In The Supreme Court of the United States
October Term, 2000

BENJAMIN J. CAYETANO and EARL I. ANZAI,
Petitioners,

v. CHEVRON USA, INC.,
Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

J. Peter Byrne*
Special Deputy Attorney General
State of Hawaii
**Counsel of Record*

Earl I. Anzai
Attorney General

Madeleine Austin
Deputy Attorney General
Office of the Attorney General
425 Queen Street
Honolulu, HI 96813

Counsel for Petitioners
John D. Echeverria
Georgetown University Law Center
600 New Jersey Avenue, N.W.
Washington, D.C. 20003

QUESTIONS PRESENTED

1.Does the Takings Clause authorize a court to invalidate state rent control or land use regulatory legislation on its face, without regard to whether it diminishes economic value or use or causes any physical invasion of the plaintiff's property, when the court concludes that the statute does not substantially advance a legislative purpose?

2.Does the facial constitutional validity of state legislation depend on whether a federal court predicts that it will achieve its objective?

PARTIES TO THE PROCEEDINGS The parties to the proceedings below were petitioners Benjamin J. Cayetano, the Governor of Hawaii, and Earl I. Anzai, the Attorney General of Hawaii, and respondent Chevron USA, Inc. Earl I. Anzai was substituted below for his predecessor as Attorney General, Margery S. Bronster, pursuant to Fed. R. App. P. 43(c)(2).

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v.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 224 F.3d 1030, and is reprinted in the appendix hereto, App. 1, *below*. The opinion of the District Court granting respondent's motion for summary judgment is reported at 57 F. Supp. 2d 1003 (D. Haw. 1998) and is reprinted at App. 43.

JURISDICTION

The Ninth Circuit entered its judgment and opinion on September 13, 2000. Petitioner filed timely petitions for reconsideration and for reconsideration *en banc* on September 27, 2000. The Ninth Circuit denied these petitions on October 26, 2000 and entered an amended order on October 31, 2000. App. 69-72.

The jurisdiction of this Court to review the decision of the Ninth Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

The Fifth Amendment to the Constitution provides in relevant part: "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." The Fourteenth Amendment provides, in section 1: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The relevant portion of Act 257, Haw. Rev. Stat. § 486H-10.4 (1997), is reprinted at App. 73.

STATEMENT OF THE CASE

Hawaii enacted Act 257 in 1997 to try to temper the State's relatively high retail price of gasoline. Haw. Rev. Stat. § 486H-10.4. The Act limits the amount of rent that oil distributors may charge gasoline retailers who lease company-owned filling stations to 15% of gross profit from gasoline sales and of gross revenue from sale of other products. Chevron owns 64 stations in Hawaii, which it leases to operators who sell Chevron gasoline at retail.

Chevron filed suit in the United States District Court for the District of Hawaii against the Governor and Attorney General of Hawaii, claiming that Act 257 facially effects an unconstitutional regulatory taking and seeking declaratory relief. Chevron moved for summary judgment, advancing several arguments. The District Court granted Chevron's motion, holding that the act constituted a regulatory taking because it failed to substantially advance a legitimate government interest.

The District Court found that the station rent control law was intended to be and was logically related to the legitimate purpose of reducing retail gasoline prices. App. 55-56. But the Court understood itself to be bound by the precedents of the Ninth Circuit and of this Court to apply a higher standard of scrutiny, captured in the phrase "substantially advance" a legitimate government interest. The Court reasoned that since the Act did not regulate the sale of a station lease by an operator, the lessee could capture a "premium" in the sale price, reflecting the difference between the regulated and market rents, and thus could defeat the goal of holding down gasoline prices. The Court also concluded, somewhat inconsistently, that there would be no savings (and no premium), because Chevron could recover lost rent by raising the price it charged the operator for gasoline. The District Court expressly rejected the State's argument that the proper standard of review was whether the legislature reasonably could have believed that the statute would hold down retail gasoline prices. App. 52-54.

