No. 11-496

In the

Supreme Court of the United States

JAMES D. HARMON, JR., and JEANNE HARMON,
Petitioners,

v.

JONATHAN L. KIMMEL, in his official capacity as Member and Chair of the New York City Rent Guidelines Board, City of New York; DARRYL C. TOWNS, in his official capacity as Commissioner, New York State Homes and Community Renewal,
Respondents.

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

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, CATO INSTITUTE, AND SMALL PROPERTY OWNERS OF SAN FRANCISCO INSTITUTE IN SUPPORT OF PETITIONERS JAMES D. HARMON, JR., and JEANNE HARMON

R. S. RADFORD
Counsel of Record
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: rsr@pacificlegal.org

Counsel for Amici Curiae Pacific Legal Foundation, Cato Institute, and Small Property Owners of San Francisco Institute

QUESTION PRESENTED

Does this Court's ruling in *Lingle v. Chevron U.S.A.* preclude the holding of the Second Circuit below, that the Fifth Amendment's "explicit textual protection" against governmental takings of property without just compensation bars a substantive due process claim that New York City's Rent Stabilization Law fails to substantially advance legitimate state interests?

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Rule

Pacific Legal Foundation (PLF), Cato Institute (Cato), and Small Property Owners of San Francisco Institute (SPOSF Institute) respectfully submit this brief amicus curiae in support of Petitioners James D. and Jeanne Harmon (the Harmons).[1] In accordance with Rule 37.2(a), these Amici provided ten days' notice to all counsel of record of their intention to file this amicus brief. The parties have issued general consents to the filing of amicus briefs in this matter by specified Amici, including PLF, Cato, and SPOSF Institute, and those consents have been duly lodged with the Court.

INTEREST OF AMICI CURIAE

Pacific Legal Foundation is a nonprofit, tax-exempt corporation organized under the laws of California for the purpose of litigating matters affecting the public interest. Representing the views of thousands of members and supporters, PLF is an advocate of individual rights, including the fundamental right to own and make productive use of private property. PLF attorneys have litigated leading cases before this Court and around the nation arising under the Takings and Due Process Clauses of the Fifth Amendment. PLF attorneys were counsel of record before this Court in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997), and

[1] No counsel for a party authored any portion of this brief and no such counsel or party made a monetary contribution intended to fund the brief's preparation or submission. No person or group made a monetary contribution intended to fund the preparation or submission of this brief. The parties have consented to the filing of the brief, and were given ten days' notice of the intention to file.

Palazzolo v. Rhode Island, 533 U.S. 606 (2001). PLF attorneys also litigated *Crown Point Development, Inc. v. City of Sun Valley*, 506 F.3d 851 (9th Cir. 2007) before the Ninth Circuit Court of Appeals, a case that directly conflicts with the opinion of the Second Circuit in the case at bar. PLF filed a brief amicus curiae in support of the Harmons in the proceedings below.

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was created in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, the Center publishes books and studies, conducts conferences and forums, publishes the annual *Cato Supreme Court Review*, and files amicus briefs – including in cases implicating property rights and the Fifth Amendment's Takings Clause, such as *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, 130 S. Ct. 2592 (2010), *Kelo v. City of New London*, 545 U.S. 469 (2005), and *PPL Montana, LLC v. Montana*, 131 S. Ct. 3019 (2011).

Small Property Owners of San Francisco Institute is a nonprofit organization dedicated to the fair treatment of small property owners in San Francisco and works closely with Small Property Owners of San Francisco (SPOSF). The members of the Institute and SPOSF typically own buildings with two to six apartments. SPOSF and the Institute have challenged ordinances adopted by the City and County of San Francisco related to rent control and other onerous regulations of property owners. For example, SPOSF defeated an ordinance prohibiting property owners

from living in their own properties. *Tom v. City and County of San Francisco*, 120 Cal. App. 4th 674 (2004). SPOSF and the Institute have also filed amicus briefs in the California courts. *E.g.*, *Drouet v. Superior* Court, 31 Cal. 4th 583 (2003). The Institute has filed amicus briefs in cases before this Court, including *San Remo Hotel v. City and County of San Francisco*, 545 U.S. 323 (2005), and *Lingle v. Chevron U.S.A.*, 544 U.S. 528 (2005). The Institute also conducts education, outreach, and research programs designed to help small property owners understand and protect their rights, and works to help San Francisco's residents understand the societal costs of restrictive regulations and rent control.

