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 *AMICI CURIAE* SMALL PROPERTY OWNERS OF SAN FRANCISCO INSTITUTE, SAN FRANCISCO APARTMENT ASSOCIATION, CALIFORNIA APARTMENT ASSOCIATION and SAN FRANCISCO ASSOCIATION OF REALTORS IN SUPPORT OF RESPONDENT, CHEVRON U.S.A. INC.

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STATEMENT OF INTEREST

Small Property Owners of San Francisco Institute, San Francisco Apartment Association, California Apartment Association and San Francisco Association of Realtors submit this amici curiae brief supporting Chevron USA, Inc.[1]

The Small Property Owners of San Francisco Institute is a non-profit organization dedicated to the fair treatment of small property owners in San Francisco. The Institute was recently founded to expand upon the efforts of Small Property Owners of San Francisco ("SPOSF"), whose members typically own buildings with two to six apartments. SPOSF together with SFAA and SFAR recently has defeated a local ordinance prohibiting property owners from living in their own properties. *Tom v. San Francisco*, 120 Cal.App.4th 674 (2004). SPOSF has also filed amicus briefs in the California courts. E.g., *Drouet v. Superior Court*, 31 Cal.4th 583 (2003). Most recently, the Institute joined the Washington Legal Foundation in filing an amicus brief in *San Remo Hotel v. San Francisco*, No. 04-340. The Institute also conducts education, outreach, and research programs designed to help small property owners understand and protect their rights, and works to help San Francisco's residents understand the societal costs of restrictive regulations and rent control.

The San Francisco Apartment Association ("SFAA") has been a non-profit trade association since 1917. SFAA's 2,700 members own small to medium-sized apartment buildings in

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[1] The parties have filed letters consenting to the filing of this amici curiae brief. No counsel for any of the parties authored any part of this brief. No person or entity other than the amici filing this brief has made any monetary contribution to the preparation or submission of this brief.

San Francisco with more than 60,000 rental units. SFAA defends its members by challenging unfair local government regulations, has prosecuted several actions, e.g., *Tom v. San Francisco*, 120 Cal.App. 4th 674 (2004)(successful challenge to ordinance prohibiting owner occupancy of property), and has filed amicus briefs in the California courts. SFAA also advises its members concerning the extraordinarily complex and growing regulations imposed by the City and County of San Francisco.

The California Apartment Association ("CAA") is the largest statewide rental-housing trade association in the United States, with a diverse membership of 50,000 rental property owners and managers ranging from California's largest property management companies to individuals with a single rental unit, which control nearly two million rental units in California. CAA provides a voice for rental property providers throughout California, and encourages the fair, ethical, and professional operation of rental housing.

The San Francisco Association of Realtors ("SFAR") (formerly the San Francisco Real Estate Board) was founded as a non-profit association on February 6, 1905. It antedates the National Association of Realtors and the California Association of Realtors. It actively participated in the formation of both of these organizations. SFAR presently represents more than 4,200 members, most of whom are active residential real estate brokers and agents. It is dedicated to providing service to its members, the community, and the public at large. SFAR was founded upon the principle that the wise utilization of real property is fundamental to the growth and survival of this country. To that end, it promotes policies that lead to the highest and best use of land, the safeguarding of property rights, equal opportunity in housing, and professional competence. SFAR actively lobbies local

government in this regard and when necessary and appropriate it properly challenges local ordinances. It joined with SFAA and SPOSF in *Tom v. San Francisco*, 120 Cal.App.4th 674 (2004). It took the lead in *Cwynar v. San Francisco*, 90 Cal.App.4th 637 (2001), a takings challenge to a local ordinance that limited the occupancy rights of owners of residential real property. SFAR joins in filing this amicus brief to advance the interest in fair judicial scrutiny under the United States Constitution of local laws and regulations that so diminish the bundle of sticks that is ownership as to effect a taking.

SUMMARY OF ARGUMENT

Amici file this brief because the constitutional issues raised by this case are poorly presented by a fight waged by a multi-national corporation with billions of dollars and a state with millions of taxpayers. Unlike the property owners who will be most affected by the decision in this case, Chevron can afford to protect itself by using its resources to influence the political process.

