No. _____

In The
Supreme Court of the United States

LINDA LINGLE, GOVERNOR OF THE STATE OF HAWAII, and MARK J. BENNETT, ATTORNEY GENERAL OF THE STATE OF HAWAII,

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

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QUESTIONS PRESENTED

1. Whether the Just Compensation Clause authorizes a court to invalidate state economic legislation on its face and enjoin enforcement of the law on the basis that the legislation does not substantially advance a legitimate state interest, without regard to whether the challenged law diminishes the economic value or usefulness of any property.

2. Whether a court, in determining under the Just Compensation Clause whether state economic legislation substantially advances a legitimate state interest, should apply a deferential standard of review equivalent to that traditionally applied to economic legislation under the Due Process and Equal Protection Clauses, or may instead substitute its judgment for that of the legislature by determining *de novo*, by a preponderance of the evidence at trial, whether the legislation will be effective in achieving its goals.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below were petitioners Linda Lingle, the Governor of Hawaii, and Mark J. Bennett, the Attorney General of Hawaii, and respondent Chevron USA, Inc. Pursuant to Fed. R. App. P. 43(c)(2), Linda Lingle was substituted below for her predecessor as Governor, Benjamin J. Cayetano, and Mark J. Bennett was substituted below for his predecessors as Attorney General, Earl I. Anzai and Margery S. Bronster. (The opinion of the Ninth Circuit issued on April 1, 2004 erroneously listed former Attorney General Bronster as a defendant and misspelled Attorney General Bennett's name; the court amended its opinion on April 15, 2004 to correct the caption. The amended opinion is reprinted in the appendix hereto.)

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OPINIONS BELOW

The Ninth Circuit's opinion (App. 1) is reported at 363 F.3d 846. The District Court's opinion (App. 30) is reported at 198 F.Supp.2d 1182. The Ninth Circuit's earlier decision reversing summary judgment and remanding for trial (App. 54) is reported at 224 F.3d 1030. The District Court's initial decision (App. 94) is reported at 57 F.Supp.2d 1003.

JURISDICTION

The Ninth Circuit entered its judgment on April 1, 2004. On June 21, 2004, Justice O'Connor extended petitioners' time to file a petition for *certiorari* to July 30, 2004. The jurisdiction of this Court 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: "No state shall . . . 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 portions of Act 257, Haw. Rev. Stat. § 486H-10.4 (1997), are reprinted at App. 121.

STATEMENT OF THE CASE

1. The State of Hawaii is "physically small and geographically remote." Act 257, § 1(4). As a result, its economy is unusually subject to risk of oligopolistic concentration. This risk is particularly evident in the market for oil products in the state. Hawaii is served by only two refiners, and the wholesale market for gasoline on Oahu,

the state's most populous island, is divided among only six companies. The retail market for gasoline is protected from similar high concentration, however, by the presence of numerous gas station operators who lease stations from oil companies and set pump prices independently.

To maintain the benefit for consumers of a multiplicity of independent lessee-dealerships, the Hawaii legislature enacted Act 257. The Act prohibits oil companies from converting lessee-dealer stations to company-operated stations, and from locating new company-operated stations in proximity to existing lessee-dealer stations. In addition, to prevent oil companies from increasing rents to drive independent dealers out of business, § 3(c) of the Act limits the maximum rent that oil companies may charge dealers. Although Act 257 employs rent regulation to achieve its goals, it was not enacted primarily for the benefit of dealers paying rent (in contrast to, for example, an apartment rent control measure intended primarily for the benefit of rent-paying tenants). Rather, the Act is intended to stabilize the present structure of the retail market for gasoline, preserving the long-term benefit for consumers of multiple retail vendors and averting the economic harm that would occur if the retail market, like the wholesale market, were to become concentrated in the hands of the few oil companies serving the islands.[1]

2. Chevron USA, Inc., the largest refiner and marketer of gasoline in Hawaii, sued the Governor and Attorney General of Hawaii, claiming that the rent cap imposed by Act 257 on its face effects an unconstitutional taking of Chevron's property and violates due process and equal

[1] Although the purpose of the Act is plainly prophylactic, the Ninth Circuit misapprehended this point. The Ninth Circuit characterized the purpose of the law as "lowering retail gas prices," App. 18, erroneously implying that the Act was intended to *reduce* prices for gasoline from current levels rather than to ward against potential *increases* in such prices if lessee-dealers were driven from the marketplace.

protection. Chevron sought declaratory and injunctive relief, but did not request compensation. Chevron subsequently stipulated that, including its earnings from the sale of gasoline, "Chevron has earned in the past and anticipates that it will earn in the future, at the rent levels allowed by Act 257, a return that satisfies any Constitutional standards on its investment in lessee dealer stations in Hawaii." C.A. Excerpts of Rec. ("ER") 60.[2]

In 1998, the District Court granted Chevron summary judgment on its claim that § 3(c) of Act 257 effects a taking. The court rejected the State's argument that it should employ the deferential standard traditionally applied in the review of economic legislation under the Due Process Clause. Relying on language in *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980), the court held that the rent cap in Act 257 "does not substantially advance legitimate state interests," and enjoined the State from enforcing § 3(c) of the Act. App. 118. Chevron then voluntarily dismissed its due process and equal protection claims without prejudice.

