No. 14-1201

IN THE

Supreme Court of the United States

CENTRAL RADIO COMPANY INC.,
ROBERT WILSON, AND KELLY DICKINSON,

Petitioners,

v.

CITY OF NORFOLK, VIRGINIA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF OF NEIGHBORHOOD ENTERPRISES, INC., SANCTUARY IN THE ORDINARY, AND JIM ROOS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF OF NEIGHBORHOOD ENTERPRISES, INC., SANCTUARY IN THE ORDINARY, AND JIM ROOS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Neighborhood Enterprises, Inc., Sanctuary In The Ordinary, and Jim Roos hereby move for leave to file a brief as *amici curiae* supporting the petition for a writ of certiorari. Counsel for petitioners consented to the filing of the brief, but counsel for respondent withheld consent.

Movants are the victorious plaintiffs in *Neighborhood Enterprises, Inc.* v. *City of St. Louis*, 644 F.3d 728 (8th Cir. 2011), *cert. denied*, 132 S. Ct. 1543 (2012), a decision that directly conflicts with the Fourth Circuit judgment below. Like petitioners, movants placed a sign on their property protesting the threatened taking of that very property. Unlike petitioners, however, movants were vindicated by a federal court of appeals, which struck down the challenged sign ordinance as unconstitutional. As individuals and organizations who provide and promote low-income housing, which often is the target of eminent domain actions, their proposed brief provides this Court with a unique perspective on the importance of securing robust First Amendment protections for those who oppose improper takings.

Movants respectfully request that this Court grant them leave to file their brief as *amici curiae*.

Respectfully submitted.

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INTEREST OF *AMICI CURIAE*[1]

Amici are the victorious plaintiffs in *Neighborhood Enterprises, Inc.* v. *City of St. Louis*, 644 F.3d 728 (8th Cir. 2011), *cert. denied*, 132 S. Ct. 1543 (2012), a decision that directly conflicts with the Fourth Circuit judgment below. Like petitioners, *amici* placed a sign on their property protesting the threatened taking of that very property. Unlike petitioners, however, *amici* were vindicated by a federal court of appeals, which struck down the challenged sign ordinance as unconstitutional. As individuals and organizations who provide and promote low-income housing, which often is the target of eminent domain actions, *amici* have an interest in preventing the abuse of eminent domain and securing robust First Amendment protections for those who oppose improper takings.

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[1] Pursuant to this Court's Rule 37.2(a), *amici* gave at least 10 days' notice to counsel for petitioners and counsel for all respondents who entered an appearance in the court of appeals of their intent to file this brief. Counsel for petitioners consented, but counsel for respondent withheld consent. Pursuant to this Court's Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the brief's preparation or submission. No person other than *amici* or their counsel made a monetary contribution to the brief's preparation or submission.

Amicus Sanctuary In The Ordinary ("Sanctuary") is a non-profit, low-income housing provider for persons in need in the St. Louis, Missouri area.

Amicus Neighborhood Enterprises, Inc., is a self-supporting housing ministry that manages low-income rental properties in St. Louis, including for Sanctuary.

Amicus Jim Roos founded both Neighborhood Enterprises and Sanctuary. He has long been active in the St. Louis community, particularly in matters of low-income housing policy. As part of his efforts to ensure that affordable housing is available for those of modest means, Mr. Roos acts as coordinator and spokesperson for the Missouri Eminent Domain Abuse Coalition, a civic organization concerned about abusive eminent domain practices. He appeared as amicus in *Reed* v. *Town of Gilbert, Ariz.*, No. 13-502. *See* Brief of Robert Wilson, et al.

SUMMARY OF ARGUMENT

In *Kelo* v. *New London*, 545 U.S. 469, 489 (2005), this Court restricted property owners' ability to invoke the Fifth Amendment to prevent the use of "eminent domain to promote economic development." Property owners were told to rely instead on their First Amendment right to engage in "public debate" about "the necessity and wisdom" of such eminent domain practices. *Ibid*.

