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 WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE STATES OF NEW YORK, CALIFORNIA, ALASKA, ARIZONA, COLORADO, CONNECTICUT, DELAWARE, IDAHO, ILLINOIS, IOWA, KENTUCKY, MAINE, MARYLAND, MASSACHUSETTS, MINNESOTA, MISSISSIPPI, MONTANA, NEW JERSEY, OKLAHOMA, OREGON, PENNSYLVANIA, RHODE ISLAND, TENNESSEE, UTAH, VERMONT, WASHINGTON, AND WEST VIRGINIA, THE COMMONWEALTHS OF PUERTO RICO AND THE NORTHERN MARIANA ISLANDS, AND THE TERRITORIES OF AMERICAN SAMOA, GUAM, AND THE VIRGIN ISLANDS, AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether the Just Compensation Clause authorizes a court to invalidate state economic legislation on its face and enjoin enforcement of the law on the basis that the legislation does not substantially advance a legitimate state interest, without regard to whether the challenged law diminishes the economic value or usefulness of any property.

2. Whether a court, in determining under the Just Compensation Clause whether state economic legislation substantially advances a legitimate state interest, should apply a deferential standard of review equivalent to that traditionally applied to economic legislation under the Due Process and Equal Protection Clauses, or may instead substitute its judgment for that of the legislature by determining *de novo*, by a preponderance of the evidence at trial, whether the legislation will be effective in achieving its goals.

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INTEREST OF THE *AMICI CURIAE*

Amici States, Commonwealths, and Territories, through their legislative and executive branches, routinely engage in many forms of regulation that affect economic interests. The challenges posed by new patterns of growth and development, a rapidly-changing economy, advances in science and technology, and increased understanding of public health risks and environmental harms require the states to respond and, on occasion, to experiment with regulations that seek to address these challenges. Accordingly, the *amici* have an interest how regulatory takings jurisprudence affects their ability to implement regulatory programs to protect the health and welfare of their citizens. For at least 70 years, the legislatures and regulatory agencies of the *amici* States have had considerable discretion within the federal system to fashion responses to various problems, *see generally Ferguson v. Skrupa*, 372 U.S. 726, 731 (1963); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). *Amici* have a keen interest in maintaining the deference that courts have traditionally given the States in making the countless policy choices of how to meet the economic, social, and health needs of their citizens.

The Ninth Circuit's decision threatens to complicate, perhaps even paralyze, these routine exercises of the States' police power. The ruling encourages challenges under the Just Compensation Clause that are premised on the so-called "means-ends" test mentioned in *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). *Agins* suggests that land-use regulation "effects a taking if [it] does not substantially advance legitimate state interests." *Id*. Since announcing that test, the Court has never used the *Agins* standard to strike down a generally-applicable statute or regulation as a regulatory

taking violative of the Just Compensation Clause. As this Court has recently indicated, despite *Agins* it is far from clear whether generally-applicable legislation should even be subject to a means-ends test in order to determine whether a taking has occurred.

The Ninth Circuit, however, not only employed such a test but made it an exceedingly stringent one. Its decision requires a court to enjoin the operation of economic legislation under the Just Compensation Clause if the court, after conducting a *de novo* review of the statute, concludes that the challenged law will not in fact accomplish the legislature's intended goal.

In doing so, the lower court upset the careful balance of power that our federal system strikes between democratically-elected state and local regulatory bodies on the one hand and the judiciary on the other. If allowed to stand, the Ninth Circuit's decision will severely constrain the options for a legislature grappling with urgent and competing policy concerns. Courts will have to scrutinize not the rationality of a regulation, but whether the legislative "means" chosen by the elected members of state government will, in the court's own view and as a matter of fact, achieve their "ends." The Ninth Circuit's decision threatens to establish the federal courts as overseers of state laws, routinely inquiring whether the state has made the "correct" policy choice to respond to a particular problem. This scheme would represent a sharp departure from the distribution of authority in our federal system.

SUMMARY OF THE ARGUMENT

The *Agins* "substantially advance" test conflicts with the language and structure of the Just Compensation Clause. That provision is not a substantive limitation on governmental process. Rather, by its terms the Just Compensation Clause presupposes the legitimacy of government action and requires only that the government provide compensation when it takes private property.

