No. 22-_____

In The
Supreme Court of the United States

SAGE LEWIS AND SAGE LEWIS LLC,

Petitioners,

v.

AKRON BOARD OF ZONING APPEALS,

Respondent.

On Petition For A Writ Of Certiorari To The Ohio Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Sage Lewis wants to use the backlot of his commercial building in Akron, Ohio, to provide temporary tent-shelter to homeless, street-dwelling Akronites during a life-threatening emergency such as a sub-zero blizzard. Akron denied Petitioners' variance request under the local zoning code, and the state courts upheld that denial because the zoning code does not provide for emergency tent shelter. The courts then rejected Petitioners' constitutional claim on the ground that Akron's actions, being in conformity with the zoning code, were not "arbitrary."

The Question Presented is: When a person wants to exercise the deeply and objectively rooted right to use liberty and property for the non-economic purpose of saving lives, does the standard of review amount to "not utterly arbitrary"?

CORPORATE DISCLOSURE STATEMENT

Petitioner Sage Lewis LLC has no parent corporation, and no publicly held company owns any stock in it.

STATEMENT OF RELATED CASES

The Homeless Charity v. Akron Board of Zoning Appeals (Supreme Court of Ohio), No. 2022-0790 (review declined September 13, 2022)

The Homeless Charity v. Akron Board of Zoning Appeals (Court of Appeals of Ohio, Ninth District), No. 30075 (judgment entered May 11, 2022)

The Homeless Charity v. Akron Board of Zoning Appeals (Court of Common Pleas of Ohio, Summit County), No. CV-2019-02-0684 (judgment entered July 14, 2021)

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PETITION FOR WRIT OF CERTIORARI

It was ten below zero the night Petitioner Sage Lewis attended a 2019 hearing before the Akron Board of Zoning Appeals on his variance request. They sought permission to temporarily put up a handful of tents for the homeless on the backlot of a commercial building during a life-threatening emergency like frigid cold. Tents are necessary because the homeless are allowed inside the building to warm up, but fire officials will not allow them to sleep inside. Petitioners did not ask to create a permanent tent community. They asked to do what compassionate people have done since time immemorial—use their property and liberty to rescue the desperate from grave peril. The zoning board said no.

Petitioners brought suit, asserting that this decision violated the Due Process Clause of the Fourteenth Amendment. They argued that the magnitude of the life, liberty, and property interests at stake—sheltering people from life-threatening danger in emergencies—vastly outweighed Akron's interest in rigidly applying its zoning code. Yet not only did the Ohio courts affirm, the courts applied the most deferential version of rational-basis review. They treated Petitioners as though they had asked to put a hot tub too close to the property line. The only constitutional bar the zoning board had to clear was not being arbitrary. And here, admittedly, the board's decision was not *wholly* arbitrary. The zoning code required a showing of "harmony" for a variance, *see* App. 146, 156, and the zoning board probably guessed right that some people would

find even temporary emergency tent shelter "unharmonious." App. 135–36 (stating that the presence of tents is "not harmonious or appropriate in appearance with the existing or intended character" of the area). Hence, forcing Petitioners to turn the homeless out into a bitter night to find refuge in the forests and underpasses was not "arbitrary" and was thus "reasonable." App. 20.

The refusal of the Ohio courts to distinguish between siting hot tubs and saving lives is no accident. Those courts, like federal and state courts across the country, faithfully follow this Court's precedent, which, for generations since the New Deal, has relegated property rights to the dustiest, darkest back corner of the constitutional basement. Yet that precedent is willfully blind to history. Especially here. The historical pedigree of the right to use liberty and property to shelter the needy is beyond question. In his Parables, Jesus describes a Samaritan finding a robbery victim at the side of the road "stripped [] of his clothes" "and le[ft] half dead." *Luke* 10:30 (New International). The Samaritan "bandaged his wounds, . . . put the man on his own donkey, brought him to an inn and took care of him." *Id.* 10:34. For centuries in the Anglo-American world, it was customary to open one's doors to travelers without shelter, lest they remain out at night exposed to the elements and highwaymen. *See*, *e.g.*, Preamble, The Charitable Uses Act of 1601, 43 Eliz. c. 4, 1601; Eric C. Cimino, *The Travelers' Aid Society: Moral Reform and Social Work in New York City, 1907–1916*, 97 New York History 34, 35–39 (2016). Congress had to

enact the Fugitive Slave Act of 1850 to criminalize abolitionists who were using their private property to shuttle escaped slaves north on the storied Underground Railroad. *See generally* Thomas D. Morris, *Free Men All: The Personal Liberty Laws of the North 1780–1861*, 130–47 (Johns Hopkins Univ. Press 1974). Acting in this deeply rooted tradition, Petitioners hoped to help in the best way they could, though rough and imperfect, to assist their fellow human beings. But they immediately sank in the rational-basis quicksand.

This Court must step in. The problem here is that this Court's substantive due-process jurisprudence—buckling under its own contradictions for generations—has reached a crisis point after *Dobbs* that cannot be ignored. In *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), this Court reaffirmed its multi-generational commitment to sorting our rights into two piles: fundamental and everything else. The tiny fundamental-rights box consists of "rights guaranteed by the first eight Amendments," and "a select list of fundamental rights that are not mentioned anywhere in the Constitution." *Id.* at 2246.

