No. _____

In The
Supreme Court of the United States

RESIDENTS AGAINST FLOODING, et al.,

Petitioners,

v.

REINVESTMENT ZONE
NUMBER SEVENTEEN, et al.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, and to what extent, on a Rule 12(b)(6) motion to dismiss, a court must give deference to a plaintiff's complaint, viewing the government's rational basis as a rebuttal presumption, as the Seventh, Fourth, and Tenth Circuits have held; or whether a court may hypothesize its own rational basis unconstrained from the factual allegations, as the Fifth, Eighth, and D.C. Circuits have held.

2. Whether a plaintiff's real property ownership is a sufficient property interest to enable a substantive due process challenge to a city's land use decisions, as decisions of this Court have implicitly held, since *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926).

PARTIES TO THE PROCEEDINGS BELOW

Residents Against Flooding, plaintiff-appellee below, is an alliance of citizens dedicated to responsible stormwater and drainage management in the City of Houston and Harris County region. Anita Giezentanner, plaintiff-appellee below, is a citizen of Houston. Virginia Gregory, plaintiff-appellee below, is a citizen of Houston. Lois Myers, plaintiff-appellee below, is a citizen of Houston.

The following parties were defendant-appellants below: Reinvestment Zone Number Seventeen; Memorial City Redevelopment Authority; and The City of Houston, Texas.

CORPORATE DISCLOSURE STATEMENT

Under Rule 29.6 of this Court's Rules, Petitioner Residents Against Flooding states that it is a nonprofit organization with no parent corporations. It has not issued stock. Accordingly, no publicly-traded company owns 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF APPENDICIES

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page

OTHER AUTHORITIES

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is unpublished and may be found at 734 Fed. Appx. 916. It is reproduced at App. A1–12.

The opinion of the United States District Court for the Southern District of Texas is reported at 260 F. Supp. 3d 738. It is reproduced at App. A13–148.

JURISDICTION

The opinion of the Fifth Circuit Court of Appeals was entered on May 22, 2018. On August 8, 2018, this Court extended the time to file this petition until October 19, 2018. This Petition for Writ of Certiorari is filed on October 19, rendering it timely and thereby giving this Court jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The plaintiffs below brought this action under 42 U.S.C. § 1983, alleging violations of the Fourteenth Amendment's Due Process Clause. The Fourteenth Amendment, U.S. Const. amend. XIV, § 1, provides:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny

> to any person within its jurisdiction the equal protection of the laws.

Additionally, the first question presented in this petition involves Federal Rule of Civil Procedure 12(b)(6), which provides: "[A] party may assert the following defenses by motion: * * * (6) failure to state a claim upon which relief can be granted."

INTRODUCTION

The right to challenge arbitrary governmental action under the Fourteenth Amendment is at the core of a substantive due process claim. *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998). The most common constitutional review standard applied to governmental action in this context is the rational basis test—a standard that is deferential, *Armour v. City of Indianapolis*, *Ind.*, 566 U.S. 673, 680 (2012), but not "toothless." *Schweiker v. Wilson*, 450 U.S. 221, 234 (1981). During review of a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a court must accept all well-pled facts as true. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009); *see also Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984) (stating that a complaint may be dismissed only if no relief could be granted under any set of facts that can be proven consistent with the allegations). When a court is tasked with rational basis review on a 12(b)(6) motion, the intersection of these two inherently competing standards—one deferential to the plaintiff and the other to

the governmental defendant—produces a "perplexing situation," *Wroblewski v. City of Washburn*, 965 F.2d 452, 459–60 (7th Cir. 1992), and has caused divergent approaches among the courts. Over twenty-five years, a mature circuit split has emerged. The Fifth Circuit decision below falls within one line of cases, and the time is ripe for this Court to weigh in.

Although substantive due process cases before this Court often arise from executive action (*e.g.*, *Rochin v. California*, 342 U.S. 165 (1952)) or purely legislative action (*e.g.*, *Lawrence v. Texas*, 539 U.S. 558 (2003)), the present case arises from a city government's land use decisions, codified in ordinances, sometimes called "quasi-legislative action." *Shelton v. City of College Station*, 780 F.2d 475 (5th Cir. 1986). Under this Court's jurisprudence, a city's land use decisions also may be challenged under the Substantive Due Process Clause of the Fourteenth Amendment. *See Nectow v. City of Cambridge*, 277 U.S. 183, 188–89 (1928) (holding city's zoning ordinance to violate the Fourteenth Amendment). But, "[i]n the land-use context, [appellate] courts have taken (at least) two different approaches for determining the existence of a property interest for substantive due process purposes." *George Wash. Univ. v. D.C.*, 318 F.3d 203, 206–07 (D.C. Cir. 2003), *cert. denied*, 540 U.S. 824 (2003). Some circuits have imported this Court's procedural due process jurisprudence to analyze the plaintiff's property interest, *see id.*; others have more broadly determined that property ownership is "worthy of substantive due process protection." *DeBlasio v. Zoning*

Bd. of Adjustment, 53 F.3d 592, 598 (3d Cir. 1995), overruled on other grounds, *United Artists Theatre Circuit, Inc. v. Twp. of Warrington, PA*, 316 F.3d 392 (3d Cir. 2003). In the decision below, the Fifth Circuit took the extraordinary position that Petitioners' property interest in their own homes was "too broad and unsupported by caselaw" to allege a substantive due process violation against the challenged City of Houston ordinances. App. A6. The Fifth Circuit's holding deepens the existing circuit split, warranting this Court's review.

