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City of San José

City Council

200 E. Santa Clara St.

San José, Ca 95113

Via email: city.clerk@sanjoseca.gov

Re: Item 10.3, General Plan Review & Missing Middle Housing

Dear City Council of San José,

YIMBY Law is a 501(c)(3) non-profit organization dedicated to ensuring compliance with California's housing laws. YIMBY Law sues municipalities when they fail to comply with state housing laws. We write to strongly encourage San Jose city council to approve the General Plan Task Force's recommendations to allow for more housing. Taken together with California Affirmatively Furthering Fair Housing responsibilities and recent Supreme Court precedent, the law presents high standards for cities seeking to justify extremely restrictive zoning policies, like the existing zoning.

San Jose's existing zoning mechanism has historically limited necessary development. Under that plan, existing residential zoning would not survive the legal strictures developed by the Roberts court; this logic weighs public purpose against restrictions on property rights. YIMBY Law is prepared to challenge the existing zoning plan on that basis, but the proposed higher density plan being contemplated may survive these tests.

Constitutional Support for Property rights

For decades, judicial uber-deference to local *preferences* instead of *exigencies* against real harm has restricted many American neighborhoods to exclusive single-family use. The Court encapsulated the preference-over-exigency approach when it wrote, "[w]here property interests are adversely affected by zoning, the courts generally have emphasized the breadth of municipal power to control land use and have sustained the regulation if it is rationally related to legitimate state concerns and does not deprive the

owner of economically viable use of his property.” *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981).

However, in recent years, rulings from the U.S. Supreme Court have offered a far more exacting framework for analyzing when, where and how far state, county, and municipal governments may go in using their *police powers* to order the public regulation of private property. Crucially, these rulings have recognized a far more expansive universe of *fundamental* (that is, pre-constitutional) property rights than American jurists have ever previously read into the constitutional context. Recent trends in takings and due-process jurisprudence are poised to now largely disfavor exclusionary zoning rules, requiring lawmakers and land-use administrators to do more than merely aver that their chosen housing-density limits are within their generalized police powers. Recent caselaw—including several landmark high-court rulings, are far more skeptical of official proffers that a given land-use control is justifiable in view of the restrictions they impose on a host of *fundamental* rights categories, including (but not limited to): (a) private property; (b) due process; (c) travel; and (d) establishing a home.

Until the last decade or so, most courts gave legislatures and public agencies wide latitude to determine what qualified as a *public exigency* or even merely a *public purpose* sufficient to pierce the private-property veil. These courts all followed in the footsteps of *Berman v. Parker*, 348 U.S. 26 (1954), in which Justice William O. Douglas declared that a legislature’s justification for a land-use law is “well-nigh conclusive” and afforded the greatest judicial deference. *Id.* at 32. However, the landscape has shifted markedly in recent years—primarily with respect to rights to property, but also to due process, travel, and establishing a home becoming far less deferential to official narratives.

This letter surveys the new landscape and applies it to the zoning and permitting contexts—in particular, to controls that impede medium-density housing. This letter gauges the extent to which the new rules (or rather, a return to the old ones) replace the *Berman* paradigm in favor of a far more heightened standard for reviewing land-use controls. While most land use controls still do not invite the most exacting standard of judicial review—*i.e.*, the “strict scrutiny” applied to laws targeting narrow classes of rights and individuals¹—recent years have witnessed a rising tide of courts willing to consider scrutinizing beyond “mere” rational-basis review (*Berman*’s ambit) and increasingly *eager* to determine whether or not the target rule implicates (and disrupts) one or more fundamental rights.²

To best explain how San Jose’s current zoning code contains fatal constitutional defects, we open this letter with a brief history of American land-use regulation. We start with its

¹ See generally Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. Rev. 1267 (2007).

² See, e.g., *Cedar Point Nursery v. Hassid*, 594 U.S. 139 (2021); *Sheetz v. El Dorado County*, 601 U.S. 267 (2024).

common-law origins, discuss a handful of high-court opinions from the 1910s and 20s that laid the doctrinal groundwork for modern zoning, and conclude with *Kelo v. City of New London*, 545 U.S. 469 (2005) which took *Berman* to its most extreme yet, holding “economic development” by itself to be a justified public basis for overriding private interests. To this end, we then discuss recent Supreme Court rulings offering strong signals that the end of *Berman* is nigh, to be replaced with standards of review that accord rights in property the same heightened or enhanced levels of scrutiny long afforded to personal rights to privacy, to establish a home, to travel, and to be free from certain species of discrimination. Diving deeper, we will see how lower federal and state courts have put this new paradigm into practice—previewing the standard of review that the courts hearing challenges to the zoning code will likely employ, and to what end.