This Court uses a history-and-tradition inquiry to identify unenumerated rights so deeply and objectively rooted as to warrant being treated as fundamental. Restrictions on such rights elicit heightened scrutiny. Thus far, only a handful of rights related to raising children, reproductive rights, and bodily integrity have been deemed fundamental. *See*, *e.g.*, *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925); *Rochin v. California*, 342 U.S. 165 (1952);

Griswold v. Connecticut, 381 U.S. 479 (1965); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Obergefell v. Hodges*, 576 U.S. 644, 675 (2015).

Everything a person does that does not land in the "fundamental" box is deemed "nonfundamental." Yet this immense latter box contains activities that most Americans would rate as very much "fundamental" to their lives: buying and owning a home, pursuing a common occupation, opening a business, earning and saving money, purchasing the necessities of life, obtaining health care, securing childcare, donating to charity, and so forth. And, in Petitioners' case, using property to protect the lives of the homeless.

No one believes that this Court has consistently applied the same history-and-tradition inquiry to unenumerated rights. If this Court had, property rights, enumerated and unenumerated, would look very different, and, more to the point, would look like they did in 1789 and 1868. And no one believes that this Court has consistently applied the same rational-basis test to supposedly "nonfundamental" rights. *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 176–77 n.10 (1980) ("The most arrogant legal scholar would not claim that all of [the Court's] cases applied a uniform or consistent test. . . ."). The rational-basis test must be recalibrated, but "recalibration of the rational-basis test . . . is for the U.S. Supreme Court." *Tiwari v. Friedlander*, 26 F.4th 355, 369 (6th Cir. 2022); *see also Arceneaux v. Treen*, 671 F.2d 128, 136 (5th Cir. 1982) (Goldberg, J., concurring) (describing the rational-basis test as "mean[ing] little more than 'anything goes'" and

"register[ing his] dismay at the prospect of being bound by" it).

That recalibration should start here. There is a deeply and objectively rooted right to use property for the noneconomic purpose of sheltering the needy in a moment of acute desperation. A local zoning code, whatever breadth it may enjoy under ordinary circumstances, cannot be applied so as to outlaw that. By recognizing that a *Dobbs*-style history-and-tradition inquiry is appropriate in the property context, and by "recalibrati[ng] the rational basis test" for deeply and objectively rooted property rights, this Court will begin to reshape a body of law that, in its present form, would be unrecognizable to the Framers and Ratifiers.

OPINIONS BELOW

The order of the Supreme Court of Ohio declining review, App. 1, is referenced in the Supreme Court of Ohio Motion Tables in the North Eastern Reporter at 194 N.E.3d 378. The opinion of the court of appeals, App. 2, is reported at 189 N.E.3d 370. The district court's opinion is unreported but may be found at App. 25. The Board of Zoning Appeals' decisions are unreported but may be found at App. 65.

JURISDICTIONAL STATEMENT

The order of the Supreme Court of Ohio declining review was entered on September 13, 2022. This petition was timely filed on December 12, 2022. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1257(a).

RELEVANT PROVISIONS

Section 1 of the Fourteenth Amendment provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

The text of two relevant ordinances is reproduced in the Appendix.

STATEMENT OF THE CASE

Petitioner Sage Lewis is an Akron entrepreneur and community activist. App. 101. In 2016, while gathering ballot signatures for a mayoral run, he

befriended homeless Akronites. App. 103. Wanting to help, he hired them for his auction business in a commercial building he owns at 15 Broad Street (via Petitioner Sage Lewis LLC). *Id.* In January 2017, Summit County Metro Parks evicted homeless people squatting in the woods. App. 104. Some asked Petitioner Lewis about pitching their tents behind 15 Broad Street. *Id.* Given the bitter cold, he agreed. *Id.* In addition, 15 Broad Street became a day center for Akronites in need, providing laundry, showers, a food pantry, a community table, free clothing, and more. App. 106.

Petitioners applied to the Akron City Council for a conditional-use permit in April 2018 to avoid zoning problems. App. 78. On September 17, 2018, a divided City Council denied the permit.[1] *Id.* As winter approached, Petitioners, social-service providers, and city officials worked together to get people out of tents and into housing. App. 78–80. This effort was so successful that 15 Broad Street was nearly empty of tents by early December (while the day center remained). App. 80.

On December 6, 2018, Akron sought to force out the few remaining homeless, issuing Appellants a citation for violating the zoning code. App. 128–30, 72. As Petitioners evicted the last residents, they also

[1] Petitioners appealed, but review was denied on procedural grounds, not the merits. *See The Homeless Charity v. City of Akron*, 143 N.E.3d 531 (Ohio 2020) (table). That case, which involved different parties and different facts, has no bearing on the instant appeal.

sought a variance to allow a handful of tents in life-threatening emergencies. App. 73. The day of the January 30, 2019 hearing before the Board of Zoning Appeals—below zero with a howling wind—illustrated exactly the sort of situation in which emergency tent shelter at 15 Broad Street might be necessary. It is much safer than the alternative—forests, underpasses, abandoned homes—because people can warm up inside the building, have ready access to warm food and indoor plumbing, and Sage can keep an eye on everyone. App. 76, 115.

