No. 04-163



In The

# Supreme Court of the United States

LINDA LINGLE, Governor of Hawaii, et al.,

*Petitioners,*

v.

CHEVRON U.S.A. INC.,

*Respondent.*

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

## BRIEF OF THE AMERICAN PLANNING ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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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.

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## INTEREST OF *AMICUS CURIAE*[1]

The American Planning Association is a nonprofit public interest and research organization, founded in 1978 exclusively for charitable, educational, literary, and scientific research purposes to advance the art and science of planning – physical, economic and social – at the local, regional, state, and national levels. APA's mission is to encourage planning that will contribute to public well-being by developing communities and environments that more effectively meet the present and future needs of people and society.

APA resulted from a merger between the American Institute of Planners, founded in 1917, and the American Society of Planning Officials, established in 1934. The organization has 46 regional chapters and 19 divisions devoted to specialized planning interests. APA represents more than 34,000 practicing planners, officials, and citizens involved with urban and rural planning issues. Sixty-five percent of APA's members work for state and local government agencies. These members are involved, on a day-to-day basis with the public, in formulating planning policies and preparing land-use regulations.

The American Planning Association has filed *Amicus* briefs in a number of cases involving the Takings Clause: *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *Williamson County Regional Planning Com'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985); *First English Evangelical*

[1] Counsel for the parties did not author this brief in whole or in part. No person or entity other than the *amicus*, its members, and its counsel made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of *amicus* briefs.

*Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304 (1987); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); and *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002).

This case raises critical issues of national importance for state and local governments, and planners who work both in the public and private sectors, as well as the general public they serve.

## SUMMARY OF ARGUMENT

Courts should not substitute their views of the wisdom or efficiency of state economic legislation under the guise of the Takings Clause.

The Takings Clause conveys a straightforward message: when government physically takes property, it must pay. Yet, no property of Respondent was physically taken by the statute.

Regulations that destroy all economic value of property also may fall within the compensation command of the Takings Clause based on the principle that such a denial is the functional equivalent of a confiscation. Yet, the statute did not deprive Respondent's property of economically viable use.

Principle does not support moving the Fourteenth Amendment's substantially advances test into the Takings Clause of the Fifth Amendment. The question of the

validity of government action is not a part of the takings inquiry, and it ought not become so based on the historical confusion between due process and takings.

The adoption of legislation, particularly at the local government level, aided by the planning process, involves the participation of all segments of the community working to define the public interest. Allowing judges to second guess legislation will undermine the public's role in the democratic process. Intermediate judicial scrutiny is neither needed nor justified to protect those who are well represented in legislative halls.

## ARGUMENT

### I. Whether legislation substantially advances a legitimate state interest is not a question within the purview of the Takings Clause.

#### A. Neither the language nor the purpose of the Takings Clause supports the use of the substantially advances test.

The Ninth Circuit's decision invalidating Hawaii's statute on the grounds that it represents unwise and ineffective legislation is wrongly based on the Takings Clause of the Fifth Amendment. The Takings Clause – "nor shall property be taken for a public use without just compensation" – on its face limits the eminent domain power, not the police power. The Court has subjected the police power to the Takings Clause, but only in cases where regulations have an economic impact that is tantamount to a confiscation of property. Except insofar as the exercise of the power of eminent domain must be for a public use, ill-advised governmental action is not within

the purview the Takings Clause. As Chief Justice Rehnquist has said:

> This basic understanding of the [Fifth] 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 an otherwise proper interference amounting to a taking.

*First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 314-315 (1987).

The substantially advances test, drawn from *Agins v. City of Tiburon*, 447 U.S. 255 (1980), and used by the Ninth Circuit in the case at bar, assesses the validity of government action pursuant to the police power. This question, however, precedes the takings question. If a court finds a regulation does not substantially advance a legitimate state interest, the case is over and the regulation is invalidated. If a court finds the law does substantially advance a legitimate state interest, then the court may move to the question of whether that law has gone too far in the imposition of economic harm on a property owner and thus been converted into a taking. The substantially advances test, already answered, should not be reexamined as part of the takings inquiry.

The plain language of the Takings Clause cannot support a requirement that a law substantially advance a legitimate state interest. The mandate is straightforward. If government takes property for a public use, it must pay. While deciding what constitutes a "taking" or a "public use" or qualifies as "property" or suffices as "just compensation" may be difficult, they are questions that must be asked. What is not covered, and no reading, however

tortured, can supply it, is whether the government is doing a good job in legislating to promote the general welfare.