On appeal, the Ninth Circuit held that the District Court had applied the correct standard but vacated the grant of summary judgment and remanded for trial. The Court of Appeals, too, rejected the State's argument that the validity of a land use ordinance should be evaluated under the traditional standard of the due process clause, "whether 'the Legislature rationally could have believed the Act would substantially advance a legitimate government purpose.'" App. 6. The Court felt itself bound by circuit precedent, *Richardson v. City and County of Honolulu*, 124 F.3d 1150 (9th Cir. 1997), *cert. denied*, 525 U.S. 871 (1998). The Court interpreted "substantially advance" to "depend[] on whether it will in fact lead to lower fuel prices." App. 24-25. Finding that the affidavits relied on by the trial court did not clearly resolve this question, the Court of Appeals remanded for a trial. It recognized that the inquiry would deal with "questions of predictive fact, rather than historical fact." App. 18. The Court expressly found that the legislation does not deprive Chevron's property of economic viability, noting that the legislation allows it to charge "more than it would otherwise have charged under its own rental program." App. 25.

Judge William Fletcher concurred in the result but disagreed with the majority's analysis. App. 28. Within the constraints of circuit precedent, he argued that the court should have applied the more lenient due process standard of reasonableness previously applied to rent and price control legislation. App. 28, 37. He concluded:

> I fear that under the majority opinion virtually all rent control laws in the Ninth Circuit are now subject to the "substantially advances a legitimate state interest" test, and that this test may invalidate many of these laws. . . . The question before the judiciary is not the advisability of rent control laws but rather their constitutionality. Ever since its retreat from economic substantive due process at the end of the 1930s, the Supreme Court has essentially left it to the other branches of government to decide . . . whether to adopt rent and price controls." App. 40-41.

REASONS FOR GRANTING THE WRIT

I.The Ninth Circuit's Rule That the Validity of Property Regulation be Analyzed Under the Takings Clause Raises an Important Issue Which This Court has Recognized as Unsettled and Conflicts with Decisions by State Supreme Courts and by the Court of Federal Claims.

Claims that legislation takes property from an owner, by authorizing a permanent physical invasion or by destroying its economic viability, properly invoke the Takings Clause. By contrast, claims that state legislation falls outside the police power, because it fails to rationally relate to a legitimate state purpose, long have been considered under the Due Process Clause. Since 1996, however, the Ninth Circuit has insisted that challenges to the rationality and validity of land use regulation not only may but must be analyzed under the Takings Clause, rather than under the Due Process Clause.[1] Moreover, the Ninth Circuit has made it clear that it will apply a higher standard of scrutiny when it reviews state legislation under the Takings Clause than it would under the Due Process Clause, although it has never presented any principled justification for this much greater intrusion into State democratic decision making. Such error and confusion concerning core constitutional provisions require prompt cure by this Court.

In this case, the court below held that Hawaii's Act 257 must be found to violate the Takings Clause if the trial court finds that it will not "substantially advance" the state's legitimate purpose of reducing the retail price of gasoline. The Ninth Circuit's decision clearly commits that court to use of the Takings Clause for second guessing the wisdom of virtually all state and local legislation regulating land, bringing doctrinal confusion in this area to an appalling level and endangering the relationship between federal courts and state governments. This Court needs to

resolve this confusion and restore the appropriate and traditional deference that federal courts show state legislation addressing social and economic problems.

This Court has not authoritatively resolved whether challenges to the means - ends rationality of legislation may be resolved under the Takings Clause. Indeed, contradictory indications by the Court may have fostered the confusion that now reigns in the lower courts, making timely guidance from this Court particularly appropriate. Of course, this Court authored the long line of cases establishing that arbitrary legislation violates due process. *E.g., Village of Euclid v. Ambler Realty Co*., 272 U.S. 365, 395 (1926). The confusion stems from *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980), where the Court, while unanimously upholding a large lot zoning ordinance against a facial challenge, stated that a taking occurs where the law "does not substantially advance legitimate state interests." For that proposition, the *Agins* opinion, issued near the end of the 1979 Term, cites only a due process decision, *Nectow v. City of Cambridge*, 277 U.S. 183, 188 (1928). Although the Court has quoted *Agins* subsequently, it neither has explained its meaning nor ever struck down a regulation as a taking for failing this test. It is high time the Court clarify that the *Agins* formulation amounts only to inadvertent *dicta*.

