Received 7/19/2022 9:46:54 AM Supreme Court Western District

Filed 7/19/2022 9:46:00 AM Supreme Court Western District
27 WAP 2022

Docket No: 27 WAP 2022

SUPREME COURT OF PENNSYLVANIA

DONALD R. BINDAS,

Appellant,

vs.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF TRANSPORTATION,

Appellees.

Appeal from the Order of the Commonwealth Court entered May 18, 2021, at No. 652 CD 2018, affirming the Order of the Court of Common Pleas of Washington County entered February 26, 2018, at No. 2016-4760

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF THE APPELLANT AND REVERSAL

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INTRODUCTION

Douglas Adams' *The Hitchhiker's Guide to the Galaxy* begins with the condemnation of Arthur Dent's home for a highway bypass. Arthur never saw the plans because, although technically located in the local planning office, they were "in the bottom of a locked filing cabinet stuck in a disused lavatory with a sign on the door saying, 'Beware the Leopard.'"[1] While *Hitchhiker's Guide* is satire, it "is effective as social commentary precisely because it is often grounded in truth." *Farah v. Esquire Magazine*, 736 F.3d 528, 537 (D.C. Cir. 2013). It is appropriate here because Donald R. Bindas finds himself in much the same situation as Arthur Dent and Mr. Bindas isn't laughing.

The document establishing the Department of Transportation's 1958 easement for the highway interchange project that commenced over fifty years later on Mr. Bindas' land existed at the County Recorder's Office only in microfiche form in an unlabeled drawer of a filing cabinet. Moreover, the parcel number on the easement instrument differed from the parcel number on the land on which the easement was taken. The easement was never indexed as required by 36 P.S. § 670-210. *Bindas v. Dep't of Transp*., 260 A.3d 991, 994−95 & n.5 (Commw. Ct. Pa. 2021). Nonetheless, the court

[1] Douglas Adams, *The Hitchhiker's Guide to the Galaxy* 10 (Pocket Books 1979).

below rejected Mr. Bindas' claims. While fiction tolerates "absurd or impossible things," the law does not. *Delaware & Hudson Canal Co. v. Hughes*, 38 A. 568, 569 (Pa. 1897). This Court should reject the Department's "highly farcical" position and reverse. *See Black v. Hepburne*, 2 Yeates 331, 333 (Pa. 1798).

INTEREST OF AMICUS CURIAE

Pacific Legal Foundation[2] respectfully submits this brief amicus curiae in support of Appellant, Donald R. Bindas. PLF is a nonprofit, tax-exempt corporation organized for the purpose of litigating matters affecting the public interest in private property rights, individual liberty, and economic freedom. PLF attorneys have vast experience in matters involving property rights, eminent domain, and inverse condemnation. PLF attorneys have served as lead counsel in several landmark United States Supreme Court cases in defense of the right to make reasonable use of one's property, and the corollary right to obtain just compensation when that right is infringed. *See, e.g.*, *Wilkins v. United States*, 13 F.4th 791 (9th Cir. 2021), pending on writ of certiorari, No. 21-1164 (U.S. 2022) (to determine timeliness of lawsuit

[2] Pursuant to Rule 531(b)(2), Pacific Legal Foundation affirms that no person or entity other than amicus curiae, its members, or counsel paid in whole or in part for the preparation of this amicus brief or authored in whole or in part this amicus brief.

under federal Quiet Title Act); *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021) (access easement is a *per se* physical taking); *Pakdel v. City and Cnty. of San Francisco*, 141 S. Ct. 2226 (2021); *Knick v. Twp. of Scott*, 139 S. Ct. 2162 (2019). PLF also routinely submits amicus briefs in important property rights cases in state and federal courts nationwide. Here, PLF argues that government action that infringes upon fundamental property rights must be strictly reviewed, with any ambiguities favoring the property owner. PLF further contends that recording statutes are rendered nonfunctional unless combined with an accurate index, and that free markets and stability in real estate depend upon certainty in public records.

ARGUMENT

I. Government Action Infringing on Property Rights Must be Strictly Reviewed

John Adams said, "Property must be secured, or liberty cannot exist." Discourses on Davila, in 6 Works of John Adams 280 (C. Adams ed. 1851), quoted in *Cedar Point*, 141 S. Ct. at 2071. The right to exclude, is one of the most "fundamental" and "treasured" elements of property ownership. *Id.* at 2072; *Ala. Ass'n of Realtors v. Dep't of Health & Human Svcs.*, 141 S. Ct. 2485, 2489 (2021).

