No. 14-404

In The

Supreme Court of the United States

DAVID KENTNER, *et al.*,

Petitioners,

v.

CITY OF SANIBEL, FLORIDA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW[1]

(1) Whether a riparian landowner's "qualified" right to construct a dock *on adjoining state-owned submerged lands* is a "fundamental" right "implicit in the concept of ordered liberty" entitled to heightened review under the due process clause?

(2) Whether the Eleventh Circuit erred in applying the "rational basis" standard in reviewing a substantive due process challenge to legislation eliminating docks as a conditional use on a three-mile stretch within Sanibel?

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[1] Petitioners David and Susan Kentner and Robert and Diana Williams collectively will be referred to as "the Kentners," Respondent City of Sanibel as "Sanibel," and Sanibel Ordinance No. 93-18, which in 1993 eliminated docks as a conditional use for a three-mile stretch along San Carlos Bay within Sanibel, as "Ordinance 93-18." References to the Kentners' petition for certiorari will be to "Pet.Cert.," and to the amicus brief from the National Federation of Independent Business, Cato Institute, Owners Council of America, and Rutherford Institute as "NFIB Brief." Because the Kentners' lands border San Carlos Bay, the lands are technically littoral lands, rather than riparian lands. See, e.g., *Haynes v. Carbonell*, 532 So.2d 746, 748 n. 1 (Fla. 3d DCA 1988). Whether the Kentners' lands are littoral or riparian is immaterial to their due process claim. Thus, Sanibel will use the term "riparian," as did the amended complaint, the district court, the Eleventh Circuit, and the Kentners in their petition for certiorari in this Court.

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CONCISE STATEMENT OF THE CASE, SETTING FORTH FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTIONS PRESENTED

Two facts are centrally material to the consideration of the questions presented: (1) that the Kentners desire to construct a dock largely *on state-owned submerged lands, rather than on their privately-owned uplands,* and (2) that any "right" to construct a dock on state-owned submerged lands is, as the district court below found, no more than a "qualified" right.

First, the Kentners are claiming a riparian right to construct a dock predominantly on state-owned submerged lands rather than on their privately-owned uplands. Indeed, the Kentners acknowledge that they claim a "right to build a dock *over the water abutting their property.*" Pet.Cert.3. Elsewhere, however, the Kentners suggest that their "property . . . does not contain any seagrass" (Pet.Cert.5), and that they are attempting to exercise a "recognized right to build a dock on *their* shoreline properties." Pet.Cert.5-6.

It would always be physically impossible for the Kentners' private property to contain seagrass because the Kentners own property only landward of the mean high-water line; the state of Florida owns lands seaward of the mean high-water line. Any dock would be largely seaward of the mean-high water line and, thus, predominantly on state-owned submerged

lands, rather than on the Kentners' privately-owned lands. Florida Constitution Article II, Section 1(a); Florida Constitution Article X, Section 11, "Sovereignty lands. The title to lands under navigable waters, within the boundaries of the state . . . including beaches below mean high water lines, is held by the state. . . . Private use of portions of such lands may be authorized by law, but only when not contrary to the public interest"). See *Illinois Central R. Co. v. Illinois*, 146 U.S. 387, 435 (1892) ("ownership of and dominion and sovereignty over lands covered by tide waters . . . belong to the respective states within which they are found"); *Barney v. Keokuk*, 94 U.S. 324, 325 (1876) ("[i]t appears to be the settled law of [Iowa] that the title of the riparian proprietors on the banks of the Mississippi extends only to ordinary high-water mark, and that the shore between high and low water mark, as well as the bed of the river, belongs to the State. This is also the common law"); *Darbie v. State*, 711 So.2d 1280, 1284 (Fla. 3d DCA 1998) ("the United States Supreme Court determined that the state has title and jurisdiction over submerged lands"); *State, Department of Natural Resources v. Contemporary Land Sales, Inc*., 400 So.2d 488, 491 (Fla. 5th DCA 1981) ("by virtue of sovereignty, [the State of Florida] became the owner of all the land under navigable bodies of water within the state").

Second, the Kentners' riparian "right" to construct a dock on state-owned submerged lands is a state-created "qualified" right, rather than a "fundamental" right "implicit in the concept of ordered

liberty." The district court, applying Florida law, so found. Pet.Cert.App. B-17 through B-22.

As for riparian rights being a matter of state law, see, e.g., *Fox River Paper Co. v. Railroad Comm'n*, 274 U.S. 651, 655 (1927) ("the nature and extent of the right of the state and of riparian owners in navigable waters within the state and to the soil beneath are matters of state law"); *Weems Steamboat Co. v. People's Steamboat Co.*, 214 U.S. 345, 355 (1909) ("[t]he rights of a riparian owner upon a navigable stream in this country are governed by the law of the state in which the stream is situated"); *Hardin v. Jordan*, 140 U.S. 371, 382 (1891) ("[t]his right of the states to regulate and control the shores of tide-waters, and the land under them, is the same as that which is exercised by the crown in England. . . . [I]t depends on the law of each state to what waters and to what extent this prerogative of the state over lands under water shall be exercised. . . . [I]t is for the several states themselves to determine this question, and . . . if they choose to resign to the riparian proprietor rights which properly belong to them, in their sovereign capacity, it is not for others to raise objections"); *Packer v. Bird*, 137 U.S. 661 (1891) (noting that state law controlled, and may have differed from state to state, concerning ownership to riparian lands depending on whether the water body was navigable or was subject to tidal influence); *Barney v. Keokuk*, 94 U.S. 324, 338 (1876) ("[w]hether, as rules of property, it would now be safe to change these doctrines where they have been applied, as before remarked, is

for the several States themselves to determine. If they choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objections").

As for the "right" to a dock *on state-owned submerged lands* being a "qualified" right, rather than a "fundamental" right, see, e.g., *Scranton v. Wheeler*, 179 U.S. 141, 158 (1900) (explaining that the qualified right of access to navigable waters as manifested in the building of wharves is a constitutionally protected property right that vests *only* when those wharves are built); *Stupak-Thrall v. United States*, 843 F.Supp. 327, 331 (W.D. Mich. 1994), *aff'd*, 89 F.3d 1269 (6th Cir. 1996) ("[r]iparian rights are not . . . absolute rights. They may be regulated under the police power"); *Shorehaven Golf Club, Inc. v. Water Resources Comm'n*, 146 Conn. 619, 624, 153 A.2d 444 (1959) ("[t]here is no reason why, because of its peculiar nature as property, [a riparian] right cannot, like any other property right, be made subject to reasonable police regulation in the interest of the public welfare"); *Nelson v. City of Birchwood*, 2009 WL 3426792 (Minn. App. 2009), quoting *Nelson v. DeLong*, 213 Minn. 425, 431, 7 N.W.2d 342, 346 (1942) (riparian "rights are 'qualified, restricted, and subordinate to the paramount rights of the public.' A municipality may exercise its police power to regulate navigable waters . . . and 'riparian rights must yield to the governmental power to regulate'"); *Karam v. State, Department of Environmental Protection*, 308 N.J. Super. 225, 240-241, 705 A.2d 1221, 1229 (1998)

("riparian grant from the State to the Schweinerts did not create an absolute and perpetual right to construct a dock, free from all legislative and regulatory intervention").

