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 U.S.A., INC.,

Respondent.

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

BRIEF OF ACTION APARTMENT ASSOCIATION, INC., AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

ROSARIO PERRY*
ROBERT J. FRANKLIN
LAW OFFICES OF ROSARIO PERRY
312 Pico Boulevard
Santa Monica, CA 90405
Telephone: 310.394.9831
**Counsel of Record*

Counsel for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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 a 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 THE *AMICUS CURIAE*

In Southern California concerns over *Lochner*'s revival, 198 U.S. 45 (1905), seem prosaic.[1] With the region's housing, environmental and fiscal problems more and more intrusive land use regulations are a certainty. Southern California property owners rely on Federal Courts not to turn back the clock, but to help manage conflicting demands on the community's resources that will only increase in the future.

Amicus Curiae Action Apartment Association, Inc., is a nonprofit association of Santa Monica and Los Angeles housing providers subject to rent control. Action advocates for its members in legislative and political forums and in court, where it has successfully challenged enactments violative of constitutional rights. The *Substantially Advance* requirement has protected Action's members from border-line irrational property infringement harmful to them and the community. In *Action Apartment Ass'n, Inc. v. Santa Monica Rent Control Bd.*, 94 Cal. App. 4th 587 [114 Cal. Rptr. 2nd 412] (2001), discussed *infra*, the Court used the *Substantially Advance* requirement to overturn a rent control enactment it found lacked "logic, fairness or justice" and was "an unedifying example of class legislation." 94 Cal. App. 4th 604, 606.

Amicus is currently prosecuting a takings claim in U.S. District Court for the Central District of California, *Action Apartment Ass'n, Inc. v. Santa Monica Rent Control Board*, CV04-10343.

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[1] The parties have consented to *Amicus Curiae* filing this brief. Neither party nor their counsel authored the brief in whole or in part. No one other than the *Amicus Curiae* and its counsel made a monetary contribution for this brief's preparation and submission.

SUMMARY OF ARGUMENT

Because society receives no benefits to offset the property owner's injury, land use regulations that are not in the public interest are unconstitutionally unfair takings.[2] Hawaii enacted a rent control statute which harms the public, but since its legislature could have rationally concluded otherwise Hawaii claims the law is fair.

The issue before the Court is which branch of government determines what is an unconstitutionally unfair infringement on property rights, the judiciary or the legislature?

It would be contrary to precedent, logic, public policy and the text of the Fifth Amendment to defer to the legislatures' judgment of the constitutional fairness of laws they author. Takings doctrine grants the police power significant intrusions into Fifth Amendment private property rights, including rational basis deference to the legislature's determination of what constitutes a public use. Were the Court to permit rational basis review of constitutional fairness, the Just Compensation Clause would be completely coterminous with the police power. Rather than a delicate balance of public and private interests, private property would be subject to all but the most irrational and arbitrary state action. Property owners could be singled out to bear burdens properly borne by the public as a whole. This is not what the Fifth Amendment contemplates.[3]

Choosing public uses may be best accomplished in the legislature, but assessing constitutional fairness is a judicial function.[4] There is no evidence legislatures are

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[2] *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414-416 (1922).

[3] *Yee v. City of Escondido*, 503 U.S. 519, 522-523 (1992).

[4] *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).

more competent arbiters of fairness and much to the contrary. In California, where state courts apply rational basis review to means-end analysis, municipalities have set off in a race for the bottom, enacting ever more confiscatory regulations and singling out property owners to fund and establish special-interest groups. Takings doctrine has been a successful effort to accommodate private property and the public interest. The Ninth Circuit correctly applied that doctrine to rent control. Its judgment should be affirmed.

STATEMENT OF THE CASE

Because Hawaii is small and remote it has high gasoline prices, an average of $.30 per gallon higher than the mainland.[5] In 1997 the Hawaii Legislature determined that the high prices were harming the State's economy and consumers. Rather than reduce gasoline taxes, encourage investment or subsidize consumers, it attempted to lower retail gasoline prices by regulating gasoline station owners. Act 257 § 3(c) of the 1997 Hawaii State Legislature limited the maximum rent that oil companies can collect from dealers who lease company-owned stations. The Legislature found that reducing dealers' operating costs would encourage dealerships, increase competition and thereby indirectly lower retail prices.[6]

Respondent Chevron U.S.A., Inc., owns two petroleum refineries in Hawaii. It retails its refined products through a network of Chevron owned stations. Chevron purchases or leases station plots, constructs the stations, performs ordinary maintenance and pays property taxes. Rather than operate the stations, it leases them to local dealers. It

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[5] *Chevron U.S.A., Inc. v. Cayetano*, 57 F. Supp. 2d 1003, 1009-1010, 1014 (D. Haw., 1998).

[6] *Id.* at 1010.

recoups its investment through monthly lease payments and profits from gasoline sales. Dealers are required to enter into a gasoline supply contract with Chevron, which unilaterally determines the wholesale prices it charges. Chevron has invested more than $58,000,000 in locally operated service stations in Hawaii.[7]

Chevron brought a 42 U.S.C.S. § 1983 claim against Hawaii's Attorney General and then Governor, since replaced as a party by current Governor Linda Lingle, hereinafter "Hawaii." Chevron asserted that Act 257 abridged its Fifth Amendment property rights because it did not substantially advance a legitimate state interest. Since Act 257 burdened their property, Chevron claimed it effected a taking.[8]

On cross-motions for Summary Judgement the parties stipulated that the Act's rent cap would increase the value of dealers' leaseholds, and that incumbent dealers would be able to sell their franchises and capture the premium.[9] Hawaii does not see premium capture as a problem. Rather than inhibiting dealers from realizing their profits, the Act's § 3d provides that nothing prevents them from doing so.[10] The Court granted Chevron summary judgment on two grounds. It held that because Act 257 lacked a mechanism preventing premium capture it failed to substantially advance the State's interest of lowering gasoline prices. Instead, it increased the price of leaseholds. Incumbent dealers could capture their premium by selling to new dealers, who would have no benefit to pass on to consumers. It further held that the Act's failure to

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[7] *Chevron U.S.A., Inc. v. Cayetano*, 198 F. Supp. 2d 1182, 1185-1186 (D. Haw., 2002).