I. A BRIEF HISTORY OF AMERICAN LAND-USE CONTROLS

From the Colonial Era until the 1910s, American courts strongly disfavored land-use controls that did not provably advance the anti-nuisance doctrine of *sic utere tuo, ut alienum non laedas*—viz., that “one cannot not use his or her own lands in manners interfering with another’s rights to theirs.” See Elmer E. Smead, *Sic Utere Tuo Ut Alienum Non Laedas: A Basis of the State Police Power*, 21 Cornell L.Q. 276, 276 (1936) (“The principle that one should use his own property in such a way that he does not injure that of another is to be found early in the common law.”). For centuries, *sic utere* and other anti-nuisance doctrines did much of the legwork for justifying codified controls, enabling jurists to render independent judgment of lawmakers’ motives without fear of hijacking their legislative prerogative. See, e.g., *Mugler v. Kansas*, 123 U.S. 623 (1887) (declaring courts “at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority”).

This paradigm began to shift at the turn of the twentieth century as the demands of industrialization and proto-suburbanization offered “a strange coalition of interests” the opportunity to “enrich incumbent property owners, lock existing neighborhoods in amber, institutionalize segregation, and mandate a sprawling vision of growth.” M. Nolan Gray, *Arbitrary Lines: How Zoning Broke the American City and How to Fix It* 12 (2022). The move also compelled American courts to reappraise whether the nuisance-based approach to land-use controls was still sustainable in an increasingly complex world. See Charles M. Haar & Michael Allan Wolf, Commentary, *Euclid Lives: The Survival of Progressive Jurisprudence*, 115 Harv. L. Rev. 2158, 2176 (2002) (noting that the Supreme Court’s decision in *Village of Euclid v. Ambler Realty Co.*, *infra*, “appeared during a crucial transition period in American legal and constitutional history, as statutory and administrative law began to supplant the common law as the primary source of law governing business and private property relationships”). Many jurists began to view the catch-all “public interest” as a way to simplify seemingly irreducible socioeconomic

problems.³ Courts largely began tolerating zoning or permitting measures that lawmakers simply *declared* would further the public interest, whether or not they could plausibly claim that it was only or even the best means available,⁴ and with ever less attention paid to the wounds these measures inflicted on fundamental private rights.⁵ Soon, the harm-prevention model of land-use regulation expressed in the ancient *sic utere* maxim found itself nearly everywhere displaced by a rubberstamp allegiance to legislative “wisdom”—or at least a willful blindness to its shortfalls for fear that the old model would slow the compounding technological progress.

By the 1940s, the *Euclidean* model had become the norm in land-use planning. See Steven J. Eagle, *Land Use Regulation and Good Intentions*, 33 J. Land Use & Envtl. L. 87, 94–99 (2018) (tracing the rapid evolution from comprehensive plans to the targeted regulation of certain clearly non-nuisant uses). Fast forward to the post-*Berman* period wherein courts at nearly every level came to treat the police power as all but self-justifying, sustaining land-use controls on little more than a legislative recital that they advanced the general welfare. That deference reached its apogee a half-century later in *Kelo v. City of New London*, 545 U.S. 469 (2005), which upheld the condemnation of unblighted homes for transfer to a private developer on the theory that the anticipated economic development was itself a public use—and, in so holding, provoked the broadest popular and legislative backlash of any modern takings decision. *Kelo* almost instantly stirred a national argument over whether *Bermanesque* deference can be squared with the needs of the public, let alone its conflicts with the constitutional text. And all of this is still unfolding against an acute and ever-worsening housing shortage on one side and, on the other, a Supreme Court increasingly prepared to treat the incidents of private ownership (among others) as fundamental. This new convergence that subjects controls like San Jose’s current zoning to far more searching scrutiny than the *Euclidean* settlement ever contemplated.

1. The Pre-*Euclidean* Landscape

Almost all iterations of judicial deference to legislative “wisdom” on land-use questions can trace their origins to *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). There, the Supreme Court approved a municipal zoning scheme designed *specifically* to exclude apartment housing from the affluent suburbs northeast of Cleveland, Ohio. *Euclid* is known as a landmark case because it was a break with previous Court reasoning on zoning. The exclusionary measure in *Euclid* had gone well beyond those that the Court had previously endorsed. In the interregnum between *Mugler* and *Euclid*, the Court in *Hadacheck v. Sebastian*, 239 U.S. 395 (1915), sought to balance these competing

³ See Charles M. Haar & Michael Allan Wolf, *Euclid Lives: The Survival of Progressive Jurisprudence*, 115 Harv. L. Rev. 2158 (2002).

