

ORIGINAL

IN THE SUPREME COURT OF OHIO

MATTHEW E. MOORE and LORI A. MOORE,

Appellants

v.

CITY OF MIDDLETOWN, OHIO

Appellee

Case No. 2010-1363

On Appeal from the Butler County  
Court of Appeals, Twelfth Appellate  
District

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**BRIEF IN SUPPORT OF NEITHER PARTY OF *AMICUS CURIAE* 1851 CENTER FOR  
CONSTITUTIONAL LAW**

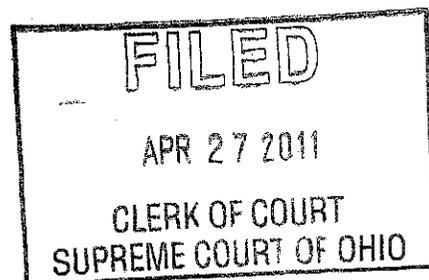
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## **INTEREST OF AMICUS CURIAE**

Formed to support public policies that advance liberty, individual rights, and a strong economy in Ohio, the 1851 Center for Constitutional Law is dedicated to protecting Ohioans' control over their lives, their families, their property, and thus, ultimately, their destinies. In doing so, the 1851 Center has developed particular expertise in Ohio constitutional law, has authored numerous publications on this topic, and has achieved favorable results for Ohioans in numerous state constitutional law cases.

More pointedly, the 1851 Center has an interest in protecting Ohioans' rights to acquire, possess, use, and dispose of their private property in a way that does not harm others, and in ensuring that government act responsibly in all cases, and adhere to strict procedural safeguard prior to taking or destroying private property. The 1851 Center believes, indeed, that "property must be secured, or liberty cannot exist."<sup>1</sup>

The 1851 Center for Constitutional Law thus has a strong interest in this Court's ruling, as it will (1) confirm or deny the proposition that the Ohio Constitution is more protective of Ohioans' property rights than its federal counterpart; and (2) preserve or eviscerate Ohioans' right to be free from an application of the regulatory takings doctrine that renders their private property in perpetual jeopardy.

## **FACTS AND STATEMENT OF THE CASE**

*Amicus* defers to the Facts and Statement of the Case articulated by Appellees, with only this caveat: there appears to be no dispute whatsoever that the purpose of the ordinance at issue

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<sup>1</sup> John Adams, Discourses on Davila, 1790

in this case was to “clear the way for the construction of a coke plant operated by Suncoke Energy for the benefit of AK Steel, one of Middletown’s more prominent employers.”<sup>2</sup>

## ARGUMENT

### A. The Appellate Court’s Rationale in Denying Appellants’ Police Power and Substantive Due Process Claims Cannot be Permitted to Stand.

Irrespective of how this matter is ultimately resolved, this Court must stridently refute the rationale relied upon by the Appellate Court in finding that Appellant’s substantive due process and police power challenges fails to state a claim upon which relief can be granted, i.e. that a local Ohio government may regulate for the pleasure of a prominent local employer. In response to property owners’ claims that the ordinances at issue exceed Middletown’s police power, the Appellate Court unconscionably responds by dismissing the landowners’ claims on the following grounds: “given the landowners’ admission that eth ordinances were passed for the benefit of one of Middletown’s most prominent employers, we find it clear from the four corners of their complaint that the ordinance were not arbitrary, capricious, or unreasonable.”<sup>3</sup> This understanding of government power turns the police power on its head.

#### **i. Police power cannot be wielded solely to benefit private interests.**

“[T]o be a valid exercise of the city’s police power, the ordinance ‘must directly promote the general health, safety, welfare or morals and must be reasonable, the means adopted to accomplish the legislative purpose must be suitable to the end in view, must be impartial in

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<sup>2</sup> Moore v. Middletown (2010), 2010-Ohio-2962, at Paragraph 3.