[8] *Chevron U.S.A., Inc. v. Cayetano*, 57 F. Supp. 2d at 1010.

[9] *Chevron U.S.A., Inc. v. Cayetano*, 224 F.3d 1030, 1033 (9th Cir., 2000) (*Chevron I*).

[10] *Chevron U.S.A., Inc. v. Cayetano*, 57 F. Supp. 2d at 1005.

prevent Chevron from raising wholesale gasoline prices to recoup lost rental income also rendered it ineffective.[11]

On appeal, Hawaii did not contest the District Court's finding that the Act was intended to reduce retail gasoline prices. Instead, it claimed that the correct standard of review was not whether the Act failed its goal, but whether the legislature "rationally could have believed the Act would substantially advance a legitimate government purpose."[12] It further argued that whatever the standard, material issues of fact remained and therefore summary judgment was inappropriate.

The Ninth Circuit reversed and remanded. It disagreed with Hawaii's contention that the State's rational belief in a substantial means-end relationship entitled it to enact any rent control law no matter how misguided. But it also found fault with the Court's analysis. Chevron's showing that the Act permitted premium capture and pass-through of rental losses to consumers did not meet plaintiff's burden under the *Substantially Advance* requirement. Chevron had to show that either premium capture or pass-through would occur, and occur to the extent that they would defeat the Act's goals.[13]

Upon remand Hawaii agreed that dealers would not pass rent savings on to consumers, and admitted that rents had nothing to do with high retail prices.[14] Instead, it presented evidence that lower rents would attract more dealers, stimulating competition and thereby indirectly lowering prices.[15]

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[11] *Id.* at 1012-1014.

[12] *Chevron U.S.A., Inc. v. Cayetano*, 224 F.3d at 1033, n.3 (*Chevron I*).

[13] *Id.* at 1037-1038.

[14] *Chevron U.S.A., Inc. v. Cayetano*, 198 F. Supp. 2d 1182, 1190-1191.

[15] *Id.* at 1191.

Hawaii's theory was weak and did not prevail. The District Court found that Act 257 would raise gasoline prices and reduce competition. While incumbent dealers benefited from the Act, no one else did. The Act contained no incentives for dealers to lower retail prices. At the same time, Chevron had a great incentive to raise prices – to recoup lost rents – and its supply contracts gave it the power to do so. Moreover, the shortage of dealerships was not due to too few Hawaiians willing to operate them, but too few oil companies willing to finance them. Rent control would discourage, not encourage, oil company investment, and lead companies to raise prices and close marginally performing stations. It would make a bad situation worse.[16]

Hawaii again appealed, arguing that the (1) District Court applied the wrong standard, (2) granted it inadequate deference, and (3) reached an erroneous conclusion. Even dissenting Circuit Judge Fletcher conceded the evidence clearly proved that the Act did not substantially advance a legitimate purpose.[17] The Circuit held Hawaii's other two arguments barred by the law of the case. The Court granted Hawaii's Petition for a Writ of Certiorari.

ARGUMENT

1. The *Substantially Advance* requirement is firmly rooted in the Court's Just Compensation Clause jurisprudence.

A. The Just Compensation Clause protects private property from unfair takings.

"Nor shall private property be taken for public use, without just compensation." U.S. CONST., AMDT. 5. The aim of the Just Compensation Clause is to prevent the

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[16] *Id.* at 1191-1192.

[17] *Chevron U.S.A., Inc. v. Lingle*, 363 F.3d 846, 859 (9th Cir., 2004) (J. Flectcher, dissenting).

government "from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

Takings problems arise from either physical invasion or public programs. Public programs, even well intentioned ones, may effect takings. *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978). Allegations that they do – regulatory takings claims – present issues of whether economic legislation exceeds the bounds of fairness and justice. But whether one views the Fifth Amendment as a limitation on police powers, or police powers a limitation on property rights, neither engulfs the other:

> "The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. . . . When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States. The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

In order to determine the bound of fairness and justice, and if the government has gone too far, the Court articulated a three-factor balancing test. The first two factors – the regulation's economic impact on the claimant and the extent to which it interferes with reasonable investment-backed expectations – focus on the property right infringement. The third – the character of the governmental action – focuses on the public benefit. *Penn Central Transp. Co. v. New York City*, 438 U.S. at 124. The test is an ad hoc, factual inquiry. *Id.*

A number of corollaries – the *Substantially Advance* requirement included – arise from the *Penn Central* formulation. Although these corollaries are commonly referred to as "exceptions" or "alternatives" to the *Penn Central* test, they are more precisely special applications of the test, applications where one factor tips the scales so strongly it is unnecessary to weigh the other two. For example, a regulation which denies property owners all economically viable use of their property is a taking without regard to the public benefit.[18] And under the *Nuisance Exception,* the government can employ its police power to prevent property owners from using their property to injure others without providing compensation.[19]

The *Substantially Advance* test uses the same logic as the *Nuisance Exception*, but it applies in opposite circumstances. Under the test, a regulation which limits land use but fails to substantially advance a legitimate state interest effects a taking.[20] In accord with the *Nuisance Exception,* parties pleading no substantial advancement are not required to establish the extent to which the challenged law affects property values. But instead of providing a defense for governments advancing urgent public interests, the *Substantially Advance* requirement helps plaintiffs avoid property infringement where the character of the public interest is so slight it cannot conceivably outweigh any right infringed.