The consequences of the constitutional issue are best illustrated by the millions of property owners who are targeted by cities and states to pay the costs of public goods that should be borne by the public as a whole. The vast majority of those property owners cannot protect themselves in the political process and are, accordingly, targeted by cities and states to pay for problems that they did not cause and did not exacerbate. It is all too easy for legislators to exact funds from the few, rather than explain tax increases to the voters. And, with enormous budget deficits, state and local governments are increasingly reaching for easy options.

The appeal of such easy options was predicted by Justice Oliver Wendell Holmes more than 70 years ago, when this Court held that the police power to regulate property must be limited by the courts under the Fifth Amendment:

> If instead, the uses of private property were subject to unbridled, uncompensated qualification under the police power, "the natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappear[ed]".

Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1014 (1992), quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

Hawaii seeks to preserve and protect those easy options, and asks this Court to reverse its prior decisions in order to give state and local governments that luxury. In Hawaii's view, any meaningful judicial review of its legislation under the decades-old substantial advancement test would amount to a return to the *Lochner* era. Hawaii raises the specter that judicial review of legislation that imposes public costs on a few private property owners will transform the courts into an unelected, super-legislature.

That argument is wrong. No decision of the courts under the Takings Clause could ever prohibit Hawaii's legislature from acting in its own perception of the public good. The Takings Clause requires only that Hawaii's taxpayers pay the costs of regulations that go too far. Indeed, that is the only question in this case, and the lower courts properly held that Hawaii may not single out two property owners to pay the entire cost of this attempted solution to a public problem. The cost should be borne by the public as a whole.

In short, this is an unusual case that presents the usual problems. Here, Hawaii has chosen to regulate Chevron's property, requiring Chevron to subsidize its gasoline station operators. Hawaii's stated purpose was to reduce the price of gasoline to the consumer for the public good. But, the law's failure to advance that purpose demonstrates that Hawaii's real (if unstated) purpose was to provide a subsidy for local gasoline station operators at Chevron's expense, and that is a cost that the public should bear.

The State argues, however, that the courts may not even evaluate the legislation under the substantial advancement test. The State claims that if the courts ask whether a legislative decision to subsidize gasoline station operators at the expense of two property owners substantially advances a legitimate government purpose, the legislative heavens will fall. And, Hawaii stretches the argument even further. As Hawaii would strike the "balance" between legislators and the courts, the courts must give legislators free rein to reduce their burgeoning deficits and appease their taxpayers by imposing the costs of public programs on small groups of property owners.

This Court has long disagreed. The issues raised by Hawaii have long been foreclosed by decisions of this Court establishing the substantial advancement test. Nothing new is offered by Hawaii. Contrary to Hawaii's claims, this Court's substantial advancement decisions have not transformed the courts into super-legislatures. Indeed, the substantial advancement test makes the courts precisely what they should be: guardians of the Constitution.

In this case, the lower courts merely required, as the Takings Clause demands, that Hawaii not impose the cost of this regulation on Chevron. If this law is invalidated because

the State chooses not to pay that cost, that does not mean that the courts have imposed their own economic policies. The State is free, and remains free, to adopt economic regulations that its legislators believe will create a public benefit, as long as they do not impose the cost of those decisions on a few property owners, rather than Hawaii's taxpayers as a whole.

In sum, while Chevron may not be the most sympathetic beneficiary of the Fifth Amendment, this case hardly provides a reason to revisit this Court's decisions under the Takings Clause. When the courts protect the few -- even the richest of the few -- they send a message that legislators must follow the Constitution. The lower courts followed this Court's decisions and those decisions were right.

ARGUMENT

I. THE STATE OF HAWAII PRESENTS NO REASON FOR THIS COURT TO OVERRULE ITS DECISIONS UNDER THE SUBSTANTIAL ADVANCEMENT TEST

In *Agins v. Tiburon*, 447 U.S. 255, 260 (1980), this Court held that an economic regulation violates the Takings Clause of the Fifth Amendment if it fails to substantially advance a legitimate government interest. This Court has repeatedly reaffirmed that holding. E.g., *Lucas*, 505 U.S. at 1016.

This Court has also expressly rejected the very argument that Hawaii makes here -- that Takings Clause claims should be reviewed under the same test as claims under the Due Process Clause. Petitioners' Brief on the Merits ("Pet. Mer. Br.") at 14-36; *Nollan v. California Coastal Commission*, 483 U.S. 825, 834 n. 3 (1987) (takings tests are not "the same as those applied to due process and equal protection claims");

Dolan v. Tigard, 512 U.S. 374, 391 (1994) (reasonable relationship test does not apply under Takings Clause because it "seems confusingly similar to the term 'rational basis' which describes the minimal level of scrutiny under the Equal Protection Clause").

