Brief of the CATO Institute, et al., As Amici Curiae in Support of Petitioners

From: Cato Institute

Summary: Just a decade ago in Palazzolo v. Rhode Island, the Supreme Court rejected the idea that those who buy property subject to burdensome regulations lose the right the seller otherwise has to challenge those regulations. The Court ruled that the Takings Clause does not have an "expiration date." Sadly, not all government authorities or courts took Palazzolo to heart. In 2000, after the EPA issued a Record of Decision concerning limiting access to a "slough" (a narrow strip of navigable water) on its Superfund National Priorities List, CRV Enterprises began negotiations to buy a parcel of land next to the slough across from a site once occupied by a wood-preserving plant. CRV hoped to develop that parcel and others it already controlled into a mixed-use development, including a marina, boat slips, restaurants, lodging, storage, sales, and service facilities. The company eventually bought the land with notice of the EPA's ROD but the EPA later installed a "sand cap" and "log boom" that obstructed CRV's access to the slough. CRV sued the United States in the Court of Federal Claims, which dismissed the case for lack of standing. The Federal Circuit affirmed, finding that CRV's claim "is barred because [the company] did not own a valid property interest at the time of the alleged regulatory taking." The Federal Circuit thus turned two Supreme Court precedents on their head and put that "expiration date" on the Takings Clause. It did so despite the fact that multiple federal courts have upheld Palazzolo's rule and that longstanding California common law recognizes that a littoral (next to water) owner's access to the shore adjacent to his property is a property right. Cato, joined by Reason Foundation, the Center for Constitutional Jurisprudence, and the National Federation of Independent Business, filed an amicus brief supporting CRV's request that the Supreme Court review the Federal Circuit's decision and reaffirm Palazzolo. We argue the following: (1) when post-enactment purchasers are per se denied standing to challenge regulation, government power expands at the expense of private property rights; (2) a rule under which pre-enactment owners have superior rights to subsequent title-holders threatens to disrupt real estate markets; (3) the Federal Circuit abrogated the rule of Palazzolo; and (4) this case — viewed in the context of other courts' rulings — indicates the need for the Supreme Court to settle the spreading confusion about Palazzolo. Otherwise, the existence of a "post-enactment" rule will create a "massive uncompensated taking" from small developers and investors that would preserve and enhance the rights of large corporations. Palazzolo put to rest "once and for all the notion that title to property is altered when it changes hands." The ability of property owners to challenge government

interference with their property is essential to a proper understanding of the Fifth Amendment; the Court must reestablish the principle that transfer of title does not diminish property rights. Significantly, the Federal Circuit isn't alone in its misapplication of Palazzolo; the Ninth Circuit in Guggenheim v. City of Goleta (in which Cato also filed a brief) also recently issued an opinion severely narrowing Palazzolo's scope and deepening a circuit split.

Please see full brief below for more information.