B. The *Substantially Advance* requirement is an integral part of takings analysis.

While *Agins* articulated the *Substantially Advance* requirement's modern formulation, it neither invented it

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[18] *Agins v. Tiburon*, 447 U.S. 255, 260 (1980).

[19] *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 512-513 (1987) (J. Rehnquist, dissenting).

[20] *Id.*

nor borrowed it from due process doctrine. The rule that a land use regulation which fails to substantially advance a state interest is unconstitutionally unjust had long been relied upon to overturn legislation.

In *Pennsylvania Coal v. Mahon*, the Mahons owned the surface estate underneath which the Pennsylvania Coal Company mined coal. The Mahons derived their title from the company, which had reserved the right to remove coal without liability from its activities. Despite the reservation, the Mahons sought an injunction preventing further mining beneath their premises under the Kohler Act of 1921. The Act prohibited mining that caused subsidence under structures on land where the surface and underground rights were owned by different parties.[21]

The Kohler Act was unfair and thus a taking. Because concurrent owners of both estates were allowed to extract coal without limitation, surface estate owners could acquire underground estates free of restrictions, and inflict harms the Act sought to prevent. The Act benefited surface owners, not the public. The coal company surrendered its mining rights under the pretext of subsidence prevention, but the Act failed to prevent subsidence, so it received nothing for its rights, no "average reciprocity of advantage."[22] Without reciprocity the Act was unconstitutionally unfair.

Pennsylvania Coal is the source of the modern *Substantially Advance* test.[23] Contrary to Hawaii's assertion,

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[21] *Pennsylvania Coal Co. v. Mahon*, 260 U.S. at 412-413.

[22] *Id.* at 414-416. In addition to finding the Act unconstitutionally served purely private interests, Justice Holmes found that it denied the coal company any value for its rights. Both the denial of a viable use and the lack of a substantial advancement of a public purpose rendered the Act unconstitutional. *Id.* at 414.

[23] *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. at 484-485.

Agins's formulation was not dictum.[24] The *Agins* Court applied the test, finding that Plaintiffs challenging the City of Tiburon's zoning ordinances had no substantial advancement claim. Tiburon's zoning insured orderly development and open spaces, which Plaintiffs also enjoyed. The shared advantages meant the law was fair. *Agins v. Tiburon*, 447 U.S. at 262. *Agins* conducted the same review *Chevron I* required of the District Court, except here the District Court came down against the government. Since Act 257 hurts Hawaii's consumers and economy, Chevron receives no reciprocity for surrendering its property rights. The Ninth Circuit's holding that this effects a taking is in accord with long-standing Fifth Amendment doctrine.

Takings claims require a fairness evaluation, described variously as "proportionality," "cost spreading," "means-ends" or "reciprocity of advantage."[25] The *Penn Central* Court applied a "reasonably necessary to the effectuation of a substantial public purpose" standard.[26] Because Act 257 fails to substantially advance a legitimate state interest it is unfair under any of those formulations, and is a taking, without regard to whether it diminishes economic values or usefulness.

C. A fairness determination requires an analysis of the relationship between Act 257's means and ends.

Hawaii and *Amici* agree that fairness is the goal of takings analysis, but insist the Court determine fairness by looking exclusively at the impact upon Chevron, without taking into account Act 257's harm to Hawaii's

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[24] Brief for Petitioners p. 25.

[25] *Santa Monica Beach, Ltd. v. Superior Court*, 19 Cal. 4th 952, 1025 [81 Cal. Rptr. 2nd 93] (1999) (Brown, J., dissenting).

[26] *Penn Central Transp. Co. v. New York City*, 438 U.S. at 127 (stating test), 129 (applying it).

consumers and economy.[27] This is not what *Penn Central* and *Pennsylvania Coal* require. Hawaii selectively quotes the decision in *Keystone Bituminous Coal Ass'n v. DeBenedictis* as stating "[t]hat a land use regulation may be somewhat overinclusive or underinclusive is, of course, no justification for rejecting it."[28] However, the Court immediately qualified this statement, and endorsed and applied the mean-ends inquiry:

> "But on the other hand, *Pennsylvania Coal* instructs courts to examine the operative provisions of a statute, not just its stated purpose, in assessing its true nature. In *Pennsylvania Coal*, that inquiry led the Court to reject the Pennsylvania Legislature's stated purpose for the statute, because the "extent of the public interest is shown by the statute to be limited." In this case, we, the Court of Appeals, and the District Court, have conducted the same type of inquiry the Court in *Pennsylvania Coal* conducted." *Keystone Bituminous Coal Ass'n v. DeBenedictis,* 480 U.S. 487 n.16 (citing to *Pennsylvania Coal v. Mahon*, 260 U.S., at 413-414).

In *Hodel v. Irving*, 481 U.S. 704 (1987), the Court found the Indian Land Consolidation Act of 1983 § 207 a taking after determining that the Act's operative provisions conflicted with its ends. In 1889 Congress allotted lands reserved for the Sioux Indian Nation to individual Sioux. To protect the Sioux from improvident disposition of their land the tracts were alienable by decent only. Succeeding Sioux generations divided their predecessors' tracts into increasingly tiny undivided fractional interests,

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[27] Brief for Petitioners, p. 15 (urging the Court to "focus largely, if not exclusively" on the impact on claimant); p. 16 ("fairness and justice"); Brief for the United States as *Amicus Curiae*, p. 24 ("Nor has the Court ever engaged in extended consideration of the efficacy of a challenged statute"); p. 18 ("justice and fairness").

[28] Brief for Petitioners, p. 44.

which often yielded pennies in annual rent, and resulted in enormous administrative costs. Productive land was lying fallow due to the difficulties of managing property in this manner. Congress responded with the Indian Land Consolidation Act of 1983. The Act provided that any undivided fractional interest representing less than 2% of a tract's acreage, and earning less than $100 in the preceding year, would escheat to the tribe without compensation to the owner's estate. 481 U.S. 704, 707-708.

