No. 20-_____

In The
Supreme Court of the United States

SACRAMENTO COUNTY,

Petitioner,

v.

JOSEPH HARDESTY, YVETTE HARDESTY; JAY L. SCHNEIDER; SUSAN J. SCHNEIDER; JAKE J. SCHNEIDER; LELAND A. SCHNEIDER; KATHERINE A. SCHNEIDER; LELAND H. SCHNEIDER; AND JARED T. SCHNEIDER,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

PEDER K. BATALDEN
Counsel of Record
SCOTT P. DIXLER
HORVITZ & LEVY LLP
3601 West Olive Avenue, 8th Floor
Burbank, California 91505-4681
(818) 995-0800
pbatalden@horvitzlevy.com

Counsel for Petitioner

QUESTIONS PRESENTED

This case presents two questions involving efforts to expand the scope of the substantive component of the Due Process Clause.

1. Land-use regulation lies within the police power of the states and is typically exercised by municipalities. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 386–88 (1926). Municipalities make *legislative* land-use decisions when they enact zoning ordinances and other broadly applicable rules governing how people use property. Municipalities make *executive* land-use decisions in adjudicating permit and variance requests affecting particular people or parcels. A substantive due process claim lies to challenge legislative land-use decisions. *Nectow v. City of Cambridge*, 277 U.S. 183, 187–89 (1928). The Court should now address the unresolved question whether the same is true of executive land-use decisions. The Ninth Circuit holds that all land-use decisions are subject to substantive due process scrutiny; the Seventh and Eleventh Circuits disagree.

2. Government interference with an individual's pursuit of a chosen profession raises due process concerns. *Greene v. McElroy*, 360 U.S. 474 (1959). The Court should clarify what claim may be brought to vindicate this occupational liberty interest—a *substantive* due process claim (as the Fifth and Ninth Circuits hold) or a *procedural* due process claim (as a majority of other circuits hold).

PARTIES TO THE PROCEEDING

Sacramento County, petitioner on review, was the defendant-appellant below. Roger Dickson, Jeff Gamel, and Robert Sherry were also defendants-appellants below. Joseph Hardesty, Yvette Hardesty, Jay L. Schneider, Susan J. Schneider, Jake J. Schneider, Leland A. Schneider, Katherine A. Schneider, Leland H. Schneider, and Jared T. Schneider, respondents on review, were the plaintiffs-appellees below.

RELATED PROCEEDINGS

United States District Court (E.D. Cal.):

> *Hardesty v. Sacramento County et al.*, No. 2:10-cv-02414-KJM-KJN (June 9, 2017) (entry of judgment)
>
> *Hardesty v. Sacramento Metropolitan Air Quality Management District et al.*, No. 2:10-cv-02414-KJM-KJN (March 31, 2018) (post-trial order)

United States Court of Appeals (9th Cir.):

> *Hardesty v. Sacramento County et al.*, Nos. 18-15772 and 18-15773 (August 19, 2020) (decision on the merits)

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PETITION FOR WRIT OF CERTIORARI

Sacramento County petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The decision issued by the court of appeals, App. 1a–10a, is not published in the Federal Reporter, but is available at 824 F. App'x 474. The district court's order denying Sacramento County's posttrial motions, App. 11a–102a, is published at 307 F. Supp. 3d 1010.

JURISDICTION

The judgment of the court of appeals was entered on August 19, 2020. The court of appeals denied the County's timely petition for rehearing on October 13, 2020. This Court's March 19, 2020, order extended the deadline for all petitions for writs of certiorari due thereafter to 150 days from the date of the lower court judgment or order denying a timely petition for rehearing. The County invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides, in relevant part: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

INTRODUCTION

Municipalities have authority to make a wide variety of land-use decisions. A municipality acts legislatively when it formulates broad rules governing how citizens may use property. In contrast, a municipality exercises executive authority when its officials address parcel-specific petitions for permits and variances, or when they adjudicate specific violations of ordinances and regulations.

These land-use decisions are subject to state and local laws governing zoning and related matters. Landowners, businesses, and other persons aggrieved by municipal land-use decisions may sue in state court under these laws.

In exceptional cases, redress under the federal Constitution may be available. A decision confiscating property might be challenged under the Takings Clause, for example. And the Fourteenth Amendment's Due Process Clause may be invoked if a municipality denies state-law rights without affording fair procedures.

This case tests the limits of federal relief in two situations arising out of municipal land-use decisions. First, may a landowner file a *substantive* due process claim to contest a municipality's executive land-use decision? Second, if that decision disrupts another person's pursuit of his chosen profession, may that person also file a *substantive* due process claim?

