No. 22-50908

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RAFAEL MARFIL, VERGE PRODUCTIONS, LLC, ENRICO MARFIL, NAOMI MARFIL, KOREY A. RHOLACK, DANIEL OLVEDA, and DOUGLAS WAYNE MATHES
Plaintiffs - Appellants,

v.

CITY OF NEW BRAUNFELS, TEXAS,
Defendant - Appellant.

Appeal from the United States District Court
for the Western District of Texas, Waco Division
No. 6:20-CV-248 (Hon. Alan D. Albright)

UNOPPOSED MOTION OF PACIFIC LEGAL FOUNDATION, MANHATTAN INSTITUTE, AND REASON FOUNDATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF APPELLANTS

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INTRODUCTION AND RELIEF REQUESTED

Pursuant to Federal Rule of Appellate Procedure 29 and Fifth Circuit Rule 29, *amici* applicants Pacific Legal Foundation ("PLF"), Manhattan Institute, and Reason Foundation respectfully ask this Court to grant their unopposed motion to file the attached proposed brief *amicus curiae* in support of Appellants Rafael Marfil *et al.*, and in support of reversal. Counsel for the parties have consented to the filing of this motion and the brief *amicus curiae*.

INTEREST OF *AMICI CURIAE*

PLF was founded in 1973 and has since become widely recognized as the most experienced nonprofit legal foundation of its kind. PLF attorneys have participated as lead counsel in several landmark Supreme Court cases in defense of the right of individuals to make reasonable use of their property. *See*, *e.g.*, *Cedar Point Nursery v. Hassid*, 141 S.Ct. 2063 (2021); *Pakdel v. City & Cnty. of San Francisco*, 141 S.Ct. 2226 (2021); *Knick v. Twp. of Scott*, 139 S.Ct. 2162 (2019); *Murr v. Wisconsin*, 137 S.Ct. 1933 (2017); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Suitum v. Tahoe Reg'l Plan. Agency*, 520 U.S. 725 (1997). PLF attorneys have also participated as *amici curiae* in numerous property

rights cases. *See, e.g.*, *Marvin M. Brandt Revocable Tr. v. United States*, 572 U.S. 93 (2014), *Ark. Game & Fish Comm'n v. United States*, 568 U.S. 23 (2012); *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); and *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

Manhattan Institute is a nonprofit public policy research foundation whose mission is to develop and disseminate new ideas that foster greater economic choice and individual responsibility. To that end, it has historically sponsored scholarship and filed briefs supporting constitutional protections for property rights and meaningful judicial review of government actions that violate those protections.

Reason Foundation is a national, nonpartisan, nonprofit think tank founded in 1978. Reason's mission is to advance a free society by applying and promoting libertarian principles and policies—including free markets, individual liberty, and the rule of law. Reason supports dynamic market-based policies that allow and encourage individuals and voluntary institutions to flourish. Reason advances its mission by publishing *Reason* magazine, as well as commentary on its websites, and by issuing policy research reports.

This case interests *amici* because it presents an opportunity to establish that the "rational basis" standard of review still allows legislation to be invalidated by evidence showing that the purpose of the regulation is illegitimate or that the means used to accomplish the ends are irrational.

REASONS WHY THE MOTION SHOULD BE GRANTED

Amicus applicants' breadth of experience, expertise, and unique perspectives on these issues will assist this Court in considering the complex questions of constitutional law at the heart of this appeal. Their interest in this appeal is in presenting a coherent interpretation of the Fourteenth Amendment's Due Process of Law Clause in accord with controlling U.S. Supreme Court precedent and the Constitution's defense of individual liberty and the freedom against the irrational governmental deprivation of property rights. Based on this perspective, the proposed *amicus* brief urges this Court to hold that the "rational basis" standard of review operates as a rebuttable presumption in favor of legislation that *may be overturned* by evidence showing that the purpose of the regulation is illegitimate or that the means used to accomplish the ends are irrational. *United States v. Carolene Prods. Co.,* 304 U.S. 144, 152 (1938)

("[F]or regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.").

The proposed *amicus* brief argues that such a conclusion is in the public interest because a standard that does not require meaningful judicial engagement with the facts, frees any legislature to contrive whatever justification for a law that stands the best chance of passing a mere "magic words" test. Allowing the rule articulated by the court below to stand would undermine private property rights—and other constitutionally protected rights and liberties—by allowing such abuse to continue unchecked.

CONCLUSION

For the reasons set forth above, the Court should grant this unopposed Motion and permit PLF, Manhattan Institute, and Reason Foundation to submit this brief *amicus curiae*.

