No. 14-864

In The
Supreme Court of the United States

HILLCREST PROPERTY, LLP,

Petitioner,

v.

PASCO COUNTY, FLORIDA,

Respondent.

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

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TABLE OF CONTENTS

Page*(s)*

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 5

ARGUMENT 7

I. THE ELEVENTH CIRCUIT INSULATES LOCAL GOVERNMENTS FROM FACIAL SUBSTANTIVE DUE PROCESS CLAIMS BY FORCING PROPERTY OWNERS TO BRING CLAIMS PRIOR TO SUSTAINING CONCRETE AND PARTICULARIZED INJURIES 7

A. Article III Standing Rules Require Property Owners To Sustain Concrete and Particularized Injuries 7

B. The Eleventh Circuit's Rule Causes Practical Problems For Land Developers By Forcing Them To Bring Premature Claims 9

C. The Purpose of a Statute of Limitations Is Not Served By The Eleventh Circuit's Decision To Force Property Owners, Many of Whom are Small Businesses, to Waste Resources By Bringing a Premature Claim 11

TABLE OF CONTENTS *(cont.)*

Page*(s)*

II. THE ELEVENTH CIRCUIT CONTRADICTS THIS COURT'S RULING IN *LINGLE V. CHEVRON* BY HOLDING THAT PURPORTED DEVALUATION OF PROPERTY IS INCLUDED AS PART OF A SUBSTANTIVE DUE PROCESS ANALYSIS 14

A. Valuation Is An Appropriate Consideration Under A Fifth Amendment Claim For Just Compensation 14

B. This Court's Decision In *Lingle v. Chevron* Makes It Clear That Devaluation Of Property Should Not Be Analyzed By Courts To First Determine If There Has Been A Violation Of Substantive Due Process 17

C. The Eleventh Circuit's Decision Contradicts This Court's Decision In *Lingle v. Chevron* By Combining Due Process And Takings Principles 19

III. THE ELEVENTH CIRCUIT DEVIATES FROM OTHER COURTS WHICH REQUIRE A PROPERTY OWNER'S INJURY TO BE FULLY EFFECTUATED TO START THE STATUTE OF LIMITATIONS CLOCK. 20

TABLE OF CONTENTS *(cont.)*

Page*(s)*

CONCLUSION 23

TABLE OF AUTHORITIES

Page*(s)*

Cases

Action Apartment Ass'n. v. Santa Monica Rent Control Bd., 509 F.3d 1020 (2007) ... 21, 22, 23

Agins v. City of Tiburon, 447 U.S. 255 (1980) 18

County of Sacramento v. Lewis, 523 U.S. 833 (1998) 19

CTS Corp. v. Waldburger, 134 S.Ct. 2175 (2014)..... 13

De Anza Prop. X, Ltd. v. County of Santa Cruz, 936 F.2d 1084 (9th Cir. 1991) 22

Gillmore v. Summit County, 246 P.3d 102 (Utah 2010) 10-11

Hall v. City of Santa Barbara, 833 F.2d 1270 (9th Cir. 1986)..... 21-22

Hillcrest Prop., LLC v. Pasco County, 754 F.3d 1279 (2014) 6, 14

Kuhnle Bros., Inc. v. County of Geauga, 103 F.3d 516 (6th Cir. 1997) 11, 14, 20-21, 23

Lindner v. Kindig, 826 N.W.2d 868 (2013)..... 23

Lingle v. Chevron, 544 U.S. 528 (2005)..... 6, 14, 17, 18, 19

TABLE OF AUTHORITIES *(cont.)*

Page*(s)*

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) 15-16

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) 16

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 7, 8, 10

Mugler v. Kansas, 123 U.S. 623 (1887)..... 17-18

Nat'l Adver. Co. v. City of Raleigh, 947 F.2d 1158 (4th Cir. 1991)..... 14

Nectow v. City of Cambridge, 277 U.S. 183 (1928).. 19

Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978) 16

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) 15

Order of R.R. Telegraphers v. Ry. Express Agency, Inc., 321 U.S. 342 (1944)..... 13