Here, the Hardesty Plaintiffs operated a sand and gravel mine on land in Sacramento County owned by the Schneider Plaintiffs. The County received complaints about Plaintiffs' mining activities. After investigating (with other federal and state agencies),

the County took action to forestall a potential environmental calamity. As a first step, the County noted violations spotted by the state Office of Mine Reclamation and informed Plaintiffs that, to continue mining, they needed to apply for and obtain a use permit. The Schneider Plaintiffs insisted they had a vested right to use their land for mining, which freed them from having to obtain a use permit. They brought a substantive due process claim against the County for interfering with their use of their land. The Hardesty Plaintiffs brought a separate substantive due process claim alleging the County had deprived them of the right to pursue their chosen profession of mining.

A jury in the Eastern District of California heard these substantive due process claims and awarded Plaintiffs $105 million—perhaps the highest-ever substantive due process award. Existing Ninth Circuit precedent endorsed Plaintiffs' theories of substantive due process. Thus, on appeal, a panel of the Ninth Circuit did not question those theories and concluded they were supported by evidence in the record. Yet other circuits do not recognize those theories in the same way. This Court should resolve these splits of authority—one pertaining to each family of Plaintiffs—regarding the reach of substantive due process.

Over the last century, this Court has steadily narrowed substantive due process liability. In *Washington v. Glucksberg*, the Court confined substantive due process claims to "certain fundamental rights and liberty interests," such as the right to marry or to raise children. 521 U.S. 702, 720 (1997). Plaintiffs here do not invoke fundamental

interests of that order. Instead, they seek to vindicate purely economic interests grounded in state law—mining and property rights, and the ability to work as mine operators. Many decades ago, this Court recognized due process claims challenging government land-use regulations and interference with professional opportunities. Today, however, it is unclear if those interests are protected by substantive due process or, instead, by procedural due process and state law.

As we explain, the unique theories underlying Plaintiffs' substantive due process claims survived scrutiny in the Ninth Circuit, but other circuits would have rejected them:

1. *Executive land-use decisions should be actionable under state law or the Takings Clause, not substantive due process.* The Schneider Plaintiffs contended that County officials violated substantive due process by acting arbitrarily and unreasonably in requiring them to apply for a permit to continue mining. The Ninth Circuit allows virtually any land-use challenge to proceed as a substantive due process claim, *e.g.*, *Crown Point Dev., Inc. v. City of Sun Valley*, 506 F.3d 851, 855–56 (9th Cir. 2007), so the Ninth Circuit did not question the Schneider Plaintiffs' theory. But that approach blurs the distinction between *legislative* enactments (like ordinances) and *executive* decisions (like granting permits). It also embroils federal courts in quintessentially local land-use decisions, even when adequate state remedies are available.

Other circuits approach this issue quite differently. In the Eleventh Circuit, legislative

challenges *may* be pursued as substantive due process claims, but executive challenges *may not*. *Hillcrest Prop., LLP v. Pasco County*, 915 F.3d 1292, 1301 (11th Cir. 2019). And the Seventh Circuit bars substantive due process challenges to land-use decisions when state-law remedies are adequate. *GEFT Outdoors, LLC v. City of Westfield*, 922 F.3d 357, 368–69 (7th Cir. 2019). This Court should grant certiorari to resolve this split of authority and should hold that routine, individualized disputes over the use of specific parcels (like the Schneiders' permitting dispute) do not give rise to a substantive due process claim.

2. *A chosen-profession theory should not implicate substantive due process*. The Hardesty Plaintiffs pursued what some courts have labeled an occupational-liberty theory. They contended that the County deprived them of their right to engage in their chosen profession of mining. The Ninth Circuit did not question that theory here because it treats chosen-profession claims as *substantive* due process claims. *Engquist v. Or. Dep't of Agric.*, 478 F.3d 985, 997 (9th Cir. 2007). But other circuits disagree, holding that a chosen-profession theory implicates *procedural* due process only. *E.g.*, *Zorzi v. County of Putnam*, 30 F.3d 885, 894–95 (7th Cir. 1994). Those circuits' approach is consistent with the limited scope of substantive due process and with this Court's seminal chosen-profession decisions, which reflect a concern for the use of fair procedures in government licensing disputes. This Court should grant certiorari and reject the Ninth Circuit's expansive approach to substantive due process.

* * *

The substantive due process issues presented here have divided lower courts and are ripe for this Court's consideration. The practical importance of these issues is considerable. The standards applied to—and the remedies available for—substantive due process claims differ markedly from procedural due process claims and state-law claims. Plaintiffs could not recover the astronomical verdict here if their substantive due process claims are legally unavailable. The jury awarded Plaintiffs separate damages for procedural due process claims, and Plaintiffs abandoned pertinent state-law claims. Thus, this case frames the consequences of, and is an excellent vehicle for drawing, appropriate distinctions between substantive due process claims, procedural due process claims, and state-law claims.