Understandably, the State does not even address the standards set out by this Court for overturning its own decisions. E.g., *State Oil v. Kahn*, 522 U.S. 3, 20 (1997) ("We approach the reconsideration of decisions of this Court with the utmost caution."). Instead, the State offers its fear that this Court's Takings Clause decisions will result in a judicial revival of *Lochner v. New York*, 198 U.S. 45 (1905).

Hawaii's arguments have been made and rejected before, and this legislation giving subsidies to its gasoline station operators for the "public good" adds nothing to the debate. As an obvious point, this Court was fully aware of *Lochner*-era jurisprudence when it decided *Agins*, and when it repeatedly reaffirmed the underlying doctrinal grounds for *Agins*' holding. E.g., *Lucas*, 505 U.S. at 1016. The Takings Clause addresses dangers of governmental leveraging that the Due Process Clause does not address. *Nollan*, 483 U.S. at 834-837. The substantial advancement test under the Takings Clause is required to prevent legislators from using regulations to force a few property owners to bear the general costs of remedying societal problems. That potential for mischief cannot be prevented by the political process alone because it will always be politically popular to impose the costs of the many on the few.

The last 25 years have shown that, with the substantial advancement test, this Court struck the appropriate balance between protecting property rights and allowing sufficient latitude for governmental regulation of property. Since *Agins*,

there has been no flood of substantial advancement litigation, let alone a flood of judgments for plaintiffs. Indeed, the substantial advancement test is sufficiently difficult to meet that it takes a regulation as extreme as rent control for gasoline stations to satisfy the test.

Even in the few cases in which regulations have gone too far, the substantial advancement test presents no serious conflict between the courts and legislators. A decision under the Takings Clause does not require the courts to invalidate legislation as in *Lochner*. It requires only that the costs of the legislation be borne by taxpayers, rather than by property owners who are singled out because they can be forced to pay. Even when a court rules that legislation is a taking, its ruling will not prevent any legislature from acting in the name of the public good. The legislature may proceed as long as it pays the cost of its legislation.

Hawaii's predictions of legislative ruin caused by this case are unwarranted. An affirmance in this case will not ruin any legislature, but may ruin the careers of individual legislators who are willing to disregard their constitutional oaths. In virtually every city and state, legislators will not be reelected if their constituents are required to pay for all that they were promised. For those legislators, the "solution" is increasingly to force the few to pay for the many, whether by constitutionally permissible means or not. Here, the lower courts followed this Court's decisions and rejected that "solution."

For the same pragmatic reasons, this Court should reject Hawaii's contention that the political process is sufficiently robust to protect property owners from oppression by the majority. Pet. Mer. Brf. at 37-42. While that might be true of Chevron because it has enough resources to do battle in the

political arena, it is not true of most property owners. Amici, for example, do not have Chevron's resources. SPOSF's members typically own 2-6 unit buildings and the members of SFAA and CAA typically own 5-100 unit buildings. In jurisdictions like San Francisco, where 65% of the voters are tenants, the minority of property owners cannot protect themselves from the political process. Justice Holmes' prediction that, "the natural tendency of human nature" is to expand the police power until "private property disappear[ed]," *Pennsylvania Coal*, 260 U.S. at 415, has proven true: "private property . . . is now extinct in San Francisco[, which] has implemented a neo-feudal regime where the nominal owner of property must use that property according to the preferences of the majorit[y]". *San Remo Hotel v. San Francisco*, 27 Cal.4th 643, 692 (2002) (Brown, dissenting). If property owners are protected at all, it will be through the courts.

In sum, Hawaii has chosen to make a small case involving a few gasoline stations into a reason to overrule this Court's decisions and give cities and states free rein to violate the Takings Clause. In the process, Hawaii has shown that the substantial advancement test is even more vital now than it was 25 years ago when *Agins* was decided.