The Court analyzed the Act's impact on tract owners, finding these two *Penn Central* factors together favored constitutionality.[29] But the Act's operative provisions strongly and decisively weighed against it. Since the Act abolished decent and devise it prevented passage to heirs who already owned an undivided property interest. In so doing the Act's operation conflicted with its purpose – ownership consolidation. *Id.* at 717-718. The need for consolidation, and the net positive effect on the tribe, may have justified the government's destruction of some tract owners' rights to devise their interests. But by abolishing decent and devise even where a tract's passage to the heir might have resulted in land consolidation the Act went "too far." *Id.* at 718.

The Ninth Circuit, in requiring an analysis of whether Act 257 substantially advanced its intended purpose, was in accord with *Hodel v. Irving* and established takings doctrine. Takings analysis requires "essentially ad hoc, factual inquiries."[30] The Circuit's methodology was proper.

D. The *Substantially Advance* requirement ensures that property will be fairly regulated.

The Emergency Price Control Act of 1942 authorized mandatory rent reductions in parts of the country where

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[29] *Hodel v. Irving*, 481 U.S. 704, 714-716.

[30] *Penn Central Transp. Co. v. New York City*, 438 U.S. at 124.

World War II related activities had increased housing costs. The Court found the Act consistent with the Fifth Amendment, holding that it justly asked property owners to share the burdens of war.[31] The Court today is not revisiting whether a few can avoid shared sacrifice, but deciding if a subset of rent control laws, laws that single out property owners while worsening the problems they are enacted to address, are constitutionally fair. In addressing the fairness inquiry, *Amicus* the United States insists that evidence that these laws fail their aims is "logically irrelevant," that only a plaintiff's immediate burden is germane. Indeed, the United States argues that more effective legislation would likely impose a greater financial burden on Chevron, which under the Solicitor General's conception of takings doctrine would render the Act, if anything, more unfair.[32]

The Act's ineffectiveness is highly relevant because the ills Hawaii purports to remedy justify its infringement of property rights.[33] Since Act 257 worsens those ills it would subject Chevron to ever more infringement. Requiring property owners to submit to wealth redistributions which give rise to further financial demands is quintessential unconstitutional unfairness.

The relationship between social ills and private property rights was described in *Munn v. Illinois*, 94 U.S. 113 (1877). Munn, the owner of a Chicago grain elevator, was convicted of charging rates higher than Illinois permitted. He claimed unconstitutional violation of his property rights. The Court disagreed. Illinois could use its police power to regulate Munn's elevator fees because the

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[31] *Bowles v. Willingham*, 321 U.S. 503, 512-513, 519 (1944).

[32] Brief for the United States as *Amicus Curiae*, pp. 16-21.

[33] *Pennell v. San Jose*, 485 U.S. 1, 20-22 (1988) (Scallia, J., concurring and dissenting).

possible use of his property to the public detriment granted the State an interest:

> "[W]e find that when private property is affected with a public interest, it ceases to be *juris privati* only. . . . Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, *and must submit to be controlled by the public for the common good,* to the extent of the interest he has thus created." *Munn v. Ill.*, 94 U.S. at 125-126. (citation and epsilons omitted, emphasis added).

When rent control fails to advance the "common good" the fairness nexus breaks down. Constitutional fairness is predicated on a cause-and-effect relationship between a regulated land use – e.g., high rents – and social ills. "Once such a connection is no longer required, however, there is no end to the social transformations that can be accomplished by so-called 'regulation,' at great expense to the democratic process." *Pennell v. San Jose,* 485 U.S. at 20-22.

Rent control that exacerbates social ills, such as Act 257, are uniquely pernicious. As the public need for remedial resources is fueled by counterproductive legislative mandates, property owners affected with a public interest will incur ever greater regulatory demands. There is no natural stopping point, "no end" to the incremental confiscation or festering harm to society. Without a means-ends requirement the state's police power is free to swallow Fifth Amendment property rights.

Justice Holmes warned that property can be regulated until it disappears.[34] The *Substantially Advance* requirement insures that it is not.

2. The fairness inquiry requires intermediate scrutiny because legislatures are incompetent to determine fairness.

A. Rational basis review would take the *Just* out of the *Just Compensation* Clause.

The Court has been solicitous of the police power in fashioning takings doctrine. Unlike other enumerated rights, the police power is not required to yield to the Fifth Amendment. Instead, the Court accommodates public needs and private property rights through a give-and-take that allows public interests and private property to harmoniously coexist. Hawaii's requests would disrupt that balance.

The Court has frequently held that urgent public needs are secondary to enumerated rights even in economic contexts. In *Turner Broadcasting System v. FCC*, 512 U.S. 662 (1994) (*Turner I*), the Court refused to accept Congress's findings that local television broadcasters' economic viability was at risk and the must-carry provision of the Cable Act of 1992, requiring cable providers to carry local stations, a necessary cure. It held that First Amendment protections demanded greater scrutiny, and remanded for further factual findings. 512 U.S. at 666-669. In *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980), the Court found an order prohibiting advertising encouraging electricity consumption during a fuel shortage violated the First Amendment, despite finding that the order directly advanced a substantial state interest. 447 U.S. at 568-572.

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[34] *Pennsylvania Coal Co. v. Mahon*, 260 U.S. at 415.

The Court has also held that the Fourth Amendment trumps the police power, even where employed in purely economic legislation. In *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978) it held that the Occupational Safety and Health Act of 1970 § 8(a), which empowered the Secretary of Labor to inspect facilities within its jurisdiction for safety hazards, violated the Constitution. Even businesses in closely regulated industries are protected from warrantless searches. 436 U.S. 314-315.