STATEMENT

1. To mitigate environmental risks, California comprehensively regulates surface mining of sand and gravel (also called aggregate). *See* Cal. Pub. Res. Code §§ 2710–2796.5 (West 2018). The Schneider Plaintiffs own a ranch on which the Hardesty Plaintiffs operated an aggregate mine. App. 12a. When they expanded their mining operation, App. 42a–45a, County officials received complaints, App. 52a–53a. The County investigated and confirmed a dramatic increase in the volume of mining, calling into question Plaintiffs' adherence to a reclamation plan required by statute and approved by the County. App. 43a–44a. County staff sent letters directing Plaintiffs to amend the plan and to apply for a use permit to continue mining. App. 57a–58a.

Plaintiffs claimed they had a vested right under California law to mine without a permit. App. 60a–61a. Rather than applying for a permit, Plaintiffs stopped mining and started litigating.

2. Plaintiffs initially sought pertinent state-law remedies in state court. *See* App. 87a–88a. But they later abandoned state court and filed this action in the Eastern District of California.

3. In the district court, all Plaintiffs pursued substantive due process claims against the County and its officials. App. 13a–14a. But the theories underlying those claims differed. The Schneiders claimed that the County deprived them of property—a state-law vested right to mine their ranch without a permit. App. 60a. The Hardestys claimed the County deprived them of liberty—the right to pursue their chosen profession by effectively closing the mine. App. 4a–5a. Plaintiffs argued the County's decisions were colored by the influence of a competing mining company. App. 47a–48a, 52a–55a.

The jury awarded $30 million to the Schneiders and $75 million to the Hardestys. App. 13a–14a. (Separate verdicts on procedural due process and First Amendment claims are not at issue.) The district court denied posttrial relief. App. 11a.

4. A divided panel of the Ninth Circuit affirmed the judgment in part, reversed in part, and remanded for further proceedings. App. 7a.

The Ninth Circuit evaluated the County's arguments against substantive due process liability through the lens of the County's motions for judgment under Fed. R. Civ. P. 50. App. 4a–5a. The panel concluded that "[t]here is substantial evidence in the

record to support the jury's verdict that the Schneiders had a vested right which the County abrogated in violation of substantive due process." App. 5a. The panel also held that "the jury could conclude the County acted arbitrarily and unreasonably to deprive the Hardestys of their chosen occupation." *Id.*

The panel reversed the damages awards as excessive, reasoning that Plaintiffs had pursued incorrect damages theories. App. 5a–6a. And the panel remanded for further proceedings. App. 7a. (The panel separately reversed as to the County officials who were defendants. App. 3a–4a.) Judge Nelson partially dissented on three discrete issues not involved here. App. 7a–10a.

The Ninth Circuit denied petitions for rehearing filed by Plaintiffs and the County. App. 103a–104a. The County's petition presented the arguments discussed below. 9th Cir. ECF No. 93 at 8–9, 13–20. Those arguments were blocked by circuit precedent and unavailable to the panel that had resolved the appeal. *Id.* at 7.

REASONS FOR GRANTING THE PETITION

I. The circuits disagree whether executive land-use decisions may be challenged via substantive due process claims.

A. This Court's recent substantive due process cases—which protect only "fundamental" liberties—call into question earlier land-use precedents.

The Due Process Clause of the Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const., amend. XIV, § 1. This provision speaks in terms of fair procedure. It "imposes procedural limitations on a State's power to take away protected entitlements." *Dist. Attorney's Off. for Third Jud. Dist. v. Osborne*, 557 U.S. 52, 67 (2009).

But the Court has also recognized "a substantive component, which forbids the government to infringe certain 'fundamental' liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 301–02 (1993). Substantive due process "provides heightened protection against government interference" with deeply rooted fundamental rights including the rights to marry, to have children, to direct the upbringing of one's children, to marital privacy, to use contraception, and to bodily integrity. *Glucksberg*, 521 U.S. at 720; *see also Palko v. Connecticut*, 302 U.S. 319, 324–25 (1937) (defining fundamental rights as those "implicit in the concept of ordered liberty").

