

**No. A13-1028**

*State of Minnesota*

***In Supreme Court***

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Ethan Dean, et al.,

*Appellants,*

vs.

City of Winona,

*Respondent.*

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**BRIEF AMICI CURIAE OF THE CATO INSTITUTE AND THE MINNESOTA  
FREE MARKET INSTITUTE AT THE CENTER OF THE AMERICAN  
EXPERIMENT**

**IN SUPPORT OF APPELLANTS REQUESTING REVERSAL**

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## **INTEREST OF *AMICI CURIAE***

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and files amicus briefs.<sup>1</sup>

The Minnesota Free Market Institute at Center of the American Experiment (“Center of the American Experiment”) is a non-partisan, educational organization dedicated to the principles of individual sovereignty, private property, and the rule of law. It advocates for policies that limit government intrusion in individual affairs and uphold the protection of private property rights, and promote competition and consumer choice in a free market environment. Center of the American Experiment is a non-profit, tax-exempt educational organization under Section 501(c)(3) of the Internal Revenue Code.

This case concerns *amici* because it involved the arbitrary violation of property owners' fundamental constitutional rights.

## **BACKGROUND**

Since late 2005, the City of Winona has had in effect a rule that prevents a property owner from obtaining a rental license for his or her property if more than thirty

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<sup>1</sup> Disclosure under Rule 129.03. This brief was authored in its entirety by counsel for *amici*; counsel for appellants did not author this brief in whole or in part. Counsel for *amici* has undertaken this representation on a pro bono basis; no party or other person made a monetary contribution to the preparation or submission of this brief.

percent of the lots on the same block already have rental licenses (the “30% Rule”).<sup>2</sup>

Instead of depending primarily on the characteristics of the property to be regulated (*i.e.*, whether it meets building code specifications, parking requirements, etc.), or on the characteristics of the property owners as landlords, Winona property owners’ ability to exercise their fundamental right to rent depends on characteristics of *other* properties or property owners. The 30% Rule also contains a “grandfather clause” that exempts properties that already had rental licenses prior to the 30% Rule’s effective date. Grandfathered property owners are able to keep their licenses, even if more than 30% of the lots on their block already have rental licenses. *See* Winona Rental Property Code (RPC) § 33A.03(i)(i). As a result, the grandfather clause enshrined many blocks that already far surpassed the thirty percent threshold.

### **Summary of Argument**

The 30% Rule constitutes an arbitrary, inefficient, and unconstitutional restraint on an essential and fundamental property right—the right of property owners to manage and enjoy their property as they wish. The ordinance arbitrarily restricts which persons are able to rent their properties based solely on the actions of their neighbors and without consideration of any rational criteria. Stripping property owners of such a fundamental right not only harms the property owners, but also damages communities by reducing property values and creating inefficiencies in the local economy and housing market.

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<sup>2</sup> City of Winona, Rental Property Code (“RPC”) § 33A.03(i).

*Amici* recognize that local governments have an important role in maintaining stability and order and all other indicia of the quality of life in a community. But the 30% Rule does not bear a substantial relation to any such interest. Rather, the 30% Rule unfairly and arbitrarily burdens property owners while failing to address community quality-of-life issues that can arise from rental housing. This brief aims to demonstrate the importance of property rights—including the right to rent as a key part of those rights—while also emphasizing the arbitrary, inefficient, and harmful manner in which this Rule and similar restrictions affect communities and the people who live in them.

## **ARGUMENT**

### **A. A Property Owner’s Right to Enjoy His or Her Property—which Includes the Right to Rent—is Fundamental to Property Ownership**

The right to rent represents a significant part of a land owner’s property rights. In the residential property context, owners have principally three productive ways to use their properties: they can (1) live on the property; (2) rent the property to another individual; or (3) sell or transfer the property. *See Gangemi v. Zoning Bd. of Appeals*, 763 A.2d 1011, 1015–16 (Conn. 2001). The 30% Rule represents a significant intrusion into the rights of residential property owners because it explicitly denies one of these three core rights—the right to rent—and significantly hinders the ability to exercise another—the right to sell. *See infra* Part C.1 (describing Ethan Dean’s situation). This strips residential property owners of a large portion of their economic property rights. *See Gangemi*, 763 A.2d at 1016.