STATEMENT

This case arises from drainage projects implemented by the City of Houston, the Tax Increment Reinvestment Zone Number Seventeen ("TIRZ 17"), and the Memorial City Redevelopment Authority (all three, collectively "Respondents") and codified in City of Houston ordinances. Through a series of ordinances, Respondents decided to fix a localized flooding problem within a commercial district by implementing drainage projects that directed stormwaters from within that district to the neighborhoods directly north and south of it. *See* App. A2–4, A150, A166–69. Respondents' actions were done despite their own drainage studies documenting the need for regional solutions, and forewarning the inevitable flooding of Petitioners' real properties. App. A17–18, A162–66.

Petitioners are a nonprofit association called Residents Against Flooding and named individuals (collectively "Petitioners") living in the long established residential neighborhoods adjacent to the TIRZ 17 commercial district. App. A185–88. Petitioners challenged Respondents' actions on constitutional grounds and sought injunctive relief, in the form of flood-relief projects, which had been long documented in Respondents' own studies, and promised to the residential areas for years but never delivered. App. A196–97.

A. Respondents' Arbitrary Actions Transfer a Localized Flooding Problem from within a Commercial District to the Petitioners' Adjacent Residential Neighborhoods.

In 1999, the City of Houston authorized formation of TIRZ 17 to remedy the flooding within the commercial district's approximately 1,000 acre area. App. A2, A156–57. TIRZ 17 is governed by representatives from the private commercial developers located in the commercial district, and in that capacity, the private commercial developers control the projects that are implemented with the TIRZ's public funds. App. A3, A158–59.

On an annual basis, TIRZ 17 prepares Capital Improvement Plans ("CIPs"), which contain a budget and identify proposed drainage projects. App. A158–59. After the TIRZ Board approves a CIP, it is presented to Houston's City Council, which reviews the CIP and approves it by ordinance. App. A159.

Since its formation, TIRZ 17 has proposed, and Houston City Council has approved, successive years of CIPs with drainage projects that directed storm-waters out of the TIRZ 17 commercial district and into Petitioners' adjacent residential neighborhoods. App. A159, A166–69. As Petitioners alleged, the Respondents had full knowledge of flooding dangers within and adjacent to the TIRZ 17 commercial district, due to Respondents' own drainage studies and hydrological models documenting the area flooding risks. App. A18, A162–65.

As a consequence of Respondents' actions, property within TIRZ 17 no longer floods. Beginning in 2009, however, homes in Petitioners' neighborhoods that did not flood before TIRZ 17's inception began to flood. App. A179. The adjacent residential neighborhoods experienced three devastating flooding events in 2009, 2015, and 2016. App. A4, A179–81.

Petitioners complained to the City Council and at TIRZ board meetings that public monies were in fact not being spent for the "general benefit of the municipality" as required by state law. App. A178, A181-82. Petitioners objected that Respondents were allocating significant public funds to private projects that only benefitted the private commercial developers affiliated with TIRZ 17, instead of allocating funds towards regional detention basins. App. A4, A176–78 (describing the allocation of funds to a $23 million landscaping and beautification project); App. A178 (allocating public funds to remove a private developer's property from

the floodplain and thus avoid costly floodplain regulations).

Failing to gain traction through political advocacy, Petitioners filed the present suit in 2016. App. A4. Petitioners alleged that Respondents' actions were arbitrary and unreasonable because Respondents transferred the flooding problem from within TIRZ 17 to the adjacent residential neighborhoods. Petitioners asserted two Section 1983 claims based on the Substantive Due Process Clause of the Fourteenth Amendment, and the Fourth Amendment's proscription against unreasonable seizures, as well as a due course of law claim under the Texas Constitution, Tex. Const. art. 1, § 19. App. A4. Only the Fourteenth Amendment claim is at issue in this Petition.

B. Proceedings Below.

Petitioners filed suit "to enjoin arbitrary governmental action which benefited, and continues to benefit, private commercial interests and developers within [TIRZ 17], at the expense of significant harm and loss to hundreds of residential homes in the nearby Memorial City neighborhoods." App. A150. Petitioners specifically pleaded the government action lacked a rational basis:

> "The Defendants' decisions and actions and inactions lack a rational basis. The governmental action—i.e., approving infrastructure projects, year after year, to eliminate flooding within the TIRZ 17 area, thereby creating

> flooding conditions in adjacent residential areas without any flood relief for those residential areas—is not rationally related to a legitimate governmental interest. Further, the city government's spending tens of millions of dollars of public money to improve flooding in one area—with the direct result of worsening flooding in adjacent areas and not allocating funds to alleviate flooding in the residential areas—is irrational, arbitrary, and abusive."

App. A190–91. Petitioners' allegations were supported by other well-pled facts that identified and described, among other things, Respondents' infrastructure projects, drainage studies showing foreseeability, willful decision-making to protect the private commercial properties over the residential ones, and knowledge of the inevitable consequences of their actions. App. A162–69, A176–79, A181–83.