Petitioners' variance request specifically addressed the concerns behind denial of the conditional-use permit for the tent village, such as the visual impact of tents and neighborhood well-being. App. 89–91. The variance asked to use tents on a greatly scaled-down basis: no more than seven; for short-term use only in a dire emergency; standardized size, color, and design; situated out of sight of nearby apartments; erected on hard platforms; located behind planted vegetation and creative screening. *Id.*; *see also* App. 4. Petitioners also emphasized that denying the variance would have little practical effect because the homeless would still be present at 15 Broad Street to use the day center for impoverished Akronites. App. 86–88. The BZA denied the variance. App. 65–66.

Petitioners appealed but had the door slammed in their face every step of the way. The lower courts first reviewed the variance denial, concluding that it was correct because the zoning code did not account for tents on the property and that tents were not "in

general keeping with, and appropriate to, the uses authorized" in the area. App. 11, 41. Then the courts reviewed the constitutional claim: whether Appellants could use their property in an emergency to save the life of someone else. Having just determined that the variance denial wasn't arbitrary under the zoning code, the lower courts then treated the constitutional claim as a forgone conclusion: A decision not arbitrary under the zoning code satisfies constitutional review. App. 20–21, 47–49.

REASONS FOR GRANTING THE WRIT

I. There Is No Basis in the Plain Text, History, or Tradition at the Ratification of the Fourteenth Amendment for Treating Property Rights as Third-Class Citizens Subject to the Most Deferential Version of Rational-Basis Review.

1. This case raises a question of exceptional national importance about how to square rational-basis review for restrictions on property rights with this Court's renewed attention to history and tradition, as recently exemplified in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), and *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022). Ever since Footnote 4 bifurcated our rights into fundamental/nonfundamental categories, this Court has treated property rights as third-class constitutional citizens despite the respect and protection long granted them.

Rational-basis review is, by design, detached from reality. "This standard of review is a paradigm of judicial restraint." *FCC v. Beach Commc'ns*, 508 U.S. 307, 314 (1993). This "restraint" is so extreme that a statute or government action "must be upheld . . . if there is any reasonably conceivable state of facts that could provide a rational basis" for what the government has done. *Id.* at 313. Bluntly, courts are instructed to pay scant attention to actual facts and focus instead on "conceivable" ones in an alternate universe. *E.g.*, *Heller v. Doe*, 509 U.S. 312, 320 (1993) (stating that "any reasonably conceivable state of facts that could provide a rational basis" must result in upholding a law); *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487 (1955) (upholding as constitutional a law that "may exact a needless, wasteful requirement"); *see also Tiwari v. Friedlander*, 26 F.4th 355, 361 (6th Cir. 2022) ("[R]ational-basis review epitomizes a light judicial touch."). This Court has said, in effect, that the only practical limitation on government power in the rational-basis context is the limit of the human imagination. Worse still, in what would be a blatant procedural due-process violation in any other context, this Court has suggested that judges should not be neutral, that they should firmly press their thumbs on the government side of the scale. *See U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980) (stating that if there are plausible reasons for a law, the law stands, regardless of whether the reasoning actually underlay the law). In short, the form of legal analysis that is mandatory in the rational-basis context would not be tolerated for an instant in any other.

This deliberate detachment from reality dominated the analysis below. Petitioners argued that the Akron zoning board violated substantive due process by applying the local zoning code to prohibit the temporary use of tents for the street-dwelling homeless in acute, transient emergencies such as frigid cold. But the lower court's rational-basis analysis ignored the facts and instead asked general questions about what kind of power Akron was exercising. The lower court framed the test this way: "A challenge to the constitutionality of a zoning ordinance as applied, . . . considers 'whether the ordinance, in proscribing a landowner's proposed use of his land, has any reasonable relationship to the legitimate exercise of police power by the municipality'" App. 16 (quoting *Jaylin Invs., Inc. v. Vill. of Moreland Hills*, 839 N.E.2d 903, 908 (Ohio 2006)). The lower court then did literally no analysis. It pointed back to its earlier conclusion that prohibiting the emergency tents was authorized under the local zoning code. That fact—that the ordinance allowed what Petitioners insisted was unconstitutional—was dispositive. App. 17 ("The application of the Akron Zoning Code in this instance bore a reasonable relationship to Akron's exercise of its police power in regulating the uses to which the property at issue may be put.").

But a constitutional test that amounts to "does the ordinance authorize what the government did" is no constitutional test at all. The purpose of constitutional review is to ask whether a government action authorized by statutory law violates the Constitution. *See*

generally Alvin B. Rubin, *Judicial Review in the United States*, 40 La. L. Rev. 67, 68 (1979) ("The basic tenet of judicial review is that, where applicable, the provisions of the United States Constitution must control judicial decision-making."). There was no effort to wrestle with the constitutional stakes here. No recognition that real people wanted to help other real people under desperate circumstances. The court simply asked whether the law green-lit the government behavior, which, *ipso facto*, established a "reasonable relationship" to the police power. That was a low bar to clear; indeed, it was essentially lying on the ground.