For property owners facing confiscation, the most effective and efficient means of engaging in such public debate and opposing takings is often to place protest signs directly on the threatened property itself. Such signs and their placement on the property at risk convey a message that no other sign, in no other location, can convey, revealing to the public the

true cost of the proposed taking in an immediate and emotional way and inspiring an appreciation for the lives and businesses at stake. Indeed, many property owners—including *amici* and the petitioners before this Court—have succeeded in preventing eminent domain actions using this very technique.

Yet state and city officials—often the very officials who are seeking to take the property at issue—repeatedly target eminent domain protest signs for removal, using obscure and infrequently enforced sign regulations that provide far too much discretion to government officials, in direct contravention of the First Amendment. As the Eighth Circuit recognized in *Neighborhood Enterprises*, federal courts should be particularly wary of government officials seeking to trample property owners' First Amendment rights so they may realize their eminent domain ambitions.

In this case, the Fourth Circuit upheld the government's decision to squelch and skew public debate by enforcing an unjust sign ordinance against petitioners. The Fourth Circuit ignored the vital First Amendment interests at stake, holding that petitioners "do not have a constitutional right to place their sign in the location and manner that they deem most desirable." Pet. App. 17.

As this Court has recognized, however, displaying a political sign on one's own property "often carries a message quite distinct from placing the same sign someplace else." *City of Ladue* v. *Gilleo*, 512 U.S. 43, 56 (1994). That is certainly true where the sign protests the taking of *the very property on which it is placed*. Requiring the protestors to place the sign anywhere else would force the speakers to "chang[e] what they say," *Fed. Election Comm'n* v. *Wis. Right to Life, Inc.*, 551 U.S. 449, 477 n.9 (2007)

(opinion of Roberts, C.J.), and would not convey the same immediate and urgent message: "Stop the taking of *this* building." *See Cohen* v. *California*, 403 U.S. 15, 26 (1971).

This Court should grant certiorari to protect the rights of property owners facing eminent domain actions and secure the fairness of the "public debate" described in *Kelo*. It should instruct the lower courts that a speech alternative is "inadequate" if it forces the speaker to change the message by moving the speech to a new location. *Members of City Council of L.A.* v. *Taxpayers for Vincent*, 466 U.S. 789, 812 (1984). And it should remind the lower courts that the most effective and efficient place for a property owner to affix a political protest sign is on his own property. *See Ladue*, 512 U.S. at 57.

ARGUMENT

When a property owner is compelled to protest the taking of his property, there is no adequate alternative to placing a sign on the property itself. No other speech conveys the same message. As *amici* know firsthand, such speech works—*amici* have successfully fended off eminent domain actions using such tactics.

Amici provide housing to low-income residents in the St. Louis area. From 2000 to 2004, the City of St. Louis used eminent domain to acquire 24 buildings housing 60 low-income apartments owned or managed by Sanctuary or Neighborhood Enterprises. St. Louis took the buildings for private development.

These expropriations of *amici*'s buildings were only the latest in a long history of cities using eminent domain to displace poor residents and replace them with higher-tax-earning developments. *See*, *e.g.*,

Remarks of Ilya Somin 43–50, *The Civil Rights Implications of Eminent Domain Abuse*, U.S. Comm'n on Civil Rights (June 2014). Indeed, of the "several million Americans [who] were expelled from their homes as a result of blight and urban renewal condemnations" since World War II, the "vast majority" have been "poor minorities, primarily African Americans." *Id.* at 43 (citation omitted).

In 2005, this Court decided *Kelo* v. *New London*, 545 U.S. 469 (2005), which held that the Taking Clause of the Fifth Amendment, as incorporated against the States, does not, as a "bright-line rule," prohibit taking property for economic development. *Id.* at 484. The Court, however, left States free to set "stricter" requirements for their use of eminent domain, stating that "the necessity and wisdom of using eminent domain to promote economic development are certainly matters of legitimate public debate." *Id.* at 489.