3. On appeal, the Ninth Circuit held that the District Court had applied a correct standard of review under the Just Compensation Clause, but vacated the grant of summary judgment and remanded for trial. The court read a previous circuit decision, *Richardson v. City and County of Honolulu*, 124 F.3d 1150 (9th Cir. 1997), to foreclose the State's argument that a deferential, rational-basis standard of review should apply. Rather, the court stated that "a challenged regulatory action 'substantially advances' its interest if it bears a reasonable relationship to that interest," and concluded that "[w]hether Act 257's rent cap is reasonably related to its objective of lowering fuel prices

[2] Chevron also stipulated that the cap on permissible rent established by Act 257 was *higher* than the rent that it would otherwise have charged for 53 of the company's 64 lessee-dealer stations, and that Act 257 allows Chevron to recover more rent in aggregate from its lessee-dealer stations than it would otherwise charge. ER 56-57, 66-68.

certainly depends on whether it will in fact lead to lower fuel prices." App. 76. Finding that the affidavits before the trial court did not resolve that question, the Court of Appeals directed the District Court on remand to use trial procedures, including assessment of the credibility of the parties' expert witnesses through cross-examination, to determine as a matter of "predictive fact" whether the statute will achieve its goals. App. 69-72.

Judge William Fletcher concurred in the Ninth Circuit's disposition, but disagreed with the majority's analysis. App. 79-93. Judge Fletcher contended that this Court's precedents require that rent controls and other price controls be evaluated under a deferential standard of review, rather than the heightened "substantially advance" standard employed by the majority.

4. On remand, the District Court held a one-day evidentiary hearing at which the parties each presented a single expert economist to give his opinion on the effectiveness of Act 257's rent cap in protecting Hawaii's consumers. Chevron's expert argued that dealers will be able to capture a premium reflecting the economic benefit of the rent cap if they sublease their stations to new dealers, making the law ineffectual to the extent it aimed at lowering dealer costs. He also opined that oil companies will try to recoup at least part of any lost rent by increasing the wholesale gasoline prices charged to their dealers, undermining the goal of controlling gasoline prices. Finally, Chevron's expert argued that the rent cap will discourage oil companies from investing in new lessee-dealer stations, leading over time to fewer such stations. ER 105-110. Chevron's expert did not deny, however, that the law would prevent oil companies from using rent increases to displace lessee-dealers.

The State's expert testified that, by helping to maintain the existence of lessee-dealers as independent price-setters, Act 257 protected Hawaii's consumers from the economic harm that would result if the retail gasoline

market were controlled directly by the few oil companies serving the state. He testified that the legislation would achieve this goal whether or not existing dealers could capture a premium upon subleasing, because the rent cap would in any case preclude the oil companies from raising rents to the point of driving dealers out of business. He contested Chevron's contention that the oil companies would rationally attempt to raise wholesale prices, noting that such a strategy would lead to reduced sales volume and net revenues. He also disputed Chevron's suggestion that the rent cap would deter the oil companies from investing in new lessee-dealer stations, pointing out that the oil companies were not building such stations anyway, and opined that consumers would benefit as long as some number of lessee-dealers remained in the retail market. ER 135-142.

Finding the economic theories presented by Chevron's expert "more persuasive" than those of the State's expert, App. 43, the District Court concluded that Act 257 does not substantially advance a legitimate state interest and therefore effects a taking of Chevron's property. App. 53. The District Court acknowledged that the rent cap would prevent oil companies from raising rents to levels designed to drive lessee-dealers out of business, but it discounted this justification for the Act because it did not believe that oil companies would attempt such constructive eviction.[3] App. 48, 52.

[3] The District Court overlooked testimony that oil companies found company-operated stations more profitable than leased stations, as well as the testimony of Chevron's own expert that he had served as an expert for oil companies in many cases where dealers alleged that the oil companies had raised their rents in order to drive them out of business. ER 154-58, 163-65. Congress has repeatedly recognized the anticompetitive practices of the oil industry toward independent retailers. *See, e.g.,* S. REP. NO. 102-450, at 3-4, 6 (1992) (noting oil companies' use of "massive rent increase[s] . . . that would assure the economic eviction of the dealer"). Congress enacted the Petroleum

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5. On appeal once more to the Ninth Circuit, the State argued that Chevron's claim that Act 257 does not "substantially advance a legitimate state interest" properly lies under the Due Process Clause, rather than the Just Compensation Clause. The State also argued that the District Court should have deferred to the rational economic judgment of the legislature that the rent cap would benefit consumers. The Court of Appeals held that these arguments were barred by law of the case established in its previous decision. With respect to the State's argument that challenges to the rationality of legislation properly belong under the Due Process Clause, the Court of Appeals remarked that the "varying opinions" of the Supreme Court "suggest confusion over the relationship between due process and takings claims." App. 10. The Court of Appeals nonetheless concluded that this Court had not clearly repudiated the "substantially advance" takings formulation, and held that the panel's prior decision resolving this issue was not clearly erroneous. App. 11-13. The Court of Appeals also concluded that this Court's decisions require a heightened, "intermediate" standard of review for claims under the Just Compensation Clause that laws do not substantially advance legitimate state interests. App. 14-17. The Court of Appeals did not consider whether the statute would be sustained under a deferential standard.[4]

Marketing Practices Act, 15 U.S.C. §§ 2801-2806, to restrain oil companies from replacing lessee dealers with company-owned stations. The federal statute does not directly restrain rents charged by oil companies, however, as Act 257 does.

[4] The State also pointed out that the District Court found that Act 257 would prevent constructive eviction of the lessee-dealers in Hawaii. This finding, the State argued, establishes that the law in fact substantially advances the State's goals. The Ninth Circuit rejected that argument, stating that the State "does not challenge the district court's conclusion of law that Act 257 fails to advance Hawaii's goal of lowering retail gas prices," but "focuses instead on whether Act 257 advances

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Judge Fletcher dissented, repeating his view that the "substantially advance" takings test was incorrectly applied to the rent cap imposed by Act 257:

> We took a wrong turn in *Richardson*, we continued on the wrong path in *Chevron I,* and we are now in the wrong place. Under the panel's holding, virtually all rent control laws in the Ninth Circuit are now subject to the "substantially advances a legitimate state interest" test, and many of those laws may well be held unconstitutional under that test. Rent control is often inefficient and sometimes unfair. But we should not confuse inefficiency and unfairness with unconstitutionality.