Respondents filed motions to dismiss under Rules 12(b)(1) and 12(b)(6) in district court. App. A15. Although the district court erroneously analyzed the case as a Fifth Amendment taking, the court granted Respondents' motions to dismiss. App. A133–48.

The Fifth Circuit affirmed the dismissal on 12(b)(6). App. A12. On the Substantive Due Process claim, there were two bases for the Fifth Circuit's holding: the court held that "the plaintiffs have not adequately pleaded that government conduct implicated a constitutionally protected right." App. A6. The court explained that Petitioners' "claimed right to use their homes is too broad

and unsupported by caselaw." App. A6. The court also held that, even assuming a property right were implicated, the Petitioners have "failed to state a substantive due process claim because these [government] projects were at least debatably rationally related to a legitimate government interest." App. A7.

REASONS FOR GRANTING THE WRIT

This case presents questions meriting this Court's attention regarding the intersecting standards of Federal Rule of Civil Procedure 12(b)(6) review and the rational basis test, as well as the scope of the property right necessary to enable a substantive due process challenge in land use cases. On the first question, this Court should resolve whether courts engaged in rational basis review at the 12(b)(6) stage should consider proffered rational bases as presumptions that can be rebutted through the plaintiffs' factual allegations, or whether courts should have license to create any hypothetical rational basis in contradiction of the plaintiffs' well-pled complaint. On the second question, this Court should resolve whether real property ownership is sufficient to enable a plaintiff to challenge a city government's land use decisions as a substantive due process violation.

In Part I, Petitioners discuss the longstanding circuit split on the intersection of the competing legal standards and how the Fifth Circuit's decision fits into the split. Petitioners also explain how this Court's own

jurisprudence on rational basis provides insufficient guidance to the lower courts. In Part II, Petitioners describe the circuit split that has emerged on the scope of the property interest necessary to bring a viable substantive due process violation. Petitioners explain how certain lower courts have tackled this issue by importing this Court's jurisprudence on procedural due process into the substantive due process context. Petitioners urge that only this Court's ruling can resolve the disparate approaches to this important constitutional issue.

I. The Time is Now for this Court's Guidance on How Lower Courts Review Rational Basis under Fourteenth Amendment Challenges at the 12(b)(6) Stage.

The Fourteenth Amendment provides that "[n]o State shall * * * deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. This Court has recognized that this provision contains a substantive component that "bars certain arbitrary, wrongful government action 'regardless of the fairness of the procedures used to implement them.'" *Zinerman v. Burch*, 494 U.S. 113, 125 (1990) (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986)). The Court has recognized substantive due process limitations on not only law-enforcement personnel, public-school officials, and government employers, but also those who make decisions affecting property rights. *E.g.*, *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 450 (1985); *Nectow*, 277 U.S. 183

(invalidating a zoning ordinance that did not bear a substantial relation to public health, safety, and morals); *Vill. of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926) (holding that government action affecting real property violates substantive due process if the action is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare"); *see also Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 541 (2005) (discussing *Nectow* and *Euclid*).

Under both substantive due process and equal protection analyses, governmental actions involving social and economic regulations that do not interfere with the exercise of fundamental rights or rely upon inherently suspect classifications are subject to rational basis review. *City of New Orleans v. Dukes*, 427 U.S. 297, 303–04 (1976); *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483, 488–90 (1954). In other words, governmental actors can be held liable under the Substantive Due Process Clause if two conditions are met: (1) there is a deprivation of a constitutionally protected right and (2) the governmental action is not rationally related to a legitimate governmental interest. *See Lingle*, 544 U.S. at 542 ("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"); *Cnty. of Sacramento*, 523 U.S. at 846 (stating that the Due Process Clause is intended to protect the individual against "the exercise of power without any reasonable justification in the service of a

legitimate governmental objective"); *see also Mikeska v. City of Galveston*, 451 F.3d 376, 379 (5th Cir. 2006) (explicitly adopting this two-part test).

Rational basis review, as the lowest level of constitutional scrutiny, is generally deferential to the government actor. *Armour*, 566 U.S. at 680. This Court has emphasized, however, that the standard is not "toothless" and must impose an actual limit on governmental action. *See Schweiker*, 450 U.S. at 234.

The Federal Rules of Civil Procedure allow a trial court to dismiss a case prior to discovery if the complaint fails "to state a claim upon which relief can be granted[.]" Fed. R. Civ. P. 12(b)(6). The "complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 678 (internal quotations omitted). This is true even if recovery is unlikely. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007). The application of this rule becomes more complicated when a court is also tasked with undertaking a rational basis review.

The inherent tension between the rational basis test and the standard applied when deciding a motion to dismiss has been an ongoing subject not only for the lower courts, but also for commentators, for many years. *See generally Wroblewski*, 965 F.2d at 459–60; Clark Neily, *Litigation Without Adjudication: Why the Modern Rational Basis Test Is Unconstitutional*, 14 Geo. J.L. & Pub. Pol'y 537 (2016); Timothy Sandefur,

Rational Basis and the 12(b)(6) Motion: An Unnecessary Perplexity, 25 Geo. Mason U. Civ. Rts. L.J. 43 (2014); Robert C. Farrell, *Legislative Purpose and Equal Protection's Rationality Review*, 37 Vill. L. Rev. 1, 39 (1992). That there exists a clear conflict in how this commonly-faced circumstance is handled among the circuits is not surprising, and it requires a resolution only this Court can provide.