Amici attempted to participate in that public debate when St. Louis again threatened to seize their low-income housing. In early 2007, St. Louis notified *amici* that it intended to acquire one of their residential buildings located in an area that St. Louis had declared "blighted" under Missouri's Land Clearance for Redevelopment Law, a declaration that permitted St. Louis to take the property for private redevelopment. *See* Mo. Rev. Stat. § 99.420(4); § 99.320(3), (10)(a); St. Louis, Mo., Ordinance 64831 § 8 & Ex. B § D(2) (Dec. 17, 1999).

To protest St. Louis's eminent domain practices, *amici*, with tenant approval, placed a mural on the building that St. Louis sought to acquire. The mural contained the words "End Eminent Domain Abuse" inside a red circle and slash—virtually the same ex-

pression used in the banner at issue in this case. *See* Pet. App. 6. *Amici*'s mural was approximately 363 square feet in area and visible from, among other areas, Interstates 44 and 55.

At the urging of the same alderman who had introduced the ordinance declaring *amici*'s building "blighted," St. Louis cited *amici* for displaying an "illegal sign." *See* Respondents Br. 10–11, *City of St. Louis* v. *Neighborhood Enters., Inc.*, 132 S. Ct. 1543 (2012). St. Louis's Comprehensive Sign Control Regulations, like Norfolk's sign code, require that an individual obtain permission from the government, in the form of a permit, to post a sign. St. Louis, Mo., Rev. Code §§ 26.68.060, 26.68.170. And, like Norfolk, St. Louis imposes additional regulations—including varying size limits—depending on the sign's location. *Id.* at §§ 26.68.050, 26.68.070-120, 26.68.140. Thus, St. Louis explained that a sign in the district where *amici*'s mural was located could be no more than 30 square feet. Much larger signs were permitted in other districts. *See id.* §§ 26.68.050, 26.68.090–120.

Moreover, St. Louis's sign code, like Norfolk's, exempts from the definition of "sign"—and thus from all sign regulations—flags from governmental and religious organizations and certain works of art. St. Louis, Mo., Rev. Code § 26.68.020(17).

The Eighth Circuit accordingly struck down St. Louis's sign code as a content-based regulation that failed strict scrutiny. *Neighborhood Enters.* v. *City of St. Louis*, 644 F.3d 728, 736–38 (8th Cir. 2011). It explained that a national, state, or religious "crest[]" of the same size as *amici*'s mural would be exempt from regulation. *Id.* at 737. And, although St. Louis argued that its ordinance promoted "traffic safety and aesthetics," the court refused to "accept legisla-

tive explanations" about the "purpose(s)" of the sign code. *Ibid.*

As petitioners explain in their petition, the Fourth Circuit reached the opposite result on materially identical facts. Pet. 12–23. The Fourth Circuit reasoned that protestors "do not have a constitutional right to place their sign in the location and manner that they deem most desirable." Pet. App. 17. It acknowledged that petitioners could not leave their sign on their property unless they reduced it from 375 square feet to 60 square feet, but held that this "alternative" was "adequate." *Ibid.* (citing *Wag More Dogs, LLC* v. *Cozart*, 680 F.3d 359, 369 (4th Cir. 2012)).

The Fourth Circuit erred.

I. A PROPERTY OWNER PROTESTING THE TAKING OF HIS PROPERTY CANNOT CONVEY THE SAME MESSAGE BY MOVING HIS SPEECH TO ANOTHER LOCATION.

The Fourth Circuit's decision flouts this Court's First Amendment jurisprudence, which holds that there is no constitutional substitute for placing signs on one's own property. *City of Ladue* v. *Gilleo*, 512 U.S. 43, 56 (1994) (citation omitted); *cf. Members of City Council of L.A.* v. *Taxpayers for Vincent*, 466 U.S. 789, 812 & n.29 (1984) (holding that alternative means of speech may be adequate where they are located "*in the same place*") (emphasis added). Indeed, the Fourth Circuit grounded its conclusion not on this Court's cases, but on its own prior precedent. Pet. App. 17 (citing *Ross* v. *Early*, 746 F.3d 546, 559 (4th Cir. 2014)).