While the Court "has . . . not read [the Takings Clause] literally," *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 142 (1978) (Rehnquist, J., dissenting), it has gone beyond the language of the Amendment to transmute regulations into takings in only the narrow circumstance where a regulation is the functional equivalent of a confiscation. Thus, while the operative language of the clause connotes a physical invasion or seizure, under *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922), an otherwise valid regulation can be converted into a taking if it goes "too far." *Id.* at 415. In language perhaps more familiar to the law, such a regulation constitutes a "constructive taking" based on the reasoning that a "total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1017 (1992).

In contrast to the *Agins* supposed substantially advances takings test, *Pennsylvania Coal's* regulatory takings equation is a principled interpretation of the Takings Clause. Over the years, the Court has steadfastly viewed the purpose of the Fifth Amendment's Takings Clause to prevent government from forcing one property owner "alone [to] bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). For the greater good, the property owner yields the land but his loss is mitigated by the payment of compensation and the burden of paying is shared by the public by use of public funds. As explained in *Pennsylvania Coal*, the Takings Clause prevents government from "forgetting that a strong

public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." 262 U.S. at 416.

A concern for excessive economic impact does not enter into the antecedent question of whether a law substantially advances a legitimate state interest. That question is applicable to all legislation and is grounded on the proposition that there are some things government may not do under any circumstance. The Takings Clause only comes into play where an otherwise valid measure is alleged to have gone too far and extracted too much. It is at this point that the "fairness and justice," which are the guideposts for the Takings Clause, come into play. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 334 (2003).

### B. No explanation has been forthcoming as to how the substantially advances test fits within either the language or purpose of the Takings Clause.

The entry of the "substantially advance" language into the takings lexicon was either a mistake or a momentous change in takings jurisprudence that was announced without fanfare or explanation. The former is the more likely explanation. *Agins v. City of Tiburon*, 447 U.S. 255 (1980), drew the substantially advances test from *Nectow v. City of Cambridge*, 277 U.S. 183 (1928), a substantive due process case.[2] The Court in *Agins* said:

[2] While the declaration in *Agins* is commonly viewed as the source of the supposed incorporation of the Fourteenth Amendment test into

(Continued on following page)

> The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, see *Nectow v. Cambridge*, . . . , or denies an owner economically viable use of his land, see *Penn Central*. . . . The determination that governmental action constitutes a taking is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest.

447 U.S. at 260.

Glaringly absent from the above quoted language is an explanation that links the *Nectow* rule in the first clause of the first sentence, that a valid exercise of the police power must substantially advance a legitimate state interest, to the ultimate goal set out in the second sentence of determining whether it is fair to burden a single landowner with the cost of an otherwise valid police power measure.

No principled explanation has been offered as to how a law that does not substantially advance a legitimate state interest can be a taking within the language or purpose of the Takings Clause. On numerous occasions the Court has stated that a regulation that does not substantially advance a legitimate state interest is a taking, but as the Court observed in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999), it has yet to offer "a thorough explanation of the nature or applicability of the requirement that a regulation substantially advance

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the Fifth Amendment, two years earlier, the Court used "substantially advances" language in *Penn Central*.

legitimate public interests outside the context of required dedications or exactions." *Id.* at 704.[3] Lower courts have likewise failed to explain how the test fits within the Fifth Amendment. This lack of an explanation is understandable since, outside the context of physical exactions, a regulation that does not substantially advance a legitimate state interest cannot be viewed as the functional equivalent of a physical appropriation, the touchstone of the regulatory takings doctrine.

In most of the instances when the Court has expressed the *Nectow* or *Agins* substantially advances language as a takings test, it has done so in dicta. On the few occasions when the Court has applied the test and said that a particular regulation is not a taking because it passes the substantially advances test, it has not only not paused to discuss why it is relevant to ask that question but in those cases, the landowner's so-called takings claim was in fact an effort to secure an invalidation of the law in question, not to seek compensation. In *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987), the Court declared the Pennsylvania prohibition of mining so as to cause surface subsidence substantially advanced a state interest and then moved on to the question of economic impact. The answer to the former question was virtually a given, and, while four justices dissented, none took issue with this conclusion. The serious question of the case for the majority and the dissent was whether the

[3] Five members of the Court have expressed serious reservations about the test, see *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998) (Kennedy, J., concurring in the judgment but dissenting in part, and, Breyer, J., joined by Stevens, J., Ginsburg, J., and Souter, J., dissenting.

statute went too far in the economic harm it imposed on owners of the mineral estates.