DATED: December 16, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

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Attorney for Amicus Curiae

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I hereby certify that on December 16, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

s/ Sam Spiegelman
SAM SPIEGELMAN

No. 22-50908

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BRIEF *AMICUS CURIAE* OF PACIFIC LEGAL FOUNDATION, MANHATTAN INSTITUTE, AND REASON FOUNDATION IN SUPPORT OF APPELLANTS AND REVERSAL

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CERTIFICATE OF INTERESTED PERSONS

No. 22-50908; *Marfil v. City of New Braunfels*

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualifications or recusal.

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IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

Pacific Legal Foundation was founded in 1973 and has since become widely recognized as the most experienced nonprofit legal foundation of its kind. PLF attorneys have participated as lead counsel in several landmark Supreme Court cases in defense of the right of individuals to make reasonable use of their property. *See, e.g.*, *Cedar Point Nursery v. Hassid*, 141 S.Ct. 2063 (2021); *Pakdel v. City & Cnty. of San Francisco*, 141 S.Ct. 2226 (2021); *Knick v. Twp. of Scott*, 139 S.Ct. 2162 (2019); *Murr v. Wisconsin*, 137 S.Ct. 1933 (2017); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Suitum v. Tahoe Reg'l Plan. Agency*, 520 U.S. 725 (1997). PLF attorneys have also participated as *amici curiae* in numerous property rights cases. *See, e.g.*, *Marvin M. Brandt Revocable Tr. v. United States*, 572 U.S. 93 (2014), *Ark. Game & Fish Comm'n v. United States*, 568 U.S. 23 (2012); *Lingle v. Chevron U.S.A., Inc.*, 544 U.S.

[1] Pursuant to Fed. R. App. P. 29(a), Pacific Legal Foundation (PLF), Manhattan Institute, and Reason Foundation submit this brief amicus curiae in support of Appellants. In accordance with Fed. R. App. P. 29(a)(4)(E), counsel for all parties have consented to the filing of this brief. *Amici* affirms that no counsel for any party authored this brief in whole or in part, no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than *amici*, their members, or their counsel have made a monetary contribution to this brief's preparation or submission.

528 (2005); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); and *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

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This case interests *amici* because it presents an opportunity to establish that the "rational basis" standard of review still allows legislation to be invalidated by evidence showing that the purpose of the

regulation is illegitimate or that the means used to accomplish the ends are irrational. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938) (holding that "regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators"). Absent meaningful judicial engagement with the facts, legislatures are free to contrive any justifications for laws that stand the best chance of passing a "magic words" test. The rule articulated by the court below would undermine constitutional protection for a host of rights and liberties, thus implicating *amici*'s central missions.

ISSUE ADDRESSED BY *AMICI*

Whether a government defendant may obtain dismissal under Federal Rule of Civil Procedure 12(b)(6) simply by asserting in its motion that the challenged statute has a rational basis.

INTRODUCTION AND SUMMARY OF ARGUMENT

This appeal raises a critical question concerning the limits that the Due Process Clause of the Fourteenth Amendment places on a local

government's authority to enact a zoning law that purports to ban an exercise of traditional property rights in order to avoid a potential nuisance. Specifically, it asks whether the City of New Braunfels may obtain dismissal simply by asserting in a Rule 12(b)(6) motion that there is a "rational basis" for its decision to ban short-term rentals within single-family zones. *The answer is no.*

The determination whether a land-use law is rationally related to a legitimate state interest is "essentially fact-bound in nature." *City of Monterey*, 526 U.S. at 721; *see also Nebbia v. New York*, 291 U.S. 502, 525 (1934) (while regulations may be presumed constitutional, "the reasonableness of each regulation depends upon the relevant facts"). Thus, when a plaintiff's complaint sufficiently alleges that discovery will reveal evidence showing the absence of a rational basis, the plaintiff must be provided an opportunity to have those facts evaluated on the merits. *Spivey v. Robertson*, 197 F.3d 772, 774 (5th Cir. 1999) ("We accept a plaintiff's factual allegations as true when considering motions to dismiss under Fed. R. Civ. P. 12(b)(6)."); *Russell v. Harris Cnty.*, 500 F.Supp.3d 577, 613 (S.D. Tex. Nov. 10, 2020) ("District courts are reluctant to dismiss a sufficiently pleaded claim without allowing the plaintiffs to

make a showing, if they can, that the challenged government policy is irrational.").

The lower court's opinion to the contrary should be reversed because it significantly alters—and weakens—the rational basis standard by accepting as true the City's purported nuisance-avoidance justification, depriving Appellants of any opportunity to discover and present evidence contesting that basis, "based solely on the *ipse dixit* of the City." App. Op. Br. at 35; *see also Nordlinger v. Hahn*, 505 U.S. 1, 31 (1992) (Stevens, J., dissenting) ("deference is not abdication and 'rational basis scrutiny' is still scrutiny"). In so doing, the district court wrongly transformed the rational basis test from "a [rebuttable] presumption of fact," *Borden's Farm Products Co. v. Baldwin*, 293 U.S. 194, 209 (1934), into an unassailable shield by which the government can have lawsuits dismissed at the outset merely by issuing bare assertions that the challenged law rationally relates to a legitimate governmental interest.