The *Agins* test instead needlessly duplicates the means-ends scrutiny of government action that the substantive component of the Due Process Clause requires. Indeed, *Agins* itself derives entirely from a line of due process and equal protection decisions.

A majority of this Court has already recognized the incongruity of lodging a "substantially advance" test within regulatory takings jurisprudence. Nor does this Court's adoption of a means-ends test to measure the validity of exactions vitiate this recognition. As the Court has noted, such a test is peculiarly appropriate to evaluating the validity of exactions, which are individualized land-use decisions conditioning approval of development on the dedication of property to public use. It has no application to government regulation outside that context.

Even if a "substantially advance" test is appropriate for challenges to regulatory takings under the Just Compensation Clause, it requires only deferential rational-basis review. Post-*Agins* decisions regularly apply such a standard when reviewing generally-applicable statutes and regulations that affect property interests. This deferential standard is necessary to prevent courts from sitting as superlegislatures

and second-guessing the wisdom of the elected branches of government. Any stricter scrutiny – much less the decisive factual demonstration of a statute's effectiveness required by the courts below – will inhibit the states from developing and experimenting with policies that address evolving problems.

I. The Just Compensation Clause Does Not Require That Generally-Applicable Legislation "Substantially Advance" A Legitimate Government Interest

A. The "Substantially Advance" Test Does Not Belong in Regulatory Takings Jurisprudence Because the Just Compensation Clause Presupposes the Legitimacy of Governmental Action

The *Agins* "substantially advance" test conflicts with the key assumption underlying the Just Compensation Clause. While the *Agins* test focuses on the potential illegitimacy of governmental activity, the Just Compensation Clause presupposes the legitimacy of the government action and operates simply as a conditional limitation, permitting the government to take private property as long as it provides compensation.[1] *First English Evangelical Lutheran Church of*

1. The Just Compensation Clause provides "nor shall private property be taken for public use without just compensation." The *Agins* "substantially advance" test asks whether a governmental action effects a "taking" by focusing on the extent to which a regulation fulfills a concededly-valid public purpose. This is distinct from the threshold inquiry under the "public use" component of the Just Compensation Clause, which asks whether a governmental action alleged to be a "taking" has a "public purpose" at all. *See, e.g.*, *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 240-43 (1984); *National Railroad Passenger Corp. v. Boston and Maine Corp.*, 503 U.S. 407, 422 (1992). Neither the nature of this threshold inquiry nor its outcome is at issue in the present case.

Glendale v. County of Los Angeles, 482 U.S. 304, 314-15 (1987). Stated differently, the Just Compensation Clause seeks to ensure compensation for a taking of private property, not to prevent government from adopting irrational regulatory schemes. It is not a substantive limitation on governmental power. Just as a government's physical takings of private property require that it pay the owner just compensation, regulatory takings jurisprudence analyzes whether a regulation imposes restrictions so severe that it is tantamount to a condemnation or an appropriation. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414-15 (1922) (finding a regulatory taking because a statute that "[made] it commercially impracticable to mine certain coal [had] very nearly the same effect for constitutional purposes as appropriating or destroying it"). While a generally-applicable regulation that is not rationally related to some legitimate governmental interest may violate the Due Process Clause, such irrationality is not the equivalent of a condemnation or appropriation. It therefore does not violate the Just Compensation Clause.

The incongruity of lodging a "substantially advance" test within regulatory takings jurisprudence is confirmed by *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), where five justices rejected a Just Compensation Clause challenge to the federal Coal Industry Retiree Health Benefit Act ("Coal Act"). Justice Kennedy opined that "the takings analysis is inapplicable" to challenges to the substantive validity of government regulation. 524 U.S. at 547. Four other Justices agreed that "the Constitution's Takings Clause does not apply to such challenges." *Id*. at 554.

