No. _____

In the
Supreme Court of the United States

EUGENE MONGEAU,

Petitioner,

v.

CITY OF MARLBOROUGH and STEPHEN REID, individually and as Commissioner of Inspectional Services and as a Member of the City of Marlborough Site Plan Review Committee,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

When it is alleged that a local official denied a land use permit without any health, safety, or welfare justification, is the standard for determining whether the decision violates substantive due process a "shocks the conscience" test, as the First and Third Circuits hold, or a rational basis analysis, as applied in the Second, Fourth, Fifth, Sixth, Seventh, and Ninth Circuits?

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PETITION FOR WRIT OF CERTIORARI

Eugene Mongeau respectfully petitions this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 492 F.3d 14 (1st Cir. 2007), and is included as Appendix (App.) A. The opinion of the district court, included as App. B., is reported at 462 F. Supp. 2d 144 (D. Mass. 2006).

JURISDICTION

The judgment of the Court of Appeals for the First Circuit was entered on June 22, 2007. On August 17, 2007, this Court issued an Order granting Petitioner's motion to extend the time for filing this petition until October 20, 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AT ISSUE

The Fourteenth Amendment to the United States Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law." Amend. XIV, U.S. Const.

INTRODUCTION

This case raises the issue of the proper standard of review for determining whether a local government's denial of a land use permit violates the substantive guarantees of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The federal circuits are in disarray on this issue, and are in particular conflict on whether the "shocks the conscience" analysis this Court articulated in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), governs substantive due process claims in the land use context. In the decision below, the First Circuit Court of Appeals concluded that *Lewis* and its "shocks the conscience" standard indeed control land use claims, thereby putting that circuit in conflict with others that apply a rational basis or arbitrariness analysis.

The underlying dispute in this case arises from Petitioner Eugene Mongeau's (Mongeau) lengthy and ultimately unsuccessful attempts to secure a valid building permit from the City of Marlborough, Massachusetts (City), and its leading permitting official, Stephen Reid (Reid). Although Mongeau received approval from all relevant local and state land use bodies, Reid actively thwarted these approvals and ultimately refused to issue a permit due to his personal hostility to Mongeau, and without any rationale related to the public's health, safety, or welfare.

As a last resort, Mongeau brought legal action, alleging that Reid's refusal to issue a permit violated Mongeau's constitutionally guaranteed right to substantive due process. The district court applied a "shocks the conscience" analysis to Mongeau's claim, and concluded that his allegations did not state a

substantive due process violation under this analysis. On appeal, the First Circuit affirmed. In the decision below, the First Circuit rejected Mongeau's argument that the "shocks the conscience" test does not control in the deliberative land use context, and that a rational basis analysis should instead apply. This ruling conflicts with the decisions of other circuits, and with the decisions of this Court, and therefore warrants the granting of this petition.

STATEMENT OF THE CASE

A. Facts

In 1991, the City decided to exercise its eminent domain power to take three parcels among five belonging to Mongeau. App. B at 3. The targeted parcels hosted two buildings owned by Mongeau, from which Mongeau derived rental income. The City intended to take these parcels for development of a city fire station. *Id.* Such a taking would leave Mongeau with two vacant parcels that had been environmentally contaminated prior to Mongeau's ownership. *Id.*

The City and Mongeau subsequently entered into an agreement (Agreement) whereby Mongeau would accede to the taking in return for $450,000, the right to build a 60' x 80' structure on his remaining vacant property, and the City's promise to maintain a right-of-way providing access to this remaining land. App. B at 3-4.

After the Agreement was complete, Mongeau spent nearly $700,000 on environmental cleanup and other costs to prepare his remaining property for the structure agreed to by the City. App. B at 4. Mongeau

eventually submitted an application for construction of a building less than half as large, by square footage, as the one authorized by the Agreement. *Id*.