Likewise, the court rejected Petitioners' argument that substantive due process included intertwined liberty interests in rescuing those in peril and in being rescued. Petitioners sought to place the full constitutional context of their efforts before the court: Their property rights were reinforced by liberty interests in rescuing the homeless from grave peril. This argument drew on the long-recognized right to come to the defense of the life of another, along with the concomitant right to take reasonable steps to protect one's own life. The lower court doubted the existence of these liberty interests but concluded that, even if they existed, Akron's prohibition on using emergency tents was valid because the question was only whether "*arbitrary* state action may unconstitutionally deprive an individual of the right to life for purposes of the Fourteenth Amendment." App. 20 (emphasis in original). Again pointing back to its statutory analysis, the court observed that it "cannot conclude that the Akron

Zoning Code's applicability in this instance is arbitrary." *Id.*

The lower court understood that its analysis was perfunctory, skewed entirely in the government's favor, and indifferent to the actual facts. Although speaking about the arbitrary and capricious standard in administrative law, the court's conclusion applies with equal force to its constitutional analysis.

> The Homeless Charity, Sage Lewis LLC, and Mr. Lewis direct this Court's attention, as they directed the trial court's attention, to the numerous affidavits documenting the positive effects that their efforts have had on the lives of homeless individuals and the voluminous record of emails provided to the city in support of their work. This Court does not seek to diminish the profound effect that The Homeless Charity, Sage Lewis LLC, and Mr. Lewis appear to have had on the lives of the individuals who provided affidavits to the [Board of Zoning Appeals], nor do we dismiss the plight of the homeless in Akron as insignificant. But this Court is tasked in an administrative appeal from a zoning decision to consider the Akron Zoning Code as written, and we are constrained by our standard of review to do so in accordance with established precedent.

App. 13.

2. "Constrained by [the] standard of review" is the problem. Rational-basis review has become so deferential that courts are "constrained" to ignore

material facts and the gravity of plain-text protections in the Fourteenth Amendment for "life, liberty, and property." Those protections for individual rights have morphed into protections for government prerogatives. The salient question in the property context is never (or very rarely) "is the government violating the property owner's rights." The salient question, as illustrated below, "is the government exercising its police power to regulate property, in any way imaginable, for the very general purposes of health, safety, and welfare." If the answer to this latter question is yes, then the regulation is valid, no matter how egregiously it trenches on vital constitutional interests. But a test that is essentially impossible for the government to fail is no test at all.

Today's extreme deference is rooted in Footnote 4 of *United States v. Carolene Products*, where the Court divided the Fourteenth Amendment's Due Process Clause into, in modern parlance, fundamental and nonfundamental rights. 304 U.S. 144 (1938). Fundamental rights are those "within a specific prohibition of the Constitution," as well as "the general prohibitions of the Fourteenth Amendment." *Id.* at 152 n.4. Today, "the Due Process Clause protects two categories of substantive rights." *Dobbs*, 142 S. Ct. at 2246. "The first consists of rights guaranteed by the first eight Amendments," and "a select list of fundamental rights that are not mentioned anywhere in the Constitution." *Id*.

Nonfundamental rights are . . . everything else. Everything a person wants to do that is not a

fundamental right is nonfundamental. And those "nonfundamental" rights include activities that most people would deem very much *fundamental* to their lives: opening a business; accepting a job; buying or building a home; buying a car; saving for retirement; purchasing food, health care, and life insurance. All of that and almost all of ordinary life is "nonfundamental." *See Corfield v. Coryell*, 6 F. Cas. 546, 551–52 (C.C.E.D. Pa. 1823) (identifying the privileges and immunities of citizens in the several states as including "the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety").

This Court's decision to treat aspects of life that are very much fundamental as nonfundamental is a pure policy choice, one sharply at odds with the plain text, history, and tradition of the Constitution. After generations of having to play pretend, lower courts are growing increasingly frustrated in being "constrained by [the] standard of review" when evaluating substantive due-process claims involving rights that are fundamental in reality—*e.g.*, using property to save lives in desperate conditions—but labeled "nonfundamental" by this Court. They do not like that they are required to ignore the seriousness of the constitutional interests. They do not like that their analyses are required to be detached from reality.

And on this latter point—detachment from reality—lower courts do not like the gap between this Court's fundamental/nonfundamental distinction and history and tradition. Nonfundamental rights such as

the use and enjoyment of property or the pursuit of a common occupation are as deeply and objectively rooted in history and tradition as the enumerated rights.

For example, Judge Sutton of the Sixth Circuit has recently called for this Court to reconsider rational-basis review and the supposedly nonfundamental right to pursue a common occupation:

> [M]any thoughtful commentators, scholars, and judges have shown that the current deferential approach to economic regulations may amount to an overcorrection in response to the *Lochner* era at the expense of otherwise constitutionally secured rights. . . . And is there something to Justice Frankfurter's criticism of the dichotomy between economic rights and liberty rights, a dichotomy first identified in *Carolene Products*? . . . But any such recalibration of the rational-basis test and any effort to create consistency across individual rights is for the U.S. Supreme Court, not our court, to make.

Tiwari, 26 F.4th at 368–69 (internal citation omitted). Likewise, Judge Ho of the Fifth Circuit just observed:

> The Supreme Court has recognized a number of fundamental rights that do not appear in the text of the Constitution. But the right to earn a living is not one of them—despite its deep roots in our Nation's history and tradition. . . . Cases like this nevertheless raise the question: If we're going to recognize various

> unenumerated rights as fundamental, why not the right to earn a living?
>
> . . . .
>
> But that is for the Supreme Court to determine.

Golden Glow Tanning Salon, Inc. v. City of Columbus, 52 F.4th 974, 981, 984 (5th Cir. 2022) (Ho, J., concurring).

