No. _______

In the

Supreme Court of the United States

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

Petitioners,

v.

CITY OF SANIBEL,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

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

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

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

LIST OF ALL PARTIES

The parties to the judgment from which review is sought are the Petitioners, David Kentner, Susan A. Kentner, Robert H. Williams, and Diane R. Williams, and the Respondent, the City of Sanibel.

CORPORATE DISCLOSURE STATEMENT

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

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PETITION FOR WRIT OF CERTIORARI

David Kentner, Susan A. Kentner, Robert H. Williams, and Diane R. Williams respectfully request that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the Eleventh Circuit Court of Appeals is reported at *Kentner v. City of Sanibel*, 750 F.3d 1274 (11th Cir. 2014), and is reproduced in Petitioner's Appendix (Pet. Cert. App.) at A. The judgment of the district court was not reported, and is reproduced in Pet. Cert. App. at B.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Kentners and the Williamses filed a lawsuit in a Florida trial court, alleging in part that the City of Sanibel's Anti-Dock Ordinance did not substantially advance any legitimate state interest and therefore violated their due process rights under the U.S. Constitution. The City removed the case to the federal district court, which dismissed the due process cause of action for failing to state a claim upon which relief may be granted. *See* Pet. Cert. App. B at 17-18. The Eleventh Circuit affirmed the district court's order of dismissal. *See* Pet. Cert. App. A. The decision became final on May 8, 2014, when the Eleventh Circuit entered its judgment. On July 28, 2014, Justice Thomas granted Petitioners' application to extend the time within which to file the petition to October 3, 2014. *Kentner v. City of Sanibel*, No. 14A103.

CONSTITUTIONAL PROVISIONS AT ISSUE

The Fifth Amendment to the U.S. Constitution provides that: "No person shall . . . be deprived of life, liberty, or property, without due process of law[.]"

The Fourteenth Amendment to the U.S. Constitution provides, in relevant part: ". . . [N]or shall any state deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

A. The City of Sanibel Prohibits the Kentners From Building Docks on Their Shoreline Properties, Despite A Well-Recognized Common Law Property Right To Build Docks

David and Susan Kentner and Robert and Diana Williams (Kentners) own residential lots along San Carlos Bay in Sanibel, Florida.[1] *See* Pet. Cert. App. E at 3. Because their land borders the high tide line, the Kentners enjoy littoral property rights, which include the well-recognized, state common law right to build a dock over the water abutting their property, subject to reasonable regulation. *See* Pet. Cert. App. B at 3, 19-

[1] San Carlos Bay, located on Florida's Gulf Coast, extends south from the mouth of the Caloosahatchee River, and is bordered by Pine Island to the north and Sanibel Island to the west. Elinore M. Dormer, The Sea Shell Islands: A History of Sanibel and Captiva, map insert (Rose Printing 3d ed. 1987).

20. Their neighbors have docks along the bay, as does the city itself. *See* Pet. Cert. App. E at 5-6.

The city, however, prohibited the Kentners from exercising their right to build a dock when it enacted Ordinance 93-18 (the "Anti-Dock Ordinance"). Pet. Cert. App. A at 2. The Anti-Dock Ordinance bans any new docks in the "Bay Beach Zone," which includes San Carlos Bay:

> [A]ccessory piers and docks [are conditionally allowed,] except in the portion of this [Bay Beach] zone extending from the west boundary of Lighthouse Park to the west right-of-way boundary of Dixie Beach Boulevard at Woodring's Point.

Pet. Cert App. D at 1.

The city enacted the Anti-Dock Ordinance to protect seagrass, which it determined was an "invaluable natural resource." Pet. Cert. App. B at 27-28. But, in adopting its dock ban, the City: (1) made no finding as to the conditions of the submerged lands, including whether seagrass is even present in all of the areas subject to the ban; (2) made no allowance for modern dock technology that will not harm seagrass; and (3) prohibited any conditional use or variance. *See* Pet. Cert. App. A at 3. In addition, there was evidence that the city adopted the Anti-Dock Ordinance to serve the aesthetic preferences of certain interest groups, and to enhance the property values of other property owners who were allowed to build docks. *Id.*

The city's publicly stated purpose for its Anti-Dock Ordinance was called into question when, in 2006, the city ignored the outright ban and issued *itself* permission to build a new dock on San Carlos Bay. Pet. Cert. App. E at 6. The city explained that, regardless of the ban, it should be allowed to construct a dock because there was no seagrass on the site. *Id.* The Kentners' property also does not contain any seagrass. Encouraged by the city's actions, they applied for and received necessary approvals for construction of a dock from both the State Department of Environmental Protection and the United States Army Corps of Engineers. *Id.* at 6-7.

