No. 20-1286

IN THE

Supreme Court of the United States

SACRAMENTO COUNTY, CALIFORNIA,
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

BRIEF FOR HARDESTY AND SCHNEIDER RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether there is any basis for the Court to review this case when plaintiffs proved the exercise of government power without any reasonable justification in the service of a legitimate governmental objective and the court of appeals, in a non-precedential unpublished memorandum opinion, affirmed Sacramento County's liability for that arbitrary and oppressive exercise of government power and remanded to the district court for further proceedings.

2. Whether cases involving due-process rights of government employees subjected to employment actions by their government employers provide any basis for the Court to review this case involving the arbitrary and irrational destruction of private citizens' private business by government acting as sovereign, which was resolved below in accord with precedent of this Court and that of those courts of appeals that have ruled on similar claims.

PARTIES TO THE PROCEEDING

Sacramento County, petitioner on review, was a defendant-appellant below. Roger Dickinson, 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)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

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INTRODUCTION

Plaintiffs-respondents are two hardworking families who, for decades, made their livelihood from a sustainable, small-scale gravel mining operation on ranch property in Sacramento County, California. For decades, the County officially recognized the families possessed a vested right to carry on the mining and that they were doing so in full compliance with all

applicable regulations, environmental and otherwise.

Things changed when a competing large, politically influential mining corporation insisted that the County shut plaintiffs' operation down and the County complied. As the jury found and the Ninth Circuit affirmed, the County had no valid, legitimate governmental objective for its egregious conduct toward plaintiffs. The County—as the powerful competitor demanded—waged a protracted and successful campaign to run plaintiffs out of business, on false pretexts.

The County's petition largely ignores or misrepresents these established facts. The Schneiders' claims arising from the unconstitutional revocation of the vested right to have mining continue at their century-old ranch and other conduct, all of which resulted in permanently stopping the mining, are not a dispute about a routine permitting decision. The Hardestys, who suffered the loss of the business to which they had devoted their entire adult lives, are not analogous to terminated government employees, and their claim does not involve occupational licensing. Both families fell victim to an extended course of arbitrary and unreasonable governmental conduct.

The court of appeals affirmed the County's liability for violating both families' substantive-due-process rights in a nine-paragraph

unpublished memorandum opinion. The non-precedential memorandum does not address the legal questions the County seeks to present to this Court.

As to those legal issues, even if the opinion below addressed them, the County could not show that this case presents any conflict among the circuits. Nor can it show any other reason that the Court should review those issues, particularly using this case as a vehicle.

The County cites no Ninth Circuit precedent conflicting with the Eleventh Circuit regarding executive land-use decisions or with the Seventh Circuit's standard for finding substantive-due-process violations in the land-use context. The County ignores relevant precedent of this Court. And cases regarding the due process rights of government employees in relation to their governmental employers have nothing to do with the Hardestys' protected interest in not having their private business destroyed. Under applicable precedent from other circuits, the outcome regarding the County's substantive-due-process liability to both families would have been the same as it was in the Ninth Circuit.

This case, especially under an honest assessment of its facts and the legal issues as developed below, does not present any conflict needing to be resolved or any other legal question warranting the Court's attention.

Even if any such issues existed, this case would be an unsuitable vehicle for addressing them. The Court should deny the petition.

STATEMENT

The following facts—which the County largely ignores, misrepresents, or distorts—are consistent with the jury verdict and supported by the evidence, as held by the district court and affirmed by the court of appeals. *See, e.g.*, Pet. App. 4a-5a, 11a-13a, 25a-63a.

Plaintiffs-respondents are Joe Hardesty and his wife Yvette and members of the Schneider family. The Schneiders own an approximately 4,000-acre ranch in eastern Sacramento County, a 3,500-acre tract of which is designated the Schneider Historic Mine ("Mine"). 7.SER.1734. [1] Mining had occurred on the ranch since the 1800s, modern aggregate (*i.e.*, sand and gravel) mining since the 1930s, and by the late 1900s the mining had become the Schneider family's primary source of income. 7.SER.1735-74; 17.SER.3745. Since 1980, for 30 years prior to being shut down, Joe Hardesty had operated the Mine under contract with the Schneiders and built up a small but successful aggregate mining business operating as

[1] References in the format [volume].SER.[page] are to plaintiffs' Supplemental Excerpts of Record in the Ninth Circuit.

Hardesty Sand & Gravel ("Hardesty S&G"). Pet. App. 30a; 8.SER.2137-40.

