No. 06-56306

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Daniel Guggenheim, Susan Guggenheim and Maureen H. Pierce,
Petitioners and Appellants,

vs.

City of Goleta,
Respondent and Appellee.

On Appeal From A Judgment Of The United States District Court,
Central District Of California
The Honorable Florence-Marie Cooper

AMICUS CURIAE BRIEF OF CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONERS/APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Amicus Curiae Center For Constitutional Jurisprudence states that no publicly held corporation owns 10% or more of its stock.

Dated: April 16, 2010

Respectfully submitted,

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INTRODUCTION

California has always marched to the beat of its own Fifth Amendment drummer. That is why its land use regulations have provided a stream of constitutional cases for courts at all levels that is out of scale, even given California's status as the most populous state in the Nation.

The purpose of this brief is to show the unavailability of a compensatory, 5th Amendment remedy in the California courts for regulatory takings in general and for the owners of mobile home parks in particular. We will show how the California state courts, despite repeated reversals by the U.S. Supreme Court, have reinstated rules that preclude compensation as a remedy, even in the context of suits brought under 42 U.S.C. §1983, a statute whose "central purpose...is to provide *compensatory relief* to those deprived of their federal rights by state actors." (*Felder v. Casey*, 487 U.S. 131, 141 [1988]; emphasis added.)

Twice in a two-week span, for example, the Supreme Court reined in the California judiciary, because it had been deciding just compensation cases "inconsistently with the requirements of the Fifth

Amendment" (*First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 311 [1987]), and that its decisions about development exactions smacked of "extortion" (*Nollan v. California Coastal Commn.*, 483 U.S. 825, 837 [1987]) and were out of step with "every other court that has considered the question" (*Nollan*, 483 U.S. at 839).

California did not take those messages to heart. Instead, it spent the years since 1987 reestablishing its old, discredited position that landowners claiming regulatory takings of their property have no 5th Amendment compensation remedy.

This has been particularly true in rent control cases.

The California Supreme Court has flatly told the owners of rental property that government regulators may essentially do as they please without concern over potential financial liability. As plainly shown by *Kavanau v. Santa Monica Rent Control Bd.*, 16 Cal.4th 761, 767, 782, 786 (1997) and *Galland v. City of Clovis*, 24 Cal.4th 1003 (2001), California *will not* provide a just compensation remedy for a 5th Amendment taking.

California's solution for a rent control regulation that stifles 5th

Amendment rights is for the owner to ask the regulator who has violated those rights to consign any financial consequences of the regulation onto third-party private tenants by means of future rent increases. In no sense does that fulfill the 5th Amendment's promise. In *First English*, the Court held that "the Just Compensation Clause of the Fifth Amendment *requires that the government pay* the landowner for the value of the use...." (*First English*, 482 U.S. at 319.) Shunting that governmental burden onto random future tenants who have done nothing wrong cannot be 5th Amendment compliance. (Compare *United States v. Winstar Corp.*, 518 U.S. 839, 896 [1996][government breached contracts through "statutes tainted by a governmental object of self-relief...in which the Government seeks to shift the costs of meeting its legitimate public responsibilities to private parties"].)

We recognize that panels of this Court have accepted the *Kavanau* process on its face as providing a "remedy" for mobile home park owners. (*Equity Lifestyle Properties, Inc. v. County of San Luis Obispo*, 548 F.3d 1184, 1186 [9th Cir. 2008]; *Carson Harbor Village, Ltd. v. City of Carson*, 353 F.3d 824, 830 [9th Cir. 2004].) Respectfully, however, it is time to consider how the *Kavanau* "adjustment" process is working now that it has been in existence for

more than a decade. As discussed *post*, if the goal was to provide a system in which park owners could obtain fair, speedy, hearings on their requests for rental increases with a reasonable prospect of obtaining relief, then the answer is that *Kavanau* is a failure. If the goal was to create the illusion of due process without any substance, then *Kavanau* is a success. The upshot of *Kavanau* in the state courts is that park owners cannot obtain a trial on the merits of their claims for just compensation. The process has become so snarled in procedural complications that there is no room left for the merits. Unless this Court upholds the panel decision, there will be no federal right to a 5th Amendment trial either.

The question of whether California provides a compensation remedy for takings of property within the meaning of the 5th and 14th Amendments is important because it is the key to access to the federal courts and the protection of federal law like 42 U.S.C. §1983. In *Williamson County Reg. Planning Commn. v. Hamilton Bank*, 473 U.S. 172 (1985), the Supreme Court established a rule of prudential ripeness for regulatory taking cases that allows district courts to decline jurisdiction unless the property owner "unsuccessfully attempted to obtain just compensation through the procedures

provided by the State." (*Id*. at 195.) Such state "procedures" fit that template only if they provide a "reasonable, certain, and adequate" means of obtaining the just compensation mandated by the 5th Amendment. (*Id*. at 194.) The treatment of these issues by the California courts provides ample basis for the exercise of this Court's prudential jurisdiction.