<sup>3</sup> Id., at paragraph 19.

operation, must have a real and substantial relation to such purpose and must not interfere with private rights beyond the necessities of the situation.”<sup>4</sup>

These requirements of “general” or “public” welfare and impartiality dovetail with the requirement that Ohio Municipalities’ operations be constrained by a public purpose. “It must be considered well settled that the funds of a municipality can be expended only for public purposes.”<sup>5</sup> While incidental private benefits are certainly permissible, the primary purpose of municipal conduct must still be public in nature.<sup>6</sup> “What is a public municipal purpose is not susceptible of precise definition. While the question of what is and what is not a public purpose is initially a legislative responsibility to determine, in its final analysis, it is for the courts to answer.”<sup>7</sup> The courts as a rule have attempted no judicial definition of a public as distinguished from a private purpose, but have left each case to be determined by its own peculiar circumstances. However, generally, “a public purpose has for its objective the promotion of the public health, safety, morals, general welfare, security, prosperity, and contentment of all the inhabitants or residents within the municipal corporation, the sovereign powers of which are used to promote such public purpose.”<sup>8</sup> Moreover, “the phrase ‘municipal purpose’ used in the

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<sup>4</sup> *Hausman v. Dayton* (1995) 73 Ohio St.3d 671, 653 N.E.2d 1190, 1995 -Ohio- 277, citing *Teegardin v. Foley* (1957), 166 Ohio St. 449, 2 O.O.2d 462, 143 N.E.2d 824, paragraph one of the syllabus. *Mominee v. Scherbarth* (1986), 28 Ohio St.3d 270, 28 OBR 346, 503 N.E.2d 717.

<sup>5</sup> *State ex rel. McClure v. Hagerman* (1951), 155 Ohio St. 320, 98 N.E.2d 835, at 838.

<sup>6</sup> *Id.*, citing 38 American Jurisprudence, 86, Section 395; see also 15 McQuillin, *Municipal Corporations* (3d Ed.), 36

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

broader sense is generally accepted as meaning public or governmental purpose as distinguished from private.”<sup>9</sup>

Courts are obliged to review whether local legislators have abused their discretion in enacting legislation that is truly for private interests, rather than pursuant to a public purpose.<sup>10</sup>

If this ordinance is ultimately found to be a regulation of the appellant’s property, and *amicus curiae* expresses no view as to whether it is, the police power is further restricted:

Under the police power, society may restrict the use of property without making compensation therefor, if the restriction be reasonably necessary for the prevention of the public health, morals, or safety. This is so, because all property within the state is held subject to the implied condition that it will be used as not to injure the equal right of others to use and benefit of their own property \* \* \* The police power, however, is based upon *public necessity*. *There must be essential public need for the exercise of the power in order to justify its use.*”<sup>11</sup>

Clearly, the police power is only properly exercised when “public necessity” or “essential public need” is demonstrated - - it may only be exercised to interfere with fundamental rights when necessary to protect the *public*.<sup>12</sup> This analysis embraces two components: (1) an application of law must be absolutely necessary to achieve the desired result; and (2) an application of law must be for the welfare of the general public. Moreover, local promulgations are only within the police power when “*the relation to the public interest and the common good is substantial and the terms of the law or ordinance are reasonable and not arbitrary in character.*”<sup>13</sup>

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<sup>9</sup> Id.

<sup>10</sup> Id., citing 64 Corpus Juris Secundum, Municipal Corporations, § 1835 b., pages 334, 335.

<sup>11</sup> *State ex. rel. Killeen Realty Co. v. City of East Cleveland* (1959), 169 Ohio St. 375, 160 N.E.2d 1, citing *Pritz v. Messer*, 112 Ohio St. 628, at 637, 149 N.E. 30, at 33; *City of Youngstown v. Kahn Bros. Building Co.*, 112 Ohio St. 654, at 661.

<sup>12</sup> *Palmer v. Tingle* (1896), 55 Ohio St. 423, 36 W.L.B. 315, 45 N.E. 313.

<sup>13</sup> *Olds v. Klotz* (1936), 131 Ohio St. 447, 451, 3 N.E.2d 371, 373.

Thus, in determining whether an interference with property rights is unduly burdensome or beyond the necessities of the situation, Ohio courts should be “extremely zealous in preventing the constitutional rights of citizens being frittered away by regulations passed by virtue of the police power.”<sup>14</sup> And for good reason: “the constitutional guaranty of the right of private property would be hollow if all legislation enacted in the name of the public welfare were *per se* valid.”<sup>15</sup> For this reason, “the judgment of the general assembly in such cases is not conclusive.”<sup>16</sup>

**ii. Legislation promulgated solely for the benefit of private interests violates substantive due process.**

Essentially, to avoid violating due process, legislative action must bear a real and substantial relation to public health and welfare, and not be unreasonable or arbitrary.<sup>17</sup> Courts and Scholars from across the spectrum concur that “purely private interest legislation does not protect the general welfare; it treats one group of people differently from another group because of a ‘raw exercise of political power,’”<sup>18</sup> or put another way, “the distribution of resources or opportunities to one group rather than another solely on the ground that those favored have

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<sup>14</sup> *City of Cincinnati v. Correll* (1943), 141 Ohio St. 535, 539, 49 N.E.2d 412, 414.