By contrast, takings doctrine has granted the police power significant intrusions into the Fifth Amendment. Primary among these is acquiescence to the legislatures' determination of what constitutes a *public use*. For this reason pre-1937 takings decisions survived the post-*Lochner* revolution intact. Justice Holmes described this high level of deference in *Pennsylvania Coal,* where he wrote:

> "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."[35]

Legislatures alone decide what constitutes a *public use* to be advanced by exercise of the takings power.[36] Accordingly, the *public use* requirement is coterminous with the scope of sovereign police powers.[37] Deference to the legislature's *public use* determination is conditioned only by rational basis review.[38]

A plaintiff challenging governmental action as a taking also bears burdens of proof and production.[39] As

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[35] *Pennsylvania Coal Co. v. Mahon*, 260 U.S. at 416.

[36] *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 244 (1984).

[37] *Id.* at 240.

[38] *Id.* (citing to *Old Dominion Co. v. United States*, 269 U.S. 55, 66 (1925)).

[39] *E. Enters. v. Apfel,* 524 U.S. 498, 523 (1998) (plurality opinion).

Justice Holmes noted, courts "assume the exigency exists."[40] In *Chevron I,* the Court held that Chevron had initially not met this burden. On remand, Chevron had to prove by a preponderance of the evidence that the Act did not substantially advance a legitimate state interest.[41] In accommodating the police power the Court has stripped the Just Compensation Clause of all but the fairness requirement. Rational basis review of fairness would improperly delegate the fairness inquiry to the legislatures. Choosing public uses may be better accomplished by legislators, but assessing constitutionally mandated fairness is a judicial function.[42]

Were the Court to delegate this judicial task to the legislature, the Just Compensation Clause would no longer be an independent source of any right except to an accurate accounting. It would become completely coterminous with the police power. Rather than a delicate balance of public and private interests, private property would be subject to all but the most irrational or arbitrary state action. Property owners could be singled out to bear burdens properly borne by the public as a whole. This is not what the Fifth Amendment contemplates.[43]

Requiring courts to assume state action "just" would negate the text of the Fifth Amendment. Federal courts already assume state interference with property is well intentioned, and they assume the state acted upon evidence that its interference was warranted. If the Just Compensation Clause is to remain a discrete source of

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[40] *Pennsylvania Coal Co. v. Mahon*, 260 U.S. at 416.

[41] *Chevron U.S.A., Inc. v. Cayetano,* 224 F.3d at 1037 (*Chevron I*).

[42] *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943); *see also Marbury v. Madison*, 5 U.S. 137, 177-180 (1803) (the "constitution must be looked into by the judges.").

[43] *Yee v. City of Escondido*, 503 U.S. 519, 522-523.

rights, heightened scrutiny of the remaining determination is necessary. In accord with takings doctrine's factual emphasis, the scrutiny level should relate to the character of the government action. In the rent control context, the *Chevron I* Court held that the *Substantially Advance* test required a determination of whether plaintiff had proved the absence of a "reasonable relationship" between the public purpose and the means employed, a standard more stringent than rational basis but less exacting than "rough proportionality."[44] This standard of review correctly applies the Court's accommodation of public and private rights to rent control. The Court should leave it undisturbed.

3. The *Substantially Advance* requirement is a necessary counterpart to the *Williamson* state-remedy exhaustion requirements.

The *Substantially Advance* requirement provides an alternative for Plaintiffs where state remedial procedures are futile in any but the most technical sense. *Yee v. City of Escondido* held that takings claims predicated on the *Substantially Advance* requirement are *per se* ripe. Allegations that a challenged regulation fails to advance a legitimate interest do not depend on the extent to which plaintiffs are deprived of use of their property or the inadequacy of their compensation. 503 U.S. 519, 534. Therefore the availability of alternative remedies is irrelevant.

The *Substantially Advance* requirement prevents municipalities from successfully enforcing legislation enacted to serve purely private interests by hiding behind California's high level of judicial deference and *Williamson*. It helps provide deserving civil rights plaintiffs their

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[44] *Chevron U.S.A., Inc. v. Lingle,* 363 F.3d 846, 853-854.

day in Federal Court. Rather than contradicting *Williamson*, the requirement assures its coherence.

In *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), plaintiff's predecessor received County approval to develop its property. It then conveyed to the County an easement and began building roads, utility lines and a golf course. The County later changed its zoning ordinance and ruled the development nonconforming. A U.S. District Court found that the County's refusal to grant final approval violated the Just Compensation Clause. 473 U.S. 172, 178-182. The County appealed.

This Court held the claim unripe. Under applicable state law Plaintiff could have brought an inverse condemnation action to obtain just compensation. But it had not, nor had it alleged inverse condemnation was unavailable or inadequate. Moreover, Plaintiff had failed to apply for a variance. Since either procedure may have provided a remedy Plaintiff was not conclusively denied just compensation. Its taking action was premature. *Id.* at 196-197, 200.

California's disregard for private property rights has encouraged municipalities to abuse the *Williamson* requirements. As the Court has noted, California is alone among the fifty States in its acceptance of private property infringement.[45] In addition to evaluating takings claims under the deferential due process standard,[46] California requires victims of unconstitutional rent control to seek an adjustment of prospective rents as a remedy.[47] Plaintiff has

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[45] *Nollan v. California Coastal Com.*, 483 U.S. 825, 839 (1987).

[46] *Galland v. City of Clovis,* 24 Cal. 4th 1003, 1024 [103 Cal. Rptr. 2nd 711] (2001).