Courts must carefully review government actions that infringe upon this right and other fundamental property rights, resolving any ambiguities in

favor of the property owner. *See, e.g.*, *Andress v. Zoning Bd. of Adjustment*, 188 A.2d 709, 712 (Pa. 1963) ("Our State and Federal Constitutions ordain, protect and guarantee *the ownership and use of private property*."); *Sandyford Park Civic Ass'n v. Lunnemann*, 152 A.2d 898, 900 (Pa. 1959) (The right of private property includes not only the ownership but also the right of use of private property, which are a fundamental part of the property owner's liberty.). Because "the protection of private property is indispensable to the promotion of individual freedom," *Cedar Point*, 141 S. Ct. at 2071, courts contemplating the forced deprivation of private property rights must review them through a sharply critical lens. *See Fidler v. Zoning Bd. of Adjustment*, 182 A.2d 692, 695 (Pa. 1962) ("It is fundamental that restrictions imposed by zoning ordinances are in derogation of the common law and must be strictly construed.").

The government may effectively condemn property only by following the statutory procedures to the letter. In fact, all property transactions depend on reliable recordkeeping. "A public, enduring, authoritative, and transparent record of all land ownership provides a vital information infrastructure that has proven indispensable in facilitating . . . virtually all forms of commerce." *Fuller v. Mortgage Electronic Registration Systems, Inc.*, 888 F.Supp.2d 1257, 1263 (M.D. Fla. 2012), quoting Christopher L. Peterson, *Two Faces:*

Demystifying the Mortgage Electronic Registration System's Land Title Theory, 53 Wm. & Mary L. Rev. 111, 114–15 (2011). This Court should therefore interpret the statutory requirements of Rule 210 in light of property owners' reliance interests. Protecting such "reasonable reliance interests is not only a legitimate governmental objective: it provides 'an exceedingly persuasive justification . . . .'" *Heckler v. Mathews*, 465 U.S. 728, 746, (1984) (citation omitted).

Petrosky v. Zoning Hearing Board of Upper Chichester Township, 402 A.2d 1385 (Pa. 1979), provides an example of how this Court has approached reliance interests. *Petrosky* established a five-part test under which property owners may acquire vested rights because of an improperly issued permit. It offers a useful analogy to this case in its discussion of due diligence and good faith reliance. In *Petrosky*, landowners constructed a garage with a permit that, it turned out, failed to incorporate all required statutory elements—namely, setbacks. The government argued that the landowners "failed to exercise due diligence because they did not research the zoning laws and discover for themselves the setback requirements." *Id.* at 1388. This Court refused to place this duty on landowners who had "ma[de] inquiry of the proper officials." *Id.*

The government also relied on language that appears in some zoning and use permits that they could be revoked "if it appears that the [permit was] obtained by fraud or misrepresentation, or if the Zoning Ordinance is violated." *Id.* at 1389. This Court refused to interpret this language as "warning a citizen that in spite of receiving the permits one acts at one's own peril. . . . It would be ludicrous to read the proviso as an escape clause which shields the township from the consequences of issuing permits in violation of its own ordinance." *Id*. A contrary interpretation "would render the permit process a useless exercise" because landowners' reliance "would be devoid of any legal effect." *Id.* In short, this Court rejected "any argument that the concept of Caveat emptor has any place in the consideration of due diligence." *Id.* Here, too, Mr. Bindas purchased property apparently free of any encumbrances, in reliance on the public records that the government was required to maintain and organize in accessible indexes. As shown below, the government's failure to index must be fatal to its claims on Mr. Bindas' property.

II. Indexing Is a Critical Component of Recording Encumbrances on Property

"Public land title records created a platform, or infrastructure, upon which private commerce could take place. Indeed, real property recording statutes are the earliest and most practical expression of the American

commitment to the use of transparent rule of law in the preservation and orderly exchange of property rights." Christopher L. Peterson, *Foreclosure, Subprime Mortgage Lending, and the Mortgage Electronic Registration System*, 78 U. Cin. L. Rev. 1359, 1365 (2010). A primary purpose of recording is to create official public records that protect buyers against any competing claims and to influence the behavior of owners in a way that motivates the creation and transaction of title that is as clean as possible. Donald J. Kochan, *Dealing with Dirty Deeds: Matching* Nemo Dat *Preferences with Property Law Pragmatism*, 64 U. Kan. L. Rev. 1, 11 (2015). Thus, from its earliest days, Pennsylvania maintained a recording system to "prevent honest purchasors, or mortgages, of real estates, from being deceived by prior secret conveyances, or incumberances . . . ." *Levinz v. Will*, 1 Dall. 430, 435 (Pa. 1789). None of this is possible "without an accurate and efficient index." Joyce Palomar, 1 *Patton and Palomar on Land Titles* § 67 (3d ed.).