Of course, for every rule, there are often exceptions. So too here, where on rare occasion the rational-basis test has provided a level of judicial review that is worthy of the name. In *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), this Court invalidated a zoning ordinance as applied to a home for the intellectually disabled. The Court, applying rational-basis review, *id.* at 446, examined the justifications for the ordinance one-by-one and found each to be lacking, *id.* at 447–50. Ultimately, all that remained was prejudice against the home's residents, which is irrational. *Id.* at 450. Similarly, lower courts have, on rare occasions, applied a genuine level of review within the rational-basis test. *E.g.*, *St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013); *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002); *Catherine H. Barber Mem'l Shelter, Inc. v. Town of N. Wilkesboro*, 576 F. Supp. 3d 318 (W.D.N.C. 2021). But those cases are nearly impossible to come by because lower courts treat *Cleburne*, with its genuine judicial review, as largely defunct. *E.g.*, *Jones v. Governor of Florida*, 950 F.3d 795, 814 (11th Cir. 2020) ("The Supreme Court has never overturned *Cleburne* or disavowed its logic. However, the case has

come to be seen as an exception to ordinary rational basis review that applies a more demanding standard where the measure at issue has no purpose other than a bare desire to harm a politically unpopular group." (cleaned up)); *Monarch Bev. Co. v. Cook*, 861 F.3d 678, 685 (7th Cir. 2017) (describing *Cleburne* as "better understood as [an] extraordinary rather than exemplary rational-basis case[]").

Notwithstanding those exceptions, the rational-basis test can hardly be called judicial review. It presses both thumbs firmly on the scale for the government and allows the elected branches to rampantly abridge rights that our Founders intended to protect. Only this Court can fix the error.

3. Judges Sutton and Ho are calling on this Court to apply a meaningful history-and-tradition inquiry to so-called "nonfundamental rights" that Footnote 4 has relegated to the dust bin despite their immense historical importance and their immense practical importance to Americans. That test involves an inquiry into "the history and tradition that map the essential components of our Nation's concept of ordered liberty." *Dobbs*, 142 S. Ct. at 2248. In *Dobbs*, the Court rededicated itself to this test, and overruled *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey* because the "inescapable conclusion is that a right to abortion is not deeply rooted in the Nation's history and traditions." *Id.* at 2253. In contrast to the dearth of historical support for abortion rights, the *Dobbs* majority pointed to the extensive historical record supporting the recent incorporation

decisions in *Timbs v. Indiana*, 139 S. Ct. 682 (2019) (excessive fines) and *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (individual self-defense). *Dobbs*, 142 S. Ct. at 2246–47. Likewise, in *Bruen*, 142 S. Ct. 2111, the Court invalidated New York's restrictions on the right to carry a functional firearm for self-defense outside the home because "the government [failed to] demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation." *Id.* at 2126.

The Court's renewed attention to history and tradition cannot be squared with its long disparagement of rights in property, enumerated and unenumerated. Those rights have a historical pedigree as impressive, if not more so, than that of the protection against excessive-fines and the right to carry a handgun. Yet the Court has instructed lower courts for generations to treat property rights as insignificant. For example, in *Kelo v. City of New London*, 545 U.S. 469 (2005), the Court applied a super-charged form of rational-basis review to the *enumerated* right requiring an actual "public use" for any taking, and the Court did that despite this right having been recognized as fundamental as far back as 1897. *See Chicago, B. & Q.R. Co. v. City of Chicago*, 166 U.S. 226 (1897). Unsurprisingly, then, the Court has given *carte blanche* to zoning officials who, as here, can thwart a traditional use of property without the slightest fear that a court will perform a *Dobbs*-style history-and-tradition inquiry. *E.g.*, *Spence v. Zimmerman*, 873 F.2d 256 (11th Cir. 1989) ("We stress that federal courts do not sit as zoning boards of

review and should be most circumspect in determining that constitutional rights are violated in quarrels over zoning decisions."); *see also* Charles L. Siemon & Julie P. Kendig, *Judicial Review of Local Government Decisions: "Midnight in the Garden of Good and Evil,"* 20 Nova L. Rev. 707, 710 (1996) ("[T]he lack of a judicial enforcement of constitutional rights ensures that there is no incentive for local governments to do a good job of planning and regulating because it does not matter. Doing a good job is simply not required to win in court; thus, legal defensibility is all that matters." (cleaned up)).

It is time for this Court to take a case that faithfully applies the history-and-tradition inquiry to deeply and objectively rooted rights in property. This is not a matter of mere *confusion* in the law. Petitioners are not asking the Court to provide *guidance*. To the contrary, the law is pellucidly clear—this Court takes history and tradition seriously only as long as property rights are not on the table. If they are, then, as an act of "freewheeling judicial policymaking," *Dobbs*, 142 S. Ct. at 2248, this Court banishes them to the bottom of the rational-basis bin. All lower courts understand that and follow this Court's decisions. No split of authority will ever arise, which is why Judge Ho and Judge Sutton have implored this Court to revisit its rational-basis precedent. Simply, this Court must address the yawning holes in its jurisprudence because the Court itself is committed to getting the law right. To do otherwise would betray the very principles this

Court purports to cleave to—principles that are supposed to ensure principled decision-making.