With approvals in hand, the Kentners tried to work with the city to reach some accommodation regarding the desired docks. *Id.* at 6. Since the Anti-Dock Ordinance prohibited any conditional use or variance, the Kentners asked the city to repeal or amend the regulation. *Id.* The city voted against repeal, despite having just authorized itself to build a dock in apparent violation of the outright ban. *Id.* at 6-7. The city's code, therefore, provided no opportunity for the Kentners to file an application for permission to build a dock. *Id.*

B. The Outright Ban on the Common Law Right To Build a Dock Leaves the Kentners with No Choice but To Sue

The Kentners filed suit in Florida state court against the city, asserting that the Anti-Dock Ordinance deprived them of their recognized right to

build a dock on their shoreline properties.[2] Pet. Cert. App. B at 8. The complaint alleged that the city's blanket prohibition on the construction of new docks violated the due process guarantee of the Fifth and Fourteenth Amendments to the U.S. Constitution because it did not substantially advance a legitimate government interest.[3] *Id.* The Kentners argued that this Court's decision in *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005), reaffirmed a long line of precedents holding that traditional property rights are among those fundamental rights and liberties that are protected by substantive due process. *See* Pet. Cert. App. E at 11.

The city removed the case to the federal district court. Pet. Cert. App. B at 8. Thereafter, it moved to dismiss the due process claims under a line of Eleventh Circuit decisions holding that traditional rights in real property are not protected by substantive due process. *See Id.* at 1-2, 8-9, 18-24. According to those circuit decisions, the Due Process Clause only protects those rights that are expressly created by the U.S. Constitution—due process, therefore, cannot protect traditional property rights which are defined by state law. *Id.* at 22-23.

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[2] Other aggrieved property owners also filed suit, but they have since dropped out of the case, for a variety of reasons. None have been granted permission to build docks.

[3] The Kentners alleged other state-law claims that are not at issue here.

The trial court recognized that the Kentners had a qualified common law right to build a dock on their shoreline properties, and that the Anti-Dock Ordinance effected an outright prohibition on the exercise of that right. *Id.* at 18-20. Nonetheless, the trial court dismissed their due process claims because littoral rights are premised on state law and therefore are not "fundamental rights," and not protected by due process under the law of the circuit. *Id.* at 22-24. To avoid addressing the apparent conflict between *Lingle* and Eleventh Circuit case law, the trial court dismissed as dicta "any discussion of the viability of a substantive due process claim in *Lingle*." *Id.* at 23-24.

C. The Eleventh Circuit Refuses To Follow *Lingle*, Holding That Property Rights Are Not Fundamental Rights Entitled to Substantive Due Process Protections

The Kentners appealed the district court's decision to the Eleventh Circuit. *See* Pet. Cert. App. A at 2. In support of their argument that a landowner can state a viable claim for a violation of their substantive due process rights, the Kentners relied once again on *Lingle*'s explanation, that when a regulation of property does not "substantially advance legitimate state interests," the affected property owner's remedy is to sue the government for a violation of substantive due process. 544 U.S. at 540-41.

The Eleventh Circuit, however, concluded that the Kentners' argument went "beyond what *Lingle* held," and rejected the claim that restrictions on property

must substantially advance a legitimate government interest to satisfy due process. Pet. Cert. App. A at 5-7. In reaching that conclusion, the court failed to discuss nearly a century of on-point Supreme Court case law; instead, it held firm to circuit precedents that excluded property rights from due process protection.[4] Pet. Cert. App. A at 7. The court explained that only "fundamental rights"—defined as those rights expressly enumerated by the text of the U.S. Constitution—are entitled to substantive due process protection. *Id.* Thus, according to Eleventh Circuit case law, property rights, which are defined by state law, are not fundamental rights and a landowner cannot bring a substantive due process based on a deprivation of those rights. *Id.* at 7-8, 9-10.