App. 29 (internal quotes and citations omitted).

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's decision in this case raises two closely related issues of constitutional law that call out for

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another purported purpose," namely, maintaining the existence of an independent body of gas station operators "for their own sake." App. 18. These remarks by the Ninth Circuit misstate the State's position. First, although the State did not dispute whether the statute would directly reduce *current* gasoline prices, it squarely challenged the District Court's conclusion of law that the statute did not substantially advance the State's goals of protecting consumers. The State argued that by maintaining the viability of lessee-dealers, the Act will avert *future* harm, in the form of increased gasoline prices, that would result if independent retail gasoline vendors were eliminated. Second, the State never suggested that maintenance of the lessee-dealers was an end in itself; Hawaii's position has always been that Act 257 seeks to maintain the viability of independent lessee-dealers *as an essential means* to avoid the economic harm of oligopolistic concentration in the retail market for gasoline. This understanding of the Act is supported by its numerous provisions aimed at protecting lessee-dealers from economic pressure from the oil companies and by its legislative history, which confirms the legislature's intention to "provide certain protection for dealer operated retail service stations." Conference Comm. Rep. No. 38, reprinted at App. 124.

resolution by this Court. Both questions implicate fundamental concerns about the proper balance between the judiciary and institutions of democratic governance, and between the national government and the states within our federal system. The first question is whether challenges to a law's substantive validity – that is, the law's reasonableness or efficacy in accomplishing the government's objectives – properly lie under the Just Compensation Clause at all. If so, the second question is whether courts should employ a deferential "rational-basis" standard of review for such challenges, as they unquestionably would if the same inquiry were undertaken under other constitutional rubrics, such as the Due Process Clause. This Court has recently identified the first question as an open, important issue, and there are conflicts as to both issues in the federal appellate courts and the highest courts of several states.[5] The Court should grant review of both questions to make clear that the Just Compensation Clause cannot be employed to second-guess the reasonableness of legislative policy judgments, but rather exists to ensure – as the text of the Clause makes clear – that, when the government does take private property for public use, it must pay compensation.

[5] At least ten other petitions for *certiorari* have been filed in the past several years requesting that the Court resolve either or both of these issues. In *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999), the Court granted *certiorari* to resolve issues related to the application of the "substantially advance" test, but did not reach the validity of that test for procedural reasons. In *Yee v. City of Escondido*, 503 U.S. 519 (1992), the Court declined to consider the validity of a regulatory taking claim based on the "substantially advance" theory because the issue was not fairly included within the Court's grant of *certiorari*.

I. Whether The Just Compensation Clause Authorizes Judicial Scrutiny Of The Reasonableness Or Efficacy Of Legislation Is An Open Question In This Court, And Is An Issue Of Fundamental Importance On Which Lower Courts Are In Conflict

A. This Court Has Noted The Uncertainty As To Whether A Regulation May Be Deemed A "Taking" Solely Because It Does Not Substantially Advance A Governmental Interest

Every Justice of this Court has recently authored or joined in opinions acknowledging that it is at least an open question whether a law may be challenged as an unconstitutional "taking" on the ground that it does not substantially advance a governmental interest. Moreover, five Justices have endorsed the view that such a challenge does not lie under the Just Compensation Clause at all.

In *Agins*, this Court stated that a regulation may effect a taking "if the ordinance does not substantially advance legitimate state interests." 447 U.S. at 260. For that proposition, *Agins* cited and discussed only due process decisions, *Nectow v. City of Cambridge*, 277 U.S. 183, 188 (1928), and *Village of Euclid v. Ambler Realty Co*., 272 U.S. 365 (1926).[6] The Court in *Agins* did not articulate in detail the nature of the legal inquiry intended by that language, or the relevance of the rationality of government action to a claim brought under the Just Compensation Clause. Outside the special context of exactions of real property, the Court has never squarely relied upon the

[6] In *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 127 (1978), the Court similarly relied upon due process case law, including *Nectow* and *Euclid*, in suggesting in *dictum* that a regulation "may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial public purpose."

Agins means-ends test to invalidate a government regulation under that Clause.

In *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), five Justices directly challenged the validity of the *Agins* language as a test for the existence of an unconstitutional "taking." Justice Kennedy, concurring in the judgment, observed that the *Agins* formulation, calling for "normative consideration[ ] about the wisdom of government decisions," is in "uneasy tension with our basic understanding of the Takings Clause":

> As its language indicates, and as the Court has frequently noted, [the Takings Clause] does not prohibit the taking of private property, but instead places a condition on the exercise of that power. This basic understanding of the Amendment makes clear that it is designed not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of otherwise proper interference amounting to a taking.

Id. at 545 (quoting *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 314-15 (1987)) (internal quotation marks omitted). He concluded: "Given that the constitutionality of the [statute] appears to turn on the legitimacy of 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, writing for four dissenting Justices, agreed that inquiry into the legitimacy of government action is inappropriate under the Just Compensation Clause: "[A]t 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 (second emphasis added). Even if these congruent conclusions from five Justices do not technically constitute a holding rejecting the *Agins* formulation,

Eastern Enterprises clearly indicates that a majority of the Court doubts the validity of that test.