"As a general matter, the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." *Osborne*, 557 U.S. at 72 (citation omitted). "The doctrine of judicial self-restraint requires [this Court] to exercise the utmost care whenever [it is] asked to break new ground in this field." *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992). Indeed, some Members of the Court have favored abandoning substantive due process entirely, reasoning that "the oxymoronic 'substantive' 'due process' doctrine has no basis in the Constitution." *Timbs v. Indiana*, 139 S. Ct. 682, 692 (2019) (Thomas, J., concurring); *see also United States v. Carlton*, 512 U.S. 26, 39 (1994) (Scalia, J., concurring) (characterizing substantive due process as an "oxymoron" rather than a " constitutional right").

Courts therefore proceed cautiously when applying the substantive due process doctrine. *Osborne*, 557 U.S. at 72. Caution is particularly appropriate when parties invoke substantive due process to protect economic interests.

A century ago, in a line of cases epitomized by *Lochner v. New York*, 198 U.S. 45 (1905), this Court regularly relied on substantive due process to strike down economic measures it deemed unwise or unreasonable. *See Obergefell v. Hodges*, 576 U.S. 644, 696–97 (2015) (Roberts, C.J., dissenting) (discussing history of substantive due process); *see also Lochner*, 198 U.S. at 62 (striking down maximum-hours law for bakers); *Adkins v. Children's Hosp. of D.C.*, 261 U.S. 525, 559 (1923) (striking down minimum wage law).

"Eventually, the Court recognized its error and vowed not to repeat it." *Obergefell*, 576 U.S. at 696–97 (Roberts, C.J., dissenting). The Court "returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws." *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963). This Court now recognizes that it "is not free to substitute its preferred economic policies for those chosen by the people's representatives." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1632 (2018).

In the decades following *Lochner*, this Court has erected barriers to invoking substantive due process. First, substantive due process rights must be "fundamental"—in other words, they arise from the Constitution, in contrast to property rights created by state law. *See Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 229–30 (1985) (Powell, J., concurring); *see also Glucksberg*, 521 U.S. at 720–21; *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972) ("Property interests, of course, are not created by the Constitution."). Second, "the 'liberties' protected by substantive due process do not include economic liberties," which would appear to include property rights affected by land-use decisions. *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Protection*, 560 U.S. 702, 721 (2010) (plurality opinion: Scalia, J., joined by Roberts, C.J., and Thomas and Alito, JJ.); *accord New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 439 U.S. 96, 106–07 (1978) (recognizing "the demise of the concept of 'substantive due process' in the area of economic regulation"). "It is now settled that States 'have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long

as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law.'" *Ferguson*, 372 U.S. at 730–31.

Though the Court has recalibrated and narrowed substantive due process, the Court has not revisited that doctrine's role in municipal land-use decisions since the *Lochner* era. Then, this Court upheld a municipality's authority to enact a zoning ordinance against a substantive due process challenge. *Village of Euclid*, 272 U.S. at 395. The Court held that a zoning ordinance was valid as long as it was not "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *Id.* But two years later, the Court held that another city's zoning ordinance violated substantive due process because, as applied, it failed to promote the city's "health, safety, convenience, and general welfare." *Nectow*, 277 U.S. at 188–89.

In the near-century since *Village of Euclid* and *Nectow*, this Court has not reexamined the applicability of substantive due process to municipal land-use decisions in light of the Court's ongoing project of narrowing the scope of substantive due process. In the absence of this Court's guidance, the lower courts have created a doctrinal muddle, disagreeing whether and how land-use decisions are subject to substantive due process scrutiny. These disagreements, described below, warrant this Court's intervention.

B. Only legislative land-use decisions may be challenged via substantive due process in the Eleventh Circuit.

The Eleventh Circuit has divided land-use challenges into two categories. Challenges to legislative enactments (like zoning ordinances) *may* be pursued as substantive due process claims, but challenges to executive decisions (like permitting determinations) *may not*. *Hillcrest Prop.*, 915 F.3d at 1301. Thus, in the Eleventh Circuit, "non-legislative deprivations of state-created rights, which would include land-use rights, cannot support a substantive due process claim, not even if the plaintiff alleges that the government acted arbitrar[il]y and irrationally." *Greenbriar Vill., L.L.C. v. Mountain Brook*, 345 F.3d 1258, 1263 (11th Cir. 2003) (per curiam).

The Eleventh Circuit has explained that a permit furnishes state-created property rights, while substantive due process protects only fundamental rights created by the Constitution. *Id.*; *see also McKinney v. Pate*, 20 F.3d 1550, 1560–61 (11th Cir. 1994) (en banc).

C. Only land-use decisions for which state remedies are inadequate may be challenged via substantive due process in the Seventh Circuit.