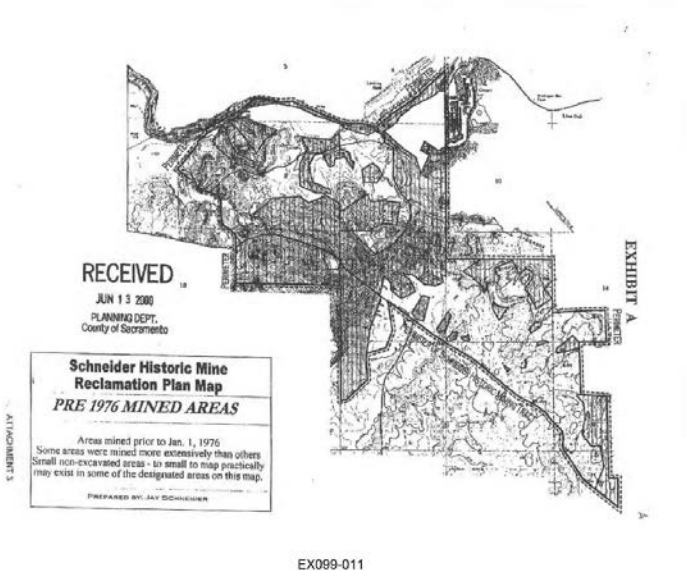
Compared to "tremendously large," dynamited quarries excavated by large mining corporations in Sacramento County, the Hardesty operation on the Schneider ranch was much smaller in scale, more sustainable, and environmentally friendly. Pet. App. 39a-40a; 5.SER.1213; 19.SER.4260-64; 4.SER.1078, 1103-06, 1118; 15.SER.3486. The agile Hardesty operation dug small pits and reclaimed mined out areas as it went along. 4.SER.1118; 15.SER.3486.

Because aggregate mining had occurred there for decades before California's Surface Mining and Reclamation Act ("SMARA") took effect in 1976, the Mine was being operated under a "vested right," meaning no permit or rezoning was needed, *see* CAL. PUB. RES. CODE §2776(a); *People ex rel. Dep't of Conservation v. El Dorado Cty.*, 36 Cal.4th 971, 981, 984 (2005); *Hansen Brothers Enterprises, Inc. v. Board of Supervisors*, 12 Cal.4th 533, 553, 573 (1996); *Calvert v. Cty. of Yuba*, 145 Cal.App.4th 613, 617-18 (2006), as expressly recognized by the County Board of Supervisors in 2002, Pet. App. 27a. Although even a vested mine must comply with other regulatory requirements, the exemption from SMARA's permit requirement is crucial for sustaining a small family operation because the permitting process (even if

successful) can take years and millions of dollars. Pet. App. 62a-63a. Accordingly, California law declares a vested mining right under SMARA to be subject to due process protection under the Constitution. *Calvert*, 145 Cal.App.4th at 617.

As of 1969, when it executed an agricultural-land-conservation agreement with the Schneiders, the County officially authorized aggregate mining at the Mine. 10.SER.2714-36; 7.SER.1744-45. In 1994, the County officially recognized the SMARA vested right. Pet. App. 12a, 34a; *see Calvert*, 145 Cal.App.4th at 630-31. In 2002, the County's Board of Supervisors formally approved a 100-year reclamation plan. Pet. App. 34a.

As illustrated by the bold dotted line in this map from the reclamation plan, the Board of Supervisors officially recognized that the vested right covered the entire portion of the Schneider ranch designated as the Mine:



EX099-011

11.SER.2905; *see* Pet. App. 38a.

The County-approved reclamation plan also contemplated that mining would occur all over the Mine tract and that production would vary with market demand, and it placed no limits on the quantity or methods of production. Pet. App. 37a-41a. By placing no such limits, the County acted consistently with California law, which recognizes the diminishing assets doctrine. *Hansen Bros.*, 12 Cal.4th at 542, 553-559.

From 2001 through 2008, the County repeatedly acknowledged the Mine's vested status and also conducted inspections, at least annually, that found no violations. Pet. App. 34a, 47a-48a; 4.SER.1107-08; 11.SER.2945-46;

14.SER.3349-58; 15.SER.3484-87. Before 2009, the County never accused plaintiffs of any regulatory violations. 4.SER.1107-08; 8.SER.2149, 2151-53, 2174, 2195, 2254-55.

In early 2009, the County abruptly changed course and began attacking plaintiffs' mining operation, as a County official conceded, "pretty much out of the blue." 5.SER.1231-32. On April 2, the County sent plaintiffs two letters: one to Joe Hardesty, suddenly accusing the mining operation of multiple regulatory violations despite years of spotless inspection reports, and one to the Schneiders, declaring the Mine had lost the vested right. Pet. App. 47a-48a; 15.SER.3510-17. These letters were issued without notice or hearing, or any kind of process. Pet. App. 47a-48a; 5.SER.1231-32l; 8.SER.2197-98.

The April 2009 letters set the stage for a protracted course of conduct that, over nearly four years, destroyed the Hardesty S&G business operation and permanently ended mining at the Schneider ranch. *See, e.g.*, Pet. App. 12a. The campaign included many specific acts, among them: In 2010, the County sent violation notices that, relying on the 2009 unilateral declaration revoking the vested right, ordered plaintiffs to cease all mining on the ranch if they had not obtained a permit and rezoning within 90 days (an impossible condition to fulfill). Pet. App. 57a-58a, 62a-63a.