⁴ See *Berman v. Parker*, 348 U.S. 26, 32 (1954).

⁵ See John G. Sprankling, *Property and the Roberts Court*, 65 Kan. L. Rev. 1 (2016).

philosophies by deferring to lawmakers on what *tangible* harms (e.g., noxious smells, humming machinery) merited public interference of private property rights, but reserving for itself the final word on the validity of regulations of *intangible* harms, like those offensive to broad categories “public health” or “safety.”

Euclid extended the Court’s uber-deferential approach to *intangible* harms, writing that “the harmless may sometimes be brought within the regulation or prohibition in order to abate or destroy the harmful.” *Euclid*, 272 U.S. at 392 (internal citation omitted). Soon after, however, the Court published two opinions *exercising* the very independence it claimed to have just *exorcized* in *Euclid*. In *Nectow v. City of Cambridge*, 277 U.S. 183 (1928), the Court rejected a municipal ordinance restricting the claimant’s property to residential use. Then, in *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928), it held that requiring neighbors’ consent for certain uses—in that case, for the siting of an indigent nursing home—violated the would-be residents’ due process rights by delegating legislative authority to the crowd. On paper, *Nectow* and *Roberge* placed powerful limits on the breadth of legislative fiat in determining legitimate public interests sufficient to overcome private property (and other) rights. In practice, however, the next several decades would see the Court issue a host of rulings that leaned heavily in *Euclid*’s uber-deferential direction.

2. *Berman* and Its Aftermath

For the next eighty odd years, land-use authorities at all levels promulgated regulations that should have died under *Nectow* or *Roberge* but thrived, instead, on a watered-down version of *Euclid* in which “[s]ubject to specific constitutional limitations . . . the role of the judiciary in determining whether” the legislature is acting *intra vires* “is an extremely narrow one.” *Berman*, 348 U.S. at 32. Widespread adoption of the *Berman* approach turned most land-use controls into creatures of fiat, as courts at all levels dependably greenlit exclusionary zoning, permitting, and building and housing rules thinly veiled as serving some nebulous “public purpose,” but in reality meant to preserve the economic self-interest of established residents and businesses, or worse. Scholars have long documented how this deference allowed incumbents to convert the police power into an instrument for protecting their own home values. See Richard F. Babcock, *The Zoning Game* 3–18 (1966); William A. Fischel, *The Homevoter Hypothesis* 39–71 (2001).

In *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), the Court endorsed a local law prohibiting the cohabitation of nonrelatives or even extended family. In so holding, the Court ran through a laundry list of the “specific constitutional limitations” contemplated in *Berman* but found no reason to doubt legislative assurances that the restriction served legitimate and non-discriminatory public ends. It concluded under *Berman* “[a] quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs.” *Id.* at 9. That “[t]he police

power is not confined to elimination of filth, stench, and unhealthy places” but “is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a *sanctuary* for people.” *Id.* (emphasis added). Indeed, under this rubric the Court went so far to reserve for “single-family residences” its own special status within the panoply of legitimate public purposes. See *City of Edmonds v. Oxford Houses, Inc.*, 514 U.S. 725, 732–33 (1995) (“In particular, reserving land for single-family residences preserves the character of neighborhoods, securing “zones where family values,” etc., make them “sanctuar[ies] for people.”).

3. New Patterns Emerge

To be sure, some courts were never entirely sold on the constitutional soundness of the *Euclidean* approach. “Over the subsequent 90 plus years,” one scholar notes, “many courts and commentators have expressed discomfort with the notion that all zoning decisions made by the local legislature constitute ‘legislative’ decisions that are owed such generous deference.” Michael Allan Wolf, *A Common Law of Zoning*, 61 *Ariz. L. Rev.* 771, 796 (2019). So long as the Supreme Court remained on board, however, these voices would remain on the sidelines.

Enter the Roberts Court. This Court has proven itself the most property-friendly assemblage in generations. See John G. Sprankling, *Property and the Roberts Court*, 65 *Kan. L. Rev.* 1, 1 (2016). This is not necessarily to praise the current bench, but to acknowledge how far prior majorities had fallen from the original conception of constitutional property rights.

