No. 04-163

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.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF

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As the State has explained, the lower courts erred in deciding, using a *de novo* standard of review, that Act 257 effected a "taking" because it "failed to substantially advance" the State's interest in protecting gasoline consumers. This analysis was wrong because (1) it assumed that an inquiry into the alleged illegitimacy of a government action can support a finding of a taking under the Just Compensation Clause, and (2) it further assumed that this inquiry (even if it were appropriate under that Clause) could be carried out without according deference to the policy judgments of Hawaii's legislators.

As to the first point, Chevron offers a pastiche of unconvincing arguments that attempt to make the "substantially advance" test appear less foreign to traditional takings principles than it actually is. Thus, Chevron contends that this test represents an application of the familiar "character" factor in taking analysis (even though the Court has never defined character in this fashion); that it is designed to prevent the government from unfairly singling out one or a few property owners to bear the costs of social programs (even though the substantially advance inquiry ignores whether *any* burden has been imposed); and that it is consistent with the compensatory purpose of the Just Compensation Clause (even though Chevron disclaimed any interest in compensation until it filed its brief in this Court, and the Ninth Circuit has ruled that this takings theory supports requests for injunctive relief). Chevron's *amici* present such a discordant array of theories in support of the result below that they simply highlight the basic point: there is no coherent justification for a "substantially advance" takings test, because this inquiry does not fit in takings law.[1]

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[1] Chevron's *amici* variously suggest, for example, that (1) this test is actually grounded in the Court's precedents interpreting the "public use" requirement (Richards family), (2) the test reflects a "fusing" of takings and due process doctrines (National Association of Homebuilders), or (3) the validity of the test is beside the point because in any event Act 257 effects a physical occupation resulting in a *per se* taking (Cato Institute).

On the second point, Chevron does not deny that the lower courts conducted a *de novo* factual inquiry, and it makes no attempt to defend the application of that remarkably intrusive standard of review. Chevron thus effectively abandons the Ninth Circuit's holding that the substantially advance test requires a factual determination, by a preponderance of the evidence, of the effectiveness of challenged legislation. That concession, by itself, provides a second ground for reversal. As a fall back position, Chevron argues that the lower courts properly found a taking because the Hawaii legislature failed to engage in a sufficiently thorough analysis of its policy options prior to enacting Act 257. There is no basis in takings jurisprudence for imposing this kind of retrospective procedural straitjacket on the legislative process. The argument is in any event based on a false premise, because the Hawaii legislature conducted an exhaustive investigation, spanning half a dozen years, before enacting Act 257.

This case, quite simply, is about Chevron's dissatisfaction with classic price control legislation enacted by the Hawaii legislature—where Chevron's arguments were heard, considered, and rejected. The Just Compensation Clause does not authorize the courts to overturn the legislature's reasonable accommodation of the various economic interests at stake in the retail gasoline market in the State of Hawaii.[2]

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[2] Chevron stipulated that it suffered no constitutionally significant economic injury as a result of Act 257. JA 40. But the company nonetheless attempts before this Court to exaggerate in various ways the economic effects of the legislation. As an initial matter, Chevron seeks to define the relevant unit of property as the rent it receives (or even more narrowly, the "right to collect market rents"). Chevron Br. i, 13. In fact, Chevron's gas station properties, either individually or collectively, represent the relevant unit of property for the purpose of takings analysis, as Chevron itself acknowledged in its briefing before the Ninth Circuit. *See* Brief of Appellee at 31-32 (Nov. 26, 2002) (describing property interest as company's "leasehold interests" in its stations). In any event, there was no evidence that Act 257 had any effect on current rents, and it reduced the rents that Chevron planned to charge if the law had not been enacted by only a small

I. THE ALLEGED FAILURE OF ECONOMIC LEGISLATION TO "SUBSTANTIALLY ADVANCE" A LEGITIMATE STATE INTEREST DOES NOT SUPPORT A CLAIM OF A TAKING UNDER THE JUST COMPENSATION CLAUSE

A. The "Substantially Advance" Test Is A Misplaced Due Process Analysis

In its opening brief, the State explained that the "substantially advances" test reflects a transposition of due process thinking into takings law, where it fundamentally does not belong. This is confirmed by the essential identity of traditional substantive due process analysis with the substantially advance inquiry; the historical evidence that this test was borrowed from due process precedents; and the fact that the test has been read to support a request for injunctive relief, which is a due process, not a takings, remedy. Chevron's efforts to show otherwise are unavailing.

