CA Nos. 97-35220, 97-35221

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KEVIN THOMAS, et al.,

Plaintiffs-Appellees,

v.

ANCHORAGE EQUAL RIGHTS COMMISSION, et al.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

BRIEF OF AMICUS CURIAE COMMUNITY RIGHTS COUNSEL FOR THE *EN BANC* COURT IN SUPPORT OF DEFENDANTS-APPELLANTS

TIMOTHY J. DOWLING
Community Rights Counsel
1726 M Street NW, Suite 703
Washington, D.C. 20036
(202) 296-6889

Counsel for Amicus Curiae
Community Rights Counsel

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Community Rights Counsel states that it is a non-profit corporation organized under the laws of the District of Columbia and has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

STATEMENT OF INTEREST

Amicus Community Rights Counsel (CRC) is a non-profit, public interest law firm established in 1997 to assist state and local governments in defending against challenges to local land-use controls and other community protections. CRC began as a project of the International City/County Management Association, a national association representing more than 8,000 city and county managers. We have represented government groups and municipalities in many takings cases, including a regulatory takings case currently pending before this Court. *See* Brief of Amicus Curiae International Municipal Lawyers Association in Support of the Defendants-Appellants, *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, CA Nos. 99-15641, 99-15771 (filed Aug. 9, 1999 by CRC). CRC assisted the Municipality of Anchorage in preparing its rehearing petition in the instant case. *See* Petition for Rehearing and Suggestion for Rehearing En Banc at 9 n.1 (Jan. 27, 1999) (acknowledging CRC's assistance).

This brief is devoted exclusively to the takings issue. The trial court did not rely on the Just Compensation Clause in analyzing the claims in this case, and the landlords' brief to the panel relied on the Free Speech Clause as the primary hybridization vehicle. As a result, the bulk of the briefing thus

far has focused on other important issues. Because the panel incorrectly elevated the prominence of the takings issue, CRC believes that this brief will assist the Court in the resolution of the case.

As is true of the other amicus briefs in this case, this brief is filed with the consent of all the parties, as reflected in the parties' joint stipulation dated September 23, 1997.

ARGUMENT

This brief focuses solely on the alleged takings implications of the Anchorage and Alaska fair housing laws, and it shows that based on more than 35 years of Supreme Court precedent, the landlords have no colorable claim under the Just Compensation Clause of the Fifth Amendment.

CRC assumes *arguendo* that the landlords' "colorable claim" standard for hybridization is correct, a standard the panel described as requiring "a fair probability" or "likelihood" of success. *See Thomas v. AERC*, 165 F.3d 692, 705-07 (9th Cir.), *vacated*, 192 F.3d 1208 (9th Cir. 1999). We emphasize that this assumption is for the sake of argument, for we find unfathomable the suggestion that the landlords may succeed by asserting two colorable claims, even if neither claim would succeed standing alone.

We show in Section I below that the landlords have no colorable claim under the Just Compensation Clause. The Supreme Court has

unequivocally rejected nearly identical takings claims and repudiated the notion that a landlord has a "right" to select tenants without regard to the law. Binding precedent also precludes the finding of a regulatory taking because the fair housing laws neither cause the landlords economic harm nor interfere with their reasonable expectations. Section II demonstrates that under repeated Supreme Court rulings, the landlords have no takings claim under the U.S. Constitution because they have failed to seek compensation in state court. In Section III, we show that even if the landlords had a colorable takings claim, a claim for compensation should not be used to hybridize free exercise claims that seek to invalidate government action.