There are myriad explanations for this shift, from the obvious rebalancing of the Court towards a more originalist center to the more gradual evolution of political, sociocultural, and economic forces that bear on the Court’s decisionmaking, whether the justices admit it or not. This is most evident in legislative climate in years immediately following the landmark *Kelo v. City of New London*, 545 U.S. 469 (2005)—which extended *Berman*’s already-permissive logic to its outer limit—when state lawmakers everywhere took seriously the raucous public outrage at a ruling that its author Justice John Paul Stevens later called “the most unpopular opinion” he wrote in more than three decades on the Court. See John Paul Stevens, *The Making of a Justice: Reflections on My First 94 Years* (2019).

In *Kelo*, a 5–4 majority held that a municipality’s condemnation of unblighted private homes for conveyance to a private developer satisfied the Public Use Clause, *provided* it was rationally related to a comprehensive economic-development plan. In so ruling, however, the Court ignited a public firestorm, as many rightfully feared that it gave local governments a blank check to simply label a taking “useful” to the public and call it a day. The popular and legislative response was immediate –polling showed lopsided disapproval across the political spectrum, and some forty-five states answered with

statutes or constitutional amendments curtailing the use of eminent domain. See Ilya Somin, *The Grasping Hand: Kelo v. City of New London and the Limits of Eminent Domain* (2015). More consequential for present purposes was the decision's effect on the property-rights conversation writ large. *Kelo* furnished a vivid, cross-ideological emblem of how far judicial deference had drifted from the constitutional text, and it lent fresh urgency to the long-marginalized argument that the incidents of ownership deserve protection commensurate with other fundamental rights. That argument has only sharpened as the nation confronts a deepening housing shortage—one that a less reflexively deferential, more accommodating jurisprudence is increasingly understood to be essential in relieving. See generally Gray, *supra*.

II. FUNDAMENTAL RIGHTS AT THE ROBERTS COURT

The Roberts majority has shown itself more than willing to depart from the Court's own precedent when stare decisis would perpetuate an abjectly incorrect reading of the Constitution. This is not limited to property rights, of course. However, given the earlier "poor relation" that property rights bore to other fundamental and constitutional rights,⁶ it is sensible for this field among all others to undergo one of the more drastic doctrinal revisions. According to one source, "[o]wners prevail in 86% of civil property-related disputes with government entities." John G. Sprankling, *Property and the Roberts Court*, 65 Kan. L. Rev. 1, 1 (2016). Sprankling concluded that "under the leadership of Chief Justice Roberts the Court has expanded the constitutional and statutory protections afforded to owners to a greater extent than any prior Court." *Id.* And this was *prior* to some of the most pivotal opinions.

On questions of regulating land use, since mid-century onwards, courts have overwhelmingly privileged legislative averments, even without evidence, that a given regulation served a legitimate public purpose, even when it meant turning a blind eye to its injurious impact on private property. The upshot is that since *Berman*, property rights have not been treated as "fundamental rights" of the kind long recognized in the rights to speech, to vote, to marry, or to privacy.

The Roberts Court is beginning to reconsider that taxonomy, showing clear signs of a project to dismantle the very deference that has long made exclusionary zoning so difficult to challenge. Local land-use authorities would be remiss to ignore or downplay this nascent development.

For example, in *Cedar Point Nursery v. Hassid*, 594 U.S. 139 (2021), the Court confirmed that the "right to exclude" others from one's property (*not* from one's community) is a fundamental (that is, pre-constitutional) right. Public interference with that right

⁶ The Court has expressly disclaimed any such hierarchy. See *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994) (declining to relegate the Takings Clause "to the status of a poor relation" among the provisions of the Bill of Rights).

requires governments show more than mere “rational basis review,” the light standard under which nearly any conceivable public purpose permits interference with private property without triggering a constitutional taking.

Treating property rights by this standard has long placed them in the “status of a poor relation” with the other rights expressed in the Bill of Rights. See *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994). *Cedar Point* marks a paradigm shift away from rational basis and towards a heightened scrutiny of regulations that disrupt private property rights, among other rights “so rooted in the traditions and conscience of our people as to be ranked fundamental”—e.g., the right to establish a home. *Palko v. Connecticut*, 302 U.S. 319; *Washington ex rel. Seattle Title Trust co. v. Roberge*, 278 U.S. 116 (1928).

In *Cedar Point*, the court upheld a landowner’s fundamental property right to exclude to prevent labor organizers from coming onto their property to meet with employees during business hours, as California law permitted. California argued that it has the police power to interfere with the right to exclude in order to advance the general welfare that it claimed the public derived from labor’s exercise of their First Amendment rights. The Supreme Court acknowledged the conflict between employees’ right to free speech but that the right to exclude is the sine qua non of private property, and so its interference required the state show that there were no less restrictive means of furthering that public interest.

