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INTEREST OF *AMICUS CURIAE*¹

Southeastern Legal Foundation, Inc. (hereinafter "SLF"), founded in 1976, is a national public interest law firm and policy center that advocates for constitutional individual liberties, private property rights and free enterprise in the courts of law and public opinion. SLF drafts legislative models, educates the public on key policy issues, and litigates regularly in state and federal courts.

SLF seeks in this case to support the protection of private property against abuse and usurpation by governmental authority. In particular, SLF supports the private property owners' right to exclude others from their privately-held land. The right to exclude, as stated by the United States Supreme Court, is the "hallmark" of private property² and this Court should not allow the State of Ohio to deprive the landowners of this essential property right.

In pursuit of its goal to protect private property ownership rights, SLF has represented numerous plaintiffs against governmental entities, which have infringed upon their private property rights. SLF currently represents plaintiffs in the State of Florida, where a municipality has refused to enforce the state trespass law in the area adjacent to the Gulf of Mexico shoreline, thereby effectively eliminating the property owners' right to exclude others from their legally-titled land.

For these reasons, SLF respectfully submits this *amicus curiae* brief in support of the Class Plaintiffs-Appellees and affirm the judgment below.

¹ No counsel for a party authored the brief in whole or in part. No counsel for a party made any monetary contribution intended to fund the preparation or submission of the brief.

² *College Sav. Bank v. Fla. Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666, 673 (1999).

I. Preliminary Statement: A Matter of Inches or a Paradigmatic Shift?

The State of Ohio, through the Ohio Department of Natural Resources (“Ohio”), asserts it owns in public trust the land lakeward of the Ordinary High Water Mark along the shores of Lake Erie, as established by the United State Corps of Engineers in 1985.³ A class of plaintiffs (“Property Owners”) claim the true boundary is the Ordinary Low Water Mark.⁴ The difference in these two boundary lines may only be a matter inches, but this Court’s decision will either affirm or eviscerate any meaningful concept of ownership regarding those who the land is legally titled.

If this Court agrees with Ohio, it will strip from the Property Owners the one and only essential element of what is known as “property”: the right to exclude others from scarce resources (‘right to exclude’). Throughout hundreds, indeed thousands of years, through varying theories of what it actually means to own property, and through ancient and modern social convention, this single attribute has materialized as property’s *sine qua non*.⁵ Give someone a resource and the ‘right to exclude,’ and he has property, deprive him of this right and property ceases to exist. All other rights in property flow from this one essential right.

This brief will: (i.) track the theoretical, historical and social development of property law, and the primacy of ‘right to exclude’; (ii.) explain why this particular right establishes or destroys property; and (iii.) examine the economic success of the Western world through the prism of property rights and ‘right to exclude’s’ recognition in international law.

³ *State ex rel. Merrill v. State*, 2009 Ohio 4256 at ¶ 2.

⁴ *Id.* at ¶ 30.

⁵ Thomas W. Merrill, *ESSAY: Property and the Right to Exclude*, 77 *Neb. L. Rev.* 730, 752 (1998).

II. The Theories of Property.

Three distinct theories currently encapsulate the study of property, the first two—Single Variable Essentialism and Multi-Variable Essentialism—derive from William Blackstone, the West’s first full-time law professor; the third—a 20th Century concoction—arose as a reaction to the first two.

A. Single Variable Essentialism.

The first theory holds property exists if the owner has the right to exclude others from it. This theory, dubbed Single Variable Essentialism by Professor Thomas Merrill,⁶ describes this right as the core and only requisite attribute of property. Blackstone first articulated this theory thusly: “There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.”⁷

The popularity of this theory has ebbed and flowed over the centuries, but has lately enjoyed a resurgence of sorts. Perhaps the most famous modern advocate of Single Variable Essentialism is New Deal lawyer and theorist Felix Cohen. In a posthumously published work, he describes the essence of property in a simple yet profound manner:

To the world: Keep off X unless you have my permission,
which I may grant or withhold.