The panel opinion held that the *Williamson County* rule was satisfied here both because the City waived it and because no California remedy satisfied it. This brief will focus on the absence of a "reasonable, certain, and adequate" remedy in the California court system for property owners with 5th Amendment takings claims.

I

THE LEGAL CLIMATE IN CALIFORNIA COURTS HAS BECOME OPENLY HOSTILE TO THE CONSTITUTIONAL RIGHTS OF PROPERTY OWNERS

California holdings have become the subject of criticism and, at times, derision by distinguished commentators *on both sides of the 5th Amendment taking issue*, who have called California's attitude toward property owners "more hostile...than any other high court in the

nation."[1] They concluded that California's attitude was "extreme,"[2] "onerous [and] draconian"[3]—in short, "the most restrictive state in the country with respect to land use."[4] Commentators sympathetic to government regulators agree that California's courts have applied this anti-property owner bias "consistently," and that it "pervades the body of California zoning law generally."[5]

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[1] DiMento, *et al.*, *Land Development and Environmental Control in the California Supreme Court: The Deferential, the Preservationist, and the Preservationist-Erratic Eras*, 27 U.C.L.A.L. Rev. 859, 872 (1980). Eight highly knowledgeable authors, led by the late UCLA law professor Donald Hagman, the leading land use legal analyst of his time, noted for his balanced position.

[2] Fischel, Regulatory Takings: Law, Economics, and Politics 226 (Harvard U. Press 1995), by a nationally recognized land economics professor at Dartmouth.

[3] Callies, *The Taking Issue Revisited*, 37 *Land Use Law & Zoning Digest* 6, 7 (July 1985). The author, a professor of law at the University of Hawaii, co-wrote one of the most influential books on land use—with an unequivocally pro-regulation orientation. (Bosselman, Callies, & Banta, The Taking Issue [Council on Environmental Quality 1973].)

[4] Bauman, *The Supreme Court, Inverse Condemnation, and the Fifth Amendment*, 15 Rutgers L.J. 15, 70 (1983). The author has seen both sides of the issue, having served, at different times, as litigation counsel to the National Association of Home Builders and as Chairman of the Maryland-National Capital Park and Planning Commission (regulating land use in Montgomery County, Md.).

[5] 1 Williams, American Land Planning Law §6.03 at 184 (rev. 1988, supp. 2000). Others openly gloated. See Longtin, *Avoiding and*

Nothing changes;[6] the Supreme Court's 1987 admonitions notwithstanding, Californians' property rights remain very much a constitutional "poor relation." (Compare *Dolan v. City of Tigard*, 512 U.S. 374, 392 [1994].) A poll of land use experts found "California was a near unanimous choice as the state least likely to protect landowner rights. California municipalities...are accustomed to meeting little resistance from the state courts."[7] Two knowledgeable commentators concluded that, "[i]n California, the courts have elevated governmental arrogance to a fine art." [8]

Defending Constitutional Attacks on Land Use Regulations (Including Inverse Condemnation), 38B NIMLO Municipal L. Rev. 192-193 (1975), quoted with disapproval in *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 655, fn. 22 (1981) (Brennan, J., dissenting, but expressing the substantive views of five Justices).

[6] After the decision in *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999), in which the Supreme Court affirmed decisions that the city acted unconstitutionally when it denied development permission—leading to a seven figure compensation award—the city's attorney was asked how the city would change in response to the Court's ruling. He replied: "Will it change anything? No." (Belcamino, "Monterey loses long court battle," Monterey County Herald, May 25, 1999, p. A. 10.)

[7] Coyle, Property Rights and the Constitution 11 (State U. of N.Y. Press 1993).

[8] Babcock & Siemon, The Zoning Game Revisited 263 (Lincoln Inst. of Land Policy 1985). The late Richard Babcock was, at the time, the recognized dean of the Nation's land use bar and—

II

CALIFORNIA'S MAVERICK FIFTH AMENDMENT JURISPRUDENCE PROVIDES NO REMEDY FOR PROPERTY OWNERS, LEAVING THE FEDERAL COURTS AS THE ONLY FORUM CAPABLE OF PROVIDING CONSTITUTIONAL RELIEF

After 1979, the rule in California was that the only remedy for a regulatory taking of property was to attempt to invalidate the offending regulation. (*Agins v. City of Tiburon*, 24 Cal.3d 266 [1979], *aff'd on other grounds*, 447 U.S. 255 [1980].) That remained the California rule until the Supreme Court overturned it in *First English*.

During the interim between *Agins* and *First English*, California property owners' suits were welcome in federal court because there was no state law remedy. (See, e.g., *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 [1999].) After *First English*, the courts in this Circuit assumed that the California courts would change their ways and provide the constitutionally-compelled compensation remedy. Thus, the requirement that property owners repair to state court where state law provided a remedy was believed to be fulfilled. (See, e.g., *Schnuck v. City of Santa Monica*, 935 F.2d 171, 174 [9th Cir. 1991].)