A. Over Twenty-Five Years, a Clear Circuit Split has Emerged on Application of the Competing Deferential Standards.

Courts have struggled with this "perplexing situation" for more than twenty-five years. *Wroblewski*, 965 F.2d at 459–60.[1] The tension between the two deferential standards is clear: the rational basis standard allows the government to prevail if any set of facts reasonably may be conceived to justify its actions or classification, *see id*. at 459, and the Rule 12(b)(6) standard requires the plaintiff to prevail if "relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon*, 467 U.S. at 73.

In *Wroblewski*, the Seventh Circuit noted that the rational basis standard, "of course, cannot defeat the plaintiff's benefit of the broad Rule 12(b)(6) standard."

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[1] *Wroblewski* involved allegations under both the Due Process Clause and the Equal Protection Clause. The court noted that review for non-arbitrariness under the Due Process Clause is "analogous to review for a 'rational basis' under the equal protection clause." 965 F.2d at 458.

Id. In resolving this "perplexing" situation, the Seventh Circuit viewed the rational basis test as a rebuttable presumption, stating that to survive a motion to dismiss for failure to state a claim, "a plaintiff must allege facts sufficient to overcome the presumption of rationality that applies to government [acts or classifications]." *Id*. at 460. Under the Seventh Circuit standard, courts should treat as true all of the complaint's allegations and reasonable inferences, but if a rational basis is reasonably conceivable, then it is treated as a presumption of fact that can be rebutted by the plaintiff's non-conclusory allegations. *Id*.

The Fourth Circuit and the Tenth Circuit have explicitly adopted the *Wroblewski* standard. *See Brown v. Zavaras*, 63 F.3d 967, 971–72 (10th Cir. 1995) (describing *Wroblewski* as a "hybrid approach" to reconciling standards and applying it); *Giarratano v. Johnson*, 521 F.3d 298, 304 (4th Cir. 2008) (finding *Wroblewski*'s analysis persuasive and applying it).

For instance, in *Dias v. City and County of Denver*, the Tenth Circuit acknowledged that "granting a motion to dismiss is a harsh remedy which must be cautiously studied, not only to effectuate the spirit of the liberal rules of pleading but also to protect the interests of justice." 567 F.3d 1169, 1178 (10th Cir. 2009). The Tenth Circuit reversed the district court's grant of a motion to dismiss after a "careful review of the complaint" because "the complaint plausibly allege[d]" that the pit bull ordinance at issue was not rationally related to a legitimate government interest. *Id*. at 1183. The Tenth Circuit observed that, though the plaintiffs

may have been "unable to demonstrate through evidence that the Ordinance was irrational, the complaint makes out a claim for relief." *Id*. The *Diaz* court did not speculate about a hypothetical justification for the ordinance (*e.g.*, general welfare of citizens because pit bulls could hypothetically be dangerous).

The *Wroblewski* approach advanced by the Seventh, Fourth, and Tenth Circuits stands in conflict with that of the Fifth, Eighth, and D.C. Circuits. In a second line of cases, these courts have given nearly unlimited deference to the government's purported rational basis when dismissing well-pled complaints, even adopting a standard that allows courts to speculate a conceptual rational basis "unsupported by evidence or empirical data" and to dismiss the complaint based on the court-manufactured rationale. *See Carter v. Arkansas*, 392 F.3d 965, 968 (8th Cir. 2004). In *Carter*, the Eighth Circuit held that because "all that must be shown [under rational basis review] is 'any reasonably conceivable state of facts that could provide a rational basis for the [act],' it is not necessary to wait for further factual development." *Id*. (quoting *Knapp v. Hanson*, 183 F.3d 786, 789 (8th Cir. 1999)).

Similar to the Eighth Circuit, the D.C. Circuit Court of Appeals has held that even at the motion to dismiss stage, a plaintiff "must plead facts that establish that there is not 'any reasonably conceivable state of facts that could provide a rational basis for the [act or classification].'" *Hettinga v. United States*, 677 F.3d 471, 479 (D.C. Cir. 2012) (quoting *Dumaguin v. Sec'y of Health and Human Servs.*, 28 F.3d 1218, 1222 (D.C. Cir.

1994)). In applying this standard, the court dismissed the suit once the government had "provided an explanation" that was "rational on its face." *Id*. at 479.

Courts in this second category have themselves hypothesized rational bases and put the burden on plaintiffs to affirmatively "negate every conceivable" justification at the pleading stage. *E.g.*, *Gilmore v. Cnty. of Douglas, State of Neb.*, 406 F.3d 935, 939–40 (8th Cir. 2005) (holding that "the district court was within its discretion to formulate a conceivable basis"). Conceptually, these courts have required the logically impossible of plaintiffs: to plead a universe of facts affirmatively establishing that there is not any conceivable state of facts that could provide a rational basis for a decision. Moreover, if "a rational basis lawsuit can be dismissed whenever a court can imagine a rationale for the challenged law, then applying rational basis analysis at the 12(b)(6) stage would mean reaching the merits on a motion to dismiss." Sandefur, *supra* at 44.