In his capacity as Commissioner of the City's Inspectional Services–the chief authority for issuing building permits–Reid denied Mongeau's initial application on the grounds that the property lacked proper street access and frontage. Mongeau soon submitted a second, modified application; Reid also denied this application for lack of sufficient street access. *Id*. When Mongeau appealed the second denial to the City's Zoning Board of Appeals (Board), Reid opposed this appeal. In so doing, he expressed a personal belief that Mongeau already had profited sufficiently from the property and had no right to build, notwithstanding the Agreement dating from the eminent domain action. App. B at 5.

The Board unanimously approved Mongeau's proposed project, reversing Reid's denials and rejecting his opposition to the project. *Id*. It issued Mongeau a permit that would expire in one year, and noted that any building plans would require review by the City Conservation Commission and the Site Plan Review Committee, of which Reid was a member. *Id*. Mongeau soon addressed every concern raised by Reid in this capacity. However, due to extended delays and demands in that process, Mongeau was forced to seek a six-month extension of time on his permit. *Id*. The Board granted his request.

When the new six-month period approached expiration without any decision, Reid advised Mongeau that he should seek yet another extension. App. B at 5-6. When Mongeau did so, Reid threatened to appeal any renewed permit, presumably to the state

Department of Environmental Protection (DEP), and declared that he had no intention of ever issuing a permit. App. B at 6. Despite this, Mongeau obtained yet another six-month extension from the Board. *Id.* Well before this period expired, Mongeau received final approval from both the Site Plan Review Committee and the City's Conservation Commission. *Id.*

Mongeau was unable to act on the approvals, however, as Reid had orchestrated an appeal to Massachusetts DEP in order to delay the project and cause the existing permit to expire. *Id.* Although the state DEP eventually rejected Reid's appeal–at which point all local and state bodies had signed off on Mongeau's plans–the existing permit had indeed expired during the appeal, as Reid intended. *Id.* Nevertheless, possessing the approval of all relevant state and local bodies, Mongeau submitted a third application for a permit to Reid. Reid denied it, citing the manufactured expiration of the prior permit and the unexplained conclusion that the project was "deficient in many ways." *Id.*

B. The District Court Decision

Mongeau timely filed a complaint against Reid and the City in Massachusetts Superior Court. The suit was premised on various state law claims and a federal claim, pursuant to 42 U.S.C. § 1983, alleging the deprivation of property rights in violation of the Due Process Clause of the Fourteenth Amendment. App. A at 4. The Defendants removed the case to federal district court based on the due process issue and filed a motion for judgment on the pleadings. *Id.* On November 13, 2006, the district court issued a published opinion granting this motion and dismissing Mongeau's federal claims. *Mongeau v. City of*

Marlborough, 462 F. Supp. 2d 144 (D. Mass. 2006); *see* App. B.

In considering Mongeau's substantive due process claim, the district court ruled that Mongeau's allegations had to "shock the conscience" in order to state a claim for a violation of constitutional due process guarantees. App. B at 13. The court went on to hold that Reid's alleged actions did not "shock the conscience," and therefore that Mongeau stated no viable substantive due process claim. App. B at 14.

C. The First Circuit Opinion

On appeal, Mongeau argued that the "shocks the conscience" test, derived from police abuse cases, was not the proper standard for determining whether a land use permit denial violated substantive due process. App. A at 6. Mongeau specifically argued that a rational basis, or arbitrary or capricious analysis, rather than the "shocks the conscience" test, was the proper method for determining whether a deliberative administrative decision, such as a land use permit denial, infringed on due process protections. *Id.*

The First Circuit rejected Mongeau's arguments. *Mongeau v. City of Marlborough*, 492 F.3d 14 (1st Cir. 2007); *see* App. A. The court initially disagreed with the proposition that *Lewis* applies only "when [the defendants] have not had time to deliberate before coming to a decision to engage in the behavior that is the basis of the claim." App. A at 6. In the lower court's view, *Lewis* set a standard for both exigent and deliberative conduct, under which "only conscience-shocking behavior will constitute a substantive due process violation." App. A at 7. Avoiding any doubt as to whether the "shocks the conscience" test applies to

the land use context, the First Circuit stressed that "in order to state a substantive due process claim *of any ilk*, a plaintiff must allege behavior on the part of the defendant that is so outrageous that it shocks the conscience." App. A at 10 (emphasis added).