Such extreme deference renders the constitutional test a nullity, because "a plaintiff could not possibly disprove an infinite set of theoretically imaginable facts and speculations so as to prove the law irrational, especially if the genuine facts she relies upon to prove this are

declared irrelevant at the outset." Timothy Sandefur, *Rational Basis and the 12(b)(6) Motion: An Unnecessary "Perplexity"*, 25 Geo. Mason U. Civ. Rts. L.J. 43, 47 (2014); *see also Russell*, 500 F.Supp.3d at 614 (denying motion to dismiss because "[w]ithout discovery allowing the parties to present a proper factual record, these disputes [relating to the purported rational basis] cannot be accurately, reliably, or fairly resolved").

It is in the public's interest that this Court reiterate that rational basis review requires at least *examination* of the evidentiary support for plaintiffs' claims. *Reynolds v. State*, 746 A.2d 422, 446 (Md. App. 1999) (the failure to provide appropriate judicial oversight of the government's discharge of police powers puts the public at risk of an arbitrary deprivation of their protected rights). This is especially important in zoning—one of the most impactful and far-reaching powers of local government. Data-driven research and scholarship have long highlighted the stymieing effect of land use laws on the availability of housing and how this can impact matters of social justice by directing what opportunities and amenities (*e.g.*, access to affordable homes, schools, transportation, infrastructure, jobs) will be provided, and to whom. *See, e.g.*, Richard Rothstein, THE COLOR OF LAW: A FORGOTTEN HISTORY OF

HOW OUR GOVERNMENT SEGREGATED AMERICA (2017) *and* Edward L. Glaeser, *Reforming Land Use Regulations*, Brookings Inst. (2017) ("America's affordability problem is local, not national, but that doesn't mean that land use regulations don't have national implications."); *see also* White House, *Housing Development Toolkit* at 4–5, 9 (2016) (noting that restrictive zoning has resulted in home prices far higher than the costs of construction); White House, *Report of the President's Commission on Housing* at 177–82 (1982) (discussing the significant costs that zoning and land use regulation places on the production of housing).

ARGUMENT

I.

SUBSTANTIVE DUE PROCESS REQUIRES BONA FIDE REVIEW OF GOVERNMENTAL ACTIONS

The Due Process Clause guarantees that state and local government shall not "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, cl. 1. This guarantee provides more than just fair process. *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992). By including the words "due process *of law*," it also provides substantive protections against government impairment of the natural and customary rights and liberties secured by the U.S.

Constitution. *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997). It does so by policing "against arbitrary action of government." *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998) (quoting *Wolff v. McDonnell*, 418 U.S. 539, 588 (1974)); *see State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416–17 (2003) (Breyer, J., concurring) ("This constitutional concern, itself harkening back to the Magna Carta, arises out of the basic unfairness of depriving citizens of life, liberty, or property, through the application, not of law and legal processes, but of arbitrary coercion.").

At issue here is the "rational basis" standard of review—the standard that is most commonly applicable when reviewing laws that impair constitutionally protected rights. *See Carolene Prods. Co.*, 304 U.S. at 152 n.4 (proposing that courts adopt a tiered approach to review whereby only certain rights are afforded more protection than others). Although the Supreme Court has insisted that there is only one rational basis test,[2] *see e.g.*, *Vance v. Bradley*, 440 U.S. 93, 96–97 (1979), the state

[2] Indeed, Justice Stevens wrote the Court's entire body of due process and equal protection case law had applied "a single [rational basis] standard in a reasonably consistent fashion." *City of Cleburne v. Cleburne Living Center,* 473 U.S. 432, 452 (1985) (Stevens, J., concurring); *see also Wagner v. AGW Consultants*, 137 N.M. 734, ¶ 41, 114 P.3d 1050 (2005) (Bosson, C.J., concurring in part, dissenting in part)

and lower federal courts have, in practice, adopted at least two remarkably different versions of "rational basis" review, with the differences between them being extremely consequential—indeed, as demonstrated by the opinion below, a court's selection of which version of rational basis to apply often determines a case at the outset. *Compare Marfil v. City of New Braunfels*, No. 6:20-CV-00248-ADA-JCM, 2021 WL 8082644, at *7–*8 (W.D. Tex. July 29, 2021) (accepting as true the government's factual assertions supporting it purported rational basis to dismiss substantive due process claim) *with Mahone v. Addicks Util. Dist. of Harris Cnty.*, 836 F.2d 921, 937 (5th Cir. 1988) (reversing dismissal order because the "rational relationship analysis . . . depends on the specific facts pleaded by the plaintiff[,] the state of knowledge of the court making the analysis[, and] the complexity of the official action which is being challenged").