The Court has given several indications that it is ready to do so. Indeed, in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), even though the Court struck down retroactive health care liability legislation, five justices stated that questions about the legitimacy of economic legislation should be addressed under the Due Process, rather than under the Takings Clause. *Id*. at 545-6 (Kennedy, J., concurring); *id.* at 554 (Breyer, J., dissenting). Justice Kennedy explicitly noted the "uneasy tension" between his view and the *Agins* test. *Id.* at 545. He concluded: "Given that the constitutionality of the Coal Act appears to turn on the legitimacy of the Congress' judgment rather than on the availability of compensation . . . the more appropriate constitutional analysis arises under general due process principles rather than under the Takings Clause." *Id.* Justice Breyer, for four dissenters, wrote, "As this language [of the Takings Clause] suggests, at the heart of the Clause lies a concern, not with preventing arbitrary or unfair government action, but with providing *compensation* for legitimate government action that takes 'private property' to serve the 'public' good." *Id.* at 554 (emphasis in original). Even if these congruent conclusions from five justices do not technically constitute a holding with which the Ninth Circuit is in conflict, it does indicate that a majority of the Court rejects the linchpin of the decision below.

The Court also raised but expressly did not settle the appropriateness of the "substantially advance" test for a takings challenge in *City of Monterey v. Del Monte Dunes of Monterey, Ltd.*, 526 U.S. 687, 704 (1999). In *Del Monte Dunes*, the Court affirmed liability based on an instruction permitting the jury to decide whether denial of a permit related to a legislative interest, without deciding whether the Takings Clause authorized such an instruction, because the defendant had explicitly agreed to the instruction. In this case, by contrast, defendants contested the standard for review in both the Court of Appeals and the District Court. App. 6, 52. In addition to the Court, the authors of the separate opinions went out of their ways to "express no view," *Del Monte Dunes* at 732 n. 2 (Scalia, J., concurring in part and concurring in the judgment), and "offer no opinion," *id*. at 753 n. 12 (Souter, J., concurring in part and dissenting in part), about whether the *Agins* test was correct. Plainly, the justices view this question as open and timely.

Del Monte Dunes also made clear the important analytical distinction between exaction cases and regulation cases. The Court has required that transfers of physical possession or ownership from a private owner to the government in exchange for approval of a development plan, referred to generally as exactions, both "substantially advance" and be "roughly proportional" to the goals of the relevant legislation. *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). But these cases address the discreet and sensitive question of when a permit condition can effect an actual physical occupation without resulting in a taking and have no logical bearing on when a regulation becomes so burdensome as to effect a taking. The Court confirmed in *City of Monterey v. Del Monte Dunes at Monterey, Ltd*., 526 U.S. 687, 702-03 (1999), that the rough proportionality test of *Dolan* had been fashioned for exactions

and had no role in assessing regulations of use. The same logic requires the conclusion that the substantially advance test of *Nollan* has no role in reviewing a regulation. Without the transfer of physical possession there is neither need nor justification for a higher level of scrutiny of the state's reason for its action. Thus, in another useful way, the Court recently has shed light on the error below.

In sum, all nine justices recently have authored or joined opinions admitting the need for clarification of this important issue. Thus, the Court has identified and framed the question here cleanly presented, making this an unusually compelling case for the grant of certiorari.

The Ninth Circuit's approach directly conflicts with decisions by the Rhode Island and Washington Supreme Courts squarely holding that challenges to the rationality of land use regulation must be brought under the Due Process, not the Takings Clause. *Brunelle v. Town of South Kingston*, 700 A.2d 1075, 1083-84 n.5 (R.I. 1997) ("[T]he arbitrariness or capriciousness of a particular state action is properly examined under the light of the Fourteenth Amendment due process clause and not the Fifth Amendment takings clause."); *Mission Springs Inc. v. City of Spokane,* 954 P.2d 250, 258 (Wash. 1998). No doubt more courts would be in conflict with the decision if they did not feel bound by the Court's pronouncement in *Agins*.