Because the lower court believed that property rights are not protected by due process, it considered the Kentners' due process claim as an ordinary challenge to the adoption of an ordinance, which is subject only to minimal rational basis review. *Id.* at 9-11. Applying that deferential standard, the court held that both purported purposes for the dock ban—preservation of seagrass and aesthetic conditions—were rational bases, and affirmed the district court's order of dismissal. *Id.* at 11.

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[4] The lower court relied on two prior circuit decisions, *DeKalb Stone, Inc. v. County of DeKalb, Ga.*, 106 F.3d 956, 959 n.6 (11th Cir. 1997), *cert. denied* 522 U.S. 861 (1997), and *McKinney v. Pate*, 20 F.3d 1550, 1556 (11th Cir. 1994), *cert. denied* 513 U.S. 1110 (1995).

The Kentners now respectfully ask this Court to issue a writ of certiorari and provide much-needed guidance on the important questions of federal law decided below.

REASONS FOR GRANTING THE WRIT

I

THE ELEVENTH CIRCUIT'S REFUSAL TO RECOGNIZE THAT TRADITIONAL PROPERTY RIGHTS ARE PROTECTED BY SUBSTANTIVE DUE PROCESS CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER CIRCUIT COURTS OF APPEALS

The decision below adopted a rule that excludes all traditional property rights from the substantive protections guaranteed by the Due Process Clauses of the U.S. Constitution. U.S. Const. amend. V; XIV, § 1. In so doing, the lower court departed from nearly a century of due process precedents from this Court and deepened a longstanding split of authority among the Circuit Courts of Appeals.

A. This Court Has Long Recognized That Due Process Protects Against Arbitrary and Irrational Restrictions on the Use of Private Property

The Due Process Clauses protect against government deprivations of "life, liberty, or property,

without due process of law." U.S. Const. amend. V; XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law."). Due process embraces the substantive and fundamental concept that all government actions must relate to a legitimate end of government. *See Nectow v. City of Cambridge*, 277 U.S. 183, 188 (1928); *Lawton v. Steele*, 152 U.S. 133, 136-37 (1894). This concept reflects the essential difference between the rule of law and arbitrary government. *County of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998). Decisions that restrict the liberty of individuals or the enjoyment of their property must be justifiable by one of the legitimate ends of government: the promotion of health, safety, morals, or general welfare. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926).

Contrary 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.

In *Village of Euclid v. Ambler Realty Co.*, this Court held that regulatory restrictions on an owner's right to use his land will violate due process if the regulations are "clearly arbitrary and unreasonable, having no substantial relations to the public health, safety, morals, or general welfare." 272 U.S. at 395. This Court reiterated that test two years later in *Nectow v. Cambridge*, 277 U.S. at 187-88. And since those landmark decisions, this Court has consistently held that property rights are protected by due process. *See*, *e.g.*, *Schad v. Borough of Mount Ephraim*, 452

U.S. 61, 68 (1981) ("Where property interests are adversely affected by zoning, the courts generally have emphasized the breadth of municipal power to control land use and have sustained the regulation if it is rationally related to legitimate state concerns and does not deprive the owner of economically viable use of his property."); *Moore v. City of East Cleveland*, 431 U.S. 494, 498 n.6 (1977) ("*Euclid* held that land-use regulations violate the Due Process Clause if they are 'clearly arbitrary and unreasonable, having no substantial relations to the public health, safety, morals, or general welfare.' "); *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 263 (1977) (recognizing a "right to be free of arbitrary or irrational zoning actions").

In *Nebbia v. New York*, this Court provided a good synopsis of how due process protects traditional rights against arbitrary decision making:

> [The Fifth and Fourteenth Amendments] do not prohibit government regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as has often been held, 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. 502, 525 (1934) (quoted favorably by *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 85 (1980)).

Using different terms, this Court similarly held in *Goldblatt v. Town of Hempstead*:

> The classic statement of the rule in *Lawton v. Steele*, 152 U.S. 133, 137 (1894), is still valid today: "To justify the State in . . . interposing its authority in behalf of the public, it must appear, first, that the interests of the public . . . require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals."