Signed: Private citizen Endorsed: The state.⁸

⁶ *Id.* at 734.

⁷ 2 William Blackstone, *Commentaries on the Laws of England* *2.

⁸ Felix S. Cohen, *Dialogue on Private Property*, 9 *Rutgers L. Rev.* 357, 374 (1954).

More recent theorists also endorse variations of Single Variable Essentialism as the proper prism with which to analyze property.⁹

B. Multi-Variable Essentialism.

Blackstone's second attempt at defining property focuses on a more integrated approach. Here Blackstone posits property consists of three defining elements: "free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land."¹⁰ This theory, although including 'right to exclude,' along with, in modern parlance, use and transfer, holds 'right to exclude' as but one of a triumvirate. According to this theory, each of the three is necessary to define a thing as property, and the absence of any effectively removes the property label.¹¹

C. Jural Relations/Bundle of Rights.

The third, and currently most prevalent theory of property is the Jural Relations/Bundle of Rights concept. This theory posits property is an empty vassal to be filled by whatever rights a legal system or society at large wish to place in it. At its basest form, 'right to exclude' is not an essential element of property, but one attribute available, along with others, which can constitute property.¹² Scholar Wesley Hohfeld was the first to prominently articulate this theory,¹³ which arose as a reaction to the earlier more tangible theories of property. The proponents of this

⁹ See J.W. Harris, *Property and Justice* (Oxford University Press) (1996); and J.E. Penner, *The Idea of Property in Law* (Oxford University Press) (1997). Penner argues "the right to property is a right to exclude others from things which is grounded by the interest we have in the use of things," and "the law of property is driven by an analysis which takes the perspective of exclusion, rather than one which elaborates a right to use." *Id.* at 71 quoted in Merrill, *supra* note 5 at 734 n.10

¹⁰ 1 William Blackstone, *Commentaries on the Laws of England* *138.

¹¹ Merrill, *supra* note 5, at 736.

¹² Merrill, *supra* note 5, at 738.

¹³ See Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 Yale L.J. 710, 746-47 (1917).

theory aimed to attenuate and destroy well-founded notions of private property rights for the purported public benefit. These “Legal Realists” led by Hofeld, viewed private property as an evil, which must be overcome for the good of the commons.¹⁴

D. Modern American View: Hybrid of Single Variable Essentialism and Bundle of Rights.

Although American law schools present the Bundle of Rights theory of property as the property-law norm, the United States Supreme Court does not wholly adopt this theory in its most elemental form. Instead, the Supreme Court has singled out ‘right to exclude’ as the one *crucial* “stick” in the bundle of rights forming property. The most cited example of the Supreme Court’s affection for ‘right to exclude’ is from *Kaiser Aetna v. United States*,¹⁵ there the Court held that a government-ordered right of public access to a privately-owned marina, which had been improved to create a link to navigable waters constituted a “taking.” In so holding, the Court confirmed ‘right to exclude’ as “one of the most essential sticks in the bundle of rights that are commonly characterized as property.” Indeed, the Supreme Court has singled out no other property right for such “extravagant endorsement.”¹⁶ In another case with factual similarities to the case at bar, *Nollan v. California Coastal Commission*,¹⁷ the Supreme Court emphasized the preeminence of ‘right to exclude’ when a municipality attempted to “trade” approval of permits in exchange for private land owners allowing a public easement across their oceanfront property. As if the Supreme Court was speaking directly to Ohio’s current action the Court stated, “Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach, . . . we have no

¹⁴ Merrill, *supra* note 5, at 755.

¹⁵ 444 U.S. 164, 176 (1979).

¹⁶ Thomas W. Merrill, *The Landscape Of Constitutional Property*, 86 Va. L. Rev. 885, 973 (2000).