The Ninth Circuit rule also squarely conflicts with a long line of decisions by the United States Court of Federal Claims, which has jurisdiction over all takings claims for just compensation against the United States under the Tucker Act. That Court has consistently held that challenges as to whether legislation "substantially advances" a government interest cannot be entertained under the Takings Clause and fall outside that court's jurisdiction. *Bamber v. United States*, 45 Fed. Cl. 162, 165 (1999); *Florida Rock Industries, Inc. v. United States,* 45 Fed. Cl. 21, 42 (1999); *Loveladies Harbor v. United States,* 15 Cl. Ct. 381, 390 (1988), *aff'd*, 28 F.3d 1171 (Fed. Cir. 1994) ("[N]o court has ever found a taking has occurred solely because a state interest was not legitimately advanced . . ."). The Claims Court's refusal to hear challenges to the validity of federal legislation may reflect its sensitivity to limitations on the liability of the United States under the Tucker Act.

The confusion below extends beyond these direct conflicts as lower courts have struggled to make sense of the Court's inconclusive statements. In *Santa Monica Beach, Ltd. v. Superior Court,* 968 P.2d 993 (Cal. 1999), where the California Supreme Court upheld a rent control ordinance against a facial takings challenge, Justice Kennard explicitly requested this Court to resolve the confusion sown by *Agins*:

> [R]ecently, Justice Kennedy of the United States Supreme Court has questioned the appropriateness of using a means ends test as the measure of whether a taking has occurred. . . . Outside the *Nollan/Dolan* context, should a means-ends test be used to determine whether a taking has occurred, or instead should means-end testing remain within due process jurisprudence? Only the high court can resolve this question and, given the importance of this area of law, I respectfully suggest that it do so when the opportunity next arises.

Id. at 1012-13 (Kennard, J., concurring).[2] See also *John Corp v. City of Houston*, 214 F.3d 573, 579 n.9 (5th Cir. 2000) (avoiding "knotty issue" of whether claim that government action failed to advance a public purpose should be brought under Due Process or Takings Clause). Commentators have argued for years that it is anomalous to test the validity of legislation under the Takings Clause. John Echeverria, *Takings and Errors*, 51 Ala. L. Rev. 1047 (2000); Jerold Kayden, *Land Use, Regulations, Rationality, and Judicial Review: The RSVP in the* Nollan *Invitation,* 23 Urb. Law. 301 (1991).

The Ninth Circuit's insistence on testing the rationality of state legislation under the Takings Clause plunges litigants into a host of logical and practical problems. Certainly, the most harmful effect has been the heightened level of scrutiny applied to economic legislation just because land is the asset being regulated. The difference in standard between regulation of land and of other contractual or property assets seems particularly indefensible in this case, where Chevron both leases land and sells gasoline to the retailer. Hawaii's regulation of rent is subject to demanding review under the Takings Clause, but a regulation of wholesale gasoline prices would be considered under the more generous standard of the Due Process Clause. *See, e.g., Permian Basin Area Rate Cases*, 390 U.S. 747, 769-70 (1968). No reasoned justification for decreasing dramatically the scope of legislative discretion to regulate commercial real estate as opposed to other business assets has ever been offered. We address this issue at length below under the heading of the next argument.

The Due Process Clause serves as a substantive limit on governmental power; laws found in violation generally are held invalid. The Takings Clause, by contrast, "is designed not to limit governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking." *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 315 (1987) (emphasis in original). Legislation challenged as invalid may impose quite minor burdens on a property owner, as the Ninth Circuit found was the case here, App. 25, which in no way resemble the severe losses targeted by the Takings Clause. Arbitrary legislation does not raise the fundamental question of whether it forces "some people alone to bear public burdens which, in all fairness and justice should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Arbitrary legislation imposes burdens that no one should bear.

Entertaining challenges to the validity of legislation under the Takings Clause raises perplexing questions about remedy. The constitutionally required remedy for a regulatory taking is an award of just compensation. *First English , supra,* 482 U.S. 314-22. But it is difficult to understand what constitutes "just compensation" when the fault of the law is that it does not achieve its objectives, since this fault bears no economic relationship to the property owner's loss, if any.