I. Longstanding Precedent Makes Clear that the Fair Housing Laws at Issue Do Not Implicate the Just Compensation Clause.

A. Supreme Court Precedent

In its historic ruling in *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), the Supreme Court unanimously rejected a takings challenge to the Civil Rights Act of 1964, which prohibits invidious discrimination by public lodging facilities and other commercial enterprises open to the public. The motel alleged that the federal civil rights laws took its property without just compensation in violation of the Fifth Amendment because the motel was "deprived of the right to choose its customers and operate its business as it wishes." *Id*. at 243-44. In language that could not

be clearer, the Court repudiated the claim, stressing that an operator of a place of public accommodation "has no 'right' to select its guests as it sees fits, free from government regulation." *Id*. at 259, 261. In concurrence, Justice Black was even more emphatic, concluding that a restriction on the ability to choose one's customers "does not even come close to being a 'taking' in the constitutional sense." *Id*. at 277 (Black, J., concurring).

The Supreme Court has preserved this bedrock principle throughout the development of its modern takings jurisprudence. In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), the Court articulated a "very narrow" per se rule of takings liability for a government-compelled permanent physical occupation of property. *Id*. at 441. The *Loretto* Court found a per se taking because the challenged law in that case required Mrs. Loretto to allow a cable television operator to maintain equipment on the rooftop of her apartment building. *Id*. at 438-41. But the Court was careful to recognize the government's "broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails." *Id*. at 440. Citing *Heart of Atlanta Motel*, the *Loretto* Court expressly reaffirmed the government's authority to prohibit discrimination by landlords. *Id.* The *Loretto* Court distinguished *Heart of*

Atlanta Motel and related cases by observing that in none of these cases "did the government authorize the permanent occupation of the landlord's property by a third party." *Id*. In other words, a *Loretto* taking may occur where the government requires a landlord to suffer permanent occupation by a non-tenant third party, but no taking occurs where the government simply constrains the landlord's choice of tenants on property voluntarily made available for lease to the public.

The Court returned to the issue in *Federal Communications Comm'n v. Florida Power Corp.*, 480 U.S. 245 (1987). There, public utilities brought a takings challenge to a federal statute that authorized the FCC to regulate rents charged by utilities to cable television operators for the use of utility poles. The Court rejected the takings claim because nothing in the statute required the utilities to act as lessors. *Id*. 251-52. The *Florida Power* Court emphasized that the "element of required acquiescence is at the heart of the concept of occupation" for purposes of takings analysis. *Id*. at 252. Because the utilities could avoid occupation of their poles by evicting the cable operators, no taking occurred.

Finally, in *Yee v. City of Escondido*, 503 U.S. 519 (1992), the Court addressed a per se takings challenge to a municipal law that regulated rents charged by operators of mobile home parks. The park operators argued that

the rent control law, in combination with a state residency law that restricted evictions, effected a physical taking of their property. *Id*. at 526-27. The *Yee* Court rejected the claim, emphasizing that the rent control law, even in combination with the state residency law, did not authorize an occupation of the claimants' property because they "voluntarily rented their land to mobile home owners." *Id*. at 527. Moreover, neither law "compels [the claimants], once they have rented their property to tenants, to continue doing so." *Id*. at 527-28. Although the state residency law allowed evictions only upon six or twelve months notice (*id*. at 528), park owners eventually could avoid any occupation by evicting the tenants and changing the use of the land. The Court concluded: "Put bluntly, no government has required any physical invasion of petitioners' property." *Id*. The *Yee* Court reaffirmed the central premise of *Heart of Atlanta Motel*, stating that "[b]ecause [the claimants] voluntarily open their property to occupation by others, [they] cannot assert a per se right to compensation based on their inability to exclude particular individuals." *Id*. at 531 (citing *Heart of Atlanta Motel*).

The claimants in *Yee* relied on language in *Loretto* stating that a taking had occurred even though Mrs. Loretto could have avoided the occupation of her building by cable television operators by ceasing to rent the building to tenants. *Id*. at 531. The *Yee* Court responded that the

argument "fails at its base" because there was no government-authorized invasion by a third party in *Yee*. *Id*. at 532. In other words, where the challenged occupation is by a non-tenant third party (like the cable operator in *Loretto*), the ability to avoid the invasion by ceasing to rent to tenants does not defeat the takings claim; but where the alleged occupation is by the tenants themselves (or a subset thereof), the landowner's ability to evict all tenants defeats any contention that the occupation is government-authorized.