The right of property owners to use and enjoy their property—particularly real property—has historically been a fundamental property right, at least since the founding of the United States. *See* Carl W. Herstein, *Real Property*, 47 WAYNE L. REV. 669, 669–70 (2001). Indeed, as others have noted, this right is a “primary incident of ownership.” 73 C.J.S. *Property* § 44 (2013) (citing *N. Ill. Univ. Found. v. Sweet*, 237 Ill. App. 3d 28, 35 (1992)). In fact, the right to use and enjoy property is so important that, in some jurisdictions, government interference with it can, if unreasonable, constitute a partial taking. *See, e.g.*, *Vulcan Materials Co. v. City of Tehuacana*, 369 F.3d 882, 888 (5th Cir. 2004). In Minnesota specifically, “the right to acquire, possess, and enjoy property; and the right to establish a home” are substantive rights that the Minnesota Constitution guarantees. *Thiede v. Scandia Valley*, 217 Minn. 218, 224 (1944); *See* Minn. Const. art. I, § 7 and art. I, § 16.

The right to use and enjoy property—and the privileges that stem from that right—represents a stick in what commentators and jurists commonly refer to as the bundle of property rights. *See generally* J.E. Penner, *The “Bundle of Rights” Picture of Property*, 43 UCLA L. REV. 711 (1996) (describing the bundle of rights concept). The use-and-enjoyment stick includes not only the right of possession, but also other rights, such as “[t]he right to rent, the right to sell, [and] the right to improve” property. *See N. Coast R.R. Co. v. Aumiller*, 112 P. 384, 386 (Wash. 1910). If each of these discrete rights to real property represents one stick in the bundle, then all of the privileges that together form the right of use and enjoyment represent one of the most important sticks. *See generally*, Louis W. Hensler III, *What’s Sic Utere for the Goose: The Public Nature of*

*the Right to Use and Enjoy Property Suggests a Utilitarian Approach to Nuisance Cases*, 37 N. KY. L. REV. 31, 31 (2010).

One element of this fundamental right of use and enjoyment is the market value of real property, and the more useful a piece of land is, the higher its value. *See id.* at 31–32 (“Market value has long been considered one aspect of the property owner’s use and enjoyment.”). The destruction of a key privilege included in the use and enjoyment stick—such as the ability to rent—constitutes an intrusion upon the owner’s interest in the land’s use and enjoyment and degrades the market value of the property. *See id.* at 32. In tangible terms, stripping the right to rent away from residential property owners takes away more than a third of their right to use and enjoy. *Gangemi v. Zoning Bd. of Appeals*, 763 A.2d 1011, 1015–16 (Conn. 2001) (explaining that a “no rental condition” affects not only ability to rent but also “significantly reduces market value”).

The Court of Appeals did not consider that this Rule substantially infringes on the fundamental “right to acquire, possess and enjoy property.” *Thiede*, 217 at 224. The Court of Appeals merely stated that since the right to rent one’s property is not explicitly a constitutionally protected fundamental right, only rational-basis scrutiny must apply. *Dean v. City of Winona*, 843 N.W.2d 249, 260 (Minn. Ct. App. 2014). The Court of Appeals therefore failed to consider that the law is not carefully tailored to achieve the city’s interests because the 30% Rule can be both over-inclusive, since it prohibits even harmless rentals, and under-inclusive, because it applies to some homeowners but not others. *See e.g.*, *Gangemi*, 763 A.2d 1011 (invalidating a variance provision permitting a property to expand on the condition that it not be rented); *Kirsch Holding Co. v. Borough*

of *Manasquan*, 281 A.2d 513 (N.J. 1971) (striking down an ordinance banning the renting of summer houses to anyone but families). The Court of Appeals acknowledged these cases, but stated that they are not controlling because they are from different jurisdictions. While it is true that these cases do not control, they do offer persuasive examples of other state supreme courts recognizing the fundamentality of the right to rent and striking down laws that are less restrictive than the 30% Rule. The Court of Appeals thus erred when it refused to inquire any further as to the 30% Rule’s impact on constitutionally protected substantive property rights. *Dean*, 843 N.W.2d at 260.

