No. 14-404

In the
Supreme Court of the United States

DAVID KENTNER, SUSAN A. KENTNER, et al.,

Petitioners,

v.

CITY OF SANIBEL,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BRIAN T. HODGES
Counsel of Record
Pacific Legal Foundation
10940 NE 33rd Place
Suite 210
Bellevue, Washington 98004
Telephone: (425) 576-0484
Facsimile: (425) 576-9565
E-mail: bth@pacificlegal.org

MARK MILLER
Pacific Legal Foundation
8645 N. Military Trail
Suite 511
Palm Beach Gardens,
Florida 33410
Telephone: (561) 691-5000
Facsimile: (561) 691-5006
E-mail: mm@pacificlegal.org

Counsel for Petitioners

QUESTIONS PRESENTED

This Court has long recognized that traditional property rights are protected by the Due Process Clause. *See Lingle v. Chevron, U.S.A., Inc.*, 544 U.S. 528 (2005), *Nectow v. Cambridge*, 277 U.S. 183 (1928), and *Village of Euclid v. Ambler Realty Co.*, 262 U.S. 365 (1926). But the lower court in this case held that a firmly entrenched state law property right, namely, the riparian right to build a dock, is not protected by due process. The questions presented are:

1. Whether traditional property rights are among those fundamental rights and liberties subject to the substantive protections of due process, per *Lingle*, *Nectow*, and *Euclid*; and

2. Whether a regulatory restriction on the right to use one's property "must substantially advance a legitimate state interest" to satisfy the substantive requirement of due process, per *Lingle*, *Nectow*, and *Euclid*.

CORPORATE DISCLOSURE STATEMENT

There is no parent or publicly held company owning 10% or more of the corporation's stock involved in this case.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS—Continued

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES—Continued

Page

Rules of Court

Miscellaneous

INTRODUCTION AND SUMMARY OF ARGUMENT

The Eleventh Circuit held that, as a matter of Circuit law, private property rights are not among the "fundamental rights" that are secured by the Due Process Clauses of the U.S. Constitution. App. A at 7. As a result, the court of appeals held that "there is generally no substantive due process protection for state-created property rights." *Id.* at 7-8, 9-10. According to Circuit law, an individual cannot bring a substantive due process claim based on a government action that deprives an owner of his property rights. *Id.* Instead, an aggrieved landowner must bring a facial due process challenge to the law authorizing such action, which is reviewed under minimal rational basis scrutiny. *Id.* at 9-11. Each of these rulings raises an "important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c). In addition, the Eleventh Circuit's resolution of these questions conflicts with decisions of this Court, and conflicts with decisions from other federal courts of appeals. Sup. Ct. R. 10(a).

The City of Sanibel does not seriously dispute that the Eleventh Circuit's decision implicates important questions of constitutional law. Instead, the City opposes the petition on three grounds, none of which has any merit. First, the City claims that shoreline property owners have no right to build docks. Not so. A long line of Florida precedent establishes that shoreline property owners are entitled to construct and maintain a dock from their land to the navigable portion of adjoining waters. *Belvedere Dev. Corp. v. Dep't of Transp.*, 476 So. 2d 649, 651 (Fla. 1985) (riparian rights include the right "to wharf out to

navigability"). And this Court has long recognized that riparian rights are protected by the Due Process and Takings Clauses of the U.S. Constitution. *Yates v. City of Milwaukee*, 77 U.S. (10 Wall.) 497, 504 (1870); *Ill. Cent. R. Co. v. Illinois*, 146 U.S. 387, 446 (1892).

Second, the City claims that the petition does not identify issues worthy of this Court's review. It does so, however, by rewriting the questions presented, mischaracterizing the Eleventh Circuit's decision, and ignoring arguments raised by the petition. In fact, the Opposition fails to respond to any of the arguments relating to the first question presented—whether traditional property rights are among those fundamental rights and liberties subject to the substantive protections of due process, per *Lingle v. Chevron, U.S.A., Inc.*, 544 U.S. 528 (2005), *Nectow v. Cambridge*, 277 U.S. 183 (1928), and *Village of Euclid v. Ambler Realty Co.*, 262 U.S. 365 (1926). On that issue, the Eleventh Circuit's decision conflicts with decisions of this Court and exacerbates a split of authority among the Circuit Courts of Appeals.