Schnuck v. City of Santa Monica, 935 F.2d 171 (9th Cir. 1991)..... 21

Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976) 8

TABLE OF AUTHORITIES *(cont.)*

Page*(s)*

Vill of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977) 9

Virginia Hosp. Ass'n v. Baliles, 868 F.2d 653 (4th Cir. 1989), *aff'd in part on oth grounds sub non Wilder v. Virginia Hosp. Ass'n,* 496 U.S. 498 (1990) *accord Nat'l Adver. Co. v. City of Raleigh,* 947 F.2d 1158 (4th Cir. 1991) 13-14

Warth v. Seldin, 422 U.S. 490 (1975)..... 8, 9, 10

Wolff v. McDonnell, 418 U.S. 539 (1974) 19

Statutory and Constitutional Provisions

Art. III §2, cl. 1 7

Other

Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 Harv. L. Rev. 1321 (2000)..... 23

Timothy Sandefur, *The Timing of Facial Challenges,* 43 Akron L. Rev. 51 (2010)..... 22-23

Steve Melman*, Structure of the Home Building Industry, Special Studies* (Dec. 1, 2010), *available at* http://www.nahb.org/generic.aspx?sectionID=734&genericContentID=148743&channelID=311 12

TABLE OF AUTHORITIES *(cont.)*

Page*(s)*

Table of Small Business Size Standards Matched to North American Industry Classification System Codes (July 14, 2014), *available at* http://www.sba.gov/sites/default/files/files/Size_Standards_Table.pdf 12

INTEREST OF *AMICI CURIAE*[1]

The National Association of Home Builders (NAHB) is a Washington, D.C.-based trade association whose mission is to enhance the climate for housing and the building industry. Chief among NAHB's goals is providing and expanding opportunities for all people to have safe, decent, and affordable housing. Founded in 1942, NAHB is a federation of more than 800 state and local associations. About one-third of NAHB's approximately 140,000 members are home builders or remodelers, and constitute 80% of all homes constructed in the United States. NAHB is a vigilant advocate in the nation's courts. It frequently participates as a party litigant and *amicus curiae* to safeguard the constitutional and statutory rights and business interests of its members and those similarly situated.

The National Association of Realtors® (NAR) is a nationwide, nonprofit professional association, incorporated in Illinois, that represents persons engaged in all phases of the real estate business, including, but not limited to, brokerage, appraising, management, and counseling. Founded in 1908, NAR

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1 Counsel of record for all parties received notice at least 10 days prior to the due date of the amicus curiae's intention to file this brief. Letters of consent are on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

was created to promote and encourage the highest and best use of the land, to protect and promote private ownership of real property, and to promote the interests of its members and their professional competence. The membership of NAR includes 54 state and territorial Associations of REALTORS®, approximately 1,400 local Associations of REALTORS®, and more than 1 million REALTOR® and REALTOR ASSOCIATE® members.

The National Federation of Independent Business Small Business Legal Center (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses.

NFIB represents 350,000 member businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business. To fulfill its role as the voice

for small business, the NFIB Legal Center frequently files amicus briefs in cases that will impact small businesses.

The International Council of Shopping Centers (ICSC) is a not-for-profit corporation organized under the Not-for-Profit Corporation Law of the State of Illinois. It is the global trade association of the shopping center industry with nearly 68,000 members worldwide, more than 52,000 in the United States and 4,590 in the State of Florida. Its members include developers, owners, retailers, lenders and others that have a professional interest in the shopping center industry. The ICSC's members own and manage essentially all of the more than 10,754 shopping centers in the State of Florida. In 2013, these Florida shopping centers accounted for more than $180 billion in combined sales. That same year, these shopping centers employed more than 851,180 individuals, constituting 11.3 percent of the total employment in Florida, and contributed $10.8 billion in state sales tax revenue and $1.3 billion in property tax revenue.

Based in Washington, D.C., the National Multifamily Housing Council (NHMC) is a national nonprofit association that represents the leadership of the $1.1 trillion apartment industry. Our members engage in all aspects of the apartment industry, including ownership, development, management and finance, providing apartment homes for 37 million Americans. Under Small Business Administration guidelines, 99 percent of residential rental housing operators qualify as small businesses. Over one-third of Americans rent their housing, and 22 percent of all

households live in an apartment home (buildings with two or more units). NMHC advocates on behalf of rental housing, conducts apartment-related research, encourages the exchange of strategic business information and promotes the desirability of apartment living.