4. Property rights easily satisfy this Court's history-and-tradition inquiry for fundamental rights. In considering whether an enumerated right should be incorporated against the States or whether an unenumerated liberty interest exists, "the Court has long asked whether the right is 'deeply rooted in [our] history and tradition' and whether it is essential to our Nation's 'scheme of ordered liberty.'" *Dobbs*, 142 S. Ct. at 2246 (quoting *Timbs*, 139 S. Ct. at 686). *Timbs*, for example, incorporated the Excessive Fines Clause of the Eighth Amendment after "trac[ing] its venerable lineage back to at least 1215," through the "Stuart kings" to the "ratification of the Fourteenth Amendment" in 1868, when "the constitutions of 35 of the 37 States" protected against excessive fines. *Timbs*, 139 S. Ct. at 687–88. *See also McDonald*, 561 U.S. at 767–70 (incorporating the Second Amendment right of "individual self-defense"). The same test applies to unenumerated liberty interests. *Dobbs*, 142 S. Ct. at 2247 ("[I]t would be anomalous if similar historical support were not required when a putative right is not mentioned anywhere in the Constitution.").

The Court does not consistently apply its fundamental-rights jurisprudence, even to enumerated rights. The glaring example is property rights and eminent domain. 125 years ago, even before the era of selective incorporation, this Court recognized that

> a judgment of a state court, even if it be authorized by statute, whereby private property is taken for the state or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the fourteenth amendment.

Chicago, B. & Q.R. Co., 166 U.S. at 241. *See also Murr v. Wisconsin*, 137 S. Ct. 1933, 1942 (2017) (recognizing *Chicago*'s incorporation of the Fifth Amendment's Takings Clause). In *Chicago*, this Court followed the lineage of the public-use right through state and federal cases, as well as the leading treatises. *Chicago*, 166 U.S. at 235–41. This *Dobbs*-style historical inquiry concluded that the "requirement that the property shall not be taken for public use without just compensation is but 'an affirmance of a great doctrine established by the common law for the protection of private property. It is founded in natural equity, and is laid down as a principle of universal law.'" *Id.* at 236 (quoting 2 Story Const. § 1790).

Yet, notwithstanding the fact that the public-use clause codifies a fundamental enumerated right, this Court has never reviewed public-use determinations under heightened scrutiny. To the contrary, the Court has "eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power." *Kelo*, 545 U.S. at 483. *See also id.* at 506 (Thomas, J., dissenting) ("Today's decision is simply the latest in a string of our cases construing the Public

Use Clause to be a virtual nullity, without the slightest nod to its original meaning."). That is a policy choice, not constitutional law rooted in history and tradition.

The problem with unenumerated property rights is even starker. As an initial matter, the Court's view that unenumerated rights "are not mentioned anywhere in the Constitution," *Dobbs*, 142 S. Ct. at 2246, is not true. The Constitution has at least four *enumerated* repositories of rights that are not themselves expressly spelled out. The Fifth and Fourteenth Amendments contain due-process clauses that protect "life, liberty, [and] property." U.S. Const. amend. V; U.S. Const. amend. XIV. Due process has always been understood to contain a substantive component. *See generally* James W. Ely, Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 Const. Commentary 315, 342–44 (1999); Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* (Little, Brown & Co. 1868). The Fourteenth Amendment also includes the Privileges or Immunities Clause, U.S. Const. amend. XIV, which has been moribund since its inception because this Court read it out of the Constitution as soon as it was ratified. *See Slaughter-House Cases*, 83 U.S. 36 (1872). Last, the Ninth Amendment could not be clearer: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. Const. amend. IX. To be sure, elucidating the historical meaning of unenumerated rights requires careful work, but the

notion that they are "not mentioned anywhere in the Constitution," *Dobbs*, 142 S. Ct. at 2246, and thus can be readily "disparage[d]," U.S. Const. amend. IX, is a policy choice by the Court, not a feature of the Constitution.

Property rights, including the many unenumerated sticks in the bundle of property ownership, are as deeply and objectively rooted as any right, enumerated or otherwise. When the Framers used the terms "life, liberty and property," they referred to natural rights that existed not as a creation of positive law but as a divine gift. *See*, *e.g.*, 1 William Blackstone, Commentaries *54; Paul J. Larkin, Jr., *The Original Understanding of "Property" in the Constitution*, 100 Marq. L. Rev. 1, 3 (2016) (hereinafter Larkin, *Original Understanding*); James W. Ely, Jr., *The Guardian of Every Other Right: A Constitutional History of Property Rights* 17 (Oxford Univ. Press 3d ed. 2008) ("According to Locke, private property existed under natural law before the creation of political authority. Indeed, the principal purpose of government was to protect these natural property rights, which Locke fused with liberty.") (hereinafter Ely, *Guardian*). Indeed, private property has been a central institution since the Roman law of Justinian, and "the protection of private property from the Crown was a major purpose of the Magna Carta." Richard A. Epstein, *Supreme Neglect: How to Revive Constitutional Protection for Private Property* 5–6 (Oxford Univ. Press 2008); *see also* Gottfried Dietze, *Magna Carta and Property* 38, 43–44 (Magna Carta Comm'n 1965) (if "[t]he charter of

'liberties' is thus in large measure a charter of 'properties,'" then it may be that "property rights constitute the better part of freedom as an end of the rule of law"). According to Blackstone, property was "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." 2 William Blackstone, Commentaries *2.