Winona’s 30% Rule severely restricts property owners’ rights by prohibiting the right to rent and hindering the right to sell. Restrictive rules such as this must be carefully tailored to achieve a legitimate government purpose because the right to use and enjoy property is so fundamental. The 30% Rule fails this test.

#### **B. The Right to Rent Is Too Important to Restrict With an Arbitrary Limit on Rental Licenses**

There are limits on what a local government can do in the name of protecting the community. *See e.g., Connor v. Chanhassen Twp.*, 249 Minn. 205, 216 (1957) (striking down ordinance and stating that police and zoning powers are “subordinate to the constitution which is the supreme law of the land”). While *amici* acknowledge that states and municipalities may regulate to protect the health, safety and well-being of the communities within their jurisdictions, those “restrictions upon the free and unrestricted alienation of property” should not operate in an arbitrary manner. *Cf. Gangemi*, 763 A.2d

at 1015 (stating that restrictions *should* “serve a legal and useful purpose”).<sup>3</sup> The City’s 30% Rule is such an arbitrary rule. Specifically, the Rule too severely restrains the rights of property owners by preventing them from renting and hindering their ability to sell their residences, and fails to achieve a legitimate purpose.

The City proposed the 30% Rule to preserve “community character” and to stop “rental housing [from] spreading like a virus throughout the community.” Trial Court Order at 4 (internal quotation marks omitted) (citing “community character” as a reason for the rental restriction). The City acknowledged that a restrictive ordinance like the 30% Rule could impede the ability of certain Winona residents to sell their homes and even deter prospective future residents from buying homes in Winona. But the City brushed aside these concerns and ultimately adopted the ordinance based on the unsupported belief that “landlords and students often do not have any interest in how their properties appear and the effect they have on the community.” *See* Trial Court Order at 4–6.

Municipalities such as Winona have an interest in working with citizens to preserve or improve the quality of life in their communities, and we do recognize the appellate court’s point that the public may have a legitimate interest in rental housing being regulated. *Dean*, 843 N.W.2d at 257. However, the appellate court’s rationale is not clear as to how the 30% Rule actually operates as an effective use of the police power to protect the public’s interest or the general welfare. Regardless of the City’s

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<sup>3</sup> “The rule against direct restraints on alienation is an old one, going back to the fifteenth century or perhaps even earlier.” *See Gangemi*, 763 A.2d at 1015 (citing Jesse Dukeminier & James E. Krier, PROPERTY 223 (3d ed. 1993)).

justification for the Rule as necessary to prevent concentrations of rental properties, its reasoning is undercut by the law's exceptions and arbitrary application.<sup>4</sup> The Rule's sledgehammer approach attempts to address a wide range of unique problems, yet its indiscriminate and arbitrary design fails to actually do so. However difficult it may be to manage a municipality, we cannot agree with the City's Rule because it impermissibly seeks to achieve its goals by unconstitutionally undercutting property ownership.<sup>5</sup>

### **1. *The City's 30% Rule Is Arbitrary in Application***

Rules such as the 30% Rule that imposes a limit on the number of rental licenses issued are arbitrary primarily because they prevent property owners from exercising their right to rent solely based on the actions of their neighbors. The City has stripped many people of their right to rent without giving any consideration to their circumstances or providing a process to exercise objections to their exclusion from a rental market because of an arbitrary prohibition under the 30% Rule. The consequences are significant. For example, two of the named plaintiffs in this case—Ted and Lauren Dzierbicki—bought

