No. 16-1732

In the
United States Court of Appeals
for the Fourth Circuit

SIENA CORPORATION, A Maryland Corporation; ROCKVILLE NORTH LAND LLLP, A Maryland Limited Liability Limited Partnership,

Plaintiffs-Appellants,

v.

MAYOR AND CITY COUNCIL OF ROCKVILLE MARYLAND; BRIDGET NEWTON, Rockville Mayor; BERYL FEINBERG, Rockville City Council Member; VIRGINIA ONLEY, Rockville City Council Member; JANE DOE,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND AT GREENBELT

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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No. 16-1732 ***Siena Corp., et al. v. Mayor & City Council of Rockville, Md., et al.***

Pursuant to FRAP 26.1 and Local Rule 26.1, **Pacific Legal Foundation** who is amicus, makes the following disclosure:

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s/ Anastasia P. Boden Date: September 14, 2016

Counsel for Amicus Curiae Pacific Legal Foundation

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IDENTITY AND INTEREST OF AMICUS[1]

Pursuant to Fed. R. App. P. 29 and Local Rule 29-1, Pacific Legal Foundation (PLF) submits this brief amicus curiae in support of Appellants. PLF was founded over 40 years ago and is widely recognized as the most experienced nonprofit legal foundation of its kind. PLF represents the views of thousands of supporters nationwide who believe in limited government, individual rights, and free enterprise.

PLF litigates to protect both the right to make reasonable use of one's property, and the right to earn a living free of arbitrary government interference. To this end, PLF has litigated numerous lawsuits under the rational basis standard. *See Bruner v. Zawacki*, 997 F. Supp. 2d 691 (E.D. Ky. 2014); *Merrifield v. Lockyer*, 547 F.3d 978 (9th Cir. 2008). PLF has also appeared as amicus curiae in rational basis cases, such as *St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013); *Powers v. Harris*, 379 F.3d 1208 (10th Cir. 2004); and *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002). PLF believes its litigation experience and public policy perspective will aid this Court in consideration of this case.

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[1] In accordance with Fed. R. App. P. 29(c)(5), Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than the Amicus, its members, or its counsel have made a monetary contribution to this brief's preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

Siena Corporation[2] bought the property at the heart of this lawsuit to open a self-storage facility. Siena is prevented from using it for that purpose because of an after-the-fact zoning amendment enacted by the Rockville City Council. Siena argues that this amendment was adopted at the behest of local citizens concerned not about public safety, but about the potential effect of the project on their own property values. Op. at 39. If Siena can prove its allegations, the Council's actions would violate the Fourteenth Amendment because the zoning amendment would not be rationally related to a legitimate government purpose. "[I]rrational, arbitrary governmental measures," made against "a politically unpopular target on the basis of complaining neighbors' fears or negative attitudes are repugnant to constitutional guarantees." *Marks v. City of Chesapeake, Va.*, 883 F.2d 308, 310 (4th Cir. 1989) (citations omitted).

The court below accepted the government's bare assertion that the law was rational and refused to inquire whether the law actually furthered any valid public health or safety purpose. Op. at 88 ("I'm going to decline the invitation to try to get involved in that battle."). It ruled prior to any discovery, thereby denying Siena an opportunity to obtain information essential to proving its claim. Because the law's

[2] For convenience, Siena Corporation and Rockville North Land LLLP are collectively referred to as Siena.

purpose was a disputed question of material fact, the court should not have granted summary judgment to the Council. *Willis v. Town of Marshall, N.C.*, 275 Fed. App'x 227, 233 (4th Cir. 2008) (where dispute of material fact exists, plaintiff is entitled to trial to determine whether she was treated differently without a rational basis).