The Florida Home Builders Association (FHBA) FHBA is a Florida not-for-profit corporation that has more than 6,513 members throughout the State of Florida. FHBA is affiliated with the National Association of Home Builders (NAHB) and has 25 local/regional affiliated home builders associations throughout the State of Florida. FHBA aims to "serve, advance and protect the welfare of the home building industry in such a manner that adequate housing will be made available by private enterprise to all Americans." FHBA's core mission is one of advocacy and its legislative, legal and political initiatives work together to create the best possible economic and regulatory environments for our members to succeed. FHBA enjoys a legacy that spans more than 65 years.

What unites *amici* in this single brief is the fundamental belief in protecting the rights of private property owners, particularly against extortive and unconstitutional government regulation. *Amici* have a particular interest in this case, because the Eleventh Circuit Court of Appeals' decision insulates the Respondent's unconstitutional law from a facial substantive due process challenge. This decision now provides local government with an incentive to freely pursue constitutional mischief by enacting an unconstitutional law, and then waiting until the

statute of limitations passes before enforcing it. *Amici's* members, many of whom are small business owners, will now have to expend limited financial resources to bring a premature facial substantive due process claim, only to find out that their claim has no opportunity to be heard. *Amici* seek clarification that this Court's precedents prevents such an outcome.

SUMMARY OF ARGUMENT

The Eleventh Circuit erred by creating a blanket rule of law that the mere enactment of an ordinance always commences a statute of limitations for a facial substantive due process claim. Such a rule creates an untenable scenario since property owners will often lack Article III standing to bring a claim within the time allowed under a statute of limitations, thereby effectively shutting the courthouse door. In cases where courts have found that the enactment of a law starts the statute of limitations clock, there have been concrete and particularized injuries to the plaintiffs.

To uphold the Eleventh Circuit's decision will waste precious judicial resources by requiring property owners to prematurely initiate lawsuits. At the same time, many of the *amici* members are small businesses, and are unable to mount a long and costly legal challenge before suffering a concrete injury.

Further, this is not a Fifth Amendment Takings Clause case. Yet, the Eleventh Circuit incorrectly utilized statute of limitations rules from Takings jurisprudence by holding that Petitioner's facial substantive due process claim was time-barred, because the statute of limitations commenced from the

mere enactment of Respondent's unconstitutional Right-of-Way Preservation Ordinance ("Ordinance"). The court below held that the event of the Ordinance enactment, by itself, devalued Petitioner's property. *Hillcrest Prop., LLC v. Pasco County,* 754 F.3d 1279, 1283 ("We are persuaded by the reasoning expressed by our sister circuit's . . . . Hillcrest's land became encumbered immediately upon the Ordinance's enactment in 2005. Its property would have decreased in value at that time because any current or future development plans would have been subject to the Ordinance's requirement that, in exchange for granting a commercial development permit, Hillcrest would have to deed part of the land to the county without payment for the acquisition."). The Eleventh Circuit's reliance on a purported "decrease[] in value" is in error. As this Court has explained, devaluation of property is part of the analysis of whether just compensation is due under the Takings Clause, but devaluation does not play a role in substantive due process analysis. *Lingle v. Chevron,* 544 U.S. 528 (2005).

Finally, in cases where lower courts have found that the statute of limitations commences from the enactment of a law, the injury sustained by the plaintiff was fully effectuated by the enactment of the statute. Such an injury did not occur here.

ARGUMENT

I. THE ELEVENTH CIRCUIT'S DECISION INSULATES LOCAL GOVERNMENTS FROM FACIAL SUBSTANTIVE DUE PROCESS CLAIMS BY FORCING PROPERTY OWNERS TO BRING CLAIMS PRIOR TO SUSTAINING CONCRETE AND PARTICULARIZED INJURIES.