¹⁷ 483 U.S. 825, 831 (1987).

doubt there would have been a taking.”¹⁸ Similarly in this case, Ohio seeks to redefine littoral private property, so as to eviscerate the true indicia of ownership. Thus, the Supreme Court emphasizes that while the Bundle of Rights may be the prominent current theory of property, without including ‘right to exclude’ as one of those “sticks,” the “bundle” becomes meaningless, the theory falls apart and property ceases to exist.

The Supreme Court’s emphasis on including ‘right to exclude’ in any “bundle” discussion of property ostensibly derives from its recognition that all other rights commonly associated with property emanate from it. Commencing an analysis of property from any other point does not yield a meaningful definition and the law must add ‘right to exclude’ to arrive at property. Conversely, however, all other rights associated with property can be implied from ‘right to exclude.’¹⁹ The four most common attributes scholars associate with property other than ‘right to exclude’ are the right to use, the right to transfigure (develop), the right to transfer during life, and the right to devise during death. When starting with ‘right to exclude,’ all of these other rights flow naturally and logically.²⁰ For instance, the right to exclude sets permanent and fixed boundaries, which allow the owner to use, develop or transfer his parcel as he wishes. Starting with any of these other four attributes yields no meaningful definition of property without the exclusion right because of uncertainty of ownership, and thus the law must add ‘right to exclude’ separately.²¹

¹⁸ *Id.*

¹⁹ Merrill, *supra* note 5, at 740.

²⁰ The analogy becomes less clear with the “neo-property rights” of procedural due process first recognized in *Goldberg v. Kelly*, 397 U.S. 254 (1970). Although one could argue a property right in a welfare check for instance deprives the government from excluding it from the individual who is entitled to it, these cases may be more properly characterized as outliers and aberrations of 1970’s Supreme Court jurisprudence. See Merrill, *supra* note 5 at 752.

²¹ *Id.*

Following the Supreme Court's lead, the States also recognize the essential nature 'right to exclude' plays in American property law. Most important, for the facts of the present case is *Sloan v. Biemiller*,²² where there, this Court held littoral owners have the right to exclude others from their property. Other state courts have followed Ohio's lead in recognizing the preeminence of 'right to exclude' as the essential element of land ownership. For instance, in *Eaton v. B.C. & M.R.R.* the New Hampshire Supreme Court stated,

If property in land consists of certain essential rights, and a physical interference with the land substantially subverts one of those rights, such interference "takes," *pro tanto*, the owner's "property." The right of indefinite user (or of using indefinitely) is a essential quality . . . This right of user necessarily includes the right and power of excluding others from using the land. From the very nature of these rights of user and exclusion, it is evident they cannot be materially abridged without, *ipso facto*, taking the owner's "property."²³

In *Noranda Exploration, Inc. v. Ostrom* the Wisconsin Supreme Court stated, "although a state may redefine property rights to a limited extent, it lacks the power to restructure rights so as to interfere with traditional attributes of property ownership, such as the right to exclude others."²⁴ In addition, several other states recognize 'right to exclude' as the most essential aspect of property.²⁵

III. The Historical Perspective of Property.

In addition to the purely theoretical argument for 'right to exclude' as the *sine qua non* of property, the prehistorical and historical record also supports this assertion. Thousands of years ago, well before the advent of legal systems, 'right to exclude'

²² 34 Ohio St. 492 (1878).

²³ 1872 WL 4329 (1872).

²⁴ 335 N.W.2d 596, 603-604 (1983).

²⁵ See *Margola Associates v. City of Seattle*, 854 P.2d 23 (1993); *In re Water Distribution Mains*, 466 A.2d 239, 245 (Pa. Comm. Ct. 1983); *Clanton v. Hathorn*, 600 So. 2d 963, 965 (Miss. 1992); *Southland Development Corp. v. Ehrler's Dairy, Inc.*, 468 S.W.2d 284, 286 (Ky. Ct. App. 1971); *Opinion of the Justices*, 313 N.E.2d 561 (Mass. 1974); and *Bell v. Town of Wells*, 557 A.2d 168, 178 (Me. 1989).