Although the rational basis test is deferential, it does not require the court to ignore a plaintiff's evidence in favor of the government's *ipse dixit*. *Brown v. North Carolina DMV*, 166 F.3d 698, 706 (4th Cir. 1999) ("[E]ven rational basis review places limitations on states."). The rational basis test permits a presumption of constitutionality in favor of government action that can be overcome by plaintiffs through evidence. *Cruz v. Town of Cicero, Ill.*, 275 F.3d 579, 587 (7th Cir. 2001) (Rational basis is "not [a set of] magic words that municipal defendants can simply recite in order to insulate their . . . decisions from scrutiny under federal law."). Under this standard, Siena was not given an adequate opportunity to prove its claim.

Courts must interpret the rational basis test as requiring meaningful scrutiny to protect individual rights. In cases where judges have applied an overly deferential view of the rational basis test, the results for property owners and entrepreneurs have been tragic. *See generally* Steven M. Simpson, *Judicial Abdication and the Rise of Special Interests*, 6 Chap. L. Rev. 173, 188-205 (2003) (discussing how lax use of the rational basis test has harmed independent taxi cab owners and has led to eminent domain abuse). The results have been particularly harmful to minorities and others

who lack the political power to protect themselves through the legislative process. This Court should reverse to allow future plaintiffs who seek refuge under the Fourteenth Amendment a fair chance to prove their claims.

I

THE RATIONAL BASIS TEST REQUIRES MORE THAN GOVERNMENT'S BARE ASSERTION THAT THE LAW IS RATIONAL

The rational basis test acts as a rebuttable presumption in favor of government action that can be overcome by plaintiffs through the presentation of evidence. *See, e.g.*, *Borden's Farm Products Co., Inc. v. Baldwin*, 293 U.S. 194, 209 (1934); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973). Though deferential, the rational basis test is not insurmountable. The test is not a "a conclusive presumption, or a rule of law which makes legislative action invulnerable to constitutional assault." *Borden's*, 293 U.S. at 209. The presumption can be overcome by "some factual foundation of record for overthrowing the statute." *O'Gorman & Young, Inc. v. Hartford Fire Ins. Co.*, 282 U.S. 251, 257 (1931).

The rational basis standard requires courts to look at the evidence at hand, rather than relying on government's *ipse dixit*. For example, in *Nashville, C. & St. L. Ry. v. Baker*, 71 S.W.2d 678 (Tenn. 1934), *rev'd sub nom. Nashville, C. & St. L. Ry. v. Walters*, 294 U.S. 405 (1935), a railroad company challenged a requirement that it pay to remove the railroad grades at a highway crossing. The company argued that

technological changes rendered it arbitrary to require it to pay to remove the grades. 294 U.S. at 416. The Tennessee Supreme Court refused to consider the evidence, and held that if the legislature believed the challenged law was rational, it was constitutional. *Id.* at 415.

The Supreme Court reversed, holding that a law's rationality must be evaluated in light of the facts at hand, because "[a] statute valid as to one set of facts may be invalid as to another. A statute valid when enacted may become invalid by change in the conditions to which it is applied." *Id.* at 415 (citation omitted). The railroad company should have the opportunity to prove that technological advances did in fact undercut the rationale for the requirement. In other words, plaintiffs must be allowed the chance to prove that a law is illegitimate, despite the government's proclamations otherwise.

Thus, the Supreme Court refuses to blindly accept the government's asserted rationale in rational basis cases. The Court instead looks to the evidence to determine whether the problem that the government asserts actually exists, and whether the law is rationally related to fixing that problem. In *Moreno*, 413 U.S. 528, the Court held that a law prohibiting unrelated people living in the same household from receiving food stamps was unconstitutional under the rational basis test. The government asserted that the law prevented food stamp fraud. After considering the evidence, the Court concluded that the purpose of the regulation was to discriminate against

"hippies." *Id.* at 537-38. Such irrational discrimination could not satisfy the rational basis test. *See also Romer v. Evans*, 517 U.S. 620, 632 (1996) (animus alone is not a legitimate state interest).