In *City of Monterey v. Del Monte Dunes at Monterey, Ltd.,* 526 U.S. 687 (1999), the Court reviewed an application of the "substantially advance" test, but declined to resolve the validity of this ostensible takings test since the city itself drafted the jury instructions incorporating that standard. However, the Court acknowledged that, outside the special context of exactions, it has never provided a "thorough explanation of the nature *or applicability* of the requirement that a regulation substantially advance legitimate public interests." *Id.* at 704 (emphasis added). In separate opinions, five Justices expressly reserved the question whether the "substantially advance" formulation represents a valid test under the Just Compensation Clause. *Id.* at 732 n.2 (Scalia, J., concurring) ("As the Court explains, petitioner forfeited any objection to this standard, . . . and I express no view as to its propriety."); *id.* at 753 n.12 (Souter, J., dissenting) ("I offer no opinion here on whether *Agins* was correct in assuming that this prong of liability was properly cognizable as flowing from the Just Compensation Clause of the Fifth Amendment, as distinct from the Due Process Clauses of the Fifth and Fourteenth Amendments.").

The Court's earlier decisions in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), did invoke the "substantially advance" formulation to address the special problems posed by permit conditions mandating public access to private property. The Court has made clear, however, that the rules developed in those cases, requiring that such exactions have an "essential nexus" with and be "roughly proportional" to the government's concerns, do not apply more broadly to denials of permits or other regulatory actions. *See Del Monte Dunes*, 526 U.S. at 703. Nor do those standards apply to general legislation. *See Dolan*, 512 U.S. at 391 n.8. This Court's invocation of the

Agins formulation in *Nollan* and *Dolan* in no way diminishes the Court's recognition in subsequent decisions that its validity as a general test for regulatory takings represents an important, unresolved issue.

B. Whether The Just Compensation Clause Authorizes Judicial Review Of The Rationality Of State Legislation Is A Question Of Fundamental Importance

The Ninth Circuit's view that a statute may be enjoined as an unconstitutional "taking" on the ground that it fails to advance legitimate government interests, if allowed to stand, would effect a dramatic change in takings jurisprudence. The Ninth Circuit's position is contrary to this Court's long-settled understanding that the purpose of the Just Compensation Clause is to ensure compensation for appropriations of property and regulations of equivalent severity, not to act as a substantive check on the government action in the first instance. As this Court said in *First English*, "[t]his basic understanding of the [Clause] makes clear that it is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of *otherwise proper* interference amounting to a taking." 482 U.S. at 314 (second emphasis added). Apart from the special context of exactions, this Court has never deviated from that "basic understanding" of the Just Compensation Clause.[7]

[7] Numerous commentators have argued that it is anomalous to test the validity of legislation under the Just Compensation Clause. *See, e.g.*, Frank Michelman, *The Jurisprudence of Takings*, 88 COLUM. L. REV. 1600, 1605-14 (1987); Jerold Kayden, *Land-Use Regulations, Rationality, and Judicial Review: The RSVP in the* Nollan *Invitation*, 23 URB. LAW. 301 (1991); Thomas E. Roberts, Karen Edginton Milner, Robert I. McMurry, *Land-Use Litigation: Doctrinal Confusion Under the Fifth and Fourteenth Amendments*, 28 URB. LAW. 765, 769-70 (1996).

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This Court's regulatory takings jurisprudence thus presupposes that a government regulation serves a valid public purpose. *E.g., Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) ("The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides it shall not be taken for such use without compensation"). Indeed, a government action *must* serve a valid public use if it is to be treated as a taking that would require compensation. In *Brown v. Legal Foundation of Washington,* 123 S. Ct. 1406, 1417 (2003), for example, the Court stated that the precondition for any exercise of the government's taking power is that the government action serve a "public use," which the Court equated to a requirement of "legitimacy" of the government action. *See also Palazzolo v. Rhode Island,* 533 U.S. 606, 635 n.* (O'Connor., J., concurring) (question whether regulation serves a valid public use is distinct from the question of whether a regulation effects a compensable taking). The Ninth Circuit's embrace of the "substantially advance" test, however, leads to the untenable position that the substantive *legitimacy* of government action is a prerequisite for a valid takings claim *and* that substantive *illegitimacy* provides an independent basis for establishing a taking. Both of these propositions cannot be correct. Because the Ninth Circuit apparently believed itself compelled by language in this Court's decision in *Agins* to produce this strange result, this Court's review is necessary to resolve this confusion.

The Ninth Circuit's approach is particularly incongruous where, as here, it is stipulated that the government

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Academic critics of the Court's *Agins* formulation include prominent scholars who generally argue for a broad reading of the Just Compensation Clause. *See, e.g.,* John E. Fee, *The Takings Clause as a Comparative Right*, 76 S. CAL. L. REV. 1003, 1035-36 (2003); Steven J. Eagle, *Substantive Due Process and Regulatory Takings: A Reappraisal*, 51 ALA. L. REV. 977, 978 (2000).

regulation will not have any significant adverse economic effect on the property owner. *See* p. 3, *supra*. This Court's regulatory takings jurisprudence focuses primarily if not exclusively on whether the economic burden imposed by government action "goes too far," *Mahon*, 260 U.S. at 415, such that the government may proceed if, but only if, it pays compensation. A regulatory taking is understood to be the equivalent of a physical appropriation precisely because of the severity of the economic impact that it works upon the property owner. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Penn Central*, 438 U.S. at 124. Under the Ninth Circuit's mistaken view, however, a law may be invalidated as a regulatory taking merely because a court deems it ineffective, even if its economic impact is slight (or nonexistent).