A. Article III Standing Rules Require Property Owners To Sustain Concrete and Particularized Injuries.

Article III of the Constitution limits federal court jurisdiction to hearing actual "Cases" and "Controversies." Art. III §2, cl.1. One aspect of the case or controversy requirement is that plaintiffs must establish that they have standing. To establish standing, a plaintiff must show (i) an "injury in fact," (ii) a sufficient "causal connection between the injury and the conduct complained of," and (iii) that it is likely that the injury "will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–561 (internal quotation marks omitted). Specifically, the injury in fact must be "concrete and particularized" and "actual or imminent," it cannot be "conjectural" or "hypothetical." *Id.*

In *Lujan*, the plaintiffs challenged an Endangered Species Act rule which was applicable only in the United States. The claimed injury was that by applying the rule only in the United States, the rule increased the rate of extinction of threatened and

endangered species abroad. This in turn would impact the plaintiff's desire to observe certain species.

The Court found that the plaintiffs lacked standing because although they had an interest in endangered species, they were not affected by the rule. For example, one affiant had visited Egypt and observed the endangered Nile crocodile and she intended to do so in the future. Similarly, another affiant had visited Sri Lanka and observed the Asian elephant and leopard and that she intended to go back to observe other endangered species. According to the Court, these "some-day" intentions without concrete plans or specifications of when their actions would occur did not satisfy the "injury in fact" requirement. *Lujan* at 564.

The Court expressed the same idea in an earlier case in which the plaintiffs challenged a town's zoning ordinance. *Warth v. Seldin*, 422 U.S. 490 (1975). In *Warth*, the Court held that home building associations did not have standing because the ordinance at issue had not negatively impacted the projects of any of the association's members. Specifically, the Court explained none of the builders had "applied to the [town] for a building permit or a variance with respect to a current project." *Id* at 516. Thus, without averments to a specific project, the plaintiff's lacked standing. *See also, Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 44 (1976) (providing that "unadorned speculation will not suffice to invoke the federal judicial power.")

Warth can be contrasted with *Vill. of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977), where the Metropolitan Housing Development Corporation (MHDC) challenged the Village of Arlington Heights' denial of the MHDC's rezoning request. MHDC had entered into a 99-year lease with a landowner and an agreement to purchase the property if the property was to be rezoned. The Court explained that even though it did not own the property in question, the Village's zoning was a barrier to housing that MHDC had a contract to build. Furthermore, MHDC spent thousands of dollars on plans and studies that it developed to support its rezoning petition. Because it had spent money and had specific plans, the Court had "little doubt" MHDC was injured by the Village's denial.

Simply put, this Court's jurisprudence stands for the proposition that impacts to "some-day" plans, without more, will not support a plaintiff's standing.

B. The Eleventh Circuit's Decision Causes Practical Problems For Land Developers By Forcing Them to Bring Premature Claims.

It is routine for developers not to have specific plans for property when purchased, and many developers hold a small inventory of properties for future development or resale.[2] Therefore, assume for example, that a developer purchases property the year

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2 In Hillcrest's case the time between purchasing the property and seeking preliminary site approval was more than five years.

a facially unconstitutional ordinance is passed and that the statute of limitations is four years. Also assume that the developer had no specific intentions for the property. The Eleventh Circuit's rule may force this developer to initiate litigation before having any concrete plans for the property. The owner could, of course, speculate in a Complaint how the property might be used or developed. However, as in *Lujan* and *Warth*, those "some-day" plans would not likely satisfy Article III standing requirements. *Lujan* at 564. However, an owner who waits until there are concrete plans for the property now risks expiration of the statute of limitations. Thus, the Eleventh Circuit's rule insulates unconstitutional laws from challenge because property owners that can challenge them may not have standing to do so until after the statute of limitations has run.

A lower court addressed a similar scenario:

> [W]e believe that the broad position [to do what was] advocated by the County would tend to produce an illogical, unjust, and potentially unconstitutional result. For instance, if an unconstitutional zoning ordinance could not be challenged by a property owner in an action to prevent its enforcement within thirty days of its application, but instead could be challenged only within thirty days of its enactment, a property owner subjected to some constitutional violation would be without remedy unless the owner had the foresight to challenge the ordinance when it was enacted, possibly years or even decades before it was applied to her

> property and before she ever had standing to assert her claims.