A. Property Is a Fundamental Right and Is Protected by Due Process

The district court's opinion is predicated on the erroneous conclusion that a homeowner's right to lease his or her property is not a

("[T]he Court professes to have only one rational basis test, but sometimes appears to apply heightened scrutiny.")

fundamental property right and is, therefore, not due the same degree of protection as other property rights such as the right to own a home. *Marfil*, 2021 WL 8082644, at *4. While the court did not explain how that reasoning impacted its resolution of the case, its conclusion should nonetheless be corrected to avoid the erroneous trend among some lower courts of treating property rights as a "poor relation" to the other rights and liberties protected under the Bill of Rights and the Fourteenth Amendment. *Knick v. Twp. of Scott*, 139 S.Ct. 2162, 2170–71 (2019).

Property rights are unquestionably among those fundamental rights and liberties secured by the Bill of Rights, *Knick*, 139 S.Ct. at 2170–71 (2019), and are furthermore considered "an essential pre-condition to the realization of other basic civil rights and liberties which the [Fourteenth] Amendment was intended to guarantee." *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 544 (1972) (citation omitted); *see also Cedar Point*, 141 S.Ct. at 2081 (Kavanaugh, J., concurring) ("Property rights are fundamental."); *Murr v. Wisconsin*, 137 S.Ct. 1933, 1943 (2017) ("Property rights are necessary to preserve freedom, for property ownership empowers persons to shape and to plan their own destiny in a world where governments are always eager to do so for them."); *United*

States v. James Daniel Good Real Prop., 510 U.S. 43, 81 (1993) (Thomas, J., concurring) ("property rights . . . are central to our heritage"). Thus, the Supreme Court has long held that each of the essential attributes of property—*i.e.*, the rights to own, use, alienate, and exclude[3]—are protected by due process. *Fuentes v. Shevin,* 407 U.S. 67, 86 (1972) ("[The Fourteenth Amendment] has been read broadly to extend protection to any significant property interest."); *Buchanan v. Warley*, 245 U.S. 60, 74 (1917) (due process "protects the[] essential attributes of property").

The fact that zoning laws are subject to rational-basis scrutiny does not change the fundamental nature of property rights. *River Park v. City of Highland Park,* 23 F.3d 164, 166 (7th Cir. 1994) ("Zoning classifications are not the measure of the property interest but are legal *restrictions* on the use of property."). Instead, the Supreme Court's adoption of a deferential standard simply reflects an attempt to balance an owner's right to use his property as he sees fit against the government's interest in enacting laws designed to avoid nuisances. *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926) (explaining that

[3] *See United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945) (the term "property" refers to the bundle of rights inhering in an individual's relationship to his or her land or chattels).

zoning authority embraces the "maxim *sic utere tuo ut alienum non laedas*" (roughly, "use your own property in such a manner as not to injure that of another")); *Nebbia*, 291 U.S. at 523 (explaining that rational basis review is appropriate because the public's desire to regulate "the common interest" is "[e]qually fundamental with the private right [to property]").

Property, moreover, is not defined in the reductive and ad hoc manner employed by the court below. *Marfil*, 2021 WL 8082644, at *5 (characterizing the right at issue as "the right to lease property for short durations" rather than, say, the right to alienate). Instead, the term "property" broadly refers to the bundle of protected rights (also called "elements" or "attributes") that preexisted nationhood, as well as those rights created by state property law. *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 164 (1998) ("[The] Constitution protects rather than creates property interests," which means that "the existence of a property interest," for purposes of whether one was taken, "is determined by reference to existing rules or understandings that stem from an independent source such as state law.") (citation omitted); *see also Hall v. Meisner*, 51 F.4th 185, 189–90 (6th Cir. 2022) (the existence of a

property right is not limited to state law, but also includes those rights established by custom and common law from well before statehood).

Here the City's zoning code impairs the right to alienate by banning certain types of leases. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 263 (1977) (recognizing a "right to be free of arbitrary or irrational zoning actions"); *Horne v. Dep't of Agric.*, 576 U.S. 350, 364 (2015) (finding that the right to control the disposition of property is a fundamental attribute of property). This element of property ownership is protected by due process, just like all of its other essential elements. *Washington ex rel. Seattle Tit. Trust Co. v. Roberge*, 278 U.S. 116, 121 (1928) (an owner's "right . . . to devote [his or her] land to any legitimate use is properly within the protection of the Constitution."). Thus, due process instructs that the legitimacy of a law impairing an essential attribute of property cannot be adjudged based solely on the government's own determination of what constitutes a "proper exercise of police power . . . *but is subject to supervision by the courts*." *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (citing *Lawton v. Steele*, 152 U.S. 133, 137 (1894)) (emphasis added).