Not only must a law be justified by the facts, the government's goal must also be legitimate—meaning that it protects the public, rather than promoting the interests of politically-influential groups. *See St. Joseph Abbey*, 712 F.3d at 222-23. The goal can only be discerned after a fair evaluation of the evidence. In *St. Joseph Abbey*, an Abbey of the Benedictine Order of the Catholic Church challenged a state law that forced anyone who sold caskets—including the Abbey's monks—to obtain a funeral director's license. *Id.* at 215. The state baldly asserted that the law protected "the health, safety, and welfare" of Louisianans, but after conducting a trial and considering evidence from both sides, the court found that the evidence contradicted the state's rationale. *Id.* at 222. For instance, the training requirements for funeral directors had little to do with selling caskets. Worse, the state did not even require that caskets be used for burial, undermining any argument that knowledge of caskets was necessary for providing burial advice. *Id.* The court found that the law was, in reality, motivated by economic protectionism, and therefore failed rational basis scrutiny. *See also Craigmiles v. Giles*, 110 F. Supp. 2d 658 (E.D. Tenn. 2000), *aff'd*, 312 F.3d 220 (6th Cir. 2002) (same).

Because rational basis review provides merely a presumption of constitutionality, many plaintiffs have successfully challenged laws under the rational basis test in federal courts. In *Sams v. Ohio Valley Gen. Hosp. Ass'n*, 413 F.2d 826 (4th Cir. 1969), this Court struck down a law that barred physicians who had offices outside a West Virginia county from obtaining hospital privileges in that county. The Court emphasized that the question of whether there was a rational basis for the unequal treatment should be based on "practical considerations" rather than "theoretical" ones. *Id.* at 829 (citation omitted). The government put forth various rationales for the law, but contrary to those assertions, the law did nothing to protect public health or safety. Instead, it made "doctors . . . unacceptable because they live[d] on the wrong side of the street." *Id.*; *see also Dias v. City & Cnty. of Denver*, 567 F.3d 1169 (10th Cir. 2009) (whether ban on pitbulls in fact furthered public safety required looking at the evidence at hand, and court could not rely on city's assertions).

Plaintiffs have also successfully challenged licensing requirements, which are subject to rational basis review, by introducing evidence that the law did not have a legitimate purpose, or that the chosen means were not rationally related to achieving that purpose. Arbitrary restrictions for hair braiders, *Brantley v. Kuntz*, 98 F. Supp. 3d 884 (W.D. Tex. 2015), moving companies, *Bruner*, 997 F. Supp. 2d at 697, and pest controllers, *Merrifield*, 547 F.3d at 992, have all been struck down under the rational basis test after the courts considered the evidence.

The City Council posited during oral argument that this case concerns a "garden variety land use zoning text amendment," but even land use issues have to satisfy rational basis. In *Cruz*, 275 F.3d at 587, the Seventh Circuit rejected the town's proposition that the case should be treated differently because it was a "garden variety zoning dispute." In that case, a condo developer alleged that the town of Cicero demanded that it satisfy a more rigorous permitting requirement than a similarly situated developer. *Id.* at 587-88. After surviving a motion for summary judgment, the plaintiff proved at trial that the town president was personally biased, and tried to make it difficult for the developer to gain zoning approval. *Id.* at 588.

This Court has struck down land use decisions under the rational basis test based on the plaintiff's evidence. In a case similar to this one, the district court struck down a permit denial after finding that City officials had succumbed to "irrational neighborhood pressure." *Marks*, 883 F.2d at 310. This Court affirmed, noting that "government officials simply cannot act solely in 'reliance on public distaste for certain activities, instead of on legislative determinations concerning public health and safety.'" *Id.* at 311 (citation omitted). The City's true motivation was a question of fact. Based on evidence produced at trial, the Court found that the City's post-hoc justifications were pretextual, and that it acted "arbitrarily" by responding to irrational public pressure. *Id.* at 312.