The instant case is on all fours with *Heart of Atlanta Motel* and its progeny. Like the motel operator in *Heart of Atlanta Motel*, the utility lessors in *Florida Power*, and the mobile home park operators in *Yee*, the landlords here are free to avoid occupation of their property by closing it to the public. Indeed, *Yee* appears to apply *a fortiori*, for while the California residency law restricted the Yee's ability to evict for up to twelve months, the landlords here have failed to challenge any restriction on their right to convert their land to other uses. Because the landlords continue to make their land available to the public for leasing, they may not select their tenants in a way that would violate the law. As the Supreme Court made clear in *Heart of Atlanta Motel*, they have no "right" to choose their customers, free from government regulation, and they have no right to demand compensation as a result of laws that prevent illegal discrimination.

B. The Panel's Errors

Notwithstanding this overwhelming Supreme Court precedent, the panel found a colorable takings claim based on three erroneous premises. First, the panel concluded that although the fair housing laws do not work a per se taking under *Yee*, "they authorize a 'physical invasion' of the landlords' property just the same." *Thomas*, 165 F.3d at 709. Second, the panel concluded that *Yee* allows for consideration of restrictions on the ability to choose tenants in evaluating a regulatory (as opposed to a physical) takings claim. *Id*. Third, the panel concluded that the landlords have a colorable regulatory takings claim under *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978) -- even though the fair housing laws neither interfere with the landlords' reasonable expectations nor cause them economic harm -- because the character of the government action here has controlling significance. *Id*. We address these three errors in turn.

First, the panel wrongly concluded that the fair housing laws "authorize" a physical occupation of the landlords' property. As shown above, *Yee* repeatedly holds just the opposite. *E.g., Yee*, 503 U.S. at 527 (the California mobile home law "authorizes no such thing"). Like the mobile home park operators in *Yee*, the landlords may avoid occupation of their land by excluding the public altogether, and thus there is no government-

authorized invasion. *Id.*; *accord Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 685 (9th Cir. 1993) (the laws in *Yee* "in no way authorized a compelled physical invasion of the property because the landlords 'voluntarily rented their land to mobile home owners.'") (quoting *Yee*).[1]

Second, the panel misconstrued the factor that the *Yee* Court suggested might be relevant to regulatory takings analysis. The relevant factor was not infringement of any purported right to select tenants, for *Yee* expressly reaffirms that there is no such "right." *Yee*, 503 U.S. at 531 (citing *Heart of Atlanta Motel*). Instead, the relevant factor identified by the *Yee* Court was unique to the facts of *Yee*:

> [W]e understand petitioners to be making a more subtle argument -- that before the adoption of the ordinance they were able to influence a mobile home owner's selection of a purchaser by threatening to increase the rent for prospective purchasers they disfavored. To the extent the rent control ordinance deprives petitioners of this type of influence, petitioners' argument is one we must consider.

---

[1] The panel cited *Penn Central* for the proposition that "[a] 'taking' may be more readily found where the interference with property can be characterized as a physical invasion by government" as opposed to mere regulation of land use. *See Thomas*, 165 F.3d at 709 (quoting *Penn Central*). But again, the operative phrase is "physical invasion by the government." Under *Yee*, there is no government-authorized invasion in this case. The landlords may avoid any occupation by evicting their tenants and using their land for other purposes. If they rent to the public, however, nothing in *Penn Central* trumps the governments' ability to regulate their choice of tenants under *Heart of Atlanta Motel*.

Id. at 531n. In other words, it was the ability to threaten a rent increase for disfavored prospective purchasers that the *Yee* Court found to be relevant to the regulatory takings claim. That factor, unique to the claim in *Yee*, has no application here.