Applying this test to Mongeau's allegations, the First Circuit held that Mongeau did not state a claim for a violation of substantive due process because the allegations did not sufficiently "shock the conscience." App. A at 10-11. The court specifically stated that the "district court determined that nearly all of Mongeau's allegations–that Reid had denied his building permit and interfered in the zoning process for improper reasons–failed to shock the conscience. We agree." App. A at 10.

Because this decision conflicts with the decisions of other circuits, and the decisions of this Court, Petitioner Mongeau now timely asks this Court to exercise plenary review over the decision below.

REASONS FOR GRANTING THE WRIT

I

THERE IS A CONFLICT AMONG THE CIRCUITS ABOUT WHETHER A "SHOCKS THE CONSCIENCE" TEST, OR A RATIONAL BASIS ANALYSIS, CONTROLS SUBSTANTIVE DUE PROCESS CLAIMS ARISING FROM THE DELIBERATIVE LAND USE CONTEXT

In *Lewis*, this Court considered whether a substantive due process claim was stated where a high-speed police chase resulted in the death of a young motorcycle passenger. 523 U.S. at 836-37. Noting that the split-second nature of many police decisions merits a standard deferential to that class of government action, the Court held that a "shocks the conscience" test governed the substantive due process claim.[1] *Id.* at 846-47, 851. In so doing, the Court distinguished between the kind of impulsive action at issue in police cases such as *Lewis*, and the more "deliberative" government actions found in other contexts. *Id.* at 851-52.

Some lower courts have accordingly construed Lewis' "shocks the conscience" test to be limited to police actions. *See Khan v. Gallitano*, 180 F.3d 829, 836 (7th Cir. 1999) ("the [*Lewis*] Court made clear that

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[1] *Lewis* built on *Rochin v. California*, 342 U.S. 165 (1952). Like *Lewis*, *Rochin* involved a substantive due process claim arising from allegedly abusive police action–the use of a stomach pump to extract evidence from a defendant. The Court held that the claim was valid, describing the police action as "conduct that shocks the conscience." 342 U.S. at 172.

its shocks-the-conscience analysis was not generally applicable to all substantive-due-process claims.") (citations omitted); *Moreland v. Las Vegas Metro. Police Dep't*, 159 F.3d 365, 372-73 (9th Cir. 1998) (noting that "the Supreme Court limited the holding in *Lewis* to the facts of that case (i.e., to high-speed police chases)") (parenthetical in original); *Braley v. City of Pontiac*, 906 F.2d 220, 226 (6th Cir. 1990) ("Applying the 'shock the conscience' test in an area other than excessive force . . . is problematic. . . . We doubt the utility of such a standard outside the realm of physical abuse, an area in which the consciences of judges are shocked with some degree of uniformity."). Others, including the First Circuit, have rejected such limits. App. A at 7.

The conflict among the circuits on whether and where the "shocks the conscience" test controls is particularly concrete in the land use permitting context, where courts have historically applied a rational basis approach. While most Circuits have retained a rational basis or arbitrary and capricious standard as the governing test in land use cases, others, including the court below, have extended *Lewis*' "shocks the conscience" analysis to that context. This difference often determines whether a substantive due process complaint will state a viable claim or be dismissed. This Court should grant the Petition to resolve the conflict.

A. Six Circuits Apply a Rational Basis Analysis to Substantive Due Process Claims Arising from the Deliberative Land Use Context

Among the Federal Courts of Appeal, the Second, Fourth, Fifth, Sixth, Seventh, and Ninth Circuits review substantive due process land use claims using some form of a rational basis analysis. Under this approach, claims similar to those raised by Mongeau have been found viable.