The Seventh Circuit also restricts substantive due process review of land-use disputes. But its approach differs from the Eleventh Circuit. In the Seventh Circuit, a land-use decision violates substantive due process only if a plaintiff establishes "'the inadequacy of state remedies to redress the deprivation.'" *GEFT Outdoors, LLC*, 922 F.3d at 368–

69 (citation omitted). The Eleventh Circuit, in contrast, does not consider the adequacy of state remedies in substantive due process analysis. *McKinney*, 20 F.3d at 1556–57.

The Seventh and Eleventh Circuits' different tests channel cases toward similar outcomes, however. Substantive due process claims should generally fail under the Seventh Circuit's test because state laws almost always furnish a mechanism for challenging land-use decisions. *E.g.*, *Hansen Bros. Enters., Inc. v. Bd. of Supervisors*, 12 Cal. 4th 533, 577–78 (1996) (citing Cal. Civ. Proc. Code § 1094.5); 65 Ill. Comp. Stat. 5/11–13–25 (2021) (authorizing judicial review of Illinois zoning decisions). And those claims fail in the Eleventh Circuit because the core property rights at issue are created by state law, thus violations are not remediable under the Due Process Clause.

At root, these courts' limitations on substantive due process in the land-use context reflect the rule that substantive due process cannot "do the work of the Takings Clause," *Stop the Beach Renourishment, Inc.*, 560 U.S. at 721; *cf. Graham v. Connor*, 490 U.S. 386, 395 (1989) (holding that substantive due process does not apply to a claim covered by "an explicit textual source of constitutional protection"). As the Seventh Circuit has recognized, "substantive due process is of questionable relevance in this area" because "the due process clause's procedural guarantees and the rights protected by the equal protection and takings clauses leave little if any ground uncovered." *CEnergy-Glenmore Wind Farm No. 1, LLC v. Town of Glenmore*, 769 F.3d 485, 488 (7th Cir. 2014).

D. Virtually any land-use decision may be challenged via substantive due process in the Ninth Circuit.

In contrast to the Seventh and Eleventh Circuits' restrained approaches to substantive due process, the Ninth Circuit allows seemingly any land-use challenge to proceed as a substantive due process claim. *See Crown Point*, 506 F.3d at 855–56.

In *Crown Point*, the Ninth Circuit held that a landowner may pursue a substantive due process claim based on an arbitrary and irrational executive land-use decision—the denial of a permit. 506 F.3d at 852–53. The Ninth Circuit thus parted company from the Eleventh Circuit, which bars substantive due process challenges to permitting and other executive land-use decisions. *Hillcrest Prop.*, 915 F.3d at 1301. The Ninth Circuit also deviated from the Seventh Circuit's approach by imposing no requirement that a plaintiff show that state remedies are inadequate. *GEFT Outdoors, LLC*, 922 F.3d at 368–69; *see Mann v. City of Tucson*, 782 F.2d 790, 792 (9th Cir. 1986) (per curiam) (holding that substantive due process plaintiffs need not show state remedies are inadequate).

Previously, the Ninth Circuit had "totally preclud[ed] substantive due process claims" targeting municipal land-use decisions. *Crown Point*, 506 F.3d at 855. But the Ninth Circuit concluded that this Court's intervening decision in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005), had "pull[ed] the rug out from under" its earlier cases, requiring a 180-degree course correction. *Crown Point*, 506 F.3d at 855–56. After *Crown Point*, challenges to both

legislative and executive land-use decisions may now be framed as substantive due process claims in the Ninth Circuit. *Id.* at 852–53 (denial of a permit application), 856 (rent control ordinance).

E. The Ninth Circuit's approach is wrong.

We have shown above that a landowner could invoke substantive due process to challenge a permitting decision in the Ninth Circuit, but not in the Seventh or Eleventh Circuits. Although there are policy justifications for each view, this Court should reject the Ninth Circuit's approach.

Some courts would subject every allegedly arbitrary and unreasonable municipal land-use decision to due process scrutiny. *Samson v. City of Bainbridge Island*, 683 F.3d 1051, 1057–58 (9th Cir. 2012). These courts view due process as a bulwark against zoning abuses. This sweeping view of due process occasionally produces laudable outcomes in outlier cases, as when land-use decisions are motivated by racial animus. *Scott v. Greenville County*, 716 F.2d 1409, 1419 (4th Cir. 1983).

Yet most of the time, in most municipalities, the intervention of federal constitutional law is neither prudent nor desirable. Federal courts lack zoning expertise and "do not sit as a super zoning board or a zoning board of appeals." *Raskiewicz v. Town of New Boston*, 754 F.2d 38, 44 (1st Cir. 1985). And state laws and state courts are available to curb zoning abuses. Obligating federal courts (applying the Due Process Clause) to supervise local planners making local land-use decisions under local law is unlikely to produce better decisions—for the law or for the land.