Chevron contends that heightened means-ends scrutiny of legislation affecting property interests is a proper takings test because the Just Compensation Clause evinces special solicitude for property interests above and beyond the "generalized" protection "against arbitrary, unfair or irrational governmental behavior" provided by the Due Process Clause. Chevron also argues that heightened review of state economic regulation under this standard does not "herald a return of *Lochner*-era substantive due process review" because the version of means-ends analysis employed in this case is not grounded in the "vague contours of the Due Process Clause," but is instead "tethered" by the "express" and "specific" Just Compensation Clause. *See* Chevron Br. at 27.

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amount: a mere 4% of Chevron's projected rent stream from its lessee-dealer stations. JA 45-47. Chevron never even made a proffer of proof that Act 257 had reduced the value of its dealer stations or of its business enterprise in Hawaii as a whole. *See* Decl. of Keith Leffler, Docket No. 34 (July 30, 1998) (noting that in 1997 Chevron made $14.7 million in before-tax profits, a return of over 39% on the book value of its stations).

This argument effectively seeks to overturn decades of this Court's constitutional teachings. In Chevron's world, and that of its *amici*, any regulation affecting property interests beyond a trivial degree could be held unconstitutional unless it can be demonstrated to a court's satisfaction that the regulation is supported by prevailing economic theory and likely to work in practice. The clear effect—and, one suspects, the intent—of this position would be to bring much government economic regulation to a halt. As political philosophy, this stance is debatable; as constitutional law, it is not. As Justice Holmes observed in dissent almost exactly a century ago in *Lochner v. New York*, 198 U.S. 45, 75 (1905), the Fourteenth Amendment "does not enact Mr. Herbert Spencer's Social Statics" or any other particular theory of economics. And given that the Due Process Clause clearly does not support Chevron's approach to judicial review of economic regulation, it would be "surprising indeed" to discover, at this late stage of development of American constitutional law, that the Just Compensation Clause does. *Cf. Connolly v. PBGC*, 475 U.S. 211, 223 (1986).

In any event, Chevron's argument is not persuasive on its own terms. Because the "substantially advance" inquiry is indistinguishable from traditional substantive due process analysis, and was actually derived from precedents interpreting the Due Process Clause, the claim that heightened means-ends review can be justified based on the specific language of the Just Compensation Clause itself is both nonsensical and a historical. This test, in origin and in substance, is a due process test; the fact that the test has been relabeled as a taking test does not support the assertion that the test is actually tethered to the language of the Just Compensation Clause.

Chevron also argues that the Just Compensation Clause protects "property," whereas the Due Process Clause protects "life, liberty, and property," suggesting that the Due Process Clause has a broader scope than the Takings Clause. But this argument does not justify transplanting due process means-ends analysis into takings law—much less transplanting it *and* intensifying it. And to the extent Chevron is suggesting that the dangers of *Lochner*-style judicial review are less serious so long as it is confined to the realm of property, this suggestion should be rejected as well. In the first place, it is difficult to see how any limitation of heightened review to laws affecting "property" is a limitation at all; virtually every form of governmental economic regulation affects some form of property (including real property, personal property, or intellectual property). Second, and more generally, the *Lochnerian* approach advocated by Chevron is a problematic intrusion on the principle of legislative primacy under our constitutional system regardless of how broadly it is applied.

Finally, and "perhaps most importantly" according to Chevron, Chevron asserts that a "substantially advance" taking claim should be viewed as distinct from a due process claim because the former generally supports a claim for compensation, whereas the latter can result in an order prohibiting government from acting at all. Chevron is half-right, in the sense that, under the Court's precedents, a *proper* taking claim *should* generally support only a claim for compensation, whereas injunctive relief is an appropriate remedy for a due process violation. *See* State Br. 21-22. But Chevron is also half-wrong, because, in applying the ersatz "substantially advance" takings test, the Ninth Circuit has held that a meritorious "substantially advance" claim, just like a due process claim, entitles a claimant to injunctive relief. *See, e.g., Daniel v. County of Santa Barbara*, 288 F.3d 375, 385 (9th Cir. 2002). And, indeed, if a regulation contravened the Constitution because it failed to "substantially advance a legitimate state interest," it is entirely logical to conclude that an injunction, rather than compensation, should be the appropriate remedy. That the remedy available under the substantially advance theory, an injunction, is the same remedy available under the Due Process Clause simply confirms that it actually *is* the due process test.[3]