<sup>15</sup> *Id.*, at 546.

<sup>16</sup> *Id.*

<sup>17</sup> *Hausman v. Dayton* (1995) 73 Ohio St.3d 671, 653 N.E.2d 1190, 1995 -Ohio- 277, citing *Teegardin v. Foley* (1957), 166 Ohio St. 449, 2 O.O.2d 462, 143 N.E.2d 824, paragraph one of the syllabus. *Mominee v. Scherbarth* (1986), 28 Ohio St.3d 270, 28 OBR 346, 503 N.E.2d 717.

<sup>18</sup> Jim Thompson, *Powers v. Harris: How the Tenth Circuit Buried Economic Liberties*, 82 *Denv. U.L.Rev.* 585, 599–600 (2005).

exercised the raw political power to obtain what they want” is a constitutionally impermissible “capture of government power by faction.”<sup>19</sup>

To this end, the substantive component of the Due Process Clause still “provides heightened protection against government interference with certain fundamental rights and liberty interest ... even when the challenged regulation affects all persons equally.”<sup>20</sup> The rational basis review standard for equal protection and for substantive due process “converge” and are in essence the same.<sup>21</sup>

Rational basis review requires “only that the regulation bear some rational relation to some legitimate end.”<sup>22</sup> This requirement translates into a two part test—that is whether (1) *the regulation has a legitimate governmental purpose*; and (2) there is a rational relationship between that purpose and the means chosen by the State to accomplish it.<sup>23</sup> And so the issue presented is whether protecting a discrete interest group from economic competition is a legitimate governmental purpose.

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<sup>19</sup> Cass Sunstein, *Naked Preferences and the Constitution*, 84 Colum. L. Rev. 1689, 1690 (1984).

<sup>20</sup> *Powers v. Harris* (10<sup>th</sup> Cir., 2004), 379 F.3d 1208, at 1215 (citing *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997))

<sup>21</sup> *Powers*, 379 F.3d at 1215; *Craigiles v. Giles* (6<sup>th</sup> Cir., 2002), 312 F.3d 220, at 223; Anthony Sanders, *Exhumation Through Burial: How Challenging Casket Regulations Helped Unearth Economic Substantive Due Process in Craigiles v. Giles*, 88 Minn. 1. Rev. 668, 674 n. 50 (2004).

<sup>22</sup> *Romer v. Evans*, 517 U.S. 620, 631(1996).

<sup>23</sup> See, *inter alia*, *Casket Royale, Inc. v. State of Mississippi*, 124 F.Supp.2d 434, 437 (S.D.Miss.2000)(Barbour, J) (funeral statutes and regulations prohibiting sale of caskets without licenses violated due process and equal protection clauses citing *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997)).

The *Craigmiles* court found unequivocally that the kinds of prohibitions at issue in that case bore no rational relationship to any legitimate purpose and thus violated equal protection and due process clauses. In that case, Nathaniel Craigmiles and several other plaintiffs challenged a provision of the Tennessee Funeral Directors and Embalmers Act that prohibited anyone from selling caskets without being licensed by the state as a "funeral director." To be licensed required an applicant to undergo a period of education and training which had little to do with casket design or selection for a period, in essence, of two years.<sup>24</sup>

Plaintiffs operated two independent casket stores in Tennessee; they sold caskets, urns, grave markers, monuments, and straight merchandise items. The store did not embalm or arrange funeral services, cremations or burials. Like the case at bar, the Board of Funeral Directors and Embalmers, ordered the plaintiffs to cease and desist and the plaintiffs brought suit. Noting that a rational basis review requires only that "the regulation bear some rational relation to a legitimate state interest", the *Craigmiles* court noted that a 1972 amendment to the law which swept into the pre-existing laws concerning "funeral directing" the sale of funeral merchandise was designed only for the economic protection of funeral home operators.<sup>25</sup> As such, the *Craigmiles* court stated: "Courts have repeatedly recognized that protecting a discrete interest group from economic competition is not a legitimate governmental purpose."<sup>26</sup>

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<sup>24</sup> *Craigmiles*, 312 F.3d at 222.

