No. 14A103

In The
Supreme Court of the United States

DAVID KENTNER, *et al.*,

***Petitioners*,**

v.

CITY OF SANIBEL, FLORIDA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF AMICI CURIAE OF NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, CATO INSTITUTE, OWNERS COUNCIL OF AMERICA, AND RUTHERFORD INSTITUTE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

(1) Are "property rights" excluded from the substantive protections of the Due Process Clause of the Fourteenth Amendment, which bars state deprivation of "life, liberty or property, without due process of law?"

(2) Can an act of state government—abrogating recognized property rights—be upheld, under the Due Process Clause of the Fourteenth Amendment, in the absence of facts demonstrating that the restriction does anything to advance the asserted public goals?

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STATEMENT OF INTEREST[1]

Each of the organizations joining in this coalition has an interest in defending the constitutional principle that property rights may not be abrogated arbitrarily or unreasonably. A full statement of interest for each of the *amici* is set forth in Appendix A.

STATEMENT OF THE CASE

Amici incorporate by reference the description of facts and proceedings outlined in the petition for writ of *certiorari*.

SUMMARY OF ARGUMENT

The Eleventh Circuit's exclusion of property rights from the substantive protections of the Fourteenth Amendment's Due Process Clause is a dangerous rule that cannot be allowed to stand. It goes against the text of the Amendment, its original meaning, and longstanding precedent. It also dangerously imperils the rights of property owners—

[1] Pursuant to this Court's Rule 37.2, all parties have consented to the filing of this brief. Letters evidencing consent have been filed with the Clerk of the Court. Further, all parties were given notice of this brief more than ten days prior to the deadline. Pursuant to Rule 37.6, *amici* affirm that no counsel for any party authored this brief in whole or in part and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici*, their members, or their counsel made a monetary contribution to fund the preparation or submission of this brief.

especially the poor, vulnerable minorities, and those with little political influence.

In order to ensure that the Due Process Clause provides meaningful protection for property owners, this Court should make clear that any government act confiscating or abrogating property rights is covered by the Clause—regardless of whether the act is characterized as "executive" or "legislative" in nature. To withstand judicial scrutiny, the government must be able to show that its actions restricting property rights have a "substantial relation to the public health, safety, morals, or general welfare." *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926). This standard requires at least a minimal factual showing that the restriction advances the asserted public interests. The Eleventh Circuit's ultra-deferential approach violates this standard and legitimizes even the most arbitrary restrictions on property rights. It also exacerbates an already deep circuit split over this issue.

I. THERE IS NO JUSTIFICATION FOR EXCLUDING PROPERTY RIGHTS FROM SUBSTANTIVE DUE PROCESS PROTECTIONS

The Eleventh Circuit held that "there is generally no substantive due process protection for state-created property rights" and that property rights are only potentially protected if an owner can prove that there is no conceivable rational basis supporting the challenged restrictions. *Kentner v. City of Sanibel*, 750 F.3d 1274, 1279 (11th Cir. 2014).

This ruling is at odds with the text and original meaning of the Fourteenth Amendment, and with this Court's longstanding precedent. If permitted to stand, the opinion poses a serious threat to the rights of property owners—especially imperiling the rights of the poor, minorities, and the politically weak.

A. The Text of the Due Process Clause Explicitly Protects Property Rights

The Due Process Clause of the Fourteenth Amendment bans state actions that deprive individuals of "life, liberty, or property, without due process of law." U.S. CONST. Amend. XIV, § 1. It would be truly strange if one of the three rights explicitly listed in the text of the Clause were excluded from its substantive protections. It is inconceivable that either life or liberty could be left unprotected. The same point applies to property.

Moreover, the text is at odds with the Eleventh Circuit's arbitrary distinction between "legislative" and "executive" acts that infringe on property rights, with only the latter being constrained by the substantive protections of the Due Process Clause. *Kentner*, 750 F.3d at 1280. Section 1 of the Fourteenth Amendment that indicates that "no *State*" is permitted to violate the Due Process Clause, regardless of which branch of state government happens to be the violator. (emphasis added).

When a provision of the Constitution "bars the *State*" from violating a right, that right is protected

against all infringement by state officials and the identity of "the particular state *actor* is irrelevant." *Stop the Beach Renourishment v. Fla. Dep't. of Envtl. Protection*, 560 U.S. 702, 715 (2010) (Scalia, J.). Courts routinely protect other rights covered by the Fourteenth Amendment against violation by all branches of state and local government. "A State, or a city, may act as authoritatively through its executive as through its legislative body." *Lombard v. Louisiana*, 373 U.S. 267, 273 (1963). There should be no property rights exemption from this principle.

