No. 19-197

In the
Supreme Court of the United States

LAVERN BEHM,
Petitioner,
v.
MONTANA-DAKOTA UTILITIES CO.,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of North Dakota

BRIEF FOR THE NORTHWEST LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

Pursuant to Supreme Court Rule 37.2(a), the Northwest Legal Foundation submits this brief amicus curiae in support of Petitioner Lavern Behm.[1]

The Northwest Legal Foundation was established in 1988 for the purpose of stopping government abuse of citizen's rights, specifically focusing on property rights.[2] The Northwest Legal Foundation believes that

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[1] All parties were given at least 10 days notice and have consented in writing to the filing of this brief. No counsel for any party authored this brief in whole or in part and no person or entity made a monetary contribution specifically for the preparation or submission of this brief. The brief was authored by the Northwest Legal Foundation; we note that Attorney Boughey was consulted and provided editorial assistance. It should be further noted that Justice Sanders and Mr. Hale "cut and pasted" from a prior brief submitted by the Northwest Legal Foundation written by Mr. Boughey in 2013 in the case of *Marvin M. Brandt Revocable Trust v. United States*, No. 12-1173, 572 U. S. ___ (2014). No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

[2] Robert Hale, a founding member of the Northwest Legal Foundation, has personally or through the Foundation asserted property rights or limited government in numerous actions, including *Hale v. State of North Dakota*, 2012 ND 148, ¶ 35, 818 N.W.2d 684, 696, *cert. denied* 133 S.Ct. 847 (Jan. 7, 2013); *Gowan v. Ward County Commission*, 2009 ND 72, 764 N.W.2d 425, cert. denied 558 U.S. 879 (Oct. 5, 2009); *City of Seattle v. McCoy*, 101 Wash.App. 815, 4 P.3d 159, Wash.App. Div. 1, July 17, 2000 (amicus brief filed by Northwest Legal Foundation involving decision of lower court to prevent property owners from using property vacated, appellate court holding (1) drug nuisance statute was unconstitutional taking of property as applied to owners; (2) common-law nuisance exception did not apply to the otherwise compensable taking; and (3) drug abatement statute violated due process as applied); *Richmond v. Thompson*,130 Wash.2d 368, 922

property rights are fundamental rights that should be recognized as rights of individuals that are provided the same protections as other fundamental rights.

P.2d 1343, Wash., September 26, 1996 ("Northwest Legal Foundation and other amici ask this court to recognize a common law absolute privilege for citizen complaints concerning police conduct" – issue not raised below in a timely manner so not decided on appeal); *Postema v. Snohomish County*, 83 Wash.App. 574, 586-587, 922 P.2d 176, 183, Wash.App. Div. 1, September 09, 1996 ("Amicus Northwest Legal Foundation argues that RCW 36.70A.210 creates a city-county government in violation of Wash. Const., art. 11 § 16, which provides that '[n]o such 'city-county' shall be formed except by a majority vote of the qualified electors voting thereon in the county.' NLF also argues that RCW 36.70A.210 is void for vagueness."); *Cobb v. Snohomish County*, 64 Wash.App. 451, 829 P.2d 169, Wash.App. Div. 1 (1991); *R/L Associates, Inc. v. City of Seattle*, 113 Wash.2d 402, 780 P.2d 838 (1989).

Richard Sanders served as the Northwest Legal Foundation counsel of record in the Washington cases listed immediately above. He was admitted to the United States Supreme Court on January 12, 1976, No. 105718. From 1995 through 2011 Justice Sanders served on the Washington Supreme Court as an Associate Justice. In the case of *State ex rel. Public Disclosure Comm. v. Wea*, 130 P.3d 352 (Wash. 2006), Justice Sanders dissented, asserting that the Washington Supreme Court "majority turns the First Amendment on its head." *Id.* at ¶ 65. The United States Supreme Court agreed, adopting Justice Sanders' analysis in *Davenport v. Washington Ed. Assn.*, 551 U.S. 177 (2007).

SUMMARY OF ARGUMENT

This Court should recognize that an individual's property rights are fundamental rights that must be protected by the courts and as such this Court should apply strict-scrutiny analysis to any government actions involving the taking of a property right from an individual or any limitation of the use of property by a property owner. In addition, any limitation or condition imposed by the government on a person's property should be rejected unless, under the strict-scrutiny analysis, there is a strong and compelling basis for such limitation or condition.