<sup>25</sup> *Id.*

<sup>26</sup> *See Craigmiles*, 110 F.Supp.2d at 664, citing *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624, 98 S.Ct. 2531, 57 L.Ed.2d 475, (1978) ("Thus, where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected.") *See also H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 537-38, 69 S.Ct. 657, 93 L.Ed. 865 (1949); *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411, 103 S.Ct. 697, 74 L.Ed.2d 569 (1983) (distinguishing between legitimate state purposes and "providing a benefit to special interest").

Here, the Appellate Court dismissed Appellant's police power and substantive due process claims on the improvident grounds that the ordinance(s) at issue are lawful precisely because they are for the benefit of a politically powerful private interest: "given Landowners' admission that the ordinances were passed for the benefit of one of Middletown's most prominent employers, we find it clear from the four corners of their complaint that the ordinances were not arbitrary, capricious, or unreasonable."<sup>27</sup> This reasoning simply cannot be permitted to stand. Ohioans must be permitted to continue to challenge, on police power and substantive due process grounds, local ordinances which harm them solely for the benefit of more politically-connected private interests. Thus, where an Ohioan asserts that an enactment is promulgated solely for the benefit of a private party, that Ohioan clearly has alleged a cause of action for (1) insufficient police power; and (2) violation of substantive due process, upon which relief can be granted.

**B. This Court should adopt regulatory takings standards that reflect Ohio's greater textual and jurisprudential commitment to private property rights.**

Without expressing a view on how this matter should ultimately be decided, or even whether the ordinance(s) at issue here are in fact "regulations" of property, *amicus* respectfully requests that this Court adopting the dissenting opinion's views in the Appellate Court below, chiefly (1) the *Penn Central* test is insufficiently protective of private property rights when evaluating regulatory takings in Ohio, in light of Ohio's unique protections; (2) a cause of action for diminution in property value should not be prevented under the Ohio Constitution, and a property owner who has lost part of the benefit of ownership should, at minimum, be permitted

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<sup>27</sup> *Moore v. Middletown* (2010), 2010-Ohio-2962, at Paragraph 3, citing *DeMarco, Inc. v. Johns-Manville Corp.*, Franklin App. No. 05AP-445, 2006-Ohio-3587, ¶ 16.

to attempt to establish a takings claim; and (3) denying Appellants a forum for establishing a taking where they have pled the element of the *Penn Central* test is improper.

The United States Supreme Court has repeatedly reminded state courts that they are free to construe their state constitutions so as to provide different, and broader, protections of individual liberties than those offered by the federal Constitution.<sup>28</sup> It has further declared that “state courts’ interpretations of state constitutions are to be accepted as final, as long as the state court plainly states that its decision is based on independent and adequate state grounds.”<sup>29</sup>

Accordingly, Ohio courts are free to interpret the Ohio Constitution without adherence or deference to federal court decisions-- the United States Constitution provides a floor, not a ceiling, for individual rights enjoyed by state citizens.<sup>30</sup> Put another way, “states may not deny individuals or groups the minimum level of protections mandated by the federal Constitution. *However, there is no prohibition against granting individuals or groups greater or broader protections.*”<sup>31</sup>

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<sup>28</sup> *Arnold v. Cleveland*, (1993), 67 Ohio St.3d 35, 616 N.E.2d 163, citing, e.g., *City of Mesquite v. Aladdin's Castle, Inc.* (1982), 455 U.S. 283, 293, 102 S.Ct. 1070, 1077, 71 L.Ed.2d 152, 162 (“ \* \* \* [A] state court is entirely free to read its own State's constitution more broadly than this Court reads the Federal Constitution, or to reject the mode of analysis used by this Court in favor of a different analysis of its corresponding constitutional guarantee.”); and *California v. Greenwood* (1988), 486 U.S. 35, 43, 108 S.Ct. 1625, 1630, 100 L.Ed.2d 30, 39 (“Individual States may surely construe their own constitutions as imposing more stringent constraints on police conduct than does the Federal Constitution.”). See, also, *Pruneyard Shopping Ctr. v. Robins* (1980), 447 U.S. 74, 81, 100 S.Ct. 2035, 2040, 64 L.Ed.2d 741, 752.