1. Fifth Circuit

The Fifth Circuit has steadfastly adhered to a rational basis test in reviewing land use decisions claimed to violate substantive due process, in direct conflict with the decision of the First Circuit. In *Mikeska v. City of Galveston*, 451 F.3d 376 (5th Cir. 2006), for instance, property owners alleged a violation of substantive due process stemming from the city's refusal to issue a building permit after a tropical storm. 451 F.3d at 378. The appeals court reviewed this denial to determine whether it was "rationally related to a legitimate governmental interest." *Id.* at 379 (citing *Simi Inv. Co. v. Harris County*, 236 F.3d 240, 249 (5th Cir. 2000), *cert. denied*, 534 U.S. 1022 (2001), and *FM Props. Operating Co. v. City of Austin*, 93 F.3d 167, 172-74 (5th Cir. 1996)). Applying this test, the *Mikeska* court found that because there was no rational basis evident in the record, the property owners stated a viable claim. The court therefore remanded the case to the district court, which initially had granted summary judgment in favor of the city. *Id.*

2. Ninth Circuit

Like the Fifth Circuit, but in conflict with the court below, the Ninth Circuit utilizes a rational basis or arbitrary and capricious test in land use disputes.

In *Lockary v. Kayfetz*, 917 F.2d 1150 (9th Cir. 1990), several property owners raised a substantive due process claim based on a city's refusal to grant water hookups. The court opted to apply the rational basis test, noting that "the rational relation test will not sustain conduct by state officials that is malicious, irrational or plainly arbitrary." 917 F.2d at 1155. Under this test, the court reversed summary judgment against the property owners and remanded the claims for trial, writing that "[c]onstrued in the light most favorable to appellants, [the city authority's] refusal to grant water hookups to the [property owners] may have been arbitrary or even malicious conduct prohibited by due process . . . ." *Id.* at 1156.

To the same effect is *Herrington v. Sonoma County*, 834 F.2d 1488, 1495 n. 4 (9th Cir. 987), *cert. denied*, 489 U.S. 1090 (1989). There, the Ninth Circuit upheld a jury finding of a substantive due process violation under the arbitrariness test based on evidence that local officials had manipulated the decision-making process in order to prevent development. 834 F.2d at 1501. More recent decisions continue to apply a rational basis test. *See, e.g., Equity Lifestyle Prop. v. County of San Luis Obispo*, 2007 WL 2694677 at n. 16 (9th Cir. 2007) (noting particularly the impact of this Court's *Lingle* decision, *see* Part II *infra*.)

3. Second Circuit

In accord with the Fifth and Ninth Circuits, the Second Circuit also has favored the rational basis test when analyzing substantive due process claims against land use denials. In *Walz v. Town of Smithtown*, 46 F.3d 162, 167-69 (2d Cir. 1995), the Second Circuit upheld a finding of a substantive due process violation, arising from a permit denial based on improper motives, under the rational basis or arbitrariness standard. In the recent case of *O'Mara v. Town of Wappinger*, the Second Circuit confirmed that where a plaintiff alleges a violation of substantive due process rights owing to a land use permit denial, he must show that the denial occurred "in an arbitrary and irrational manner." 485 F.3d 693, 700 (2d Cir. 2007). This of course, is the very standard rejected by the court below, App. A at 6, resulting in a clear conflict between the First and Second Circuits.

4. Fourth Circuit

An "arbitrary or irrational" analysis is favored by the Fourth Circuit when it considers a substantive due process claim arising from a building permit denial. In *Scott v. Greenville County,* 716 F.2d 1409 (4th Cir. 1983), a property owner claimed that denial of a building permit for low-income housing violated his substantive due process rights without any legitimate reason. 716 F.2d at 1418. Applying an arbitrariness test, the Fourth Circuit held that the owner stated a viable claim that his property was "taken from him by manifest arbitrariness and unfairness." 716 F.2d at 1421. *See also Tri-County Paving, Inc. v. Ashe County*, 281 F.3d 430, 440 (4th Cir. 2002) (substantive due

process plaintiff required to "demonstrate that the County's actions were arbitrary or irrational as required [by Circuit precedent]").

5. Sixth Circuit

Although it has expressed some uncertainty on the issue of the proper substantive due process test, the Sixth Circuit appears to apply a rational basis analysis in land use cases. In the 1992 case of *Pearson v. City of Grand Blanc*, arising out of a local government denial of a rezoning application, the court authored what is among the more comprehensive accounts of the inter-circuit confusion surrounding the proper substantive due process test. 961 F.2d 1211, 1217-22 (6th Cir. 1992). The court questioned whether it should apply an arbitrariness or rational basis test, or rely on some other approach.