These Amici seek to provide this Court with an additional viewpoint on a question of nationwide importance arising from the decision below. Prior to this Court's 2005 decision in *Lingle v. Chevron U.S.A.*, 544 U.S. 528, allegations that a land-use regulation fails to substantially advance legitimate state interests stated a claim for a regulatory taking, requiring just compensation under the Fifth Amendment's Takings Clause. *See*, *e.g.*, *Agins v. City of Tiburon*, 447 U.S. 255 (1980), *Nollan v. California Coastal Commission*, 483 U.S. 825. As a corollary, under the doctrine of *Graham v. Connor*, 490 U.S. 386 (1989), those same allegations could not give rise to a claim for a violation of the Fourteenth Amendment's Due Process Clause, since the general protections of substantive due process were deemed to be subsumed under the explicit constitutional guarantee of the Takings Clause. When *Lingle* repudiated the "failure to substantially advance" test as a regulatory takings standard, some Circuits recognized that the holding necessarily

restored independent viability to substantive due process claims based on such allegations. *See*, *e.g.*, *Crown Point Development, Inc. v. City of Sun Valley,* 506 F.3d 851. As exemplified by the decision below, however, the Second Circuit continues to rely on *Graham* to dismiss substantive due process claims resting on allegations of failure to substantially advance legitimate state interests, even though such allegations can no longer support a claim for a taking.

PLF, Cato, and SPOSF Institute are concerned that the Second Circuit has entirely foreclosed a constitutional remedy to property owners whose rights have been abridged by predatory regulations such as the rent control scheme at issue here. If the City's failure to advance a legitimate governmental purpose with such regulations does not state a claim for a taking under *Lingle*, yet also—as the Second Circuit held below—does not support a substantive due process claim under *Graham*, property owners have been stripped of all meaningful constitutional protections of their rights. Accordingly, these Amici urge the Court to grant the petition for certiorari and restore uniformity among the circuits on this question of utmost importance to property owners.

ARGUMENT

CERTIORARI SHOULD BE GRANTED TO ESTABLISH UNIFORMITY AMONG THE CIRCUITS ON THE INDEPENDENT VIABILITY OF REGULATORY TAKINGS AND SUBSTANTIVE DUE PROCESS CLAIMS FOLLOWING *LINGLE v. CHEVRON*

The Harmons filed a complaint in the United States District Court alleging, inter alia, that New York City's Rent Stabilization Law (RSL) violates the Takings Clause of the Fifth Amendment with respect to the Harmons' rental property. Petition Appendix (Pet. App.) 87a-88a. In support of this claim, the Harmons argued principally that the RSL effected a permanent physical invasion of their property, in contravention of *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). Pet. App. 17a.

In addition to the takings claim, the Harmons also alleged that the RSL violates the Fourteenth Amendment's Due Process Clause. Pet. App. 88a. The gravamen of the Harmons' due process argument was that the RSL fails to substantially advance a legitimate governmental interest, since the regulations cover only a fraction of the City's rental housing stock, are not targeted on those in need of affordable housing, and are justified by a nonexistent state of emergency. Pet. at 24.

The trial court considered and rejected the Harmons' allegations of an unconstitutional taking, on ripeness and other grounds. Pet. App. 13a-20a. Instead of evaluating the Harmons' independent due process claim on its merits, however, the trial court

summarily dismissed that claim as unripe under *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). Pet. App. 21a.

On appeal, the Second Circuit ignored the trial court's application of *Williamson County* and ruled against the Harmons' takings claim on the merits. Pet. App. 3a-5a. The appellate court then upheld the dismissal of the Harmons' substantive due process claim, not because it was supposedly unripe, as the trial court had held, but because the Second Circuit believed the due process claim was subsumed by the takings claim:

> [T]he Due Process Clause cannot "do the work of the Takings Clause" because "[w]here a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims."

Pet. App. 6a (quoting *Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Prot.*, 130 S. Ct. at 2606). This was a critical error, demonstrating the Second Circuit's deep misunderstanding of this Court's substantive due process doctrine following *Lingle v. Chevron U.S.A.*, 544 U.S. 528, and a disregard of the conflicting decisions of other Circuits. This Court should grant certiorari to ensure uniformity among the Circuits on this important question of constitutional doctrine.