These two different approaches represent an established circuit split: some courts view the rational basis test as a rebuttable presumption which a plaintiff can overcome through well-pled factual allegations (*Wroblewski* and its progeny), whereas other courts view rational basis as something the courts may postulate themselves, in defiance of a plaintiff's pleading (the Eighth and D.C. Circuits, and the Fifth Circuit in the present case).

B. The Decision Below Propagates the Precedent that Courts May Disregard a Plaintiff's Pleading and Hypothesize a Rational Basis.

The Fifth Circuit in the present case fell in line with the approach of the Eighth and D.C. Circuits. The Fifth Circuit conceived a rational basis, which was untethered from Petitioners' allegations. The Fifth Circuit did not accept as true Petitioners' factual allegations or the reasonable inferences therefrom and did not consider whether factual development might overcome the hypothetical rational basis. In effect, this judicial course of conduct deprives litigants of the very due process of law they seek.

Articulating the rational basis test, the Fifth Circuit ignored the tension of the test with a 12(b)(6) review, stating only:

> The question is only whether a rational relationship exists between the [government action] and a conceivable legitimate objective. If the question is at least debatable, there is no substantive due process violation.

App. A7 (citing *Simi Inv. Co. v. Harris Cnty.*, 236 F.3d 240, 249 (5th Cir. 2000)). For legal support, the Fifth Circuit cited cases that were decided on summary judgment or at trial, where courts had the benefit of fact development, and did not have to balance the competing reviewing standard of 12(b)(6). App. A5–7 (citing *Simi Inv. Co.*, 236 F.3d 240; *FM Properties Operating Co. v. City of Austin*, 93 F.3d 167 (5th Cir.

1996); *Hackbelt 27 Partners, L.P. v. City of Coppell*, 661 Fed. Appx. 843 (5th Cir. 2016)). The court concluded, "[h]ere, the government objectives were to improve its tax base and the general welfare * * * * It is 'at least debatable' that a rational relationship exists between the government projects and objectives." App. A7.

The Fifth Circuit's assertion of rational basis, however, stands in direct conflict with the Petitioners' complaint, which specifically alleged that TIRZ 17 was controlled by the private commercial property developers and that the drainage projects advanced the private commercial interests, not the "general welfare." App. A178. Petitioners' complaint emphasized that flooding improvements to the commercial district were known by all to be a zero sum game with the residential areas:

> Defendants' actions and inactions—knowingly sending stormwaters into the residential neighborhoods that lack adequate infrastructure, without mitigation or necessary infrastructure improvement, and favoring projects for the private commercial interests at great expense to the residential interests—should shock our collective conscience.

App. A153. Taking Petitioners' allegations as true, "the general welfare" has not increased, only the welfare of the commercial properties within TIRZ 17.[2]

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[2] The Fifth Circuit also imputed motives on Petitioners that conflicted with the complaint. The court commented that the

The Fifth Circuit's sparse analysis actually conflicts with this Court's approach in land use cases, wherein a local government's police power is just the start of the analysis. Indeed, in *Euclid*, the fact that a local government was attempting to advance the "public welfare" was the starting point, not the ending point, of the inquiry. This Court stated:

> The ordinance now under review, and all similar laws and regulations, must find their justification in some aspect of the police power, asserted for the public welfare. The line which in this field separates the legitimate from the illegitimate assumption of power is not capable of precise delimitation. It varies with circumstances and conditions.

Euclid, 272 U.S. at 387. Likewise, in *City of Cleburne*, this Court moved beyond the proffered rational bases and instead explored why homes for the mentally disabled were being treated differently—ultimately finding an "irrational prejudice" at play. 473 U.S. at 447–50.

Here, the Fifth Circuit hypothesized a rational basis that is no different than a local government's police power over "general welfare"—a standard impossible for a plaintiff to overcome. The court's decision echoes those of the Eighth and D.C. Circuit that also

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"plaintiffs did not desire the[ ] [drainage] improvements." App. A7. To the contrary, the Petitioners averred they "do not object that actual blight within TIRZ 17 should be improved, but it cannot come at the cost of transferring that blight to them." App. A183.

demanded the impossible, namely, to allege every conceivable negative of the rational basis test to survive a 12(b)(6) motion. This conception of the rational basis standard, however, is "tantamount to no review [of rational basis] at all." *F.C.C. v. Beach Commc'ns*, 508 U.S. 307, 323 n.3 (1993) (Stevens, J., concurring).

Petitioners respectfully ask this Court to review the lower court's decision, resolve the circuit conflict, and address the *Wroblewski* line of cases, wherein the rational basis test is a rebuttable presumption that a plaintiff can overcome through well-pled facts, as the Petitioners did here.

C. The Current Supreme Court Jurisprudence Does Not Address the Problem Faced by the Lower Federal Courts; Clarification is Warranted.

