No. 04-163

In The Supreme Court of the United States

LINDA LINGLE, Governor of the State of Hawaii, and MARK J. BENNETT, Attorney General of the State of Hawaii,

Petitioners,

v.

CHEVRON USA, INC.,

Respondent.

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

BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, INTERNATIONAL CITY-COUNTY MANAGEMENT ASSOCIATION, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a court may invoke the Just Compensation Clause to resurrect heightened scrutiny and invalidate State economic legislation through de novo second-guessing of the State's judgment as to the law's wisdom and efficacy.

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INTEREST OF THE *AMICI CURIAE*[1]

Amici's members include thousands of State and local legislators and other government officials throughout the United States. They are responsible for drafting, enacting, and administering laws and regulations in the public interest. These efforts include "the commendable task of land use planning," *Dolan v. City of Tigard*, 512 U.S. 374, 396 (1994), as well as a broad array of other regulatory initiatives that promote the public good. *Amici* thus bring a vital perspective to regulatory takings challenges to these protections, and we have submitted friend-of-the-court briefs to this Court in many takings cases. *See, e.g., Brown v. Legal Found. of Wash.*, 538 U.S. 216 (2003); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987).

Amici's members have a compelling interest in preserving their police power authority to adopt reasonable land use laws, economic legislation, and other community protections, and in ensuring that courts refrain from improperly second-guessing the wisdom of legislative policy judgments. A grant of review and reversal in this case will eliminate the chilling effect produced by the

[1] Counsel for the parties did not author this brief in whole or in part. No person or entity other than the *amici*, their members, and their counsel made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of *amicus* briefs in connection with the petition for certiorari, and they filed letters reflecting consent with the clerk.

decision below, as well as the need for *amici*'s members to expend limited resources defending against challenges rooted in a level of scrutiny for economic regulation unprecedented in modern times.

ARGUMENT

I. Review Is Needed to Resolve the Federal and State Appellate Court Splits Over Whether the Just Compensation Clause Authorizes *Lochner*-Like Second-Guessing of Economic Regulation.

It is no exaggeration to say that the rulings below raise a question of historic proportions: May courts invoke the Just Compensation Clause to resurrect heightened, *Lochner*-esque scrutiny of economic regulation?

The trial court gave no deference to the State's legislative judgment and held that Act 257 does not substantially advance a legitimate interest. Pet. App. 50-53. It concluded that Act 257 would not benefit Hawaii consumers and thus violated the Just Compensation Clause because, in the court's view, the economic theories presented by Chevron were "more persuasive" than the State's position. *Id.* at 43. The Ninth Circuit affirmed, applying heightened scrutiny under the Just Compensation Clause (*id.* at 6-17, 58-66), expressly rejecting the rational basis test typically applied under the Due Process Clause (*id.*), and giving no deference to the views of the State legislature regarding the wisdom and efficacy of Act 257. *Id.* at 17-21.

Plain and simple, the lower courts invalidated Act 257 because they disagreed with the judgment of the State's elected lawmakers that the measure would protect Hawaii

consumers. The lower courts articulated a naked preference for Chevron's economic views and rejected the State's legislative judgment as to the efficacy of Act 257, just as the *Lochner* Court concluded that New York's worker protection laws were unwise. *See Lochner v. New York*, 198 U.S. 45, 53-54 (1905) ("The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid."). In other words, the lower courts imposed on Hawaii their own economic vision regarding the efficacy of Act 257, much as *Lochner* imposed Mr. Herbert Spencer's Social Statics on New York. *See Lochner*, 198 U.S. at 75 (Holmes, J., dissenting).

Since the demise of the *Lochner* era, courts generally have upheld economic regulation against constitutional challenge so long as there is a rational basis for the legislature to conclude that the challenged law advances a legitimate purpose.[2] This familiar rational basis test, while deferential, has some bite in appropriate cases.[3] As the Court well knows, the rational basis test is now firmly entrenched in our constitutional jurisprudence, and every Member of the Court has joined opinions criticizing the

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[2] *E.g., FCC v. Beach Communications, Inc.*, 508 U.S. 307, 309 (1993) ("The question before us is whether there is any conceivable rational basis justifying this [regulatory policy choice] for purposes of the Due Process Clause of the Fifth Amendment."); *Bowen v. Gilliard*, 483 U.S. 587, 602-03 (1987) (more searching scrutiny is appropriate only where government action impairs a fundamental right or targets a suspect class).