B. The "Substantially Advance" Test Does Not Apply The "Character" Factor Of This Court's Regulatory Takings Test

As alternative support for the "substantially advance" taking test, Chevron argues that the enhanced means-ends scrutiny under this test can be linked to the traditional examination of the "character" of the government action in takings cases. *See* Chevron Br. 19, 20-21. According to Chevron, this version of "character" analysis serves as a threshold screen: unless demonstrably justifiable in court as a means of achieving a governmental purpose, *any* government action that diminishes property value, no matter how modestly, may be condemned as a taking. This argument should be rejected.

First, the argument is inconsistent with the Court's traditional approach to the "character" of the government action under the three-part *Penn Central* test, which is to treat it as one of several relevant factors, along with the economic impact of the regulation and the extent to which it interferes with investment-backed expectations. *See Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 123-24 (1978). Considering the character of the government action divorced from economic impact is inconsistent with the Court's strong preference for a nuanced, multi-factor approach to takings cases as opposed to a *per se* approach. *See Tahoe-Sierra Preserv. Council v. Tahoe Reg'l Planning Agency,* 535 U.S. 302, 326 (2002). It also inconsistent with the foundational idea, reflected in the traditional *Penn Central* analysis, that regulatory takings doctrine is largely concerned with identify-

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[3] As the State explained in its opening brief, it would be equally illogical to conclude that compensation under the Just Compensation Clause was an appropriate remedy under the substantially advance theory. If a government action is illegitimate in a constitutional sense, payment of compensation cannot cure the constitutional defect and provide authorization for the government to proceed.

ing restrictions that, in term of the economic burdens they impose, are functionally equivalent to outright appropriations. *See* State Br. 14-15.

Similarly, Chevron mistakenly asserts that the substantially advance test comports with the fundamental purpose of the Just Compensation Clause "to bar Government from forcing some people alone to bear public burdens which, in all fair-ness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). *Armstrong* involved the government's complete destruction of property liens and establishes that, when the government singles out private property for destruction for public purposes, the government must pay compensation. But *Armstrong's* teaching is inapposite where the claim is not that the government action has imposed inordinate burdens, but that it has acted in illegitimate fashion. By contrast, the *Penn Central* test does implement the *Armstrong* principles. *See Penn Cen-tral*, 438 U.S. at 123-24 (describing the three *Penn Central* factors as having "special significance" in the "ad hoc, factual inquiries" necessary to determine when "fairness and justice" require compensation). Act 257, of course, would easily have survived a challenge under *Penn Central*, if Chevron had made one.

The Court has recognized that the character of the government action, in rare instances, may be so extraordinary that character, standing alone, may support a finding of a taking. But these special rules rest on extraordinarily severe intrusions on traditional, indeed ancient, private property rights. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982) (describing permanent physical occupations as "perhaps the most serious form of invasion of an owner's property interests"); *Hodel v. Irving*, 481 U.S. 704, 716 (1987) (abrogation of right to pass property to one's family, part of Anglo-American legal system since feudal times).

The Court has never suggested, however, that the alleged illegitimacy of a government action is a relevant aspect of the "character" of the action, even when considered as part of the traditional multi-factor analysis. Consistent with its generally *ad hoc* approach to the takings inquiry, the Court has not articulated an exhaustive list of the considerations that inform application of the character factor. However, the Court has generally approached the character factor as a way of gauging the nature and practical effect of the burden imposed on property owners by regulation. In *Penn Central*, for example, the Court described character as relating to whether the government action involves a physical occupation. 438 U.S. at 124. *See also Loretto*, 458 U.S. at 426 (explaining that temporary physical occupations should be analyzed under the rubric of character in a *Penn Central* analysis). The Court has also indicated that an important aspect of "character" is whether regulation applies to a broad cross-section of the community or instead singles out one or a few owners to bear a disproportionate burden. *See Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 491 (1987) (discussing "reciprocity of advantage").