In *Ladue*, this Court held unconstitutional a sign code passed by a St. Louis suburb that prohibited

most residential signs. 512 U.S. at 45, 58–59. The Court assumed that the ordinance could be viewed as a content-neutral "regulation of the 'time, place, or manner' of speech," but unanimously held that the ordinance nevertheless violated the First Amendment because no "adequate substitutes exist for the important medium of speech that [the city] has closed off." *Id.* at 56. In particular, the Court explained that the "message" conveyed in one location often is "quite distinct" from the message that would be conveyed with identical words in another location. *Ibid.*

One reason for this Court's conclusion is that, "[p]recisely because of their location," speaker-owned "signs provide information about the identity of the 'speaker'" that is "an important component of many attempts to persuade." *Ladue*, 512 U.S. at 56. A "sign advocating 'Peace in the Gulf' in the front lawn of a retired general . . . may provoke a different reaction than the same sign in a 10-year-old child's bedroom window." *Ibid.* And "[a]n espousal of socialism may carry different implications when displayed on the grounds of a stately mansion than when pasted on a factory wall." *Id.* at 56–57.

As other courts have recognized, these "principles" apply outside the home as well. *City of Painesville Bldg. Dep't* v. *Dworken & Bernstein Co., LPA*, 733 N.E.2d 1152, 1158 (Ohio 2000). For example, "a sign advocating the election of a particular judicial candidate" could "have a more significant communicative effect by virtue of its placement on law firm property than had the same sign been placed elsewhere." *Ibid.*

Where eminent domain abuse is concerned, the identity of the speaker is particularly important. A

provider of low-income housing, for example, is uniquely positioned to protest the use of eminent domain for private development purposes and draw public attention to the disproportionate burden that eminent domain practices place on low-income and minority communities. And business owners like petitioners who are longstanding fixtures of the community (Pet. App. 67) are uniquely positioned to reveal the threat that eminent domain poses to a community's stability and values.

But identity of the speaker is not the only way in which the "location of speech, like other aspects of presentation, can affect the meaning of communication and merit First Amendment protection." *Galvin* v. *Hay*, 374 F.3d 739, 750–51 (9th Cir. 2004) (collecting cases). *Amici*'s sign, like petitioners' sign, was emblazoned across the very property threatened to be taken. The building was marked by the sign, just as the city had marked the building for expropriation. In one glance, viewers would see both the building and the threat it faced. No other display would have conveyed the same message; a pamphlet explaining the impact of eminent domain on low-income housing, for example, could not have presented the issue as imminently, starkly, or clearly.

As this Court has held, "much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well." *Cohen* v. *California*, 403 U.S. 15, 26 (1971). Other courts have reached the same conclusion. In *Goward* v. *City of Minneapolis*, 456 N.W.2d 460, 462 (Minn. Ct. App. 1990), for example, the Minnesota Court of Appeals held that a property owner has a First Amendment right to place signs on

his home protesting mistreatment of that very home by city authorities. The court explained that "the messages contained on [plaintiff]'s signs are so closely connected to their location that no adequate alternative means of communication exists." *Ibid.* Displaying the same words "any place other than the house" would not communicate the same idea. *Ibid.*

Here, the Fourth Circuit failed to appreciate that moving petitioners' sign to another location would gut the "emotive" force of their arguments—"which, practically speaking, may often be the more important element of the overall message sought to be communicated." *Cohen*, 403 U.S. at 26. The alternatives proposed by the Fourth Circuit would force petitioners either to "chang[e] what they say" or be silent. *Fed. Election Comm'n* v. *Wis. Right to Life, Inc.*, 551 U.S. 449, 477 n.9 (2007) (opinion of Roberts, C.J.). Putting petitioners in that untenable position is unconstitutional.