But it was not to be. California, instead, made its own Fifth

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significantly—a vigorous defender of expansive government regulatory control.

Amendment world by recreating the non-remedial regime the Supreme Court so roundly criticized in *First English*, 482 U.S. at 311 and *Nollan*, 483 U.S. at 837, 839.

An Illustration — *First English* Partly Nullified

The decision in *Landgate v. California Coastal Commn.*, 17 Cal.4th 1006 (1998) provides an apt illustration. In *First English*, the Supreme Court reviewed—and rejected—California's rule that the remedy for a regulatory taking was to invalidate the regulation, holding that compensation was constitutionally mandated. (482 U.S. at 315, 322.) When it overruled California's unconstitutional rule, the Court did so *precisely* because California refused to permit compensation for the period *before* judicial determination that a regulation kept private property from being put to economically productive use. The California rule that the Court consigned to the constitutional scrap heap in 1987 is *precisely* what the California Supreme Court resuscitated in *Landgate*. The deliberate nature of California's intellectual insurrection is apparent when one reads *First English*. The Supreme Court could not have been clearer in its opening paragraph, which left no doubt as to the issue before it, the

correct rule, and California's disregard of it:

> "In this case the California Court of Appeal held that a landowner who claims that his property has been 'taken' by a land-use regulation may not recover damages *for the time before it is finally determined that the regulation constitutes a 'taking' of his property*. We disagree, and conclude that in these circumstances the Fifth and Fourteenth Amendments to the United States Constitution would *require compensation for that period*." (482 U.S. at 306-307; emphasis added.)
>
> "While the Supreme Court of California may not have actually disavowed this general rule..., we believe that it has truncated the rule *by disallowing damages that occurred prior to the ultimate invalidation of the challenged regulation*." (482 U.S. at 317; emphasis added.)

First English thus holds that, once the regulatory action is administratively final, compensation is constitutionally compelled for the period *during litigation that determines the invalidity of the regulation*. California, however, has simply nullified that teaching. It has defiantly re-established pre-*First English* law by holding that the aggrieved landowner must first sue to invalidate the regulation,[9] and that such a litigational period is merely part of the "normal delay" in the "planning process" and cannot result in a constitutional taking that

[9] This aspect of California's rule, established in *Hensler v. City of Glendale*, 8 Cal.4th 1, 10 (1994), is also contrary to federal law. The U.S. Supreme Court has held that a challenge to the validity of a statute is not ripe until after the landowner seeks just compensation. (*Preseault v. I.C.C.*, 494 U.S. 1 [1990].)

requires compensation—regardless of the illegality of the regulation and its effect on the property owner. (*Landgate*, 17 Cal.4th at 1010.) Once again, California has "truncated the [constitutional] rule" (*First English*, 482 U.S. at 317) by defying *First English* and refusing compensation for this period.

Another Illustration — *Lucas* Ignored

The Supreme Court's decision in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) fared no better at the hands of the California court. In *Lucas*, the Court held that denial of all economically beneficial or productive use of property, whether permanent or temporary, is a "categorical" *per se* taking that requires compensation. (*Lucas*, 505 U.S. at 1015.) Under California's resurrected pre-1987 rules, however, even such a drastic impact *cannot* be deemed a taking if the "development restrictions on the subject property substantially advanced some legitimate state purposes[10] so as to justify the denial of the development permit." (*Landgate*, 17 Cal.4th at 1022.)

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[10] Of course, how there can be a "legitimate" governmental purpose when an agency acts unconstitutionally and without jurisdiction (i.e., beyond the purview of its legitimate powers) no one has bothered to explain.

Thus, in California, there cannot be a regulatory taking as long as the government had some arguably legitimate basis for its actions. (*Landgate*, 17 Cal.4th at 1022.)[11]

But the U.S. Supreme Court's jurisprudence has consistently held that takings are measured by the impact of the regulators' acts on the property owner, not the worthiness of their intentions. Good intentions do not trump the Constitution. (See *McDougal v. County of Imperial*, 942 F.2d 668, 676 [9th Cir. 1991].) The government can no more confiscate private property for good reasons than for bad ones.[12] Indeed, in *every* direct condemnation case, there is a finding of public use and public necessity (i.e., good intentions). But the presence of those factors does not vitiate the Just Compensation Clause—on the contrary, it triggers its applicability. Justice Brennan's frequently cited opinion in *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 653 (1981) (Brennan, J., dissenting, but expressing the views of five Justices) aptly encapsulated the High Court's teachings

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[11] Note that this goes far beyond the "nuisance exception" discussed in *Lucas*, 505 U.S. at 1029-1030.

[12] Impermissible government action is *ultra vires* and void, even though well-intentioned. (See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 [1952] [wartime seizure of steel mills voided].)

with this quote from Justice Stewart:

> "[T]he Constitution measures a taking not by what a State says, or by what it intends, but by what it *does*." (Quoting with approval from *Hughes v. Washington*, 389 U.S. 290, 298 [1967] [Stewart, J., concurring]; emphasis in original.)