Respondents here sued seeking declaratory relief. But this Court has repeatedly held that "[e]quitable relief is not available to enjoin an alleged taking of private property for public use, duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to the taking." *Ruckelshaus v. Monsanto Co.,* 467 U.S. 986, 1016 (1984); *see also Presault v. ICC,* 494 U.S. 1, 11-17 (1990). The plurality in *Eastern Enterprises, supra,* strove to fashion an exception to this rule when the payment of compensation by government would be nonsensical, as it would be here, 524 U.S. at 519-22, but the need to improvise such an exception and its uncertain scope suggest the continuing problems of jamming square pegs in round holes. Similarly, some courts have limited plaintiffs' "temporary takings" damages, after a statute has been held invalid under the Takings Clause, to damages based on "actual losses," the measure that would have been used if the case had been brought under the Due Process Clause, rather than "compensation for the period during which the taking was effective." *First English, supra,* 482 U.S. at 321. *See, e.g., Corrigan v. City of Scottsdale,* 720 P.2d 513, 518-19 (Ariz. 1986). Paying compensation often would confer windfalls on owners.[3] Moreover, because the public, by definition, does not benefit from arbitrary legislation, the fairness argument for compensation by taxpayers fails.[4]

The issue presented here is among the most important that the Court can resolve at this time. The Ninth Circuit's rule subjects virtually all state and local government regulation touching land in the western third of the United States to illogical and unjustifiably intense judicial second-guessing, fomenting extensive, expensive litigation under a fundamentally incoherent constitutional doctrine. This Court should take responsibility for clearing up this dangerous confusion, having recognized that *Agins* is problematic and is creating havoc in the lower courts. This Court can save all lower courts from troublesome confusion and wasted effort by now

making it clear that challenges to the means ends rationality of legislation should be brought under the Due Process and not the Takings Clause.

II.The Ninth Circuit Adopted a Standard of Review That Requires Courts to Evaluate the Wisdom of State Legislation Contrary to Fundamental Constitutional Principles and in Conflict with the Decisions of Other Federal Courts of Appeal and State Supreme Courts.

Whether challenges to the validity of state land use regulation are adjudicated under the Due Process Clause, as we urge, or under the Takings Clause, the standard of review is crucial to maintaining a proper balance between democratic governance and the rule of law. Since at least the 1930's, this Court generally has employed a rational relationship test for Due Process and Equal Protection Clause challenges to social and economic legislation. Under this test, the Court upholds legislation that a rational legislator could have believed would advance a permissible public purpose. *E.g., Williamson v. Lee Optical*, 348 U.S. 483, 487-88 (1955). The Court has exercised "strict scrutiny" in cases where legislation touches upon certain "fundamental interests," so that the legislation will be held invalid unless the state can show that it is necessary to advance a compelling state interest. *E.g., Moore v. City of East Cleveland*, 431 U.S. 494, 499-500 (1977) (occupancy statute struck down for burdening interests of members of extended family in living together). Some few cases may fall in an intermediate category, where the interests affected are unusually important but not fundamental and where a tighter fit between means and ends must be demonstrated than in rational basis cases. *See e.g., City of Cleburne v. Cleburne Living Center,* 473 U.S. 432 (1985). Although the Court has divided over how to determine which interests require a higher level of scrutiny, this basic structure has been remarkably consistent.

Land use regulation has long been considered social and economic regulation subject to rational basis scrutiny. *Village of Belle Terre v. Boraas*, 416 U.S. 1, 8 (1974); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926). And the validity of rent control laws, when not confiscatory, has been subject to invalidation only when "arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt." *Pennell v. City of San Jose,* 485 U.S. 1, 11 (1988). Experts dispute whether or under what conditions rent control laws are efficacious. But the wisdom of this long line of cases is that the usefulness of a rent control or other land use laws is a question that should be decided by the people through their elected representatives and not by judges.

In this case, the Ninth Circuit held that Act 257 must "substantially advance" the public interest, that legislation "substantially advances" an interest if it "bears a reasonable relationship" to that interest, and that "[w]hether Act 257's rent cap is reasonably related to its objective of lowering fuel prices certainly depends on whether it will in fact lead to lower fuel prices." op at 14. This standard affords the decision of the Hawaii legislature no deference at all. It instructs the trial judge to void the statute if, based upon testimony concerning "predictive facts," a telling oxymoron, he predicts that the Act will not work. This Court should not permit lower federal courts to exercise such supervisory power over the merits of state legislative decisions. Such a judicial role resembles far too closely that prevalent during the discredited *Lochner* era, when courts struck down maximum hour legislation because they did not think that it would protect the health of workers or minimum wage legislation because they did not think it would improve the economic position of workers. *Lochner v. New York*, 198 U.S. 45 (1905); *Adkins v. Children's Hospital*, 261 U.S. 525 (1923).