emerged as the first right associated with property. A sea change occurred in the evolution of human beings when people ceased primarily living as ‘hunter-gatherers’ and learned how to cultivate land for crops and food. Anthropologists and scholars believe advances in husbandry gave rise to the first primitive concept of property: the usufruct. This concept derived from the understanding that so long as one person, or more likely one group was occupying or cultivating a certain area of land, others could also not make use of that same land without inuring the “owners” some harm. Although these usufructs were temporary in nature and subject to abandonment and re-cultivation it formed the genesis of what is known today as property—with ‘right to exclude’ as its primary component.²⁶ Later, in North America, native Indians formed a similar type of usufruct system, which forbade interference with group land rights at the time of use and occupation.²⁷

Property rights also played a central role in the intellectual underpinnings of the American Revolution. Men fought and died for the right to be free from the Crown’s interference with their property. John Adams, the second President and an intellectual force for revolution in the New England states wrote, “property must be secured or liberty cannot exist.”²⁸ Specifically regarding exclusion rights, James Madison, the primary intellectual force behind the United States Constitution believed property “means that domination which one man claims and exercises over the external things of the

²⁶ See Robert C. Ellickson, *Property in Land*, 102 Yale L.J. 1315, 1365 (1993) quoted in Merrill, *supra* note 5 at 746.

²⁷ See William Cronon, *Changes in the Land: Indians, Colonists, and the Ecology of New England* (1st ed. Hill and Wang 1983), quoted in Merrill, *supra* note 5 at 746.

²⁸ 6 John Adams, *The Works of John Adams, Defence of the Constitution, Vol. III, Davila, Essays On The Constitution*, 280 (Charles Francis Adams ed. 1851).

world, in exclusion of every other individual.”²⁹ Similarly, Thomas Jefferson believed intellectual property could not be considered “property” because it lacked containment and exclusion attributes.³⁰ Thus, from the beginning of history through the founding of the Nation, ‘right to exclude’ has always been regarded as the most essential aspect of property.

IV. The Social Benefits of ‘Right to Exclude’; its Correlation to Wealth and Prosperity in Western Nations; and its Use in International Law.

The application and enforcement of ‘right to exclude’ in modern American property law and in Western countries in general inures many societal benefits. First, it serves as a decentralization mechanism, which distributes power away from the State and into its citizens. This in turn promotes liberty and freedom among the citizenry and lessens the opportunity for corruption and tyranny on the part of the State.³¹ The power ownership and exclusion rights bestow on individuals encourages investment and productive labor.³² Exclusion rights also make it easy to identify ownership thereby lowering transaction costs³³ and fostering stability in communities.³⁴ Finally, in addition to its central role in protecting the individual’s right to be let alone, the ability to exclude

²⁹ James Madison, Property, Nat’l Gazette, Mar. 5, 1792, reprinted in James Madison, *The Mind of the Founder* 186 (Marvin Meyer ed., Brandeis University Rev. ed 1981) quoted in Adam Mossoff, *What is Property? Putting the Pieces Back Together*, 45 Ariz. L. Rev. 371 (2003).

³⁰ Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813), in Thomas Jefferson, *The Life and Selected Writings of Thomas Jefferson* 577 (Adrienne Koch & William Peden eds., Random House) (1972) quoted in Mossoff, *supra* note 23, at 377-378.

³¹ See, e.g., Cass R. Sunstein, *On Property and Constitutionalism*, 14 Cardozo L. Rev. 907, 914-15 (1993) quoted in Merrill, *supra* note 16 at 973.

³² See Richard A. Posner, *Economic Analysis of Law* 36 (Aspen Publishers 5th ed. 1998) quoted in Merrill, *supra* note 16 at 973.

³³ See Robert C. Ellickson, *Property in Land*, 102 Yale L.J. 1315, 1331 (1993) quoted in Merrill, *supra* note 16 at 973.