Before *Cedar Point*, federal courts would not have required the government to announce anything more than a “rational basis” for the interference. With respect to San Jose’s existing low-density zoning, the existing public welfare goals are already, at best, poorly defined (and certainly do not implicate the public’s constitutional rights). The City will not be able to show, under heightened scrutiny, that there exist no less restrictive means of achieving these goals than maintaining its current low-density zones. In fact, the city’s own staff reports demonstrate that the proposed high density zoning both achieve the cities’ stated public welfare goals, and are also less restrictive than the existing zoning. And even if it did not, it would likely fail heightened scrutiny because it unduly interferes with owners’ right to gainful use of their property and, crucially, the right of aspiring residents to establish their homes within San Jose’s borders.

The Roberts Court’s skepticism of public-purpose justifications that interfere with elemental property rights is not a departure from longstanding precedent on other categories of fundamental rights. It is, instead, early signals of a substantive *restoration* of the harm-prevention framework, in which courts exercise real and robust skepticism towards the declared police-power justifications for interferences with private property rights.

All told, the Roberts Court’s elevation of private *property* to the same constitutional status as one’s *personal* rights to privacy and others listed in, or “emanating” from, the

Bill of Rights, continues to enhance the standards by which courts measure the legitimacy of public disruptions of private property. As we shall see, these heightened standards resemble those *already* broadly applied to state interferences with a person's rights to privacy, to establish a home, to travel, and to be free from discrimination.

III. ENHANCED STANDARDS OF REVIEW

The Roberts Court's willingness—even eagerness—to overturn precedent it believes incorrect is already enhancing the standards by which courts at all levels scrutinize declared police-power justifications. These downstream effects are not limited to property rights but extend to a host of other fundamental—often called “substantive”—rights that bear directly on the constitutional status of a host of longstanding exclusionary zoning rules. According to our research and review of all relevant caselaw, after (a) private property, exclusionary zoning rules like San Jose's current density limits also often implicate (b) rights to privacy included in the “penumbra, formed by emanations” of the Bill of Rights (it sounds funny, but it's real⁷); (c) the right to “establish a home”; and, finally, (d) the right to travel. And fundamental rights *require* courts to exercise their independent judgment. As an earlier Court put it: “When a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests.” *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978).

Before we expound on San Jose's constitutional trespasses, we must first gauge the prevailing standard(s) of scrutiny to which alleged offenses to each of these categories of rights are subject. Only at this high-altitude can we offer informed predictions of how courts will scrutinize challenges to San Jose's current building standards. For all of these, the *Kelo* case offers a useful chronological pathmark, as it both contributed to, and largely coincided with, the Roberts Court's and lower federal and state courts' elevating rights in property to the same status as those categories of rights long accorded enhanced scrutiny. See Erwin Chemerinsky, *Substantive Due Process*, 15 Touro L. Rev. 1501, 1509 (1999) (noting “courts use substantive due process . . . in the protection of unenumerated constitutional rights”).

Of course, what enhanced scrutiny entails varies substantially across different areas of law and depending on the dangers a challenged government action poses to the fundamental right invoked. See generally Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. Rev. 1267 (2007) (surveying variations in the composition and application of various tests, all of which courts have at one time or another described as “heightened”

⁷ The reference is to *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965), which located certain unenumerated rights in the “penumbras, formed by emanations” of the specific guarantees of the Bill of Rights.

or “strict” scrutiny). In the following Subparts, we parse and then offer informed predictions on how the doctrinal landscape will continue to evolve and, eventually, strip legislative (and administrative) “wisdom” of much of its mystique—at least replaced with standards of review that robustly test whether the stated (and even less so, implied) public benefits are not sufficient—nor the methods used necessary—to justify their degree of interference into the private realm.⁸

A. Property Rights

Property rights cover a wide ambit of private-over-public prerogatives rooted in the *bundle of rights* attached to ownership (and some lesser interests) in both chattel and realty. The “right to exclude” at stake in *Cedar Point* is hardly the only “fundamental” element of ownership. As Professor Adam Mossoff argued that “the right to exclude is essential to the concept of property, but it is not the only characteristic, nor is it the most fundamental. Other elements of property—acquisition, use, and disposal—are necessary for a sufficient description of this concept.” Mossoff, *What Is Property? Putting the Pieces Back Together*, 45 Ariz. L. Rev. 371, 376 (2003). See *Cedar Point*, 594 U.S. at 150 (discussing the Court’s consistent treatment of certain fundamental or “essential” sticks in the “bundle of rights”). See also *Horne v. Dep’t of Agric.*, 576 U.S. 350, 358 (2015) (extending takings-clause protection to the appropriation of personalty, not just realty). On this front, zoning rules and permitting decisions designed to prohibit mixed uses and denser housing arrangements must conform to a standard of review that acknowledges the fundamental rights at stake.