A. The Takings Clause Does Not Prohibit Government Action; It Ensures that No Group is Singled Out to Bear the Cost of a Public Burden

The Takings Clause is perhaps the most disarming of the Bill of Right's protections of the few against the tyranny of the many. Unlike the other provisions of the Bill of Rights, the Takings Clause does not prohibit government action. Instead, it requires only that government pay just compensation for its actions, thereby spreading the cost of its

actions benefitting the public to all taxpayers. As this Court explained in *First English Evangelical Lutheran Church v. Los Angeles*, 482 U.S. 304, 315 (1987):

> The 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 otherwise proper interference amounting to a taking.

In the end, the Takings Clause requires only what the legislators should know is right. When the courts enforce this constitutional right, they merely "bar 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).

Hawaii hopes to transform this Takings Clause case into an enormous conflict between the courts and legislatures. According to Hawaii, the substantial advancement test under the Takings Clause has revived (or will revive) the *Lochner* era by allowing unelected judges to second-guess the wisdom of politically-popular economic regulations. Pet. Mer. Brf. at 39.

Even as a doctrinal matter, Hawaii's argument makes no sense at all. The Takings Clause does not prohibit government regulations, it simply requires the government to use tax dollars to accomplish its purpose rather than forcing a few to pay the cost. *First English*, 482 U.S. at 315; *Armstrong*, 364 U.S. at 49. By contrast, when a government regulation is found to violate the Due Process Clause, the government may not continue to enforce the regulation – even if the government were willing to pay the costs imposed by the regulation.

In the *Lochner* era, judges did use the Due Process Clause to second-guess legislative decisions and impose their own economic views. One reason that this Court ultimately overruled *Lochner* was to enable each state to try novel (and thus untested) solutions to economic problems. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, 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."). But, the Takings Clause does not call for judges to impose their economic views and thereby prevent economic regulations that are novel. The only issue for the courts under the Takings Clause is who pays for the novel or experimental solutions.[2] Thus, Hawaii's point fails at the threshold. Under the Takings Clause, the courts cannot second-guess legislative judgments or usurp legislative power. At most, the courts can direct the state to pay for the cost of their own legislation. That is, unless -- as in this case -- the government refuses to pay.

B. Even If Invalidation Were the Wrong Remedy in this Case, That Does Not Affect the Issue of Whether Heightened Scrutiny Is Required by the Fifth Amendment

The State makes much of the fact that the remedy chosen by the lower courts in this case was to invalidate Hawaii's rent control law. The State argues that the invalidation

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[2] Of course, a different issue is presented when a governmental taking of property is challenged on the ground that it is not for a public use. In that case, the proper remedy is not compensation, it is an injunction. This Court is considering the scope of the public use requirement in *Kelo v. New London*, No. 04-108.

remedy shows that the substantial advancement test is really a substantive due process test. The State's underlying premise is correct: the courts may not unilaterally order invalidation as the remedy for a taking. Instead, the courts are required to give the government the option of either paying just compensation or accepting invalidation of the regulation and paying temporary takings damages for the time that the regulation was in effect. *First English*, 482 U.S. at 321 ("Once a court determines that a taking has occurred, the government retains the whole range of options already available – amendment of the regulation, withdrawal of the invalidated regulation, or exercise of eminent domain.").

However, it is often quite obvious that the government has no desire or intention to pay just compensation. In those cases, this Court has not hesitated to invalidate a regulation once it was found to be a taking. E.g., *Babbitt v. Youpee*, 519 U.S. 234, 243-245 (1997).

In this case, Hawaii's rent control law does not provide for compensation, nor did the State argue in the lower courts that the right remedy was an order requiring it to provide compensation to Chevron. As this Court explained in *First English*, "a governmental body may acquiesce in a judicial declaration that one of its ordinances has effected an unconstitutional taking of property; the landowner has no right under the Just Compensation Clause to insist that a 'temporary' taking be deemed a permanent taking." *First English*, 482 U.S. at 317. In other words, a government, like Hawaii, may choose not to contest the remedy of invalidation because it is simply not willing to pay just compensation. Apparently, some legislative experiments – like Hawaii's

gasoline station rent control – are only worth trying if someone else pays the price.[3]

Ultimately, whether the remedy of invalidation is the proper remedy in this case is irrelevant to the real issue raised by the State: should this Court overrule its prior precedents establishing that there is a different standard of review under the substantial advancement test of the Takings Clause than the rational basis test of the Due Process Clause. The legislature's ability to advance the public good (according to its own views of social and economic policy) is unaffected by the Takings Clause. *Nollan*, 483 U.S. at 841-842 ("California is free to advance its 'comprehensive program,' if it wishes, by using its power of eminent domain for this 'public purpose,' [; but . . .] it must pay for it.").