³⁴ See Margaret Jane Radin, *Reinterpreting Property* 35-97 (University of Chicago Press) (1993) quoted in Merrill, *supra* note 16 at 973.

freeriders is understood as essential to economic development, as it avoids the wasting of resources found under common property systems.³⁵

The protection of property rights and specifically ‘right to exclude’ in the West enables these countries to accumulate wealth and prosper beyond any other geographic area of the world. In fact, even countries attempting to duplicate Western prosperity by adopting free-market economic policies have been stymied by the lack of legal systems willing to protect private property rights. Hernando de Soto, a widely noted Peruvian academic, advocates this theory in reference to South America. In his landmark book *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else*³⁶ and in speeches across the globe, de Soto claims the invisible hand of Adam Smith is no longer invisible, because it is called property rights, and uses the word “magic” to describe the effects of property law regularization.³⁷ The lack of property rights in less-developed countries leads to governmental tyranny and a bottom level standard of living for its citizens. One need look no further than the current situation in Venezuela to see the effect the deterioration of property rights has on peoples’ opportunity for prosperity.³⁸

Finally, ‘right to exclude’ is on its way to achieving international norm status. In a case before the European Court of Human Rights, France tried to force three farmers to join a hunting cooperative, which would have allowed persons on their property at

³⁵ *Hendler v. United States*, 952 F.2d 1364, 1374-1375 (Fed. Cir. 1991).

³⁶ (1st ed. Basic Books 2000).

³⁷ Hernando de Soto Address at “Property for the Poor: The Path to Development” Conference, Washington, DC (Apr. 12, 1994) quoted in Steven E. Hendrix, *Myths Of Property Rights*, 12 *Ariz. J. Int’l & Comp. Law* 183, 184 n.2 (1995).

³⁸ Antonio Maria Delgado, *Venezuela introduces Cuba-like food card*, *Miami Herald*, September 3, 2010, available at <http://www.miamiherald.com/2010/09/04/1807508/venezuela-introduces-cuba-like.html> (last viewed September 19, 2010).

anytime to hunt wild game.³⁹ France argued the interference with the property owners' land was minimal since they still enjoyed use of it and only lost the right to exclude others. The international court struck down the French statute claiming the injury to the landowners was disproportionate to any benefit that may accrue to the public.⁴⁰ Thus even in areas where social-democratic regimes are common, the courts recognize the primacy of 'right to exclude.'

V. Conclusion.

A few inches of property boundary becomes a fundamental change in property when the State uses those inches as a pretext to deny the core principles of ownership to its citizens' private property. Ohio and its allies seek nothing less than to remove all meaning of ownership from those whose assets it desires. The road to tyranny is paved with such governmental abuses. From a theoretical, historical and social context, 'right to exclude' above all other rights and privileges is the crucial and necessary determiner of ownership. In fact, this right has existed since the very beginning of human civilization, and remains essential, even under the most "progressive" theories of property. Denying the Property Owners this right essentially denies them of true ownership and allows Ohio to trample over those it should be protecting. Therefore, for the foregoing reasons, this Court should uphold the decision of the Court of Appeals and protect Property Owners' rights, particularly their 'right to exclude.'

³⁹1999 Eur. Ct. H.R. (25088/94, 28331/95 and 28443/95) (April 29 1999) quoted in David L. Callies and J. David Breemer, *Evolving Voices In Land Use Law Afestschrift In Honor of Daniel R. Mandelker: Part II: Discussions on the National Level: Chapter 2: Property Rights: The Right to Exclude Others From Private Property: A Fundamental Constitutional Right*, 3 Wash. U. J.L. & Pol'y 39, 58 (2000).

⁴⁰*Id.* at para. 85 quoted in Callies, note *supra* 39.

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The undersigned certifies that a copy of the foregoing **BRIEF OF AMICUS CURIAE SOUTHEASTERN LEGAL FOUNDATION, INC. IN SUPPORT OF CLASS PLAINTIFFS-APPELLEES** has been sent by regular U.S. Mail upon the following persons this 20th day of September, 2010:

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