Citing *Agins*, Justice Kennedy recognized that the means-ends standard "open[s] the door to normative considerations

about the wisdom of government decisions" and that "[t]his sort of analysis is in uneasy tension with our basic understanding of the Takings Clause, which has not been understood to be a substantive or absolute limit on the Governments's power to act." 524 U.S. at 545 (Kennedy, J., concurring in the judgment and dissenting in part). This "uneasy tension" results from the fact the Just Compensation Clause "presupposes what the government intends to do is otherwise constitutional." *Id*. (citing *First English*, 482 U.S. at 314-15); *accord Mahon*, 260 U.S. at 415. Since "the constitutionality of the Coal Act appear[ed] to turn on the *legitimacy of Congress' judgment* rather than on the availability of compensation," Justice Kennedy opined that "the more appropriate constitutional analysis arises under general due process principles rather than under the Takings Clause," 524 U.S. at 545 (emphasis added), and that "we should proceed first to general due process principles, reserving takings analysis for cases where the governmental action is otherwise permissible." *Id*. at 546. Similarly, Justice Breyer, speaking for the four dissenters, stated that "at the heart of the [Just Compensation] Clause lies the concern, not with preventing arbitrary or unfair government action, but with providing *compensation* for *legitimate* government action that takes 'private property' to serve the 'public' good." 524 U.S. at 554 (first emphasis in original, second emphasis added).

The Court's subsequent decision in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999), did not vitiate this aspect of *Eastern Enterprises*. In *Del Monte Dunes* the Court upheld a district court's finding that a series of adverse zoning determinations by the City of Monterey constituted a taking. The finding was based on jury instructions (to which the defendant city had waived any

objection) incorporating the "substantially advance" principle. But five of the Justices either wrote or joined opinions reserving the question of the validity of the substantially-advance test. *See Del Monte Dunes*, 526 U.S. at 732 n.2 (Scalia, J. concurring) (the City "forfeited any objection to this standard . . . , and I express no view as to its propriety"); *id*. at 753-54 n.12, n.13 (Souter, J. dissenting, joined by O'Connor, Breyer, Ginsburg, JJ.) (offering "no opinion here on whether *Agins* was correct in assuming that this prong of liability was property cognizable as flowing from the Just Compensation Clause of the Fifth Amendment as distinct from the Due Process Clauses of the Fifth and Fourteenth Amendments"). Furthermore, the majority opinion acknowledged that the Court had never explained the "nature or applicability" of the "substantially advance" standard outside the physical exaction context and declined to explain it, given that Monterey waived any objection to the jury instructions. 526 U.S. at 704.

Thus, a majority of the Court has recognized that the *Agins* "substantially advance" formulation is at odds with the Just Compensation Clause. Accordingly, that standard should not be incorporated in regulatory takings jurisprudence, but rather should remain a part of due process analysis, under which state statutes that lack a rational basis may be invalidated.

B. Means-Ends Scrutiny of the Validity of Legislation and Regulatory Decisions Under the Takings Clause is Unnecessary Because Such Review is Already Required By the Due Process Clause

There is no need to import the *Agins* "substantially advance" standard into regulatory takings jurisprudence because the Due Process Clause provides an independent check on irrational enactments that serve no government interest. Under the due process standard, courts may inquire whether "it might be thought that the particular legislative measure was a rational way to correct [a particular problem]." *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 487-88 (1955); *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 124-25 (1978).

Courts have invalidated statutes and regulatory actions under a rationality standard in the context of due process challenges. *See, e.g., Nectow v. City of Cambridge*, 277 U.S. 183 (1928) (portion of city zoning ordinance invalidated under the Due Process Clause).[2] Indeed, this Court itself has

2. *See also Pheasant Bridge Corp. v. Township of Warren*, 777 A.2d 334, 343 & n.1 (N.J. 2001), *cert. denied*, 535 U.S. 1077 (2002); *San Carlos Apache Tribe v. Superior Court*, 972 P.2d 179, 189 (Ariz. 1999) (State statute violates substantive due process protection of Arizona's constitution because it retroactively alters vested property rights in water); *Pitocco v. Harrington*, 707 A.2d 692, 696 (R.I. 1998) (reversing dismissal of substantive due process claim because, if proven, government official's denial of a building permit for reasons other than those authorized in the applicable ordinance would be arbitrary); *L.A. Ray Realty v. Town Council of Cumberland*, 698 A.2d 202 (R.I. 1997) (Town officials violated substantive due process rights of developers where they denied the developers' subdivision applications without any legal basis and with animus); *Town of*

(Cont'd)

indicated that a due process standard is appropriate for evaluating the validity of most generally-applicable zoning regulations. *Dolan v. City of Tigard*, 512 U.S. 374, 391 n.8 (1994) ("in evaluating most generally applicable zoning regulations, the burden rests on party challenging the regulation to prove that it constitutes an arbitrary regulation of property rights"). There is no need to distort regulatory takings law to fit Chevron's claim, since the "substantially advance" inquiry already has a natural home in due process jurisprudence.