That any "right" to construct a dock *on state-owned submerged lands* is not a right "implicit in the concept of ordered liberty" is clear because any such right differs from state to state. See, e.g., *United States v. Robertson Terminal Warehouse, Inc.*, 575 F.Supp.2d 210, 220-221 (D.D.C. 2008) (accepting United States' position that "there is no universal right to lay fill and construct wharves and that Old Dominion's riparian rights in the Potomac River are governed by Maryland law"); *Watts v. Lawrence*, 703 So.2d 236, 238 (Miss. 1997) ("[l]ittoral rights . . . are not property rights per se; they are merely licenses or privileges"); McCordic & Crosby, *The Right of Access and the Right to Wharf Out to Navigable Water*, 4 Harv. L. Rev. 14, 19-23 (1890) (detailing judicial decisions concerning a riparian's "right" to wharf out, ranging from no rights in New York, Pennsylvania, and Vermont, to "a mere [revocable] license" in New Jersey).

Neither the Kentners nor the amici have cited any authority that a riparian right to construct a dock on adjoining state-owned lands is a "fundamental" right. See, e.g., *Coalition for Equal Rights, Inc. v. Owens*, 458 F.Supp.2d 1251, 1263 (D. Colo. 2006) ("[p]laintiffs argue . . . that the Act infringes on their fundamental right to use their property as they wish. . . . However, the cases Plaintiffs cite do not

support the startling proposition that all state infringements on property use, by definition, implicate fundamental rights").

SUMMARY OF THE ARGUMENT

This Court should deny the Kentners' petition for certiorari because the Eleventh Circuit did not exclude "riparian" rights from substantive due process protection. Rather, the Eleventh Circuit applied the "rational basis" standard in analyzing the Kentners' substantive due process claim. The Eleventh Circuit properly applied the "rational basis" standard in reviewing Ordinance 93-18 because any riparian "right" to construct a dock on adjoining state-owned submerged lands is neither a "fundamental" right nor a right "implicit in the concept of ordered liberty."

The Eleventh Circuit's decision also does not conflict with decisions from the other circuit courts of appeals or from this Court, including *Euclid*, which used a "rational basis" standard, and *Lingle*, which cautioned that a "substantially advances" test would be unmanageable and would infringe on legislative judgments.

Accepting the Kentners' argument that substantive due process requires local and state governments to prove that ordinances and statutes "substantially advance" a state interest would be unmanageable and would usurp legislative bodies' role in passing ordinances and statutes. Accepting the Kentners'

argument also would negate well-established black-letter law that "zoning decisions, as legislative acts, . . . are presumed valid," and would effectively turn federal courts into "super zoning boards" and "super zoning tribunals."

REASONS FOR DENYING THE WRIT

I. Misstatements of law or fact in the petition that bear on what issues properly would be before the Court if certiorari were granted.

A. The Eleventh Circuit did not hold that substantive due process was inapplicable here.

The Kentners claim that "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." Pet.Cert.i; see Pet.Cert.7, 25. The Kentners also claim that the Eleventh Circuit "held firm to circuit precedents that excluded property rights from due process protection" (Pet.Cert.8), that "only 'fundamental rights' . . . are entitled to substantive due process protection," and that "according to the Eleventh Circuit case law, property rights . . . are not fundamental rights and a landowner cannot bring a substantive due process based on a deprivation of those rights." Pet.Cert.8. In sum, the Kenters claim that "[t]he decision below adopted a rule that excludes all traditional property

rights from the substantive protections guaranteed by the Due Process Clauses." Pet.Cert.9. The NFIB Brief similarly claims that the Eleventh Circuit "exclu[ded] property rights from the substantive protections of the Fourteenth Amendment's Due Process Clause." NFIB Brief 1, 3.

The Eleventh Circuit did no such thing. Rather, *the Eleventh Circuit held* that because the prohibition on docks was legislative, *the Kentners were entitled to substantive due process*, but that Ordinance 93-18 was valid under "rational basis" review. Pet.Cert.App. A-8 through A-12. Although the Eleventh Circuit noted that "there is generally no substantive due process protection for state-created property rights," the Eleventh Circuit held that "[w]here a person's state-created rights are infringed by a 'legislative act'," such as Ordinance 93-18 here, "the substantive component of the Due Process Clause generally protects that person from arbitrary and irrational governmental action." Pet.Cert.App. A-7, A-8; see Pet.Cert.App. A-6. The Eleventh Circuit further held that "[s]ubstantive due process" does apply to the Kentners' challenge to Ordinance 93-18, but that the standard of review of the Kentners' substantive due process claim was "the 'rational basis' standard." Pet.Cert.App. A-9.

The NFIB Brief suggests that the Eleventh Circuit's decision "allows" local and state governments "to infringe on property rights without having to meet even minimal substantive standards under the Due Process Clause. . . ." NFIB Brief 11. The

Eleventh Circuit's decision, however, required Ordinance 93-18 to meet "the 'rational basis' standard." Pet.Cert.App. A-9. This Court has often applied a "rational basis" standard in reviewing equal protection or due process claims where no "fundamental" right or suspect class is involved. See, e.g., *Armour v. City of Indianapolis*, 132 S.Ct. 2073, 2080 (2012); *Kelo v. City of New London*, 545 U.S. 469, 490 (2005); *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 489-490 (1955). Moreover, federal courts have indicated that "rational basis" may be effectively used to curb zoning and land use decisions. See, e.g., *Mikeska v. City of Galveston*, 451 F.3d 376 (5th Cir. 2006).

B. Riparian owners do not have a "well-recognized common law right to build a dock over the water *abutting their property*."

The Kentners claim that they "enjoy littoral property rights, which include the well-recognized, state common law right to build a dock *over the water abutting their property*." Pet.Cert.3.