Ultimately, the *Pearson* court rejected a "shocks the conscience" test for substantive due process claims arising from administrative land use decisions, and instead held that a substantive due process claim is properly stated if the decision is "arbitrary and capricious," or has "no rational basis." *Id.* at 1221. Post-*Lewis*, the Sixth Circuit has reaffirmed the validity of that test in land use cases. *See Brody v. City of Mason*, 250 F.3d 432, 438 (6th Cir. 2001) ("This court has held that to sustain a substantive due process claim, in the context of a zoning administrative action, 'a plaintiff must show that the state administrative agency has been guilty of 'arbitrary and capricious action' in the strict sense, meaning 'that there is no rational basis for the . . . [administrative] decision.'" (quoting *Pearson*) (alterations in original).

6. Seventh Circuit

The Seventh Circuit has decided few substantive due process land use cases. However, the relevant cases indicate that the circuit employs a rational basis test in settings similar to the instant case. In *Centres, Inc. v. Town of Brookfield*, 148 F.3d 699 (7th Cir. 1998), the appeals court reviewed the denial of a commercial building permit. The Seventh Circuit applied an "arbitrary or unreasonable" standard to determine whether the denial violated the applicant's right to substantive due process. 148 F.3d at 704. Similarly, in *Pro-Eco, Inc. v. Jay County*, 57 F.3d 505, 515 (7th Cir. 1995), *cert. denied*, 516 U.S. 1028 (1995), the court applied the "arbitrary and unreasonable" test to a land use moratorium, noting that the Seventh Circuit interprets "arbitrary and unreasonable" to "mean invidious or irrational." 57 F.3d at 515.

In sum, the Second, Fourth, Fifth, Sixth, Seventh, and Ninth Circuits rely on a rational basis or arbitrary and capricious analysis, rather than "shocks the conscience," to review substantive due process claims in the land use context. Under such a standard, allegations that a permit was denied for an illegitimate reason, for no police power purpose, out of animus, or solely to deny a property right, have been sufficient to state a claim. *See*, *e.g.*, *Mikeska*, 451 F.3d at 379; *Lockary*, 917 F.2d at 1155; *Walz*, 46 F.3d at 167-69; *Scott*, 716 F.2d at 1418-21. In contrast, in the decision below and in prior cases, the First Circuit has held the same sort of allegations inadequate under the "shocks the conscience" test. App. A at 10-12. Consequently, it seems likely that Mongeau's complaint–that the denial of his permit was unrelated to any legitimate

planning concern–would be treated differently and be held to state a claim for a substantive due process violation if filed in the majority "rational basis" circuits, rather than in the First Circuit.

B. Like the First Circuit, the Third Circuit Relies Exclusively on the "Shocks the Conscience" Test in Land Use Cases

Although it is in the minority, the First Circuit is not alone in rejecting a rational basis or arbitrariness standard in land use cases in favor a "shocks the conscience" test. App. A at 7. The Third Circuit also has elected to follow this course. In *Eichenlaub v. Township of Indiana*, 385 F.3d 274 (3d Cir. 2004), *cert. denied*, 552 U.S. __ (Oct. 1, 2007), that court held that "whether a zoning official's actions or inactions violate due process is determined by utilizing a 'shocks the conscience' test." 385 F.3d at 285.

In *Eichenlaub*, the Third Circuit conceded that "shocks the conscience" is not precisely defined. *Id.* Yet, citing the Circuit's 2003 opinion in *United Artists Theatre Circuit, Inc. v. Township of Warrington*, 316 F.3d 392 (3d Cir. 2003), the court left no doubt that the rule remained controlling in Third Circuit land use permitting cases. 385 F.3d at 285. In both *Eichenlaub* and *United Artists*, the Third Circuit held that allegations that a permit denial was unrelated to any legitimate government purpose were insufficient to state a claim under the "shocks the conscience" test. *Eichenlaub*, 385 F.3d at 285-86; *United Artists*, 316 F.3d at 400-01. Indeed, since the "shocks the conscience" test has been in force, no court in the Third Circuit (as in the First) has ever found a sufficiently

stated land use substantive due process claim. *Id.* A petition for certiorari was filed in *Eichenlaub* to test the viability of the Third Circuit's strict "shocks the conscience" approach, but it was denied. 552 U.S. __ (Oct. 1, 2007). Thus, the Third Circuit, like the First, remains at odds with the majority "rational basis" circuits.

