordinarily -- and you've asked me to
3 assume that the tests that they have -- they purport to be
4 stating the Federal standard. Ordinarily the answer would
5 be no if the argument simply is they made a mistake.
6 I mean, that's -- that's what happens in issue
7 preclusion. That's what in Allen v. McCurry and -- and
8 all of the cases in which this Court has applied full
9 faith and credit, Kremer and -- and -- I'm forgetting the
10 names of the other cases. The argument was, yes, they
11 thought they were adjudicating rights under the Fourth
12 Amendment, but they were wrong, and issue preclusion
13 shouldn't apply.
14 I'm -- I'm qualifying my answer a little bit
15 because I do think that if you came to Federal court and
16 said, look, this was a sham or they -- they -- their
17 analysis was so skewed that it can't fairly be said that
18 they were really applying the Federal standard, something
19 like, you know, the -- the AEDPA standard now that -- that
20 you get review if it's an -- not just an incorrect
21 determination, but a wholly unreasonable application of
22 law or fact. Then I think you would look and see, well,
23 would a State court say, well, that's right. I mean, if
24 your allegation is that they were so far off the
25 reservation that it really wasn't a determination of that

1 issue, I think you get a new review. I mean, I do
2 think --
3 JUSTICE KENNEDY: Well, was there an
4 allegation --
5 JUSTICE SOUTER: I guess in the --
6 JUSTICE KENNEDY: -- at any point here -- was
7 there an allegation at any point here that the State
8 procedures were inadequate to protect property rights?
9 MR. WAXMAN: No, to the contrary. Not only --
10 there's no Pullman issue presented in this case, but the
11 procedural posture of this case demonstrates, if anything,
12 a full-throated appeal to the State courts. They --
13 JUSTICE KENNEDY: Well, it's not so much that
14 weren't appellate procedures, but that the procedures and
15 the variance procedures and -- and a multiplicity of
16 agencies here were just so complex that it amounted to an
17 -- inadequate remedies to protect against a taking.
18 MR. WAXMAN: There have been absolutely no such
19 allegations made in this case. And I think a -- I think
20 that the San Remo would have to concede that although
21 there was a plethora of litigation in the State courts and
22 in the lower Federal courts about the zoning
23 determinations and whether a conditional use permit was or
24 wasn't required, the -- the hotel conversion ordinance,
25 the ordinance that requires the payment of this in lieu

1 fee, applies across the board to all residential hotels
2 based -- wherever they're located in the city, whether
3 they're in a historic district or not and whether they
4 have to be rezoned or not. It was a simple,
5 straightforward question about whether an ordinance that
6 says if you run a residential hotel or you have
7 residential rooms that you have certified as of the date
8 the ordinance was enacted and you want to change them
9 permanently to full-time tourist use, you have to bring an
10 equivalent number of units on line or you have to pay an
11 in lieu fee to the city's building fund.
12 And they made a challenge, like many people
13 have, that substantively that violates the Federal and
14 State takings clause. That is a taking of private
15 property without just compensation. But it applies to all
16 the residential hotels in the city wherever they're
17 located, regardless of whether they need variances or --
18 or anything like that.
19 Now, in this case they went first to the
20 Superior Court in San Francisco and they filed an
21 administrative mandamus claim challenging the zoning
22 determination that was made in their case because they're
23 in a historic district. And at the same time, they went
24 to the Federal court and they raised all of their takings
25 claims with respect to the ordinance and the zoning

1 issues. They got a preliminary injunction in Federal
2 court which was then -- but then lost a summary -- they
3 had summary judgment issued against them on all the
4 substantive -- all the claims in their case.
5 When they came to the Ninth Circuit, they asked
6 the Ninth Circuit to abstain under Pullman because they
7 had this municipal law question pending in the superior
8 court. It had been pending for 5 years, and that might
9 somehow obviate or change the constitutional question.
10 And they then went to -- they -- the -- the Ninth Circuit
11 noted that it was rather unusual for the plaintiff to be
12 invoking Pullman abstention and certainly to be doing so
13 for the first time on appeal after losing in the district
14 court, but nonetheless, the Ninth Circuit said fine.
15 And they then went to State court, and they
16 pressed not only their pending municipal law question, but
17 they also made their takings claims under Penn Central and
18 under the substantially advance prong both as applied and
19 both facial under the State constitution. And they
20 received a full and fair hearing on those claims in the
21 superior court, in the court of appeal where they won, and
22 in the California Supreme Court where they ultimately lost
23 4 to 3. There -- I don't believe there is any argument
24 made or available in this case that there was a denial of
25 a full and fair opportunity to litigate those issues as to

1 which preclusion is required.

2 JUSTICE GINSBURG: But they said there was no

3 litigation because it was just decided. They didn't plead

4 enough to state a claim for relief.

5 MR. WAXMAN: Well, the -- the California Supreme

6 Court decision makes clear at page 113a of the petition

7 appendix that it decided the takings claims, the

8 substantially advance claims, on a demurrer and that they

9 decided it, therefore, based on the factual allegations of

10 the complaint, matters subject to judicial notice, of

11 which there were many, and facts and circumstances that

12 were not disputed.