Here, the parties dispute the reason for zoning amendment. The defendants claim that the amendment was enacted in response to the safety concerns of the citizens, Op. at 12, while Siena argues that there were no such safety concerns, and the citizens were, in reality, concerned about "the devaluation of property value in the neighborhood." *Id.* at 42. Siena introduced statements from legislators and local citizens, and argued that the city discriminated against them and burdened their right to make reasonable use of their property without any legitimate government purpose. *Id.* It further argued that there was no public health or safety risk associated with its business, as evidenced by a determination of the City's own Planning Commission. *Id.* at 53.

In the lower court's view, it was sufficient under the rational basis test that the Council enacted the zoning amendment in response to citizen concerns. *See, e.g.*, *id.* at 84 ("[no] court should try to get into the business of second guessing whether there in fact is a safety issue or that there is in fact a crime issue or anything of that nature when these are legitimate concerns raised by the people not based on gender or race or anything else."); *id.* at 88 ("This claim would ask courts to come in and second guess quintessential land use judgments made day in and day out as to whether this does benefit the health, safety and general welfare of the community."). But not all citizen concerns are legitimate, *Marks*, 883 F.2d at 310, and when presented with well-founded allegations that the stated rationale is illegitimate, or a pretense, courts

must determine whether the government's concerns were real, imaginary, or pretextual. By ignoring plaintiffs' evidence and ruling that the law was rational as a matter of law, the district court improperly applied the rational basis test.[3]

Courts have repeatedly repudiated the idea that government can satisfy the rational basis test merely by asserting a state interest. The government's assertion of a valid public purpose is given great weight, but that assertion can be overcome. If it were otherwise, states could isolate their actions from rational basis scrutiny by coming up with any plausible justification for a law. For the rational basis test to have any meaning, courts must provide meaningful scrutiny based on the evidence at hand. "Even rational basis review places limitations on states." *Brown*, 166 F.3d at 706-07; *see also Hadix v. Johnson*, 230 F.3d 840, 843 (6th Cir. 2000) (rational basis review "is not a rubber stamp of all legislative action").

[3] The Supreme Court has repeatedly affirmed in other contexts that it must ensure that the government's rationales are not pretextual. *See, e.g.*, *Kelo v. City of New London, Conn.*, 545 U.S. 469, 478 (2005) (under public use clause, government may not "take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit."); *Hernandez v. New York*, 500 U.S. 352, 363 (1991) (under *Batson* challenge to peremptory strike of potential juror, court must determine whether prosecutor's rationale is pretextual); *Pers. Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 272 (1979) (purportedly race-neutral classifications that are pretexts for racial discrimination are presumptively invalid).

II

RATIONAL BASIS REQUIRES MEANINGFUL JUDICIAL REVIEW TO PROTECT INDIVIDUAL RIGHTS

Meaningful rational basis scrutiny is needed to protect individuals who seek recourse from the courts when their rights are violated. In its most lax formulations, the test has inflicted serious harm on property owners, entrepreneurs, and others who seek judicial review. *See* Simpson, *supra*, at 188-205 (discussing how a lax interpretation of the rational basis test has harmed entrepreneurs in the transportation industry, and has led to exploitive uses of eminent domain).

Perhaps the most well known example of the harmful consequences of overly deferential rational basis scrutiny is the Supreme Court's opinion in *Kelo*, 545 U.S. 469. There, the Court upheld Connecticut's seizure of private homes for the purpose of transferring them to a private developer. *Id.* at 483. The Court concluded that, under rational basis scrutiny, it should prioritize "affording legislatures broad latitude," *id.*, instead of protecting individual rights. This deviation from the typical practice of using meaningful judicial review was widely denounced, because it meant that no home was safe from being bulldozed to make way for "a Ritz-Carlton, [or] a shopping mall, or . . . factory." 545 U.S. at 503 (O'Connor, J., dissenting).