A. Constructive notice depends on indexing

Constructive notice is designed to capture information from documents that are available to provide actual notice, such as records or other public documents that, with due diligence, would be discovered. Recording and indexing an encumbrance serves the critical function of providing notice,

including constructive notice, to purchasers. *Citizens' Bank of Palmerton v. Lesko*, 120 A. 808, 810 (Pa. 1923). The object is to allow all parties to a real estate transaction to understand the nature of the transfer and "to protect them from prior secret conveyances and liens." *Patterson v. De La Ronde*, 75 U.S. 292, 300 (1868). The system depends on purchasers being able to rely on the information obtained from public records. *Id*.[3]

The North Carolina Supreme Court in *Turner v. Glenn*, 18 S.E.2d 197 (N.C. 1942), stated that:

> A purchaser is chargeable with notice of the existence of the restriction only if a proper search of the public records would have revealed it and it is conclusively presumed that he examined each recorded deed or instrument in his line of title and to know its contents. If the restrictive covenant is contained in a separate instrument or rests in parole and not in a deed in the chain of title and is not referred to in such deed a purchaser, under our registration law, has no constructive notice of it.

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[3]The South Carolina Supreme Court explicitly ties the acts of recording and indexing: "The recording of a document alerts all future grantees of the rights of the recorder because the law assumes the grantee will search the index and discover the interest or claim." *Spence v. Spence*, 628 S.E.2d 869, 876 (S.C. 2006). So does California. *Hochstein v. Romero*, 219 Cal.App.3d 447, 453 (1990) (proper indexing remains an essential precondition to constructive notice; "because the purpose of proper indexing was to allow the document to be located, the failure properly to index the document rendered it unlocatable, and hence the document had to be treated as though never having been recorded.") (citing *Cady v. Purser*, 131 Cal. 552, 555–58, 63 P. 844 (1901). *See also* John C. Murray, *Defective Real Estate Documents: What Are the Consequences?*, 42 Real Prop. Prob. & Tr. J. 367, 391−95 (2007) (multiple examples of mortgage documents indexed under misspelled or incorrect names and noting that if a document was recorded, but improperly indexed, finding it during a title search is nearly impossible.).

Id. at 201 (citations omitted). *See also Dallas v. Farrington*, 490 So.2d 265, 269 (La. 1986) ("what is not recorded is not effective except between the parties, and a third party in purchasing immovable property is entitled to rely on the *absence* from the public records of any unrecorded interest in the property"); *1119 Delaware v. Continental Land Title Co.*, 20 Cal.Rptr.2d 438, 443 n.5 & 445 (Cal. App. 1993) ("wild" documents that cannot be found via an index search cannot provide constructive notice); *Dunlap Investors Ltd. v. Hogan*, 133 Ariz. 130, 132 (1982) (unindexed easement void as to third party buyer, even if the relevant document exists somewhere in the building).

The failure to properly file and index an instrument can destroy the notice-conferring effects of recordation. For instance, New York's intermediate appellate court held that a clerk's errors in recording or indexing a mortgage cannot impute knowledge of the mortgage to a bona fide purchaser. *Baccari v. DeSanti*, 431 N.Y.S.2d 829, 833 (App. Div. 1979) ("[S]ince the index has, by statute, been made part of the record of filed instruments, an erroneous indexing by the clerk fails to give constructive notice of the existence and contents of the instrument."). *See also Coco v. Ranalletta*, 733 N.Y.S.2d 849, 854 (Sup. Ct. 2001), *aff'd*, 759 N.Y.S.2d 274 (App. Div. 2003) (constructive notice may not be premised upon an

incorrectly indexed instrument, whether the error was committed by the clerk or induced by one of the parties).