13 I mean, it -- there's no such thing, I don't

14 believe, as the resolution of a legal claim in which no

15 issues are decided. There were plenty of issues decided

16 in this case.

17 JUSTICE SOUTER: Decided but not litigated. I

18 mean, the -- the problem is that -- that claim preclusion

19 normally assumes that the issue is, in fact, litigated.

20 MR. WAXMAN: Well --

21 JUSTICE SOUTER: And his -- he's arguing it was

22 not.

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

24 the hotel -- whether or not the -- San Francisco's hotel

25 conversion ordinance was reasonably related to the city's

1 objective was litigated with a vengeance. It was
2 litigated to the point of dozens, if not hundreds of pages
3 in the State court.
4 The State court -- the State courts made a
5 number of subsidiary findings leading to their conclusion
6 that, both on its face and as applied, the hotel
7 conversion ordinance was reasonably related to the city's
8 legitimate objective of retaining low-cost rental housing
9 for the elderly, the disabled, and the poor.
10 JUSTICE SOUTER: Tell me how that statement that
11 you just made, fully litigated, squares with the fact that
12 -- I thought you said a moment ago it was decided on a
13 demurrer.
14 MR. WAXMAN: It's --
15 JUSTICE SOUTER: I'm -- I'm confused here.
16 MR. WAXMAN: It's the application of law to
17 fact. What the Court decided -- this Court said, I think
18 in Yee --
19 JUSTICE SOUTER: But you're -- you're saying
20 that the facts were -- were independently developed before
21 the demurrer was filed and granted?
22 MR. WAXMAN: Yes. The -- the courts were asked
23 to take judicial notice of a number of things. They --
24 JUSTICE SOUTER: So it was not decided simply on
25 pleadings.

1 MR. WAXMAN: No.

2 JUSTICE SOUTER: Okay.

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

4 CHIEF JUSTICE REHNQUIST: A demurrer --

5 MR. WAXMAN: I'm sorry.

6 CHIEF JUSTICE REHNQUIST: A demurrer is decided

7 on the pleadings, isn't it?

8 MR. WAXMAN: Well, it -- what the court said --

9 and I think this is a -- what the California Supreme Court

10 said at page -- I think it was page 113a and they also

11 reiterate this point at page 139a, footnote 12 -- is this

12 is a demurrer. So we take -- we accept as true the

13 allegations of the complaint. Plus, we take judicial

14 notice of all the things that the parties asked us to take

15 notice of, which are matters of public record, of which

16 there were many, many, many in this case, including, for

17 example, the fact that every year from 1990 -- well, every

18 year from the -- from 1983 on, when they took over

19 operation of this property, they filed with the city an

20 annual report that listed that, A, the determination that

21 all 62 of their rooms were for residential use and then

22 explained -- and then stated out the exact number of rooms

23 by quarter that were, in fact, used by -- for long-term

24 residences and those that, during the summer months, were

25 used for tourist use.

1 The court took judicial notice of that, as it
2 was appropriate, en route to its decision -- this is a
3 subsidiary issue I suppose -- that the conversion of this
4 hotel to full-time tourist use would, in fact, cause a
5 loss in the stock of available affordable housing. That
6 was an issue that was determined in this case. And the
7 ultimate question decided by the court was a mixed
8 question. It was the application of law to fact, as this
9 Court explained, I think in Yee, is characteristic of
10 substantially advances claims.
11 Thank you very much.
12 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Waxman.
13 Mr. Utrecht, you have 4 minutes remaining.
14 REBUTTAL ARGUMENT OF PAUL UTRECHT
15 ON BEHALF OF THE PETITIONERS
16 MR. UTRECHT: Thank you, Your Honor.
17 There's no question that Williamson County
18 creates problems. The Ninth Circuit in this case did not
19 just issue a Pullman abstention order the first time we
20 were there. They dismissed our as-applied claims as
21 unripe. It dismissed our facial claim based on economic
22 viability as unripe. So we're squarely within the context
23 contemplated by Williamson County; i.e., we proceeded in
24 State court with our State compensation claim in order to
25 ripen the Federal claim.

1 The city acknowledges, as a result of that, that
2 there's no claim preclusion. And this Court's decision in
3 Migra says that if there's a reason not to apply claim
4 preclusion, there should also be a reason not to apply
5 issue preclusion, that there should be an exception for
6 both or an exception for neither.
7 In this case, in addition to acknowledging an
8 exception for claim preclusion, Mr. Waxman also
9 acknowledged that if the State court was, as I -- my notes
10 show, so far off the reservation, the Federal court could
11 revisit the question. The problem, of course, with so far
12 off the reservation is that might be a good test for this
13 Court to adopt, but if the city's position is correct,
14 this Court does not have that opportunity. This Court is
15 stuck with whatever law the State imposes under issue
16 preclusion. So this Court is not free, if the city is
17 correct, to create some special exception.
18 I think the only basis for finding a separate
19 exception in this case is the one that this Court set out
20 in England. I see no reason that it shouldn't be extended
21 to this circumstance.
22 Unless there are any questions, I have nothing
23 further.
24 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
25 Utrecht.

1 The case is submitted.

2 (Whereupon, at 11:00 a.m., the case in the

3 above-entitled matter was submitted.)

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25