[3] *E.g.*, *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1996) (zoning ordinance excluding group homes for the mentally retarded lacked a rational basis); *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002) (law permitting casket sales only by licensed funeral directors lacked a rational basis and thus violated the Due Process Clause).

more searching scrutiny of economic regulation that characterized the *Lochner* era.[4] Scholars, too, routinely refer to *Lochner* as reviled.[5]

And yet now in the Ninth Circuit – which comprises nine States and two territories, nearly 40 percent of the Nation geographically, and more than 51 million people[6] – federal courts are duty bound to use the Just Compensation Clause to engage in precisely the kind of policy second-guessing regularly denounced by courts and commentators. The lower courts did little more than swap the Just Compensation Clause for the Due Process Clause to justify this new judicial intrusion into economic policymaking, a point made clear by this Court's rejection of a due process challenge to a very similar law. *See Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978) (rejecting a due

[4] *See, e.g., College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 690 (1999) (Scalia, J., joined by Rehnquist, C.J., and O'Connor, Kennedy, and Thomas, JJ.) (referring to "the discredited substantive-due-process case of *Lochner*"); *id.* at 701 (Breyer, J., joined by Stevens, Souter, Ginsburg, JJ., dissenting) (describing *Lochner* as improperly limiting legislative flexibility without constitutional warrant).

[5] Robert H. Bork, *The Judge's Role in Law and Culture*, 1 Ave Maria L. Rev. 19, 21-22 (2003) (referring to *Lochner* as an "abomination"); David A. Strauss, *Why Was* Lochner *Wrong*?, 70 U. Chi. L. Rev. 373, 373 (2003) ("*Lochner v. New York* would probably win the prize, if there were one, for the most widely reviled decision of the last hundred years."); Judge Alex Kozinski, *Conduct Unbecoming*, 108 Yale L. J. 835, 871 n.254 (1999) (referring to *Lochner* as "the most reviled opinion since *Plessy v. Ferguson*").

[6] *Ninth Circuit Court of Appeals Reorganization Act of 2001: Hearing on H.R. 1203 Before the Subcommittee on Courts, the Internet, and Intellectual Property of the House Committee on the Judiciary*, 107th Cong. 36 (2002), at http://commdocs.house.gov/committees/judiciary/hju80880.000/hju80880_0f.htm (prepared statement of Idaho Attorney General Alan G. Lance).

process challenge to a law requiring oil companies to divest company-operated stations to maintain a competitive retail market for gasoline).

Amici do not make the *Lochner*-izing charge lightly, and we are aware that the term is sometimes bandied about so casually that users risk sounding like the boy who cried wolf. But here the lower courts enforced a pure judicial policy judgment on an economic issue that the Constitution leaves to elected legislators, the very essence of *Lochner* era jurisprudence. The wolf quite clearly is in the flock.

And like *Lochner*, the rulings below find no plausible basis in the text, structure, or original meaning of the Constitution. This Court has recognized that the Just Compensation Clause was originally understood as applying only to physical appropriations of property.[7] Although the Court has since extended the Clause to regulation that constitutes the functional equivalent of an expropriation, its text – "nor shall private property be taken for public use, without just compensation" – cannot reasonably be read as authorizing invalidation of economic regulation based on a means-end inquiry into the law's efficacy.

In fact, the text and structure of the Just Compensation Clause cut directly against the rulings below. The Clause requires that any taking be for a public use, a

[7] *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1014 (1992) ("[I]t was generally thought that the Takings Clause reached only a 'direct appropriation' of property * * * or the functional equivalent of a 'practical ouster of [the owner's] possession.' ") (citations omitted); *id.* at 1028 n.15 ("[E]arly constitutional theorists did not believe that the Takings Clause embraced regulations of property at all.").

requirement that is satisfied if the legislature "rationally could have believed that the [legislation] would promote its objective." *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 242 (1984). It makes no sense to construe the Just Compensation Clause as also requiring a second means-end inquiry under heightened scrutiny to determine whether a taking occurred. The Ninth Circuit attempted to distinguish *Midkiff* by asserting that a more deferential standard was proper in that case because it involved a physical taking as opposed to economic regulation. Pet. App. 15-16. But this argument stands takings law on its head, for it is well-established that physical occupations receive greater scrutiny than regulation under the Just Compensation Clause. *See, e.g.*, *Tahoe-Sierra*, 535 U.S. at 321-24 (discussing the "longstanding distinction" between permanent physical occupations and regulations, with the former receiving categorical treatment and the latter being subject to a more complex analysis).