A. *Lingle* Established That Failure To Advance Legitimate Governmental Interests States a Claim for a Due Process Violation, but Not a Regulatory Taking

In 1980, this Court established that a regulation of real property violates the Takings Clause of the Fifth Amendment if the measure "does not substantially advance legitimate state interests." *Agins v. City of Tiburon*, 447 U.S. at 260. This rule was subsequently applied, both by this Court and lower courts, to strike down such enactments as regulatory takings. *See*, *e.g.*, *Nollan v. California Coastal Commission*, 483 U.S. 825; *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

Twenty-five years after *Agins*, the Court reversed direction in *Lingle v. Chevron U.S.A.*, 544 U.S. 528. At issue in *Lingle* was a Hawaii statute that limited the rent oil companies could charge dealers leasing company-owned service stations. *Id.* at 533. The question before the Court was whether "the 'substantially advances' formula announced in *Agins* is an appropriate test for determining whether a regulation effects a Fifth Amendment taking." *Id.* at 532. The Court concluded that it was not. *Id.* at 545.

The *Lingle* Court explained that regulatory takings tests must "focus[] directly upon the severity of the burden that government imposes upon private property rights." *Id.* at 539. The "substantially advances" test did not fit that mold, the Court declared, because it "suggests a means-ends test, asking, in essence, whether a regulation of private property is effective in achieving some legitimate

public purpose." *Id.* at 529. Given that focus, the substantial-advancement inquiry "reveals nothing about the *magnitude or character of the burden* a particular regulation imposes" or how the "burden is *distributed* among property owners." *Id.* at 542. Ultimately, the Court found that the substantial-advancement test "does not help to identify those regulations whose effects are functionally comparable to government appropriation or invasion of private property; it is tethered neither to the text of the Takings Clause nor to the basic justification for allowing regulatory actions to be challenged under the Clause." *Id.* at 529. For these reasons, the Court held that the substantial-advancement inquiry "is not a valid method of identifying regulatory takings for which the Fifth Amendment requires just compensation." *Id.* at 545.

But in repudiating the "substantially advances" test as a takings standard, *Lingle* recognized that the test implicates due process doctrine: "This formula [the substantially advances formula minted in *Agins*] prescribes an inquiry in the nature of a due process, not a takings, test . . . . [An] inquiry of this nature has some logic in the context of a due process challenge, for a regulation that fails to serve any legitimate governmental objective may . . . run[] afoul of the Due Process Clause." *Id.* at 540, 542. Thus, while *Lingle* repudiated the Court's previous view that failure to substantially advance legitimate interests was grounds to strike down a regulation under the Takings Clause, the decision reinvigorated substantive due process doctrine as the proper and exclusive vehicle for such allegations. In short, after *Lingle*, allegations that a property regulation fails to substantially advance legitimate state interests set forth a claim for a due

process violation ***that cannot possibly be subsumed by a takings claim***, since those allegations no longer state a viable claim for a taking.

B. *Graham v. Connor* Provides No Basis for Dismissing a Substantive Due Process Claim That Could Not Trigger the Protections of the Takings Clause

The language from *Stop the Beach Renourishment* the Second Circuit relied upon in the decision below, that a substantive due process claim cannot do the work of an Amendment that provides "an explicit textual source of constitutional protection," derives from this Court's opinion in *Graham v. Connor*, 490 U.S. 386. *See Stop the Beach Renourishment*, 130 S. Ct. at 2606 (quoting *Graham*, 490 U.S. at 395). Yet whatever its doctrinal value in other contexts, *Graham* has no applicability to cases such as this one.

In *Graham*, the Court held that the Fourth Amendment's protections against unreasonable seizures preempted a substantive due process claim arising from allegations of excessive use of force by the police. 490 U.S. at 395. The Court explained that because the Fourth Amendment provided "an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims." *Id.* Since then, the *Graham* doctrine has been held to apply whenever any claim of a constitutional violation "is covered by a specific constitutional provision," *United States v. Lanier*, 520 U.S. 259, 272 n.7 (1997). Correspondingly, however, *Graham* does ***not*** apply if the alleged substantive due

process violation stems from allegations that are ***not*** covered by an explicit textual protection. *See County of Sacramento v. Lewis*, 523 U.S. 833, 842-44 (1998) (applying substantive due process, rather than Fourth Amendment standards, to an excessive use of force claim that did not involve a search or seizure).