C. The *Agins* "Substantially Advance" Formulation Has No Basis in the Just Compensation Clause, But Simply Reflects Long-Standing Due Process and Equal Protection Principles

The Court's apparent discomfort with the *Agins* test may reflect its recognition that the test has no basis in Takings Clause jurisprudence. A review of *Agins's* supporting citations confirms that its "substantially advance" test reflects nothing more than the traditional standard of review based on the Due Process and Equal Protection Clauses, as opposed to the Just Compensation Clause. The formulation is rooted exclusively in a series of zoning cases decided in the late

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Orangetown v. Magee, 665 N.E.2d 1061 (N.Y. 1996) (landowners who were denied substantive due process because the town decision affecting their property had been made in an arbitrary and capricious manner and without any rational basis recovered five million dollar verdict); *Tampa-Hillsborough County Expressway Authority v. A.G.W.S. Corp.*, 640 So. 2d 54, 57 (Fla. 1994); *Lutheran Day Care v. Snohomish County*, 829 P.2d 746, 748, 763 (Wash. 1992) (County violated substantive due process because it acted arbitrarily and capriciously in denying a conditional use permit to build a rest home), *cert. denied*, 506 U.S. 1079 (1993).

1920's, culminating in *Nectow v. City of Cambridge*, 277 U.S. 183 (1928). Each of the cases concerned the Due Process or Equal Protection Clauses; each requested equitable relief; each employed the same deferential standard of review; and none invoked the Just Compensation Clause or requested compensation.

The first, *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), concerned a due process and equal protection claim seeking to enjoin a municipal zoning ordinance. The Court squarely rejected the due process and equal protection challenges, using the deferential standard of review appropriate for such challenges:

> [the statute's] reasons are sufficiently cogent to preclude us from saying, as it must be said before an ordinance can be declared unconstitutional, that such provisions are clearly *arbitrary* and *unreasonable*, having *no substantial relation* to the public health, safety, morals, or general welfare.

272 U.S. at 395 (emphasis added).

That term saw the Court employ the same standard to sustain two other zoning ordinances. *Zahn v. Board of Public Works for the City of Los Angeles*, 274 U.S. 325, 327 (1927), relying on *Euclid* and other cases, upheld a statute designating various zoning districts against a due process and equal protection challenge. A few days later, *Gorieb v. Fox*, 274 U.S. 603 (1927), rejected a due process and equal protection challenge to a zoning ordinance that imposed a building set-back requirement. Employing the same language and standard used in *Euclid* and *Zahn*, the Court sustained the ordinance

because it was not "clearly arbitrary and unreasonable, having no substantial relation to the public health safety morals or general welfare." 274 U.S. at 610.

The next year in *Nectow*, the Court applied the same standard in reviewing an "as-applied" challenge to a general zoning ordinance. 277 U.S. 183. The complaint alleged that the ordinance, as applied to the landowner, "deprived him of his property without due process of law in contravention of the Fourteenth Amendment." *Id*. at 185-86. Using the same "substantial relation" language employed in *Euclid* and *Zahn*, the Court reaffirmed those holdings and the general validity of zoning ordinances:

> a court should not set aside the determination of public officers in such a matter unless it is clear that their action "has no foundation in reason and is a mere *arbitrary* or *irrational* exercise of power having *no substantial relation* to the public health, the public morals, the public safety or the public welfare in its proper sense."

277 U.S. at 188 (quoting *Euclid*, 272 U.S. at 395) (emphasis added). On the basis of factual findings made by a special master appointed by the trial court, the Court determined that the particular application of the zoning ordinance to plaintiff's property did not promote the health and safety of the local inhabitants. 277 U.S. at 188-89. For this reason, the ordinance as approved did "not bear a substantial relation to the public health, safety, morals, or general welfare," and the Court sustained the plaintiff's due process claim. 277 U.S. at 188.