But there is no authority that the alleged illegitimacy of the government action may be weighed, along with other factors, in a *Penn Central* case—and the addition of this consideration would only further complicate what is, by all accounts, already a challenging legal framework.[4] Clarifying that the "substantially advance" test (under a properly deferential standard of review) is actually a test for a due process violation will not in any way undermine the traditional *Penn Central* analysis, which remains the "polestar" of the regulatory takings analysis.

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[4] Chevron points to the *dictum* in *Penn Central* suggesting that it is somehow "implicit" in the Court's older Due Process cases that a use restriction on real property may constitute a "taking" if "not reasonably necessary to the effectuation of a substantial public purpose." 438 U.S. at 127. But this statement, which was a progenitor of the similar (although not identical) formula used a few years later in *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980), was not offered in the context of defining the "character" factor and actually appears several pages away in the U.S. reports from the Court's initial, now famous articulation of the *Penn Central* factors.

C. Chevron's "Causal Connection" Theory Does Not Support The "Substantially Advance" Test

Chevron argues that the "substantially advance" theory can be justified based on what it puts forward as a general principle of takings doctrine—namely that government regulation affecting property interests will be a taking unless that regulation responds to a particular social evil caused by the claimant's actual use of its property. There is no basis for this supposed principle, and in any event it could not help Chevron in this case.

As we understand Chevron's argument, Act 257 is invalid as a taking because, even though excessive rents and concentration of retail outlets for gasoline might be a problem in Hawaii in the future, they are not problems now and so there is no cause for the State to regulate Chevron's use of its property now. *See* Chevron Br. 20 (stressing the State has not claimed that the "rents *charged*" in the past to its dealers "*have been* the source of high gasoline prices," or "*have contributed* to any market concentration") (emphases added). This is a curious approach to government regulation, not to mention constitutional law, under which the State may not act to address a problem until it may well be too late to do so. The Court has repeatedly recognized the "traditional legislative authority to make predictive judgments," *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 181 (1997), including the "fundamental principle of legislation" that Congress may act to prevent harm, rather than waiting its realization. *Id.* at 212. *See, e.g., McConnell v. Federal Election Comm'n*, 540 U.S. 93, 165 (2003).

When that "fundamental principle" is recognized, it becomes quite clear that Act 257 does respond to a social problem—potentially excessive rents and concentration in the retail gasoline market—that is directly related to Chevron's use of its property. As the State explained in its opening brief, the primary purpose of the rent cap imposed by Act 237 is to avert the harm to Hawaii's consumers that will occur if Chevron and other oil companies raise their rents and squeeze lessee-dealers out of the retail market for gasoline, leaving that market dominated by the handful of oil companies serving the State. Thus, this legislation easily satisfies any "cause-of-the-problem" theory. *See Pennell v. City of San Jose*, 485 U.S. 1, 22 (1988) (Scalia, J., concurring in part and dissenting in part) (rent controls prohibiting excessive rents are fairly placed on landlords, since "they can plausibly be regarded as the source or the beneficiary of the high-rent problem").[5]

More fundamentally, there is no general "cause-of-the-problem" rule at work in regulatory takings doctrine. Government may act to promote the public good just as it may act to prevent harm, and whether a regulation will survive a challenge under the Just Compensation Clause does not turn on whether the regulation prevents a harm or promotes a benefit—as the Court made clear in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), where it repudiated the harm/benefit distinction for takings analysis. *See id*. at 1025-26. Nor is there any connection between Chevron's cause-of-the problem theory and the *Armstrong* principle. *Armstrong* does not address whether liability under the Just Compensation Clause should depend upon whether the government is acting to promote a public benefit or to prevent harm to the public.

Finally, Chevron attempts to invoke *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), in support of its cause-of-the-problem rule. But the nexus and "rough proportionality" standards of those cases are based on the distinct principles

[5] The legislative history of Act 257 shows that the Legislature was specifically concerned that "new rent structures" proposed by oil companies would place economic pressure on the dealer network. *See* 1997 Haw. Sen. Journal 511 (statement of Sen. Baker). Thus, contrary to Chevron's argument, the immediate restraint on rent increases at eleven of Chevron's stations directly responded to the problem the legislature sought to address.

that apply to permit conditions that seek uncompensated public access to private property. As the Court subsequently made clear, those requirements, which are rooted in the unconstitutional conditions doctrine, do not apply outside the special context of exactions. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702 (1999).