In view of the sheer size of the Ninth Circuit, the radical nature of its ruling by itself would justify review by this Court. But the case for review is made far stronger by the severe split of authority among the federal circuits and State high courts on the propriety of heightened means-end review under the Just Compensation Clause. As shown in the Petition (pp. 16-18), the Ninth Circuit has split from the Fifth, Eleventh, and Federal Circuits, as well as the highest courts of Florida, New Jersey, Rhode Island, and Washington, on the question of whether claimants can challenge the arbitrariness of government action under the Just Compensation Clause. The Petition (pp. 27-29) also demonstrates that the ruling below squarely conflicts with the First Circuit and the highest courts of California and New York regarding the proper

level of review under the ostensible "substantially advance" test.

These divergent rulings have prompted judges on both sides of the issue to call out for clarification by this Court. *Compare Santa Monica Beach, Ltd. v. Superior Court*, 968 P.2d 993, 1013 (Cal. 1999) (Kennard, J., concurring) ("Only the high court can resolve this question and, given the importance of this area of the law, I respectfully suggest that it do so when the opportunity next arises."), *with id.* at 1047 (Brown, J., dissenting) ("If such measures are capable of withstanding [means-end scrutiny under a] takings clause analysis, the high court ought to tell us so, preferably sooner rather than later.").

Amici's members in the States of California and Washington are especially concerned about the conflict between the Ninth Circuit and the highest courts of those States, splits that will encourage forum-shopping and generate confusion among government officials, the regulated community, and the public. More generally, *amici*'s members nationwide now face the burden of uncertainty created by a deep split among five federal appeals courts and six State high courts regarding the propriety of a means-end inquiry under the Just Compensation Clause, or the proper level of scrutiny for any such inquiry. Plainly, these are fundamental issues upon which national uniformity is desirable.

The Ninth Circuit's improper second-guessing of a legislative policy choice threatens not only similar regulation, but also countless other laws that will be challenged by claimants on the ground that they inadequately advance a legitimate goal. Future takings claimants almost certainly will argue there is no principled basis for limiting

heightened scrutiny to rent control cases, especially given that a principal case cited by the Ninth Circuit – *Agins v. City of Tiburon*, 447 U.S. 255 (1980) – is not a rent control case, but instead a workaday zoning challenge that purports to articulate a general test for takings liability.

While it is common for government-side *amicus* briefs in regulatory takings cases to list examples of laws that would be threatened by an adverse ruling, in this case the list could be virtually endless. It is difficult to imagine an economic or social regulatory provision that could *not* be challenged by an affected property owner in the hope that the court would second-guess the wisdom of the underlying policy choices, deem the law ineffective, and invalidate it under the Just Compensation Clause. The rulings below thus threaten the core federalism principle of preserving the role of States and their municipal subdivisions as laboratories of experimentation. *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

The implications of the Ninth Circuit's ruling are made all the more startling by the absence of economic harm to Chevron, which stipulated that Act 257 allows it to recover more rent in the aggregate from its lessee-dealer stations than it would otherwise charge, a rate of return that, in Chevron's words, "satisfies any Constitutional standards." Pet. 3 & n.2 (citing record). Because the Ninth Circuit's ruling does not turn on any showing of economic harm, countless State and local laws in the Circuit are now up for grabs, as claimants request judicial

second-guessing of those laws regardless of their economic effect.

The real-world impacts of the Ninth Circuit's ruling already are being felt. Just weeks ago, in *Cashman v. City of Cotati*, 374 F.3d 887, 896-99 (9th Cir. 2004), the Ninth Circuit relied on the ruling below to sustain a takings challenge to a mobile home ordinance because, in the court's view, the law did not substantially advance the public interest. The *Cashman* ruling prompted the dissent to lament the court's return to judicial activism: "We learned in the 1930s that economic regulation is generally done better by politically accountable legislators than by life-tenured judges. I regret to say that the Ninth Circuit is unlearning that painfully learned lesson." *Id.* at 905 (Fletcher, J., dissenting). And in *Committee for Reasonable Regulation of Lake Tahoe v. Tahoe Reg'l Planning Agency*, 311 F. Supp. 2d 972 (D. Nev. 2004), the court held that the Ninth Circuit's 2000 ruling in the instant case required heightened scrutiny of a local ordinance regulating the appearance of lakefront housing. *Id.* at 998-99. Given the invocation of the ruling below in a takings challenge to an aesthetic ordinance, it seems certain that future invocations will be limited only by the imagination of claimants' counsel.