<sup>29</sup> *Arnold v. Cleveland*, (1993), 67 Ohio St.3d 35, 616 N.E.2d 163, citing *Michigan v. Long* (1983), 463 U.S. 1032, 1041, 103 S.Ct. 3469, 3476-3477, 77 L.Ed.2d 1201, 1214-1215.

<sup>30</sup> *PruneYard Shopping Ctr. v. Robbins* (1980), 447 U.S. 74, 100 S.Ct. 2035, 64 L.Ed.2d 741; *State v. Brown* (1992), 63 Ohio St.3d 349, 588 N.E.2d 113.

<sup>31</sup> *Arnold*, supra.

This Court has not hesitated to recognize this capacity:

[W]e believe that the Ohio Constitution is a document of independent force. In the areas of individual rights and civil liberties, the United States Constitution, where applicable to the states, provides a floor below which state court decisions may not fall. As long as state courts provide at least as much protection as the United States Supreme Court has provided in its interpretation of the federal Bill of Rights, *state courts are unrestricted in according greater civil liberties and protections to individuals and groups.*<sup>32</sup>

The above statement leaves no doubt that Ohio courts have the capacity to find that the Ohio Constitution provides protections for individual liberty that stretch beyond those of the U.S. Constitution.<sup>33</sup> In 2008, the Ohio Supreme Court reaffirmed this axiom, acknowledging in *State v. Gardner*, that “[w]e are, of course, free to determine that the Ohio Constitution confers greater rights on its citizens than those provided by the federal Constitution, and we have not hesitated to

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<sup>32</sup> *Arnold*, supra. After making this paradigmatic statement, the Ohio Supreme Court, recognized an obligation “not to disturb the clear protections provided by the drafters of [the Ohio] Constitution.” As such, in *Arnold*, it interpreted the Ohio Constitution’s protection of the Right to Bear Arms, articulated in Section 4, Article I of the Ohio Constitution, as more protective of that right than the Second Amendment. Emphasis added.

<sup>33</sup> *Preterm Cleveland v. Voinovich* (1993), 89 Ohio App.3d 684, 627 N.E.2d 570, citing *Direct Plumbing Supply Co. v. Dayton* (1941), 138 Ohio St. 540, 21 O.O. 422, 38 N.E.2d 70. To the same effect, see, for example, *State v. Smith* (1931), 123 Ohio St. 237, 174 N.E. 768; *State v. Mapp* (1960), 170 Ohio St. 427, 11 O.O.2d 169, 166 N.E.2d 387; *State ex rel. The Repository v. Unger* (1986), 28 Ohio St.3d 418, 28 OBR 472, 504 N.E.2d 37; and *Bd. of Edn. v. Walter* (1979), 58 Ohio St.2d 368, 12 O.O.3d 327, 390 N.E.2d 813, all cases where the Ohio Supreme Court found the Ohio Constitution as conferring rights greater than those of the U.S. Constitution. See also *Gardner*, infra, *Arnold*, supra, and *Norwood v. Horney* 110 Ohio St.3d 353, 853 N.E.2d 1115, 36 Env’tl. L. Rep. 20,161, 2006 -Ohio- 3799.

do so in *cases warranting an expansion*,”<sup>34</sup> and recognized that “state constitutions are a vital and independent source of law.”<sup>35</sup>

Ohio recognizes the need to use its own constitution to protect individual rights, and especially the right to be left alone in harmless property and business endeavors. The Ohio Supreme Court’s 1941 ruling in *Direct Plumbing Supply v. City of Dayton* stresses the importance using the Ohio Bill of Rights as an independent basis for protecting individual rights:

‘The guaranties of sections 1, 2, and 19 of the Bill of Rights in the Constitution of Ohio are similar to those contained in the amendment to the federal Constitution referred to [the 14th Amendment].’ If in the midst of current trends toward regimentation of persons and property, this long history of parallelism seems threatened by a narrowing federal interpretation of federal guaranties, it is well to remember that Ohio is a sovereign state and that the fundamental guaranties of the Ohio Bill of Rights have undiminished vitality. Decision here may be and is bottomed on those guaranties.<sup>36</sup>

Just as this Court departed from the “long history of parallelism” after the United States Supreme Court narrowed federal guarantees in *Kelo v. New London*, this Court must now again recognize the undiminished vitality of the Ohio Constitution, and depart from parallelism in

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<sup>34</sup> *State v. Gardner* (2008) 118 Ohio St.3d 420, 889 N.E.2d 995, citing *Norwood v. Horney*, 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115 (holding that the Ohio Constitution's Takings Clause affords greater protection than the corresponding federal provision).