C. The Remaining Circuits Exhibit Intra-Circuit Confusion

The Eighth, Tenth, and Eleventh Circuits appear to be embroiled in internal conflicts over the appropriate standard in substantive due process land use cases. In 2001, the Eighth Circuit reviewed a governmental withholding of project approval, and a resulting substantive due process claim, by asking whether the government action was "truly irrational." *Iowa Coal Mining Co. v. Monroe County*, 257 F.3d 846, 853 (8th Cir. 2001). Five years later–without any reference to its decision in *Iowa Coal*–the Eighth Circuit decided another land use case by writing that "land use decisions . . . must therefore be so egregious or extraordinary as to shock the conscience." *Koscielski v. City of Minneapolis*, 435 F.3d 898, 902 (8th Cir. 2006).

Similar inconsistency is evident within the Tenth Circuit. Three years after *Lewis*, the Tenth Circuit used an "arbitrariness" standard to determine whether a denial of development rights constituted a substantive due process violation. *Signature Props. Int'l Ltd. P'ship v. City of Edmond*, 310 F.3d 1258, 1267 (10th Cir. 2002). Yet in 2006, the Tenth Circuit–like the Eighth in *Koscielski*, having neglected to cite the

circuit's earlier opinion, and having first laid out an arbitrariness standard–later in an opinion held that the "shocks the conscience" test controlled substantive due process land use claims. *Camuglia v. City of Albuquerque*, 448 F.3d 1214, 1222-23 (10th Cir. 2006).

The Eleventh Circuit historically has applied a rational basis analysis to substantive due process claims stemming from land use decisions. *See Resolution Trust Corp. v. Town of Highland Beach*, 18 F.3d 1536, 1549 (11th Cir. 1994) (holding that a city's irrational and arbitrary land use decisions violated a property owner's substantive due process rights). Yet more recently, in a police action case, the Eleventh Circuit declared that *Lewis* and its "shocks the conscience" test applies to "*any* claim to a substantive due process right." *Tinker v. Beasley*, 429 F.3d 1324, 1327 (11th Cir. 2005) (emphasis added). This mirrors the First Circuit's expansive view of *Lewis*, articulated in the decision below, but it is as yet unclear whether this will hold in Eleventh Circuit land use cases.

The circuit courts are in confusion about the proper standard to gauge whether a land use denial amounts to a violation of substantive due process guarantees. Moreover, differences on whether to apply a traditional rational basis standard or *Lewis*'s less-established "shocks the conscience" approach tend to determine whether a plaintiff can state a viable claim. This Court should grant the petition to resolve the conflicts between and within the circuit courts on this recurring constitutional issue.

II

APPLYING A "SHOCKS THE CONSCIENCE" TEST TO ALL SUBSTANTIVE DUE PROCESS CLAIMS, INCLUDING THOSE INVOLVING LAND USE DECISIONS, IS IN CONFLICT WITH THE OPINIONS OF THIS COURT

At first glance, it may appear as if the circuits' varying approaches are simply a reflection of this Court's own substantive due process jurisprudence. In various cases, this Court has sanctioned (1) the rational basis test, *see*, *e.g.*, *Eastern Enterprises v. Apfel*, 524 U.S. 498, 537 (1998); (2) the "shocks the conscience" approach, *Lewis*, 523 U.S. at 846; and (3) a violation of a right "rooted in the concept of ordered liberty" test, *see Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). However, when the examination is narrowed to substantive due process claims involving an alleged deprivation of *property* rather than liberty, this Court has uniformly applied some variant of a rational basis test. Land use disputes fall within this category; and accordingly, circuits applying a "shocks the conscience" test in land use cases do so in conflict with this Court's jurisprudence.