D. The "Substantially Advance" Test Conflicts With the Just Compensation Clause's Compensatory Purpose

Chevron concedes, as it must, that the fundamental purpose of the Just Compensation Clause is to provide compensation, not to block government action. Chevron Br. 33. Apparently recognizing the tension between the compensatory purpose of the clause and the type of injunctive relief that has been awarded under the "substantially advance" theory. Chevron offers the imaginative theory that its "substantially advance" claim is and has always been about obtaining compensation.

Chevron's complaint in this case, however, sought only declaratory and injunctive relief. JA 19. Until the briefing before this Court, Chevron had never suggested it sought compensation[6] and a litigant is obviously not permitted to redesign its lawsuit in this Court. Moreover, as discussed above, the decisions of the Ninth Circuit that have applied and elaborated upon this theory of takings liability have repeatedly affirmed that, unlike normal takings claims, claims under the substantially advance theory give rise to injunctive relief. *See Daniel*, *supra*. There is no denying that the "substantially advance" theory is fundamentally at odds with the compensatory purpose of the Just Compensation Clause.[7]

[6] Chevron explicitly represented to the District Court at the outset of this case that "Chevron does not seek compensation from the State of Hawaii," but instead sought a judgment preventing enforcement of Act 257. Memorandum in Support of Motion [for Summary Judgment] at 1-2, Docket No. 25 (Jan. 28, 1998).

[7] Contrary to Chevron's argument, this Court's decision in *Del Monte Dunes* does not establish that the "substantially advance" theory is consistent with the compensatory purpose of the Just Compensation Clause.

Chevron also fails to explain away the logical contradiction between the ostensible "substantially advance" theory as a test for determining whether the government has "taken" private property, and the separate "public use" requirement, which bars the government from taking property (whether by appropriation or regulation) unless that taking would be in pursuit of a legitimate governmental objective. The Court has made clear that the test for a "public use" is highly deferential, essentially identical to the test under the Due Process Clause for the exercise of the police power—and in particular, that whether a law will, or will not, be effective at accomplishing its aims is generally irrelevant to whether it serves a "public use." *See Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 242 (1984). If the Court were to apply a higher standard of review to the very same issue of efficacy when considering whether the law effected a "taking," the Public Use Clause would serve little function at all, for its protections would be entirely subsumed within, and duplicated by, the "substantially advance" taking analysis. Thus, it is unsurprising that the Court has assumed the same deferential standard that governs the public use requirement would apply as well to the

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The Court had no occasion to address that question in that case because (a) the City there waived its objection to the application of "substantially advance" theory, 526 U.S. at 704, and (b) the award of compensation there was supported by plaintiff's alternative taking claim that it had been denied all economic use of the property, *id.* at 701-02. The Court did rule in *Del Monte Dunes* that the claimant was entitled under the Seventh Amendment to a jury trial on its taking claim because the claimant sought a compensatory monetary remedy. *See id.* at 710-11. But the Court did *not* rule that the "substantially advance" test is a valid takings theory. *See id.* at 721-22 ("The posture of the case does not present an appropriate occasion to define with precision the elements of a temporary regulatory takings claim . . . ."). Indeed, the only Seventh Amendment ruling on which a majority of the Court agreed was that "a § 1983 suit seeking legal relief is an action at law within the meaning of the Seventh Amendment." *Id.* at 709. That ruling does not depend on the validity of any particular § 1983 claim, or any particular taking claim pursued under § 1983.

"substantially advance" issue. *See Keystone*, 480 U.S. at 487 n.11; *id*. at 511 n.3 (Rehnquist, C.J., dissenting).

Chevron suggests that it is sensible to apply two different standards of review to the same means-ends question because the public use requirement concerns whether government can proceed at all (regardless of whether compensation is paid) whereas—under Chevron's revisionist interpretation—the "substantially advance" test supposedly focuses on whether government must pay compensation as a condition of proceeding with its program. Even if Chevron's distinction had merit,[8] it would still fail to explain why, as a matter of takings law, the government's obligation to pay compensation for a taking should turn on a showing that the regulation under challenge is illegitimate. It is hard to understand why the government (a) may not act if its regulation clearly will not work at all (*i.e.*, would fail the rational-basis test), (b) may act, but must pay compensation as a condition of doing so (if the regulation has a rational basis but is invalid under a heightened means-ends standard), and (c) may act, and need not pay compensation, if the government can prove that its regulation will work (*i.e.*, would survive heightened scrutiny). This schema bears no resemblance to any familiar construct of constitutional law, and has no grounding in the basic purpose of the Just Compensation Clause to provide compensation for economically burdensome, but "otherwise proper" government actions. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 314 (1987).