B. Rational Basis and Its Application to Zoning

The Supreme Court established a specific iteration of the rational basis test applicable to zoning in *Euclid*, 272 U.S. at 377.[4] There the Court held that a land-use "ordinance can be declared unconstitutional [where its] provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *Id.* at 395. Using the phrases "substantial relation" and "rational relation" interchangeably, *id.* at 397, the Court explained that the two-part test evaluates both the legitimacy of the government's *ends* (that is, whether they fall within the state's police powers) and the *rationality* of the government's action measured against the ends pursued. *Id.* at 395; *Lingle*, 544 U.S. at 541–42 (the "substantial relation" inquiry asks "whether a regulation of private property is *effective* in achieving some legitimate public purpose"); *Lewis*, 523 U.S. at 846 (due process protects the individual against "the exercise of power without any reasonable justification in the service of a legitimate governmental objective"). Thus, as this Court has previously recognized, the

[4] In *Nebbia,* the Court confirmed that *Euclid*'s "substantial relation" inquiry is an application of the "rational basis" standard. 291 U.S. at 525.

"rationality analysis requires more than just a determination that a legitimate state purpose exists; it also requires that the [means] be rationally related to that legitimate state purpose . . . the rational relationship must be real." *Mahone*, 836 F.2d at 937.

The Supreme Court's zoning cases confirm that the question whether a land use law is sufficiently justified in the police power—such as a law purporting to avoid a potential nuisance—turns on the facts and circumstances of each case:

> [T]he question whether the power exists to forbid . . . a particular use, like the question whether a particular thing is a nuisance, is to be determined not by an abstract consideration of the building or of the thing considered apart, but by considering it in connection with the circumstances and the locality. A nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard.

Euclid, 272 U.S. at 387–88 (explaining that a "zoning ordinance, which would be clearly valid as applied to the great cities, might be clearly invalid as applied to rural communities"). The Court was clear that its "rational relation" standard was not intended to be a rubber stamp on zoning laws; it was meant to require that the justification for a land use law must be "sufficiently cogent to preclude us from saying . . . that [the

law is] clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *Id.* at 395.

Soon after *Euclid*, *Nectow v. City of Cambridge*, 277 U.S. 183 (1928) further demonstrated the factual nature of rationality analysis. There, the Supreme Court struck down provisions of a zoning ordinance that had barred the owner from making any business or industrial use of a portion of his property that was in an area of historically mixed use. *Id.* at 188. The Massachusetts Supreme Judicial Court had upheld the designation based on its conclusion that the government had acted with some "foundation in reason" when enacting the law. *Nectow v. City of Cambridge*, 260 Mass. 441, 447–48 (1927).

That conclusion, however, was deemed insufficient because "[t]he governmental power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use is not unlimited, and . . . such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare." *Nectow*, 277 U.S. at 188. And to address that aspect of the rational basis inquiry, the Supreme Court looked to the factual record which contained a finding "that the health, safety, convenience, and

general welfare of the inhabitants of the part of the city affected will not be promoted by the . . . ordinance" to be determinative of a due process violation. *Id.* Based on facts showing a lack of means-ends fit, the Court invalidated the zoning designation. *Id.*; *see also N.D. State Bd. of Pharm. v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 167 (1973) (the means selected must have "a manifest tendency to cure or at least to make the evil less"); *Moore*, 431 U.S. at 498 n.6 ("our cases have not departed from the requirement that the government's chosen means must rationally further some legitimate state purpose"); *Nebbia,* 291 U.S. at 525 (To satisfy rational basis "the means selected shall have a real and substantial relation to the object sought to be attained."). *See also* Timothy Sandefur, *In Defense of Substantive Due Process, or the Promise of Lawful Rule,* 35 Harv. J.L. & Pub. Pol'y 283, 292 (2012) ("Goal-oriented acts can be tested for their rationality, through means-end analysis, and an arbitrary action is not a means to any end.").

In the same term it decided *Nectow*, the Supreme Court also tackled a zoning controversy in *Washington ex. rel. Seattle Title Trust Co. v. Roberge.* There, the Court considered a due process challenge to a permit denial issued under a Seattle zoning ordinance that allowed development

of a "philanthropic home for children or for old people" in a particular district only "when the written consent shall have been obtained of the owners of two-thirds of the property within four hundred (400) feet of the proposed building." 278 U.S. at 118–19 (the permit was denied due to the property owner's "failure to furnish such consents"). As in *Nectow*, the Supreme Court concluded that the fact that a restriction is adopted as part of a local government's zoning authority does not, in and of itself, legitimize the property restriction. *Id*. at 120–21. "Legislatures may not, under the guise of the police power, impose restrictions that are unnecessary and unreasonable upon the use of private property or the pursuit of useful activities." *Id*. at 121.