This case proves the point. Whether Hawaii (explicitly or implicitly) acquiesced in the lower courts' remedy invalidating its legislation is completely irrelevant to the issue of the correct standard of review. If the incorrect remedy is the linch-pin of the State's position as its merits brief seems to indicate, there is a simple solution: remand the case with a direction that the lower courts order the State to choose between paying just compensation or accepting the invalidation of its legislation.[4]

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[3] Senator Russell Long explained a similar difficulty in adopting tax reform, most voters subscribe to the philosophy of "Don't tax you, don't tax me, tax that fellow behind the tree." Fred R. Shapiro, *The Oxford Dictionary of American Legal Quotations* 401 (Oxford Univ. Press 1993), quoting *Forbes*, Dec, 15, 1976.

[4] One solution to the problem posed by the dispute over the remedy in this case and avoid a fact question about whether the government silently acquiesced to the invalidation remedy is for the trial courts

II. HEIGHTENED SCRUTINY IS NECESSARY TO INSURE THAT PUBLIC COSTS ARE NOT SHIFTED TO PARTICULAR PROPERTY OWNERS UNDER THE GUISE OF ORDINARY ECONOMIC REGULATIONS

The regulatory takings doctrine has its modern roots in a seminal opinion by Justice Oliver Wendell Holmes, who explained:

> 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. . . . . We are in danger of 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.

Pennsylvania Coal, 260 U.S. at 415-416.

In that opinion, the Court discussed rent control that was imposed during World War I and concluded that while it was "to the verge of the law", it was not a taking because of the exigencies of the war-time "emergency". *Id*. at 416, citing *Block v. Hirsh*, 256 U.S. 135 (1921). Hawaii's legislation is, of course, not justified by any emergency, and is not even near the verge of a constitutional measure. Its rent control

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to routinely require defendants in takings cases to explicitly elect between just compensation and invalidation plus temporary takings damages before trial. In addition to insuring that the government's right to select the remedy is observed, that practice would help both the parties and the courts manage the trial of takings cases: the issues at trial will be quite different depending on which remedy the government selects.

regulation for a few gasoline station operators plainly goes "too far" and requires just compensation under the Takings Clause. But, Hawaii asks for more than just this Court's approval of this piece of legislation. Hawaii asks that this Court abandon the very doctrine that allows the courts to determine whether legislation has gone too far.

The substantial advancement test should be protected, not abandoned, because it enables the courts to distinguish between regulations that adjust the ordinary benefits and burdens of economic relations from regulations that impose an unfair burden on a few property owners. *Nollan*, 483 U.S. at 834-837 (substantial advancement test distinguishes an ordinary economic regulation from "'an out-and-out plan of extortion'"); *cf. Lucas*, 505 U.S. at 1017-1018 (economically viable use test distinguishes ordinary economic regulations that adjust the "benefits and burdens of economic life" from regulations that "carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serous public harm."). The substantial advancement test protects property owners from the significant danger that the government has used the opportunity created by the immobility of real property to single out a few owners (in this case, two oil companies) and unfairly impose the cost of a public good on those property owners.

Hawaii's regulation poses precisely the same danger that was identified in *Nollan* and *Dolan*. Chevron alleged that the State leveraged its power to regulate property in order to impose the cost of public burdens on property owners.[5]

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[5] In this case, the State regulated particular pieces of real property, i.e., the land under gasoline stations. Thus, the State's reliance on Justice Kennedy's concurrence in *Eastern Enterprises* is irrelevant

While Hawaii admits that heightened scrutiny under the substantial advancement test was appropriate in *Nollan* and *Dolan*, it asks the courts to abandon that test in this case and preclude the courts from determining whether Chevron's allegation was true. Hawaii argues that the courts should only apply heightened scrutiny to review exactions imposed on a single property owner in an administrative proceeding. Pet. Mer. Brf. at 33-35.