This Court's settled understanding that the Just Compensation Clause affords compensation for economically onerous government action affecting property interests – not a mechanism for substantive judicial review of the efficacy or wisdom of the government action – also explains why this Court has consistently stated that (with narrow exceptions), the ordinary remedy for a violation of the Just Compensation Clause is just compensation, not invalidation of a government regulation. *See Ruckelshaus v. Monsanto Co.,* 467 U.S. 986, 1016 (1984) ("Equitable relief is not available to enjoin an alleged taking of private property for public use"). By contrast, the Ninth Circuit has ruled that the appropriate remedy for a taking under the "substantially advance" theory is an injunction rather than compensation, because the premise of such a claim is that the government lacks the authority to act. *Daniel v. County of Santa Barbara*, 288 F.3d 375, 384-85 (9th Cir. 2002). The Ninth Circuit's novel injunctive remedy for a taking under the substantially advance test is inconsistent

with *Ruckelshaus*, providing another reason for the Court to grant review in this case.[8]

More fundamentally, as the State explains in greater detail in Part II, *infra*, the Ninth Circuit's improper incorporation of substantive due process analysis into takings doctrine has provided a pretext for that court's improper judicial invalidation of state legislation based on an intrusive standard of review of economic legislation not seen since the days of *Lochner v. New York*, 198 U.S. 45 (1905). It has long been settled that, under the Due Process Clause, the courts owe the legislature great deference in reviewing the wisdom and effectiveness of economic legislation. *See Williamson v. Lee Optical Co.*, 348 U.S. 483, 488 (1955). Yet now the Ninth Circuit has adopted, without any real explanation or justification, the position that the courts may and should engage in intrusive means-ends review of economic legislation under the Just Compensation Clause that would be obviously and completely out of bounds if the claim were brought under the Due Process Clause.[9] That position cannot be sustained

[8] Consistent with the view that injunctive relief is an appropriate remedy under this takings theory, the Ninth Circuit has also ruled that a claimant raising a "substantially advance" taking claim may file suit immediately in federal court and has no obligation to exhaust available state compensation procedures in compliance with *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985). *See, e.g., Daniel, supra,* 288 F.3d at 385. The ability of takings claimants invoking this theory to avoid state exhaustion requirements, combined with the heightened level of scrutiny under Ninth Circuit precedents, means that litigants challenging state and local regulations will routinely file in federal rather than state court. Thus, the issue raised by this case has significant implications for forum shopping between the federal and state courts, as well as for the potential burdens such claims may impose on federal courts.

[9] There is no theory that justifies transplanting due process analysis into takings soil. To the contrary, given the differences in language between the Just Compensation and Due Process Clauses, it is more logical to conclude that these two provisions provide different rather than overlapping types of protections for private property

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under the Court's long-settled understanding of the Just Compensation Clause.

C. The Lower Courts Have Reached Conflicting Conclusions About The Proper Role Of The Just Compensation Clause In Judicial Review Of Government Action

In the absence of definitive guidance from this Court about the proper role of the Just Compensation Clause in challenges to the substantive validity of government action, lower appellate courts (both state and federal) have reached widely divergent conclusions, including many decisions in conflict with the decision below in this case. The Ninth Circuit's decision conflicts directly with state supreme court decisions holding that challenges to the rationality of government regulation must be brought under the Due Process Clause, not the Just Compensation Clause. *See 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) (claim of arbitrary action by municipality in withholding building permit was not "appropriative governmental action" within the scope of Just Compensation Clause). The Ninth Circuit's decision also conflicts with state supreme court decisions holding that a taking claim must be based on economic harm to affected property interests, and may not be predicated simply on the application of an invalid regulation. *See Tampa-Hillsborough County Expressway Authority v. A.G.W.S.*

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interests. *See Harmelin v. Michigan,* 501 U.S. 957, 978 n.9 (1991) ("When two parts of a [single constitutional amendment] use different language to address the same or similar subject matter, a difference in meaning is assumed.").

Corp., 640 So.2d 54, 56-58 (Fla. 1994) (clarifying that a prior decision invalidating a statutory mechanism for land use planning was based upon due process principles, out of concern that claimants would seek unfair windfalls under the Just Compensation Clause by arguing that ordinance failed to advance a legitimate state interest); *Pheasant Bridge Corp. v. Township of Warren*, 777 A.2d 334, 343-46 (N.J. 2001) (application of an invalid ordinance to plaintiff's property is not the "'otherwise proper [governmental] interference' that the Takings Clause presupposes").[10]

The Ninth Circuit's decision also conflicts with decisions of other federal circuits. *Simi Investment Co. v. Harris County*, 256 F.3d 323 & n.3 (5th Cir. 2001) (although the Just Compensation Clause covers many landowner complaints about intrusions on property rights, challenges to government action as "illegitimate and arbitrary" lie under the Due Process Clause); *Restigouche, Inc. v. Town of Jupiter*, 59 F.3d 1208, 1211 n.1 (11th Cir. 1995) (the Eleventh Circuit "does not recognize [substantially advance takings claims] as distinct, viable federal constitutional claims in the zoning context"). The Ninth Circuit's decision also cannot be reconciled with decisions of the Federal Circuit holding that the legitimacy of the government's action is a *precondition* for a claim for just compensation against the United States. *See, e.g., Rith Energy, Inc. v. United States*, 270 F.3d 1347, 1352 (Fed. Cir. 2001); *Florida Rock Industries, Inc. v. United States*, 791 F.2d 893, 898-900 (Fed. Cir. 1986). The Court of Federal Claims, with jurisdiction over virtually all takings claims against the United States, has held that allegations

[10] Other state courts, however, have endorsed the *Agins* formulation as a test for the substantive validity of a state law, reflecting the ambiguity of this Court's decisions. *See, e.g., Sheffield Development Co., Inc. v. City of Glenn Heights, Texas*, __ S.W.3d __, 2004 WL 422594 (Tex. 2004); *State ex rel. Shemo v. City of Mayfield Heights*, 765 N.E.2d 345 (Ohio 2002).

that a federal action does not substantially advance a legitimate interest do not state a claim under the Just Compensation Clause, but instead represent either a tort claim or a due process claim. *Bamber v. United States*, 45 Fed. Cl. 162, 165 (Fed. Cl. 1999). To the State's knowledge, no decision of the Court of Federal Claims or the Federal Circuit has ever found a taking based on the "substantially advance" test. *Cf. Seiber v. United States*, 364 F.3d 1356, 1367-68 (Fed. Cir. 2004) (noting uncertainty in the Supreme Court's decisions, but finding it unnecessary to decide whether *Agins* established a distinct takings test).