And third, instead of addressing the conflicts and split of authority regarding the proper standard of review, the Opposition argues that regulatory restrictions on property should only be subject to minimal, rational basis scrutiny. But taking a position on the merits does not refute the existence of conflicts —it remains undisputed that the Eleventh Circuit rejected this Court's holding that a restriction on the right to use one's property "must substantially advance a legitimate state interest" to satisfy due process. App. A at 5-7.

In light of these indisputable conflicts, it is apparent that this petition raises important federal

questions requiring the Court's resolution. Indeed, the Opposition highlights the need for review by conceding that, if riparian rights are fundamental rights, then the Kentners were entitled to review under a heightened scrutiny standard. Opp. at i, 31-34. That concession makes clear the central point of this litigation: whether the Due Process Clause protects against government deprivations of "life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1 (emphasis added). The Eleventh Circuit's decision eliminates this constitutional guarantee, thereby raising an important question of constitutional law.

CORRECTIONS TO SANIBEL'S MISSTATEMENT OF FACTS AND PROCEDURE

The Opposition relates a version of the facts and law that contradicts the findings and conclusions below. Opp. at 1-6, 7-10. Most egregiously, the City claims that the Kentners never established a right to build a dock over water adjoining their shoreline property. Opp. at 1-2, 4-6, 9, 11-12. That assertion is patently false. The Kentners' complaint set out all of the facts necessary to establish that the plaintiffs were shoreline property owners and entitled to riparian rights. App. E at 5-6, 10. As discussed below, shoreline property owners are entitled to build docks from their land to the navigable portion of adjoining waters, subject only to the rights established by the public trust doctrine (the rights of navigation and commerce).

The Kentners received approvals from state and federal government to build a dock on their property. *Id.* The City, however, refused to lift its ban on the

construction of new docks for reasons wholly unrelated to navigation and commerce. App. B at 27-28; *see also* Appellee's Br. at. 41-56 (setting out the reasons for dock ban). And, to make matters worse, the City built its own dock on land subject to the outright ban. App. B at 6; App. E at 6-7; Opp. at 10. Because this case was decided on a motion to dismiss, the Eleventh Circuit accepted as true the Kentners' well-pled allegations. App. A at 2-3; *see also* App. B at 2-7. Notably, the lower courts recognized that Florida law entitles shoreline property owners to build docks. *See* App. B at 17-21 (surveying law of riparian rights to find a right to build docks); App. A at 9 ("the District Court correctly concluded that the riparian rights asserted by plaintiffs are state-created rights").

ARGUMENT

I

RIPARIAN RIGHTS ARE PROTECTED BY DUE PROCESS

The Opposition is predicated on the assertion that shoreline property owners have no property interest in building a dock on their land, and, therefore, cannot invoke the protections guaranteed by due process. *See* Opp. at i (rephrasing the Questions Presented); *id.* at 1-2, 4-6, 9, 11-12, 31-33. That argument is frivolous. *See Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Prot.*, 560 U.S. 702, 735 (2010) ("[T]his Court has long recognized that property regulations can be invalidated under the Due Process Clause.") (Kennedy, J., concurring).

According to Florida law, a shoreline property owner has a qualified right to construct and maintain a dock from his or her land to the navigable portion of

adjoining waters. *See Shore Vill. Prop. Owners' Ass'n, Inc. v. State Dep't of Envtl. Prot.*, 824 So. 2d 208, 211 (Fla. Ct. App. 2002) (riparian owner's right to build a dock is settled law in Florida). That right is characterized as "qualified" because, under the public trust doctrine, the State holds certain submerged lands in trust to ensure that the public can use the water for navigation or commerce. *Ferry Pass Inspectors' & Shippers' Ass'n v. White's River Inspectors' & Shippers' Ass'n*, 48 So. 643, 645 (Fla. 1909). Thus, a riparian owner's right to build a dock is subject to the public's rights to navigation and commerce. *Freed v. Miami Beach Pier Corp.*, 112 So. 841, 844-45 (Fla. 1927) (Riparian owners "have, by the common law, a qualified right with the consent or acquiescence of the state . . . to erect wharves or piers or docks in front of the riparian holdings to facilitate access to and the use of the navigable waters, subject to lawful state regulation and to the dominant powers of Congress."); *Ill. Cent. R. Co.*, 146 U.S. at 445-46 (a riparian owner "is entitled . . . to make a landing, wharf, or pier for his own use" subject to the limitations imposed by the public trust doctrine).