Euclid, *Zahn*, *Gorieb*, and *Nectow* all applied the same deferential standard to review property owners' various due process and equal protection claims. Fifty years later in *Agins*, the Court restated the *Nectow* test, apparently transplanting it to the inhospitable soil of the Just Compensation Clause without acknowledging it was doing so: "The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, *see Nectow v. Cambridge*, 277 U.S. 183, 188 (1928) . . ." *Agins*, 447 U.S. at 260.[3] *Agins* thus cannot and should not be understood to establish a new standard based on the Just Compensation Clause to evaluate takings challenges to generally- applicable regulations.

While the Court has referred to the *Agins* formulation on several occasions, *see Del Monte Dunes*, 526 U.S. at 704 (1999) (citing cases), it has never used that standard to strike down a generally-applicable regulation as a regulatory taking violative of the Just Compensation Clause. To the contrary, in *Dolan*, the Court, relying on *Euclid* rather than *Agins*, agreed that "in evaluating most generally applicable zoning regulations, the burden properly rests on the party challenging

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3. While *Agins* is commonly understood as the source of the "substantially advance" standard, the Court noted, in *dictum*, a related concept two years before in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). There, the Court mentioned that "a use restriction may constitute a taking if not reasonably necessary to the effectuation of a substantial governmental purpose." *Id.* at 127. In support of this observation, the Court cited *Nectow* and *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962). As previously discussed, *Nectow* is a due process case. So, too, is the relevant portion of *Goldblatt*: *Penn Central's* reference to a "reasonably necessary" standard is rooted in *Goldblatt's* discussion of due process principles. *See* 369 U.S. at 594-95 (citing *Lawton v. Steele*, 152 U.S. 133, 137 (1894)).

the regulation to prove that it constitutes an arbitrary regulation of property." *Dolan*, 512 U.S. at 391 n.8 (citing *Euclid*). As the roots of the *Agins* test in *Euclid* and *Nectow* reveal, the Court's reliance on *Euclid* in *Dolan* suggests, and many lower courts agree,[4] challenges based on the asserted arbitrariness of generally-applicable regulations should be brought under the Due Process Clause, not the Just Compensation Clause.

The *Nollan* and *Dolan* exaction decisions do not help Chevron. *See Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994). Individualized exactions – land-use decisions conditioning approval of development on the dedication of property to public use – represent a special category of claim under the Just Compensation Clause. Even if means-ends scrutiny of government decisions were unavailable under *any* constitutional provision, the Court might well want to use it for exactions, for which it is uniquely appropriate.

4. *See, e.g.*, *Rith Energy, Inc. v. United States*, 270 F.3d 1347, 1352 (Fed. Cir. 2001) (refusing to consider the appellant's claim that the government's revocation of a coal-mining permit which was allegedly "driven by political pressure" constituted a taking); *Simi Investment Co. v. Harris County*, 256 F.3d 323 n.3 (5th Cir.) (on petition for rehearing *en banc*) (citing *Eastern Enterprises* and noting that challenges alleging that government interference with property interests is impermissibly "illegitimate and arbitrary" arise under the Due Process Clause, not the Takings Clause), *cert. denied*, 534 U.S. 1022 (2001); *Restigouche, Inc. v. Town of Jupiter*, 59 F.3d 1208, 1211 n.1 (11th Cir. 1995) ("We do not recognize ["substantially advance" takings claims] as distinct, viable federal constitutional claims in the zoning context."); *Pheasant Bridge Corp. v. Township of Warren*, 777 A.2d 334, 343 n.1 (N.J. 2001), *cert. denied*, 535 U.S. 1077 (2002); *Mission Springs, Inc. v. City of Spokane*, 954 P.2d 250, 261 (Wash. 1998); *Brunelle v. Town of South Kingstown*, 700 A.2d 1075, 1083 n.5 (R.I. 1997); *Tampa-Hillsborough County Expressway Authority v. A.G.W.S. Corp.*, 640 So.2d 54, 57 (Fla. 1994).

This appropriateness derives from the fact that, as this Court has recognized, exactions are regulatory takings in form but physical takings in substance. *See Nollan*, 483 U.S. at 831-32. Whereas a government is per se liable to property owners for all its physical takings, it need pay just compensation for only certain regulatory actions. *See*, *e.g.*, *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). Thus, there is a risk that a government will attempt to leverage an uncompensated physical taking out of the happenstance of a permit application. On the other hand, treating all individualized exactions as physical takings and requiring payment of just compensation for them hampers government in its ability to facilitate development of property while responding to such development with appropriate conditions that mitigate its effects. *See, e.g.*, *Nollan,* 483 U.S. at 836 ("a permit condition that serves the same legitimate police-power purpose as a refusal to issue the permit" is not a taking "if the refusal to issue the permit would not constitute a taking").