369 U.S. 590, 594-95 (1962).

And more recently, *Lingle* reiterated this Court's long-standing rule that a regulatory restriction on the right to use one's property "must substantially advance a legitimate state interest" to satisfy the substantive requirement of due process. 544 U.S. at 540.

B. The Eleventh Circuit Decision Conflicts with Decisions of This Court

The primary issue decided below was whether *Lingle*'s summary of the due process standard applicable to land-use regulations was an accurate statement of the law or not. *See* Pet. Cert. App. A at 4-6. The Eleventh Circuit concluded that it was not and, as a result, purports to supplant the rule set out in

Lingle with a conflicting rule developed by Eleventh Circuit case law. *See* Pet. Cert. App. A at 7-12.

There is no basis to question *Lingle*'s accuracy, or its stature as controlling authority. In *Lingle*, this Court was asked to determine whether a state action that does not "substantially advance a legitimate state interest" is properly challenged as a taking compensable under the Fifth and Fourteenth Amendments, or as a violation of substantive due process under the Fifth and Fourteenth Amendments. *Lingle*, 544 U.S. at 531. The case concerned a Hawaii law setting price controls on returns collected by oil companies. *Id*. at 532. The property owners argued that the regulation did not serve a legitimate state interest, resulting in a taking of their property in violation of the Fifth Amendment. *Id*. The lower courts agreed. *Id*.

Lingle overturned those decisions. Citing its early due process cases, *Nectow*, *Euclid*, *Goldblatt*, and *Lawton*, this Court held that when a government action does not "substantially advance a legitimate state interest," the affected property owner's remedy is to sue the government for a violation of substantive due process, and not a taking. *Id*. at 540-41 ("[W]e conclude that this formula [the substantial advancement test] prescribes an inquiry in the nature of a due process, not a takings test, and that it has no proper place in our takings jurisprudence.").

Lingle restates the due process standard applicable to restrictions on the ownership and use of property—a standard that this Court has consistently

upheld for nearly a century. By rejecting that standard, the Eleventh Circuit effectively cast aside this Court's entire body of on-point due process case law dating back to *Euclid*.

C. The Eleventh Circuit's Decision Deepens an Irreconcilable Split of Authority Among the Circuit Courts of Appeals

The Eleventh Circuit's decision also conflicts with opinions from several sister circuit courts of appeals, which recognize, to varying degrees, that private property rights are protected by substantive due process per *Euclid* and *Nectow*. For example, in *Pearson v. City of Grand Blanc*, the Sixth Circuit identified the ownership of property is a "protected liberty" subject to due process. 961 F.2d 1211, 1223 (6th Cir. 1992) ("[W]hen a zoning law infringes upon a protected liberty, it must be narrowly drawn and must further a sufficiently substantial government interest."); *see also id*. at 1216 (A zoning regulation "is arbitrary and capricious [when][] it does *not bear a substantial relation* to the public health, safety, morals, or general welfare."). In reaching its conclusion, the Sixth Circuit lamented the deep and irreconcilable conflict among the circuits. *Id*. at 1220 n.45 ("We wish it were within our power to harmonize these decisions, but the conflicts among the circuits are too great. Harmony will have to await action by the Supreme Court.").

The Third, Fifth, and Seventh Circuits also protect property rights via substantive due process. In

DeBlasio v. Zoning Board of Adjustment for the Township of West Amwell, the Third Circuit explained that,

> where the governmental decision in question impinges upon a landowner's use and enjoyment of property, a land-owning plaintiff states a substantive due process claim where he or she alleges that the decision limiting the intended land use was arbitrarily or irrationally reached.

53 F.3d 592, 601 (3d Cir. 1995); *see also Belloe v. Walker*, 840 F.2d 1124 (3d Cir. 1988) (Allowing a substantive due process claim where the government denied a building permit because of the applicant's political activities.). Similarly, in *FM Priorities Operating Company v. City of Austin*, the Fifth Circuit upheld the right of property owners to be free of arbitrary government action affecting their property rights. 93 F.3d 167, 174 (5th Cir. 1996) ("[I]f 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.") (quoting *Euclid*, 272 U.S. at 395). And in a zoning case from the Seventh Circuit, the court held:

> Statutes or other exertions of governmental power that lack a rational basis, in the sense of some connection however tenuous to some at least minimally plausible conception of the public interest, are held to violate due process even if there is no procedural

> irregularity; so if they deprive someone of life, liberty, or property, they give rise to a claim under the due process clause.