B. The Original Meaning of the Due Process Clause Protects Property Rights On Par with Other Substantive Rights Covered by the Clause

The history and original meaning of the Due Process Clause contradict the Eleventh Circuit's exclusion of property rights from its substantive protections. The Court follows the original meaning of a constitutional provision in cases where "nothing in our precedents forecloses . . . adoption of the original understanding." *Dist. of Columbia v. Heller*, 554 U.S. 570, 625 (2008).

The need to protect property rights against abusive state and local governments was one of the main purposes behind the enactment of the Fourteenth Amendment. Advocates of the Amendment feared that southern state governments would threaten the property rights of African-Americans and those whites who had supported the Union against the Confederacy during the Civil War.

AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 268-69 (1998). The right to private property was a central component of the "civil rights" that the framers of the Fourteenth Amendment sought to protect.[2] "Equality in the enjoyment of property rights was regarded by the framers of that Amendment as an essential pre-condition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee." *Shelley* v. *Kraemer*, 334 U.S. 1, 10 (1948). That original purpose would be undermined if property rights were excluded from the substantive protections of the Due Process Clause.

The Eleventh Circuit held that property rights are generally not protected by the Due Process Clause because the Clause only protects "[f]undamental rights … created by the Constitution." *Kentner*, 750 F.3d at 1279. Thus the opinion holds that there are no substantive due process protections for "state-created property rights." But, this misconceives the structure of the Fourteenth Amendment, and the general status of property rights under the federal constitution. *See e.g.*, *Palazzolo v. Rhode Island*, 533 U.S. 606, 626-27 (2001) (affirming that the Constitution protects common law property rights, and that states cannot

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[2] On the centrality of property rights in nineteenth century conceptions of civil rights, *see*, *e.g.*, HAROLD HYMAN & WILLIAM WIECEK, EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT, 1835-75 395-97 (1982) (describing the right to property as one of the main elements of civil rights as conceived in the 1860s); MARK A. GRABER, TRANSFORMING FREE SPEECH: THE AMBIGUOUS LEGACY OF CIVIL LIBERTARIANISM (1991) (describing how most nineteenth century jurists viewed property as a fundamental civil right).

strip an owner of constitutional protections through positive enactments).

At the time of the Founding and the establishment of the Fourteenth Amendment, the dominant view was that property rights are natural rights that the state has a duty to protect, not merely creations of the state. *See*, *e.g.*, JAMES W. ELY, JR. THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 41-43 (3d ed. 2008) (describing how the property rights were "undoubtedly a paramount value for the framers of the Constitution"). At the Constitutional Convention of 1787, Alexander Hamilton stated that "one great obj[ect] of Gov[ernment] is the personal protection and security of property." MAX FARRAND, 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 534 (1937). James Madison, a key drafter of the Fifth Amendment Due Process Clause on which that of the Fourteenth Amendment is based, wrote that "Government is instituted to protect property of every sort… This being the end of government, that alone is a *just* government, which *impartially* secures to every man, whatever is his *own*." James Madison, *Property*, *in* 1 THE FOUNDERS CONSTITUTION 598 (Philip Kurland & Ralph Lerner, eds., 1987).

The Founders' strong commitment to natural property rights was widely shared by Americans in the nineteenth century, and at the time of the enactment of the Fourteenth Amendment. *See* JAMES W. ELY, THE GUARDIAN OF EVERY OTHER RIGHT at 78-83; Eric R. Claeys, *Public-Use Limitations and Natural Property Rights*, 2004 MICH. ST. L. REV.

877 (2004). In its influential 1856 decision in *Wynehamer v. People*, the New York Court of Appeals held that the Due Process Clause of the New York state constitution, which used the same wording as that of the Fifth and–later–the Fourteenth Amendment, protected the substantive right to "private use and enjoyment" of property. 13 N.Y. 378, 396 (1856). Under the state Due Process Clause, the court emphasized, "[p]roperty is placed by the constitution in the same category with liberty and life." *Id.* at 393; *cf. Mugler v. Kansas*, 123 U.S. 623 (1887) (relying extensively on *Wynehamer* as a guide to the standard of protection for property rights provided by the Due Process Clause of the Fourteenth Amendment).

Like property rights, the rights to life and liberty are often regulated and in large part defined by state statutory and common law. For example, state common law regulates and restricts bodily autonomy by imposing tort liability for assault and battery. State law also defines the beginning and end of life for a variety of purposes. *See* Kirsten Rabe Smolensky, *Defining Life From the Perspective of Death: An Introduction to the Forced Symmetry Approach*, 2006 U. CHI. LEGAL F. 41, 58 n.79 (2006) (discussing state laws defining the beginning and end of life). But that does not mean either that the rights to life and liberty exist solely at the state's discretion or that they are exempt from the protection of the Due Process Clause.

C. This Court's Precedents Extend Substantive Protection to Property Rights under the Due Process Clause

This Court's precedents consistently reject the exclusion of property rights from the substantive protections of the Due Process Clause. "[T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights." *Lynch v. Household Financial Corp.*, 405 U.S. 538, 552 (1972).