The solution, as *Nollan* and *Dolan* make clear, is "some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Dolan*, 512 U.S. at 391. A nexus requirement between the condition imposed by an exaction and "the public need or burden [the proposed development] creates or to which it contributes," *Nollan*, 483 U.S. at 838, guarantees that the exaction is responsive rather than opportunistic. Thus, for example, in *Nollan,* an exaction that required physical access across the applicant's property as a condition of a proposed development that would have hindered only the public's "visual access" lacked a nexus with the burden imposed by the development, whereas "a condition that would have protected the public's ability

to see the beach notwithstanding construction" could have been constitutional. *Id*. at 836. Similarly in *Dolan*, the development that affected a flood plain would have justified a permit condition requiring a private buffer area designed to mitigate flooding, but not a permit condition requiring public access to the buffer area. 512 U.S. at 392-93. The exaction, as the Court saw it, lacked "rough proportionality" to the development to which it purported to respond. *Id*. at 391. But as the Court has recognized, *Nollan-Dolan* means-ends scrutiny does not apply "beyond the special context of exactions." *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702 (1999).[5] Proportionality review under the Takings Clause is designed to detect physical takings disguised as regulatory adjudications. It is uniquely suited to that purpose. It has no relevance to "essentially legislative determinations," *Dolan*, 512 U.S. at 384-85; *see also Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 323 (2002) (it is "inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a 'regulatory taking,' and vice versa").

5. Although *Yee v. City of Escondido*, 503 U.S. 519, 530 (1992), contains *dictum* implying that *Nollan's* nexus analysis might apply to rent control cases, *Yee* predates the clarification in *Del Monte Dunes* that the *Nollan/Dolan* standard is confined to exactions.

II. Even If Regulatory Takings Claims Authorize Judicial Review Of The Reasonableness Of Generally-Applicable Legislation, Such Review Must Be Deferential

Even if the Court decides to approve the use of the "substantially advance" test in regulatory takings challenges, it should make clear that the test requires only the deferential "rational basis" review applied in substantive due process challenges, not the Ninth Circuit's highly-intrusive de novo standard. As discussed above, the *Agins* test derived from *Nectow*, which (along with its antecedent, *Euclid*) employed a deferential standard of review. Because *Agins* apparently meant to apply the *Euclid-Nectow* standard, albeit in the new setting of the Just Compensation Clause, the *Agins* standard cannot be any more rigorous than the deferential substantive due process standard of *Euclid* and *Nectow*. Under this standard, only a statute that is "arbitrary" and "unreasonable" would have "no substantial relation" to the public welfare.

Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981), decided one year after *Agins*, confirms this understanding that the *Agins* standard is deferential. In *Schad*, the Court emphasized that *Agins*, *Euclid*, and *Nectow* applied the identical, highly deferential "rationally related" standard:

> Where property interests are adversely affected by zoning, the courts generally have emphasized the breadth of municipal power to control land use and have sustained the regulation if it is rationally related to legitimate state concerns and does not deprive the owner of economically viable use of his property. [*citing, inter alia Agins and*

> *Euclid*] But an ordinance may fail even under that limited standard of review. [*citing, inter alia, Nectow*]

452 U.S. at 68.

Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978), which has several similarities to this case, employs the same approach. *Exxon* involved a due process challenge to a Maryland gasoline-station statute that was more intrusive than Hawaii's. Rather than merely restricting the rents that oil companies could charge lessee gas stations, Maryland's statute flatly prohibited oil companies from owning retail gas stations. The prohibition was based on a concern that, during oil shortages, oil companies would favor their own stations over independent dealers and thus harm consumers. *Id*. at 121. Just as Chevron here presented the testimony of an economist, Exxon presented the testimony of four economists that the Maryland statute would reduce competition and therefore hurt consumers. *Governor of Maryland v. Exxon Corp*., 370 A.2d 1102, 1108 (Md. 1977). In response, this Court deferred to the judgment of the state legislature. It unanimously held that it was not the judiciary's role to evaluate "the economic wisdom of the statute." *Exxon*, 437 U.S. at 124-25. The Court determined that as long as the State had a legitimate purpose, the "ultimate economic efficacy of the statute" was irrelevant; it was enough that the State's purpose in enacting the statute, namely "controlling the gasoline retail market," was legitimate. 437 U.S. at 124-25. "Regardless of the ultimate economic efficacy of the statute," the Court had "no hesitancy in concluding that it bears a reasonable relation to the State's legitimate purpose in controlling the gasoline retail market, and we therefore reject appellants' due process claim." *Id*.