Gillmore v. Summit County, 246 P.3d 102 (Utah 2010).

C. The Purpose of a Statute of Limitations Is Not Served By The Eleventh Circuit's Decision To Force Property Owners, Many of Whom are Small Businesses, to Waste Resources By Bringing a Premature Claim.

Amici are trade associations that include many small business owners. The Eleventh Circuit's decision now expects these small businesses to spend limited resources to bring a challenge that is legally premature and before a property owner has any plans to develop. *But see Kuhnle Bros., Inc. v. County of Geauga,* 103 F.3d 516 (1997) at 520 ("In determining when the cause of action accrues in section 1983 actions, we have looked to what event should have alerted the typical lay person to protect his or her rights.")(citations omitted). The Eleventh Circuit's decision places smaller developers in a severely disadvantaged position when attempting to assert constitutionally-protected rights.

For example, most of *amicus* NAHB's members can be categorized as small businesses. To qualify as a small business, the U.S. Small Business Administration (SBA) has established ceilings of $33.5 million in annual receipts for all types of builders (including residential remodelers), $7.0 million for land developers, and $14.0 million for specialty trade

contractors. U.S. Small Business Administration, *Table of Small Business Size Standards Matched to North American Industry Classification System Codes* (July 14, 2014), http://www.sba.gov/sites/default/files/files/Size_Standards_Table.pdf (last visited Nov. 6, 2014). Incredibly, 96 percent of builders, 94 percent of land developers, and 98 percent of trade contractor establishments are small by SBA standards. Stephen Melman, *Structure of the Home Building Industry* at 3, Special Studies, (Dec. 1, 2010), http://www.nahb.org/generic.aspx?sectionID=734&genericContentID=148743&channelID=311 (last visited Jan. 23, 2015).

Even when using a smaller cap than what is utilized by the federal government, the building industry is still constituted largely by small business owners. Another study by *amicus* NAHB shows that 65 percent of all home building establishments had annual receipts of under $1 million and 31 percent generated revenue of between $1 million and $10 million. *Id.* at 1-2. In fact, just 4.1 percent of home builders finished 2007 with $10 million or more in annual receipts. *Id.* at 1. Land developers follow a similar profile; 61 percent of land developers did less than $1 million in business. *Id.* at 2. Home remodelers are even smaller with 84 percent of all residential remodelers having annual receipts of under $1 million. *Id.*

In short, those affected by the Eleventh Circuit's decision, such as home builders, developers, and other small businesses, do not only create vibrant neighborhoods, they also fit the profile of your average

neighbor. These groups simply do not have a bottomless bank of financial resources in which to bring a case well before there may be any plans to improve the property.

Finally, the purposes of a statute of limitations are not served by forcing property owners to bring premature claims. Statutes of limitations "promote justice by preventing surprises through [a plaintiff's] revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. *CTS Corp v. Waldburger*, 134 S.Ct. 2175, 2183 (2014), *quoting Order of R.R. Telegraphers v. Ry. Express Agency, Inc.,* 321 U.S. 342, 348-349 (1944). While clearly applicable in certain circumstances like a personal injury claim, the same rationale is less tenable in the context of a facial substantive due process challenge to a land use law. In this case, the erroneously applied statute of limitations defeated justice, by practically insulating the government in perpetuity from a facial substantive due process challenge to a clearly unconstitutional law. It cannot be the case that the statute of limitations can run before the harm of the ordinance is manifest. Truly, "[a] law that works an ongoing violation of constitutional rights does not become immunized from legal challenge for all time merely because no one challenges it within two years of its enactment. '[T]he continued enforcement of an unconstitutional statute cannot be insulated by the statute of limitations.' *Virginia Hosp. Ass'n v. Baliles*, 868 F.2d 653, 653 (4th Cir. 1989), *aff'd in part on other grounds sub non Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 110 S.Ct. 2510, 110 L.Ed.2d 455 (1990);

accord Nat'l Adver. Co. v. City of Raleigh, 947 F.2d 1158 (4th Cir. 1991)." *Kuhnle Brothers, Inc. v. County of Geauga*, 103 F.3d 516, 522 (6th Cir. 1997).