In *Del Monte Dunes,* the Court upheld the trial judge's decision to allow the jury to determine the city's takings' liability, which included ascertaining whether the city's permit denials substantially advanced the stated purposes of its regulations. Since the city itself had proposed the jury instructions that included the *Agins* question, the Court "decline[d] the suggestions of amici" to address the issue. 526 U.S. at 704. These uses of the substantially advances test hardly constitute endorsements of the test since its application was not contested in *Keystone* and was assumed in *Del Monte Dunes*.

It is not a strong endorsement of *Agins* as a takings test to say that the courts have repeated it often. Yet, no other reason is forthcoming. Repeated inconsequential reiterations should not be used to knowingly validate a test that stems from an erroneous reading of authority and cannot be tied to the language or purposes of the Takings Clause. Merely wishing to have intermediate scrutiny applied to regulations of property is also insufficient.

### C. The historical confusion between due process and regulatory takings led to the mistaken application of the substantially advances test of the former into the latter.

Confusion has been a constant companion of the regulatory takings doctrine. This confusion can be traced to the doctrine's origins, which is usually said to have been the 1922 *Pennsylvania Coal v. Mahon* decision. 260 U.S. 393 (1922). With the advantage of hindsight we can look back and say that the regulatory takings doctrine originated

in the 1922 *Pennsylvania Coal* decision, but at the time the decision was handed down it was not clear that anything new had been done. When the Court spoke of regulations as takings in *Pennsylvania Coal*, it was difficult to distinguish that idea from then prevailing views of substantive due process.[4]

In the latter part of the Nineteenth Century and early Twentieth Century, the jurisprudence of the Court was that the validity of a police power regulation depended on whether the measure promoted the public interest by a means reasonably necessary to accomplish the purpose and was "not unduly oppressive upon individuals." *Lawton v. Steele*, 152 U.S. 133, 137 (1894). *Pennsylvania Coal*'s holding that otherwise valid regulations that went "too far" were takings in effect restated the *Lawton* due process "unduly onerous" test. The result has been a confusion of tongues and minds, as courts have spoken of "due process takings." *See Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 199 (1985); *GJR Investments, Inc. v. County of Escambia*, 132 F.3d 1359, 1364 (11th Cir. 1998).

Certain features of the *Pennsylvania Coal* opinion caused or aided this confusion. The state by definition must be a party to a takings claim yet the case was between private parties. The Takings Clause has a self-executing compensation remedy, but invalidation, not compensation, was the remedy awarded. In other words

[4] For a complete historical analysis, see Edward J. Sullivan, Emperors and Clothes: The Genealogy and Operation of the *Agins*' Tests, 33 Urb. Law. 343, 345-348 (2001). *See also* Julian C. Juergensmeyer and Thomas E. Roberts, Land Use Planning and Development Regulation Law § 10.9 (Thomson-West 2003).

what happened in the case duplicates what would have happened had the Court not mentioned the Takings Clause and relied instead on the Fourteenth Amendment's Due Process Clause. So great was the confusion that it was not known for decades whether the remedy from a regulatory taking was a Fourteenth Amendment declaration of invalidity coupled with an injunction or a Fifth Amendment taking requiring the assessment of compensation due. The historically accurate reading is merely an academic point today.[5] But, the fact of the confusion is of great importance because it goes to the heart of the error made by the Ninth Circuit in this case.

The confusion created by *Pennsylvania Coal* between due process and takings concerned the excessive impact of a regulation, not whether the regulation substantially advanced a legitimate state interest. For Justice Holmes the legitimacy of the action was a given:

> We assume, of course, that the statute was passed upon the conviction that an exigency existed that would warrant it, and we assume that an exigency exists that would warrant the exercise of eminent domain. But the question at bottom is upon whom the loss of the changes desired should fall.

*Pennsylvania Coal*, 260 U.S. at 416.