This is especially true of *executive* land-use decisions, which typically involve fact-intensive disputes. Executive decisions concern whether to grant, deny, or require permits and variances to particular persons at particular sites, often with little impact on others in the community. The benefit of local expertise nears its zenith in such cases. Subjecting those confined decisions to second-guessing by federal juries empowered to award breathtaking verdicts with few instructional guideposts (as here) is surely not what the *Glucksberg* Court intended. That is particularly true in situations where state law (as here) or other constitutional provisions like the Takings Clause or the Equal Protection Clause would supply workable standards.

The Ninth Circuit articulated a different rationale for allowing substantive due process claims to contest executive land-use decisions. The Ninth Circuit believed *Lingle* obliged federal courts to police municipal land-use decisions through substantive due process claims. But that rationale does not withstand scrutiny. *Lingle* concerned the validity of a Hawaii statute challenged as a taking. 544 U.S. at 532. This Court's decision provided no holding about substantive due process. *See id*. Moreover, its guidance about due process was limited to *legislative* land-use actions (statutes and ordinances). *Id. Lingle* said nothing about *executive* land-use decisions (such as permit and variance rulings). *Lingle* also said nothing suggesting that a plaintiff could bring a substantive due process challenge when state law furnishes adequate remedies. The few due process cases mentioned in *Lingle* involved municipal ordinances, not executive decisions, and they said

nothing about the adequacy of state remedies. *See id.* at 540–41 (citing *Nectow*, 277 U.S. at 188, and *Village of Euclid*, *supra*).

The Ninth Circuit's erroneous interpretation of *Lingle* cemented a split of authority regarding the applicability of substantive due process in land-use cases. There is no reason to expect the Ninth Circuit to change its views absent further instructions from this Court—the Ninth Circuit already believes it is properly applying *Lingle* in expanding substantive due process liability.

Nothing in *County of Sacramento v. Lewis* alters this conclusion. 523 U.S. 833, 847 & n.8 (1998). That case involved a high-speed police chase resulting in death. It was not a land-use decision. The Court did not hold that substantive due process claims are available to contest all executive actions taken by a municipality.

Finally, the Ninth Circuit's expansive approach to substantive due process in land-use cases runs afoul of the principle that substantive due process cannot "do the work of the Takings Clause." *Stop the Beach Renourishment*, 560 U.S. at 721. As the Court has recognized in the takings context, requiring "heightened means-ends review of virtually any regulation of private property" would "require courts to scrutinize the efficacy of a vast array of state and federal regulations—a task for which courts are not well suited." *Lingle*, 544 U.S. at 544. Because it is unnecessary and unwise to provide a substantive due process challenge to executive land-use decisions, this Court should grant certiorari and reverse the judgment of the Ninth Circuit.

II. The circuits disagree whether a chosen-profession theory is actionable under substantive due process.

A. Multiple circuit courts recognize that *procedural* due process protects the right to pursue a chosen profession.

Traditional *procedural* due process claims protect interests that are not coextensive with the fundamental rights protected by *substantive* due process. *E.g.*, *Smith v. Org. of Foster Families for Equality & Reform*, 431 U.S. 816, 842 n.48 (1977) ("[A] liberty interest in foster families for purposes of the procedural protections of the Due Process Clause would not necessarily require that foster families be treated as fully equivalent to biological families for purposes of substantive due process review."); *Kerry v. Din*, 576 U.S. 86, 107–08 (2015) (Breyer, J., dissenting) ("[L]iberty interests arising under the Constitution for procedural due process purposes are not the same as fundamental rights requiring substantive due process protection.").

"In a line of earlier cases, this Court has indicated that the liberty component of the Fourteenth Amendment's Due Process Clause includes some generalized due process right to choose one's field of private employment, but a right which is nevertheless subject to reasonable government regulation." *Conn v. Gabbert*, 526 U.S. 286, 292–93 (1999). This Court's seminal chosen-profession cases illustrate that the right implicates procedural, not substantive, due process.

In *Schware v. Board of Bar Examiners*, 353 U.S. 232, 233–34 (1957), a law school graduate was denied

a law license over moral character concerns. In *Greene*, 360 U.S. at 475–76, a nuclear engineer was denied a security clearance. In both cases, the disputed issues involved procedure, not substance—government officials had not employed a fair process before impeding plaintiffs' ability to work. *Greene*, 360 U.S. at 507 ("[W]e are asked to judge whether, in the context of security clearance cases, a person may be deprived of the right to follow his chosen profession without full hearings where accusers may be confronted . . . ."), 508 ("[Plaintiff] was not afforded the safeguards of confrontation and cross-examination."); *Schware*, 353 U.S. at 234, 247 (holding that the Bar had "deprived petitioner of due process in denying him the opportunity to qualify for the practice of law"); *see Roth*, 408 U.S. at 574 (treating *Schware* as raising procedural due process concerns).

