No. 230A16 TWENTY-FOURTH DISTRICT

THE SUPREME COURT OF NORTH CAROLINA

****

TOWN OF BEECH MOUNTAIN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	From Watauga County
	)	COA 15-517
GENESIS WILDLIFE	)	COA 15-260
SANCTUARY, INC.,	)	
	)	
Defendant.	)	

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AMICUS CURIAE BRIEF OF
PACIFIC LEGAL FOUNDATION

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INDEX

TABLE OF CASES AND AUTHORITIES

Cases:

Page

Constitutional Provisions:

Other Authorities:

Page

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AMICUS CURIAE BRIEF OF PACIFIC LEGAL FOUNDATION

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INTRODUCTION AND SUMMARY OF ARGUMENT

This case raises an important question about the standard of review applicable in cases alleging that property restrictions violate a landowner's substantive due process rights. Under the rational basis standard, the government must show that restrictions on property bear "a rational relation to the health and safety of the community." *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 391, 71 L. Ed. 303 (1926). The purpose of this inquiry is not to second-guess the Legislature, but to invalidate arbitrary and unreasonable property restrictions that lack a substantial connection to a legitimate police power. *Id*. at 395; *see also Moore v. East Cleveland*, 431 U.S. 494, 502, 52 L. Ed. 2d 531 (1977); *Nectow v. City of Cambridge*, 277 U.S. 183, 187-89, 72 L. Ed. 2d 842 (1928). A majority of the court below applied rational basis review so as to meaningfully consider the facts in the record to determine whether a rational basis for a challenged law exists. *Town of Beech Mountain v. Genesis Wildlife Sanctuary, Inc.*, 786 S.E.2d 335, 341-42 (2016). The dissent, however, would rely on any rationale that could uphold a law, regardless of the evidence. *Id.* at 356. The majority's view correctly implements federal due process law.

The proper application of rational basis is essential to advancing the policy and purpose of due process. This case, for example, involves a municipality's decision to adopt a superficially neutral land use ordinance that, as the record demonstrates, was designed to force one property owner—a wildlife rehabilitation sanctuary and

educational center—from its land. *Town of Beech Mountain*, 786 S.E.2d at 339-40. After considering evidence concerning the town's motivation for the new law, a jury determined that the town violated the sanctuary's substantive due process rights, which verdict was upheld on appeal by a majority in the decision below. Importantly, the majority decision looked beyond the town's proffered rationale that the ordinance was intended to protect water quality to determine the actual motivation for the law. *Id*. at 341-42. The majority, therefore, affirmed the jury verdict upon its determination that there was substantial evidence in the record showing that the actual purpose of the ordinance was to force the sanctuary to remove all the animals from its land. *Id*. One judge, however, would have upheld the law as a rational health measure to protect water quality at the lake. *Id.* at 356. According to the dissent, *any* legitimate rationale defeats a substantive due process challenge, regardless of the government's actual motivation. *Id*.

The dissent's approach to rational basis conflicts with Supreme Court case law and, if applied, would render that standard "tantamount to no review at all." *FCC v. Beach Commc'ns*, 508 U.S. 307, 323 n.3, 124 L. Ed. 2d 211 (1993) (Stevens, J., concurring). Only meaningful review, like the analysis the majority engaged in, ensures that individual rights will be protected against arbitrary or irrational government actions.

ARGUMENT

I. FEDERAL DUE PROCESS LAW REQUIRES COURTS TO ANALYZE THE TRUE RATIONALE BEHIND GOVERNMENT ACTION

It is often said that rational basis review is deferential to the government. While this may be true in a relative sense, it is false to the extent it suggests that courts should typically rubber-stamp any plausible government justification for regulation, without examination of the evidence. Under federal law, rational basis review still requires the court to examine the validity of government's rationale for a challenged enactment. *Mathews v. Lucas*, 427 U.S. 495, 510, 49 L. Ed. 2d 651 (1976). Accordingly, U.S. Supreme Court jurisprudence permits courts to review the real motivations and conduct of the legislative body to determine whether the challenged law is so unrelated to the public goal that it is arbitrary or irrational. *City of Cleburne, Tx. v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446, 87 L. Ed. 2d 313 (1985); *see also Borden's Farm Products v. Baldwin*, 293 U.S. 194, 200, 210, 79 L. Ed. 281 (1934) (a plaintiff must be allowed to prove his or her substantive due process claim based on evidence of the Legislature's rationale). Therefore, while rational basis provides a relatively lenient test in the due process context, it is far from toothless. *See Nordlinger v. Hahn*, 505 U.S. 1, 31, 120 L. Ed. 2d 1 (1992) (Stevens, J., dissenting) ("[D]eference is not abdication and 'rational basis scrutiny' is still scrutiny[.]").