Actually, "the riparian right to build a dock" is not "a firmly entrenched state law property right." Rather, the district court below noted that "the Florida Supreme Court has recognized *only a qualified* right of riparian owners to build docks." Pet.Cert.App. B-18 through B-22, and cases cited therein. For other cases indicating that any "riparian right" to construct

a dock on state-owned submerged lands is "qualified," see pages 4-5 above.

C. That the Eleventh Circuit's decision "especially" imperils "the poor, vulnerable minorities, and those with little political influence" is pure speculation.

The NFIB Brief speculates that the Eleventh Circuit's decision "especially" imperils property rights of "the poor, vulnerable minorities, and those with little political influence." See NFIB Brief 1-2, 3, 11. A decision upholding an ordinance precluding riparian owners from constructing docks on state-owned lands adjoining their highly-priced riparian lands along a three-mile stretch in Sanibel certainly does not disparately affect "the poor," "vulnerable minorities," or "those with little political influence."

D. Sanibel did not issue a permit to build its dock.

The Kentners claim that "in 2006, [Sanibel] ignored the outright ban and *issued* itself permission to build a new dock on San Carlos Bay." Pet.Cert.5, citing Pet.Cert.App. E-6. Actually, the citation from the Kentners' complaint does not allege that Sanibel "issued itself permission." Rather, the complaint alleges that Sanibel "applied for and received, from the Florida Department of Environmental Protection (DEP), regulatory approval to build a concrete boat dock. . . ."

II. The Eleventh Circuit's decision does not conflict with this Court's precedent.

The Kentners claim that "[c]ontrary to the decision below, this Court has long recognized that traditional property rights are protected by due process, in both its substantive and procedural aspects. . . ." Pet.Cert.10.

The Eleventh Circuit's decision did not preclude procedural or substantive due process being applied to "protect" "traditional property rights." First, the Eleventh Circuit's decision did not address procedural due process at all. Second, the Eleventh Circuit's decision indicated that "[w]here a person's state-created rights are infringed by a 'legislative act'," such as Ordinance 93-18, "the substantive component of the Due Process Clause generally protects that person from arbitrary and irrational governmental action." Pet.Cert.App. A-7, A-8. The Eleventh Circuit then went on to hold that the Kentners "cannot show Sanibel's Ordinance lacks a rational basis," noting that the Kentners "themselves plead at least two rational bases for the ordinance in their Amended Complaint: (1) protection of seagrasses and (2) aesthetic preservation." Pet.Cert.App. A-11.

The Kentners also claim that "the Eleventh Circuit's characterization of property as a 'non-fundamental right' conflicts with case law establishing that property rights are fundamental, and are worthy of protection as a right implicit in the concept of ordered liberty." Pet.Cert.25. No authority exists that a landowner has the right to construct a dock

on adjoining state-owned lands, much less that any such right would be a "fundamental" right "implicit in the concept of ordered liberty." See pages 4-5 above.

The Kentners suggest that the Eleventh Circuit's rational basis review conflicts with this Court's "recogni[tion] that due process protects against arbitrary and irrational restrictions on the use of private property." Pet.Cert.9. In support of their suggestion, the Kentners primarily rely on *Village of Euclid v. Ambler Realty Co*., 272 U.S. 365 (1926); *Nectow v. City of Cambridge*, 277 U.S. 183 (1928); and *Lingle v. Chevron U.S.A., Inc*., 544 U.S. 528 (2005). Pet.Cert.i, 9-14. The NFIB Brief primarily suggests "irreconcilable" conflict with *Euclid* and *Nectow*. NFIB Brief 9, 23-25.

A. No conflict with *Euclid*.

Euclid applied a "rational basis" review in upholding a city's zoning ordinance, just like the Eleventh Circuit did below. *Euclid* noted that "[i]f the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control," and that "the reasons [for the zoning ordinance] are sufficiently cogent to preclude us from saying, as it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." 272 U.S. at 388, 395. The Eleventh Circuit similarly applied a

"rational basis" review in upholding Ordinance 93-18. Pet.Cert.App. A-9 through A-12. The Eleventh Circuit quoted favorably from *Samson v. City of Bainbridge Island*, 683 F.3d 1051, 1058 (9th Cir. 2012), that "to establish a substantive due process violation, the [landowners] must show that [the] ordinances. . . . were clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." Pet.Cert.App. A-10. Rather than conflicting with *Euclid*, the Eleventh Circuit applied a standard word-for-word consistent with the standard promulgated in *Euclid*.

The Kentners claim that the "rational basis" review the Eleventh Circuit applied conflicts with "meaningful review under a test like *Euclid*'s 'substantially advances' formula." Pet.Cert.21. As has been pointed out in the immediately-preceding paragraph, however, *Euclid* applied "rational basis" review. This Court would later characterize the *Euclid* test as "the generous *Euclid* test." *Village of Arlington Heights v. Metropolitan Housing Development Corp*., 429 U.S. 252, 263 (1977). Courts of appeals have consistently recognized that *Euclid* applied a "rational basis" rule for substantive due process claims. See, e.g., *Ramsey Winch, Inc. v. Henry*, 555 F.3d 1199, 1211 (10th Cir. 2009) ("[o]ne professed purpose of the Amendments is the protection of the broader Oklahoma community. We need not decide the long-running debate as to whether allowing individuals to carry firearms enhances or diminishes the overall safety of the community. The very fact that this question is so hotly

debated, however, is evidence enough that a rational basis exists. . . . *See Village of Euclid*"); *Greater Chicago Combine & Center, Inc. v. City of Chicago*, 431 F.3d 1065, 1071 (7th Cir. 2005) ("*Euclid* ruled that for an ordinance to be held unconstitutional, the ordinance must be 'clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.' While *Euclid* employed the words 'substantial relation,' it also used the words 'clearly arbitrary and unreasonable.' Moreover, prior to this summarization passage, *Euclid* had already said that the ordinance did not go beyond 'the bounds of reason and assume[d] the character of a merely arbitrary fiat.' Also, *Euclid* had already explained that the ordinance passed constitutional muster because it '[bore] a rational relation to the health and safety of the community' and, at that point, *Euclid* listed several conceivable grounds for this rational relation. Keying off the words 'clearly arbitrary and unreasonable' as well as the other rational basis language in *Euclid*, our precedent has routinely applied *Euclid* as a rational basis rule for substantive due process . . . challenges to municipal ordinances. . . . Accordingly, GCCC is not entitled to a heightened, 'substantial relationship' review"); *Oblin Homes, Inc. v. Village of Dobbs Ferry*, 133 F.3d 907 (2d Cir. 1997) ("[i]n order to prevail on a claim of deprivation of substantive due process, a claimant must demonstrate that the challenged legislation lacked a rational basis. See, e.g., *Village of Euclid*"); *Gamble v. City of Escondido*, 104 F.3d 300, 307 (9th Cir. 1997) ("[r]ational basis scrutiny also is