This Court similarly recognizes the power and limitations of public records in determining whether a prospective buyer has notice of encumbrances on property. In *Maul v. Rider*, 59 Pa. 167, 171 (1869), this Court held that public records provide notice only to those individuals who have some "relation," or "fact," or "circumstance of suspicion" that imposes a duty to search for documents. *Id.* ("[T]here must be some reason to awaken inquiry and direct diligence in the channel in which it would be successful."). A "general rumor" is not enough; there must be "some *act*—some declaration from an authentic source" to generate a duty for further inquiry. *Id.* at 172 (emphasis added). That is, a purchaser's duty to investigate beyond the public records exists only when an affirmative action or statement puts the purchaser on guard that something may be awry. Contrary to the decision below,[4] the mere existence of a highway nearby cannot be enough to suggest that the government failed to comply with its statutory duty to properly record and index highway easements.

[4] *Bindas*, 260 A.3d at 997, 1001.

B. Innocent parties and cost avoidance

There's no doubt that the county recorder's office was primarily responsible for the errors in recording and indexing that underlie this lawsuit. *Bindas*, 260 A.2d at 995−96. The government bore secondary responsibility for ensuring that its easement was properly recorded and indexed. *See Compiano v. Jones*, 269 N.W.2d 459, 462 (Iowa 1978) (The filer "should suffer the consequences of improper indexing as he is usually the only one who can make certain that it is done right."). The only truly innocent party in this transaction is Mr. Bindas, who hadn't an inkling of a highway easement until the bulldozers arrived. *See Neslin v. Wells*, 104 U.S. 428, 436 (1881) (where lack of notice occurs after failure to record, it would work an "injustice" to prefer the prior interest holder over "that of the innocent party, who otherwise would suffer loss"); *Lessee of Henry v. Morgan & Cox*, 2 Binn. 497, 502 (Pa. 1810) (recording acts "protect innocent purchasers from suffering by the fraud or negligence of those, who had obtained prior conveyances from the same person, and omitted to have them recorded") (emphasis omitted).

But even assuming the Department of Transportation was also an innocent party done wrong by the county clerk, having sought the benefit of the recording laws, the Department must "incur all the risks of the failure" of

the clerk's office because "where one of two innocent parties must suffer, the loss ought justly to fall on that one whose error has led to it." *Neas v. Whitener-London Realty Co*., 178 S.W. 390, 393 (Ark. 1915). The Department's error was to drop off its paperwork without ensuring that it was properly recorded and indexed. The Washington Supreme Court explained:

> As between two innocent persons, one of whom must suffer a loss, [the prior interest holder] is obviously the one who is responsible therefor. He failed to have his property correctly described in his deed and then failed to have it recorded. He failed to do as the ordinarily prudent and cautious individual does . . . . [The prior interest holder] had ample opportunity to protect himself and did nothing. [The subsequent purchaser] did everything that could be expected of it.

Cunningham v. Norwegian Lutheran Church of Am., 184 P.2d 834, 840 (Wash. 1947).

The fact that index books exist leads the public to a reasonable expectation that they are maintained and correctly reflect encumbrances on property. *Neslin*, 104 U.S. at 439 ("[T]o withhold from the record conveyances or incumbrances in their own favor is a waiver of their right, and equivalent to a representation that they do not exist, in favor of innocent subsequent purchasers, who otherwise would be wrongfully affected by them."); *see also Hoyt v. Schuyler*, 28 N.W. 306, 308 (Neb. 1886) ("The legislature in requiring an index, and prescribing what it should contain, intended it for the purpose of rendering the contents of the records readily

accessible,—it was not intended as a useless appendage."). The Iowa Supreme Court explained that an index book "indicate[s] the existence of all instruments which are recorded or on file to be recorded. If there is no index of an instrument the searcher after titles has a right to assume that none such is on file or on the record." *Barney v. Little*, 15 Iowa 527, 533 (1864). A title search that cannot rely on the accuracy and completeness of the index renders the entire index worthless. *See First Citizens Nat'l Bank v. Sherwood*, 879 A.2d 178, 183−84 (Pa. 2005) (Eakin, J., dissenting) ("proper recording necessarily implies proper indexing, for that is where the world must go to get that notice. Imperfect indexing is imperfect notice . . . the mere recordation of a mortgage without proper indexing places an innocent party on constructive notice puts an undue, nay impossible, burden on that party.")

