

## For Wilmer, a High Court 'No' Means a Client 'Yes'

By Jenna Greene

March 2, 2016

Most of the time, getting the Supreme Court to deny cert isn't much of an accomplishment. After all, the justices say no about 99 percent of the time.

But sometimes, it is a big deal. Take this case against the city of San Jose, California, represented by a team from Wilmer Cutler Pickering Hale and Dorr led by partner Daniel Volchok.

San Jose was under fire for its "inclusionary housing" ordinance that required larger developers to sell 15 percent of new homes at below-market prices to buyers with qualifying income levels, or else pay into a city housing fund.

(And why such an ordinance? Check out what \$1 million buys you in San Jose: this tiny 3-bedroom, 2-bath house built in 1960, but hey, it has new carpet.)

The nonprofit Pacific Legal Foundation, which advocates for limited government, asked the high court to hear a constitutional challenge to the law. Working pro bono on behalf of the California Building Industry Association, the foundation argued that the ordinance violates the Fifth Amendment's "ban on uncompensated takings of private property, because it singles out homebuilders to turn over a property interest to underwrite a government program."

The foundation is a formidable adversary. In 2013, PLF lawyers scored a 5-4 win before the high court in a case that raised a similar takings issue, *Koontz v. St. Johns River Water Management District*.

In the San Jose suit, seven groups filed amicus briefs backing PLF and urging the Supreme Court to grant cert. Among them: the National Association of Home Builders, the Cato Institute, Reason Foundation and the National Federation of Independent Business Small Business Legal Center.

Justice Clarence Thomas made it clear he was tempted to hear the case, which he wrote "implicates an important and unsettled issue under the Takings Clause" in a Feb. 29 opinion.

But Thomas ultimately concurred with the denial of cert—and did so by mirroring Volchok's arguments.

"There is a question about whether the petition, which was filed 91 days after the decision below issued, was jurisdictionally out of time," Volchok wrote in his opposition brief.

Thomas agreed. "The city raises threshold questions about the timeliness of the petition for certiorari that might preclude us from reaching the Takings Clause question."

Further, Volchok wrote, "petitioner did not raise the legislative/administrative issue in the state courts, and those courts (unsurprisingly) made no holding regarding it."

Thomas wrote, "Nor did the California Supreme Court's decision rest on the distinction (if any) between takings effectuated through administrative versus legislative action."

Cert denied.

"I was pleased with the court's denial of the petition," Volchok said. "We had a fantastic team working on the case here at [Wilmer] as

well as great co-counsel at both Berliner Cohen and the [San Jose] City Attorney's Office, and this was certainly the right result."

Other Wilmer lawyers who worked on the case include partner Seth Waxman, counsel David Lehn and associates Albinas Prizgintas, Sina Kian and Beth Neitzel.

Volchok, who joined the firm in 2005 after clerking for Justice David Souter, has been on a roll lately.

He was part of the Wilmer team representing Liberty Media Corp, which reached a \$775 million settlement late last week in a decade-long securities fraud lawsuit it had filed against Vivendi Universal. The case was set to be heard by the U.S. Court of Appeals for the Second Circuit on March 3.

He also scored two appellate victories the week of Jan. 25. One was a rare summary reversal by the Supreme Court for Amgen Inc. in a case involving the proper scope of liability for fiduciaries under the Employee Retirement Income Security Act. Volchok also beat back a False Claims Act suit against Purdue Pharma in the Fourth Circuit.

Contact Jenna Greene at [jgreene@alm.com](mailto:jgreene@alm.com) or on Twitter @jgreenejenna.



Daniel Volchok

WILMERHALE® 