ARGUMENT

I. Property Rights are a Fundamental Right Retained by Individuals

The purpose of this amicus brief is to suggest to the Court that now is the time to accept Justice Thomas' view that this Court should "revisit our Public Use Clause cases and consider returning to the original meaning of the Public Use Clause: that the government may take property only if it actually uses or gives the public a legal right to use the property." *Kelo v. New London*, 545 U.S. 469, 521 (2005) (Thomas, J., dissenting).We also believe that now is the time to declare, once and for all, that the ownership of private property is a fundamental right.

In our view the case of *Lavern Behm v. Montana-Dakota Utilities Co.* demonstrates governmental abuse of its power as to private property rights as well as legislative over-stepping of its legitimate authority and the concomitant failure of the judicial branch to correct

this wrong. In fact, in the *Behm* case the North Dakota Supreme Court has unfortunately used its authority to further eradicate and reduce the rights of individuals in their property.

Mr. Behm owns a quarter of land abutting a county road. This road rests upon a 66 foot public right of way. The right of way extends 33 feet on each side of the county section line. Approximately 28 feet (14 feet on each side of the section line) is improved with an asphalt roadway. Adjacent to the improvement is a 19 foot easement way. The easement was established for the purpose of locating utilities such as water lines, power lines, telephone lines, gas lines and such.

Montana-Dakota Utilities Co. desires to put in a gas pipe line to service one sole customer, Burlington Northern Railway. However, fuel to heat the switches for the railroad had been provided for many years with propane tanks adjacent to the tracks which did not impose on Mr. Behm's property.

Instead of using the propane tanks or the established public utility easement right of way, MDU chose to exercise a "private" use of the governmental power of eminent domain to condemn Mr. Behm's land and put its pipe line parallel (10 feet outside the right of way) to the public utility easement right of way on Mr. Behm's private property.

Mr. Behm objected, arguing that there was no necessity, no general public need, and that alternatives and better options were available. The lower court (state judge Gary Lee, presiding) held in Mr. Behm's favor. Judge Lee issued a written opinion citing the

applicable law and including specific findings of fact that none of the conditions justifying the use of eminent domain were met. In fact the district court found specifically that there was no necessity—and that this taking was in reality merely a private convenience allotted to one single private entity.

The utility company appealed Judge Lee's decision to the North Dakota Supreme Court, which reversed the decision of the lower court and sent it back to the district court to determine just compensation. In its reversal the North Dakota Supreme Court ruled that whether or not there was a general public need or a necessity for the taking of the easement is a determination that is to be made exclusively by the entity employing the power of eminent domain, that is, in this case, the private utility company, MDU.

MDU obtained the power of eminent domain through legislative enactment. However, the legislative body has failed to protect individual private property rights and instead gave the power of governmental eminent domain to a private entity. The North Dakota Supreme Court failed to ensure that the conditions of the use of eminent domain be followed (such as requiring necessity and a public use) and instead allowed the entity using the condemnation power to decide alone whether the taking should occur, relinquishing any judicial review as to the taking.

This case provides an appropriate vehicle for this Court to declare that the right of property is a fundamental right that deserves the protection afforded to all fundamental rights. As such, this Court has the opportunity to require that all state and federal

courts—as a function of the judiciary in protecting fundamental property rights—apply strict scrutiny in reviewing any and all actions our governmental institutions take when imposing laws, rules, regulation and assessments on private property.

In *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972) (Stewart, J.), this Court observed, "[T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights.…That rights in property are basic civil rights has long been recognized." James W. Ely, Jr., THE GUARDIAN OF EVERY OTHER RIGHT – A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS, 2d ed., Oxford University Press (1998).

According to Professor Ely, United States Supreme Court cases demonstrate a long history of protecting property rights and engender two primary themes: first, "the protection of private property [serves] as a means to uphold individual liberty against governmental overreaching," and second, "this commitment to liberty [is] reinforced by a second theme, the importance of secure property rights as the basis for economic growth." *Ibid.*

An individual's right to property is a fundamental right and should be recognized as such. Justice Alito has previously described "fundamental rights" as rights and liberties that are deeply rooted in our Nation's history and tradition and implicit in the concept of ordered liberty that without such right liberty or justice would not exist:

> But it is well established that any "substantive" component to the Due Process Clause protects only "those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition,' " *Washington v. Glucksberg,* 521 U.S. 702, 720–721, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997); *Snyder v. Massachusetts,* 291 U.S. 97, 105, 54 S.Ct. 330, 78 L.Ed. 674 (1934) (referring to fundamental rights as those that are so "rooted in the traditions and conscience of our people as to be ranked as fundamental"), as well as " 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.' " *Glucksberg, supra,* at 721, 117 S.Ct. 2258 (quoting ****2715*** *Palko v. Connecticut,* 302 U.S. 319, 325–326, 58 S.Ct. 149, 82 L.Ed. 288 (1937)).