Nor is the right to exclude the only property right that the Roberts Court has hinted to be “fundamental” and therefore subject to heightened review. The right to use, for example, is among the most basic prerogatives of ownership, and a single-family-only mandate extinguishes the right to use for nearly every form of housing an owner might otherwise build. *Cedar Point*’s reaffirmance that the right to exclude is a fundamental attribute of ownership invites—even demands—courts carefully scrutinize legislative claims of an overriding public purpose. *Cedar Point*, 594 U.S. at 149–52. All this is not to suggest that established owners do not have the same rights as newcomers. Far from it. Instead, it simply means that the public cannot use established owners’ fundamental property rights—including the right to exclude—to shield entire neighborhoods from competing uses or densities that do no tangible (*e.g.*, physical) harm to neighbors or existing uses. See Joshua Braver & Ilya Somin, *The Constitutional Case Against Exclusionary Zoning*, 103 Tex. L. Rev. 1 (2024) (contending that exclusionary zoning violates the Takings Clause because the original understanding of “property” protected the owner’s right to use, and that incumbent objections to non-nuisance uses cannot justify that interference).

⁸ See *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 542 (2005).

The *Euclidean* model does more than limit how many people may live on a lot; it also often forbids owners from devoting their properties to entire classes of otherwise lawful, and certainly moral, non-nuisant uses. Interferences with the use-and-disposition element of ownership invites two independent modes of review. Under the regulatory-takings line, a restriction denying all economically beneficial use is a *per se* taking, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992), while one short of total wipeout is weighed under the factors of *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978). Under the due-process line, *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 542 (2005), relocated the means-ends inquiry away from the Takings Clause but did not abolish it: a use ban untethered from any tangible harm remains exposed as arbitrary. The Roberts Court's takings case law cuts through much of the noise, entreating courts to ask, simply, whether a prohibition protects the public from a concrete injury or merely preserves an incumbent preference. The lesson, for land-use authorities, is that nebulous "purposes" like "preserving the neighborhood's character" will no longer suffice.

B. Right to Establish a Home

The right to establish a home is one of the lesser known (but no less) fundamental rights in common law. Properly applied, it is also one of its most potent. The Supreme Court traces this right farther back than almost any other⁹, and continues to defend it against land-use regulations lacking sufficient, overriding public purposes. The right to establish a home supersedes a number of legitimate public purposes, even if these are bona fide and not pretextual. These are, *i.a.*, (1) bans on duplexes, triplexes, and other medium-density housing where the denial of which directly disrupts would-be residents' right to reside and live as they choose; and (2) parental rights to choose how to raise their children, subject to obligations the state owes to the children (*e.g.*, in most states, to provide all an education).

In *Meyer v. Nebraska*, 262 U.S. 390 (1923), the Supreme Court held that the "liberty" vouchsafed by the Due Process Clause "[w]ithout doubt . . . denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children. . . ." *Id.* at 399. Professor John Sprankling—mentioned earlier in reference to the Roberts Court's pro-property bent—focuses his attention on the implications this right has on "exclusionary zoning ordinances":

Many cities have adopted ordinances that prohibit apartments, condominiums, and other multifamily housing; require large minimum lot

⁹ See *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (locating within constitutionally protected liberty the right "to marry, establish a home and bring up children"); Sprankling, *supra* (tracing the historical and common-law roots of the right to establish a home).

sizes for single-family residences; or bar manufactured homes. Indeed, some cities permit only a particularly expensive form of housing: detached single-family homes on large lots. These ordinances harm the public by curtailing the types of homes that are available. A person who is financially able to buy a detached home on a large lot, for example, might strongly prefer to live in an apartment or condominium. Additionally, exclusionary zoning ordinances effectively prevent low-income and moderate-income families from securing affordable homes and disproportionately exclude minority groups.

John G. Sprankling, *The Constitutional Right to “Establish a Home”*, 90 Geo. Wash. L. Rev. 632, 635 (2022). Sprankling notes that while “[n]o court has decided whether exclusionary zoning violates the right to establish a home,” the Supreme Court “has already held that the right to marry and the right to bring up children . . . are fundamental rights for purposes of substantive due process analysis, which invokes intensive judicial scrutiny.” *Id.* (citing *Obergefell v. Hodges*, 576 U.S. 644, 675 (2015) (“[T]he right to marry is a fundamental right . . .”); *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (“[T]he Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.”)).