Importantly, Florida's Supreme Court has long recognized that the government's authority to regulate property is subject to the "provisions of the federal and state Constitutions designed to protect private rights from arbitrary and oppressive governmental action."[1] *Everglades Sugar & Land Co. v. Bryan,* 87 So. 68, 77

[1] The fact that property is subject to regulation does not eliminate its constitutional protections. *Palazzolo v. Rhode Island*, 533 U.S. 606, 627 (2001); *see also Mugler v. Kansas*, 123 U.S. 623, 8 S. Ct. 273, 290 (1887) ("A legislative enactment cannot make that a nuisance which is not such in fact. . . . Rights of property cannot be so arbitrarily destroyed or injured.").

(Fla. 1921). The fact that a riparian right is "qualified" does not strip it of its constitutional protections: Riparian rights "are easements incident to the riparian holdings, and are property rights that may be regulated by law, but may not be taken without just compensation and due process of law." *Brickell v. Trammell*, 82 So. 221, 227 (Fla. 1919); *see also Feller v. Eau Gallie Yacht Basin, Inc.*, 397 So. 2d 1155, 1157 (Fla. Ct. App. 1981) ("Riparian rights exist in Florida as a matter of constitutional rights and property law[.]").

This Court has similarly held that the qualified right to build a dock is protected by the Due Process and Takings Clauses of the U.S. Constitution:

> This riparian right is property, and is valuable, and, though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired. It is a right of which, when once vested, the owner can only be deprived in accordance with established law, and if necessary that it be taken for the public good, upon due compensation.

Yates, 77 U.S. (10 Wall.) at 504; *see also Ill. Cent. R. Co.*, 146 U.S. at 446 (riparian right to wharf out cannot be "arbitrarily or capriciously impaired"). The City's arguments to the contrary are baseless.

II

THE ELEVENTH CIRCUIT'S DECISION RAISES IMPORTANT QUESTIONS OF FEDERAL DUE PROCESS LAW

A. The Lower Court's Conclusion That Property Rights Are Not Fundamental Rights Conflicts with Decisions of This Court and Other Circuits Courts of Appeals

The Opposition does not dispute the existence of conflicts on the question of whether traditional property rights are among those fundamental rights and liberties subject to the substantive protections of due process per *Lingle*, *Nectow*, and *Euclid*. Indeed, the City offers no response whatsoever to the text of the Due Process Clause, which states that the Constitution protects against government deprivations of "life, liberty, or property, without due process of law." Similarly, the Opposition provides no answer to this Court's direct statement that a regulation limiting the use of private property "comes within the ban of the Fourteenth Amendment." *Nectow*, 277 U.S. at 188-89. Nor does the City respond to the dozens of cases cited in the petition, in which various courts have held private property rights are subject to the protections of substantive due process. *See* Pet. at 9-12, 14-18.

B. The Lower Court's Refusal to Apply the "Substantially Advances" Test Conflicts with Decisions of this Court and Other Circuit Courts of Appeals

The City does not dispute that the Eleventh Circuit rejected this Court's instruction that a

restriction on the right to use one's property "must substantially advance a legitimate state interest" to satisfy due process. App. A at 5-7 (rejecting *Lingle*, *Nectow*, *Euclid*); *see also* App. B at 22 (rejecting *Lingle*, 544 U.S. at 540, as dicta). Instead, the City suggests that this Court never intended the "substantially advances" test to require anything more than what is required by a "rational basis" inquiry. Opp. at 12-22; 34-37. The City's argument, however, simply presumes to predict the outcome of the merits argument. It does not contest the conflicts set out in the petition, and does not comment on the advisability of this Court granting certiorari.

Similarly, the Opposition does not disprove the existence of a nationwide split of authority on the second question presented. Opp. at 22-30. Nor could it credibly do so where the lower courts both recognized that they were ruling on matters subject to a split of authority. App. A at 6 (disagreeing with decisions from the Fourth, Ninth, and Federal Circuits); App. B at 22 (refusing to follow conflicting decisions from other Circuit Courts of Appeals). Instead, the City ignores cases that directly conflict with the decision below,[2] while repeating the argument that the "substantially advances" test should be subsumed into a "rational basis" inquiry. Opp. at 22-30.

---

[2] *See*, *e.g.*, *DeBlasio v. Zoning Board of Adjustment*, 53 F.3d 592, 601 (3d Cir. 1995) ("[A] land-owning plaintiff states a substantive due process claim where he or she alleges that the decision limiting the intended land use was arbitrarily or irrationally reached."); *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1216 (6th Cir. 1992) (A zoning regulation "is arbitrary and capricious [when][] it does not bear a substantial relation to the public health, safety, morals, or general welfare.").