The Seventh and Eighth Circuits have parsed the distinction between procedural and substantive due process and held that a chosen-profession theory implicates only *procedural* due process. *Zorzi*, 30 F.3d at 894–95 ("[A]ny cause of action for the deprivation of occupational liberty would be confined to a claim under procedural due process; there is no such cause of action under substantive due process."); *see Singleton v. Cecil*, 176 F.3d 419, 428 (8th Cir. 1999) (en banc) ("We agree with [*Zorzi*] . . . ."). These circuits have concluded that the right to pursue a profession is not among the narrow category of fundamental rights protected by substantive due process. *See id.* at 427–28; *Ill. Psych. Ass'n v. Falk*, 818 F.2d 1337, 1342 (7th Cir. 1987). They have reasoned that extending substantive due process in this way would unduly

displace state regulatory authority. Without parsing the procedural-substantive due process distinction, other circuits have likewise held that occupational liberty claims implicate *procedural* due process. *E.g.*, *Bowman v. Iddon*, 848 F.3d 1034, 1039 (D.C. Cir. 2017); *Hill v. Borough of Kutztown*, 455 F.3d 225, 235 (3d Cir. 2006); *Jones v. Bd. of Comm'rs*, 737 F.2d 996, 1002 (11th Cir. 1984); *Fleming v. U.S. Dep't of Agric.*, 713 F.2d 179, 183–84 (6th Cir. 1983); *Rodriguez de Quinonez v. Perez*, 596 F.2d 486, 491 n.4 (1st Cir. 1979).

B. The Fifth and Ninth Circuits have split from other circuit courts by allowing chosen-profession theories to proceed as *substantive* due process claims.

Unlike the array of circuits discussed above, the Fifth and Ninth Circuits have addressed chosen-profession theories as *substantive* due process claims. *E.g.*, *Franceschi v. Yee*, 887 F.3d 927, 937–38 (9th Cir. 2018); *Engquist*, 478 F.3d at 997 ("We have held that a plaintiff can make out a substantive due process claim if she is unable to pursue an occupation and this inability is caused by government actions that were arbitrary and lacking a rational basis."); *Dittman v. California*, 191 F.3d 1020, 1029–31 (9th Cir. 1999); *San Jacinto Sav. & Loan v. Kacal*, 928 F.2d 697, 702–04 (5th Cir. 1991).

The Ninth Circuit has openly disagreed with courts of appeals that have treated chosen-profession theories as implicating *substantive* due process. *Engquist*, 478 F.3d at 997 (expressly declining to follow the Seventh Circuit in *Zorzi*).

C. The Ninth Circuit's approach is wrong.

The Ninth Circuit's expansive approach to substantive due process in occupational liberty cases empowers federal courts to scrutinize a broad range of routine state actions affecting an individual's employment prospects, ranging from occupational licensing requirements, *Dittman*, 191 F.3d at 1029–31, to driver's license suspensions, *Franceschi*, 887 F.3d at 932–33, 937–38, to the regulation of street vending, *Chalmers v. City of Los Angeles*, 762 F.2d 753, 755–59 (9th Cir. 1985). But the Due Process Clause and this Court's precedent direct courts to review the fairness of state *procedures* that affect the right to pursue a profession. They do not authorize federal courts to scrutinize the *substance* of state decisions that affect an individual's economic life. This Court has steadily (and properly) retreated from reviewing those types of issues. *See* cases cited *supra* at 9–13.

This Court should grant certiorari to resolve this recognized conflict among the circuits and hold that the right to pursue a chosen profession implicates procedural, but not substantive, due process. This circuit split is ripe for review even though some cases involve public employees, *e.g.*, *Singleton*, 176 F.3d at 428, while others concern licensed private workers like the Hardestys, *e.g.*, *Dittman*, 191 F.3d at 1029–31. An individual's liberty interest in pursuing a chosen profession is shared by both public- and private-sector workers. There is no reason to confer constitutional protections on one group, but not the other. *See Engquist*, 478 F.3d at 997–98 (explaining that blacklisting a public employee "'effectively excludes [him] from his occupation,' . . . threaten[ing]

the same right as a legislative action that effectively banned a person from a profession, and thus calls for the same level of constitutional protection").