Gamble v. Eau Claire Cnty., 5 F.3d 285, 287 (7th Cir. 1993).

The Second, Ninth, Tenth, and District of Columbia Circuits have not directly addressed this issue, but their decisions in related cases appear to agree that property ownership is protected by due process. *See*, *e.g.*, *Colony Cove Prop. v. City of Carson*, 640 F.3d 948, 960 (9th Cir. 2011) (recognizing the viability of a property-based substantive due process claim after *Lingle*); *Crown Point Development, Inc. v. City of Sun Valley*, 506 F.3d 851, 852-53 (9th Cir. 2007) (in light of *Lingle*, a substantive due process claim challenging a "wholly illegitimate" land use regulation may be a viable claim); *Alto Eldorado P'ship v. County of Santa Fe*, 634 F.3d 1170, 1175 (10th Cir. 2011) (property rights-based substantial advancement challenge "is properly brought as a due process claim as decided in *Lingle*"); *Tri County Industries, Inc. v. District of Columbia*, 104 F.3d 455, 459 (D.C. Cir. 1997) (the Takings Clause does not subsume a property owner's right to challenge a permit denial as a violation of substantive due process); *RRI Realty Corp. v. Incorporated Village of Southampton*, 870 F.2d 911, 918 (2d Cir. 1989) (property ownership is protected by the Due Process Clause of the Fourteenth Amendment).

The First Circuit differs from the above approaches, holding that due process protections are generally not available in ordinary land-use disputes, but may attach when the government action is truly horrendous:

> We have consistently rejected substantive due process claims arising out of disputes between developers and land planning authorities while leaving the door "slightly ajar" for "truly horrendous situations."

Macone v. Town of Wakefield, 277 F.3d 1, 9 (1st Cir. 2002) (quoting *Néstor Colón Medina & Sucesores, Inc. v. Custodio*, 964 F.2d 32, 45 (1st Cir. 1992)); *but see Franklyn Mem'l Hosp. v. Harvey*, 575 F.3d 121, 128 n. 9 (1st Cir. 2009) (noting that *Lingle* identified the substantial advancement test for application in the due process context).

Meanwhile, the Fourth Circuit has suggested that courts categorize the particular type of property interest at issue to determine whether a claimed deprivation gives rise to a takings claim or a violation of due process:

> Although we view [the landowner] as having held an entitlement to permit issuance which was sufficiently a "species of property" to require constitutional protection, the permit, until it is at least actually in hand, is not in the nature of interests the deprivation of which is encompassed by the Fifth Amendment "takings" doctrine. While [the

> landowner's] right to the permit prior to issuance is entitled to protection under the due process clause, non-issuance of the permit did not effectively destroy the value of the building site, the rights to which [the landowner] eventually sold. Therefore, we conclude that [the landowner] has no taking claim.

Scott v. Greenville County, 716 F.2d 1409, 1421-22 (4th Cir. 1983).

The split of authority on this important question of constitutional law is firmly entrenched and cannot be resolved without this Court's clarification. *See* Ronald J. Krotoszynski, Jr., *Fundamental Property Rights*, 85 Geo. L.J. 555, 577 (1997) ("Even at the most basic level, there is a remarkable inconsistency regarding whether substantive due process protects property interests."). Review by this Court is both warranted and necessary because the conflict impacts fundamental rights expressly protected by the Constitution; the exercise of those rights should be uniform throughout the nation—it should not depend on where one lives.[5]

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[5] *See* Brian W. Blaesser, *Substantive Due Process at the Outer Margins of Municipal Behavior*, 3 Wash. U. J. L. & Pol'y 583, 585 (2000) ("[L]andowners and developers are learning from federal court decisions in some of the circuits that, as the degree of discretion that can be exercised . . . increases, the less likely it is that they will be deemed to have any 'property interest' to protect, regardless of how arbitrarily that discretion is exercised in a particular case.").