<sup>35</sup> *Gardner*, *supra*, citing generally William J. Brennan Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights* (1986), 61 N.Y.U.L.Rev. 535.

<sup>36</sup> *Direct Plumbing Supply v. City of Dayton* (1941), 138 Ohio St. 540, 38 N.E.2d 70, 137 A.L.R. 1058, 21 O.O. 422, citing *Wilson v. City of Zanesville*, *supra*; *Steele, Hopkins & Meredith Co. v. Miller*, 92 Ohio St. 115, 110 N.E. 648, at p. 651.

regulatory takings jurisprudence, since the United States Supreme Court has narrowed federal guarantees on this front in *Lingle v. Chevron U.S.A, Inc.*<sup>37</sup>

As the dissent below correctly notes, the protection of Ohioans private property rights as against regulatory takings is precisely a “*case warranting an expansion,*” of constitutional protections through use of the Ohio Constitution: in fact, this Court has already held that Ohio’s taking clause warrant expansion of rights beyond federal guarantees.<sup>38</sup> Section 1, Article 1 of the Ohio Constitution provides the following: “All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety.”<sup>39</sup> The 1896 Ohio Supreme Court case of *Palmer v. Tingle*,<sup>40</sup> obviously of a closer proximity in time to the drafting of the 1851 Constitution, illuminates the vitality of Section 1, Article I. The Court applied the natural rights language in that Section to mean the following:

The inalienable right of enjoying liberty and *acquiring property*, guaranteed by the first section of the bill of rights of the constitution, embraces the right to be free in the enjoyment of our faculties, subject only to such restraints as are *necessary* for the common welfare.<sup>41</sup>

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<sup>37</sup> *Lingle v. Chevron U.S.A, Inc.* (2005), 544 U.S. 528, 125 S. Ct. 2074 (dispensing with the “substantially advances a legitimate state interest” prong of the test previously articulated in *Agins v. City of Tiburon* (1980), 447 U.S. 255, 100 S.Ct. 2138).

<sup>38</sup> *State v. Gardner* (2008) 118 Ohio St.3d 420, 889 N.E.2d 995, citing *Norwood v. Horney*, 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115 (holding that the Ohio Constitution's Takings Clause affords greater protection than the corresponding federal provision).

<sup>39</sup> Section 1, Art. I, Ohio Constitution.

<sup>40</sup> *Palmer v. Tingle* (1896), 55 Ohio St. 423, 36 W.L.B. 315, 45 N.E. 313

<sup>41</sup> *Id.*

The Court emphasized the importance of using the preamble and Section 1, Article I to create a *context* for constitutional interpretation that effectively amounts to an emphatic “presumption of liberty.”<sup>42</sup>

It is worthy of notice that the constitution is established to secure the blessings of freedom, and to promote the common welfare. *As the constitution must be regarded as consistent with itself throughout, it must be presumed that the laws to be passed by the general assembly under the powers conferred by that instrument are to be such as shall secure the blessings of freedom, and promote our common welfare.* To make this more emphatic, the first section of the bill of rights provides that, ‘All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and seeking and obtaining happiness and safety.’<sup>43</sup>

Meanwhile, Section 19, Article I states “Private property shall ever be held inviolate, but subservient to the public welfare.”<sup>44</sup> In aggregating this provision with Section 1, Article I, “Ohio has always considered the right of property to be a *fundamental right*. There can be no doubt that the bundle of venerable rights associated with property is strongly protected in the Ohio Constitution and must be trod upon lightly, no matter how great the weight of other forces.”<sup>45</sup>

In Ohio, these “venerable rights associated with property” are not confined to the mere ownership of property. Rather, the Supreme Court of Ohio recently acknowledged that “[t]he rights related to property, i.e., to *acquire, use, enjoy, and dispose of property*, are among the most

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<sup>42</sup> See Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (Princeton, NJ: Princeton University Press, 2004) (discussing why the courts should begin with a presumption in favor of liberty, rather than state power, when construing the constitutionality of challenged regulations).