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<sup>4</sup> Several other courts have rejected the use of rental restrictions as a way to reduce conduct that other laws already seek to regulate and some courts have found such regulations to be so sweeping that they are unreasonable. *See e.g., Coll. Area Renters & Landlords Ass'n*, 43 Cal. App. 4th 677, 687 (1996) (invalidating a rental restriction but stating that the city could address over-occupancy problems through enforcement of criminal statutes, parking requirements or facilities regulations); *Kirsch Holding Co v. Manasquan*, 59 N.J. 241, 281 A.2d 933 (1982)(stating that zoning regulations, like other police power regulations, must be reasonably exercised, and regulations limiting rentals to a “family” were so sweeping that they were unreasonable).

<sup>5</sup> The City could permissibly pursue its goals in a more direct fashion, such as by enforcing its existing police powers (*i.e.*, imposing fines for property nuisances under Nuisances Code § 32.01-.03). Instead, the City has opted for a rule that arbitrarily and significantly restricts the rights of a group of citizens—citizens who simply want to exercise basic property rights.

a property on a half-block that contained seven total lots. Due to the 30% Rule’s grandfather clause, *all* six of the other lots on the Dzierzbickis’ block already had rental licenses (90%); the couple never had a chance to obtain a rental license, despite their willingness to invest in the Winona housing market while their daughter attended college.

A.117. Although the Dzierzbickis undoubtedly demonstrated the potential to be respectable landlords in Winona—they invested \$40,000 to improve the property—the 30% Rule stripped them of their right to rent and significantly reduced the value of their property irrespective of any rational criteria, without ever assessing their qualifications.

*See A.72-76, 117.*

The City’s per-lot system for issuing rental licenses contributes to the arbitrary nature of the 30% Rule. Winona issues rental licenses on a “per-lot” basis, not a “per dwelling unit” basis. *See* RPC § 33A.03(i). The “per-lot” method allows owners of already-licensed lots to add more rental units to such lots without being subject to the 30% Rule. *See id.* § 33A.03(a). By issuing licenses in this manner, the 30% Rule arbitrarily favors currently licensed property owners over non-licensed owners while failing to achieve its intended purpose of preventing the formation of dense clusters of rental properties. The City’s per-lot distribution system permits current license-holders to place as many additional rental units on their lots as they please. *See id.* § 33A.03(i). Yet, property owners without a license are prohibited from renting their entire lot to even just *one* tenant. The 30% Rule does not state any policy reason for preventing non-licensed

homeowners from renting their properties. It allows for greater abuse by current license-holders to add rental units without further city control or oversight.

The Court of Appeals refused to address the reasonableness of the per-lot versus per-dwelling distinction stating that it is not within the Court's discretion. *Dean*, 843 N.W.2d at 261. True, the appellate court may not determine the reasonableness of the goals motivating the 30% Rule, but it is assuredly within the Court's discretion to limit a law's reach so as to not operate as an arbitrary infringement on protected rights. The per-lot, per-dwelling distinction serves to undercut the goals of the 30% Rule by allowing existing landlords to actually increase the concentration of the number of renters in a block.

Municipalities certainly have an interest in protecting their communities' quality of life. But as the Dzierzbickis' example and the per-lot feature demonstrate, rental restrictions such as the 30% Rule are much too arbitrary a vehicle for doing so.

## 2. ***The City's 30% Rule Is Misguided in Approach***

Ordinances such as the 30% Rule are also misguided because they fail to appropriately address the problems they were designed to remedy. Although the City appears to be making an effort to increase the number of owner-occupiers in relation to renters, restricting the right to rent through the 30% Rule is not a rational means of promoting that purpose.