Thus, the Court should grant certiorari because the Eleventh Circuit's decision causes practical and financial problems for small businesses, who are now forced to file lawsuits well before it is truly necessary.

II. THE ELEVENTH CIRCUIT CONTRADICTS THIS COURT'S RULING IN *LINGLE V. CHEVRON* BY HOLDING THAT A PURPORTED DEVALUATION OF PROPERTY IS INCLUDED AS PART OF A SUBSTANTIVE DUE PROCESS ANALYSIS.

A. Valuation Is An Appropriate Consideration Under A Fifth Amendment Claim For Just Compensation.

The Eleventh Circuit made a critical mistake by extending facial takings statute of limitations rules to Petitioner's facial substantive due process claim. In particular, the court erred when it held that Petitioner's facial substantive due process claim was time-barred because its property "became encumbered immediately upon the Ordinance's enactment" because "[i]ts property would have decreased in value at that time. . . ." *Hillcrest Property, LLC v. Pasco* County, 754 F.3d 1279, 1283 (2014). Any devaluation of property, while relevant in the just compensation context under the Fifth Amendment, is not part of substantive due process analysis. Rather, a property becomes encumbered in a substantive due process claim, in both the facial and as-applied context, when a law is applied to the property owner.

It is proper for courts, when hearing a claim for just compensation under the Takings Clause, to consider in its analysis that the mere enactment of a law devalues property. However, in cases where the Court conducts such an analysis, it emphasizes that the judicial inquiry for substantive due process is separate and distinct.

In 1922, this Court examined a state statute which prohibited coal mining in a manner that caused the subsidence of, among other things, any structure used as human habitation. This Court, recognizing regulatory takings for the first time, "assume[d], of course, that the statute was passed upon the conviction that an exigency existed that would warrant it, and we assume that an exigency exists that would warrant the exercise of eminent domain." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922).

This Court has repeated its proclamation that a claim for just compensation under the Fifth Amendment presupposes that the law was enacted under a valid governmental power: "The [lower court] determined that [the state statute] serves [a] legitimate public purpose . . . and thus is within the State's police power. We have no reason to question that determination. It is a separate question, however, whether an otherwise valid regulation so frustrates property rights that compensation must be paid." *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419, 425 (1982).

Similarly, in *Lucas v. South Carolina Coastal Council*, a property owner brought a facial claim under the Takings Clause claiming that the enactment of a state statute that prohibited any development on his property constituted a taking under the Fifth Amendment. Petitioner "*did not take issue with the validity of the [statute] as a lawful exercise* of South Carolina's police power, but contended that the Act's complete extinguishment of his *property's value* entitled him to compensation regardless of whether the legislature had acted in furtherance of legitimate police power objectives." 505 U.S. 1003, 1009 (1992)(emphasis added).

Under modern regulatory takings law, a change in the value of land is certainly a factor in determining whether the government must pay just compensation under the Takings Clause. *See Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978) (In the regulatory takings context, "[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations.")

B. This Court's Decision In *Lingle v. Chevron* Makes It Clear That Devaluation Of Property Should Not Be Analyzed By Courts To Determine If There Has Been A Violation Of Substantive Due Process.

As opposed to takings claims, facial substantive due process claims do not involve judicial inquiry into a purported devaluation of property. In *Mugler v. Kansas*, Justice John Marshall proclaimed in what would be the first foundational pour recognizing substantive due process as a cause of action:

> It does not at all follow that every statute enacted ostensibly for the promotion of these ends, is to be accepted as a legitimate exertion of the police powers of the State. There are, of necessity, limits beyond which legislation cannot rightfully go. While every possible presumption is to be indulged in favor of the validity of a statute, ... the courts must obey the Constitution rather than the law-making department of government, and must, upon their own responsibility, determine whether, in any particular case, these limits have been passed . . . . If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.

123 U.S. 623, 661 (1887).

For much of the 20th Century, principles of due process were used in physical and regulatory takings analysis. This Court once held that a regulation of private property "effects a taking if [it] does not substantially advance [a] legitimate state interest[]." *Agins*, 447 U.S. 255, 260 (1980).