On the question whether the restriction substantially related to a legitimate governmental objective, the Court found that Seattle had provided "no legislative determination that the proposed building and use would be inconsistent with public health, safety, morals or general welfare. The enactment itself plainly implies the contrary." *Id*. Thus, the provision requiring consent from certain neighbors allowed for permit decisions based on "selfish" and "arbitrary" reasons which is "repugnant to the due process clause of the Fourteenth Amendment." *Id*. at 122; *see*

also Romer v. Evans, 517 U.S. 620, 632–33 (1996) (on rational basis review, "we insist on knowing the relation between the classification adopted and the object to be attained [to] ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law").

The Court emphasized that its decision rested on the lack of any evidence that the restricted use was harmful to the community. *Roberge*, 278 U.S. at 122. To support this position, the Court cited an earlier decision involving a zoning ordinance that required neighbor consent before erecting a billboard in a residential neighborhood. *Id.* (citing *Cusack Co. v. City of Chicago,* 242 U.S. 526 (1917)). There, "the facts found were sufficient to warrant the conclusion that such billboards would or were liable to endanger the safety and decency of such districts." *Id.* (citing *Cusack*, 242 U.S. at 529–30). The Court found the Seattle ordinance readily distinguishable by analogy to nuisance law: "It is not suggested that the proposed new home for aged poor would be a nuisance. We find nothing in the record reasonably tending to show that its construction or maintenance is liable to work any injury, inconvenience or annoyance to the community, the district or any person." *Id.* These

conclusions, once again, showed the importance of evaluating the facts and circumstances of the case in relation to the asserted government objective.

In *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985), the Supreme Court applied rational basis to strike down a zoning ordinance that had singled out homes for the mentally disabled for a special use permit requirement. The Court's rationality analysis focused on whether there was factual support (*i.e.*, "distinguishing characteristics") that would justify a "distinctive legislative response," *id.* at 443, and whether the law was actually "based on [that] distinction." *Id.* at 449. Looking past the government's purported "community safety" justification, the Court found that "the record does not reveal any rational basis for believing that the . . . home would pose any special threat to the city's legitimate interests." *Id.* at 448. The Court concluded that "mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases" for differential treatment. *Id.*

Similarly, in *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), the Court used rational basis to strike down a zoning law limiting

occupancy of dwellings to members of a nuclear family. The Court began its rationality analysis by "examin[ing] carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation." *Id.* at 499. The Court acknowledged that East Cleveland's concerns about congestion, overcrowding, and the burden on city services were legitimate ends, but concluded that the ordinance was invalid because as a means it served the city's objectives "marginally at best." *Id.* at 500.

With the chief end of zoning being the prevention or isolation of nuisant uses, the legitimacy of a land use law or regulation is heavily context-dependent. Whether a property right is implicated depends on the degree to which the proscribed uses *actually are* harmful. *Euclid*, 272 U.S. at 388. That inquiry cannot typically be resolved as a matter of law, but must turn on case-specific facts. *Id.* at 387 (the legitimacy of a zoning law "is not capable of precise delimitation"); *id.* at 397 (the "rational relation" test was not intended "to establish general rules to which future cases must be fitted").

Properly applied, rational basis establishes only a rebuttable presumption in favor of legislation—one that may be overturned with

evidence showing that the purpose of the regulation is illegitimate or the means used to accomplish the ends are irrational. *See*, *e.g.*, *Cleburne Living Center,* 473 U.S. at 447–50; *Romer,* 517 U.S. at 632–35; *U.S. Dep't of Agric. v. Moreno,* 413 U.S. 528, 533–38 (1973). Thus understood, the test gives plaintiffs the opportunity to establish that a challenged law lacks a rational connection to a legitimate government interest, and to prove that the government objective falls outside the police power, *Romer,* 517 U.S. at 633, or that the law is so unrelated to the legislature's goal that it is arbitrary or irrational. *Cleburne Living Center,* 473 U.S. at 446; *see also District of Columbia v. Heller,* 554 U.S. 570, 628 n.27 (2008) ("'[R]ational basis' is not just the standard of scrutiny, but the *very substance* of the constitutional guarantee," and thus applies "when evaluating laws under constitutional commands that are themselves prohibitions on irrational laws.") (emphasis added).

II.