The Court of Appeals for the Federal Circuit expanded on that thought:

> "The purpose and function of the [5th] Amendment being to secure citizens against governmental expropriations, and to guarantee just compensation for the property taken, what counts is not what the government said it was doing, or what it later says its intent was....What counts is what the government *did*. [Citing *Hughes*.]" (*Yuba Goldfields, Inc. v. United States*, 723 F.2d 884, 889 [Fed. Cir. 1983]; emphasis in original.)

The Supreme Court has applied that bedrock constitutional philosophy repeatedly. For example, in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), the New York Court of Appeals upheld a statute as a valid exercise of the police power. But commendable goals, like good intentions, are no substitute for adherence to the Just Compensation Clause:

> "The Court of Appeals determined that §828 serves [a] legitimate public purpose...and thus is within the State's police power. We have no reason to question that

> determination. *It is a separate question, however, whether an otherwise valid regulation so frustrates property rights that compensation must be paid*." (*Loretto*, 458 U.S. at 425; emphasis added.)

Similarly, in *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), the Corps of Engineers had decreed that a private marina be opened to public use. The Supreme Court disagreed and, in the process, explained the relationship between justifiable regulatory actions and the takings clause of the 5th Amendment:

> "In light of its expansive authority under the Commerce Clause, there is *no question* but that Congress could assure the public a free right of access to the Hawaii Kai Marina if it so chose. *Whether a statute or regulation that went so far amounted to a taking, however, is an entirely separate question*." (*Kaiser*, 444 U.S. at 174; emphasis added; citations deleted.)[13]

And, of course, that concept is the underpinning for the

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[13] In a similar vein are cases like *Preseault v. I.C.C.*, 494 U.S. 1 (1990), *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984), *Dames & Moore v. Regan*, 453 U.S. 654 (1981), and the *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974). In each of them, the Court was faced with the claim that Congress, in pursuit of legitimate goals, had taken private property in violation of the 5th Amendment. In each, the Court directed the property owners to the Court of Federal Claims to determine whether these exercises of legislative power, *though legitimate*, nonetheless required compensation. This bedrock principle of the law of constitutional remedies goes back to the unanimous decision in *Hurley v. Kincaid*, 285 U.S. 95 (1932) (Brandeis, J.), where the Court held that the remedy for a taking resulting from validly constructed government works is just compensation, not judicial second guessing of valid government policies and decisions.

Supreme Court's categorical rule that, if regulation denies all economically beneficial or productive use of private land, it is a *per se* taking. (*Lucas*, 505 U.S. at 1015.) That is why a taking *always* occurs when economically productive use is prevented, "*without* case-specific inquiry into the public interest advanced in support of such a restraint." (*Lucas*, 505 U.S. at 1015; emphasis added.) In other words, for a taking to occur, it matters not whether the regulators acted in good or bad faith. What matters is the impact of their acts, not their motives.

And yet, the rule applied in California is that when the regulators snuff out all reasonable private land use, requiring years of litigation to correct, the property owner cannot even contend that a 5th Amendment violation occurred if the government can conjure up some objectively rational basis for its actions. (*Landgate*, 17 Cal.4th at 1022.) That telescopes takings analysis into due process analysis, something the U.S. Supreme Court has expressly refused to do. (E.g., *Nollan*, 483 U.S. at 834, fn. 3; *Eastern Enterprises v. Apfel*, 524 U.S. 498 [1998] [compare plurality, concurring, and dissenting opinions]. See also *Carson Harbor Village, Ltd. v. City of Carson*, 353 F.3d 825, 828, n. 4 [9th Cir. 2004], acknowledging California's conflation of

takings and due process, but declining to comment on its correctness as a matter of federal law.)

The due process/takings conflation is evident in the *Kavanau/Galland* lineage and shows what is constitutionally wrong with it. *Kavanau* holds that its adjustment process eliminates the possibility of a taking and becomes its avatar. When the end-product is judicially reviewed, it receives the extreme deference given to government decisions in a due process review. But the question is whether a taking has occurred, an issue subject to a higher review standard. Thus, far from dealing with any potential taking, California solves the problem with sleight-of-hand, by providing a remedy that is really no remedy and calling it an adequate substitute. As briefed *post*, it is nothing of the sort.