[5] Professor James Ely notes that the Court had intimated that regulations could become takings before 1922. *See* James W. Ely, Jr., The Fuller Court and Takings Jurisprudence, 1996 J. Sup.Ct. History, vol. II at 120. Then again, Professor Brauneis notes problems with viewing *Pennsylvania Coal* itself as a takings case. *See* Robert Brauneis, The Foundation of Our "Regulatory Takings" Jurisprudence: The Myth and Meaning of Justice Holmes's Opinion in *Pennsylvania Coal v. Mahon*, 106 Yale L.J. 613 (1996).

The confusion, instead, dealt with the third "unduly onerous" prong, which came to be confused with the "too far" test. Consequently, some courts viewed *Pennsylvania Coal* as a due process case, believing that Justice Holmes spoke merely "symbolically" in using takings language or as this Court said in *Williamson County,* he may have spoken "loosely." 472 U.S. at 198.

In *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962), the Court distinguished between takings and due process. The Court there held that a ban on excavation as applied to a sand and gravel business was not a taking because there was no showing of a reduction in the value of the property. *Id.* at 594. After reaching this conclusion, the Court looked at the validity of the ban, concluding that it did substantially advance a legitimate state interest. In reaching this conclusion this Court did not mention the Takings Clause but the Court did rely on the leading substantive due process case of *Lawton v. Steele*, 152 U.S. 155 (1894). *Goldblatt*, 369 U.S. at 594. Despite *Goldblatt*, the confusion reemerged in *Agins.*

*First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), partially resolved the confusion by settling the debate as to whether claims of excessive economic impact were actionable under the Takings Clause. The Court there held that regulations that went "too far," or, put another way, were excessive in their impact upon the affected property owner, were real, as opposed to symbolic, takings. Thus, a judicial finding of a taking by regulation triggered the "self-executing compensation remedy" of the Takings Clause. *First English*, *Id.* at 315.

A lingering question as to claims of severe economic impact from regulations is whether the Takings Clause is the exclusive home to such claims. The question is answered by the doctrine that where there is an explicit textual source in the constitution it must be used to determine liability rather than generalized notions of substantive due process. *See Graham v. Connor*, 490 U.S. 386 (1989) (claims of excessive force during arrest must be brought under the Fourth Amendment) and *Whitley v. Albers*, 475 U.S. 312 (1986) (injuries suffered in a prison riot must be heard under the Eighth Amendment). Though the Fifth Amendment is not an explicit textual source for compensation from excessive regulations, the reasoning of *Graham* and *Whitely*, as well as *Pennsylvania Coal* and *First English* call for application of the rule.

While this Court has not specifically addressed whether the Fifth Amendment Takings Clause qualifies as sufficiently explicit under the *Graham-Whitley* doctrine, the functional equivalence of regulatory takings to physical appropriations should yield that conclusion. And several circuit courts have so held. *See Banks v. City of Whitehall*, 344 F.3d 550 (6th Cir. 2003); *John v. City of Houston*, 214 F.3d 573, 583-583 (5th Cir. 2000). There is no merit in having two independent yet virtually identical causes of actions. Thus, allegations of excessive economic impact should be exclusively within the province of the Fifth Amendment's Takings Clause. But, that does not mean that allegations of arbitrary legislation likewise should be subsumed by the Takings Clause. *See* Julian C. Juergensmeyer and Thomas E. Roberts, Land Use Planning and Development Regulation Law § 10.12 C (Thomson-West 2003).

While the *Graham-Whitely* issue is not directly before the Court in this case, it is important to recognize its relevance to clarifying the distinction between regulatory takings and due process. The thrust of those cases, along with *Pennsylvania Coal* and *First English,* is that at the most the Due Process Clause can provide a check on the validity of legislation, while the Takings Clause deals with the question of whether otherwise valid government actions either confiscate or effectively confiscate property so as to become takings.

The strand of confusion that remains is the one in this case and it is of more recent origin, dating back only to the 1980 *Agins* case. The Court can remove that confusion in this case by applying the principled standard of the Takings Clause that has heretofore guided its decisions: The Fifth Amendment regulatory takings claim assumes the legitimacy of the regulation but demands that where the effect of the regulation is so great that it is the functional equivalent of a physical appropriation the landowner must be compensated.[6]

[6] Legitimacy of the exercise of eminent domain must of course be shown to meet the Public Use clause. That issue and such public use cases like *Hawai'i Housing Authority v. Midkiff*, 467 U.S. 229 (1984) and *Kelo v. City of New London*, 268 Conn. 1, 843 A.2d 500 (2004), *cert. granted*, 125 S.Ct. 27, 73 USLW 3178, 73 USLW 3204 (Sep. 28, 2004) (NO. 04-108) are different from regulatory takings actions in that they check unlawful government action rather than compensate for excessive regulation.