II. MOVING OR SHRINKING A SIGN OFTEN PREVENTS THE SPEAKER FROM REACHING HIS AUDIENCE.

In addition, the ability to post political signs on one's own property is uniquely valuable because no other speech would be as inexpensive or reach the same audience. Posting signs on one's own property is "an unusually cheap and convenient form of communication," giving "persons of modest means or limited mobility" a voice in the public debate. *Ladue*, 512 U.S. at 57. "Even for the affluent, the added costs in money or time of taking out a newspaper advertisement, handing out leaflets on the street, or standing in front of one's house with a hand-held sign may make the difference between participating and not participating in some public debate." *Ibid.*

These considerations apply with special force when government officials seek to silence the speech of individuals and businesses protesting those officials' efforts to take their property. *See* Pet. App. 26–27 (Gregory, J., dissenting) ("If a citizen cannot speak out against the king taking her land, I fear we abandon a core protection of our Constitution's First Amendment."). As this Court and others have recognized, the government may not restrict "the most . . . economical avenue of political discourse" and leave open only "'more burdensome' avenues of communication." *Meyer* v. *Grant*, 486 U.S. 414, 424 (1988) (quoting *Fed. Election Comm'n* v. *Mass. Citizens for Life, Inc.*, 479 U.S. 238, 255 (1986)).

Thus, the Sixth Circuit held unconstitutional a residential sign ordinance that restricted the location and size of signs because it did not sufficiently preserve alternative means of communication. *Cleveland Area Bd. of Realtors* v. *City of Euclid*, 88 F.3d 382, 384, 389–90 (6th Cir. 1996) ("*CABOR*"). With regard to commercial speech, the regulations forced property owners to "us[e] more costly and less autonomous methods" of communication such as newspaper ads. *Id.* at 389. The impact on noncommercial speech was similar: The regulations "greatly restrict[ed] a speaker's audience, restrict[ed] the effectiveness of speech, and relegate[d] speakers to far more expensive means of communication." *Id.* at 390.

Amici's and petitioners' experiences bear out these concerns. By placing a sign on its own property, Sanctuary, a low-income housing provider, was not forced to spend its limited resources renting a billboard or placing television, radio, or newspaper advertisements. Petitioners likewise displayed a

banner on their own property, enabling them to avoid the cost of renting space elsewhere. *See Ladue*, 512 U.S. at 57; *CABOR*, 88 F.3d at 390.

This Court in *Ladue* also noted that the effectiveness of a message depends on it reaching the intended audience: "a person who puts up a sign at her residence often intends to reach *neighbors*, an audience that could not be reached nearly as well by other means." 512 U.S. at 57. An alternative that forces a speaker to speak to a different audience is therefore inadequate. For example, in invalidating a ban on residential "For Sale" signs, this Court reasoned that the proposed alternative forms of communication were "less likely to reach persons not deliberately seeking [the] information." *Linmark Assocs., Inc.* v. *Willingboro*, 431 U.S. 85, 93 (1977); *see also Weinberg* v. *City of Chicago*, 310 F.3d 1029, 1041–42 (7th Cir. 2002) ("[A]n alternative is not adequate if it forecloses a speaker's ability to reach one audience even if it allows the speaker to reach other groups." (punctuation omitted)); *Bery* v. *City of New York*, 97 F.3d 689, 698 (2d Cir. 1996) (invalidating a ban on the sale of art on public streets in part because it foreclosed the speaker's ability to reach "the man or woman on the street who may never have been to a gallery").

Here, as in *Neighborhood Enterprises*, petitioners' sign was displayed on its property and sized to be visible from major highways. Indeed, the Fourth Circuit noted this concern, acknowledging that its decision left petitioners with no alternative "for conveying the same message in a way that can be seen from Hampton Boulevard by 'the thousands of people who pass by Central Radio's property every day.'" Pet. App. 17. A sign located elsewhere, or a sign il-

legible from the highway, would have been far less likely to reach the intended audience and therefore cannot provide a constitutionally adequate alternative.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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