The court below should have instructed the trial court to uphold Act 257 only if there is no possibility that it can achieve a lawful objective. "[W]hether *in fact* the provision will accomplish its objectives is not the question: the [constitutional requirement] is satisfied if . . . the . . . [state] Legislature *rationally could have believed* that the [Act] would promote its objective." *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 242 (1984) *quoting Western & Southern Life Ins. Co.*

v. State Bd. of Equalization, 451 U.S. 648, 671-72 (1981) (emphasis in original)[5]. It is bedrock constitutional law, that "[e]ven if the wisdom of the policy be regarded as debatable and its effects uncertain, still the legislature is entitled to its judgment." *West Coast Hotel Co. v. Parish*, 300 U.S. 379 (1937). In this case, the district court held that providing a flexible maximum rent logically aimed at reducing gasoline prices (App. 55-6), but did not substantially advance that goal, making clear that the court used a raised standard. Both the District Court and Ninth Circuit explicitly rejected Hawaii's argument that the lower, traditional level of scrutiny should be used. App. 6-7, 52-54. But this Court long ago stated the correct view:

> "Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance." *Chicago, B. & Q. R. Co. v. McGuire,* 219 U.S. 549, 569 (1911).

Federal court scrutiny of state social and economic legislation at this level of intrusiveness, not only violates long accepted understandings of the distinct roles of judges and elected representatives, it tramples on important virtues of federalism. The sovereign powers of the states can be impaired as surely by federal judges wielding expansive interpretations of vague constitutional provisions as by Congress passing the limits on its enumerated powers or commandeering state agencies, as in, for example, *United States v. Morrison,* 529 U.S. 598 (2000) and *New York v. United States*, 505 U.S. 144 (1992). The Court wisely has long heeded the admonition of Justice Brandeis that open-ended review under the Fourteenth Amendment poses a special threat when a state may "serve as a laboratory" trying "novel social and economic experiments," because broad , non-textual review makes it easy to "erect our prejudices into legal principles." *New State Ice Co. v. Liebman*, 285 U.S. 262, 280, 311 (1932) (Brandeis, J., dissenting). State experimentation simply is not possible if a federal judge has the authority to decide, on the basis of expert testimony about "predictive facts," whether a new state law "will in fact lead to lower fuel prices." App. 25. This approaches placing a state legislature into federal receivership.

The Ninth Circuit has not offered any reasoned justification for imposing a more demanding standard on land use or rent control regulation. The court below followed its own *Richardson* precedent, also striking down a rent control provision, which mechanically quoted the "substantially advance" language from *Agins* and drew an expansive command from this Court's decision in *Yee v. City of Escondido*, 503 U.S. 519 (1992). In *Yee*, the Court did suggest in dicta that rent control laws could be amenable to the "substantially advance" test restated in *Nollan v. California Coastal Commission,* 483 U.S. 825 (1987), but such authority hardly justifies the intrusive measurement of efficacy directed here. First, *Nollan* actually employed a quite deferential standard, requiring only a "logical nexus" between a regulation and goal, something found by the District Court to be present here. App. 55-56. Moreover, to the extent *Nollan* requires greater scrutiny, *Del Monte Dunes* has made it apparent that *Nollan* applies only to permanent physical occupations, not mere regulations, as explained above, at 9.

Yee also suggested that the ability of a tenant to capture the difference between regulated rent and market rent in conveying his leasehold to a new tenant "might have some bearing" on whether the ordinance was valid. 503 U.S. at 530. Hawaii does not dispute that lessees' capture of regulatory savings should be considered in assessing the rationality of the statute. But *Yee* nowhere even hints that the ability of a lessee to convey his interest *ipso facto* elevates the scrutiny to which the statute is subject or casts onto the state a duty to prove that the ordinance will work.