The Colonists brought this mindset and legal protection with them to the New World. Indeed, property was "the one great unifying value" throughout the colonies. Willi Paul Adams, *The First American Constitutions: Republican Ideology and the Making of the State Constitutions* 191 (Rowman & Littlefield 2001); Ely, *Guardian* 27 ("[T]he defense of property rights was a major force unifying the colonies in their struggle with England."); *see also* Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* 17 (Harvard Univ. Press 1985) ("The classical liberal tradition of the founding generation prized the protection of liberty and private property under a system of limited government."); Stuart Bruchey, *The Impact of Concern for the Security of Property Rights on the Legal System of the Early American Republic*, 1980 Wis. L. Rev. 1135, 1136 (1980) ("Perhaps the most important value of the Founding Fathers of the American constitutional period was their belief in the necessity of securing property rights."); Ely, *Guardian* 25 ("Significantly, the cry 'Liberty and Property' became the motto of the revolutionary movement."); Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of*

the Constitution 290 (Knopf Doubleday 1996) ("Life, liberty, and property" were "the fundamental trinity of inalienable rights," which people could never renounce, unlike "rights whose exercise was subject to the regulatory power of the state."). "Property must be secured, or liberty cannot exist." VI Works of John Adams 280 (C.F. Adams ed. 1851).

This understanding of liberty and property as a singular concept continued to prevail when the Fourteenth Amendment was adopted. Larkin, *Original Understanding*, 100 Marq. L. Rev. at 39 & n.217; Herbert Hovenkamp, *The Political Economy of Substantive Due Process*, 40 Stan. L. Rev. 379, 395–98 (1988) ("[I]n 1868, the concept of 'civil rights' of blacks—or, for that matter, of almost anyone—included two elements: (1) the right to equality of treatment in court trials and of access to the agencies of the state, and (2) a set of distinctly *economic* civil rights, namely the right to make contracts and the right to own property."); *Powell v. Pennsylvania*, 127 U.S. 678, 684 (1888) (describing as "an essential part of [someone's] rights of liberty and property, as guaranteed by the Fourteenth Amendment," their "enjoyment upon terms of equality with all others in similar circumstances of the privilege of pursuing an ordinary calling or trade, and of acquiring, holding, and selling property.").

It wasn't until the New Deal that the Court made an about-face in its treatment of property rights—something that occurred despite not an ounce of change in text, history, or tradition. Larkin, *Original Understanding*, 100 Marq. L. Rev. at 11 ("[S]ince the

New Deal the Supreme Court has permitted the government to regulate private property for reasons and in ways that would have astonished the Framers."); Richard Pipes, *Property and Freedom* 241 (Knopf Doubleday 2000) ("Roosevelt and his advisors encouraged a fundamental and longlasting change in attitude toward private property: laws conceived and presented as emergency measures were subtly transformed into innovative principles which fundamentally altered first governmental and then judicial attitudes toward ownership."); James W. Ely, Jr., "*Poor Relation" Once More: The Supreme Court and the Vanishing Rights of Property Owners*, Cato Sup. Ct. Rev. 2004–05, 39 ("It is hard to square this subordination of property rights with either the expressed views of the Framers or the language of the Constitution and Bill of Rights. But the reduced status of property rights well served the political agenda of the New Deal."). That shift was a policy choice, a picking-and-choosing by this Court of what rights it cares about, not the result of a principled history-and-tradition inquiry.

II. A Proper History-and-Tradition Inquiry Would Have Resulted in a Very Different Analysis Below.

Were the parties and the court below not "constrained" by the standard of review, the analysis would have looked much different because using one's property to help those in need is part and parcel of the historical understanding of property rights subject to constitutional protection. As Sir Edward Coke remarked, "No time was so barbarous as to abolish

learning and knowledge, nor so uncharitable as to prohibit relieving the poor." *Porter's Case*, 1 Coke's Reps. 24 (as quoted in *Birchard v. Scott*, 39 Conn. 63, 69 (1872)). In 1835, Alexis de Tocqueville observed that Americans keenly pursue voluntary activity to support their communities. Alexis de Tocqueville, *Democracy in America* 596 (Penguin 13th ed. 2003). Out of charitable impulse, Americans of the founding era ran "schools, churches, and other voluntary organizations designed to provide services to the public." Internal Revenue Service, Statistics of Income Bulletin, A History of the Tax-Exempt Sector (Winter 2008). This continued through the passage of the Fourteenth Amendment. *Id.* ("By the end of the 19th century, private philanthropy, as typified by the modern private foundation, had joined voluntary associations as an important component of the public-serving charitable sector of the United States.").

Perhaps the best example is people offering their property as part of the Underground Railroad, shuttling escaped slaves north by hiding them on private property. *See* Wilbur Henry Siebert, *The Underground Railroad from Slavery to Freedom* 87–112 (Macmillan 1898) (detailing some of those who supplied shelter and food to those on their way from bondage to freedom). This noneconomic, charitable use of property was so deeply and objectively rooted, and so pervasive, that Congress had to criminalize offering assistance to escaped slaves—not just once but twice, with Congress strengthening the second iteration after abolitionists continued to aid escaped slaves. Fugitive Slave Act of

1793, ch. 7, 1 Stat. 302; Fugitive Slave Act of 1850, ch. 10, 9 Stat. 462; *see also* Robert J. Kaczorowski, *The Tragic Irony of American Federalism: National Sovereignty Versus State Sovereignty in Slavery and in Freedom*, 45 U. Kan. L. Rev. 1015, 1030–37 (1997). This Court upheld both laws. *See Jones v. Van Zandt*, 46 U.S. (5 How.) 215 (1847); *Ableman v. Booth*, 62 U.S. (21 How.) 506 (1858). But the Reconstruction Amendments, especially the Thirteenth Amendment's abolition of slavery and Section 1 of the Fourteenth Amendment, restored the *status quo ante*, in which using property to help those in need was commonplace and protected.