II

THE ELEVENTH CIRCUIT'S DECISION UNDERMINES THE PURPOSE OF THE DUE PROCESS CLAUSE

The conflicts created by the Eleventh Circuit, by themselves, warrant certiorari. But the need for this Court's review is heightened by the fact that the Eleventh Circuit rule threatens to undermine the purpose of the Due Process Clause, to protect individuals' fundamental rights—such as to liberty and property—against arbitrary or irrational government action. *See Nectow*, 277 U.S. at 187-88. The Eleventh Circuit's refusal to accord such protections to regulatory restrictions on property allows arbitrary government to continue unchecked and undermines the due process guarantee. *See Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922) (there must be limits on government's ability to restrict property rights by regulation "or the contract and due process clauses are gone").

A. The Eleventh Circuit Rule Cannot Protect Against the Arbitrary Deprivation of Property

The Eleventh Circuit's rule operates to shield arbitrary and irrational regulation of private property from any meaningful review. It does so by categorizing a due process plaintiff's rights as either "fundamental" or "non-fundamental," with the ownership and use of private property falling into the latter category, simply because the specific rights comprising "property" are

defined by state law. Pet. Cert. App. A at 7. That conclusion is both incorrect and harmful.

The term "property" refers to the collection of protected rights inhering in an individual's relationship to his or her land or chattels. *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945). While the specific rights associated with property ownership are defined by state law (*see*, *e.g.*, *Stop the Beach Renourishment, Inc. v. Florida Dept. of Envt'l Prot.*, 130 S. Ct. 2592, 2597-98 (2010)), the idea that property rights are merely "state-created," as the Eleventh Circuit concluded, is a flawed one. *See* Ilya Somin, *Federalism and Property Rights*, University of Chicago Legal Forum 53, 86 (2011).[6] "In reality, the institution of private property long predates the existence of American states, or indeed modern states of any kind." *Id.* Indeed, this Court has long recognized that the "fundamental maxims of a free government seem to require, that the rights of personal liberty and private property should be held sacred." *Wilkinson v. Leland*, 27 U.S. (2 Pet.) 627, 657 (1829). Thus, the "prohibition against the deprivation of property without due process of law reflects the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference." *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972).

[6] *Available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1907357 (last visited Sept. 24, 2014).

According to the lower court, however, property is not a "fundamental" right—defined as a right created by and defined within the text of the Constution—and only such "fundamental" rights are subject to meaningful review under a test like *Euclid*'s "substantially advances" formula. *See* Pet. Cert. App. A at 7. Regulations restricting the exercise of "non-fundamental" rights can only be reviewed under a minimal rational basis standard, just like an ordinary challenge to the enactment of a law that does not impact a protected right. *See* Pet. Cert. App. A at 9 (citing *Fresenius Med. Care Holdings, Inc. v. Tucker*, 704 F.3d 935, 945 (11th Cir. 2013) ("[W]hen a challenged law does not infringe upon a fundamental right, we review substantive due process challenges under the rational basis standard.")).

As applied by the Eleventh Circuit, the rational basis standard simply asks whether a regulation was intended to advance a legitimate government purpose, nothing more. *Id.* at 9-12. Thus, the court in this case upheld the dock ban—even after assuming as true (for the purpose of a motion to dismiss) allegations that (1) there was no indication that seagrass was present on the restricted properties; (2) there was no factual basis establishing that a ban on new docks will in any way impact seagrass; and (3) the regulation was imposed to benefit established landowners at the expense of new property owners. Pet. Cert. App. A at 3.

The Eleventh Circuit's standard for so-called "non-fundamental" rights allows for the very real possibility that an arbitrary or irrational regulation will stand

unchecked because it fails to ask if the restriction does, in fact, advance the city's stated goal. Without an answer to that question, due process cannot be satisfied. Indeed, as this Court explained in *Lingle*, the purpose of the "substantially advances" test is to determine "whether a regulation of private property is *effective* in achieving some legitimate public purpose" because a "regulation that fails to serve any legitimate governmental objective may be so arbitrary or irrational that it runs afoul of the Due Process Clause."[7] 544 U.S. at 542 (citing *Lewis*, 523 U.S. at 846).