Indeed, because substantive due process aims to eliminate arbitrary or irrational restrictions on individual rights, courts must often dig deeper to determine the actual

impetus for the law where an enactment initially appears to coincide with a legislative goal. *See Romer v. Evans*, 517 U.S. 620, 635, 134 L. Ed. 2d 855 (1996). The dissent's suggestion that a due process claim will be defeated upon the determination that the ordinance serves a legitimate public goal is simply wrong. The mere assertion of a public rationale cannot defeat a substantive due process claim where there is evidence in the record of the government's actual, illegal motivation. *See Borden's Farm Products*, 293 U.S. at 209 (Rational basis imposes "a rebuttable presumption" and "not a conclusive presumption, or a rule of law which makes legislative action invulnerable to constitutional assault."); *see also Craigmiles v. Giles*, 110 F. Supp. 2d 658, 662 (E.D. Tenn. 2000), *aff'd*, 312 F.3d 220 (6th Cir. 2002) ("[T]he mere assertion of a legitimate government interest has never been enough to validate a law.").

A rule requiring meaningful review is absolutely necessary because it is all too easy for government to concoct a public rationale to obscure its actual motivations. By its very nature, substantive due process cannot tolerate such pretext. *Romer*, 517 U.S. at 635 (Rejecting a state's proffered rationale of promoting freedom of association as a pretext for impermissible animus toward a disfavored group.); *Kelo v. City of New London*, 545 U.S. 469, 491, 162 L. Ed. 2d 439 (2005) (Kennedy, J., concurring) (The government cannot satisfy rational basis review by relying on "pretextual public justifications."). In *Eisenstadt v. Baird*, for example, the U.S. Supreme Court struck down a law prohibiting distribution of contraceptives to

unmarried persons based upon closer analysis of the government's proffered public health rationale. 405 U.S. 438, 440-41, 455, 31 L. Ed. 2d 349 (1972). Despite having "superficial earmarks [of] a health measure," the Court concluded that the government's real motivation in adopting the statute was to sidestep constitutional restraints on contraception bans. *Id.* at 452. Therefore, even where a law hypothetically advances a public goal, courts must still consider evidence of what actually motivated the legislature. *See Borden's Farm Products*, 293 U.S. at 209 ("Fanciful conjecture" about possible public rationales will not "repel attack."); *see also* Timothy Sandefur, *Rational Basis and the 12(B)(6) Motion: An Unnecessary "Perplexity"*, 25 Geo. Mason U. Civ. Rts. L.J. 43, 53-63 (2014) (advocating for the evidentiary approach) [hereinafter *Perplexity*].

Land-use actions are not excepted from meaningful rational basis review. For instance, in *Cleburne Living Center v. City of Cleburne*, a city denied a special use permit to a proposed group home for the mentally retarded. 473 U.S. at 435-37. The Supreme Court concluded that the permit decision was irrational despite the various rationales offered by the city, including community opposition to the home, proximity to a school, density issues, and the group home's location in a flood plain. *Id.* at 448-50. The Court rejected the city's rationales as unsupported by the record—particularly where the record demonstrated that the city had issued permits to similar projects. *Id.* The Court, therefore, concluded that irrational prejudice motivated the lawmakers, which is an impermissible purpose under rational basis

review. *Id.* at 450.

The majority decision below, by considering the government's actual motivation for adopting the ordinance, is consistent with the U.S. Supreme Court's rational basis case law. *Nectow v. City of Cambridge*, 277 U.S. at 186-87 (Invalidating a land-use law where the record showed that application of the ordinance to the landowner's property did not promote health, safety, or welfare.). The dissenting opinion, by contrast, short-circuits rational basis review by looking only to the proffered rationale and not asking the necessary follow-up question: whether the record shows a sufficient connection between the land-use restrictions and the stated goal. *Borden's Farm Products*, 293 U.S. at 209.