As Justice Scalia observed in another context, means-end inquiries that go beyond rationality review are "flabby tests" that "invit[e] judicial arbitrariness and policy-driven decisionmaking." *Tennessee v. Lane*, 124 S. Ct. 1978, 2008-09 (2004) (Scalia, J., dissenting); *accord*, *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992) ("As a general matter, the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are

scarce and open-ended."). Review here is necessary to restore proper respect for decisions by our elected State and local officials, and to prevent judicial policymaking under the guise of regulatory takings analysis.[8]

II. This Case Is an Exceptionally Good and Timely Vehicle for Clarifying the Confusion Among Federal and State Appellate Courts.

It is hard to conceive of a better case for resolving the disparate rulings among federal and State appellate courts regarding the purported means-end inquiry under the Just Compensation Clause. The trial record is fully developed. The ruling below cleanly frames the constitutional issues. The ruling conflicts with State high court rulings within the Ninth Circuit, thereby threatening the unfairness of forum-shopping and additional burdens on federal courts as claimants flock to the friendlier federal forum. And the issue has percolated among lower appellate courts to the point where judges on both sides of the question are calling out for clarification. *See* page 7, *supra* (discussing *Santa Monica*).

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[8] *See Pegram v. Herdrich*, 530 U.S. 211, 221-22 (2000) (complicated factfinding and policy judgments "are not wisely required of courts unless for some reason resort cannot be had to the legislative process, with its preferable forum for comprehensive investigations"); *Chevron, U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 866 (1984) ("[F]ederal judges – who have no constituency – have a duty to respect legitimate policy choices made by those who do."); *Berman v. Parker*, 348 U.S. 26, 32 (1954) ("[T]he legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it be Congress legislating concerning the District of Columbia, or the States legislating concerning local affairs."; citations omitted).

Just as important, Members of this Court repeatedly have identified this area of the law as confused and confusing. The Court articulated the substantially advance formulation in its terse 1980 opinion in *Agins*. For many years, it was largely ignored by lower courts. *E.g.*, *Bamber v. United States*, 45 Fed. Cl. 162, 165 (1999) (the substantially advance test "has not had a fruitful life" outside the narrow context of compelled dedications of land). In *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), four dissenting Justices stated flat out that the Just Compensation Clause "does not apply" to challenges to the reasonableness or efficacy of legislation,[9] and a fifth Justice declared the *Agins* means-end inquiry to be in "uneasy tension" with a proper understanding of the Clause.[10] All five concluded instead that only the Due Process Clause governed judicial examination into the statute's reasonableness and efficacy.[11]

The following year, in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999), the Court

[9] *Eastern Enterprises*, 524 U.S. at 554 (Breyer, J., joined by Stevens, Souter, & Ginsburg, JJ., dissenting) (observing that the Just Compensation Clause "does not apply" to challenges to the legitimacy of legislation because "at the heart of the Clause lies a concern, not with presenting arbitrary or unfair government action, but with providing *compensation* for legitimate government action").

[10] *See id.* at 545 (Kennedy, J., concurring in the judgment).

[11] *Id.* at 545 (Kennedy, J., concurring in the judgment) ("[T]he more appropriate constitutional analysis arises under general due process principles rather than under the Takings Clause."); *id.* at 556 (Breyer, J., joined by Stevens, Souter, & Ginsburg, JJ., dissenting) (concluding there was "no need to torture the Takings Clause to fit this case" because issues regarding the reasonableness of government action find "a natural home in the Due Process Clause, a Fifth Amendment neighbor.").

acknowledged that it has never fully explained "the nature or applicability" of the substantially advance formulation outside the special context of compelled dedications of land, *id.* at 704, but it declined to clarify the doctrine because the issue had not been properly preserved. *Id.* Still, five Justices wrote or joined separate opinions expressly refusing to endorse the formulation as a legitimate test of takings liability.[12] As the Ninth Circuit recognized, the "varying opinions" and "inconsistent nature of the Court's precedent" in regulatory takings cases "suggest confusion" over whether the Just Compensation Clause authorizes heightened scrutiny of whether economic regulation adequately advances the public interest. Pet. App. 10.