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[8] In fact, this distinction has been created out of Chevron's own imagination. As discussed above, the Ninth Circuit views the "substantially advance" test as a basis for stopping government from proceeding at all, irrespective of whether compensation is paid. *See also Yee v. City of Escondido*, 503 U.S. 519, 534 (1992) (noting that the application of the substantially advance test "does not depend on the extent to which [property owners] . . . are compensated").

E. The "Substantially Advance" Test Is Not An "Established" Part of Takings Doctrine

Finally, Chevron argues that, whatever the merits of the "substantially advance" theory, that test is an "established" part of takings law and cannot properly be reexamined now. *See* Chevron Br. 11-12, 35-39. It is correct that the Court has recited the "substantially advance" language in several of its opinions. But it is equally true, and Chevron does not dispute, that the Court has never squarely applied the test to support a finding of a taking (outside the special context of exactions), and that every single Justice has written or joined in recent opinions questioning the validity of this ostensible takings test. Simply put, the usual presumption in favor of settled law does not apply because there is no settled law to defend in this instance.

Contrary to Chevron's position, the Court's use of the "substantially advance" language in *Agins*, 447 U.S. at 260, was plainly *dictum*. Wholly apart from the fact that the unanimous Court ruled that the test was easily met, the parties in that case raised no issue about (a) whether the illegitimacy of government action could support a finding of taking, or (b) whether the zoning ordinance at issue in that case was somehow illegitimate. Thus, the language in that case upon which Chevron relies did not actually address a disputed issue, fitting the classic definition of *dictum*. As Chief Justice Marshall observed in *Cohens v. Virginia*, 19 U.S. 264, 399 (1821), "general expressions" that "go beyond the case" in which they are used "may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision." The reasons for this maxim are "obvious": whereas "the question actually before the Court is investigated with care," the implications of statements going beyond that necessary for decision may not be apparent. *Id*.

Chevron also errs in failing to recognize that *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), at least suggests the proper outcome here—namely, the "substantially advance" inquiry is a due process test, not a takings test. The Court need not conclude (and we have not argued) that the various opinions in *Eastern Enterprises resolved* that issue. But the opinions of Justices Kennedy and Breyer (together joined by a majority of the Court), both indicate that challenges to the legitimacy of government action belong under the Due Process Clause rather than the Just Compensation Clause. *See* 524 U.S. at 545 (Kennedy, J.); *id*. at 554-56 (Breyer, J.). Chevron's attempt to dismiss those opinions as focusing on other issues represents a plain misreading. Those opinions undercut Chevron's position that the "substantially advance" test was by then firmly entrenched in takings law.[9]

II. WHETHER THE "SUBSTANTIALLY ADVANCE" INQUIRY IS A DUE PROCESS OR TAKING TEST, A DEFERENTIAL STANDARD OF REVIEW SHOULD APPLY

A. Judicial Review Of The Efficacy Of Economic Regulation Should Be Deferential, Irrespective Of The Doctrinal Framework

The second question is whether there is any basis for applying a more stringent standard of review to the means-ends fit of economic legislation under the Just Compensation Clause

[9] The *amici* arguments are no more persuasive than Chevron's. The Richards family is correct that the substantially advance test is accurately viewed as applying the "public use" standard, which this Court, in turn, has equated with the traditionally deferential due process standard. However, the public use requirement only bars *takings* that do not serve a public use. The effort of the Richards family to convert the public use requirement into a freestanding test of whether government regulation constitutes a taking would read the word "taking" out of the Just Compensation Clause. The idea advanced by the National Association of Homebuilders that the takings and due process clauses should be viewed as fused violates the basic principle that "[w]hen two parts of a [constitutional amendment] use different language to address the same or similar subject matter, difference in meaning is assumed." *Harmelin v. Michigan*, 501 U.S. 957, 978 n.9 (1991). And Professor Epstein's argument on behalf of the Cato Institute advocating a *per se* physical occupation theory fails to recognize that the Court squarely rejected that theory in *Yee.*

(assuming that such review is even proper under that clause), than would apply to the *identical issue* under traditional principles of due process.