When *Graham* was decided, *Agins* was still good law, and allegations that a regulation fails to substantially advance legitimate state interests could support either a takings or a due process claim. *See Crown Point*, 506 F.3d at 854 (discussing interaction between the "substantially advances" test and *Graham*). But when *Lingle* removed considerations of substantially advancing legitimate state interests from the Takings Clause calculus, such allegations could no longer be subsumed by takings claims pursuant to *Graham*. Post-*Lingle*, the Harmons' allegations in support of their substantive due process claim simply do not describe conduct covered by the explicit protections of the Takings Clause. And as the Ninth Circuit has put it, the Takings Clause only precludes due process challenges that are "actually covered by the Takings Clause." *Crown Point*, 506 F.3d at 855.

The *Graham*-derived passage from *Stop the Beach Renourishment*, relied on by the Second Circuit in this case, does not offer a valid foundation for treating the Harmons' substantive due process claim as subsumed in their takings claim. Rather, *Lingle*'s retrenchment of takings law controls, particularly its clear holding that complaints of regulatory failure to advance legitimate state interests are not covered by the Takings Clause, but must be independently adjudicated under the Due Process Clause.

C. In Contrast to the Holding of the Second Circuit, the Ninth Circuit Has Expressly Affirmed That Substantive Due Process Claims Based on Failure to Substantially Advance Legitimate State Interests May Not Be Subsumed by Takings Claims

In 2007, the Ninth Circuit Court of Appeals directly confronted the issue of whether, in view of *Lingle*, substantive due process claims such as the Harmons' can be subsumed by a regulatory takings claim. In *Crown Point Development, Inc. v. City of Sun Valley,* 506 F.3d 851, a developer challenged the denial of a building permit as arbitrary and irrational, alleging that the denial was a violation of substantive due process pursuant to the Fourteenth Amendment. *Id.* at 853. The developer filed a substantive due process challenge in federal court, which the city moved to dismiss on the ground that the claim had to be treated as a takings claim that could not be maintained in the federal forum under *Williamson County*. *Id.* The district court granted the city's motion. *Id.*

On appeal, the Ninth Circuit recognized that "*Lingle* pulls the rug out from under our rationale for totally precluding substantive due process claims based on arbitrary or unreasonable conduct." *Id.* at 855. The *Crown Point* court further explained that, since *Lingle* made clear that "there is no specific textual source in the Fifth Amendment for protecting a property owner from conduct that furthers no legitimate government purpose," the *Graham* rationale no longer applies to bar a substantive due process claim based on such conduct. *Id.*

Other federal court decisions since *Crown Point* have relied on that opinion to confirm that there is no longer any plausible basis for treating substantive due process claims as takings claims. *See*, *e.g.*, *A Helping Hand, LLC v. Baltimore County*, 515 F.3d 356, 369 (4th Cir. 2008); *Action Apartment Ass'n, Inc. v. Santa Monica Rent Control Opinion Bd.*, 509 F.3d 1020, 1024 (9th Cir. 2007). *See also MHC Financing Ltd. Partnership v. City of San Rafael*, No. C 00-3785 VRW, 2006 U.S. Dist. LEXIS 89195, at *26-*27 (N.D. Cal. Dec. 5, 2006) (finding that "*Lingle* undercuts the Ninth Circuit's basis for barring substantive due process challenges to deprivations of property"); *S. G. Borello & Sons, Inc. v. City of Hayward*, No. C 03-0891 VRW, 2006 U.S. Dist. LEXIS 86293, at *11 (N.D. Cal. Nov. 20, 2006) (recognizing that "*Lingle* marked a path for substantive due process challenges").

This Court should definitively clarify that, after *Lingle*, substantive due process claims supply an independently viable avenue for relief from arbitrary or illegitimate property restrictions, and thus that such claims must be adjudicated without respect to takings law. Only in this way can uniformity among the circuit courts of appeals be established on this important question of constitutional doctrine.

CONCLUSION

The Petition for Writ of Certiorari to the Second Circuit should be granted.

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Respectfully submitted,

R. S. RADFORD
Counsel of Record
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: rsr@pacificlegal.org

Counsel for Amici Curiae Pacific Legal Foundation, Cato Institute, and Small Property Owners of San Francisco Institute