The upshot of "elevat[ing] governmental arrogance to a fine art" (see Babcock & Siemon, *ante* n. 8) is that California regulators do as they please.[14] That inspires litigation to vindicate the owners' constitutional rights and puts unnecessary burdens on the judiciary. A

[14] As Professor Coyle observed: "...the basic message of the [California Supreme] court was 'Do what you want.' " (Coyle, *supra*, n. 7, p. 156.)

review of the U.S. Supreme Court's docket since 1978, when the modern era of constitutional land use jurisprudence began, reveals this startling fact: **land use cases arising in California account for as many of the Supreme Court's decisions in this field as those from all other jurisdictions combined.** Many of the household names in 5th Amendment law arose in California.[15]

When the thirteen cases the Supreme Court decided from California are compared to the fourteen land use cases arising in *all other jurisdictions combined*,[16] it is apparent that something is

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[15] *Lake Country Estates v. Tahoe Reg. Plan. Agency*, 440 U.S. 391 (1979); *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980); *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340 (1986); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987); *Nollan v. California Coastal Commn.*, 483 U.S. 827 (1987); *Pennell v. City of San Jose*, 485 U.S. 1 (1988); *Yee v. City of Escondido*, 503 U.S. 519 (1992); *Ehrlich v. Culver City*, 512 U.S. 1231 (1994); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Tahoe-Sierra Preservation Council v. Tahoe Reg. Plan. Agency*, 535 U.S. 302 (2002); *San Remo Hotel v. City & County of San Francisco*, 545 U.S. 323 (2005).

[16] *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979); *Hodel v. Virginia Surface Min. & Recl. Assn.*, 452 U.S. 264 (1981); *Williamson County Reg. Plan. Commn. v. Hamilton Bank*, 473 U.S. 172 (1985); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985); *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470

alarmingly amiss. One state—no matter how large and populous—should not account for as many cases in the Supreme Court as the other 49 states plus the 13 federal circuits.

III

THE CALIFORNIA SUPREME COURT HAS FORECLOSED ANY "REASONABLE, CERTAIN, AND ADEQUATE" MEANS OF OBTAINING COMPENSATION FOR MOBILE HOME PARK OWNERS

In two decisions, the California Supreme Court made clear its determination that mobile home park owners could not obtain just compensation from municipal regulators regardless of the overreaching or invalid nature of their rent regulations.

The first case was *Kavanau*, 16 Cal.4th 761. There, the California majority held that, where a municipality had wrongly denied rent increases for years, a landlord could not maintain an action for a 5th Amendment taking. Rather, the landlord's sole remedy was to return to the rent control board and seek increased

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(1987); *Preseault v. I.C.C.*, 494 U.S. 1 (1990); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Suitum v. Tahoe Reg. Plan. Agency*, 520 U.S. 725 (1997); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Lingle v. Chevron U.S.A., Inc.* 544 U.S. 528 (2005); *Kelo v. City of New London*, 545 U.S. 469 (2005).

rents for the future to attempt to offset the losses in the past.

The second case was *Galland*, 24 Cal.4th 1003. There, after trying several times to process rent increases, the mobile home park owner sought relief under Section 1983. While the lower courts agreed and awarded damages, the California Supreme Court reversed, sending the owners back to the very rent control board that had been held to have violated their constitutional rights, so they could plead for a rental adjustment to account for the damage that regulatory body had already done, and which it now knew it would never have to pay.

Justice [now D.C. Circuit Judge] Janice Rogers Brown's dissent put succinctly the chasm that has developed between California takings law and federal law:

> "We now intervene to eviscerate a federal civil rights remedy whose very purpose is to provide an alternative to abusive or corrupt state adjudicative procedures like those the Gallands had to endure...." (*Galland*, 24 Cal.4th at 1046 [Brown, J., dissenting].)

A

The So-Called "*Kavanau*" Adjustment Was Never Intended To Supply "Just Compensation" For A "Taking"

The *Kavanau* adjustment is named after an unfortunate Santa

Monica landlord who, after having been wrongly denied rent increases by the Santa Monica Rent Control Board, *and having a California Court of Appeal confirm that his constitutional rights had been violated*, was told—after litigating a second case to obtain redress all the way through the California Supreme Court—that his only hope of recovering the money that the city wrongly kept from him in the *past* was to return to the same rent control board and ask for a *future* rent increase. If successful, he might some day be able to recoup his wrongly deprived money from his future tenants.

By any ordinary reading of the word, Santa Monica "took" Mr. Kavanau's money. What the California Supreme Court did was to provide not "just compensation," but a substitute, in the form of additional administrative process. In the opinion's words, such an "adjustment" of future rents would "obviate[] a finding of a taking." (*Kavanau*, 16 Cal.4th at 782.) Thus, ten years after *First English* told the California courts that they had decided regulatory taking cases "inconsistently with the requirements of the Fifth Amendment" (*First English*, 482 U.S. at 311) and striking down the California idea that injunctive or declaratory relief could somehow provide an acceptable 5th Amendment substitute, the California Supreme Court reinstated its

old rule. At least for mobile home park owners. For them, there could be no compliance with the settled federal rule that "the Just Compensation Clause of the Fifth Amendment *requires that the government pay* the landowner for the value of the use..." taken by regulatory action. (*Id.* at 319.)