A heightened standard of review under the Just Compensation Clause would effectively overrule this Court's time-honored due process jurisprudence—as demonstrated by *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978), which, upheld, against a due process challenge, state regulation affecting the retail gasoline industry that in many respects closely resembles the law under challenge here. In attempting to distinguish *Exxon*, Chevron argues that the statute at issue in that case did not take a property right or restrict a property's use. *See* Chevron Br. 43. But the Maryland law challenged in *Exxon* was, if anything, considerably more severe than Act 257 in its effect on property interests: the Maryland law required Exxon to *discontinue altogether* its operation of 36 gas stations in Maryland. *See* 437 U.S. at 121. The Court's conclusion that the economic regulation in *Exxon* fully satisfied due process, and its rejection of the oil companies' effort to second-guess the economic wisdom of the law, vividly demonstrates how truly incongruous the lower courts' proceedings in *this* case have been.

Chevron also attempts to evade the unmistakable teaching of the unanimous Court in *Keystone* that the Just Compensation Clause does not grant the courts "a license to judge the effectiveness of legislation." 480 U.S. at 487 n.16; *id*. at 511 n.3 (Rehnquist, J., dissenting). Chevron argues that the Court's inquiry in *Keystone* was undertaken merely to make sure that the law at issue served public rather than private purposes, and provides no guidance for the standard to be applied where the issue is whether the law may be ineffective in accomplishing its goal. Chevron Br. 41-42. To the contrary, the possibility that the Court's analysis might be read as weighing the *extent* to which the Pennsylvania law served its announced public purpose was precisely what prompted Chief Justice Rehnquist's warning against reviewing the effectiveness of legislation, and his concern on that point was embraced by the majority of the Court. *Keystone* clearly directs the courts to avoid second-guessing the efficacy of economic regulation under the Just Compensation Clause.

B. The Just Compensation Clause Does Not Impose Any Procedural Obligation On Legislatures To Document The Harms That A Regulation Addresses

As observed above, the *de novo* review applied by the lower courts in this case represents such a startling departure from the traditional role of the courts in reviewing legislative policy judgments that Chevron does not attempt to defend it before this Court. Chevron nonetheless attempts to salvage the judgment below by suggesting that Act 257 would have been found to be a taking even under a standard that did not involve "resolving conflicting evidence or deciding which party's evidence is more persuasive." Chevron Br. 46. Chevron argues that the Hawaii legislature was required "to identify some credible evidence suggesting the likelihood of the posited harm before taking property to avert that harm." *Id*. at 49. Without such legislative fact-finding, Chevron submits, the legislature's economic judgment deserves no deference.

However, Chevron points to nothing in the Court's takings jurisprudence that supports this extraordinary, ill-defined procedural obligation on legislatures enacting economic regulations. Chevron adverts to the intermediate standard of review applied in First Amendment cases such as *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994). But the standard developed to address the special issues raised by restrictions on speech cannot logically be applied to questions about the policy wisdom of economic legislation generally. Certainly the Court has turned aside similar arguments in other contexts. *Cf. Atkins v. Parker*, 472 U.S. 115, 129-30 (1985) (rejecting argument that Due Process Clause imposes procedural constraints on legislatures); *Bi-Metallic Investment Corp. v. State Bd. of Equalization*, 239 U.S. 441, 445

(1915) (same). Moreover, the Court noted in *Dolan* that challenges under the Just Compensation Clause to generally applicable regulations are to be determined by the deferential standards adopted in the Court's traditional due process cases. 512 U.S. at 391 n.8. Under those familiar standards, the courts do not require the legislature to articulate its reasons for enacting a statute or to make any particular evidentiary showing before taking legislative action; a law will be upheld if "any state of facts, either known or which could reasonably be assumed, affords support for it." *United States v. Carolene Products Co.*, 304 U.S. 144, 154 (1938).

In any event, and as Chevron well knows, the Hawaii Legislature investigated the economic threat posed by oligopoly in the gasoline industry in Hawaii, and the particular problem posed by the need to maintain lessee-dealers as independent price-setters in the retail gasoline market, for *eight years* prior to enactment of Act 257.[10] The Legislature began its investigation after gasoline prices rose sharply in Hawaii in the wake of the *Exxon Valdez* disaster. In 1991, as the Legislature considered enacting a "divorcement" law, similar to that sustained by this Court in *Exxon*, that would have prohibited oil companies from operating their own stations, it imposed a legislative moratorium on the construction of new company-operated stations in Hawaii as an interim measure to protect lessee-dealers and consumers. 1991 Haw. Sess. Laws Act 295. That moratorium was renewed in 1993 and 1995. 1993 Haw. Sess. Laws Act 329; 1995 Haw. Sess. Laws Act 238.