The Ninth Circuit explicitly ruled that all land use regulation must meet this test. Its decisions stand in stark conflict with many decisions in other circuits employing a highly deferential standard in Due Process challenges to state and local government land use regulations, including rent control ordinances. The Fourth Circuit, for example, has stated that challenges to land use laws "can survive only if the alleged purpose behind the state action has no conceivable rational relationship to the exercise of the state's traditional police power through zoning." *Sylvia Development Corp. v. Calvert County, Maryland*, 48 F.3d 810, 827 (4th Cir. 1995). The Seventh Circuit even requires a property owner to show that an adverse zoning decision not only is arbitrary and irrational, but also show the violation of another constitutional right or that state law does not provide an adequate remedy. *New Burnham Prairie Homes v. Village of Burnham*, 910 F.2d 1474, 1481 (7th Cir. 1990). It would be difficult to overstate the aversion of most lower federal courts to open-ended review of local land use decisions under standards such as endorsed by the Ninth Circuit here. *See, e.g., RRI Realty Corp. v. Incorporated Village of Southhampton,*870 F.2d 54 (2d Cir. 1989) (refusing to entertain substantive due process challenge to denial of permit unless plaintiff preliminarily can show an entitlement to it under state law).

The Ninth Circuit's ruling also conflicts directly with important recent decisions by the highest courts of California and New York interpreting the *Agins* "substantially advance" formula so as to preserve traditional legislative discretion. In *Santa Monica Beach, supra,* the California Supreme Court sustained the granting of a demurrer to a takings challenge to a city rent control law, where the plaintiff wished to try to show that the law failed to achieve its goals, the factual inquiry ordered by the Ninth Circuit in this case. The Court stated: "In sum, with rent control, as with most other such social and economic legislation, we leave to legislative bodies rather than to the courts to evaluate whether the legislation has fallen so far short of its goals as to warrant repeal or amendment." 968 P.2d at 1007. The conflict over respective willingness to second guess legislation between the Ninth Circuit and the California Supreme Court will draw floods of litigants into federal as opposed to state courts in our largest state. Similarly, the New York Court of Appeals , in "easily" sustaining a town's zoning amendments, held that the *Agins* means-ends test only requires that land use laws bear a "reasonable relationship" to legitimate objectives, an approach indistinguishable from traditional due process analysis. *Bonnie Briar Syndicate v. Mamaroneck*, 721 N.E. 2d 971 (N.Y. 1999).

Justice Kennedy recently lamented that "[t]he imprecision of our regulatory takings doctrine does open the door to normative considerations about the wisdom of government decisions." *Eastern Enterprises v. Apfel*, 524 U.S. 498, 539, 545 (Kennedy, J., concurring in part and dissenting in part). This is a case where the Ninth Circuit's interpretation requires federal courts to strike down legislation when it concludes that elected legislators have made an unwise estimate of the benefits of legislation. This Court urgently needs to restore the correct balance between federal judicial power and state political processes.

III.Review Should Be Granted Because This Case Presents an Important and Clear-Cut Issue That Has Present Consequences for States in the Ninth Circuit and Will Control Further Conduct of This Case.

The Court should grant review in this case, even though the Ninth Circuit remanded for a trial. The Ninth Circuit has clearly and finally established the legal standard to be applied, and it is cleanly presented for review in this case. Subsequent litigation will subject Hawaii to the need to defend the wisdom of its legislation and the prescience of its legislators. As in *United States v. General Motors,* 323 U.S. 373, 377 (1945), another takings case where the Court of Appeals had remanded for trial under a troubling legal standard, the decision below is "fundamental to the further conduct of the case." *See also Gillespie v. United States Steel Corp*., 379 U.S. 148, 153 (1964).

That the standard adopted below conflicts with numerous decision of this and other courts, as we show above, provides further reason for immediate review. *Forsyth v. City of Hammond*, 166 U.S. 506, 514-15 (1897); *accord, General Motors*, 323 U.S. at 374; *Michael v. United States*, 454 U.S. 950, 951 (1981) (White, J., dissenting).