As early as 1877, the Court indicated that the Due Process Clause provides substantive protection for property rights, noting that "a statute which declares in terms, and without more, that the full and exclusive title of a described piece of land, which is now in A., shall be and is hereby vested in B., would, if effectual, deprive A. of his property without due process of law, within the meaning of the constitutional provision."[3] *Taylor v. Davidson*, 96 U.S. 97, 102 (1877); *see also Missouri Pacific R. Co. v. Nebraska*, 164 U.S. 403, 416 (1896) (reiterating this principle).

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[3] Today, such a private taking would be forbidden by the Public Use Clause of the Fifth Amendment. But in 1877, the Court had not yet ruled that the Fifth Amendment was incorporated against state governments, and takings for private uses could only be challenged in federal court under the Due Process Clause. *See Fallbrook Irrigation District v. Bradley*, 164 U.S. 112, 158 (1896) (holding that the Fifth Amendment "applies only to the federal government"); ILYA SOMIN, THE GRASPING HAND: KELO V. CITY OF NEW LONDON AND THE LIMITS OF EMINENT DOMAIN, ch. 4 (forthcoming) (discussing the relevant history).

More recent precedents continue to recognize that property rights qualify for substantive protection under the Due Process Clause. In its seminal decision in *Euclid v. Ambler Realty Co.*, the Supreme Court upheld the constitutionality of many types of zoning regulations, but recognized that "arbitrary and oppressive" restrictions on property rights are forbidden by the Due Process Clause. 272 U.S. 365, 387 (1926). Two years later, the Court struck down an "arbitrary and unreasonable" zoning restriction under the Clause. *Nectow v. City of Cambridge*, 277 U.S. 183, 188 (1928); *see also Lingle v. Chevron, U.S.A.*, 544 U.S. 528, 542 (2005) (noting that a regulation of property "that fails to serve any legitimate governmental objective may be so arbitrary or irrational that it runs afoul of the Due Process Clause.").

In support of its misguided claim that property interests are mere creations of state law, the Eleventh Circuit cites *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972), which noted that "[p]roperty interests, of course, are not created by the Constitution[, but rather] ... by existing rules or understandings that stem from an independent source such as state law." Quoted *in Kentner*, 750 F.3d at 1280. But that decision clearly indicates state law is just one possible "independent source" of property rights, which can come from any "legitimate claim of entitlement." *Board of Regents*, 408 U.S. at 577.

Moreover, property rights are not the only interests protected by the Due Process Clause that stem from an "independent source" that is "not

created by the Constitution." *Id*. The life and liberty rights protected by the Clause also have their origins in a combination of natural rights theories and state common law rights. *See* Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 423-24, 493-500 (2010) (describing how the original understanding of substantive rights protected by the Due Process Clause focused in large part on protection of "vested rights" recognized by state law, with their origins in natural rights concepts)*; see also* Gordon S. Wood, *The Origins of Vested Rights in the Early Republic*, 85 VA. L. REV. 1421 (1999). State law has regulated and defined the scope of individual rights to life and liberty since long before the enactment of the Constitution. If having origins in an independent source external to the Constitution deprives a right of substantive protection under the Due Process Clause, the rights to life and liberty would lose such protection no less than property rights.

D. Excluding Property Rights from the Substantive Protection of the Due Process Clause Poses Grave Risks for Property Owners—Especially the Poor, Disadvantaged Minorities, and the Politically Weak

The Fourteenth Amendment was initially adopted in large part for the purpose of protecting the rights of politically vulnerable minorities, especially African-Americans recently freed from slavery. *See* § I.B, *supra*. If property rights are excluded from the substantive protections of the Due

Process Clause, the rights of all property owners, particularly minorities and the poor, will be imperiled today. If local and state governments are allowed to infringe on property rights without having to meet even minimal substantive standards under the Due Process Clause, the door will be open to targeting of the politically weak for the benefit of the powerful. Local and state governments have a long history of benefitting the latter by undermining the property rights of the former. *See*, *e.g.*, ILYA SOMIN, THE GRASPING HAND: KELO V. CITY OF NEW LONDON AND THE LIMITS OF EMINENT DOMAIN, ch. 3 (forthcoming) (describing harmful impact of "urban renewal" programs on minorities); William A. Fischel, *An Economic History of Zoning and a Cure for its Exclusionary Effects*, 41 URBAN STUD. 317 (2004) (describing history of exclusionary zoning targeting the poor and minorities); Christopher Silver, *The Racial Origins of Zoning in American Cities*, *in* URBAN PLANNING AND THE AFRICAN-AMERICAN COMMUNITY: IN THE SHADOWS (June Ritzdorf & Marsha Ritzdorf, eds., 1997) (same).