RATIONAL BASIS DOES NOT CREATE AN INSURMOUNTABLE BARRIER TO A WELL-PLEADED COMPLAINT

The district court ultimately concluded that the government may obtain a Rule 12(b)(6) dismissal of a substantive due process claim, prior

to any discovery or weighing of evidence, by simply asserting that the challenged law rationally relates to a legitimate governmental interest. *Marfil*, 2021 WL 8082644, at *7–*8. That conclusion, however, departs from the practice of sister courts within this Circuit, which are "reluctant to dismiss a sufficiently pleaded claim without allowing the plaintiffs to make a showing, if they can, that the challenged government policy is irrational." *Russell*, 500 F.Supp.3d at 613. And that conclusion also undercuts the Supreme Court's engaged and fact-focused approach to rational basis . *See* Timothy Sandefur, *Rational Basis and the 12(b)(6) Motion*, *supra*, 44 ("[T]runcation of rational basis cases perverts [the rational-basis] test into a set of magic words whereby a government defendant can have a constitutional challenge dismissed on its mere say-so.").

Three cases from other Circuits illustrate how the rational basis standard can be harmonized with Rule 12(b)(6). In *Craigmiles v. Giles*, the Eastern District of Tennessee ruled that a state occupational licensing law lacked a rational connection to a legitimate government interest and was therefore unconstitutional. That statute prohibited the sale of coffins or other funeral merchandise unless the person was a

licensed funeral director. Because that law was an economic regulation, rational basis scrutiny applied. 110 F.Supp.2d 658 (E.D. Tenn. 2000), *aff'd*, 312 F.3d 220 (6th Cir. 2002). But the district court rejected the government's motion to dismiss, notwithstanding its agreement that regulating the disposal of human remains "[is] clearly a legitimate governmental interest[]." 110 F.Supp.2d at 662 (denying motion to dismiss).

Reasoning that "the mere assertion of a legitimate government interest has never been enough to validate a law," the district court convened a full-scale trial, hearing testimony and other evidence, to "ascertain whether [the statute had] a rational basis," *id.*, after which it concluded that the law was unconstitutional. *Id.* at 665.

The Sixth Circuit affirmed. *Craigmiles,* 312 F.3d at 229. It acknowledged the deferential nature of the rational basis test, but when it evaluated the evidence in the record, the court concluded that the state's factual and legal arguments "come close to striking us with 'the force of a five-week-old, unrefrigerated dead fish.'" *Id.* at 225 (citation omitted). The rational basis test may be more lenient than some other tests, but a court employing it must still allow a plaintiff the opportunity

to prove his or her case.

In *Powers v. Harris*, 379 F.3d 1208, 1215 (10th Cir. 2004), *cert. denied,* 544 U.S. 920 (2005), the Tenth Circuit upheld a law almost identical to that invalidated in *Craigmiles.* But while ruling differently on the merits, the *Powers* court *agreed* with the *Craigmiles* court that the plaintiff was entitled to introduce evidence to prove her allegations. The district court convened a full, two-day trial to weigh the evidentiary basis of the complaint, concluding that the statute rationally related to a legitimate government interest. *Powers v. Harris*, No. CIV-01-445-F, 2002 WL 32026155, at *9–*11 (W.D. Okla. Dec. 12, 2002). The Tenth Circuit, relying on the evidence presented at trial, affirmed. *See, e.g.*, 379 F.3d at 1222. While *Craigmiles* and *Powers* reached different legal conclusions, both courts agreed that under rational basis scrutiny, plaintiffs should be allowed to present evidence to prove their allegations. *See also Brown v. Zavaras,* 63 F.3d 967, 971–72 (10th Cir. 1995) (plaintiffs should be allowed to present evidence to prove their allegation that government action lacks a rational basis).

In *Merrifield v. Lockyer,* 388 F. Supp. 2d 1051 (N.D. Cal. 2005), *rev'd,* 547 F.3d 978 (9th Cir. 2008), the district court rejected the

government's effort to dismiss a rational basis case, because it was inappropriate to rule on the merits prior to factfinding. The government defendants moved to dismiss, asserting that the occupational licensing law challenged in that case was supported by a rational basis, but the district court refused to dismiss because "the issue of whether the Legislature lacked a rational basis to [impose the challenged law] . . . is premature." *Merrifield v. Schwarzenegger,* No. 04-0498 MMC, 2004 WL 2926161, at *5 (N.D. Cal. July 16, 2004). Later, after weighing the evidence, the district court upheld the constitutionality of the statute, but the court of appeals reversed, citing the "record [that] highlight[ed] that the [statute] . . . was designed to favor economically certain constituents at the expense of others similarly situated." 547 F.3d at 991.

Certainly, courts have often expressed "perplexi[ty]" when dealing with the interaction between the rational basis test and the standard for dismissal under Rule 12(b)(6). *See, e.g.*, *Brace v. Cnty. of Luzerne*, 873 F. Supp. 2d 616, 630 (M.D. Pa. 2012); *Tipton v. Mohr*, No. 2:11-CV-00719, 2012 WL 1031416, at *4 (S.D. Ohio Mar. 27, 2012), *report and recommendation adopted*, No. 2:11-CV-00719, 2012 WL 2115342 (S.D. Ohio June 11, 2012) ("applying general pleading standards to the rational

basis review 'poses unique challenges'"); *Giarratano v. Johnson*, 521 F.3d 298, 303 (4th Cir. 2008) ("dilemma"); *Wroblewski v. City of Washburn*, 965 F.2d 452, 460 (7th Cir. 1992) (a "close[] question"); *Zavaras*, 63 F.3d at 971 ("perplexing"); *Baumgardner v. Cook Cnty.*, 108 F. Supp. 2d 1041, 1055 (N.D. Ill. 2000) ("a confusing situation").