III. This case is an ideal vehicle to decide the questions presented.

As explained, the two substantive due process questions presented here involve square conflicts between the circuit courts. Reversal of the Ninth Circuit's decision would eliminate or narrow the need for further proceedings—both in this case and in other cases nationwide. This case is particularly well-suited to this Court's review because it involves two distinct applications of substantive due process; in both, the Ninth Circuit has contributed to persistent confusion by applying substantive due process expansively where only economic interests are involved. To the extent substantive due process has any legitimate role in constitutional law, that role is confined to protecting deeply rooted fundamental rights, not pecuniary interests.

Indeed, this case presents this Court with an opportunity to clarify whether substantive due process should play *any* role in a case involving purely economic interests or state-created property rights. *See Hillcrest Prop.*, 915 F.3d at 1309–12 (Newsom, J., concurring) (indicating that the true doctrinal vice is allowing *any* type of land-use deprivation to be pursued as a substantive due process claim); *cf. City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 200 (2003) (Scalia, J., concurring) (commenting, in a land-use case, that "[i]t would be absurd to think that all 'arbitrary and capricious' government action violates substantive due process—

even, for example, the arbitrary and capricious cancellation of a public employee's parking privileges.").

Respondents can be expected to raise five objections to the suitability of review. None has merit.

First, Respondents will object that this case arrives in an interlocutory posture. But the issues presented are purely legal. There are no relevant factual disputes or complicating factors impeding this Court's consideration of the applicability of substantive due process in land-use and chosen-profession cases. 17 Charles A. Wright et al., Federal Practice & Procedure § 4036 (3d ed. 2007) ("In a wide range of cases, certiorari has been granted after a court of appeals has disposed of an appeal from a final judgment on terms that require further action in the district court, so that there is no longer any final judgment."). No good reason exists for waiting to grant a writ of certiorari.

Second, the fact that the Ninth Circuit resolved this case in an unpublished decision does not diminish the need for this Court's review either. *See* Stephen M. Shapiro et al., Supreme Court Practice § 4.11 (11th ed. 2019) ("An unpublished or summary decision on a subject over which the courts of appeals have split [may be seen] as signaling a persistent conflict."). This Court regularly grants writs of certiorari to resolve circuit conflicts created or perpetuated by unpublished decisions. *E.g.*, *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 474 (2006). Some of this Court's recent pathmarking decisions arose from unpublished circuit court decisions. *E.g.*, *Bostock v.*

Clayton County, 140 S. Ct. 1731, 1738 (2020), *rev'g* 723 F. App'x 964 (11th Cir. 2018).

Third, it is inconsequential that the Ninth Circuit's decision does not address the circuit splits that we have described above. That is no surprise. Ninth Circuit precedent forecloses the County's positions, so it was futile for the County to address, or for the panel to discuss, the fundamental arguments raised here. The County fully aired the arguments here in its rehearing petition, affording the Ninth Circuit an opportunity to change its approach. This Court often reviews brief, unpublished decisions that rest on earlier, settled circuit precedent in conflict with decisions of other courts. *E.g.*, *Kimbrough v. United States*, 552 U.S. 85, 93 & n.4 (2007); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 20 (1993). It should do so here as well.

Fourth, the County's decision not to challenge on appeal Plaintiffs' *procedural* due process claims would neither affect nor complicate review of Plaintiffs' *substantive* due process claims. If Plaintiffs obtained a verdict on substantive due process claims that do not exist (as the County argues here), their substantive due process verdict must be erased. Their substantive due process claims cannot be repleaded (or reimagined) as part of their procedural due process claims at this late date. The latter were tried on different facts and theories than the former.

Finally, it is immaterial that the Ninth Circuit reviewed the chosen-profession issue only for plain error. *See* App. 4a–5a. Plain error review poses no insuperable obstacle when a party presents a purely legal question for review. *See Hagen v. Siouxland*

Obstetrics & Gynecology, PC, 799 F.3d 922, 927–28 (8th Cir. 2015); *United States v. Yijun Zhou*, 838 F.3d 1007, 1016 (9th Cir. 2016) (Graber, J., concurring) (noting that a "pure question of law" exception to plain error "makes sense in civil appeals"); *cf. Singleton v. Wulff*, 428 U.S. 106, 121 & n.8 (1976) (offering examples where "a federal appellate court is justified in resolving an issue not passed on below"). The chosen-profession question addressed in this petition is purely legal—whether that theory implicates procedural or substantive due process.

CONCLUSION

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

Respectfully submitted,

PEDER K. BATALDEN
Counsel of Record
SCOTT P. DIXLER
HORVITZ & LEVY LLP
3601 West Olive Avenue
8th Floor
Burbank, California 91505-4681
(818) 995-0800
pbatalden@horvitzlevy.com

Counsel for Petitioner
Sacramento County

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