### D. *Nollan's* essential nexus test applies to physical exactions, and is not dependent on the substantially advances test.

In *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), the Court applied the "substantially advances" test in the context of a physical exaction. The Court purportedly used the *Agins* test to find a taking but, though superficially applicable to the facts of the case, the *Agins* formulation was irrelevant to the holding reached in the case. In *Nollan*, when the owners of a beachfront lot sought permission to build a larger house, the state coastal commission conditioned the permit on the granting of an easement to allow the public to walk along the beachfront side of the lot. The Court had no quarrel with the legitimacy of the state-asserted interests (to protect the public's ability to see the beach from the street, to prevent congestion on the beach, and to overcome psychological barriers to the use of the beach resulting from increased shoreline development), but the Court was not convinced that the required lateral access easement along the beach front would promote them.

While this Court in *Nollan* found that the interests asserted by the state would not have been substantially advanced by the easement sought, the Court's concern was the state's justification for singling out the Nollans to contribute land for the public use, which the Court found wanting. The lack of a sufficient nexus between what the Nollans proposed to do and what the state was asking in return led the Court to conclude that the state's problems were not of the Nollans' making. If California wanted an easement, the Court said it would have to pay for it. This was the heart of the opinion. What was important was not whether the law substantially advanced a legitimate state

interest but whether the government was attempting to force the property owners "alone bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

Although the regulation at issue in *Nollan* did not substantially advance a legitimate state interest, the question did not need to be asked in order to decide whether a taking had occurred. While the means and ends did not link up in *Nollan*, imagine what would have happened had the state "come clean" so to speak, and simply admitted that it wanted the easement to aid public passage on the beach. Obtaining an easement unquestionably would have substantially advanced a legitimate state interest, and thus not run afoul of the *Agins* test. No one, however, would contend that it therefore was not a taking. Yet, that is where *Agins* leads.

*Nollan* does not deal with issues of regulatory takings but rather establishes the essential nexus test for physical exactions. When the state conditions development permission on a landowner dedicating property to public use it may do so without paying compensation only if the dedicated land is "reasonably necessary," *Nollan*, 483 U.S. at 834, to prevent or counteract anticipated public effects of the landowner's actions. The only difficulty with *Nollan* is that asking the wrong question runs the risk of unfair results in that it does not answer the question of who should bear the burden in question. The corrective step needed is to recognize that the use of the word "substantially" was unnecessary to the essential nexus test. A land exaction may be required because of its use or because of its location. While acquiring the land by either method substantially advances a legitimate interest, compulsory

dedication should only be imposed on those whose use is related to the interest the state is promoting. Those who own land the state happens to need but who are not contributors to or involved in the project or program that creates the need should be compensated.

In *Dolan v. City of Tigard*, 512 U.S. 374 (1994), the Court added a rough proportionality requirement to physical exactions. In *Dolan*, the Court remanded a case to the state court requiring the city to show that its demand for land for a greenway and pedestrian pathway was roughly proportional to the new burdens that would be placed on the city by the landowner's increased development.

The *Nollan* and *Dolan* requirements, that government carry the burden of justifying the need for exacting land, are based directly on the language of the Takings Clause. Physical takings of land must be compensated unless the state can show that the exaction is a legitimate condition of development permission. Planners have incorporated these rules into the planning process. A year after the *Dolan* decision, *Amicus* American Planning Association incorporated the principle of fact-based decision-making in its 1995 Policy Guide on Takings.[7] The Policy Guide advises planners to establish a sound basis for land use and environmental regulations through comprehensive planning and background studies. The Policy Guide states that "a thoughtful comprehensive plan or program that sets forth overall community goals and objectives and which establishes a rational basis for land use regulations

[7] American Planning Association, Policy Guide on Takings (April 1995). http://www.planning.org/policyguides/takings.html.

helps lay the foundation for a strong defense against any takings claim." *Id.*

## II. The invalidation remedy that necessarily follows from a finding that a law does not substantially advance a legitimate state interest contradicts the express, self-executing compensation remedy of the Takings Clause.