Payment by the government is a "vital component" of the constitutional remedy. (*Owen v. City of Independence*, 445 U.S. 622, 651 [1980].) *First*, if there is no fiscal liability, the rent regulators have *no incentive to provide relief*. Indeed, the politics will always work the other way, as there will always be more tenant voters than landlords. As *Owen* recognized, the prod of a compensation remedy is a necessary attention-getter. *Second*, even if the rent regulators agree that the existing rent is not adequate, all they can do is *authorize* the park owner to *attempt* to make itself whole by increasing rent in the future to future tenants who may not be willing to pay the increased rents to make up for past losses with which they had nothing to do and for which they received no benefit.

The California Supreme Court confirmed its adherence to *Kavanau* five years later in *Galland*. There, the park owner had

sought a substantive due process remedy, rather than claiming a taking, and had prevailed in the lower courts. The California Supreme Court reversed, requiring yet another round of appearances before the same rent control regulators that had caused the problem in the first place.

The system was not designed to provide compensation. And it does not.

While it is understandable that this Court decided to give the California courts the benefit of the doubt, it is time to take stock. There are two things that bear emphasis. *First*, after *First English*, this Court decided to trust the California state courts to comply with the holding of that case and begin providing compensation for regulatory takings. (E.g., *Schnuck*, 935 F.2d at 173-174 [two-month old decision in *First English* held to support dismissal].) *Second*, after *Kavanau*, this Court again decided to trust the California state courts to comply with the holding and begin providing adequate "adjustments" for landlords.

Wrong. Both times. California is the largest, most populous, most litigious state in the Nation. In the twenty three years since *First*

English, only one successful regulatory taking case graces the pages of the California reports. (*Monks v. Palos Verdes*, 167 Cal.App.4th 263 [2008].) In the same vein, in the thirteen years since *Kavanau*, there has been only one case of a successful landlord. (See *MHC Financing, Ltd. v. City of San Rafael*, 2008 WL 440282 at "Claimed Defenses" ¶ 21 [N.D. Cal. 2008].)[17]

If California were serious, there would be more. Indeed, rent control litigation seems to be a sport largely restricted to California, as any elementary LEXIS or Westlaw search will show. Scores of cases pop up from California, with virtually none anywhere else. Other states have rent control, of course, and sometimes there is litigation. (E.g., *Seawall Associates v. City of New York*, 542 N.E.2d 1059 [N.Y. 1989]; *Manocherian v. Lenox Hill Hosp.*, 643 N.E.2d 479 [N.Y. 1994].) But not like California. As the Supreme Court noted repeatedly in 1987, California was out of step with the rest of the

[17] In *Equity Lifestyle Properties v. County of San Luis Obispo*, 548 F.3d 1184, 1192 (9th Cir. 2008), the court noted that there may, in fact, have been two successful *Kavanau* adjustments. A review of the document cited for the second matter, however, shows that the increase was the result of a negotiated litigation settlement, not an administrative adjustment. In any event, even if there were two such instances in the eleven years between *Kavanau* and *Equity*, it would amount to less than a drop in the proverbial bucket.

country. It is again. It is time for this Court to recognize that.

B

Kavanau Sets Up A Process So Byzantine That It Appears Designed To Prevent A Mobile Home Park Owner From Ever Reaching A Conclusion That Provides Just Compensation By Having The Government Pay Anything

Experts on local planning and regulation once suggested that regulations may become "so Byzantine as to deny due process of law to the participants through the sheer complexity of the system...." (Hagman & Misczynski, Windfalls For Wipeouts 12 [Am. Soc'y of Planning Officials 1978][quoting Fred Bosselman, a noted pro-regulation practitioner and law professor and then the dean of the national land use bar].) They might have had California's *Kavanau* procedure presciently in mind when they wrote that, as it seems a perfect illustration.

The *Kavanau* "remedy" requires property owners to jump through the following six (and likely more) state hoops. (1) Seek approval of a rent increase from the rent control board. If dissatisfied, (2) appeal that to the city council.[18] If still dissatisfied, (3) seek a writ

[18] If the city council remands to the rent control board that, of course, would revert the process back to step one to begin again, adding more administrative steps.

of administrative mandate from the superior court to review the city council's decision.[19] If such review determined that the denial of a rent increase was confiscatory, then (4) return to the rent control board to seek a "*Kavanau* adjustment," i.e., an increase in future rents that might make up for the past rental increase that the municipality had wrongfully refused. If still turned down, then (5) appeal again to the city council.[20] If still dissatisfied, then (6) seek a writ of administrative mandate from the superior court to determine whether the result (even with a *Kavanau* adjustment) is still confiscatory.[21] Only after conclusion of this exhausting administrative and judicial "remedial" gauntlet, would the property owners be permitted for the first time to (7) pursue, in a *third* lawsuit, a damages remedy under 42 U.S.C. §1983 **if—but only if**—the process had already destroyed the business. *Galland* makes that clear:

> "It is conceivable there might be a case when it is clear that resort to a *Kavanau* adjustment will not prevent a constitutional injury from occurring. For example, *there*

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[19] This could, of course, lead to two additional litigational steps in the court of appeal and the state supreme court—a process that consumes years.