To compound the confusion, the Ninth Circuit itself, sitting *en banc*, has sharply questioned the propriety of reviewing the wisdom and efficacy of state legislation under the Just Compensation Clause. The Ninth Circuit relied on Justice Kennedy's concurring opinion in *Eastern Enterprises* in observing that the Clause "was never intended to replace the role of the people in determining which social programs are appropriate," and "'has not been understood to be a substantive or absolute limit on the government's power to act.'" *Washington Legal Foundation v. Legal Foundation of Washington*, 271 F.3d 835, 856 (9th Cir. 2001) (*en banc*) (quoting *Eastern Enterprises,* 524 U.S. at 545 (Kennedy, J., concurring in the judgment)), *aff'd sub nom. Brown v. Legal Foundation of Washington*, 123 S.Ct. 1406 (2003).[11]

[11] The Ninth Circuit has gone beyond embracing the "substantially advance" theory under the Just Compensation Clause to rule that property owners challenging property regulation as arbitrary or illegitimate in a constitutional sense *must* bring their claims under the Just Compensation Clause rather than the Due Process Clause. *See, e.g., Macri v. King County*, 126 F.3d 1125, 1129 (9th Cir. 1997). Thus, the Ninth Circuit has taken the position that what is really a due process claim not only *can* be brought under the Just Compensation Clause but *cannot* be brought under the Due Process Clause itself. The majority of other circuits have rejected this position. *See* Robert

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The widespread confusion has prompted calls for the Court to resolve the issue. In *Santa Monica Beach, Ltd. v. Superior Court*, 968 P.2d 993 (Cal. 1999), Justice Kennard explicitly requested this Court to resolve the confusion sown by *Agins*:

> Outside the *Nollan*/*Dolan* context, should a means-ends test be used to determine whether a taking has occurred, or instead should means-ends testing remain within due process jurisprudence? Only the high court can resolve this question and, given the importance of this area of the law, I respectfully suggest that it do so when the opportunity next arises.

Id. at 1013 (Kennard, J., concurring). Justice Kennard's request was echoed by Justice Brown in dissent. *Id.* at 1047 (Brown, J., dissenting).

II. The Proper Standard Of Review Under The Just Compensation Clause For Challenges To Economic Legislation Is Also An Important Issue On Which Lower Courts Have Divided

A. The Proper Standard Of Review Is An Important Issue

The second issue presented by this case, assuming that means-ends analysis under the Just Compensation Clause is permissible at all, is what standard of review should govern application of this test. This too is an important issue warranting review in this Court because it raises fundamental questions concerning the proper

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Ashbrook, *Land Development, the* Graham *Doctrine, and the Extinction of Economic Substantive Due Process*, 150 U. PA. L. REV. 1255 (2002). This additional conflict among the circuits would disappear if this Court were to rule, as the State submits it should, that challenges to the substantive validity of regulation do not belong under the Just Compensation Clause at all.

balance between the judiciary and institutions of democratic governance within our federal system. Since the 1930's, this Court has granted considerable deference to the judgments of legislatures about the need for, or wisdom of, economic regulation. As the Court observed in *Williamson v. Lee Optical*, "The day is gone when this Court uses the Due Process Clause . . . to strike down . . . laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought." 348 U.S. at 488. The Court has accordingly employed a rational-relationship test for Due Process and Equal Protection Clause challenges to economic laws, upholding legislation that a rational legislator could have believed would advance a permissible public purpose. *Id.* at 487-88. Property regulation, including rent control legislation, has long been considered the kind of economic regulation 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).

The reluctance of the courts to intrude upon the judgments of legislatures in enacting economic legislation, regardless of the constitutional label attached to the claim, is based on several bedrock principles. First, deferential judicial review reflects the principle that governmental economic policy should generally be determined by democratically elected representatives, rather than unelected judges. *See, e.g., Schweiker v. Wilson*, 450 U.S. 221, 230 (1981) ("[T]his Court properly exercises only a limited review power over Congress, the appropriate representative body through which the public makes democratic choices among alternative solutions to social and economic problems."). Judicial deference also reflects the limited institutional competence of the courts to make predictive judgments concerning the efficacy of economic regulation.

See, e.g., General Motors v. Tracy, 519 U.S. 278, 308-09 (1997) (the Supreme Court is "institutionally unsuited to gather the facts upon which economic predictions can be made, and professionally untrained to make them"; it is consequently "ill-qualified" to develop constitutional doctrine based on such predictive judgments). Finally, within our federal system, deferential review by federal courts of the actions of state legislatures prevents concentration of power in federal hands and helps preserve the states as "laborator[ies]" with freedom to conduct "novel social and economic experiments." *New State Ice Co. v. Liebman*, 285 U.S. 262, 280 (1932) (Brandeis, J., dissenting).

The Ninth Circuit's decision jettisons these principles of deferential review, returning to the kind of close supervision of social and economic policymaking not seen since the end of the *Lochner* era. 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." App. 76. This standard affords the judgment of the Hawaii legislature no deference at all. Instead, it instructs the trial court to void the statute if, based upon the court's independent evaluation of testimony about "predictive facts," the court concludes that the Act will not work.

The Ninth Circuit's approach dramatically undermines the protections that this Court has erected against improper judicial interference with legislative policymaking. It also wreaks havoc with constitutional jurisprudence by creating different standards of review for what are in substance identical claims under the Just Compensation and Due Process Clauses. Litigants in the Ninth Circuit, an area comprising one-third of the nation, can now evade the rational-basis scrutiny applicable to due process claims simply by reframing their challenges to economic

legislation as "substantially advance" claims under the Just Compensation Clause.