appropriate for Gamble's due process claim"); *FM Properties Operating Co. v. City of Austin*, 93 F.3d 167, 174 (5th Cir. 1996) (citing *Euclid* in applying "any conceivable rational basis" standard in reversing substantive due process verdict); *Pro-Eco, Inc. v. Board of Comm'rs of Jay County*, 57 F.3d 505, 514 (7th Cir. 1995), quoting *Northside Sanitary Landfill v. City of Indianapolis*, 902 F.2d 521, 522 (7th Cir. 1990) ("[c]oncern for public health is a sufficient reason on its face to pass the *Euclid* test, and 'governmental action passes the rational basis test if a sound reason may be hypothesized. The government need not prove the reason to a court's satisfaction' "). See also *Messiah Baptist Church v. County of Jefferson*, 859 F.2d 820, 831 (10th Cir. 1988) (referring to "[t]he rational basis standard applicable under *Euclid*").

B. No conflict with *Nectow*.

Nectow invalidated on the facts there a zoning ordinance as applied. This Court, however, reiterated that under the *Euclid* standard "a court should not set aside the determination of public officers in such a matter unless it is clear that their action 'has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense'." 277 U.S. at 187-188. The Eleventh Circuit's decision below was consistent with *Nectow*.

C. No conflict with *Lingle*.

The Eleventh Circuit's decision also does not conflict with *Lingle*. As the Eleventh Circuit pointed out, *Lingle*'s holding rejected "the substantial advancement standard as a takings test" and this Court in *Lingle* "said nothing suggesting it was establishing a new 'substantial advancement' test in the substantive due process context." Pet.Cert.App. A-5, A-6. As the district court below noted, any language in *Lingle* concerning a standard for substantive due process was *dictum*. Pet.Cert.App. B-22. Moreover, *Lingle* clearly indicated that a "substantial advancement standard" would open the floodgates and would be unwieldy.

> "[T]he 'substantially advances formula is not only *doctrinally* untenable as a takings test – its application as such would also present serious practical difficulties. The *Agins* formula can be read to demand heightened means-ends review of virtually any regulation of private property. If so interpreted, it would require courts to scrutinize the efficacy of a vast array of state and federal regulations – a task for which courts are not well suited. Moreover, it would empower – and might often require – courts to substitute their predictive judgments for those of elected legislatures and expert agencies.
>
> "Although the instant case is only the tip of the proverbial iceberg, it foreshadows the hazards of placing courts in this role. To resolve Chevron's takings claim, the District

> Court was required to choose between the views of two opposing economists. . . . Finding one expert to be 'more persuasive' than the other, the court concluded that the Hawaii Legislature's chosen regulatory strategy would not actually achieve its objectives. The court determined that there was no evidence that oil companies had charged, or would charge, excessive rents. Based on this and other findings, the District Court enjoined further enforcement of Act 257's rent cap provisions against Chevron. We find the proceedings below remarkable, to say the least, given that we have long eschewed such heightened scrutiny when addressing substantive due process challenges to government action. The reasons for deference to legislative judgments about the need for, and likely effectiveness of, regulatory actions are by now well established, and we think they are no less applicable here. . . ." 544 U.S. at 544-545.

The "substantial advancement standard" would be just as floodgates-opening and unwieldy, whether in analyzing a takings claim or a substantive due process claim.

D. No conflict with this Court's other decisions.

In addition to claiming conflict with *Euclid*, *Nectow*, and *Lingle*, the Kentners also claim that the Eleventh Circuit's decision conflicts with *Lawton v.*

Steele, 152 U.S. 133 (1894); *Nebbia v. New York*, 291 U.S, 502 (1934); *Goldblatt v. Hempstead*, 369 U.S. 590 (1962); *Village of Arlington Heights v. Metropolitan Housing Development Corp*., 429 U.S. 252 (1977); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977); *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981); and *County of Sacramento v. Lewis*, 523 U.S. 833 (1998). Pet.Cert.9-12.

As will be seen below, there is no conflict between the Eleventh Circuit's decision and any of this Court's decisions cited in the immediately-preceding paragraph.

Lawton upheld a statute permitting the summary non-judicial seizure and destruction of fishing apparatus used in violation of fishing laws against a due process challenge. In doing so, this Court noted that such statute "ought to be sustained, unless it is plainly violative of the constitution. . . ." 152 U.S. at 140.

The Eleventh Circuit's decision does not conflict with *Nebbia*. This Court, in *upholding* the order in *Nebbia*, noted that "due process . . . demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the objective sought to be attained." 291 U.S. at 525. This Court went on to indicate that "[i]f the laws are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the

requirements of due process are satisfied. . . .” 291 U.S. at 537. The Eleventh Circuit, in upholding Ordinance 93-18, applied a standard identical to the standard in *Nebbia*. The Eleventh Circuit cited *Samson, supra*, 683 F.3d at 1058, for the standard for finding a due process violation as “clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare,” and cited *A Helping Hand, LLC v. Baltimore County*, 515 F.3d 356, 372-373 (4th Cir. 2008), for the standard as “clearly arbitrary and unreasonable, with no substantial relationship to a legitimate governmental purpose.”

The Eleventh Circuit’s decision also does not conflict with *Goldblatt*, which *upheld* the ordinance there. In doing so, this Court noted immediately after the “rule” petitioners quote (Pet.Cert.12) that “[e]ven this rule is not applied with strict precision, for this Court has often said that ‘debatable questions as to reasonableness are not for the courts but for the Legislature. . . .’” 369 U.S. at 595. Here, the Eleventh Circuit found that at least two rational bases – protection of seagrasses and aesthetic preservation – supported Ordinance 93-18. The Eleventh Circuit went on, similar to this Court in *Goldblatt*, in pointing out that “[w]hile plaintiffs do not agree with the wisdom or fairness of these rationales, this is simply not the test under a rational basis review.” Pet.Cert.App. A-11.

The Eleventh Circuit’s decision also does not conflict with *Arlington Heights*. The Seventh Circuit

had held that the rezoning denial there violated the Equal Protection Clause; the words "due process" are not mentioned in the Seventh Circuit's opinion. This Court, moreover, *reversed* the Seventh Circuit's finding of a constitutional violation. In doing so, this Court noted that "the heart of this litigation has never been the claim that the Village's decision fails the generous *Euclid* test."