[20] See footnote 18.

[21] See footnote 19.

> *may be an instance when*, despite a landlord's reasonable efforts, *confiscatory rent regulations* sustained over a long period of time *have caused the enterprise to fail.* ***Under such circumstances, a section 1983 remedy may well be available.***" (24 Cal.4th at 1030-1031; emphasis added.)

Thus, the California "remedy"—for anyone who has not been put out of business by the rent control process—is an endless series of attempted *Kavanau* adjustments. (See *Stardust Mobile Estates, LLC v. City of San Buenaventura*, 147 Cal.App.4th 1170, 1186-1187 [2007][no takings claims allowed under rent control because *Kavanau* provides an alternative].)

But it does not end there. In *Hillsboro Properties v. City of Rohnert Park*, 138 Cal.App.4th 379 (2006), the owner succeeded in having a rent control ordinance held unconstitutional because it did not provide a fair return on capital improvements. When the owner sought to present an application for a *Kavanau* adjustment, the city attorney refused to present the application to the board on the ground that the city had no procedure for such a thing. When the owner then sued for damages, he lost. So much for California's "*Kavanau* remedy."

In fact, it can be even worse than that, as this Court's recent docket shows, when the *Kavanau* process is combined with the *Williamson County* ripeness criteria. In *Los Altos El Granada Investors v. City of Capitola*, 583 F.3d 674 (9th Cir. 2009) this Court dealt with another mobile home park owner who could be said to have gone through his own "12-step program" attempting to find some body that would listen. (1) First, there was an administrative request for an increase, after which the city granted an increase of $5.84 rather than the $500 requested. (2) Suit in federal court, which was dismissed for lack of ripeness. (3) Suit in state court, reserving the federal issues for federal court. The state court dismissed challenges as either time barred or res judicata (because of step # 2) and struck the reservation of federal issues. Petition for writ of mandate still pending. (4) New suit in federal court claiming case now ripe. (5) District court dismisses case. (6) State court writ of mandate denied. (7) Another suit in federal court. This time the district court abstains. (8) California Court of Appeal reverses in part and remands the ripe takings claim, but affirms striking the reservation of federal issues. (9) Amended complaint filed in state court. (10) State court demurrer sustained under *Kavanau*. (11) District court dismisses

under res judicata. (12) This Court reverses and remands. Total time elapsed: ten years and counting. Some "remedy."

C

The *Kavanau* Process Undermines The Supreme Court's Long-Settled Rules For Applying 42 U.S.C. § 1983

California's rule is based on this flawed premise: state procedure provides *an avenue* for relief; therefore, Section 1983 is not available *ab initio*. (*Galland*, 24 Cal.4th 1008.) That premise is belied by the U.S. Supreme Court's consistent interpretation and application of Section 1983:

> "...'the dominant characteristic of civil rights actions [is that] *they belong in court*.' [Citation.] 'These causes of action,' we have explained, 'exist independent of any other legal or administrative relief that may be available as a matter of federal or state law. They are judicially enforceable *in the first instance*.' [Citation.]" (*Felder*, 487 U.S. at 148; italics by the Court; underscoring added.)

The purpose of Section 1983 is to provide relief under *federal* law, and access to that law may not be conditioned on exhaustion of state law remedies.

A Section 1983 case is a "species of tort liability,"[22] a statutorily created "constitutional tort"[23] that sweeps within its ambit all governmental actions that impair Bill of Rights protections. Section 1983 was intended to provide "a uniquely federal remedy"[24] with "broad and sweeping protection"[25] "read against the background of tort liability that makes a man responsible for the natural consequences of his actions"[26] so that individuals in a wide variety of factual situations are able to obtain a *federal* remedy when their *federally* protected rights are abridged.[27] While read against the general common law tort background, "[t]he coverage of the statute [§1983] is...broader " than tort law,[28] and must be broadly and

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22 *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 709 (1999); *Heck v. Humphrey*, 512 U.S. 477, 483 (1994).

23 *Jefferson v. City of Tarrant*, 522 U.S. 75, 78-79 (1997); *Monell v. Department of Social Services*, 436 U.S. 658, 691 (1978).

24 *Mitchum v. Foster*, 407 U.S. 225, 239 (1972).

25 *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 543 (1972) [quoting with approval].

26 *Monroe v. Pape*, 365 U.S. 167, 187 (1961), overruled in part, to expand government liability, in *Monell*, 436 U.S. 658.

27 *Burnett v. Grattan*, 468 U.S. 42, 50, 55 (1984).