U.S. v. Windsor, 570 U.S. 744, 807 (2013)(Alito, J., dissenting).

The rights of individual to own property, possess property, and be safe from intrusions and limits upon the ownership and use of property are the hallmark of our country.

The entire purpose of a fundamental right, and the recognition of a fundamental right, is to protect citizens from government overreach. Such protections will not exist unless this Court adopts viable legal standards that would allow for the protection of property rights.

II. Any Limitation or Condition by the Government on a Person's Property Rights Should Engender Strict Scrutiny Analysis

The federal government was explicitly created as one of limited powers. Indeed, the Framers of the Constitution took the time to list specific enumerated powers in Article I, Section 8. Moreover, ratification of the new Constitution was initially thwarted by the arguments of the Anti-Federalists, that is until there was a consensus that upon ratification a Bill of Rights would be proposed by the First Congress as a limit on the federal government's powers. Twelve amendments were proposed by Congress in 1791, ten of which were ratified and became our Bill of Rights.

This constitutional history clearly indicates that the Framers and the states that ratified the Constitution intended that the federal government would be a *limited* federal government, not only by the powers explicitly conferred on that new government, but also by the additional limiting factor imposed upon the federal government by the adoption of the Bill of Rights. And of course, any acts of Congress—and any principles employed to interpret the powers of Congress or the Constitution—should include, as a starting point, the reality that the powers of the federal government are limited and should be construed accordingly. We further assert that the same principles should apply to state statutes and state governments.

This limiting concept should apply through the application of the Due Process Clause or the Equal Protection Clause applicable to all government entities through the Fifth and Fourteenth Amendments to the

Constitution. Unfortunately, many courts have failed to apply this basic concept of limited government and have instead countenanced numerous government actions and takings of private property through the application of the "rational-basis test." The rational basis test is in actuality inherently *irrational* in that it relegates complete discretion to the governmental entities. Such unfettered deference to government actions negates not only the limited role of government; it also at the same time negates the inherent rights of individuals by failing to properly protect property rights. Simply put, the rational-basis test protects the government when it takes private property, instead of its citizens.

We must return to those principles which were the foundation of our form of government. The American experience was founded upon the concept of individual liberty. Such liberty necessitated that individuals—not governments, kings, emperors and despots—are endowed with "certain inalienable rights."[3]

The concept of the supremacy of individual rights had been previously percolating for at least a hundred years in the writings of English and French thinkers. It is not without significance that these inalienable rights were articulated in the opening paragraph of the Declaration of Independence as rights which derived from "Nature and Nature's God." Within these words is

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[3] Thus, the colonies of England in North America birthed the concept and, for the first time, fermented a genuinely new foundation of individual liberty and anointed individuals as those who harbored and were entitled to these "certain inalienable rights."

the powerful idea that the Laws of Nature and Nature's God, not man, formed the underpinning of our Declaration of Independence and our ensuing Constitution.

The second paragraph of the Declaration of Independence articulated the self-evident truths that have built the most free, most productive, highest standard of living and most expansive opportunities for the greatest number of human beings in the history of the world. The Declaration of Independence begins by acknowledging that "all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness."[4]

From this intellectual seed flowed a Constitution that has been the envy of and an example to the World.

But unfortunately there have been significant efforts over the last 80 years to disenfranchise individuals from the inalienable rights on which the foundation of our liberty is based.

The subject case illustrates how our legislative bodies and judicial system have failed to recognize and protect our individual liberty—especially when it comes to protecting our private property rights.

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[4] As clearly articulated in the main brief submitted by Mr. Behm for the acceptance of certiorari in this case, the concept of property rights should be considered to be sacred and worthy of the same level of protections as personal rights. Indeed, as shown in the main brief submitted by Mr. Behm, property rights, when properly understood, are themselves personal rights.

We pray that this Court seize the opportunity this case offers.

For far too long our governmental institutions, at all levels, have either ignored or arrogantly case by case rendered property rights to little more than nothingness. In so doing government has failed in its prime responsibilities as articulated in the Declaration of Independence—that is to secure these rights.

We recognize that the Declaration of Independence is not the law of the land. However, it clarifies the purpose of the laws of our land and the limits of those laws. But the Constitution—that uses the words of this seminal document—*is* the law of the land, and within the Bill of Rights the people of the United States—through ratification of the Fifth Amendment—adopted and gave legal sustenance to the inherent right to life, liberty, and property.