II. THE CONSTITUTIONAL HISTORY OF SUBSTANTIVE DUE PROCESS SUPPORTS MEANINGFUL RATIONAL BASIS REVIEW

Only a rational basis test that examines the genuine rationale behind a law depriving a citizen of the right to use private land will advance the founders' understanding of "due process of law." The framers created a constitution intending to limit the power of majorities to infringe on fundamental rights. An approach that requires plaintiffs to disprove any conceivable rationale for a law, without consideration of government's actual motivation, undermines this constitutional design.

A. Meaningful Rational Basis Review Supports the Founders' Understanding That an Arbitrary Act of the Legislature Is Not a "Law"

The Constitution promises that no one shall "be deprived of life, liberty or property without due process of law." U.S. Const. amend. V, XIV. The Due Process Clause has always forbidden arbitrary government actions because such actions do not measure up to the founders' understanding of the word "law." The promise of "due process of law" assures not only that valid processes will be observed; it also promises that only a genuine "law" can deprive individuals of life, liberty, or property.

The word "law" means more than a Legislature's say-so. *See* Timothy Sandefur, *The Conscience of the Constitution* 74 (2014) [hereinafter *Conscience*]. A legislative decree can become so arbitrary or self-serving as to no longer constitute a "law." *Id.* at 79-84. As constitutional historian and scholar Edward Corwin put it, "The formal law, and especially enacted law, may at times part company with 'true law' and thereby lose its title to be considered law at all." Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law* 11 (1955). Justice Chase famously espoused this view in *Calder v. Bull*: "An ACT of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact; cannot be considered a rightful exercise of legislative authority." 3 U.S. 386, 388, 1 L. Ed. 648 (1798). The U.S. Supreme Court has since reaffirmed this understanding of "law" as "something more than mere will exerted as an act of power." *Hurtado v. California*, 110 U.S. 516, 535-36, 28 L. Ed. 232 (1884). "Due process of law," therefore, requires that a deprivation of rights may only occur through something that fits within the meaning of "law."

This explanation of what constitutes "law" is consistent with the founders' original understanding. The people who drafted and ratified the Fifth Amendment were steeped in a historical tradition that granted substantive meaning to "law." This tradition stemmed from influential British interpretations of the Magna Carta's "law of the land" clause. *See* Timothy Sandefur, *In Defense of Substantive Due Process, or the Promise of Lawful Rule*, 35 Harv. J. L. & Pub. Pol'y 283, 287 (2012) [hereinafter *In Defense*]. That clause promised that no free man would be deprived of liberty or property "except by the lawful judgement of his equals or by the law of the land." Magna Carta § 29. Lord Edward Coke's treatise, *The Institutes*—which deeply influenced the founding generation—equated this "law of the land" language with "due process of law." Sandefur, *In Defense*, *supra* at 288; Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process*, 58 Emory L.J. 585, 607, 662 (2009). Coke believed that "law of the land" or "due process of law" meant that the sovereign could only deprive someone of their rights through a law founded in rationality. Sandefur, *In Defense*, *supra* at 288. He said that Magna Carta forbade an irrational law because it failed to achieve the status of law at all. *Id.* at 290. His contemporary, Francis Bacon, made a similar observation: "In Civil Society, either law or force prevails. But there is a kind of force which pretends to law, and a kind of law which savours of force rather than equity." Francis Bacon, Aphorism 1, *reprinted in* The Philosophical Works of Francis Bacon 613 (John M. Robertson ed. 1905). The founding generation—intimately familiar with "force which pretends to

law"—embraced this understanding. Gedicks, *supra* at 611-12, 618.

A law that lacks a coherent guiding principle is arbitrary and violates Coke's rule of rationality. Sandefur, *In Defense*, *supra* at 292, 302, 328-29; Sandefur, *Conscience*, *supra* at 73. The rationality requirement looks to the fit between means and ends and asks whether the end itself is rightful for a government to pursue. Randy E. Barnett, *Our Republican Constitution* 231 (2016). The scrutiny of legitimate ends includes basic notions of justice. Sandefur, *In Defense*, *supra* at 292, 302, 328-29; Sandefur, *Conscience*, *supra* at 73. As James Madison wrote, in his essay on *Property*: "[T]hat alone is a just government which impartially secures to every man whatever is his own." James Madison, *Property*, *reprinted in James Madison: Writings* 515 (Jack N. Rakove, ed. 1999). And the corollary: "[T]hat is not a just government, nor is property secure under it, where the property which a man has in his personal safety and personal liberty, is violated by arbitrary seizures of one class of citizens for the service of the rest." *Id.* For rational basis review to conform to the basic principle that an arbitrary "law" is not a law at all it must look past hypothetical justifications, as the majority opinion did below, to determine the true impetus behind a government action.