Small businesses are also vulnerable in a world without due process protections for property. Without such safeguards, small businesses will predictably fall victim to arbitrary anticompetitive restraints that larger and more politically connected firms may lobby for in order to preserve their competitive advantages. *See e.g.*, *Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 374-75 (1991) (rejecting an antitrust challenge to an alleged conspiracy between zoning authorities and an established business). And as recognized in Justice O'Connor's dissent in *Kelo v. City of New London*,

politically powerful firms will run rough-shod over the rights of smaller businesses if the "democratic process" serves as the only protection for property rights. 545 U.S. 469, 503 (2005) (O'Connor, J. dissenting).

Many of the infringements on property rights that harm the poor, minorities, and small businesses are adopted by administrative agencies or zoning boards rather than legislative bodies. The Eleventh Circuit's interpretation of the Due Process Clause offers no protection against them. *Kentner*, 750 F.3d at 1280.

And as currently interpreted, the Takings Clause of the Fifth Amendment provides only very limited protection against these sorts of depredations. A restriction on property rights is only considered a *per se* taking if it constitutes a permanent physical invasion of property, or deprives the owner of all economically valuable uses. *See Lingle*, 544 U.S. at 538 (summarizing the case law). All other possible takings are analyzed under a multifactor balancing test, pursuant to which the government prevails in the overwhelming majority of cases. *Penn Central Transp. Co. v. New York*, 438 U.S. 104, 124 (1978);[4] The Court has also

[4] *cf.* F. Patrick Hubbard, *et al.*, *Do Owners Have a Fair Chance of Prevailing Under the Ad Hoc Regulatory Takings Test of Penn Central Transportation Company?*, 14 DUKE ENVTL. & POL'Y F. 121, 141-42 (2003) (finding that property owners prevail in only 13.4% of cases that reach the merits stage); Adam Pomeroy, Penn Central *After 35 Years: A Three Part Balancing Test or a One-Strike Rule?* (unpublished paper, Aug. 31, 2012) *available* at http://papers.ssrn.com/sol3/

interpreted the Public Use Clause of the Fifth Amendment in a highly deferential way. *See e.g.*, *Kelo*, 545 U.S. at 478-86 (holding that the public use requirement can be satisfied by almost any public benefit).

Judicial enforcement of the Due Process Clause cannot and should not eliminate all harmful restrictions on property rights. But by enabling property owners to challenge those that are "arbitrary and oppressive," it can at least curtail some of the most egregious abuses. *Euclid*, 272 U.S. at 387.

II. THIS COURT SHOULD CLARIFY WHETHER STATE AND LOCAL AUTHORITIES ARE PERMITTED TO CONFISCATE OR RESTRICT PROPERTY RIGHTS WITHOUT ANY EVIDENCE PROVING THAT THE RESTRICTIONS ARE NECESSARY TO ADVANCE A LEGITIMATE STATE INTEREST

Though the Eleventh Circuit held that property rights are not generally protected by the Due Process Clause, it also concluded that a landowner can sometimes advance an abstract facial challenge to a zoning restriction. It further ruled that a challenged restriction must be upheld as a legitimate exercise of police powers if there is any conceivable "rational basis" for its adoption. *Kentner*, 750 F.3d at 1280-81. The Eleventh Circuit apparently interpreted this "highly deferential" test

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as requiring a court to uphold a challenged abrogation of property rights without regard to whether there are *any* facts justifying the government's conduct. *Id.* at 1281. Under this approach, the Eleventh Circuit placed the burden on the plaintiff to prove a negative proposition: that there are no set of facts that might conceivably provide a rational explanation for why legislators might believe that a restriction advances the public interest. *Id.*

But this Court's seminal decision in *Euclid v. Ambler Realty* established a very different test. 272 U.S. at 395. *Euclid* provides at least some protection for property owners by requiring that government must offer some factual basis for concluding that a restriction advances a legitimate state interest. This requirement is the bare minimum for ensuring meaningful protection for property rights.[5]

[5] In a future case, this Court might consider whether the text, original meaning, and purposes of the Due Process Clause may sometimes require additional protection for property rights.

A. The "Substantial Relation" Test Requires Authorities to Demonstrate at Least Some Factual Basis to Justify the Abrogation of Property Rights

1. *Euclid v. Ambler Realty Co.*

Euclid emphasized that an infringement on property rights "must find [its] justification in some aspect of the police power, asserted for the public welfare." *Id*. at 387. Thus the government bears an affirmative burden to justify its conduct. It is not enough to posit a hypothetical public purpose. The government must also demonstrate that there is some factual basis for concluding that the challenged restriction on property rights will actually achieve that purpose. There must be a "substantial relation to the public health, safety, morals, or general welfare." *Id*. at 395.