Our Founding Fathers' beliefs were boldly announced by these originating documents that set forth the proper role of government as well as articulated the just response of the people if and when that role is not fulfilled. Our form of government was devised as an effort to *limit* governments' powers and to avoid allowing those powers to become destructive to our individual rights.

This Court has the opportunity to at least begin to correct the long smoldering abuse by our governing bodies of private property owners and their rights.

What Mr. Behm has suffered is intolerable. What is even more intolerable is the gross abuse of the power of the Supreme Court of the State of North Dakota by

failing to protect private property rights and allowing a taking in a situation where it is not necessary and does not involve a public use.

Unless a person can be secure in his or her property, all other personal rights are subject to the same risk of eradication by unfettered government.

According to Justice Thomas, "a string of our cases construing the Public Use Clause to be a virtual nullity, without the slightest nod to its original meaning. In my view, the Public Use Clause, originally understood, is a meaningful limit on the government's eminent domain power. Our cases have strayed from the Clause's original meaning, and I would reconsider them." *Kelo v. New London*, 545 U.S. 469, 506 (2005) (Thomas, J., dissenting). Today private property owners retain virtually no property rights. Property owners can do almost nothing with their property without first seeking and receiving government permission.

These permissions are themselves abusive and in virtually all cases excessive. Any "protections" from the use (and misuse) of these police powers is in name only, as clearly demonstrated by the final result of this Court's countenance of the taking in *Kelo*: An empty, weed-strewn lot given over for the sake of "economic development." The law of property has been turned on its head: Instead of the government having to justify the limits and conditions imposed on the use of property, it is the property owner who must—hat in hand—obtain permission to use his or her private property and in the process be forced to accept

whatever conditions and limits the governmental entity demands.[5]

The Supreme Court of the United States is the last hope of Mr. Behm. Possibly it is the only hope we the people have of preventing the abuses of our fundamental rights in our real property—before they are irretrievably consumed, digested and ejected from the bowels of government.

Lavern Behm v. Montana-Dakota Utilities Co. provides an opportunity for this Court to begin the necessary rehabilitation of a free peoples' rights in their property. This Court can, if it chooses, reestablish private property rights as the fundamental rights held by free people. As stated by Justice Thomas, "It is the last of these liberties, the Takings Clause, that is at issue in this case. In my view, it is 'imperative that the Court maintain absolute fidelity to' the Clause's express limit on the power of the government over the individual, no less than with every other liberty expressly enumerated in the Fifth Amendment or the Bill of Rights more generally." *Kelo*

[5] In our view, zoning restrictions, regulations, and revenue-raising schemes advanced and implemented by state or federal governments that restrict and condition private property rights improperly take away and violate the rights of property owners. Private property owners can protect themselves by the proper application of common law remedies such as nuisance, tort, and contract law. The government should cease and desist in managing and regulating private property and leave that to the private property owners themselves. Surrounding land owners and the public at large are sufficiently protected by application of the tenents contained within the domain of these laws.

v. New London, 545 U.S. 469, 507 (2005) (Thomas, J., dissenting).

We hope this Court believes private property rights are fundamental rights. As such we urge the Court to make it clear that any and all governmental actions limiting or conditioning the use of an individual's property must be viewed through the legal lens of strict scrutiny.

Any and all steps our governmental institutions take in imposing laws, rules, regulations and assessments on private property must be strictly reviewed as to whether the taking is actually necessary and for a public use—in our view under the strict scrutiny standard. As stated by Justice Thomas, "[t]he public purpose interpretation of the Public Use Clause also unnecessarily duplicates a similar inquiry required by the Necessary and Proper Clause. The Takings Clause is a prohibition, not a grant of power: The Constitution does not expressly grant the Federal Government the power to take property for any public purpose whatsoever. Instead, the Government may take property only when necessary and proper to the exercise of an expressly enumerated power." *Kelo v. New London*, 545 U.S. 469, 511 (2005) (Thomas, J., dissenting).

Due process and equal protection must be part and parcel of all actions taken by governmental bodies where private property rights are at issue. The right of private property without the protection of due process is no longer a right and instead becomes an empty shiboleth without consequence.

This Court should recognize that an individual's property rights are fundamental rights that must be protected by the courts and as such this Court should rule that all courts and governmental entities must apply strict-scrutiny analysis to any government actions involving the taking of a property right from an individual or any limitation or condition on the use of property by a property owner. In addition, any encumbrance or limit on a person's property should be rejected unless upon application of strict-scrutiny analysis there is a strong and compelling basis for such governmental-imposed limits on the individual's use of his or her property.

CONCLUSION

For the reasons stated above, we respectfully request that this Court accept certiorari in this case.

Dated this 1st day of October, 2019.

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