Several courts indicate that disruptions of the right included within the right to establish a home should at least garner something more than rational-basis review. *See Moore v. City of E. Cleveland*, 431 U.S. 494 (1977) (plurality opinion) (subjecting an ordinance that dictated which relatives could occupy a single dwelling to heightened substantive-due-process review rather than rational basis); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (protecting parental authority over the upbringing of children); *see also Obergefell v. Hodges*, 576 U.S. 644 (2015) (reaffirming that intimate choices defining family and the home occupy a constitutionally protected sphere). No court has yet squarely held that exclusionary zoning violates the right to establish a home, *see Sprankling, supra*, at 635, but the constituent rights already command scrutiny well beyond *Berman*’s deferential rubric.

There is an acute risk that San Jose is designed or will have the foreseeable effect of discriminating against nonfamilial cohabitation in ways at odds with the emerging caselaw. As we saw in *Boraas*, the Supreme Court readily rubberstamped local concerns that permitting nonfamilial cohabitation would erode a neighborhood’s single-family “spirit.” While many of these laws remain on the books, untested, recent caselaw suggests systemwide movement away from the single-family paradigm. Not simply because the social and cultural definitions of “family” are evolving, but also, again, by sheer economic necessity. The percentage of American adults living with nonrelative roommates has ticked up alongside surges in co-living among parents and their adult

children as well as unmarried (and thus not legally family) life partners. See D’Vera Cohn et al., *Financial Issues Top the List of Reasons U.S. Adults Live in Multigenerational Homes*, Pew Res. Ctr. (Mar. 24, 2022). So has the number of Americans simply living alone—due in large part to declining marriage rates. See U.S. Census Bureau, *Historical Households Tables* (2023). This puts its own strains on the housing sector; the same way more cars and less public transport means more highway traffic. See generally Kristen Jeffers, Albert Esteve, Ewa Batyra, *Non-Family Living Arrangements Among Young Adults in the United States*, 40 Euro. J. Pop. 10 (2024) (providing detailed analysis of the recent literature on American household patterns).

C. Right to Travel

Whether the right to travel is a fundamental right remains something of an open question. See generally Noah Smith-Drelich, *The Constitutional Right to Travel Under Quarantine*, S. Cal. L. Rev. 1367 (2021) (discussing variable and sometimes conflicting judicial views on the meaning and scope of the “right to travel,” especially in the backdrop of a public health crisis). Despite the muddle, some iterations of this right are more defined than others. San Jose’s code touches upon two of these—the right to relocate and the right to engage in interstate commerce.

Professor John Hart Ely has made a compelling case for a constitutional, if not fundamental, right to relocate. John Hart Ely, *Democracy and Distrust* 178 (1980). This theory still animates contemporary scholarship and has found its way into caselaw. See, e.g., Ilya Somin, *Free to Move: Foot Voting, Migration, and Political Freedom* 15–44 (2020) (discussing Ely’s theory); *Saenz v. Roe*, 526 U.S. 489, 500–04 (1999) (recognizing that the right to travel embraces a newly arrived resident’s right “to be treated like other citizens of that State” and invalidating a durational-residency penalty on that footing).

Land-use controls concerned with keeping “ins” in by “choking off the channels of political change to ensure . . . the outs will stay out” are also largely self-defeating from an economic perspective, to say nothing of its stultifying effect on social and cultural values. There are ample studies drawing direct throughlines between exclusionary zoning meant to keep “outs” out and a *decline* in local prosperity.

Wrapped up with the freedom to move is the right to engage in interstate commerce. The Supreme Court has long recognized that there is a “dormant” element to the federal government’s enumerate powers under the Commerce Clause, which places important restrictions on how their ability to regulate “persons or things” involved in cross-border transactions. Relevant here is the prohibition against enforcing rules and regulations that disadvantage out-of-state residents in favor of the protectionist interest of in-staters. See, e.g., *C&A Carbone, Inc. v. Clarkstown*, 511 U.S. 383, 390 (1994) (“The central rationale for the rule against discrimination is to prohibit state or municipal laws whose

object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent.”).

An important caveat to the Dormant Commerce Clause doctrine is that it does not extend, then, to disparate *intrastate* rules—though if enacted statewide, would likely run into equal-protection problems, and if enacted by a locality therein, is up to the state government to resolve. The doctrine’s reach into ordinary zoning is admittedly modest: most land-use controls are facially evenhanded and local in effect. But a measure whose practical object is to advantage insiders against out-of-state competition is not immune merely because it wears the label of zoning. The Court has struck down even a municipal ordinance that erected a local trade barrier, *see Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951), and a facially neutral rule that burdens interstate commerce excessively in relation to its local benefits remains subject to the balancing of *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). A growth cap or permitting regime engineered to keep outsiders and their capital at bay thus carries a residual—if rarely dispositive—Commerce Clause exposure alongside its more serious infirmities.