The facts of the case must, in some way, justify the infringement on property rights. Justice Sutherland illustrated the point in explaining that the "line which … separates [a] legitimate from [] illegitimate assumption of power… *varies with circumstances and conditions*." *Id*. at 387 (emphasis added). On this basis, he concluded that regulations, that might have been rejected as "arbitrary and oppressive" in prior times, may be upheld today in light of changed circumstances. *Id*. And because an infringement on property rights must be justified by facts in the record, he explained that "[a] regulatory zoning ordinance, which would be clearly valid as

applied to great cities, might be clearly invalid as applied to rural communities." *Id.*

2. *Nectow v. City of Cambridge*

Two years later, the Court had the opportunity to illustrate the same principle more directly in *Nectow v. City of Cambridge*. 277 U.S. at 188. In that case a landowner invoked a substantive due process theory in a challenge to a zoning restriction that prevented him from using a portion of his land for industrial purposes. *Id.* at 442-46. This area was zoned to allow for only residential uses and a handful of other specifically authorized developments. *Id.* But the parcel was not well suited for the permitted uses.

There was a railroad on the adjoining property, which would have made it an unattractive option for prospective residents. *Id.* at 186. Additionally, the property was next to a Ford manufacturing plant, which was said to be noisy at night. *Nectow v. City of Cambridge*, 260 Mass. 441, 444 (1927). And within 750 feet, there was a soap factory that occasionally emitted foul smells. *Id.* All of those facts might have given city planners good reason to think that the property should be zoned to allow similar industrial uses. But instead the City inexplicably prohibited industrial uses on a sizable portion of the property. *Nectow*, 277 U.S. at 187-88.

Euclid had already established that there may be legitimate reasons to restrict the uses of a property. *Id.* at 188. It is easy to invent hypothetical justifications for why a prohibition on industrial uses

might be justified for any given property. But if the zoning restrictions do not—*in reality*—do anything to address the cited public concerns, imposition of the restriction is necessarily "arbitrary and unreasonable."[6] *Nectow*, 277 U.S. at 188. In accordance with this principle, *Nectow* held that the City of Cambridge had violated the Due Process Clause because "[t]here [did] not appear to be any reason why" industrial uses should be precluded on this portion of the property.[7] *Nectow*, 277 U.S. at 188. This made clear that the government must be able to point to some factual basis in the record justifying the abrogation of property rights. By contrast, the Eleventh Circuit's rule places the burden on the owner to prove the absence of any conceivable facts that might justify the government's conduct. *Kentner*, 750 F.3d at 1280-81.

3. *Goldblatt v. Town of Hempstead*

In *Goldblatt v. Town of Hempstead*, this Court reaffirmed that the Due Process Clause imposes an

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[6] For example, a prohibition on industrial uses might theoretically be applied to protect the residents of a quiet suburban neighborhood from the nuisance of industrial activities. *Euclid*, 272 U.S. at 392. But if applied to a property far from any home, or in the heart of an active industrial area, this rationale could not logically justify imposition of the restriction. *Id.* at 387. That would be as irrational as allowing a Florida municipality to enforce environmental restrictions aimed at protecting a species only found in the Pacific Northwest.

[7] The only reason that the Massachusetts Supreme Court could suggest was that a "line must be drawn somewhere." *Nectow*, 260 Mass. at 447.

affirmative burden on the authorities to provide factual justifications for infringements on property rights. 369 U.S. 590, 594-95 (1962). The Court explained that "[t]o evaluate the reasonableness [of a restriction] [the court must] know such things as the nature of the menace against which it will protect, and the availability and effectiveness of less dramatic steps…" *Goldblatt*, 369 U.S at 595. The Court then considered the facts on the ground and ultimately concluded that the restriction in question—prohibiting excavation—advanced public safety because there was at least enough facts to create a"[f]air inference" that further excavation might create or exacerbate a public nuisance. *Id.*

Goldblatt reaffirmed that *facts matter*. Despite a "dearth of relevant evidence," there were *at least some minimal* facts in the record supporting the notion that the restriction might protect public safety. *Id*. By comparison, in the present case, the Eleventh Circuit held that a prohibition could be upheld on the factually unsupported assumption that it might somehow protect seagrass or preserve community aesthetics.[8] *Kentner*, 750 F.3d at 1281.

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[8] The opinion points to no facts in the record that might support the assumption that the prohibition on new docks does anything to advance either of these public concerns. In fact, the record indicates that sea grass is not even found on Appellant's property. Appendix to Pet. for Writ of Certiorari, E-7. And beyond speculation that the ordinance serves the aesthetic interests of some in the community, there does not appear to be any facts from which one might draw an inference that a newly erected dock will impair aesthetics from any particular vantage point. In the absence of such facts, it cannot be said that the prohibition bears a "substantial relation" to the asserted legislative purposes. *Nectow*, 277 U.S. at 188.