Third, even if the repudiated "right" to select tenants were relevant to regulatory takings analysis, under *Yee* it could only be one factor in the analysis. *Yee* expressly rejected the per se challenge to the laws at issue in that case, thereby precluding reliance on the character of the government action as the controlling factor in analyzing such laws. *Yee*, 503 U.S. at 526-532. Although the panel purported to apply *Penn Central*'s multi-factor inquiry, it found no economic injury or interference with the landlords' expectations, and instead gave dispositive weight to the character of the government action. *See Thomas*, 165 F.3d at 708-09. Such reliance on a single factor to find a taking is the very essence of a per se takings claim. *See Loretto*, 458 U.S. at 426 (defining the *Loretto* per se rule as giving "determinative" status to the character of the government action for government-compelled permanent physical occupations). To give dispositive weight to the character of the fair housing laws at issue works an impermissible end run around *Yee*'s rejection of a per se takings claim in comparable circumstances.

Equally startling is the panel's conclusion that the landlords have a colorable regulatory takings claim even though the fair housing laws cause no economic harm to the landlords. *See Thomas*, 165 F.3d at 708-09. If a regulatory taking causes no economic harm, no compensation need be paid and thus there is no constitutional violation. The Federal Circuit -- the appeals court with primary jurisdiction over takings claims against the United States -- recently rejected a regulatory takings claim precisely because the landowner suffered no economic injury. *See Hendler v. United States*, 175 F.3d 1374, 1385 (Fed. Cir. 1999) ("[I]f the regulatory action is not shown to have had a negative economic impact on the property, there is no regulatory taking.").

Indeed, a regulatory takings claimant generally must show severe economic harm to prevail. *See Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994) ("A land use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests and does not 'den[y] an owner economically viable use of his land.'"); *District Intown Properties Ltd. Partnership v. District of Columbia*, No. 98-7209, 1999 U.S. App. LEXIS 32701, at *24 (D.C. Cir. Dec. 17, 1999) ("[A] claimant must put forth striking evidence of economic effects to prevail even under the [*Penn Central*] *ad hoc* inquiry."); *Garneau v. City of Seattle*, 147 F.3d 802, 807-08

(9th Cir. 1998) (under *Penn Central*, "plaintiffs must show that the diminution in value is so severe that the [government] has essentially appropriated their property for public use."). To our knowledge, no court (other than the panel) has ever found a regulatory taking in the absence of economic harm to the landowner.[2]

C. The Landlords' Contentions

In their sixty-six page opening brief to the panel, the landlords devoted just three pages to the contention that the Anchorage and Alaska fair housing laws implicate their Fifth Amendment rights. *See* Brief of Appellees at 49-52 (Nov. 28, 1997). They basically relied on a single, inapposite case: *Dolan v. City of Tigard*, 512 U.S. 374 (1994). The *Dolan* Court held that where the government conditions a development permit on a requirement that the landowner dedicate property to the public, the

[2] The panel relied on *Phillips v. Washington Legal Found.*, 524 U.S. 156 (1998), but *Phillips* stands only for the unremarkable proposition that a physical item may constitute "property" even though it lacks economic value. *Id*. at 169-70. No one disputes that the landlords' rental properties are property within the meaning of the Just Compensation Clause. *Phillips* left unaddressed the issue of whether a compensable taking had occurred in that case. *Id*. at 172. The panel also relied on *Loretto*, but *Loretto* simply holds that small economic losses are cognizable where a *per se* taking is found. *Loretto*, 458 U.S. 425-41. It does not support the panel's suggestion that a regulatory taking may occur even where there is no economic loss to be compensated.

dedication requirement must be roughly proportional to the harms expected from the proposed development. *Id*. at 383-96. Just months ago, the Supreme Court unanimously reaffirmed that *Dolan*'s rough proportionality test is limited to "the special context of exactions -- land use decisions conditioning approval of development on the dedication of property to public use." *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 119 S. Ct. 1624, 1635 (1999). The *Dolan* standard "was not designed to address, and is not readily applicable to" other land use restrictions. *Id*. It has no relevance to this case.