Moore held that a housing ordinance which precluded a son and two grandsons from living in a single-family dwelling violated due process. *Moore*, however, did not change the "rational basis" standard. Rather, *Moore* cited *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), as "[a]ppl[ying] the constitutional standard announced in this Court's leading land-use case, *Euclid* . . . [in] sustain[ing] the *Belle Terre* ordinance on the ground that it bore a rational relationship to permissible state objectives." 431 U.S. at 498. It was only because the ordinance intruded upon "family" matters did this Court refuse to apply the traditional deference in reviewing the ordinance. "When a city undertakes such intrusive regulation of the family, neither *Belle Terre* nor *Euclid* governs: the judicial deference to the legislature is inappropriate." 431 U.S. at 499.

The Eleventh Circuit's decision also does not conflict with *Pruneyard* where this Court cited *Nebbia* in holding that there was "little merit to appellants' argument that [a California constitutional provision permitting individuals to exercise free speech at a privately-owned shopping center] denied

them property without due process of law." 447 U.S. at 86.

Schad reversed a conviction, holding that the zoning ordinance there violated the First Amendment. Thus, this Court "d[id] not address" the business operator's due process claims. 452 U.S. at 61 n.4. Moreover, the Eleventh Circuit's decision is consistent with the *dictum* which petitioners cite from *Schad*. Pet.Cert.10-11. This Court specifically observed that courts "have sustained the [zoning] regulation if it is rationally related to legitimate state concerns and does not deprive the owner of economically viable use of his property." 452 U.S. at 68. Here, the Eleventh Circuit applied the "rational basis" test, and there is no claim that prohibiting docks on state-owned submerged lands deprives the Kentners of economically viable use of their shoreline residential property.

Sacramento held that the parents of a motorcycle passenger killed in a police chase failed to state a substantive due process claim. This Court held only that a police chase with a purpose to cause harm unrelated to the legitimate object of arrest will satisfy the element of arbitrary conduct shocking to the conscience, necessary for a due process violation stemming from executive action.

The Kentners and NFIB have quoted from *Lynch v. Household Finance Corp*., 405 U.S. 538, 552 (1972) (Pet.Cert.23; NFIB Brief 8), but, as one district court has noted, *Lynch* "addressed only whether federal courts have jurisdiction to consider an injury to

property rights . . . but did not address whether or to what extent property rights are fundamental rights subject to strict scrutiny." *Coalition for Equal Rights, Inc. v. Owens*, 458 F.Supp.2d 1251, 1263 (D. Colo. 2006). Thus, the Eleventh Circuit's decision does not conflict with *Lynch*.

The NFIB Brief has cited various cases in addition to the cases the Kentners cite, but there is no more conflict with them than with the Kentners' cases. NFIB Brief 5, 8. *Shelley v. Kraemer*, 334 U.S. 1 (1948), involved equal protection and procedural due process, rather than substantive due process; *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), involved a taking claim, rather than substantive due process; *Davidson v. New Orleans*, 96 U.S. 97 (1877), involved procedural due process, rather than substantive due process; and *Missouri Pacific R. Co. v. Nebraska*, 164 U.S. 403, 417 (1896), involved a "taking" in violation of due process, rather than substantive due process.

III. The Eleventh Circuit's decision does not conflict with decisions from other courts of appeals.

The Kentners also suggest that the Eleventh Circuit's decision "deepens an irreconcilable split of authority among the Circuit Courts of Appeals." Pet.Cert.14. The Kentners claim "conflict" with *Macone v. Town of Wakefield*, 277 F.3d 1 (1st Cir. 2002); *RRI Realty Corp. v. Incorporated Village of Southampton*,

870 F.2d 911 (2d Cir. 1989); *Bello v. Walker*, 840 F.2d 1124 (3d Cir. 1988); *Scott v. Greenville County*, 716 F.2d 1409 (4th Cir. 1983); *FM Properties Operating Company v. City of Austin*, 93 F.3d 167 (5th Cir. 1996); *Pearson v. City of Grand Blanc*, 961 F.2d 1211 (6th Cir. 1992); *Gamble v. Eau Claire County*, 5 F.3d 285 (7th Cir. 1993); *Colony Cove Prop. v. City of Carson*, 640 F.3d 948 (9th Cir. 2011); *Crown Point Development, Inc. v. City of Sun Valley*, 506 F.3d 851 (9th Cir. 2007); *Alto Eldorado P'ship v. County of Santa Fe*, 634 F.3d 1170 (10th Cir. 2011); and *Tri County Industries, Inc. v. District of Columbia*, 104 F.3d 455 (D.C. Cir. 1997). Pet.Cert.14-18.

The Kentners below also suggested that some of the just-listed cases and other cases recognized "a new 'substantial advancement' test in the substantive due process context," but the Eleventh Circuit explicitly rejected such suggestion. Pet.Cert.App. A-5, A-6. The Eleventh Circuit noted that "most of th[o]se cases . . . were focused on the effect of *Lingle* on their Takings Clause precedent, not their substantive due process case law." The Eleventh Circuit further noted that *Lingle*'s impact was only to negate earlier precedent holding that the Takings Clause preempted any substantive due process claim and that the Takings Clause had "subsumed," "preempted" or "supplanted" any substantive due process claims. Pet.Cert.App. A-6.

As will be seen below, there is no conflict between the Eleventh Circuit's decision and the other courts of appeals' decisions listed two paragraphs above.

Macone affirmed a summary judgment *against* a landowner because the Board of Selectmen's prior approval of the project "f[e]ll far short of showing any cognizable property interest."

RRI reversed a damages award to a developer because the developer did not have a due process-protected property interest in a building permit for the second stage of a renovation project.

Bello quoted with approval *Pace Resources v. Shrewsbury Township*, 808 F.2d 1023 (3d Cir. 1987), where the Third Circuit had dismissed a substantive due process claim that a zoning ordinance violated substantive due process. In doing so, the Third Circuit had written, very similarly to the Eleventh Circuit below, that plaintiff bears the burden of demonstrating that the regulation is arbitrary or irrational and that the municipality could not have had rational reasons for the regulation; thus, the Third Circuit concluded that "[b]ecause it appears that on the face of the amended complaint that the Township decisionmakers could have had rational reasons for the decisions contested here and because the complaint alleges no facts suggesting arbitrariness, it fails to state a substantive due process claim. . . ." Here, too, the Kentners' complaint alleged at least two rational bases for Ordinance 93-18, as the Eleventh Circuit so noted. Pet.Cert.App. A-11.