Plaintiff Ethan Dean's situation illustrates this point. Dean originally purchased his Winona home in 2006 with the intent to live in it as an owner with his family. Through subsequent events—an ended relationship and tour of duty in Iraq—Dean was

forced to change his plans. He attempted to sell his home, but potential purchasers lost interest once they discovered that Dean's house did not have a permanent license, or even a reasonable prospect of obtaining one. A.70. The inability to rent had decreased the value of his home by 20%. A.90. Ultimately, Dean returned his house to the bank through an in-lieu-of-deed process after three years on the market. A.69-70. Thus, instead of promoting ownership of homes by owner-occupiers, the 30% Rule actually contributed to Dean losing his home. Not only is it a loss to the community when a local property owner is dragged towards foreclosure, but this outcome was a predictable result of the application of the 30% Rule. It was also arbitrary, given that Dean would have experienced no problems obtaining a rental license had his property been just on the other side of the block, where no residences had licenses. Instead, at the time of suit, seven of the nine lots on Dean's block were already licensed to rent, meaning that Dean owned one of only two properties on his block not grandfathered in for rental licenses.

Property owners such as Dean—whether homeowners or landlords—have a large stake in maintaining a property and keeping up its value, and are in a much better position to do so than the City. Private property is the best vehicle to incentivize upkeep and order. But rather than imposing a draconian restriction that strips property owners of a fundamental right to their property, the City should be working with homeowners like Ethan Dean, through reasonable and appropriately tailored rental regulations, to achieve legitimate community quality-of-life goals.

## **C. Arbitrary Restrictions on Property Rights Harm Communities Economically**

The 30% Rule and other similar rental restrictions also have unintentional side effects. The arbitrary application of such rules affects more people than just the individual property owners who are prevented from renting their lots: these rules harm communities by creating economic inefficiencies in local housing and rental markets.

### *1. The 30% Rule Artificially Depresses Property Values*

Although appraisal evidence revealed a 20% reduction in property values, the appellate court did not address the impact the 30% Rule has on the market value of real property. The effect on property values shows how an ordinance such as the 30% Rule can actually harm the community, and the Plaintiffs' individual situations showcase this effect. A.90-91.

The artificial (*i.e.*, not caused by the normal workings of supply and demand in the market) depression of property values affects more than just the named Plaintiffs. Their properties represent only two of the Winona properties negatively affected by the 30% Rule. The Winona city rental map shows that more than seventy-five blocks and half-blocks are above the 30% rental licensing limit. *See Winona Rental Housing Map*, (Apr. 22, 2013).<sup>6</sup> The rental map graphically illustrates the widespread scope of the reduction in the market price potentially experienced by Winona property owners. In this way, arbitrary rental restrictions such as the 30% Rule can reduce the overall market value of

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<sup>6</sup> <http://www.cityofwinona.com/wp-content/uploads/2012/12/winona-rental-april-2013.pdf>.

the local communities, negatively affecting the well-being of its citizens and the local tax base.

## 2. *The 30% Rule May Increase the Probability of Property Vacancy*

Rules like the 30% Rule are inefficient policies because they can actually *increase* the probability that a property will stand vacant. The Dzierzbickis' property exhibits this dynamic. Although the Dzierzbickis originally purchased their property with a plan for their daughter to occupy the residence while attending college, subsequent events forced them to change course (the Dzierzbickis' daughter graduated from Winona State University). The Dzierzbickis first attempted to rent their property to tenants, only to be rebuffed by the 30% Rule. Without the ability to procure income through rent payments, they placed their home for sale on the market, but they were unable to sell due to the reduction in value caused by the 30% Rule. The house then became vacant. A.75. While *amici* recognize that in general a municipality would prefer owner-occupiers to renters, rental occupancy is far preferable for a community than an increase in vacant homes.

The Dzierzbickis' situation also demonstrates the ways in which the 30% Rule and other restrictive rental rules can create avoidable opportunity costs in the community. The Dzierzbickis' property sits on a block of seven lots, and the other six lots already have rental licenses. A.117. In these circumstances, the Dzierzbickis' property was "made" to be a rental property, but the 30% Rule precludes their property from actually being able to be a rental property. The property is thus pushed towards vacancy, unable to be rented and very hard to sell as an owner-occupied property because of the nature of

the property as “made” rental property in the first instance. This is a poor outcome not only for the property owners but for the community at large.