As commentators and jurists have observed, the Supreme Court's own decisions on rational basis are not entirely consistent, and they could be viewed as comprising two lines of cases: one line of cases has been called the "realist" view of rational basis or "rational basis with bite" or even "true rational basis"; the other line of cases has been called the "formalistic" approach, or the line of "toothless" cases. *See generally* Sandefur, *supra* at 46–49 (describing the "realist" versus "formalist" approaches to rational basis, the reason for those terms, and cases in support); Andrew Koppelman, *Doma, Romer, and Rationality*, 58 Drake L. Rev. 923, 928 (2010) (describing the term "rational basis with

bite" as distinguished from "toothless" cases) (citing Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 689 (3d ed. 2006)); Donald Marritz, *Making Equality Matter (Again): The Prohibition Against Special Laws in the Pennsylvania Constitution*, 3 Widener J. Pub. L. 161, 176 (1993) (describing "true rational basis" cases where courts engage in a "true search for rationality"); *cf. Lawrence*, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring) (describing a "more searching form of rational basis review" in certain cases).

The first line of cases—the "realist" approach or "rational basis with bite"—stems from cases such as *Lawrence*, 539 U.S. 558, or *City of Cleburne*, 473 U.S. 432, or *Department of Agric. v. Moreno*, 413 U.S. 528 (1973). For example, in *City of Cleburne*, the Court ruled that a city's decision to deny a permit to a home for the mentally handicapped lacked any rational basis. The Court examined the factual record, including the city council's objections to the permit and the unspoken biases that were at issue, to make this determination. 473 U.S. at 448–50. In this first line of cases, the Court's decisions evidence a much more rigorous analysis to determine whether a governmental decision rationally advances a legitimate governmental interest. *E.g.*, *Lawrence*, 539 U.S. 558; *Moreno*, 413 U.S. at 536–37. These decisions implicitly reject the view that one must affirmatively negate or disprove all conceivable rational bases. In at least one case, the Court indicated that a court's hypothesizing its own *post-hoc* rationalizations for a legislative action leads to poor

analysis. *See*, *e.g. Eistenstadt v. Baird*, 405 U.S. 438, 450–51 (1972) (stating it "is plain that Massachusetts had no such purpose in mind before the enactment [of the statute]").

The second line of cases—the so-called "formalistic" approach—is perhaps most notably represented in *F.C.C. v. Beach Communications*. In that case, the Court stated that, on a rational basis review, the plaintiff has the burden "to negative every conceivable basis which might support [the governmental act or classification]" and that legislative choices "may be based on rational speculation unsupported by evidence or empirical data." 508 U.S. at 313–16 (internal quotation marks and citations omitted); *see also Heller v. Doe by Doe*, 509 U.S. 312, 319 (1993) (relying on *F.C.C. v. Beach Commc'ns*). Some have critiqued this line of cases as overly deferential to governmental actors. *E.g.*, *F.C.C. v. Beach Commc'ns, Inc*., 508 U.S. at 323 n.3 (Stevens, J., concurring) ("This formulation sweeps too broadly, for it is difficult to imagine a legislative classification that could not be supported by a 'reasonably conceivable state of facts.' Judicial review under the 'conceivable set of facts' test is tantamount to no review at all."); Clark Neily, *No Such Thing: Litigating Under the Rational Basis Test*, 1 NYU J.L. & Liberty 898, 900 (2005).

These seminal cases, however, were not decided on 12(b)(6) motions, and consequently, this Court has not provided guidance on whether the rational basis might be limited or circumscribed when it competes with a plaintiff's well-pled complaint. Even so, language from the majority opinion in *F.C.C. v. Beach Communications*

has been employed by courts and litigants to achieve dismissal at the 12(b)(6) stage. *See Hettinga*, 677 F.3d at 479 (relying on an earlier D.C. Circuit case that drew from *Heller* and *F.C.C.*); App. A78 (referencing TIRZ 17's argument that the plaintiffs must "negate any possible rational [sic]").

Perhaps due to the ongoing confusion related to any limits of rational basis review, litigants have attempted to bring this issue before this Court in the past. *See Hettinga v. United States*, 770 F. Supp. 2d 51 (D.D.C. 2011) (dismissing a legislative challenge at the motion to dismiss stage), *aff'd*, 677 F.3d 471 (D.C. Cir. 2012), *cert. denied*, 568 U.S. 1088. Other litigants have sought clarity on the weight that evidence should be given under rational basis review. *See Niang v. Tomblinson*, 879 F.3d 870 (8th Cir. 2018), *cert. granted*, 2018 WL 1785178 (instructing that case be dismissed as moot).

Direction from this Court on the application of the rational basis test during a lower court's 12(b)(6) review will provide crucial guidance to litigants and courts. Without guidance, lower courts, such as the Fifth Circuit, are engaging in an unusual sort of judicial activism—one that involves hypothesizing theories, and it is easily susceptible to abuse. Petitioners respectfully ask this Court to review the Fifth Circuit's decision to ensure that the rational basis test is not turned into a "rubber stamp" of challenged governmental action. *Hadix v. Johnson*, 230 F.3d 840, 843 (6th Cir. 2000).

II. This Court's Intervention is Needed on the Scope of the Property Interest Necessary to Bring a Substantive Due Process Challenge to a Local Government's Land Use Decisions.