However, the Court expressly invalidated the *Agins* standard for takings analysis in *Lingle v. Chevron*, 544 U.S. 528 (2005). In *Lingle,* the Court admitted, the *Agins* test was one that "commingl[ed]" due process and takings inquiries, and that such "reliance on due process precedents" has "no proper place in our takings jurisprudence." *Id.* at 529. The *Agins* "substantially advances" analysis is geared toward the context of a due process challenge, "for 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." *Lingle* at 542.

The Court was particularly concerned that the *Agins'* due process-like test "reveals nothing about the *magnitude or character of the burden* a particular regulation imposes on private property rights. Instead, the *Agins* inquiry "probes into the underlying validity" of the challenged regulation.[3] This question, the Court admitted, "is logically prior to and distinct from the question whether a regulation effects a

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3 Justice Kennedy wrote a concurring opinion in *Lingle* to note that "[t]he failure of a regulation to accomplish a stated or obvious object would be relevant under a due process inquiry." *Lingle* at 548-549 (Kennedy, J., concurring).

taking, for the Takings Clause presupposes that the government has acted in pursuit of a valid public purpose." *Lingle* at 543.

C. The Eleventh Circuit's Decision Contradicts This Court's Decision In *Lingle v. Chevron* By Combining Due Process And Takings Principles.

The Eleventh Circuit erred by ruling that a devaluation of property constitutes the necessary encumbrance to commence the statute of limitations. As the Court made clear in *Lingle*, it is irrelevant for facial substantive due process analysis whether or not one's property is devalued by the mere enactment of a law or regulation. In fact, this Court has "emphasized time and again that '[t]he touchstone of due process is protection of the individual against arbitrary action of government.'" *County of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998), *quoting Wolff v. McDonnell*, 418 U.S. 539, 558 (1974); *see also Nectow v. City of Cambridge*, 277 U.S. 183 (1928) (The Court invalidated a zoning ordinance, ruling that it did not bear a substantial relation to public health, safety, and morals.).

The Court should grant certiorari to keep the lower courts from commingling substantive due process and takings analysis, which the Court intended to sever in *Lingle*.

III. THE ELEVENTH CIRCUIT DEVIATES FROM OTHER COURTS WHICH REQUIRE A PROPERTY OWNER'S INJURY TO BE FULLY EFFECTUATED TO START THE STATUTE OF LIMITATIONS CLOCK.

In making the assumption that Petitioner's property was devalued by the Ordinance enactment, the Eleventh Circuit relied on a Sixth Circuit case, *Kuhnle Bros., Inc. v. Cnty. Of Geauga*, 103 F.3d 516 (6th Cir. 1997). Specifically, the Eleventh Circuit interpreted *Kuhnle* as standing for the proposition that the encumbrance in a substantive due process claim occurs upon the statute's enactment because the statute "has reduced the value of the property or has effected a transfer of a property interest." *Id.* at 521.

The lower court misinterprets *Kuhnle*. In *Kuhnle*, a trucking company entered into a contractual agreement with Geagua County to limit its use of public roads. The County then bypassed the agreement by passing a local law which immediately restricted Kuhnle from utilizing certain public roads that it was allowed to use under the contractual agreement. Kuhnle brought multiple facial substantive due process claims and a separate facial takings claim against Geauga County. Regarding the substantive due process claim, the Sixth Circuit decided that the injury occurred at ordinance enactment, because Kuhnle admitted that it began diverting trucks onto alternate routes as soon as the County enacted the local law. It makes sense, then, that "Kuhnle clearly knew at that time of the injury forming the basis of this action" because "[a]ny deprivation of property that Kuhnle suffered was *fully*

effectuated when [the resolution] was enacted . . . ." *Id.* at 521 (emphasis added).[4]