4. *Agins v. City of Tiburon*

This Court also applied *Euclid's* "substantial relation" test in *Agins v. City of Tiburon*. 447 U.S. 255, 260 (1980). In *Agins*, state and local restrictions prevented an owner from building more than five residential homes on his property. *Id.* at 257. The owner brought a Takings Claim, and a facial due process claim. *See Lingle*, 544 U.S. at 540-41.

Justice Powell cogently restated *Euclid's* essential holding: "The application of a general zoning law to a particular property effects a [constitutional violation] if the ordinance does not substantially advance legitimate state interests…" *Agins*, 447 U.S. at 260 (citing *Nectow*, 277 U.S. at 188). Applying this standard, the Court had little trouble upholding the challenged ordinances because they were designed to address concerns over the ill effects of urbanization and were supported by legislative facts.[9] *Agins*, 447 U.S. at 261-62. By contrast, the Eleventh Circuit's rule dispenses with the "substantial relation" test altogether—expressly rejecting the notion that the facts must affirmatively demonstrate that the regulation advances the cited public concerns. *Kentner*, 750 F.3d at 1279-81. Under the Eleventh Circuit's extremely deferential standard, a government action confiscating or abrogating property rights would be immune from due process challenges so long as the authorities could invent some conjectural basis for the restriction. *Id*. at 1281.

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[9] Specifically, California had determined that "the preservation of open space [was] necessary" to advance a number of public goals. *Agins*, 447 U.S. at 261.

B. There is an Extensive Circuit Split over the "Substantial Relation" Test

Though this Court established the "substantial relation" test in *Euclid*, and demonstrated its teeth in *Nectow*—there is great confusion as to whether the test is still applicable today, and over how it should be applied in practice. *See* J. Peter Bryne, *Due Process Land Use Claims After* Lingle, 34 ECOLOGY L.Q. 471, 477 (2007) (observing that "[m]ost federal courts have adopted standards of review even more deferential … than arbitrary and unreasonable.") With a dearth of Supreme Court case law addressing due process property rights claims in the modern era, there is a pressing need for this Court to bring clarity.

This is all the more true in the wake of *Lingle v. Chevron, U.S.A.*, which held that the "substantial advancement" formula, applied in *Agins*, was a due process test. 544 U.S. at 540-41. In so holding, *Lingle* expelled the "substantial advancement test" from this Court's regulatory takings jurisprudence. But the opinion did not address whether the test survives as a due process test under modern precedent. Nisha Ramachandranal, *Realizing Judicial Substantive Due Process in Land Use Claims*, 36 ECOLOGY L.Q. 381, 383 (2009).

Euclid and *Nectow* clearly endorsed the requirement that there must be a "substantial relation" between a restriction and the public good it seeks to advance. Nonetheless, many lower federal

courts have either presumed that the test is satisfied by mere assertions that the restriction advances a public good, or have assumed the test has been supplanted by later due process cases, which did not involve the abrogation of property rights. *See Id.* at 393 (noting that it is "unclear if the Supreme Court intended for the 'shocks the conscience' standard announced in *County of Sacramento v. Lewis*, 523 U.S. 833 (1989), to apply in land use cases[,]" and explaining the divergent views of the federal circuits on the proper due process test). Whatever the explanation, many lower federal courts have retreated from the "substantial relation" test in favor of more deferential standards.

The First, Second and the Third Circuits employ the most extreme deferential standard, in holding that an abrogation of property rights must "shock… the conscience" to run afoul of the Due Process Clause. *See Nestor Colon Medina & Sucesores, Inc. v. Custodio*, 964 F.2d 32, 46 (1st Cir. 1992); *O'Connor v. Pierson*, 426 F.3d 187, 204 (2d Cir. 2005); *United Artists Theatre Circuit*, 316 F.3d 392, 400 (3d Cir. 2003). This standard completely ignores the means-ends inquiry employed in *Euclid* and *Nectow*—requiring instead that the plaintiff must demonstrate that the authorities acted in a "truly horrendous" manner. Ramachandranal, 36 ECOLOGY L.Q. at 393. Despite rejecting the "shocks the conscience" standard, most of the other circuits have likewise displaced *Euclid's* "substantial relation" test. *Id.* at 394 (observing that all of the lower courts "require a higher level of arbitrariness than the failure to advance a legitimate government interest.").

The Seventh Circuit holds that, "in addition to alleging that a [challenged restriction is] arbitrary and irrational, the plaintiff must also show either a separate constitutional violation or the inadequacy of state law remedies." *New Burnham Prairie Homes, Inc. v. Vill. of Burnham*, 910 F.2d 1474 (7th Cir. 1990). Such an approach is far afield of the sort of means-ends analysis employed in *Euclid* and *Nectow*. It would deny property owners a remedy even in cases where their rights under the Due Process Clause have clearly been violated.