<sup>43</sup> *Palmer*, supra. (Emphasis added).

<sup>44</sup> Section 19, Art. I, Ohio Constitution.

<sup>45</sup> *Norwood v. Horney* (2006), 110 Ohio St.3d 353,361-62, 853 N.E.2d 1115, 1129 (internal citations omitted).

revered in our law and traditions.”<sup>46</sup> And this is as it must be: merely protection of *ownership* of property becomes a hollow and illusory right when regulations of that same property are permitted to eat away at the owner’s capacity to use and enjoy the property, while concomitantly diminished its fair market value. For this very reason, this Court has previously ruled “any substantial interference with the elemental rights growing out of ownership of private property is considered a taking.”<sup>47</sup>

Moreover, as the dissent below correctly notes, one of the faults of the 1802 Ohio Constitution identified by the drafters of the 1851 Ohio Constitution was that its clauses were deemed insufficient to properly protect the private property rights of landowners.<sup>48</sup> As a result, in the revision, the drafters changed the placement and rewrote the property clauses, and strengthened the eminent domain clause, and these protections were placed at the forefront of the constitution.<sup>49</sup>

Meanwhile, this Court has continued to apply *Penn Central* in recent Ohio regulatory takings cases.<sup>50</sup> *Amicus* concurs with the dissent below: through the repudiation of the *Agins*

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<sup>46</sup> *Norwood v. Horney* (2006), 110 Ohio St.3d 353,361-62, 853 N.E.2d 1115, 1128 (internal citations omitted).

<sup>47</sup> *Smith v. Erie RR. Co.* (1938), 134 Ohio St. 135, 142, 16 N.E.2d 310.

<sup>48</sup> *Moore v. Middletown* (2010), 2010-Ohio-2962 (Ringland, concurring and dissenting), citing Fischel, *The Offer/Ask Disparity and Just Compensation for Takings: A Constitutional Choice Perspective*, 15 *International Rev.L. & Econ.* 187, 197.

<sup>49</sup> *Moore v. Middletown* (2010), 2010-Ohio-2962 (Ringland, concurring and dissenting), citing 2 *Liberty U.L.Rev.* at 264.

<sup>50</sup> See *State ex rel. Gilmour Realty, Inc. v. Mayfield Hts.*, 122 Ohio St.3d 260, 910 N.E.2d 455, 2009-Ohio-2871, ¶ 16; *State ex rel. Duncan v. Middlefield*, 120 Ohio St.3d 313, 898 N.E.2d 952, 2008-Ohio-6200, ¶ 17; *State ex rel. Shelly Materials, Inc. v. Clark Cty. Bd. of Commrs.*, 115 Ohio St.3d 337, 875 N.E.2d 59, 2007-Ohio-5022, ¶ 19.

test in Ohio and the application of *Penn Central*, this court's regulator takings jurisprudence has evolved into "a narrow standard unrelated to the stronger protection of private property guaranteed by the Ohio Constitution."<sup>51</sup>

This case presents this Court with an opportunity harmonize Ohio's regulatory takings jurisprudence with the original meaning of the Ohio Constitution and Ohio's historical fidelity to the protection of private property. This Court must ultimately acknowledge that it is not bound by federal regulatory takings precedent, that *Penn Central* and *Lingle* standard are insufficiently protective of private property rights when evaluating regulatory takings in Ohio, in light of Ohio's unique protections, that a cause of action for diminution in property value should not be prevented under the Ohio Constitution, and that a property owner who has lost part of the benefit of ownership should, at minimum, be permitted to attempt to establish a takings claim.

### CONCLUSION

Without expressing an opinion as to the ultimate conclusion of this matter, this honorable court should refute the reasoning underling the Appellate Court's holdings on Appellants' police power and substantive due process claims, and expand its regulatory takings protections in a manner necessary to address the issues raised in this case.

Respectfully submitted,



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<sup>51</sup> *Moore v. Middletown* (2010), 2010-Ohio-2962 (Ringland, concurring and dissenting).

**CERTIFICATE OF SERVICE**

A copy of the foregoing was served upon the following this 27<sup>th</sup> day of April, 2011.

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