Act 257, enacted in 1997, represented a classic legislative compromise. The Legislature chose not to pursue the more drastic divorcement approach, and terminated the six-year moratorium on construction of new company-operated sta-

[10] *See* 1991 Haw. Sen. Journal 322 (remarks of Senator Ikeda) (observing that the number of independent dealers had declined from 600 in 1979 to less than 300 in 1991, and urging steps to prevent gasoline marketing from becoming "a total monopoly.").

tions. Instead, the Legislature enacted a multi-pronged bill that included requirements for collecting information regarding the gasoline market, prohibitions on conversion of leased stations, and the rent cap at issue in this case. The Legislature held three hearings on the proposed law, at which Chevron among others presented written statements.[11] The floor debates dealt with the economic arguments for and against the legislation; significantly, these arguments were essentially the very same arguments later reprised before the federal district court in this case.[12] The law's enactment demonstrated the Legislature's determination to "foster competition in the marketplace," 1997 Haw. Sen. Journal 511 (remarks of Senator Baker), and its concern that high lease rents might put economic pressure on lessee dealers, forcing them out of the retail market.[13]

Chevron asserts, nonetheless, that there is no evidence of any real threat that it, or other oil companies, might attempt to displace its lessee-dealers, and denies having any incentive to do so. The economic self-interest that oil companies have in increasing their direct sales of gasoline and eliminating mid-

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[11] *See, e.g.,* 1997 Haw. Sen. Journal 511 (remarks of Senator Baker) (noting that the committee had made a "concerted effort to obtain as much information as possible so we could make an informed decision," including informational briefings and public hearing); Sen. Stdg. Comm. Rep. No. 1528, 1997 Haw. Sen. Journal 1472 (noting committee had held hearings on H.B. No. 1451).

[12] *See, e.g.*, 1997 Haw. House Journal at 926-28 and 1997 Haw. Sen. Journal at 510-12.

[13] *See, e.g., id.* at 771 (remarks of Senator Baker) (noting that bill addressed concerns of dealers "who feared that they would be forced out of the market due to the potential predatory actions of manufacturers"); 1997 Haw. House Journal 926 (remarks of Rep. Yoshinaga) (bill protects dealers from being driven out of business by "excessively high rents"). The legislative history shows that, in addition to its goal of preserving a competitive retail marketplace, the Hawaii legislature was concerned about preserving the wide range of services traditionally offered by lessee dealers. *See, e.g.*, 1997 Haw. Sen. Journal 510-12 (remarks of Senators Kawamoto, Baker and Anderson).

dlemen is well-recognized, however, and was acknowledged in the evidence at trial. JA 115, 120. The Petroleum Marketing Practices Act (PMPA) was enacted by Congress because of similar concerns. *See* S. Rep. No. 95-731, at 21-25 (1978) (describing concerns for consumer welfare from increasing dominance of company-operated stations and risk that economic power of wholesaler "can be used to eliminate independent buyers"). The PMPA was amended in 1994 to restrain oil companies from intentionally converting their dealer operations to company stations, after the Senate Judiciary Committee documented the oil companies' repeated and flagrant use of economic pressure, including confiscatory rents, to drive independent dealers out of business. *See* State Br. 3 n.1. *See also* Br. of Service Station Dealers of America. To describe Hawaii's effort to address the same problem as "irrational" is entirely specious.[14]

CONCLUSION

The judgment of the Ninth Circuit should be reversed.

[14] Chevron argues that the *other* protective provisions of Act 257, precluding location of company-operated stations in proximity to lessee-dealer stations and permitting company operation of lessee dealer stations only for limited periods, render the protection afforded by the rent cap unnecessary. The legislature is entitled to adopt overlapping measures, however, to ensure that the public is protected. The other measures in Act 257 would afford little real protection for the retail marketplace if independent dealers were squeezed out by high rents, even if the oil companies were hindered in moving into their locations.

Respectfully submitted,

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