The language which the Kentners quote from *Greenville County* is in connection with finding that the landowners had no "taking" claim. The Fourth

Circuit did hold that the landowners had a due process claim but what gave rise to the due process claim there was far different than what gave rise to the Kentners' due process claim. The underlying alleged governmental action was egregious executive action (rather than legislative action), and the underlying constitutionally-protected "property interest" was "entitlement to the issuance of a permit" *on owned property, rather than* to a permit for docks *on state-owned lands*. 716 F.2d at 1417-1422.

In *FM Properties*, the Fifth Circuit *reversed* a jury verdict that the city arbitrarily and capriciously rejected an application for a land development permit, thereby violating substantive due process. In doing so, the Fifth Circuit indicated that the standard for a substantive due process claim was just like the Eleventh Circuit held below.

> "[W]hen challenges to such land-use decisions aspire to constitutional stature, we view those decisions as 'quasi-legislative' in nature, and thus sustainable against a substantive due process challenge *if there exists therefor 'any conceivable rational basis*.' In other words, such government action comports with substantive due process if the action is rationally related to a legitimate government interest. Only if such government action is 'clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare,' may it be declared unconstitutional. *Village of Euclid . . . Shelton [v. City of College Station*,

> 780 F.2d 475, 483 (5th Cir. 1986) (en banc)] ('Only if the governmental body could have had no legitimate reason for its decision' is federal judicial interference proper)."

Pearson affirmed summary judgment *against* a landowners' substantive due process claim. The Sixth Circuit held that the denial of rezoning there "survive[d] scrutiny under the administrative standard" for substantive due process claims and "[t]herefore, *a fortiori*, it must survive the more deferential review for legislative zoning action." 961 F.2d at 1221. In characterizing the substantive due process standard of review for legislative zoning actions, such as the Eleventh Circuit considered below, the Sixth Circuit noted that

> "[w]here *zoning legislation* is subjected to substantive due process attack, the scope of review by the federal court is the same as for any other legislation – even more deferential than for state administrative action. . . . [I]n reviewing legislative acts . . . the only permissible inquiry . . . being whether the legislative action is rationally related to legitimate state land use concerns. . . . [C]oncerns about traffic and the deterioration of the neighborhood are rationally related to the goals of zoning. Even parochial motives, if not based on animosity toward a protected class or similar invidious purpose, will not invalidate local zoning." 961 F.2d at 1223-1224.

In applying a rational basis standard below, the Eleventh Circuit was perfectly consistent with *Pearson*.

The Kentners misstate *Gamble* as "holding" that "[s]tatutes . . . that lack a rational basis . . . violate due process. . . ." The holding in *Gamble*, however, was that the landowners' substantive due process claim was "premature," i.e., not ripe, under *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985). Moreover, the Eleventh Circuit's decision below does not conflict with the quoted *dictum* from *Gamble*: the Eleventh Circuit found that Ordinance 93-18 had a "rational basis."

Colony Cove did note that *Crown Point* had indicated that "a substantive due process claim challenging a '*wholly illegitimate*' land use regulation is *not foreclosed as subsumed by the Takings Clause*." But the holding in *Colony Cove* was *affirming the dismissal of the landowners' substantive due process claim* because "the factual allegations in the Complaint . . . do not provide a sufficient basis for a claim that the Board's decision on Colony Cove's application for a rent increase reflects action that was arbitrary, irrational, or lacking any reasonable justification in the service of a legitimate government interest."

The Eleventh Circuit's decision also does not conflict with *Crown Point*. *Crown Point* held that a landowner had stated a substantive due process claim, holding that the Takings Clause does not necessarily "subsume" or "preempt" a substantive due process claim. The Ninth Circuit there was clear that

a landowner could state a substantive due process claim only "*to the limited extent* that a claim for *wholly illegitimate land use regulation* is *not foreclosed*." 506 F.3d at 852-853. The Eleventh Circuit did not find that Ordinance 93-18 was a "wholly illegitimate land use regulation," but rather found that rational bases supported Ordinance 93-18. Pet.Cert.App. A-11.

Moreover, the Ninth Circuit in *Crown Point* cited with approval *Spoklie v. Montana*, 411 F.3d 1051 (9th Cir. 2005). In *Spoklie*, the Ninth Circuit affirmed the dismissal of a substantive due process claim, writing very similarly to the Eleventh Circuit below that

> "[s]ubstantive due process provides no basis for overturning validly enacted state statutes unless they are 'clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.' If the legislature 'could have concluded rationally' that certain facts supporting its decisions were true, courts may not question its judgment.
>
> "The justification the State has offered for I-143 far exceed what is necessary to meet this minimal standard. Voters who supported I-143 could rationally have concluded that the proposition would promote environmentally sound resource management by encouraging sport hunting in preference to fee hunting. . . . Supporters could also rationally have concluded . . . that fee hunting created an 'unacceptable, bankrupt

> image of hunting portrayed by the paid shooting of captive animals,' thereby threatening the state's 'strong economy based on the public pursuit and enjoyment of wild, free-ranging public wildlife.' None of these rationales is clearly arbitrary or pretextual, and all implicate issues of safety, health, and welfare that are within a state's legitimate police power." 411 F.3d at 1059.

Finally, the Ninth Circuit's more recent decisions in *Guggenheim v. City of Goleta*, 638 F.3d 1111, 1122 (9th Cir. 2010), and in *MHC Financing Limited Partnership v. City of San Rafael*, 714 F.3d 1118, 1130-1131 (9th Cir. 2013), indicate that there is no conflict between the Eleventh Circuit and the Ninth Circuit in using a rational basis test in considering substantive due process claims.

In *Guggenheim*, the Ninth Circuit rejected the landowners' substantive due process challenge to a rent control ordinance, noting that

> "[w]hether the City of Goleta's economic theory for rent control is sound or not, and whether rent control will serve the purposes stated in the ordinance of protecting tenants from housing shortages and abusively high rents or will undermine those purposes, is not for us to decide. We are a court, not a tenure committee, and are bound by precedent establishing that such laws do have a rational basis. Students in Economics 101 have for many decades learned that rent control causes the higher rents and scarcity

> that it is meant to alleviate, but the Due Process clause does not empower courts to impose sound economic principles on political bodies."