California Law

Government Code § 8899.50(b)(1) requires that “[a] public agency shall administer its programs and activities relating to housing and community development in a manner to affirmatively further fair housing, and take no action that is materially inconsistent with its obligation to affirmatively further fair housing.” Cities and counties are explicitly named as public agencies subject to this obligation. (Gov. Code § 8899.50(a)(2)(B).) The duty extends to “all of a public agency’s activities and programs relating to housing and community development.” (Gov. Code § 8899.50(a)(1).) Zoning falls within that scope. The California Department of Housing and Community Development has stated in its April 2021 AFFH Guidance that “planning and zoning documents should all affirmatively further fair housing.” (HCD, *Affirmatively Furthering Fair Housing: Guidance for All Public Entities and for Housing Elements*, April 2021 Update, at 17.)

The ongoing administration of single-family zoning in a high-resource, demographically segregated area is materially inconsistent with this obligation. Zoning is not a one-time legislative act. It is continuously administered through permit decisions, applications of zoning standards, and the denial of projects inconsistent with existing zoning. Each such act of administration is an action within the meaning of § 8899.50(b)(1). Single-family zoning artificially restricts housing supply and inflates housing costs in the areas where it is enforced.

The relationship between exclusionary residential zoning and patterns of racial and economic segregation is documented in HCD’s own analysis of impediments to fair housing in California (HCD, *Final 2020 Analysis of Impediments to Fair Housing Choice*,

June 2020), and is recognized in the AFFH Guidance, which observes that "single-family zoning emerged and replaced race-based zoning as a tool for segregating communities by restricting more affordable housing options" and that "exclusionary zoning policies have made it difficult for lower-income residents to access certain communities and in turn has had a discriminatory effect on protected characteristics such as race, disability, and familial status." (HCD AFFH Guidance, April 2021, at 6.)

Because income and race are correlated in San Jose as throughout California, zoning that inflates housing costs has a racially disparate impact in its operation. Limiting large areas of San Jose to existing single-family zoning perpetuates these exclusionary patterns and is therefore materially inconsistent with the obligation to affirmatively further fair housing under § 8899.50(b)(1).

While Government Code § 8899.50(d), provides that the section does not require or prohibit "any one particular action" in fulfilling AFFH obligations, this provision does not provide a defense. By its plain terms, subdivision (d) addresses the selection of meaningful actions to fulfill the obligation imposed by subdivision (b). It presupposes compliance with that obligation; it does not exempt agencies from it. An agency may exercise discretion in choosing among actions that affirmatively further fair housing. It may not invoke that discretion to defend the continued administration of a zoning scheme whose operation is materially inconsistent with the statutory mandate.

The City may also point to Government Code § 8899.50(c), which requires that the statute be interpreted consistent with HUD's 2015 Affirmatively Furthering Fair Housing Final Rule. The HUD rule's commentary states that the rule does not impose zoning decisions on local governments. (80 Fed. Reg. 42272, 42289–42290.) This language does not support the City's position. By its terms, it addresses the scope of the federal rule, which applied only to HUD grantees and public housing authorities, not to all California cities and counties. Section 8899.50(c) directs that California's statute be interpreted consistent with the federal rule, but the California legislature simultaneously enacted in subdivisions (a) and (b) a substantially broader scope, extending the AFFH obligation to all public agencies and to all activities and programs relating to housing and community development. A reading of subdivision (c) that imported the federal rule's narrower scope into the California statute would render the legislature's express scope provisions surplusage. HCD's interpretation of § 8899.50, expressed in its April 2021 AFFH Guidance, applies the obligation to local zoning and is persuasive authority on the proper construction of the statute.

Housing Element Programs P-11 and P-35 specifically made missing middle a priority for San Jose, setting a goal of permitting 350 such units within the city. San Jose noted that P-11 itself is an AFFH implementation program. California's AFFH rules and San Jose's

own Housing Element commitments support legalizing missing middle housing types, and narrowly limiting exemptions.

Sincerely,

A handwritten signature in black ink that reads "Sonja Trauss". The signature is written in a cursive, flowing style with a large initial 'S' and a decorative flourish at the end.

Sonja Trauss
Executive Director
YIMBY Law