B. The Dissent's Approach to Rational Basis Review Clashes with the Founders' Wariness of Majority Rule

The dissent's approach to rational basis review also allows for excessive deference to legislative supremacy. Such deference stems from a worry that

substantive due process clashes with democratic rule—evoking the so-called "countermajoritarian difficulty." *See* Barry Friedman, *The History of the Countermajoritarian Difficulty*, 73 N.Y.U. L. Rev. 333, 333-34 (1998). But this mistakes the nature of our Republic, which employs an array of protections against the dangers of democracy.

The concept of substantive due process rests on the presumption that no rational polity would consent to arbitrary rule, no matter how democratic. Barnett, *supra* at 75-78, 231, 245. The Declaration of Independence reflects this notion. It says governments "deriv[e] their just power from the consent of the governed." Declaration of Independence para. 2. Rather than abdicating sovereignty to majority rule, the Declaration sets the bounds of our consent to the democratic exercise of "just powers." *Id.*; Barnett, *supra* at 41. Too much judicial restraint in the name of democracy risks exceeding this consent. Barnett, *supra* at 41.

Indeed, the Constitution was inspired by a concern over runaway democracy. When James Madison wrote of a need for a new constitution in "Vices of the Political System of the United States," he cited unchecked democracy as a "greater evil" to address. James Madison, *Vices of the Political System of the United States*, *reprinted in James Madison: Writings* 75-76. Madison said that experience had taught him to question the "fundamental principle . . . that the majority who rule in such Governments, are the safest Guardians both of public Good and of private rights." *Id.* at 75. He mourned "how easily . . . base and selfish measures" are "masked by

pretexts of public good and apparent expediency." *Id.* at 76. Madison's peers shared this worry over the "excess of democracy." Barnett, *supra* at 57. So they built a Constitution designed to check that excess. The Due Process Clause, and its promise that property rights can only be limited by legitimate and fair laws, is part of that design.

The dissent's approach to rational basis review forgets these warnings. The founders framed the Constitution to constrain majoritarian excess—they were not concerned with the counter-majoritarian difficulty that has sparked the occasional retreat from meaningful rational basis review. As Judge Janice Rogers Brown said of excessive judicial restraint: "[T]he better view may be that the Constitution *created* the countermajoritarian difficulty in order to thwart more potent threats to the Republic: the political temptation . . . to benefit narrow special interests." *Hettinga v. United States*, 677 F.3d 471, 482 (D.C. Cir. 2012) (Brown, J., concurring). This echoes Alexander Hamilton's warning that "it would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the Constitution, where legislative invasions of it had been instigated by the major voice of the community." The Federalist No. 78 (Alexander Hamilton). None of the founders doubted that this duty should prevail over timid deference to majority rule. Barnett, *supra* at 224-25. This principle can be advanced only through the type of meaningful rational basis scrutiny applied in the majority decision below.

CONCLUSION

Rational basis review requires that courts engage in a meaningful search for a rational basis in the record. Courts that refuse to analyze the government's proffered rationales encourage pretexts and frustrate the founders' hope for an "impenetrable bulwark against every assumption of power in the legislative or executive." James Madison, *Speech in Congress Proposing Constitutional Amendments, reprinted in James Madison: Writings* at 449. When a government targets a business for disfavor without any legitimate public interest, as the town did here, it acts without due process of law. There can be no justification for such laws. This Court should affirm the majority opinion below.

Respectfully submitted, this 12th day of October, 2016.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the Rules of Appellate Procedure, counsel for the Amicus Curiae certifies that the foregoing brief, which is prepared using a proportional font, is less than 3,750 words (excluding cover, indexes, table of authorities, certificates of service, this certificate of compliance, and appendixes) as reported by the word-processing software.

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STATEMENT OF RELATED CASES

Counsel for the Amicus Curiae represents that he has no knowledge of any related cases.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a copy of the foregoing brief on counsel for the parties and amici by depositing a copy, contained in a first-class postage-paid wrapper, into a depository under the exclusive care and custody of the United States Postal Service, addressed as follows:

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