The Ninth Circuit showed none of the deference *Exxon* requires. While never questioning the legitimacy of the State's purpose in enacting its statute, it directed the district court to engage in predictive fact finding, 224 F.3d at 1039, and then to determine whether Act 257 "will in fact lead to lower fuel prices." *Id*. at 1041. The district court accordingly analyzed "the efficacy of maintaining independent lessee-dealers in the context of Hawaii's purpose for enacting the Act," and found, after hearing and weighing the conflicting evidence presented at trial, that the challenged statute would not in fact achieve the goal of lower retail gas prices. 363 F.3d at 856. The Ninth Circuit, upholding the district court's conclusion, believed that the Just Compensation Clause mandates such a microscopic inquiry into the accuracy of a legislature's judgments about the efficacy of the policies it chooses. Nothing this Court has ever said justifies such intense scrutiny of state regulation under the Just Compensation Clause. To the extent it has applied a means-ends test in reviewing regulatory takings challenges, this Court has used an extremely deferential standard, akin to the "rational relationship" test under the substantive component of the Due Process Clause.

Keystone Bituminous Coal Ass'n. v. DeBenedictis, 480 U.S. 470 (1987), establishes that the Just Compensation Clause, even if it entails some review of the presence of a "public purpose" or the "character of the governmental action," *id*. at 485-93, does not permit heightened scrutiny of a statute's effectiveness. *Keystone* involved a Just Compensation Clause challenge to a Pennsylvania statute that limited coal-mining activity. Although the court split sharply on the ultimate merits, it unanimously adopted a deferential standard of review. The majority upheld the statute because the Act "plainly [sought] to further" the substantial "public interest in preventing activities similar to public nuisances." *Id*. at 492. The dissent, though persuaded

that there was a compensable taking, noted that "our inquiry into legislative purpose is not intended as a license to judge the effectiveness of legislation," *id*. at 470 n.3 (Rehnquist, C.J., dissenting). Rather, "'whether *in fact* the provisions will accomplish the objectives is not the question: the [constitutional requirement] is satisfied if . . . the . . . [State] Legislature *rationally could have believed* that the [Act] would promote its objective.'" *Id*. (quoting *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 242 (1984) (quoting in turn *Western and Southern Life Insurance Co. v. State Board of Equalization*, 451 U.S. 648, 671-72 (1981))).[6] The majority expressly agreed with this statement. 480 U.S. at 487 n.16. Thus, none of the Justices suggested that a more rigorous standard of review might be appropriate in a Just Compensation Clause challenge to a generally-applicable state statute.

The Ninth Circuit attempted to locate such a rigorous requirement in *Del Monte Dunes*, which in fact stands for precisely the opposite proposition. There, the Court rejected the application of the "rough-proportionality" Takings Clause test – which it had described as requiring "intermediate" scrutiny – "beyond the special context of exactions" at issue in *Nollan* and *Dolan*. *See Dolan*, 512 U.S. at 390. Such heightened scrutiny, the Court held, was "inapposite" to a challenge "based not on exactions but on denial of development." 526 U.S. at 703. It is presumably even more "inapposite" to a challenge to generally-applicable regulation of the sort at issue in the present case.

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6. The Ninth Circuit discounted Chief Justice Rehnquist's statements because, in its view, *Keystone* involved a physical taking. 363 F.3d at 855; 224 F.3d at 1034. The Ninth Circuit, however, plainly misread *Keystone*. *See* 480 U.S. at 488-89 ("This case, of course, involves land use regulation, not a physical appropriation of petitioners' property.").