Likewise, the D.C. Circuit also rejects the "substantial relationship" framework, holding instead that a challenged restriction must be "grave[ly] unfair" before it can be struck down under the Due Process Clause. *George Washington Univ. v. Dist. of Columbia*, 318 F.3d 203, 209 (D.C. Cir. 2003). And in *Chesterfield Dev. Corp. v. City of Chesterfield*, the Eighth Circuit endorsed a standard that appears similarly divorced from the means-ends approach employed in *Euclid* and *Nectow*. 963 F.2d 1102, 1104 (8th Cir. 1992) (suggesting that the due process standard requires the claimant to demonstrate that the process through which the authorities decided to impose the assailed ordinance was inherently arbitrary—as in imposing a restriction based on the flipping of a coin).

The "substantial relationship" test does apparently survive, in some form, in several other circuits. *See e.g.*, *Simi Inv. Co. v. Harris Cnty.*, 236 F.3d 240, 251 (5th Cir. 2000) ("The question is [] whether a rational relationship exists between the [policy] and a conceivable legitimate objective.");

Equity Lifestyle Properties, Inc. v. Cnty. of San Luis Obispo, 548 F.3d 1184, 1194 (9th Cir. 2008) (holding rent control ordinances "represent[] a rational attempt to accommodate [] conflicting [public] interests."); *see also Delong v. Dep't of Health & Human Servs.*, 264 F.3d 1334, 1341 (Fed. Cir. 2001). But whether any sort of means-ends analysis is required is far from settled. *See Lingle*, 544 U.S. at 548-49 (Kennedy, J. concurring) (emphasizing that the question remained open, but that "failure of a regulation to accomplish a stated or obvious objective would be relevant to [the due process] inquiry."). The divergence between these decisions and the approaches adopted by the D.C., First, Second, Third, Seventh and the Eighth circuits is a serious circuit split.

C. The Eleventh Circuit's Bar on "As Applied" Due Process Claims Irreconcilably Conflicts with *Euclid*, *Nectow* and Other Cases

Euclid was careful in keeping the door open for narrowly focused due process challenges. While the claimant could not prevail in a wholesale assault on his city's comprehensive zoning code, the Court indicated that the owner might well succeed in a subsequent "as applied" challenge to a specific administrative decision to deny a building permit. *Euclid*, 272 U.S. at 395. If there had been any doubt before, *Nectow* made clear that a specific administrative decision to impose a restriction will violate due process—in an "as applied" challenge—if the restriction does not bear a "substantial relation

to the public health, safety, morals or general welfare." *Nectow*, 277 U.S. at 188-89.

In patent disregard of this rule, the Eleventh Circuit holds that claimants may only advance property rights due process claims in challenges to "legislative actions." *Kentner*, 750 F.3d at 1280. This necessarily precludes "as applied" challenges to administrative decisions—closing the door that *Euclid* and *Nectow* intentionally left open. This is troubling because—combined with *Euclid's* holding that facial challenges are generally unlikely to prevail—the Eleventh Circuit has virtually wiped out the entire universe of viable due process property right claims. *See Euclid*, 272 U.S. at 395. Indeed, the vast majority of constitutional injuries are inflicted through executive or administrative actions, such as a permit denial or a refusal to allow a variance. *Cf. Palazzolo*, 533 U.S. at 618 (reasserting a restriction must be definitively applied before a constitutional injury ripens).

The Eleventh Circuit's holding that individuals cannot bring "as applied" substantive due process property claims is even more problematic. *See Kentner*, 750 F.3d at 1280. It leads to the conclusion that an action confiscating, destroying or restricting property is simply unassailable, regardless of how unreasonable or shocking it may seem. Further, the implications may extend well beyond property rights cases. The Eleventh Circuit's logic, which seems to apply to all "non-fundamental rights" would make all administrative (i.e. "executive") actions violating

such rights immune from substantive constitutional challenge. *Id.* at 1279.

CONCLUSION

For the foregoing reasons, we respectfully urge this Court to grant review and clarify the scope of protections afforded to property owners under the Fourteenth Amendment's Due Process Clause.

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APPENDIX A

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I. Statement of the National Federation of Independent Business Small Business Legal Center

The National Federation of Independent Business Small Business Legal Center (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses.

NFIB represents 350,000 member businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business.

To fulfill its role as the voice for small business, the NFIB Legal Center frequently files amicus briefs in cases that will impact small businesses. NFIB Legal Center seeks to file in this case because it is in the best interest of America's small business community to preserve due process

protections for property rights so that entrepreneurs can make investments with the basic assurance that their property will not be confiscated or their rights abrogated without good reason. Given that small business owners invest substantial assets into their business' property—often from their personal savings—it is essential that they be ensured meaningful protections.