In *San Rafael*, the Ninth Circuit in affirming judgment against a landowner's substantive due process claim against a regulation used language virtually identical to the language the Eleventh Circuit did below. "[T]he threshold for a rationality review challenge asks only 'whether the enacting body could have rationally believed at the time of enactment that the law would promote its objective.' '[T]he Due Process Clause does not empower courts to impose sound economic principles on political bodies'."

Eldorado noted in *dictum* that "a facial claim challenging the validity of the regulation . . . is properly brought as a due process claim as decided in *Lingle*." But the plaintiff landowners there did not bring any such claim. 634 F.3d at 1175. The holding in *Eldorado* was that the landowners' federal claims were not ripe. 634 F.3d at 1180. The Eleventh Circuit's decision does not conflict with *Eldorado*.

Tri County rejected Tri County's substantive due process claim arising from the suspension of a building permit because the order was "only a suspension," because Tri County failed to pursue its apparent remedies, and thus the claim "fail[ed] either for want of ripeness or on the merits." 104 F.3d at 460.

IV. Not only does the Eleventh Circuit's decision not conflict with decisions from this Court and from the other courts of appeals, but there are other reasons to deny the petition here.

A. Any "right" to a dock on state-owned submerged lands is not a "fundamental" right "implicit in the concept of ordered liberty" and, thus, "rational basis" review, rather than a higher standard of review, applies.

This Court has indicated that the due process clause "provides heightened protection against government interference *with certain fundamental rights and liberty interests*." *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997). In determining whether any right to a dock on adjoining state-owned submerged lands is a "fundamental" right, one begins by examining the "Nation's history, legal traditions, and practices," and in determining whether the "carefully describ[ed]" right is "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if [it] were sacrificed." 521 U.S. at 720-721.

In determining whether a right is "fundamental," this Court has required a "'careful description' of the asserted . . . interest." *Glucksberg, supra*, 521 U.S. at 721, citing *Reno v. Flores*, 507 U.S. 292, 302 (1993). "[B]y establishing a threshold requirement – that a challenged state action implicate a fundamental right – before requiring more than a reasonable relation to a legitimate state interest to justify the action, [one]

avoids the need for complex balancing of competing interests in every case." 521 U.S. at 722. Here, the "careful description of the asserted . . . interest" is to a dock on state-owned submerged lands.

Certainly, the "Nation's history, legal traditions, and practices" do not indicate that a right to a dock *on state-owned submerged lands* is "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if [it] were sacrificed." See page 5 above.

If the asserted right is not "fundamental," this Court has indicated that only the rational basis test applies. *Glucksberg, supra*, 521 U.S. at 728.

The NFIB Brief suggests that it would be "truly strange" if the Kentners' claimed right to a dock on state-owned sovereignty lands were "excluded from [the due process clause's] substantive protections." NFIB Brief 3. As previously noted, the Eleventh Circuit's decision does not exclude those "rights" from substantive protection, but applies a less stringent standard than the Kentners and the amici would like. Moreover, this Court has never recognized a party's subjective claim as a constitutionally-protected "property." See, e.g., *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972), where this Court held that an assistant professor had no "property" interest sufficient to require the state university to afford him a hearing. In doing so, this Court noted that "[t]o have a property interest. . . . a person . . . must . . . have a *legitimate claim of entitlement* to it." Here, the district court detailed Florida law, concluding that "the

Florida Supreme Court has recognized only a qualified right of riparian owners to build docks" on state-owned sovereignty lands. Pet.Cert.App. B-18 through B-22. This Court generally defers to lower federal courts' determinations of state law. See, e.g., *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 880 (1992) (" '[n]ormally, . . . we defer to the construction of a state statute given it by the lower federal courts.' Indeed, we have said that we will defer to lower court interpretations of state law unless they amount to 'plain' error. This 'reflect[s] our belief that district courts and courts of appeals are better schooled in and more able to interpret the laws of their respective States' "); *Bishop v. Wood*, 426 U.S. 341, 345-347 n.10 (1976). This Court long ago had held that "the Fourteenth Amendment . . . affords no protection to supposed rights of property which the state courts determine to be nonexistent." *Fox River Paper Co. v. Railroad Comm'n*, 274 U.S. 651, 657 (1927).

B. Ordinance 93-18 falls far short of being sufficiently egregious to shock-the-conscience, thereby giving rise to a substantive due process claim.

This Court has limited substantive due process claims to egregious government conduct which shocks the judicial conscience. Ordinance 93-18, which eliminates docks as a conditional use on state-owned sovereignty lands, falls far short of such standard. See, e.g., *City of Cuyahoga Falls v. Buckeye Community*

Hospital, 538 U.S. 188, 199 (2003) (reversing judgment "because the city engineer's refusal to issue the permits . . . in no sense constituted egregious or arbitrary government conduct"); *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998) (noting in reversing judgment that "[o]ur cases dealing with abusive executive action have repeatedly emphasized that only the most egregious official conduct can be said to 'arbitrary in the constitutional sense'").

C. The Eleventh Circuit's "rational basis" rule does not undermine the purpose of the due process clause.

The NFIB Brief, quoting *Euclid*, asserts that "[t]o withstand judicial scrutiny, the government must be able to show that its actions restricting property rights have a 'substantial relation to the public health, safety, morals, or general welfare.' This standard requires a minimal factual showing that the restriction advances the asserted public interests." NFIB Brief 2. The NFIB Brief, however, cites no case where this Court (or any court of appeals) has required such a "factual showing." Rather, as has been noted at pages 12-15 above, this Court and courts of appeals have consistently applied the "rational basis" and "conceivable public purpose" tests in analyzing substantive due process claims against legislation.

Other courts of appeals, like the Eleventh Circuit, have often recognized that the standard of review of legislation against a substantive due process

challenge is "rational basis." See, e.g., *Litmon v. Harris*, 768 F.3d 1237, 1242 (9th Cir. 2014) ("[a]bsent a fundamental right, strict scrutiny is inapplicable. We therefore apply rational basis review"); *Levy v. City of El Paso*, 577 Fed.Appx. 297, 298 (5th Cir. 2014) (affirming dismissal of substantive due process claim because there was "a rational basis for the legislati[on]"); *Harris v. Murphy*, 745 F.3d 56, 79 (3d Cir. 2014) ("[u]nder rational basis review, 'a statute withstands a substantive due process challenge if the state identifies a legitimate state interest that the legislature could rationally conclude was served by the statute'"); *Kansas City Taxi Cab Drivers Ass'n v. City of Kansas City*, 742 F.3d 807, 809 (8th Cir. 2013) ("'[a] rational basis . . . satisfies substantive due process analysis'"); *Goodpaster v. City of Indianapolis*, 736 F.3d 1060, 1071 (7th Cir. 2013) ("[u]nder rational basis review, a state law is constitutional even if it is 'unwise, improvident, or out of harmony with a particular school of thought.' The law must merely 'bear a rational relationship to some legitimate end. . . . It is irrelevant whether the reasons given actually motivated the legislature; rather, the question is whether some rational basis exists upon which the legislature could have based the challenged law. Those attacking a statute on rational basis grounds have the burden to negate 'every conceivable basis which might support it'"); *Ramsey Winch, Inc. v. Henry*, 555 F.3d 1199, 1210 (10th Cir. 2009) ("[t]he Supreme Court . . . has 'long eschewed . . . heightened scrutiny when addressing substantive due process challenges to governmental regulation.'