The potential for "substantially advance" claims under the Just Compensation Clause to sweep away settled principles of judicial review is dramatically illustrated by the contrast between the Ninth Circuit's decision and this Court's decision unanimously upholding a statute remarkably similar to Act 257 against arguments challenging its economic wisdom. In *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978), the Court reviewed due process and other challenges to a Maryland law prohibiting oil companies from operating their own stations within the state. The law was enacted to protect the retail market for gasoline following complaints that oil companies had favored their own stations during gasoline shortages. The oil companies contended that the law would be counterproductive, reducing the number of retail outlets for gasoline in the state and harming consumers. This Court responded in terms that could not be more starkly opposed to the review employed by the Ninth Circuit in this case:

> The evidence presented by the refiners may cast some doubt on the wisdom of the statute, but it is, by now, absolutely clear that the Due Process Clause does not empower the judiciary "to sit as a 'superlegislature to weigh the wisdom of legislation' . . . " *Ferguson v. Skrupa*, 372 U.S. 726, 731 [1963] . . . Appellants argue that [prohibiting company-operated gas stations] is irrational and that it will frustrate rather than further the State's desired goal of enhancing competition. But . . . *this argument rests simply on an evaluation of the economic wisdom of the statute*, . . . *and cannot override the State's authority "to legislate against what are found to be injurious practices in their internal commercial and business affairs. . . ." . . . Regardless of the ultimate economic efficacy of the statute, we have no hesitancy in concluding that it bears a reasonable relation to the State's*

> *legitimate purpose in controlling the gasoline retail market, and we therefore reject appellants' due process claim*.

Id. at 124-25 (emphasis added; citations omitted). If this claim were brought today before the Ninth Circuit as a takings claim, the State's "authority to legislate against . . . injurious practices" would be given no weight whatsoever, and the statute, like Act 257 in this case, could be struck down as unconstitutional simply because the trial judge rejected the economic theory on which it was based. This Court should grant review to make clear that lower federal courts may not exercise such supervisory power over the merits of state legislation, whether challenged under the Just Compensation Clause or under the Due Process Clause.

B. The Ninth Circuit's Adoption Of A *De Novo* Standard Of Review Conflicts With This Court's Precedents

The intrusive standard of review adopted by the Ninth Circuit cannot be reconciled with this Court's takings decisions. Given the Court's uncertainty concerning the validity of the "substantially advance" formulation, it is not surprising that the Court has spoken only briefly to the standard of review that would govern application of this ostensible test. To the extent the Court has spoken to the issue, however, the Court has clearly ruled that a deferential standard of review must apply, and that the "substantially advance" test cannot be viewed as a judicial license to second-guess the legislature's judgment about the wisdom or effectiveness of a legislative measure.

Agins itself strongly suggests that the Court employed a deferential standard of review. The due process precedents upon which the *Agins* Court relied clearly employed

a highly deferential standard.[12] The *Agins* Court upheld a zoning ordinance as furthering "governmental purposes long . . . recognized as legitimate," 447 U.S. at 261, without any inquiry into whether the ordinance would actually achieve such goals. One year after *Agins,* the Court described the standard in that case in terms indistinguishable from the standard generally applied to government regulation under principles of due process. *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981) ("Where property interests are adversely affected by zoning, the courts generally have emphasized the breadth of municipal power to control land use and have sustained the regulation if it is *rationally related* to legitimate state concerns and does not deprive the owner of economically viable use of his property.") (citing *Agins, Village of Belle Terre,* and *Euclid*) (emphasis added).

The Court's decision in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987), involving a claim that a Pennsylvania statute regulating mining failed to advance a legitimate purpose, also supports a deferential standard of review. To distinguish the statute at issue from the similar law held to be taking in *Mahon*, the majority in *Keystone* noted that the law reasonably served public purposes. 480 U.S. at 485-86. In dissent, then-Justice Rehnquist noted that it "may well be true" that the act under review better served a public purpose than its predecessor, but stressed that courts should not review the *efficacy* of state legislation in determining whether it

[12] *See Nectow*, 277 U.S. at 187-88 ("[A] court should not set aside the determination of public officers . . . unless it is clear that their action has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense.") (internal quotes omitted); *Euclid*, 272 U.S. at 395 (to declare zoning ordinance unconstitutional, Court must find that provisions "are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.").

effects a "taking" requiring just compensation, just as they should defer to legislative judgments as to whether a law serves a "public use":

> [O]ur inquiry into legislative purpose is not intended as a license to judge the effectiveness of legislation. When considering the Fifth Amendment issues presented by Hawaii's Land Reform Act [in *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229 (1984)] we noted that the Act, "like any other, may not be successful in achieving its intended goals. But 'whether *in fact* the provisions will accomplish the 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.' "

Id. (emphases and ellipses in original) (quoting *Midkiff*, 467 U.S. at 242).

In response, the majority agreed that a deferential standard of review should apply, invoking the Court's deferential due process jurisprudence:

> We do not suggest that courts have "a license to judge the effectiveness of legislation," . . . or that courts are to undertake "least restrictive alternative" analysis in deciding whether a state regulatory scheme is designed to remedy a public harm or is instead intended to provide private benefits. That a land use regulation may be somewhat overinclusive or underinclusive is, of course, no justification for rejecting it. *See Euclid v. Ambler Realty Co.* . . . .

Id. at 487 n.16.[13]

[13] The Ninth Circuit dismissed *Keystone*'s relevance, concluding that the Court's reference in that case to the deferential standard of review employed in *Midkiff* was irrelevant because *Midkiff* involved a formal exercise of eminent domain. App. 59. But *Keystone* itself involved a challenge to a regulation under the *Agins* "substantially advance" test, not an exercise of eminent domain.