28 *Kalina v. Fletcher*, 522 U.S. 118, 124-125 (1997).

liberally construed to achieve its goals.[29] "[T]he central purpose of the Reconstruction-Era laws is to provide compensatory relief to those deprived of their federal rights by state actors."[30]

Unless Congress has expressly forbidden the use of Section 1983, the courts enforce it. (E.g., *Golden State Transit*, 493 U.S. at 105-197.) No such prohibition is applicable in rent control cases, and therefore Section 1983 should be available to mobile home park operators on the same terms as to all other constitutionally aggrieved plaintiffs. The California Supreme Court, however, has made it unenforceable in state court after *Galland*.

California has, in fact, concocted a remedy that is worse than the disease. It sends the City's victims right back to the same regulators who caused the problem. (The California Supreme Court did so in *Galland* even though it characterized the city rent control officials' actions as " bureaucratic bungling" [24 Cal.4th at 1036].)

That California intended to place state law conditions on the

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[29] *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 105 (1989); *Lake Country Estates v. Tahoe Reg. Plan. Agency*, 440 U.S. 391, 399-400 (1979).

[30] *Felder*, 487 U.S. at 141.

use of Section 1983 is beyond question:

> "Accordingly, when landlords seek section 1983 damages from allegedly confiscatory rent regulation, we hold that they must show (1) that a confiscatory rent ceiling or other rent regulation was imposed and (2) that relief via a writ of mandate and a *Kavanau* adjustment is inadequate." (*Galland*, 24 Cal.4th at 1025; emphasis added.)[31]

Thus, California has *expressly* subordinated the availability of Section 1983 relief to exhaustion of a complex state remedial procedure. In short, California has *de facto* barred access to federal law that, ironically, was enacted to allow constitutionally aggrieved citizens to bypass obstructionist state procedures and secure expeditious vindication of their *federal* constitutional rights. (E.g., *Felder*, 487 U.S. at 138, 153; *Patsy v. Florida Bd. of Regents*, 457 U.S. 496, 503-505 [1982].)

The U.S Supreme Court's jurisprudence is strongly contrary:

> "The question before us today, therefore, is essentially one of pre-emption: is the application of the State's notice-of-claim provision to § 1983 actions brought in state courts consistent with the goals of the federal civil rights laws, or does the enforcement of such a requirement instead '"stan[d] as an obstacle to the

[31] Please note that, aside from its plain violation of Section 1983, this is a throwback to the unsound California law that the Supreme Court struck down in *First English*.

> accomplishment and execution of the full purposes and objectives of Congress"'? [Citation.] Under the Supremacy Clause of the Federal Constitution, '*[t]he relative importance to the State of its own law is not material* when there is a conflict with a valid federal law,' 'for *any state law, however clearly within a State's acknowledged power* which interferes with or is contrary to federal law, *must yield*.' [Citation.]" (*Felder*, 487 U.S. at 138; emphasis added.)

The purpose of California's *Kavanau* procedure is the same as that struck down in *Felder*: to place state administrative hurdles in the path of Section 1983 plaintiffs, with the intent of allowing municipalities to continue the process in ways designed to diminish any risk to the municipal fisc. The purpose of Section 1983, however, is wholly at odds with such an approach:

> "[T]he *central purpose* of the Reconstruction-Era laws is to *provide compensatory relief* to those deprived of their federal rights by state actors." (*Felder*, 487 U.S. at 141; emphasis added.)

Section 1983 was intended by Congress to expose municipalities and local officials to "a new form of liability." (*City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 259 [1981].) "[H]owever understandable or laudable the State's interest in controlling liability expenses might otherwise be, it is patently incompatible with the compensatory goals of the federal

legislation...." (*Felder*, 487 U.S. at 143.)[32]

Federal jurisprudence long ago settled the overriding nature of Section 1983:

> "While it may be completely appropriate for California to condition rights which grow out of local law..., California may not impair federally created rights or impose conditions upon them." (*Willis v. Reddin*, 418 F.2d 702, 704 [9th Cir. 1969].)
>
> "Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and seasonably made, is not to be defeated under the name of local practice." (*Davis v. Wechsler*, 263 U.S. 22, 24 [1923] [Holmes, J.].)

Section 1983 was designed to provide a prompt, *independent* federal remedy with real compensatory redress. That is not available to California mobile home park owners.

CONCLUSION

The panel decision is correct. On further examination, this *en banc* court should emulate it.

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[32] Careful examination of government actions "is of particular importance...where the Government has a direct pecuniary interest in the outcome of the proceeding." *(United States v. Good Real Property*, 510 U.S. 43, 55-56 [1993].)

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of the Federal Rule of Appellate Procedure 32(a)(7)(B) and contains **6,966** words, exclusive of the corporate disclosure statement, the table of contents, the table of authorities, as counted by the 2003 Microsoft Word word-processing program used to generate this brief.

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Dated: April 16, 2010

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U.S. Court of Appeals Docket Number(s): 06-56306

**AMICUS CURIAE BRIEF
OF CENTER FOR CONSTITUTIONAL JURISPRUDENCE
IN SUPPORT OF PETITIONERS/APPELLANTS**

I hereby certify that on April 16, 2010 I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

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