In their complaint, Petitioners alleged that Respondents "interfered with [their] use of their homes" and "acted arbitrarily and abused their power in their actions and inactions that cause[d] flooding and damage of Plaintiffs' properties." App. A190. The Fifth Circuit held that Petitioners' "claimed right to use their homes" was insufficient to trigger any substantive due process protections. App. A6. This Court has not yet addressed the contours, if any, of the property interest necessary to bring a substantive due process challenge.

This Court has long established, however, that a local government's land use decisions affecting real property can violate substantive due process if the governmental decision is arbitrary and unreasonable. *E.g.*, *City of Cleburne*, 473 U.S. at 450 (holding that zoning ordinance violated substantive due process for its arbitrary treatment of mental disability facilities); *Nectow*, 277 U.S. 183 (invalidating a zoning ordinance affecting plaintiffs' real property that did not bear a substantial relation to public health, safety, and morals). In *Euclid*, this Court determined that "the existence and maintenance of the ordinance in effect constitutes a present invasion of appellee's property rights" but held that the zoning ordinance passed constitutional muster. 272 U.S. at 386. Those Supreme

Court cases, starting with *Euclid*, have implied that individuals have a constitutional property interest in their use or ownership of real property that may give rise to a substantive due process violation.

Without this Court's guidance, the lower courts are devising a range of tests for determining whether, as a threshold matter, a plaintiff has the necessary property interest to bring a substantive due process challenge to a land use decision. For example, the Fifth Circuit's holding below weakens substantive due process protections by stating, without further analysis, that use of one's home is an "unsupported" basis for a substantive due process challenge. App. A6. In a different approach, several other circuits have addressed the issue by borrowing from this Court's jurisprudence in procedural due process cases, in particular, *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972), to investigate whether a plaintiff has a property interest in a benefit conferred by state law. In sharp contrast to that approach, the Third Circuit has broadly determined that property interests suffice for substantive due process challenges. But the case law is not uniform. In the zoning context in particular, the Sixth Circuit expressed, "The lack of uniformity among the circuits in dealing with zoning cases of the 'arbitrary and capricious substantive due process' category is remarkable." *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1217 (6th Cir. 1992).

Because of the recognized circuit split, and the disparate tests that have emerged, this Court's guidance is sorely needed.

A. There is an Acknowledged Circuit Split, with Some Circuits Adopting This Court's Procedural Due Process Jurisprudence.

Perhaps due to this Court's limited jurisprudence on the issue, "[i]n the land-use context [appellate] courts have taken (at least) two different approaches for determining the existence of a property interest for substantive due process purposes." *George Wash. Univ.*, 318 F.3d at 206–07; *see DeBlasio*, 53 F.3d at 598 ("Our substantive due process inquiry is rendered even more difficult by the paucity of Supreme Court guidance."). On the one hand, the Third Circuit has held that ownership in land "is a property interest worthy of substantive due process protection." *DeBlasio*, 53 F.3d at 600. Accordingly, in situations where a governmental decision "impinges upon a landowner's use and enjoyment of property," a land-owning individual could state a substantive due process claim if he or she alleged "that the decision limiting the intended land use was arbitrarily or irrationally reached." *Id*. at 601.

The approach of the Third Circuit stands in contrast to that of the Second, Fourth, Eighth, and Eleventh Circuits, which has focused on "the structure of the land-use regulatory process" that gave rise to the alleged violation. *See generally George Wash. Univ.*, 318 F.3d at 207 (describing these approaches). In these other four circuits, in cases involving zoning decisions or permitting decisions, courts have looked to "the degree of discretion to be exercised by state officials in granting or withholding the relevant permission." *Id*. "Under this approach, whether a property-holder

possesses a legitimate claim of entitlement to a permit or approval turns on whether, under state and municipal law, the local agency lacks all discretion to deny issuance of the permit or to withhold its approval." *Gardner v. City of Baltimore Mayor & City Council*, 969 F.2d 63, 68 (4th Cir. 1992) (discussing the "claim of entitlement" standard as applied to "substantive due process challenges to municipal land-use decisions"); *see also Greenbriar Vill., L.L.C. v. Mountain Brook, City*, 345 F.3d 1258, 1262 (11th Cir. 2003) (explaining that, "to the extent that [the plaintiff] predicates its substantive due process claim directly on the denial of its state-granted and [state] defined property right in the permit, no substantive due process claim is viable"); *RRI Realty Corp. v. Village of Southampton*, 870 F.2d 911, 917 (2d Cir. 1989) (holding that developer was not "entitl[ed] to the stage-two permit, sufficient to invoke the protection of the Due Process Clause"); *Bituminous Materials v. Rice County*, 126 F.3d 1068, 1070 (8th Cir. 1997) ("A claim to entitlement arises, for [substantive due process] purposes, when a statute or regulation places substantial limits on the government's exercise of its licensing discretion.").

In *Gardner*, for example, a property owner and developer brought suit against the city for failure to approve their proposals for residential development. The court held that the developer "had no legitimate claim of entitlement to the [public works] agreement and therefore did not possess a property interest within the cognizance of the Fourteenth Amendment." 969 F.2d at 68. The *Gardner* court explained that any significant

discretion conferred upon the local officials with respect to a permitting decision defeats a plaintiff's claim of a property interest. *Id*.