The Ninth Circuit's invalidation of Hawaii's law turns a blind eye to the self-executing compensation remedy of the Takings Clause and thereby reveals the *Agins* masquerade. In *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), the Court held that the remedy for a regulatory taking, as with a physical taking, is compensation. As discussed above in Part I. C., this decision ended the debate as to whether the *Pennsylvania Coal* decision spoke merely symbolically of excessive regulations as takings by concluding that it did not. A regulatory taking was a true, not a symbolic, taking, insofar as the self-executing compensation remedy is concerned. 482 U.S. at 315. As Justice Kennedy has explained:

> The [Takings] Clause operates as a conditional limitation, permitting the government to do what it wants so long as it pays the charge. The Clause presupposes what the government intends to do is otherwise constitutional.

*Eastern Enterprises v. Apfel*, 524 U.S. 498, 545 (1998) (concurring in the judgment and dissenting in part).

An act that does not substantially advance a legitimate state interest as required by the federal constitution is void, *Nectow v. City of Cambridge*, 277 U.S. 183 (1928),

and a void act cannot be a taking. Allowing an ordinance found to not substantially advance legitimate state interests to remain in effect by treating it as an exercise of the power of eminent domain is not constitutionally permissible. Yet, the plain meaning of the *Agins* formula coupled with the express mandate of the Fifth Amendment means that an ordinance that does not substantially advance a legitimate state interest can remain in force if compensation is paid.

Numerous courts have made the point that where an ordinance is invalidated as an improper exercise of the police power, any loss sustained for the period the ordinance applied to the property is not a compensable exercise of the power of eminent domain. *Pheasant Bridge Corp. v. Township of Warren*, 169 N.J. 282, 777 A.2d 334, 343 (2001), *cert. denied*, 535 U.S. 1077 (2002), *Sea Cabins on Ocean IV Homeowners Ass'n, Inc. v. City of North Myrtle Beach*, 345 S.C. 418, 548 S.E.2d 595, 604 (2001), *Miller & Son Paving, Inc. v. Plumstead Twp.*, 717 A.2d 483 (Pa.1998), *cert. denied*, 525 U.S. 1121 (1999), *Landgate, Inc. v. California Coastal Commission*, 17 Cal.4th 1006, 953 P.2d 1188, 1195, 73 Cal.Rptr.2d 841, 848, *cert. denied*, 525 U.S. 876 (1998). *See also Board Machine, Inc. v. U.S.*, 49 Fed.Cl. 325, 328 (2001) (unauthorized action of government official not within the purview of the takings clause). *See generally* John D. Echeverria, Taking and Errors, 51 Ala.L.Rev. 1047 (2000).

Since the exercise of the power of eminent domain requires legitimate government action, a judicial finding of illegal or unauthorized action precludes the constitutional trigger of compensation. Even if the period of time from application to declaration of invalidity were viewed as a taking for a public use, that would not end the inquiry. A

second analysis would follow under the *Penn Central* factors to determine whether a taking had occurred.

While retrospective monetary relief could be labeled compensation for a temporary taking, characterizing a monetary award for the past effects of a law found invalid for failing to substantially advance a legitimate state interest as a taking means that the government took property by an illegal act. Since an award of just compensation "presupposes what the government intends to do is otherwise constitutional," *Eastern Enterprises*, 524 U.S. 498, 545 (1998) (Kennedy, J., concurring in the judgment and dissenting in part), awarding compensation for something the government did unconstitutionally is a constitutional impossibility.

Despite the Fifth Amendment's self-executing compensation remedy for a taking, *First English*, 482 U.S. at 315, the Court has recognized that an exception must be made in the unusual situation where monetary relief would be ineffective. For example, in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), coal companies sued to escape having to pay money into a retirement fund for miners. Finding the act to impose retroactive liability and constitute a taking, it made no sense to have the coal company comply with the law by paying money into the fund (and thus complete the taking) only to turn around and order the fund to give the money back to the coal company as compensation. But, as Justice Kennedy pointed out in his concurrence, this feature itself suggested that the takings clause was inapposite. 524 U.S. at 540.