### **3. *The 30% Rule Fails to Rationally Addresses the City’s Concerns***

The 30% Rule fails to adequately achieve its goals while also severely restricting the property rights of homeowners in Winona. The Rule is thus both ineffective and arbitrary.

For example, the City’s 30% Rule fails to efficiently preserve on-street parking and reduce nuisance complaints related to student housing—two of the stated goals of the rental ordinance. *See* Trial Court Order at 3–5. First, concerning the goal of on-street parking preservation, the City requires two off-street parking spaces per dwelling unit or family. Winona Zoning Code § 43.36. But landlords are allowed to lease additional parking on other properties. *Id.* § 43.35(d). The per-lot licensing feature of the 30% Rule allows landlords to add rental units to licensed lots, which requires even more parking than can permissibly be obtained from other properties, and rental properties that have been grandfathered in are not even subject to the two off-street parking spot rule. The grandfather clause exception allows landlords to continue to rent to an increasing number of occupants without providing additional parking. The 30% Rule also fails to address the number of vehicles owned and parked by home owner-occupiers and their guests. Thus, the 30% Rule does very little, if anything, to preserve on-street parking.

Second, while proponents of the 30% Rule cite the reduction of student housing-related nuisance complaints as a justification for preventing non-license holders from renting out their properties, the 30% Rule exempts “theme-houses” of Winona State

University. Zoning Code § 43.84(b). Up to ten unrelated students can live in one theme-house. Memo at 6. Thus, despite being enacted to reduce nuisance complaints and the pervasiveness of student rental housing, the 30% Rule still allows large groups of unrelated students to live together, while at the same time it prevents homeowners like the Dzierzbickis from renting to a Winona State University professor or a family.

The per-lot licensing system, in tandem with the 30% Rule's grandfather clause, also creates inefficiency by stifling landlord competition in Winona. These two characteristics of the 30% Rule serve to protect the established landlords in the community by preserving their right to rent—and build additional units on already licensed lots—while preventing other, new landlords from entering the market. Thus, the 30% Rule effectively preserves a rental market for landlords that were already established in Winona upon the Rule's implementation. At the same time, the 30% Rule prevents new landlords—*i.e.*, new competition—from offering choices and downward price pressure in the community. And landlords that are protected from competition may have less incentive to keep their properties in good repair.

Not only do the per-lot licensing system and the grandfather clause stifle competition creating inefficiency in the rental market, these exceptions to the 30% Rule allow for similarly situated homeowners to be treated differently since some can rent their properties while others cannot. The Court of Appeals reasoned that the 30% Rule does not create “expressly identified groups that have been treated differently.” *Dean*, 843 N.W.2d at 259. But the law denies some homeowners the opportunity to rent altogether even as it allows those with grandfathered rental licenses to increase their

number of rental dwellings. *Id.* This exception creates not only an inefficient housing market but also undermines the purpose of the law by creating the potential for an increased concentration of rental properties in certain blocks.

## CONCLUSION

Restrictive rental ordinances, such as the 30% Rule, impose arbitrary and unconstitutional restrictions upon the real property rights of homeowners. The 30% Rule is unconstitutional because it assigns rental rights arbitrarily, based solely on the actions of a property owner's neighbors and without any consideration of the qualifications of the property owner. Municipalities like Winona certainly have the right—and the duty—to address quality-of-life issues in their communities. But the methods employed cannot unconstitutionally strip citizens of their fundamental right to use and enjoy property and thereby reduce the value of their properties, to the detriment of both owners and the community.

For the foregoing reasons, *amici* respectfully request that this Court reverse the Appeals Court's grant of defendant's motion for summary judgment.

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Respectfully submitted,

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