[47] *Id.* at 1022.

the burden of showing that this untested procedure is inadequate or unavailable.[48]

Municipalities have successfully taken advantage of these impediments. In *Galland v. City of Clovis,* Clovis and its rent commission violated Galland's due process rights by "making the rent review process so time consuming, burdensome and expensive that the potential benefits of participating in the process were nonexistent and illusory."[49] Nevertheless, the California Supreme Court overturned much of Galland's 42 U.S.C.S. § 1983 award. Although Galland brought a substantive due process claim, the Court said it was indistinguishable from a takings action. Therefore Galland was not entitled to relief where they failed to seek a prospective rent adjustment from Clovis's unconstitutional rent review apparatus.[50] Also, damages could be recovered only through future rent adjustments – again by resort to Clovis's unconstitutional administrative procedures.[51]

California's hostility to takings claims and its inadequate alternative procedures are relevant to the issues before the Court because of the Federal judiciary's strict adherence to *Williamson*. Numerous Ninth Circuit Courts and plaintiffs have noted the difficulties California property owners have enforcing their rights.[52] But to prove futility under *Williamson*, Federal plaintiffs must show

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[48] *Id.* at 1029-1030, n.5 (finding claims that prospective adjustment mechanism was inadequate "speculative").

[49] *Id.* at 1045 n.3 (J. Jones, dissenting).

[50] *Id.* at 1024-1025.

[51] *Id.* at 1046-1047, 1052-1054 (J. Brown, dissenting (citing Carroll, ALICE'S ADVENTURES IN WONDERLAND (1985 ed.) p. 115.)).

[52] *Carson Harbor Vill., Ltd. v. City of Carson*, 353 F.3d 824, 828, 830 (9th Cir., 2004); *Schnuck v. Santa Monica,* 935 F.2d 171, 173 (9th Cir., 1991); *Sinaloa Lake Owners Ass'n v. Simi Valley*, 882 F.2d 1398, 1403 (9th Cir., 1989).

they cannot "obtain just compensation through an inverse condemnation action under any circumstances."[53] It is impossible to make this showing in California because inverse condemnation recovery is technically feasible and administrative remedies technically available.

Hawaii and *Amici* mischaracterize the *Substantially Advance* test's important role when they complain that the Ninth Circuit uses it as an unconstitutional end-run around the *Williamson* state-remedy exhaustion requirements.[54] It is not. The test compliments *Williamson*, and the frequency with which it comes into play in Ninth Circuit jurisprudence reflects the unique circumstances in the Circuit.

4. Land use regulations which fail to substantially advance legitimate interests corrupt local government and increase economic inequity.

A. Welfare for the wealthy.

The poor, the elderly, single-parent families and other vulnerable members of society are all injured by unfair rent control. Act 257 raises costs to gas station owners but contains no mechanism to prevent owners from passing on their higher costs to consumers. As owners do this, by raising wholesale gasoline prices, the poor, for whom gasoline expenses are a relatively higher percentage of income, subsidize Hawaii's gas station operators, the Act's beneficiary.[55] Act 257 redistributes wealth, not from the wealthy to the needy, but from the underprivileged to the middle class. As social policy Act 257 is horrible. But as a

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[53] *Schnuck v. Santa Monica,* 935 F.2d at 173-174.

[54] Brief for Petitioners, n.7, n.10; Brief of the League of California Cities as *Amicus Curiae*, pp. 12-13. (claiming that the Ninth Circuit contradicts and defies *Williamson County*).

[55] *Chevron U.S.A., Inc. v. Cayetano*, 224 F.3d at 1048 (J. Fletcher, concurring) (noting Chevron will likely offset lower rental revenues buy raising gasoline prices).

political tool it has its advantages. The poor don't vote as reliably and the middle class is the largest special interest group.[56]

Rent control is often designed to serve special interests at the expense of the less fortunate. In *Chicago Bd. of Realtors, Inc. v. Chicago,* 819 F.2d 732 (7th Cir., 1987), the Seventh Circuit examined a Chicago ordinance that prevented housing providers from passing on increased costs, permitted tenants to withhold rent for alleged lease violations and repairs, limited late fees, required security deposits to be held in local banks and otherwise granted tenants more rights.[57] Like Act 257, it promised relief for the needy. Like Act 257, it delivered subsidies for the well off and votes for incumbent politicians:

> "The ordinance is not in the interest of poor people. As is frequently the case with legislation ostensibly designed to promote the welfare of the poor, the principal beneficiaries will be middle-class people. They will be people who buy rather than rent housing (the conversion of rental to owner housing will reduce the price of the latter by increasing its supply); people willing to pay a higher rental for better-quality housing; and (a largely overlapping group) more affluent tenants, who will become more attractive to landlords because such tenants are less likely to be late with the rent or to abuse the right of withholding rent-a right that is more attractive, the poorer the tenant. The losers from the ordinance will be some landlords, some out-of-state banks, the poorest class of tenants, and future tenants. The landlords are few in number (once owner-occupied rental housing is excluded-and

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[56] *Chicago Bd. of Realtors, Inc. v. Chicago,* 819 F.2d 732, 742 (7th Cir. 1987) (J. Posner, concurring).

[57] *Id.* at 741.

> the ordinance excludes it). Out-of-staters can't vote in Chicago elections. Poor people in our society don't vote as often as the affluent. And future tenants are a diffuse and largely unknown class. In contrast, the beneficiaries of the ordinance are the most influential group in the city's population. So the politics of the ordinance are plain enough, and they have nothing to do with either improving the allocation of resources to housing or bringing about a more equal distribution of income and wealth." 819 F.2d 732, 742 (1987) (J. Posner, concurring) (citations omitted).