Most importantly, the issue is important and has present consequences for Hawaii and other states. *Mazurek v. Armstrong*, 520 U.S. 968, 975-76 (1997). The Ninth Circuit rule subjects land use and rent control legislation over the western part of the United States to intrusive federal court oversight in violation of principles of both separation of powers and federalism. As a result, it invites a plethora of inappropriate and expensive litigation challenging the efficacy of many state and local laws. The lower courts struggle in present confusion about the governing principles. The Court would not serve well either the states or the lower courts to postpone decision on these issues until the conclusion of trial and further appeal in this case.

CONCLUSION

For the reasons stated, this petition for certiorari should be granted.

Respectfully submitted,

J. Peter Byrne*
Special Deputy Attorney General
State of Hawaii
**Counsel of Record*

Earl I. Anzai
Attorney General

Madeleine Austin
Deputy Attorney General
Office of the Attorney General
425 Queen Street
Honolulu, HI 96813

Counsel of Record (808) 586-1282

Counsel for Petitioners
John D. Echeverria
Georgetown University Law Center
600 New Jersey Avenue, N.W.
Washington, D.C. 20003

Footnotes:

[1] Armendariz v. Penman, 75 F.3d 1311 (9th Cir. 1996) (en banc). Indeed, the Ninth Circuit interpreted this Court's decision in Graham v. Connor, 490 U.S. 386 (1989), to mean that the "constitutional bar on 'private takings' preempts [more generalized] substantive due process claim[s]." Armendariz, 75 F.3d at 1322. Thus, challenges to the validity of land use ordinances may be brought only under the Takings Clause. Other circuits have rejected this view, e.g., John Corp. v. City of Houston, 214 F.3d 573, 583 (5th Cir. 2000), and it has been severely criticized. See Toni Massaro, Reviving Hugo Black? The Court's "Jot For Jot" Account of Substantive Due Process, 73 N.Y.U. L. Rev. 1086, 1100-03 (1998). This collateral issue would disappear if this Court held, as it should, that challenges to the reasonableness of legislation may not be brought

under the Takings Clause. [2] Justice Brown, who dissented, echoed the plea of Justice Kennard: "If such measures [i.e., rent control ordinances] are capable of withstanding a Nollan-inspired takings clause analysis, the high court ought to tell us so, probably sooner rather than later." Santa Monica Beach, Ltd., supra, 968 P.2d at 1047. [3] In Tampa-Hillsborough County Expressway Authority v. A.G.W.S. Corp., 640 So.2d 54 (Fla. 1994), the Florida Supreme Court initially had held that the state highway department's authority to mark the location of future roads on an official map constituted a taking because it did not advance a legitimate state interest. After trial courts began to permit affected property owners jury trials on compensation for temporary takings, with no preliminary showing of any economic injury, the Court changed the doctrinal basis for its invalidation to the Due Process Clause to limit indemnification to those who actually suffered damage. [4] The Ninth Circuit also has felt compelled to create an exception from the finality rules of Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985) for regulatory takings claims brought under the "substantially advance" rubric. Because such claims do not depend on how much economic value is left in the plaintiff's property or the extent to which it has been compensated, but on the effectiveness of the legislation, they are considered immediately ripe. Richardson v. City and County of Honolulu, 123 F.3d 1150, 1165 (9th Cir. 1997), cert. denied, 525 U.S. 871 (1998). This exception further demonstrates the illogic of addressing issues of validity under a constitutional provision concerned with compensation for what the government takes away for valid reasons. [5] The Ninth Circuit argues that Midkiff is irrelevant, because a lower standard of rationality is appropriate in a case involving expropriation and payment of compensation. Richardson v. City and County of Honolulu, 124 F.3d 1150, 1158 (9th Cir. 1997), cert. denied, 525 U.S. 871 (1998). This argument is weak. First, it ignores that the Midkiff Court expressly equated the scope of the legislature's discretion under the eminent domain power with that under the police power, 467 U.S. at 240. Second, the argument illogically advocates a higher level of scrutiny for the validity of legislation having a smaller interference with the owner's control of his property. Chief Justice Rehnquist has argued that Midkiff provides the right standard for assessing regulatory legislation. Keystone Bituminous Coal Assoc. v. DeBenedictis, 480 U.S. 470, 511 n.3 (1987) (dissenting opinion).