But, as the Seventh Circuit recognized in *Flying J Inc. v. City of New Haven*, 549 F.3d 538 (7th Cir. 2008), "[t]he solution is to take as true all of the complaint's allegations and reasonable inferences that follow, [and then] apply the resulting 'facts' in light of the deferential rational basis standard." *Id.* at 546 (quotation omitted). Put simply, to defeat a Rule 12(b)(6) motion to dismiss, "a plaintiff must allege facts sufficient to overcome the presumption of rationality that applies to government classifications." *Id.* (quotation omitted).

It is well-settled that if the factual allegations "raise a right to relief above the speculative level," a district court should not dismiss a case "even if it appears 'that a recovery is very remote and unlikely.'" *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555–56 (2007) (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)); *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) ("While legal conclusions can provide the framework of a

complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief."). Dismissal prior to discovery and factfinding is not appropriate simply because the judge disbelieves the allegations. *Bell Atl. Corp.*, 550 U.S. at 556 (citing *Neitzke v. Williams*, 490 U.S. 319, 327 (1989)). So long as the allegations "raise a reasonable expectation that discovery will reveal evidence" that would then entitle the plaintiff to relief, a court should allow the case to proceed to that stage. *Id.* at 556.

III.

CLARIFICATION OF THE RATIONAL BASIS STANDARD WILL ADVANCE THE PUBLIC'S INTEREST IN THE JUDICIAL PROTECTION OF PROPERTY RIGHTS

The district court, by accepting as true the City's anti-nuisance rationale, substantially weakened the Constitution's recognition and protection of property rights. The Constitution recognizes an owner's right to put his property to any legitimate use, *Roberge*, 278 U.S. at 121, subject to restrictions designed to avoid or minimize nuisances. *Euclid*, 272 U.S. at 388. The question whether a use of property will work a nuisance against neighboring property owners involves mixed questions

of fact and law that are properly reserved for a hearing on the merits—not a self-serving legislative pronouncement. *City of Houston v. Lurie*, 148 Tex. 391, 397 (1949); *see also Sheppard v. Giebel*, 110 S.W.2d 166, 171 (Tex. Civ. App. 1937) ("Legislature[s] cannot validly declare that to be a nuisance which is not so in fact, unless such property be so used as to constitute a nuisance, which is essentially a judicial question; or unless its use be such as to endanger the public health, public safety, public welfare, or offend the public morals.").

Preserving the nuisance question for resolution on the merits is a matter of utmost importance to the public's interest in property rights. As discussed above, a conclusion that a particular use of property is nuisant often determines a due process claim. *Euclid*, 272 U.S. at 388, 395. It is also central to a regulatory takings analysis because, when evaluating a regulation's impact on an owner's rights, the court is instructed to consider whether the legislation merely codifies "background principles of [state] law[s] of property and nuisance already place upon land ownership." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992). Thus, a determination that a prohibited use is nuisant may also be determinative of a regulatory takings claim.

The Supreme Court, however, has repeatedly cautioned against rules that shelter land-use regulations from meaningful constitutional scrutiny. "If . . . the uses of private property were subject to unbridled, uncompensated qualification under the police power, the 'natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappear[ed].'" *Lucas*, 505 U.S. at 1014 (quoting *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)). By shielding the City's purported nuisance rationale from factfinding and meaningful scrutiny, the decision below violates one of the most basic principles of constitutional law: that "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pa. Coal*, 260 U.S. at 416. The rule adopted below must be rejected because it cannot enforce the protections guaranteed by the Due Process Clauses and cannot supplant the wisdom and balance written into *Euclid*'s rational-relation test.

The district court erred in endorsing the City's nuisance counterargument *at* the pleadings stage. Government has vast and highly consequential authority to restrict private property rights via

zoning. But that authority is not unlimited. Keeping the door open to due-process claims against land use controls by subjecting them to the same 12(b)(6) standard as any other cause of action would go a long way in fixing the poor policy outcomes resulting from a flawed model of the rational basis test.

CONCLUSION

For the reasons set forth above, and those outlined in Appellants' filings, *amici* urge this Court to reverse the district court's dismissal of plaintiffs' due process claims.

Dated: December 16, 2022.

Respectfully submitted,

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I hereby certify that on December 16, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

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