When Judge Posner wrote this opinion in 1987 it was an emperor-has-no-clothes moment, cited in law school case books for years to come.[58] In 2005 it is anodyne. Now, harsher analyses can be heard from rent control's supporters. Judge Fletcher, the dissenting judge in *Chevron II*, conceded in his *Chevron I* concurring opinion that Act 257 was not in the interests of the underprivileged. He admitted that it was a subsidy for those who did not need any, and likely to harm public policy. Nevertheless, he disagreed with the Court's decision to remand with instructions to apply the *Substantially Advance* test.[59]

Judge Fletcher's point is that "we should not confuse inefficiency and unfairness with unconstitutionality."[60] Judge Fletcher would be wrong in most of the nation, where *Pennsylvania Coal* is the law and plaintiffs have the opportunity to prove that a statute fails to advance its ends before it is allowed to infringe their property rights. In those states unfairness is unconstitutionality. But not

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[58] DUKEMINIER & KRIER, PROPERTY, pp. 535-537 (Fourth Ed. 1998).

[59] *Chevron U.S.A., Inc. v. Cayetano*, 224 F.3d at 1048 (*Chevron I*) (J. Fletcher, concurring).

[60] *Chevron U.S.A., Inc. v. Lingle,* 363 F.3d at 861 (*Chevron II*) (J. Fletcher, dissenting).

in California, where state courts rely on local politicians to conduct means-ends analyses and administrative remedies can be more road block than relief. Here *Pennsylvania Coal* and reciprocity of advantage are ignored.

B. Rational basis review of property rights results in a race for the bottom.

The dire public policy consequences of deferential review of Fifth Amendment property rights are apparent in Southern California. In *Santa Monica Beach, Ltd. v. Superior Court*, 19 Cal. 4th 952 (1999), the California Supreme Court examined a takings claim alleging that Santa Monica's housing rent control failed to substantially advance a legitimate public interest. The purpose of Santa Monica's Rent Control Charter Amendment, enacted in 1979, is to help tenants, "especially the poor, minorities, students, young families and senior citizens." 19 Cal. 4th 952, 957. Following the Charter Amendment's passage, the affluent found Santa Monica a more attractive domicile: the number of very-high income households increased 37% during 1980-1990, while the number of similar households in surrounding Los Angeles County dropped 8%. *Id.* at 957-958. But in providing affordable housing to its targeted groups Santa Monica's rent control has been an abject failure:

> "During the rent-controlled decade of the 1980's, Santa Monica experienced a loss of 775 low-income-renter households, a decrease of nearly 12 percent. The number of low-income-renter households increased over this period in every comparable city in Southern California without rent control. Santa Monica also lost 285 very-low-income-renter households. This was the largest decrease in the number of very-low-income renters of any comparable Southern California city."

> "Under rent control, housing in Santa Monica has become increasingly unavailable to young families. Between 1980 and 1990, the number of family households with children in Santa Monica fell by 1,299, a decline of more than 6 percent. No comparable city in Southern California without rent control lost family households over the decade of the 1980's.
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> "The impact of rent control has been especially harsh on young families headed by a mother with no spouse. The number of female-headed households with children under the age of 18 in Santa Monica fell by 593 between 1980 and 1990, a decrease of more than 27 percent, despite an increase in such households in Los Angeles County as a whole.
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> "Under rent control, Santa Monica's elderly population (age 65 or over) declined by 1.7 percent between 1980 and 1990, whereas the elderly population of Los Angeles County rose by more than 15 percent over the same decade." 19 Cal. 4th at 957-958.

On these facts, under rational basis review, the California Supreme Court held plaintiff had failed to state a *Substantially Advance* claim. The Court commented "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." *Id.* at 957, 974. Repeal is improbable, and the Court's reliance on it improper. Santa Monica's growing percentage of high-income households are unlikely to give back their subsidies. Moreover, the purpose of the Bill of Rights is to withdraw certain subjects from political controversy, to place them beyond the reach of majorities and officials, and to establish them as legal principles to be applied by the courts, not legislatures. Property rights do not depend on the outcome of elections. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).

California's disregard for the Fifth Amendment has set local officials off in a race for the bottom. In *Action Apartment Ass'n, Inc. v. Santa Monica Rent Control Bd.*, 94 Cal. App. 4th 587 [114 Cal. Rptr. 2nd 412] (2001), *Amicus* Action Apartment Association, Inc., challenged a 1999 decision of the same Santa Monica Rent Control Board and a section of its Charter on the grounds that they failed to advance a legitimate interest and effected a taking. Santa Monica had amended its Charter to require housing providers to place security deposits in a federally insured bank and pay tenants 3% interest per annum, irrespective of the bank rate earned by the housing providers. As the amendment was enacted, the Rent Control Board directed that the interest be paid to tenants. Previously, interest could be used to improve the property. At the time, federally insured banks paid between 0.5% and 1.5% per annum. These changes cost Santa Monica housing providers $770,000 annually.[61]

The Court of Appeal found that the Rent Control Board's actions forced housing providers into becoming the tenants' "cash cows." It failed to see how this advanced the Board's goals of improving housing conditions, the general welfare, or indeed any legitimate interest.[62] Instead, it found the Rent Board was attempting to transfer wealth from housing providers to tenants. This lacked "logic, fairness or justice." *Id.* at 604. The amendment was a taking, and "an unedifying example of class legislation." *Id.* at 606 (citing to *Chicago Bd. of Realtors, Inc. v. City of Chicago,* 819 F.2d at 741-742).

While much is opaque about unfair rent control laws, this much is not: lowering the standard of review from *de novo* to rational basis will change the trend in rent control

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[61] *Action Apartment Ass'n, Inc. v. Santa Monica Rent Control Bd.*, 94 Cal. App. 4th at 595-596.

[62] *Id.* at 604-607.

enactments from bordering on unfair to bordering on the irrational. That cannot be positive for public policy.

C. Unconstitutional rent control funds special interests at great social cost.

The Ninth Circuit found a rent control ordinance similar to Act 257 a taking in *Richardson v. City & County of Honolulu*, 124 F.3d 1150 (9th Cir., 1997). The *Richardson* ordinance and Act 257 both harm the public, as did the ordinance overturned in *Action Apartment Ass'n, Inc. v. Santa Monica Rent Control Bd.* But while the *Action* ordinance was intended to transfer wealth to favored constituencies, Act 257 and the *Richardson* ordinance not only serve special interests, they create them.