In addition to *Kuhnle*, the Eleventh Circuit relied on *Action Apartment Ass'n. v. Santa Monica Rent Control Bd.,* 509 F.3d 1020 (2007). However, a historical look at a series of Ninth Circuit rent control cases leading up to *Action Apartment* shows the 90-degree turn the Ninth Circuit made in that case. First, in *Schnuck v. City of Santa Monica,* the Ninth Circuit heard a 1987 facial substantive due process challenge to a rent control ordinance that was enacted in 1979 without even addressing the statute of limitation. 935 F.3d 171. Then, in *Hall v. City of Santa Barbara*, the Ninth Circuit heard a facial takings challenge to a rent control ordinance applicable to mobile home parks. 833 F.2d 1270 (9th Cir. 1986). Importantly, the ordinance *immediately* required, among other things, landlords to offer tenants leases of unlimited duration giving "tenants a lease, a recognized estate in land, lasting indefinitely." *Id.* at 1276. The tenant, under the ordinance, was "given an economic interest in the land that he can use, sell or give away at his pleasure; this interest (or its monetary equivalent) is the tenant's to keep or use, whether or not he continues to be a tenant." *Id.* at 1277. The Ninth Circuit admitted, if the Halls' allegations are proven true, *it would be difficult to say that the ordinance does not transfer an*

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4 It is worth noting that the *Kuhnle* court heard multiple substantive due process claims, and did not bar Kuhnle's substantive due process for deprivation of liberty claim as a result of the mere enactment of the County's Resolution. *Kuhnle* at 521-522.

interest in their land to others. *Id.* at 1277 (emphasis added).

The *Hall* decision was raised again in another rent control case, *De Anza Properties X, Ltd. v. County of Santa* Cruz, 936 F.2d 1084. There, the Ninth Circuit stated that the "opinion in *Hall* makes clear that the action of the local government giving rise to a cause of action for a *taking* was the government's enactment of the ordinance itself." *De Anza* at 1087 (emphasis added). *De Anza* was in line with prior rulings, because the court was making it clear that the enactment of the ordinance effectuated the "the same injury in 1982 [at the ordinance's enactment] that they experienced in 1987 [when plaintiff's filed complaint]". *Id.* at 1086.

Unfortunately, this distinction in *Hall* and *De Anza* which focused on the immediate transfer in the interest land was lost by the Ninth Circuit in *Action Apartments*. In *Action Apartments,* the court made the blanket proclamation that "it stands to reason that any facial injury to any right should be apparent upon passage and enactment of the statute." *Id.* at 1027.

It is the effective application of the unconstitutional law that impacts the property owner in the substantive due process context and commences the statute of limitations, regardless of whether that property owner brings a facial or an as-applied claim. Indeed, "[a] plaintiff may challenge a law's validity at any time within the limitations period after that law has injured her, whether she chooses to argue that the law is facially unconstitutional or only

unconstitutional as applied in her case." Timothy Sandefur, *The Timing of Facial Challenges,* 43 Akron L. Rev. 51, 52 n.4 (2010), *quoting* Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 Harv. L. Rev. 1321, 1324 (2000) ("[T]here is no single distinctive category of facial, as opposed to as-applied, litigation. Rather, all challenges to statutes arise when a particular litigant claims that a statute cannot be enforced against her."). Simply put, "[t]he time at which a cause of action accrues will differ depending on the facts of the case, but it will come whenever the plaintiff's rights are finally and clearly affected pursuant to the law that [he or] she believes is unconstitutional." *Lindner v. Kindig*, 826 N.W. 2d 868, 392 (2013) *quoting* Sandefur, 43 Akron L. Rev. 51, 61 (2010).

Clearly, the Eleventh Circuit's decision here and the Ninth Circuit's in *Action Apartments* create a broad rule that the enactment of an ordinance alone starts the statute of limitations clock. This is in contrast from the long line of prior rent control cases, as well as in contrast to the Sixth Circuit's ruling in *Kuhnle* where the enactment of the ordinance "fully effectuate[d]" an injury because Kuhnle immediately altered his truck routes. *Kuhnle* at 520.

CONCLUSION

The Eleventh Circuit's decision shuts the front door to the courtroom by requiring property owners to bring a facial substantive due process claim before an owner has Article III standing. Further, as this Court made clear in *Lingle,* valuation is not a factor under

substantive due process analysis. For these and the other foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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