B. The Eleventh Circuit's Rule Undermines the Purpose of Constitutional Due Process Protection by Imposing a Hierarchy on the Rights to Life, Liberty, and Property

The Eleventh Circuit's decision has the potential to undermine due process at an even more fundamental level by imposing a hierarchy on the rights and liberties guaranteed by the Due Process

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[7] *See also* Stewart M. Weiner, Comment: *Substantive Due Process in the Twilight Zone: Protecting Property Interests from Arbitrary Land Use Decisions*, 69 Temp. L. Rev. 1467, 1486-94 (1996) (surveying split of authority and concluding that protecting property rights under the "substantially advances" test is consistent with the language and purpose of the Due Process Clause).

Clause.[8] Indeed, the lower court's attempt to do so is a direct affront to the Due Process Clause, which protects "life, liberty, or property" without qualification. U.S. Const. amend. XIV, § 1. As Justice Stewart eloquently stated in *Lynch v. Household Finance Corp.*:

> [T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less that the right to speak or the right to travel, is in truth a "personal" right . . . In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other.

405 U.S. 538, 552 (1972); *see also* Krotoszynski, 85 Geo. L.J. at 574 (criticizing decisions that unmoor protected rights and liberties from their express position within the Constitution).

Justice Scalia noted the absurdity of trying to draw distinctions between well-recognized rights in his concurring opinion in *United States v. Carlton*:

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[8] *See* Weiner, 69 Temp. L. Rev. at 1492 ("If the courts use substantive due process to protect the full panoply of liberty and property rights secured by the Fourteenth Amendment, they can focus instead on a more appropriate inquiry. Rather than limiting the scope of protected rights, they may evaluate the appropriate level of arbitrary government conduct that triggers substantive due process protection.").

> The picking and choosing among various rights to be accorded "substantive due process" protection is alone enough to arouse suspicion; but the categorical and inexplicable exclusion of so-called "economic rights" (even though the Due Process Clause explicitly applies to "property") unquestionably involves policymaking rather than neutral legal analysis. I would follow the text of the Constitution, which sets forth certain substantive rights that cannot be taken away, and adds, beyond that, a right to due process when life, liberty, or property is to be taken away.

512 U.S. 26, 41-42 (1994) (Scalia, J., concurring).

As one might expect when encountering a rule that so markedly departs from the purpose of due process, the Eleventh Circuit's rationale was premised on a misunderstanding of case law. The Circuit rule is loosely based on Justice Powell's concurring opinion in *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 229 (1985). *See* Pet. Cert. App. A at 7 (citing *DeKalb Stone*, 106 F.3d at 959 n.6 (citing *Ewing*, 474 U.S. at 229)). In *Ewing*, a medical student claimed that he had a right to retake a written examination that he had failed, and challenged the school's decision to dismiss him as violating his right to continued enrollment free from arbitrary state action. *Id*. at 215, 223. This Court expressed scepticism whether the student had stated a protected interest (*id*. at 222-23), but assumed the existence of such a right in order to reject the student's

claim of arbitrary dismissal on the merits. *Id*. at 227-28. Justice Powell concurred with the decision, but wrote separately to offer that, in his view, the student had not stated a constitutionally protected right. *Id*. at 229. In so opining, Justice Powell noted that those rights that are subject to substantive due process protection are "created only by the Constitution," then cautioned that each newly claimed "right" must be "considered against a background of Constitutional purposes, as they have been rationally perceived and historically developed." *Id*. at 229.

The Eleventh Circuit seized upon that language to exclude property rights from the substantive protections of due process because—although expressly protected by the Due Process Clause—the specific nature of one's rights in property is defined by state law, not the Federal Constitution. Pet. Cert. App. A at 7. That conclusion, however, finds no support in *Ewing*. Neither the majority opinion nor Justice Powell's concurring opinion addressed traditional property rights. And Justice Powell's concurring opinion cannot be read to implicitly overturn nearly a century of on-point case law.

The Eleventh Circuit's characterization of property as a "nonfundamental 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.

This Court should grant the petition to affirm that property rights are fundamental rights due no less

respect that other fundamental rights, and are entitled to meaningful substantive due process protection.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted, and the decision of the Eleventh Circuit reversed.

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Respectfully submitted,

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