The Ninth Circuit's use of the *Agins* substantially advance test to *invalidate* legislation further highlights the test's inherent dissonance. The purpose of the Just Compensation Clause is "to secure *compensation* in the event of otherwise proper interference" with property. *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 314-15 (1987). It is analytically discordant to strike down government action by invoking constitutional text that provides fair compensation for property expropriated for public use.

Of course, if a court were to award compensation upon concluding that a law did not advance the public interest,

[12] *Del Monte Dunes*, 526 U.S. at 732 n.2 (Scalia, J., concurring in part and concurring in the judgment) ("express[ing] no view as to [the] propriety" of the substantially advance formulation); *id.* at 753 n.12 (Souter, J., joined by O'Connor, Ginsburg, & Breyer, JJ., concurring in part and dissenting in part) ("offer[ing] no opinion" on whether the substantially advance formulation is correct).

the result would be even more bizarre. Such a law presumably would be improper because public officials are authorized to act only in the public interest. It makes no sense to say that an unauthorized law is cured by the payment of compensation to affected property owners, or that the public should pay when laws provide no benefit to the public. This anomaly in remedies demonstrates that the Due Process Clause, not the Just Compensation Clause, provides the appropriate framework for evaluating whether a law adequately advances a legitimate goal.

The history of the compensation remedy in regulatory takings doctrine helps explain how due process and takings analyses became conflated. Prior to 1987, certain commentators and courts believed that invalidation was a sufficient remedy for a regulatory taking.[13] As a result, there often was little need to distinguish between due process and takings analyses because violations of either clause led to invalidation. This Court frequently mixed the relevant terminology, referring to "takings of property without due process."[14] To further confuse the issue, the Just Compensation Clause applies to State and local governments through the Due Process Clause of the Fourteenth Amendment,[15] thereby encouraging a blurring of standards and phraseology.

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[13] *E.g.*, Norman Williams, et al., *The White River Junction Manifesto*, 9 Vt. L. Rev. 193 (1984) (invalidation is an adequate remedy for violations of the Just Compensation Clause).

[14] *E.g., Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 498 n.7 (1981) (describing claims as alleging "takings of property without due process"); *Rostker v. Goldberg*, 453 U.S. 57, 61 n.2 (1981) (same); *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 591 (1962) (same).

[15] *E.g.*, *Dolan v. City of Tigard*, 512 U.S. 374, 383-84 & n.5 (1994) (citing *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226 (1897)).

In 1987, the Court's landmark ruling in *First English* made clear that the government must pay just compensation for a taking, regardless of whether the taking occurs directly through the power of eminent domain or inversely through regulation that denies land economically viable use. 482 U.S. at 314-22. Although the government may limit its liability to temporary damages by rescinding the offending regulation (*id*. at 321), just compensation still must be paid.[16] Since the *First English* ruling, it has become far more important to distinguish between due process and takings due to the difference in remedy.

Worse still, the *Agins* Court derived its "substantially advance" formulation from the *Lochner* era's "substantial relation" standard for due process cases. *See Agins*, 447 U.S. at 260 (citing *Nectow v. City of Cambridge*, 277 U.S. 183, 188 (1928)). Although the demise of the *Lochner* era brought an end to heightened scrutiny of economic legislation under the Due Process Clause, heightened scrutiny improperly lives on under the Ninth Circuit's reading of *Agins*.

The five-Justice concurring and dissenting opinions in *Eastern Enterprises* constitute a candid acknowledgement that a due process means-end inquiry improperly crept into takings jurisprudence prior to *First English*. As Justice Kennedy recognized, the *Agins* substantially advance test results from a stark "imprecision" in regulatory takings doctrine, an imprecision rooted in "equivocal" assertions.

[16] There might be a narrow exception to the obligation to pay compensation for a taking where the challenged government action requires the claimant to pay money to a third party. *Eastern Enterprises*, 524 U.S. at 520-21 (plurality). This exception is inapplicable here.

Eastern Enterprises, 524 U.S. at 545-46 (Kennedy, J., concurring in the judgment). The Court should grant review here to clarify once and for all that means-end examinations of regulation should take place under the Due Process Clause, not the Just Compensation Clause.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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