These principles correctly place the burden on the "cheapest cost-avoider" instead of "requiring some lengthy and impossible investigation by every purchaser to ascertain from the hinterlands all possible adverse claims, all of which lie outside their personal knowledge (unlike the first actual purchaser who knows of his own purchase)." Kochan, *supra*, at 38, citing 1 Palomar, *supra*, § 17. There is no way that subsequent buyers could discover a deed amongst innumerable recorded transactions without an index, and thus there is no way for buyers to prevent the loss that occurs when they pay

good money for bad title. Gerald Korngold, *Resolving the Intergenerational Conflicts of Property Law: Preserving Free Markets and Personal Autonomy for Future Generations*, 56 Am. U. L. Rev. 1525, 1565 (2007). As Justice Eakin opined in *First Citizens Nat'l Bank*, 879 A.2d at 184 (Eakin, J., dissenting), while the Recorder of Deeds owes a duty to properly index mortgages and deeds, "the mortgagee ultimately bears the risk of improper indexing" because it is "a small burden" on the mortgagee but "an *impossible* burden to place on the public." (Emphasis added). Where Mr. Bindas relied on the documents recorded in his chain of title, the government here relies on *itself*. *See In re Aikens*, 94 B.R. 869, 875 (E.D. Pa. 1989) (City that did not ensure proper docketing and indexing its liens could not assert them against bona fide purchaser). The government must bear the loss.

C. An increasing number of states require proper indexing for valid recording of an encumbrance

While some states take different positions on recording clerks' recording and indexing errors, modern cases increasingly protect innocent third-party purchasers. In *Greenpoint Mortgage Funding, Inc. v. Schlossberg*, 888 A.2d 297, 313 (Md. 2005), the Maryland Court of Appeals provides a comprehensive explanation of why proper indexing is necessary to effect legitimate recording:

> Relying on indexing is the only thing that makes it possible for title attorneys to limit the examination of documents to those that are relevant, generally those cases and documents indexed in the grantor's or debtor's name. If indexing were to be eliminated, the marketability of titles would be seriously compromised and the entire system of property in this country might collapse. The contrary position, i.e., indexing is not required, would result in millions of documents having to be reviewed to certify a clear title. It would be an impossible task. . . . The most important public records relating to the examination of land titles are the indexes. *Everything depends on indexing. Without indexing nothing works.*

(Emphasis added). Other courts agree. *See Teschke v. Keller*, 650 N.E.2d 1279, 1284−85 (Mass. App. 1995) (attachment indexed in registry under name "Keller-Teschke" was not valid as against mortgagee when subsequent mortgage was granted under name "Keller."); *Vicars v. Salyer*, 68 S.E. 988, 989 (Va. 1910) (if part of a recording and indexing statute is essential to be effective, then all of it must be because "the section cannot be mandatory as to the one and merely directory as to the other.").

Attempting to find title information that is indexed in error or not at all is "a task comparable to the proverbial search for a needle in a haystack. Error in the record is not presumed." *Dorman v. Goodman*, 196 S.E. 352, 356 (N.C. 1938). *See also Hanson v. Zoller*, 187 N.W.2d 47, 56 (N.D. 1971) ("It would be a prohibitive burden to locate instruments on record without a tract index. It would certainly be a travesty of justice to hold that prospective purchasers are bound by the record, if for all practical purposes the record

cannot be located."), quoted and followed by *PLS Svcs., LLC v. Valueplus Consulting, LLC*, 960 N.W.2d 780, 787 (N.D. 2021); *Compiano*, 269 N.W.2d at 462 ("It is vital that one who searches the records should know where to look and should know, too, when he need look no further.").

An unenforced statutory requirement that recorded transactions be indexed is worse than having no index at all. In *Norton v. Kumpe*, 25 So. 841, 842 (Ala. 1889), the Alabama Supreme Court confirmed that a requirement to maintain an index demands "the same measure of care and accuracy . . . as did the statutory direction to record and index in the first instance." If a prospective buyer cannot rely on the "verity" of the index, "the searcher must resort to the records, as if there was no general index. The general index, if consulted at all, *would become a snare, rather than a guide,* if, when purporting to point to all incumbrances, it was silent as to some." *Id*. (emphasis added); *Keybank Nat'l Ass'n v. NBD Bank*, 699 N.E.2d 322, 327 (Ind. App. 1998) (same). *See also Boyer v. Pahvant Mercantile & Inv. Co.*, 287 P. 188, 199 (Utah 1930) (Straup, J., dissenting) (If due diligence "does not permit reliance on the abstract record and indices as by the mandatory provisions of the statute required to be kept, then they, instead of being aids and facilities in searching record titles, become a mere delusion and a snare and a ready vehicle to mislead and deceive.").