Accordingly, we review the [legislation] under a 'rational basis' standard. . . . Under rational basis review, 'we look only to whether a 'reasonably conceivable' rational basis exists'. . . . Because we cannot say the [statutes] have no reasonably conceivable rational basis, Plaintiffs' due process claims must fail"); *Equity Lifestyle Properties, Inc. v. County of San Luis Obispo*, 548 F.3d 1184, 1194 (9th Cir. 2008), quoting *Carson Harbor Village, Ltd. v. City of Carson*, 37 F.3d 468, 472 (9th Cir. 1994) ("[a] generally applicable . . . ordinance will survive a substantive due process challenge if it is 'designed to accomplish an objective within the government's police power, and if a rational relationship existed between the provisions and the purpose of the ordinances.' This deferential inquiry does not focus on the ultimate effectiveness of the law, but on whether the enacting body could have rationally believed at the time of enactment that the law would promote its objective'"); *Greater Chicago Combine & Center, Inc. v. City of Chicago*, 431 F.3d 1065, 1071 (7th Cir. 2005) ("[t]o be successful, GCGG must 'demonstrate . . . that the ordinance is 'arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.'. . . .' [G]overnmental action passes the rational basis test if a sound reason may be hypothesized"). See also *Kamman, Inc. v. City of Hewitt*, 31 Fed.Appx. 159 (5th Cir. 2001) ("[a]s for Kamman's substantive due process claim, a state's zoning decisions must have a rational basis").

The Eleventh Circuit's decision in applying an arbitrary and capricious standard in rejecting a riparian landowner's claim to a dock is consistent with other courts' decisions in rejecting similar challenges to a riparian's claim to a dock. See, e.g., *Montero v. Babbitt*, 921 F.Supp. 134 (E.D.N.Y. 1996).

D. A "substantially advances" test, such as the Kentners urge, would depart from judicial restraint in reviewing legislation and in reviewing municipal land use and zoning decisions.

In addition to the authorities cited in the immediately-preceding paragraph, see *South Gwinnett Venture v. Pruitt*, 482 F.2d 389, 390 (5th Cir. 1973), quoting *Higginbotham v. Barrett*, 473 F.2d 745 (5th Cir. 1973) ("'[t]he law is settled that . . . zoning . . . involves the exercise of judgment which is legislative in character and is subject to judicial control only if arbitrary and without rational basis'"); Kmiec & Turner, 1 Zoning & Planning Deskbook § 2:9 (2013) ("[m]ost zoning decisions, as legislative acts, will be upheld so long as they are reasonably related to the general welfare. Court review is limited and the zoning actions are presumed valid. The court affords deference to a legislative ordinance and will review it only to determine if it is arbitrary and capricious. . . . Federal courts are properly reluctant to provide more searching review of zoning matters in the context of Fourteenth Amendment due process challenges . . . [A]ll that is required in such a case is that the zoning

decision have a rational basis"); Rathkopf, The Law of Zoning and Planning § 3:17 (2014) ("[t]he due process validity under the federal constitution of zoning ordinances, as well as other legislation affecting property rights, generally is said to be determined by the so-called 'minimum rationality' test").

E. Not only would a "substantially advances" test, such as the Kentners urge, depart from well-settled precedent concerning legislation and substantive due process, but such a test would be unmanageable and would usurp legislative bodies' role.

In addition to pointing out that the "substantially advances" test would be impractical and in rejecting the "substantially advances" test in *Lingle* (see pages 16-17 above), this Court also rejected a "substantially advances" test in *Kelo v. City of New* London, 545 U.S. 469, 487-488 (2005), quoting *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 242-243 (1984):

> "petitioners maintain that for takings of this kind we should require a 'reasonable certainty' that the expected public benefits will actually accrue. Such a rule, however, would represent an even greater departure from our precedent. 'When the legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings – no less than debates over the wisdom of other kinds of socioeconomic legislation – are not

> to be carried out in the federal courts.' Indeed, earlier this Term we explained why similar practical concerns (among others) undermined the use of the 'substantially advances' formula in our regulatory takings doctrine. See *Lingle*. . . . (noting that this formula 'would empower – and might often require – courts to substitute their predictive judgments for those of elected legislators and expert agencies')."

F. Imposing a "substantially advances" test, such as the Kentners suggest, would convert federal courts into "zoning boards of appeal" and "super zoning tribunals."

The circuit courts have uniformly rejected attempts similar to the Kentners' attempt here, which would convert federal courts into "super zoning boards" and "super zoning tribunals." See, e.g., *Vurimindi v. City of Philadelphia*, 521 Fed.Appx. 62, 65 (3d Cir. 2013) ("in the land use context, the [shocking-the-conscience] standard is sufficiently high to 'avoid converting federal courts into super zoning tribunals'"); *United Artists Theatre Circuit v. Township of Warrington*, 316 F.3d 392, 402 (3d Cir. 2003) ("shocks the conscience" standard "prevents [the Court] from being cast in the role of a zoning board of appeals"); *Schenk v. City of Hudson*, 114 F.3d 590, 594 (6th Cir. 1997) ("it is not the province of a federal court to act as a super-zoning board"); *Ruskiewicz v. Town of New Boston*, 754 F.2d 38, 44

(1st Cir. 1985) ("federal courts do not sit as a super zoning board or zoning board of appeals"); *Autotronic Systems v. City of Coeur d'Alene*, 527 F.2d 106, 108 (9th Cir. 1975) ("[w]e have before us, as did the District Court, two opposing theories. It is not our function to decide which view is wiser; our role is at an end once we can say that the view chosen by the City council is not irrational. We do not sit as a 'Super City Council' any more than we do as a 'Super Zoning Board'").

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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