If that were the only way that governments could violate the Takings Clause, that might be a viable argument. But there are many ways for governments to transfer wealth, and to violate the Constitution. In this case, Chevron's rights are equally violated by this legislative regulation requiring it to subsidize Hawaiian gasoline distributors as they would be by an administrative regulation exacting payments to Hawaii to fund the subsidy. In either case, Hawaii has leveraged its police power to compel Chevron to pay for this legislation in the name of the "public good."[6]

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because the issue in that concurrence was whether the Takings Clause should apply to economic regulations that do not operate on particular pieces of real property. *Eastern Enterprises v. Apfel*, 524 U.S. 498, 540-542 (1998).

[6] Even if this Court were to decide that legislation imposing an economic regulation is only subject to deferential scrutiny, it should not reach the issue of whether the same level of scrutiny is applicable to legislation imposing exactions. While the consequences to the property owner are the same, the dangers of governmental leveraging are obviously greater when the government requires real property owners to give their property (in cash or fee title) directly to the government. *Town of Flower Mound v. Stafford Estates, Ltd.*, 135 S.W.3d 620 (2004).

Moreover, the State's administrative/legislative distinction is indefensible. "A city council can take property just as well as a planning commission can." *Parking Ass'n of Georgia, Inc. v. City of Atlanta*, 515 U.S. 1116, 1117-1118 (1995) (Justices Thomas and O'Connor, dissenting from denial of certiorari). The fact that the State chose to impose this regulation by legislation on the two oil companies that leased gasoline stations, rather than by administrative action, should hardly make a constitutional difference.[7] Constitutional rights should not turn on whether the cities and states choose to ask their legislators to act unconstitutionally or ask their administrators to do so.

Nollan provides an apt example. While creating an easement for public beach access was a legitimate government purpose, the State of California could have taken the easement by legislation just as easily as it did in the administrative process. In any event, California chose not to pay for the

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[7] It is true that legislative procedures and administrative procedures are different. Thus, it may make sense to treat regulations imposed by an administrative agency somewhat differently than those imposed by a legislature. For example, under *Nollan* and *Dolan*, the government bears the burden of proving that the administrative action substantially advances a legitimate government purpose. That burden is justified because the administrative agency has a quasi-judicial procedure to gather admissible evidence and must base its decision on that evidence. By contrast, the legislative process is usually not based on admissible evidence gathered before the law is adopted. As a result, it may be appropriate to place the burden of proof on the property owner to establish that a legislative regulation fails the substantial advancement test. *Ehrlich v. Culver City*, 12 Cal.4th 854, 906 (1996) (Kennard and Baxter, concurring). Other than that, there is no justification for treating legislation and administrative actions differently under the substantial advancement test.

easement. *Nollan*, 483 U.S. at 841-842 ("California is free to advance its 'comprehensive program,' if it wishes, by using its power of eminent domain for this 'public purpose,' [; but . . .] it must pay for it."). The problem faced by California was that it did not have a good reason to require the Nollans to provide the easement by legislative or administrative regulation: the Nollans did not cause the lack of access. The only problem that they caused was a lack of visual access, and that problem could not be solved by requiring them to provide an easement for public beach access.

Dolan provides another example. In *Dolan*, the city took title to land instead of requiring flood control measures, i.e., took more than was needed to satisfy its ostensible purpose. Again, the substantial advancement test enabled the courts to determine whether the city's proffered purpose was advanced by the regulation. If not, the purpose of the economic regulation must have been to shift the cost of the public good to the regulated property owners. *Dolan*, 512 U.S. at 387-388, 392-395.

Here, when Hawaii adopted gasoline station rent control, its proffered purpose was to lower gasoline prices. But, the lower courts properly determined that was not the true purpose because the law will not actually lower gasoline prices. The only result that was absolutely certain from the legislation was that Chevron would subsidize gasoline station operators by reducing their costs. While that subsidy may not be unconstitutional under the Takings Clause, Hawaii was required to pay the cost of the subsidy, rather than impose the cost on Chevron.

The courts could not have made that determination without the substantial advancement test. If that test were abandoned, as Hawaii urges, the courts would be completely precluded

from making any significant inquiry into the critical question under the Takings Clause: whether the government is 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).

In sum, the lower courts followed this Court's prior holdings under the Takings Clause and, if those holdings are abandoned, state and local governments will be free to ignore the Takings Clause in their future legislation and administrative decisions.

CONCLUSION

More than two decades ago, this Court held that legislatures may take private property only to substantially advance a public purpose. That holding has been followed by the courts and has not prevented legislators from acting within their constitutional limits. If affirmed, this case will be no exception.

Respectfully Submitted,

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