The *George Washington University* court attributed the Tenth Circuit as among that line of cases, but in fact the Tenth Circuit applies the "entitlement" inquiry only to a procedural due process challenge. According to the Tenth Circuit, "[a]uthority in this circuit is unclear on what interest is required to trigger substantive due process guarantees." *Jacobs, Visconsi & Jacobs Co. v. City of Lawrence*, 927 F.2d 1111 (10th Cir. 1991).

It is evident that the Second, Fourth, Eighth, and Eleventh Circuits have imported this Court's procedural due process jurisprudence to the substantive due process context. The *Gardner* court specifically observed that "[s]everal circuits have applied *Roth*'s 'claim of entitlement' standard to substantive due process challenges to municipal land-use decisions." 969 F.2d at 68; *see also RRI Realty Corp.*, 870 F.2d at 917 ("[O]ur post-*Roth* cases considering a landowner's claim of a due process violation in the denial of an application for regulated use of his land have been significantly influenced by the *Roth* 'entitlement' analysis."); *Greenbriar Vill.*, 345 F.3d at 1262 (relying on *Roth*).

No decision from this Court, however, has clarified whether importing procedural due process law into the substantive due process context is appropriate. According to the Tenth Circuit at least, "[r]ights of

substantive due process are founded not upon state provisions but upon deeply rooted notions of fundamental personal interests derived from the Constitution." *Mangels v. Pena*, 789 F.2d 836, 839 (10th Cir. 1986) (citing *Regents of the Univ. of Michigan v. Ewing*, 474 U.S. 214, 229 (1985) (Powell, J., concurring)). The reason that procedural due process cases focus on a plaintiff's entitlement to a benefit is because, under *Roth*, property interests "and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." 408 U.S. at 577; *accord Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 756 (2005) (describing that, in procedural due process cases, to have a property interest in a benefit, a person must have a legitimate claim of entitlement to it). Currently, no decision from this Court indicates that substantive due process should be subject to the same analysis as procedural due process in cases where a plaintiff challenges arbitrary governmental land use decisions.

The acknowledged circuit split, including several circuits' appropriating the procedural due process analysis from *Roth*, needs this Court's intervention.

B. The Fifth Circuit's Determination that Petitioners, as Real Property Owners, do not have a Constitutionally Protected Right to Challenge the City's Land Use Decisions Worsens the Circuit Split.

Petitioners alleged that a series of city ordinances, codifying land use decisions for controlling the flow of

stormwaters, were arbitrary and deprived them of their use of their real property. Petitioners own the real property that was damaged and devalued by the government's land use decisions, yet the Fifth Circuit held that their right to use their homes is "too broad and unsupported by caselaw." App. A6.

The Fifth Circuit's holding disputed the sufficiency of Petitioners' property interest, and in so doing, falls in line with the Second, Fourth, Eighth, and Eleventh Circuit decisions demanding something more than simply property ownership to allege a substantive due process violation.

As Justice Powell opined, "[w]hile property interests are protected by procedural due process even though the interest is derived from state law rather than the Constitution, substantive due process rights are created only by the Constitution." *Regents of Univ. of Michigan*, 474 U.S. at 229 (Powell, J., concurring) (internal citation omitted). This is true because this Court's "established method of substantive due-process analysis has * * * regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition." *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997). The Fifth Circuit's overt questioning, in the decision below, of whether Petitioners' use of their homes qualified for substantive due process protection appears to run counter to this Court's "established method of substantive-due-process analysis." *See id*.

Prior to the decision below, however, the Fifth Circuit appeared to follow the Third Circuit's more generous articulation of a property owner's protected right in his or her own real property. *See Simi Inv. Co.*, 236 F.3d at 253–54 (relying in part on the Third Circuit's *DeBlasio* case and finding a property interest in a landowner's access to a public street). As an example, in *Mikeska v. City of Galveston*, the Fifth Circuit reviewed a city's decision to deny a permit to the plaintiffs to reconnect their homes to utility services after a tropical storm. The Fifth Circuit affirmed the district court's determination that the plaintiffs had a "constitutionally protected right in their homes and in access to public utility services." 451 F.3d at 379. Of note, the Fifth Circuit recognized that the city "had some authority to deny utility permits pursuant to its state law obligations" but that, "in exercising that discretionary authority, the City must still conform to its constitutional obligation." *Id*. at 380. The *Mikeska* court's determination that the plaintiffs had a protected property interest in these circumstances is consistent with other cases from the court. *See Conroe Creosoting Co. v. Montgomery Cnty*., 249 F.3d 337, 341 & n.18 (5th Cir. 2001) (explicitly considering the "broader array of property rights to which the company is entitled" including "the right to acquire and own realty and personalty").

In sum, the caselaw illustrates a wide variety of approaches on addressing a plaintiff's property interest in the substantive due process context. The divergent approaches of the circuit courts underscore the need for this Court's input on the scope of the interest

necessary to sustain a substantive due process challenge and whether, in land use cases, an ownership interest in land is a protected property interest for constitutional purposes. Only this Court can resolve this important constitutional issue.

For all these reasons, Petitioners respectfully ask this Court to grant this petition and exercise its supervisory powers to provide guidance on the foregoing issues of constitutional and procedural law.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

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