Invalidation is the exception, not the rule. Asking that invalidation be recognized as a commonplace remedy for a

taking reveals the flawed basis of the Respondent's argument.

## III. Incorporating the substantially advances test into the Takings Clause in order to apply intermediate scrutiny to judge the wisdom and efficacy of government regulation undermines the legislative process and compromises orderly planning.

### A. The legislative and planning processes followed across the country, particularly at the local level, are the epitome of participatory democracy and deserve to be accorded substantial deference by the Court.

The planning and legislative processes that local governments use to consider, formulate, and adopt regulations are by their very nature participatory. Property owners, special interest groups, and members of the general public have ample opportunity to make their views known before elected officials adopt policies that will govern community affairs. If members of the public disagree with decisions made they have an opportunity to seek relief through the legislative or administrative appeals processes. In many states, they can engage in direct lawmaking by use of the initiative or referendum. And, they have the power at the polls to turn out of office those they believe have not served them well.

The appropriate way to promote the public's involvement in the development of state and local laws and regulations is through a democratic process that allows for public debate and deliberation based on studies designed to evaluate alternative approaches to achieving community objectives. The process may be time-consuming but

democracy often is. For example, this Court recognized the importance of the decision making process in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002), observing that the moratorium imposed by the regional agency allowed it "to obtain the benefit of comments and criticisms from interested parties, such as the petitioners, during its deliberations." 535 U.S. at 340. The district court in *Tahoe-Sierra* noted the complexity of the planning task, and found the agency had acted reasonably and in good faith, and did not waste time in enacting a new plan. 34 F. Supp. 2d 1226, 1250 (D. Nev. 1999). Courts should defer to the legislative judgments that flow from this process.

Involving the public in formulating legislation through public review and comments are concepts that are integral to the planning process. The Code of Ethics of the American Institute of Certified Planners,[8] whose membership includes more than 14,000 certified professional planners, places particular emphasis on the planning profession's special responsibility to serve the public interest and to involve the public in the process of balancing among divergent interests. To the planning profession the public interest is not an abstract concept but rather a set of principles that is defined through debate and with the full participation of citizens. To that end, the planner has special obligations that include striving to provide full, clear and accurate information on planning issues to citizens and governmental decision-makers. The planner's Code of Ethics requires that every effort be made "to give

[8] The American Institute of Certified Planners, known as AICP, is a subsidiary institute of *amicus* American Planning Association. http://www.planning.org/aicp/

citizens the opportunity to have a meaningful impact on the development of plans and programs. Participation should be broad enough to include people who lack formal organization or influence."[9] Endorsing the Ninth Circuit's second guessing of legislation would undermine the public's role in defining the public interest. And, as Judge J. Harvie Wilkinson has observed, in these times we can ill afford to do this:

> The very impersonality of global trends and national bureaucracy will leave state and local governments among the few places where a sense of civic connection with governing institutions can still be felt.

J. Harvie Wilkinson, III, Chief Judge, United States Court of Appeals for the Fourth Circuit, "Is There a Distinctive Conservative Jurisprudence?" 73 U.Colo.L.Rev. 1383, 1392-93 (2002).

### B. Judicial second-guessing destroys the public effort that the planning process embodies.

Intermediate judicial scrutiny is neither needed nor justified to protect those who are well represented in legislative halls. Property owners, developers, and financial institutions, along with special interest groups such as homebuilders and realtors associations, as well as environmental organizations, all have an opportunity to speak up on how their communities should develop and grow. The economic and political influence of those wishing to

[9] AICP Code of Ethics and Professional Conduct (Adopted October 1978, amended October 1991).

develop land or to prevent land from being developed will wax and wane. One group will be strong in some communities and weak in others. Legislators who disfavor growth will be replaced by those who favor growth or vice-versa. But those who are affected, particularly property owners, have a powerful voice in what happens.

The Court recognized in *Dolan v. City of Tigard* that "cities have long engaged in the commendable task of land use planning, made necessary by increasing urbanization." 512 U.S. 374, 396 (1994). Engagement in this task calls for a process that may be messy at times and may result in laws that are imperfect in design, but those imperfections are the essence of our democratic system. To permit a judge who thinks a law is imperfect or unwise, with the stroke of a pen, to undermine this democratic process violates the fundamental mandate of our constitutional government that separates the legislative, judicial, and executive branches.

## CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted,

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