The idea that a heightened standard of review should nonetheless apply to such claims seems to be attributable to an overly expansive reading of the Court's decision in *Nollan*. In that case, the Court addressed the special problem presented for courts reviewing requirements that landowners grant public access to their property in exchange for regulatory approval of specific development projects. Recognizing that physical occupations cannot ordinarily be forced upon landowners without compensation, the Court held that such exactions must show an "essential nexus" between the conditions imposed and the government's regulatory objectives. 483 U.S. at 837.

Responding to the dissent's concern that such heightened review was inconsistent with the rational-basis scrutiny generally applicable to economic regulations, *id.* at 842-48, the Court observed in a footnote that "there is no reason to believe (and the language of our cases gives some reason to disbelieve) that so long as the regulation of property is at issue the standards for takings challenges, due process challenges, and equal protection challenges are identical. . . ." *Id.* at 835 n.3. This statement is far from a holding that heightened scrutiny in fact applies to all regulatory takings claims, however. As the Court made clear in *Nollan* itself, its invocation of heightened scrutiny came in response to the unique problems posed by exactions:

> We are inclined to be particularly careful about the adjective ["substantial"] where the actual conveyance of property is made a condition to the lifting of a land-use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police-power objective.

Id. at 841.

Subsequent decisions of the Court confirm this narrow reading of *Nollan*. In *Dolan*, the Court expanded upon the

rule established in *Nollan*, requiring that municipalities demonstrate that exactions are "roughly proportional" to a proposed development's impact. The Court emphasized, however, that this requirement applies only to *adjudicatory* decisions involving exactions of real property. *Id.* at 391 n.8. Where a party challenges *generally applicable* legislation, by contrast, "the burden properly rests on the party challenging the regulation to prove that it constitutes an arbitrary regulation of property rights." *Id*. This statement clearly indicates that a different, more deferential standard applies to general legislation than to exactions. Subsequently, in *Del Monte Dunes*, the Court made clear that the special rules applicable to exactions do not apply generally to regulatory takings claims. 526 U.S. at 703. While the specific holding in *Del Monte Dunes* was that the rough proportionality test cannot be applied outside the exactions context, it is implicit in the decision that the type of heightened review applied in *Dolan* and *Nollan* does not apply outside that context either.

The intrusive, *de novo* review applied by the Ninth Circuit in this case conflicts with the Court's unanimous teaching in *Keystone* that the Just Compensation Clause cannot be read as "a license to judge the effectiveness of legislation." This Court should grant review to reaffirm that a highly deferential standard of review governs constitutional challenges to economic legislation.

C. The Ninth Circuit's Application Of *De Novo* Review Conflicts With Decisions Of Another Federal Court Of Appeals And Several State Supreme Courts

The Ninth Circuit's application of heightened scrutiny conflicts with decisions of the First Circuit and the Supreme Courts of California and New York that interpret the *Agins* "substantially advance" formula as preserving traditional legislative discretion. In *South County Sand &*

Gravel Co., Inc. v. Town of South Kingston, 160 F.3d 834 (1st Cir. 1998), the First Circuit concluded that the distinction between the takings and due process modes of analysis "is . . . largely a matter of semantics," *id.* at 836, and held that the "substantial relation" and "rational basis" standards may be used "interchangeably" in reviewing a challenged zoning ordinance. *Id.* at 836 n.3. The court specifically declined to review the "effectiveness of municipal policy," a task the court concluded was "well outside our compass." *Id*. at 839.

In *Santa Monica Beach*, *supra*, the California Supreme Court affirmed the dismissal of 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 court stated: "In sum, with rent control, as with most other such social and economic legislation, we leave to legislative bodies rather than 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 court also concluded in *Santa Monica Beach* that heightened scrutiny under this Court's *Nollan* and *Dolan* decisions did not apply to a legislative determination. *Id.* at 993. The California Supreme Court reaffirmed that conclusion in *San Remo Hotel v. San Francisco City and County*, 41 P.3d 87 (Cal. 2002), refusing to extend heightened scrutiny to legislation imposing fees on hotel conversions. The different standards applied by the Ninth Circuit and the California courts mean that challenges to state and local regulations in that state will be routinely brought in federal rather than state court.

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). The New York Court of Appeals

rejected the argument that the "essential nexus" requirement of *Nollan* was generally applicable to regulatory takings claims, and refused to evaluate the "general wisdom or desirability" of the challenged regulation. *Id.* at 975-76.

III. This Case Presents A Compelling Opportunity For The Court To Resolve Both Of These Important Issues

Two important, related issues of takings law – whether the means-ends rationality of legislation may properly be reviewed under the Just Compensation Clause, and if so, whether a deferential standard of review must be employed – are squarely raised in this case. The facts clearly frame these questions for the Court's review. Chevron made no claim that it had suffered significant economic injury from the enactment of Act 257; it sought only to use the Just Compensation Clause to invalidate the statute because of disagreement with its economic policy, and did so in deliberate preference to seeking review of the law under due process and equal protection. The trial procedure employed to resolve Chevron's takings claim illuminates the inherent risk of intrusive judicial review posed by the *Agins* test as construed by the Ninth Circuit; the trial judge even tried to weigh the demeanor of the parties' expert witnesses as a factor in determining the constitutionality of the statute. App. 43.

The issues presented for review are not complicated by the presence of collateral issues or procedural defects (as was the case, for example, in *Del Monte Dunes*, where the Court was unable to reach the question of validity of the "substantially advance" test). The Ninth Circuit's decision represents a definitive and final determination of both questions. This case thus presents a narrowly focused

and compelling vehicle for this Court to resolve these important questions of constitutional doctrine.

CONCLUSION

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

Respectfully submitted,

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