Not surprisingly, the consequence of excessive judicial deference in land use cases has been primarily to harm minority groups, who most frequently reside in the

areas targeted for "improvement." *See Kelo*, 545 U.S. at 521 (Thomas, J., dissenting) (the judiciary's excessive deference in takings cases "guarantees that these losses will fall disproportionately on poor communities"); *see also* Jim Bailey, *Ethnic and Racial Minorities, the Indigent, the Elderly, and Eminent Domain: Assessing the Virginia Model of Reform*, 19 Wash. & Lee J. Civil Rts. & Soc. Just. 73, 90 (2012) (using empirical analysis to show that majority of those whose property was taken were ethnic minorities). "Few protested the *Kelo* ruling more ardently than the NAACP." *See* David T. Beito & Ilya Somin, Op-Ed., *Battle over Eminent Domain is Another Civil Rights Issue*, Kansas City Star, Apr. 27, 2008.[4] The eminent domain program sanctioned in *Berman v. Parker*, 348 U.S. 26, 32 (1954), uprooted over 20,000 black residents and replaced their homes with retail buildings and middle-income housing. *See* Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 Yale L. & Pol'y Rev. 1, 41 (2003). Similarly, in *Poletown Neighborhood Council v. Detroit*, 304 N.W.2d 455 (Mich. 1981), the Michigan Supreme Court used the rational basis test to uphold the destruction of a Detroit suburb called Poletown—so-named because of its concentration of Polish residents—in order for General Motors to build a factory in its place.[5]

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[4] http://www.cato.org/publications/commentary/battle-over-eminent-domain-is-another-civil-rights-issue

[5] Similar concerns led the Michigan Supreme Court to reverse its *Poletown* decision (continued...)

Because members of minority groups typically have less political power to stave off a proposal to condemn their property, these groups are forced to look to the courts to protect them against majoritarian abuse. They ask courts to be " 'the poor man's shield against oppression . . . the saving quality that will make this government one of laws and not a government of men.' " *Inquiry Concerning Miller*, 644 So. 2d 75, 79 (Fla. 1994) (quoting Glenn Terrell, *The Judiciary in a Federal Republic*, *in* THE FLORIDA HANDBOOK 164, 167 (Allen Morris ed., 3rd ed. 1952)). But excessive deference deprives them of that protection by biasing the courts overwhelmingly in favor of the government.

When the government burdens economic liberty or private property, just as where government burdens free speech or freedom of religion, minorities and other politically powerless groups will often be the targets. They need judicial protection. *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982) (judiciary has a "special role in safeguarding the interests of those groups that are 'relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.' ") (citation omitted); *Raines v. Byrd*, 521 U.S. 811, 829 (1997) (courts must protect "the constitutional rights and liberties of individual citizens and minority groups against oppressive or discriminatory government

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[5] (...continued)
in 2005. *See Cnty. of Wayne v. Hathcock*, 471 Mich. 445, 480 (2004).

action."). Yet excessive pro-government bias deprives them of that protection. *See Hettinga v. United States*, 677 F.3d 471, 482-83 (D.C. Cir. 2012) (Brown, J., concurring) (excessive deference "allow[s] the legislature free rein to subjugate the common good and individual liberty to the electoral calculus of politicians, the whim of majorities, or the self-interest of factions."). Excessive deference makes it difficult, if not impossible, for courts to scrutinize the true purpose of legislation restricting economic liberty or property rights—laws that are often used to the detriment of those who lack political influence and therefore need the courts' help most. *See* Robert G. McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 Sup. Ct. Rev. 34, 50 ("To speak of [minorities'] power to defend themselves though political action is to sacrifice their civil rights in the name of an amiable fiction."). By declining to inquire whether the government's asserted rationale is real or pretextual, or justified by the facts, the decision below presents exactly this danger for future plaintiffs.

CONCLUSION

For the foregoing reasons, amicus curiae Pacific Legal Foundation respectfully requests the this Court reverse the decision below.

DATED: September 14, 2016.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 16-1732 *Siena Corp., et al. v. Mayor & City Council of Rockville, Md., et al.*

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ANASTASIA P. BODEN

Counsel for Amicus Curiae Pacific Legal Foundation

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I certify that on September 14, 2016, the foregoing document was served on all parties or their counsel of record through the CM/ECF System if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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