Property cases favoring a rational basis or arbitrary or capricious test trace to the first zoning decisions considered by this Court. In *Nectow v. City of Cambridge*, a 1928 decision, the Court held that

> [A] court should not set aside the determination of public officers in [zoning matters] unless it is clear that their action 'has no foundation in reason and is a mere

> arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense.'

277 U.S. 183, 187-88 (1928) (citation omitted).

In *Pennell v. City of San Jose*, 485 U.S. 1 (1988), the Court held that a California ordinance controlling the amount of rents charged by property owners would not pass substantive due process muster if shown to be "arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt. 485 U.S. at 11.

The Court also seemed to approve a rational basis test in its substantive due process analysis in *Eastern Enterprises*, 524 U.S. 498. In that case, a former coal company sued the Social Security Administration, bringing a claim that its substantive due process right had been violated by a federal law taking private moneys for a retiree benefit fund. 524 U.S. at 514-18. Although a plurality ultimately held that the application of the law amounted to a violation of the Takings Clause, the Court also wrote that "Eastern claims that the manner in which the Coal Act imposes liability upon it violates substantive due process. To succeed, Eastern would be required to establish that its liability under the Act is 'arbitrary and irrational.'" 542 U.S. at 537 (citation omitted).

Finally, and most recently, in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005), this Court indicated that whether a property regulation "fails to substantially advance a legitimate state interest" is an

inquiry properly within the ambit of the Due Process Clause, rather than the Takings Clause. 544 U.S. at 540-43. Noting that the "substantial advancement" test was derived from the Court's land use due process cases, the Court stressed that this is where it should remain. *Id*. at 540. Justice Kennedy wrote a separate concurring opinion, citing to *Eastern Enterprises*, for the specific purpose of noting that a substantive due process claim may be stated based on "arbitrary" land use regulation. *Id*. at 548-49 (Kennedy, J., concurring). During *Lingle*'s extensive discussion of takings and due process precedent in the land use context, no Justice suggested that the validity or legitimacy of land use regulation should hinge on whether it "shocks the conscience."

As the foregoing demonstrates, this Court always has treated substantive due process claims in the land use or property context as being governed by a rational basis or similar arbitrary or capricious standard. There is a sound doctrinal basis for this approach, and little justification for imputing the "shocks the conscience" analysis into land use decisions now. Specifically, the rational basis test is tailored to governmental decisions arising from a *reasoning* process. The test works in this context because it gauges whether the governmental decision was indeed the product of legal reasoning–due process of law–or instead unrelated to lawful considerations and thus a potential violation of substantive due process. *See Lawton v. Steele*, 152 U.S. 133, 136-37 (1894) ("the fundamental concept [of due process is] that certain government decisions must relate to a legitimate end of government and may not be made for no reason or for a bad reason"); *Hurtado v. California*, 110 U.S. 516,

536 (1884) ("Abritrary [sic] power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude.").

By contrast, "shocks the conscience" is designed to apply where government officials cannot reason out their actions; that is, where a rational basis examination is simply not possible or fair. *Lewis*, 533 U.S. at 851-54. Such a situation is rarely found in the land use permitting context, as this case demonstrates. Here, the land use process went on for over three years, during which time Reid had sufficient opportunity to consider his decision on Mongeau's permit. App. B at 4-6. Given this reasoning context, both the holdings and logic of this Court's precedent indicate that the allegedly illegitimate denial of Mongeau's permit should be weighed under the rational basis test, rather than the "shocks the conscience" approach. *Nectow*, 277 U.S. at 187-88.

Nevertheless, in conflict with the decisions of many other circuits and the jurisprudence of this Court, the court below rejected the rational basis analysis in favor of applying the "shocks the conscience" test to Mongeau's claim. The Court should take this case to confirm that substantive due process claims against reasoned land use denials are not controlled by a "shocks the conscience" analysis, but rather by the traditional rational basis or arbitrary or capricious test found in this Court's property rights jurisprudence.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

DATED: October, 2007.

Respectfully submitted,

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