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II. Statement of the Cato Institute

The Cato Institute ("Cato") was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, files *amicus* briefs with courts, conducts conferences, and publishes the annual *Cato Supreme Court Review*.

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III. Statement of the Owners Council of America

Owners' Counsel of America (OCA) is an invitation-only national network of the most experienced eminent domain and property rights attorneys. They have joined together to advance, preserve and defend the rights of private property owners, and thereby further the cause of liberty, because the right to own and use property is "the guardian of every other right," and the basis of a free society. *See* JAMES W. ELY, THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS (3d ed. 2008). As the lawyers on the front lines of property law and property rights, OCA OCA brings unique perspective to this case. OCA is a non-profit 501(c)(6) organization sustained solely by its members. Only one member lawyer is admitted from each state. Since its founding, OCA has sought to use its members' combined knowledge and experience as a resource in the defense of private property ownership, and OCA member attorneys have been involved in landmark property law cases in nearly every jurisdiction nationwide. Additionally, OCA members and their firms have been counsel for a party or *amicus* in many of the property cases this Court has considered in the past forty years, including most recently *Koontz v. St. Johns River Water Mgmt Dist.*, 133 S. Ct. 2586 (2013) and *Arkansas Game and Fish Comm'n v. United States*, 133 S. Ct. 511 (2012).1 OCA members

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1. *See also Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envt'l Protection*, 130 S. Ct. 2592 (2010); *Winter v. Natural Resources Def. Council*, 555 U.S. 7 (2008); *Kelo v. City of New London*, 545 U.S. 469 (2005); *San Remo*

have also authored and edited treatises, books, and law review articles on property law and property rights.2 OCA's specific interest in this case is in

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Hotel, L.P. v. City and County of San Francisco, 545 U.S. 323 (2005); *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005); *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); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Yee v. City of Escondido*, 503 U.S. 519 (1992); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987); *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987); *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

2. *See*, *e.g.*, Michael M. Berger, Taking Sides on Takings Issues (Am. Bar Ass'n 2002) (chapter on *What's "Normal" About Planning Delay?*); Michael M. Berger, *Supreme Bait & Switch: The Ripeness Ruse in Regulatory Takings*, 3 Wash. U.J.L. & Policy 99 (2000); Michael M. Berger & Gideon Kanner, *Thoughts on the White River Junction Manifesto: A Reply to the "Gang of Five's" Views on Just Compensation for Regulatory Taking of Property*, 9 Loy. L.A.L. Rev. 685 (1986); William G. Blake, The Law of Eminent Domain—A Fifty State Survey (Am. Bar Ass'n 2012) (editor); Leslie A. Fields, Colorado Eminent Domain Practice (2008); John Hamilton, Kansas Real Estate Practice And Procedure Handbook (2009) (chapter on *Eminent Domain Practice and Procedure*); John Hamilton & David M. Rapp, Law and Procedure of Eminent Domain in the 50 States (Am. Bar Ass'n 2010) (Kansas chapter); Gideon Kanner, *Making Laws and Sausages: A Quarter-Century Retrospective of Penn Central Transportation Co. v. City of New York*, 13 Wm. & Mary Bill of Rts. J. 679 (2005); Dwight H. Merriam, Eminent Domain Use and Abuse: *Kelo* in Context (Am. Bar Ass'n 2006) (coeditor); Michael Rikon, *Moving the Cat into the Hat: The Pursuit of Fairness in Condemnation, or, Whatever Happened to*

affirming that property owners are afforded meaningful due process protections.

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Creating a "Partnership of Planning?", 4 Alb. Gov't L. Rev. 154 (2011); Randall A. Smith, *Eminent Domain After Kelo and Katrina*, 53 La. Bar J. 363 (2006); (chapters on *Prelitigation Process* and *Flooding and Erosion*).

IV. Statement of the Rutherford Institute

The Rutherford Institute is an international non-profit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing free legal representation to individuals whose civil liberties are threatened or infringed and in educating the public about constitutional and human rights issues. Attorneys affiliated with the Institute have represented parties before the Court in numerous First Amendment cases such as *Frazee v. Dept. of Employment Sec.*, 489 U.S. 829 (1989), *Arkansas Educational Television Comm'n v. Forbes*, 523 U.S. 666 (1998), *Good News Club v. Milford Central School District*, 533 U.S. 98 (2001) and *Owasso Indep. School District v. Falvo*, 534 U.S. 426 (2002). The Institute has also filed briefs as an *amicus* of the Court on many occasions, including cases that involving issues implicating ing the right to own property and to use one's property without unreasonable government interference, such as *Kelo v. City of New London, Conn.*, 545 U.S. 469 (2005). The Rutherford Institute is participating as *amicus* herein because it regards the case as an extraordinary opportunity for the Court to confirm and uphold the sacrosanct right to own and use private property without fear of the government usurping that right.

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