Even if this Court were to consider the City's arguments regarding the standard of review, such arguments would militate in favor of granting review because they demonstrate the importance of the constitutional issue at hand. It must be presumed that this Court intended that its words have meaning when it repeatedly stated that a restriction on the right to use one's property "must substantially advance a legitimate state interest." *See*, *e.g.*, *Nebbia v. New York*, 291 U.S. 502, 525 (1934) ("[T]he guaranty of due process . . . demands . . . that the means selected shall have a real and substantial relation to the objective sought to be attained."). Indeed, a brief review of *Nectow* demonstrates that it was a site-specific, factual inquiry under the "substantially advances" test that doomed the land use restriction at issue in that case. *Nectow*, 277 U.S. at 188-89 ("[T]he express finding of the master . . . is that the health, safety, convenience, and general welfare of the inhabitants of the part of the city affected will not be promoted by the disposition made by the ordinance of the locus in question. This finding . . . is determinative of the case."); *see also Lingle*, 544 U.S. at 545 (the "substantially advances" test requires heightened scrutiny).

By contrast, the lower court explained that, as a matter of Circuit law, property owners cannot bring the type of as-applied, fact-specific challenge at issue in *Nectow*. App. A at 8. Instead, owners may bring a facial due process challenge to a land use law, but only if the law applies to a large segment of the population. *Id.* at 8-9. And even then, the standard of review is radically different from the standard applied by this Court. According to the Eleventh Circuit, it does not matter whether a regulation will actually advance the stated governmental purpose. App. A at 11. A land

use law will only be overturned if the plaintiff proves that no reasonable decision-maker "could [] have possibly believed" that the regulation would advance its stated goal. *Id.*

The Eleventh Circuit's extreme version of rational basis review, which resulted in dismissal of the Kentners' lawsuit on the pleadings, precludes any inquiry into the actual impact and effect of the property restriction (*e.g.*, *Nectow*). *See*, *e.g.*, *Borden's Farm Products v. Baldwin*, 293 U.S. 194, 209 (1934) (the presumption of constitutionality is a rebuttable presumption of fact, not a rule of law that would entitle the government to victory before the plaintiff can develop an evidentiary record). Unsurprisingly, courts and scholars have criticized such extreme deference for turning what is supposed to be a constitutional inquiry into nothing more than "a rubber stamp of all legislative action." *Hadix v. Johnson*, 230 F.3d 840, 843 (6th Cir. 2000); *see also* Timothy Sandefur, *Rational Basis and the 12(b)(6) Motion: An Unnecessary "Perplexity"*, 25 Geo. Mason U. Civ. Rts. L.J. 43, 44 (2014) ("[T]runcation of rational basis cases perverts that [rational basis] test into a set of magic words whereby a government defendant can have a constitutional challenge dismissed on its mere say-so."); Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 Colum. L. Rev. 309, 316 n.38 (1993) ("For rationality review to be real rather than a sham, the court must be willing to make some independent assessment of legislative purpose.").

C. The City Concedes That If Property Is a Fundamental Right, Then the Eleventh Circuit's Rule Is in Conflict with This Court's Due Process Precedents

In the end, the Opposition itself demonstrates why review is both necessary and warranted. The City, while pursuing its quixotic argument that riparian owners have no right to build a dock, acknowledges that restrictions on fundamental rights are subject to heightened scrutiny under this Court's due process precedent. Opp. at i, 31-34. In conceding this point, the City forgets that the nature of property rights is the key question presented in this petition, and a question on which there is an undisputed conflict of law.

The conflicts created by the Eleventh Circuit's decision are plain, and the importance of that issue is indisputable because, if left unreviewed, the lower court's decision will strip property owners within the Circuit's jurisdiction of rights expressly guaranteed by the U.S. Constitution.

CONCLUSION

For the reasons set out above and in the petition, the Kentners respectfully request that this Court grant the petition for writ of certiorari, and reverse the decision of the Eleventh Circuit Court of Appeals.

DATED: December, 2014.

Respectfully submitted,

BRIAN T. HODGES
Counsel of Record
Pacific Legal Foundation
10940 NE 33rd Place
Suite 210
Bellevue, Washington 98004
Telephone: (425) 576-0484
Facsimile: (425) 576-9565
E-mail: bth@pacificlegal.org

MARK MILLER
Pacific Legal Foundation
8645 N. Military Trail
Suite 511
Palm Beach Gardens,
Florida 33410
Telephone: (561) 691-5000
Facsimile: (561) 691-5006
E-mail: mm@pacificlegal.org

Counsel for Petitioners