Richardson v. City & County of Honolulu examined a rent control statute intended to provide affordable owner-occupied housing in Oahu. In Oahu, a small number of private owners control almost all nonpublic lands. Rather than sell, they typically long-term lease to builders. The builders construct condominiums, and residents who purchase from the builders are assigned their unit's ground lease. When the lease is up, the condominium owner and the land owner reset the lease rate, normally at a percentage of the fair market value of the land appurtenant to the unit exclusive of improvements. The rapid rise in Hawaiian land prices and the leases' long terms often result in renegotiated rents many times greater than the initial rent. 124 F.3d 1150, 1163.

To control escalating housing costs, the City and County of Honolulu enacted Ordinance 91-96. The Ordinance limits the number and regulates the timing of renegotiations. It also caps rents by linking the maximum renegotiated rent to the consumer price index, far lower than Hawaiian realty's appreciation rate. It further provides that if a condominium owner-occupant sells their ground lease during a renegotiated rent period to a prospective occupant, the renegotiated land rent applies to

the transferee. In other words, should an owner convey their lease to a person intending to occupy the condominium the transferee receives the benefit of the renegotiated lease. *Id.* at 1163-1164. The District Court found that incumbent sellers would receive a premium equal to the value of the benefit. The City and County did not appeal its finding.[63]

The Ninth Circuit struck down Ordinance 91-96 using the *Substantially Advance* test and intermediate scrutiny. Incumbent owners' ability to capture the net present value of the reduced rent in a premium meant that the Ordinance would not create affordable owner-occupied housing. Instead, the Ordinance would result in a one-time wealth transfer from land owners to current lessees. Condominium prices would increase by the value of future rent savings. Housing affordablity would remain unchanged, and the Ordinance would fail to advance its purpose. Therefore it effected a taking. *Id.* at 1166.

Why would legislatures include a premium capture provision in a rent control ordinance? In *Yee v. City of Escondido,* the Court suggested including such a feature in rent control legislation could render it a regulatory taking. 503 U.S. 519, 530. Act 257's drafters knew they were courting constitutional infirmity, yet the provision was irresistible nonetheless. It often is. *Richardson*, citing *Yee*, found its Hawaiian rent control ordinance unconstitutional on exactly this basis.[64] Constitutional niceties aside, and more to the point, these provisions defeat the legislature's stated purposes.

Legislators include self-defeating provisions because they are more concerned with reelection than constitutional rights, affordable housing or consumers. A premium capture provision not only favors special interests, it

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[63] *Chevron U.S.A., Inc. v. Cayetano*, 224 F.3d at 1040 (*Chevron I*).

[64] *Richardson v. City & County of Honolulu* 124 F.3d at 1165-1166.

creates them. But for intermediate scrutiny, Oahu condominium owners would depend on their local rent board to maintain the value of their premiums. The capture provision is a valuable incentive to vote for the incumbents. Unlike adjustments that expire when the occupant moves, a beneficiary of premium capture has a tangible and possibly permeant wealth increase, one that can be realized immediately with a call to their bank.

For legislators and rent boards a premium capture provision is the gift that keeps giving. They obtain a new constituent with every resale. But to resale purchasers rent control brings only downside. They lack any transferred wealth, suffer higher up-front housing prices, and are dependant on rent boards to maintain the value of their investment. Voter ratification of these provisions fails to grant them constitutionality, contrary to *Amicus* supporting Hawaii.[65] A constitutional right can hardly be infringed simply because a majority of the people choose it to be. The fact that a challenged law was approved by the electorate is "without federal constitutional significance."[66]

Amicus Action Apartment Association respectfully requests that the Court consider the startling sight of elected officials of States from Massachusetts to Utah, representing the full panoply of American political diversity, united as *Amici* favoring legislation which harms the public. Here the Mayor of Berkeley, a member of *Amicus* League of California Cities, and the Solicitor General have found common cause, in support of laws without legitimate purpose. No consumer advocates urge the Court to uphold Act 257 – supposedly enacted in their interest – but politicians across the spectrum do. These laws are more

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[65] Brief of the League of California cities as *Amicus Curiae*, p. 8.

[66] *Lucas v. Forty-Fourth General Assembly*, 377 U.S. 713, 736-737 (1964).

than just welfare for the wealthy. They are welfare for the political class, at great harm to public policy.

CONCLUSION

If the Court is to continue to defer to the legislature's *public use* determination, heightened scrutiny for fairness is appropriate. Without it, the Just Compensation Clause provides no justice, only a right to an accurate accounting. Since *Pennsylvania Coal* the Court has held that private property is constitutionally entitled to more.

In accord with takings doctrine's factual emphasis, the level of scrutiny should depend on the facts. Where the government uses its eminent domain power to transfer property between private citizens, the Constitution requires the transfer to be reasonably necessary.[67] Where it exacts property as a condition for land use, the nature and extent of the exaction must be proportional to the permitted development.[68] And where it limits property owners' rental rights, it may do so only if its legislation reasonably relates to the public interest.[69] Act 257 does not. The judgment of the Ninth Circuit should be affirmed.

Respectfully submitted,

ROSARIO PERRY*
ROBERT J. FRANKLIN
LAW OFFICES OF ROSARIO PERRY
312 Pico Boulevard
Santa Monica, CA 90405
Telephone: 310.394.9831
Facsimile: 310.394.4294
**Counsel of Record*

Counsel for Amicus Curiae

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[67] *Kelo v. City of New London*, 843 A. 2d 500, 587-592 (2004 Conn.) (Zarella, J., dissenting).

[68] *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994).

[69] *Chevron U.S.A., Inc. v. Lingle*, 363 F.3d 846, 853-854.