In their opposition to rehearing, the landlords chose not to brief the takings issue themselves, but instead relied on arguments presented by amicus Pacific Legal Foundation (PLF). PLF emphasizes that the right to exclude is an important "stick" in a landowner's bundle of rights. *See* Brief Amicus Curiae of Pacific Legal Foundation in Support of Plaintiffs-Appellees and in Opposition to the Suggestion for Rehearing En Banc at 3-7 (Feb. 16, 1999) ("PLF Bf."). But no one disputes this proposition. The *Yee* Court acknowledged the importance of the right to exclude. *Yee*, 503 U.S. at 528. The salient question under *Yee*, however, is whether Anchorage and Alaska have compelled a physical invasion of the landlords' property. As shown above, there is no government compulsion because the landlords

remain free to exclude everyone from their property. Once they voluntarily open their property to the public, however, they have no "right" to select their tenants. *See Heart of Atlanta Motel*, 379 U.S. at 259.

PLF argues that the fair housing laws disproportionately burden those who would prefer to disregard those laws. PLF Bf. at 7-9. As both the panel and the trial court concluded, however, the fair housing laws are neutral laws of general applicability. *Thomas*, 165 F.3d at 700-02; Haley Excerpts of Record at 91, 97-99. And PLF concedes that because the fair housing laws do not interfere with any landlord's reasonable expectations or adversely affect their economic interests, the laws "realistically impose[] no burden whatsoever on the overwhelming majority of landlords." PLF Bf. at 8. Thus, the alleged disproportionality depends exclusively on PLF's assumption that only a few landlords would prefer to discriminate against unmarried couples. Even if PLF's assumption is true, it is blatant bootstrapping to argue that the claimants are disproportionately burdened by a law of general applicability simply because most of the regulated community has no objection to it. PLF's disproportionality theory would lead to the nonsensical result that a law would be less vulnerable under the Just Compensation Clause if the entire regulated community objected to it. Nothing in the Constitution requires this absurd result.

II. Under Supreme Court Precedent, the Landlords Have No Federal Takings Claim Because They Have Not Been Denied Compensation in State Court.

Use of the Just Compensation Clause as a hybridization vehicle is especially inappropriate here because the landlords cannot even state a federal takings claim until they seek and are denied compensation in state court. In *Williamson County Regional Planning Comm'n v. Hamilton Bank,* 473 U.S. 172 (1985), the Supreme Court held that "because the Fifth Amendment proscribes takings *without just compensation*, no constitutional violation occurs until just compensation has been denied. The nature of the constitutional right therefore requires that a property owner utilize [state] procedures for obtaining compensation before bringing a § 1983 action." *Id*. at 194 n.13 (emphasis in original). If the state provides compensation, no takings claim would lie under the Fifth Amendment: "[A] property owner has not suffered a violation of the Just Compensation Clause until the owner has unsuccessfully attempted to obtain just compensation through the procedures provided by the State for obtaining such compensation * * *." *Id.* at 195.

Just last Term, the Supreme Court reiterated this hornbook principle that no violation of the Fifth Amendment occurs unless and until the claimant is denied compensation in state court: "Had the city paid for the

property or had an adequate postdeprivation remedy been available, Del Monte Dunes would have suffered no constitutional injury from the taking alone." *Del Monte Dunes*, 119 S. Ct. at 1639. Writing for the Majority, Justice Kennedy emphasized that a federal takings claim does "not accrue until [the claimant is] denied just compensation" in state court. *Id*.; a*ccord*, *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1, 11 (1990) (if the government provides a process that yields just compensation, "then the property owner 'has no claim against the Government' for a taking.") (quoting *Williamson County*).