D. Real estate markets and free trade depend on certainty and stability

A formalized system of property recordation provides essential institutional support for the market. Kochan, *supra*, at 29. When properly implemented, the system provides "a network of reliable, accessible, public, verifiable ownership information in a certain and identifiable place for inspection so that all parties interested in learning the title ownership status and other deed-related details of property could find such information and feel confident in assessing their current or future relationship with that property based on the information they can find in the records offices." *Id*. at 31, citing Raymond H. Brescia, *Leverage: State Enforcement Actions in the Wake of the Robo-Sign Scandal*, 64 Me. L. Rev. 17, 21−22 (2011) (describing useful functions of recording mechanisms).

Professor Joseph Singer explains that "[t]his system [of recording] helps clarify the state of the title and provides buyers with assurances that the person purporting to sell them land actually owns it and that the land is not subject to any competing claims or encumbrances," because buyers must always be worried that claims may exist "that might conflict with their ability to obtain title or use the property as they wish." Joseph William Singer, *Property*, § 11.4.5.1, at 538 (3d ed. 2010), quoted in Kochan, *supra*, at 30. Recording statutes provide private landowners and commercial entities with

"the stability essential for reliable evaluation of the risks involved." *United States v. Kimbell Foods*, 440 U.S. 715, 739 (1979). That is, when people can verify a chain of title, they have a higher degree of certainty that all parties to the transaction own and have authority to transfer the property, thus enhancing the value of the property itself. Dan S. Schechter, *Judicial Lien Creditors Versus Prior Unrecorded Transferees of Real Property: Rethinking the Goals of the Recording System and Their Consequences*, 62 S. Cal. L. Rev. 105, 120 (1988). Moreover, judicial outcomes related to properly recorded and indexed property titles are predictable and market participants can evaluate their transactions with reliable assessments of enforcement risks. Kochan, *supra*, at 33−34. Once obtained, the certainty of title gives property owners the confidence to invest in the property and make improvements. Abraham Bell & Gideon Parchomovsky, *A Theory of Property*, 90 Cornell L. Rev. 531, 552−59 (2005); Carol M. Rose, *Possession as the Origin of Property*, 52 U. Chi. L. Rev. 73, 81 (1985) ("[C]lear titles facilitate trade and minimize resource-wasting conflict.").

Lacking certainty means that prospective purchasers may avoid acquiring property, or purchase more insurance than would otherwise be

necessary,[5] or demand extensive guarantees in the contract in exchange for additional consideration. Recording and indexing avoids these unnecessary and inefficient costs. When members of the public cannot reliably examine records that constitute the "public memory system" for land transfers and encumbrances, the resulting uncertainty leads to instability in the market. Hernando de Soto, *The Destruction of Economic Facts*, Bloomberg Businessweek (Apr. 28, 2011);[6] *Myerson v. Sakrison*, 240 P.2d 1198, 1201 (Ariz. 1952) (removing the protection that allows reliance on public records as the priority of liens and mortgages "is unreasonable and destructive of inherent rights and the commercial life of the state would be seriously impaired."). Uncertain owners will forego improvements, underutilizing land that otherwise would have a higher and better use. Kochan, *supra*, at 35.

Stable property rights allow people to make choices and pursue long-term goals. In this sphere of ordered liberty, people must be able to rely on the government's protection of private property rights into the future. *See* Christopher Serkin, *What Property Does*, 75 Vanderbilt L. Rev. 891, 896 (2022) (citations omitted).

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[5] Title insurers conduct searches to inform the insured and to reduce their own liability by identifying and excluding known risks and some undiscovered defects. *F.T.C. v. Ticor Title Ins. Co.*, 504 U.S. 621, 626 (1992).

[6] https://www.bloomberg.com/news/articles/2011-04-28/the-destruction-of-economic-facts.

CONCLUSION

The decision below should be reversed.

DATED: July 19, 2022.

Respectfully submitted,

s/ Caleb Kruckenberg

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I hereby certify that on July 19, 2022, I electronically filed the foregoing with the Prothonotary of the Supreme Court of Pennsylvania by using the PACFile system and via mail via the U.S. Postal Service or a commercial carrier.

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