Those amendments also outlawed the historical abuse of vagrancy laws, which is relevant to Petitioners' activities assisting the homeless. The Black Codes, which applied to free or freed African Americans, sought to keep them in perpetual servitude, slavery by another name. *See Timbs*, 139 S. Ct. at 688–89. These state statutes and local ordinances deprived African Americans of the right to own property, enter into enforceable contracts, and pursue a common occupation, among other rights. *See* Paul Finkelman, *John Bingham and the Background to the Fourteenth Amendment*, 36 Akron L. Rev. 671, 681–85 (2003) (describing provisions of various states' Black Codes). The usual vehicle for the Black Codes were vagrancy ordinances, which allowed officials to arrest African Americans for being out in public when not allowed or being out in public without being employed. *E.g.*, An Act to Amend the Vagrant Laws of the State, Nov. 24, 1865, 1865

Miss. Laws 90. Those convicted of vagrancy could then put to forced labor, sometimes rented out by government officials to landowners. *E.g.*, An Act to Alter and Amend the 4435th Section of the Penal Code of Georgia, March 12, 1866, 1866 Acts of Georgia, Annual Session 234. Because vagrancy was a "public" offense, those trying to evade officials hunting for vagrants would often take refuge on private property.

The history-and-tradition inquiry would also have taken into account the deeply and objectively rooted rights of the homeless to defend their lives and the correlative right to come to the defense of the life of another. *See*, *e.g.*, *Abigail All. for Better Access to Developmental Drugs v. von Eschenbach*, 495 F.3d 695, 716–19 (D.C. Cir. 2007) (en banc) (Rogers, J., dissenting) (outlining the history and tradition of protecting life); *Ploof v. Putnam*, 71 A. 188 (Vt. 1908) (recognizing that the "doctrine of necessity applies with special force to the preservation of human life"); *Mouse's Case*, 12 Co. Rep. 63, 77 Eng. Rep. 1341, 1342 (K.B. 1609) (holding that it is lawful to destroy someone's property in order to protect the safety of another's life). *See also Ross v. United States*, 910 F.2d 1422 (7th Cir. 1990); *Munger v. City of Glasgow Police Dep't*, 227 F.3d 1082 (9th Cir. 2000); *Kneipp v. Tedder*, 95 F.3d 1199 (3d Cir. 1996); *Beck v. Haik*, No. 99-1050, 2000 WL 1597942 (6th Cir. Oct. 17, 2000).

The bottom line is that property ownership is deeply and objectively rooted in history and tradition, and the use of property to shelter those in need is likewise deeply and objectively rooted. But, because of

Footnote 4 and its progeny, the courts below never engaged in any history-and-tradition inquiry. They barely even engaged in rational-basis review. And they did that because that is how this Court had instructed lower courts to evaluate property rights. That is a grave flaw in this Court's jurisprudence that must be corrected.

III. This Court Should Grant Review to Perform a History-and-Tradition Inquiry into the Right to Use Property to Shelter Those in Need, and Make Clear that Deeply and Objectively Rooted Property Rights Are Subject to More Than the Most Deferential Version of the Rational-Basis Test.

There are no vehicle problems. The Ohio Supreme Court denied review on the state statutory and state constitutional claims. The only live claim is the Fourteenth Amendment substantive due-process claim. And the facts here are perfect for applying the history-and-tradition inquiry to property rights. The noneconomic use of property is deeply and objectively rooted. Not only that, the use of property to shelter the indigent and the outcast is directly connected to the history of the Underground Railroad and suppression of property rights, among others, that the Reconstruction amendments were intended to address.

If that historical connection exists, then the present version of the rational-basis test, which amounts to asking "did the government exercise its police power" is not appropriate. That does not mean, however, that strict scrutiny necessarily need apply. There

is no textual or historical basis for applying, in essence, "the government always loses" scrutiny to every interest that passes the history-and-tradition inquiry. Perhaps something short of strict scrutiny satisfies the constitutional requirement. One thing is clear: dismissive, imaginary rational-basis review cannot do the job, and some kind of actual judicial scrutiny must apply.

In sum, Petitioners ask this Court to grant review to: (1) Recognize that a history-and-tradition inquiry is appropriate for property rights; (2) if the right to use property to shelter the needy in emergencies is deeply and objectively rooted, then recognize that the version of rational-basis review prescribed by Footnote 4 and its progeny is inappropriate; and (3) announce the proper standard of review for restrictions on deeply and objectively rooted property rights. After that, the Court can remand to the lower courts to allow the clarified standard of review to be applied in the first instance.

CONCLUSION

This Court should grant a writ of certiorari, reverse the Court of Appeals of Ohio, and clarify that the longstanding right to use one's property to shelter those in need is subject to more than the most deferential version of the rational-basis test.

Respectfully submitted.

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