This Court also recognizes that a landowner cannot state a federal takings claim until the owner pursues and is denied compensation under available state-court remedies. *See Bateson v. Geisse*, 857 F.2d 1300, 1306 (9th Cir. 1988) (landowners cannot "state a [federal] takings claim" unless and until they seek and are denied compensation in state court); *see also San Remo Hotel v. City and County of San Francisco*, 145 F.3d 1095, 1102 (9th Cir. 1998); *Macri v. King County*, 126 F.3d 1125, 1129-30 (9th Cir. 1997), *cert. denied*, 522 U.S. 1153 (1998); *Dodd v. Hood River County*, 59 F.3d 852, 859-61 (9th Cir. 1995).

In the case at hand, the landlords have not sought, much less been denied, compensation in state court. If the landlords had brought a federal

takings challenge to the Anchorage and Alaska fair housing laws, binding precedent would have required dismissal for failure to state a claim. Accordingly, they have no colorable claim under the Just Compensation Clause that can be used to hybridize their free exercise claim.[3]

III. Claims for Compensation Under the Just Compensation Clause Should Not Be Used to Hybridize Claims for Invalidation Under the Free Exercise Clause.

The Just Compensation Clause is a particularly inapt vehicle to hybridize a free exercise claim under *Employment Division v. Smith*, 494 U.S. 872 (1990). As the Supreme Court held in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), the Just Compensation Clause "does not prohibit the taking of private property, but instead places a condition on the exercise of that power." *Id*. at 314. The condition, of course, is the payment of just compensation, for the Clause is "designed to * * * secure *compensation* in the event of otherwise proper interference amounting to a taking." *Id*. at 315 (emphasis in original)..

Where the government action serves a public purpose and money damages are available, the Supreme Court has consistently held that

[3] In his dissent from the panel's opinion, Judge Hawkins showed that the landlords also lack standing to bring a takings challenge because they failed to show that they purchased their land before the challenged laws were enacted. *Thomas*, 165 F.3d at 724. CRC agrees with these arguments.

compensation is the only remedy for a taking of real estate. The Court stated this point most clearly in *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984), where it held: "Equitable relief is not available to enjoin an alleged taking of private property for a public use, duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to the taking." *Id.* at 1016; *accord Preseault*, 494 U.S. at 11-12. The only exception to this exclusive compensation remedy arises where a compensation award would be "utterly pointless." *See Eastern Enters. v. Apfel*, 524 U.S. 498, 521 (1998) (plurality).

It makes no sense to use a constitutional provision like the Just Compensation Clause -- which requires compensation, not invalidation -- to justify heightened scrutiny of a claim for invalidation under the Free Exercise Clause. In describing hybrid claims, the *Smith* Court referred to four possible hybridization vehicles: freedom of speech, freedom of the press, freedom of association, and the right of parents to direct the education of their children. *Smith*, 494 U.S. at 881-83. The common thread is communicative activity, as shown by the *Smith* Court's express refusal to hybridize the free exercise claim before it because it was "unconnected with any communicative activity or parental right." *Id*. at 882. In the same way, a compensation claim for a taking is unconnected with communicative

activity. To our knowledge no court has ever held that a companion compensation claim should be used justify heightened scrutiny of a claim for invalidation. To do so mixes constitutional apples and oranges in a way that does violence to the basic principle that underlies *Smith*, namely the general constitutional sufficiency of neutral laws of general applicability.

CONCLUSION

The Anchorage and Alaska fair housing laws do not implicate the Just Compensation Clause. Suggestions to the contrary ignore longstanding Supreme Court precedent and thus have deeply troubling implications not only for laws that prohibit discrimination based on marital status, but for fair housing laws and civil rights laws across the board. The Court should reject the landlords' contention that they have a colorable takings claim that may be used to hybridize their free exercise claim.

Respectfully submitted,

TIMOTHY J. DOWLING
Community Rights Counsel
1726 M Street NW
Suite 703
Washington, D.C. 20036
(202) 296-6889

Attorney for Amicus Curiae
Community Rights Counsel

December 22, 1999