III. Principles Of Federalism Require Deferential Judicial Review Of State Economic And Social Legislation

The historic respect for States under our system of federalism calls for the rejection of a stringent new standard of review imposed by the Ninth Circuit. Review under this new test would not be limited to the varying legislative attempts, such as that made by Hawaii in Act 257, to address the control of oil refiners over retail sales of gasoline. *See Exxon*, 437 U.S. at 128 (noting numerous statutes and legislative proposals in this area). Nor would review be limited to legislative efforts to address related concerns that franchisors in general can take advantage of franchisees after the latter have made significant investments into their properties.[7] Rather, a vast array of State enactments – such as tort reform efforts, health care measures, gaming control statutes, environmental protection enactments and vehicle safety laws, to name just a few – would be subject to *de novo* reconsideration by federal courts without any deference to democratically-elected state legislatures. An enhanced "substantially advance" test along the lines envisioned by the Ninth Circuit would improperly turn the

7. *See*, *e.g.*, Ark. Code Ann. § 4-72-204 (2003); Cal. Bus. & Prof. Code §§ 20020, 20021 (2004); Cal. Corp. Code §§ 31113, 31115 (2004); Conn. Gen. Stat. Ann. §§ 42-133f, 42-133l (2004); Del. Code Ann. tit. 6, §§ 2552, 2554 (2004); Haw. Rev. Stat. Ann. § 482E-6(2)(H),(3) (2003); 815 Ill. Comp. Stat. Ann. 705/19, 705/20 (2004); Ind. Code Ann. §§ 23-2-2.5-12, 23-2-2.5-14, 23-2-2.7-1 (2004); Iowa Code Ann. §§ 523H.7, 523H.8 (2004); Mich. Comp. Laws Ann. § 445.1527 (2004); Minn. Stat. Ann. § 80C.14 (2003); Neb. Rev. Stat. § 87-404 (2004); N.J. Stat. Ann. § 56:10-5 (2004); P.R. Laws Ann. tit. 10, §§ 278, 278a (2002); V.I. Code Ann. tit. 12A, § 132 (2004); Va. Code Ann. § 13.1-564 (2004); Wash. Rev. Code Ann. §§ 19.100.180 (2004); and Wis. Stat. Ann. § 135.03 (2003).

federal judiciary into a "superlegislature" (*Ferguson v. Skrupa*, 372 U.S. 726, 731 (1963)), or "a super zoning board or a zoning board of appeals" (*Raskiewicz v. Town of New Boston*, 754 F.2d 38, 44 (1st Cir.), *cert. denied*, 474 U.S. 845 (1985)), and thereby undermine the "strong policy considerations [that] favor local resolution of land-use disputes," *Taylor Inv., Ltd. v. Upper Darby Township*, 983 F.2d 1285, 1291 (3d Cir.), *cert. denied*, 510 U.S. 914 (1993).

Allowing federal courts to second-guess state legislatures under the Ninth Circuit's exacting standard of review will also inhibit the States' ability to develop flexible responses to the many problems they face. The federal system encourages states to experiment with a variety of policy responses to current challenges. *See, e.g., American Federation of Labor v. American Sash and Door* Co., 335 U.S. 538, 553 (1949) (Frankfurter, J., concurring); *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) ("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.") (Brandeis, J., dissenting). As the problems they face evolve and grow, the States must retain the flexibility to develop policies to address them, even before a state-wide, regional, or national consensus develops. That is why the States are accorded broad police powers. Consistent with these police powers, courts have subjected generally-applicable legislation that does not involve suspect classifications or fundamental rights to rationality review under the Equal Protection and Due Process Clauses. To subject generally-applicable statutes and regulations to additional, enhanced scrutiny as part of regulatory takings review will inhibit such experimentation and delay development of State policy.

This Court has repeatedly rejected the type of intrusive judicial review authorized by the court below. Since the repudiation of *Lochner v. New* York, 198 U.S. 45 (1905), some seventy years ago, it has recognized that state legislatures have the discretion necessary to craft reasonable solutions to evolving problems. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). "Under the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation." *Ferguson*, 372 U.S. at 729. This Court has accordingly held that "state legislatures have constitutional authority to experiment with new techniques; they are entitled to their own standard of the public welfare; they may within extremely broad limits control practices in the business-labor field." *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423 (1952). This Court should now confirm that the States, as well as localities, may continue to do so without being second-guessed by the courts under the Just Compensation Clause.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Ninth Circuit Court of Appeals.

Respectfully submitted,

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