For a year, the County embroiled plaintiffs in sham "hearings" with a predetermined outcome. Pet. App. 61a-62a. It partnered with a state agency to conduct a raid on the Mine to trump up alleged "violations." Pet. App. 55a. It groundlessly attempted to require that the County-approved 100-year reclamation plan be amended. Pet. App. 57a-58a. It manipulated a surety requirement—originally set at under $200,000 and ultimately raised to an unjustifiable and "devastating," 9.SER.2527, $8.8 million—in retaliation for this very civil rights lawsuit, which created a lien on the Schneider property that could lead to seizure of the Mine, Pet. App. 12a-13a, 84a; 8.SER.1800-01; *see* CAL. PUB. RES. CODE §2773.1.

Aside from having numerous procedural deficiencies, the hearings were a sham because they gave plaintiffs no hope of any remedy. Although the hearings were nominally about allowing plaintiffs to contest the order to close the Mine for lack of a permit, the County Board of Supervisors adamantly refused to consider recognizing the vested right, *e.g.*, Pet. App. 61a-62a, when a vested right is the *only* exception to SMARA's requirement that miners have a permit, *see* CAL. PUB. RES. CODE §2776; 6.SER.1540. In short, a Catch-22. Plaintiffs could not avoid having to obtain a permit, the issuance of which would be at the discretion of the very government entity that had abused its discretion by revoking the vested right, without

notice or hearing, in the first instance. *See* CAL. PUB. RES. CODE §2770(a); Pet App. 47a-48a.

The evidence showed that the County's abrogation of the vested right sounded the mining operation's death knell: "it would not be economically feasible to operate the Schneider Mine because the permitting costs were too high." 6.SER.1608. That was especially so because the County refused to allow mining to continue while a permit application was pending, "a process that witnesses testified could take ten years and cost millions of dollars." Pet. App. 62a-63a. And, given the County's opposition to plaintiffs, its issuance of a discretionary permit was far from certain.

The County blithely asserts it was taking "action to forestall a potential environmental calamity," Pet. 3, ignoring that the jury rejected that assertion as false. *See* Pet. App. 20a-21a. The County likewise remarks "Plaintiffs *claimed* they had a vested right under California law to mine without a permit," Pet. 7 (emphasis added), as though the jury had not determined that plaintiffs in fact did possess that right, and that it covered essentially the entire ranch. Pet. App. 35a-41a.

In short, the jury rejected both of the County's proffered rationales for its conduct—the "environmental" rationale and an "expansion" rationale, *i.e.*, the County's claim that the mining operation had expanded beyond

the bounds of the vested right. The evidence, including expert testimony and the words of the County's own hydrogeological consultant, established there were never any valid environmental concerns. 4.SER.1109-13; 6.SER.1503-04, 1508-09; 9.SER.2383, 2541, 2546. And the evidence, including County-approved reclamation plan maps, "permitted the jury to infer plaintiffs' vested right to mine at the [Mine] encompassed the entire tract, including expansion into new areas." Pet. App. 38a.

The real explanation for the County's vendetta against plaintiffs, as found by the jury, was not environmental or "land-use" regulation. Rather, it was the demands by Teichert Aggregates, a large mining corporation with sizable operations in Sacramento County, that the County run plaintiffs' small competing operation out of business. Pet. App. 47a-59a. Teichert was the source of what the County's petition vaguely characterizes as "complaints about Plaintiffs' mining activities." Pet. 2, 6. The County's oblique references to "complaints" are an attempt to avoid informing the Court that the main focus at trial was the County's collusion with Teichert to destroy plaintiffs' mining operation by any means possible. *See* Pet. App. 47a-59a.

Although the cascade of specious "enforcement" actions fell on plaintiffs "out of

the blue," 5.SER.1231-32, behind the scenes, Teichert had been pressuring the County to take out its competitor for years. Since 2004, Teichert had been one of a few large corporate miners that were funding Sacramento County mining regulation and receiving priority treatment in return. Pet. App. 52a, 58a. By 2005, Teichert was contemplating a new quarry "within the same market area" as plaintiffs' Mine. 5.SER.1260-61; 19.SER.4270-89. It considered buying the Mine, but concluded plaintiffs' selling price would be too high because of the vested right. 15.SER.3415, 3463; 5.SER.1265-66, 1331. By 2007, Teichert was bothered about losing customers to Hardesty S&G, 5.SER.1278; *see also, e.g.*, 14.SER.3361; 16.SER.3664-73, and it began pressuring County officials to close the Mine. Pet. App. 54a-55a.

Teichert's detailed "Strategy Matrixes" documented a multi-pronged lobbying effort to have plaintiffs' operation closed. Pet. App. 56a-57a. Teichert's campaign came to focus especially on the County because, as documented at a meeting in a congressman's office, the County, as the lead agency for mining regulation, "ha[d] the biggest handle," thus "everything else will pile on top of it." Pet. App. 52a-53a.

In collusion with Teichert, County officials willingly undertook the pile-on. *E.g.*, Pet. App.

51a-59a. "[T]he trial record is replete with evidence that permitted the jury to conclude defendants ceased to recognize plaintiffs' vested right based on improper motivation, and not a legitimate governmental interest." Pet. App. 52a. Specifically, the evidence supported the jury's conclusion that "this decision was based on an improper motivation in the form of political pressure from donors," *id.*, especially Teichert. "Evidence of . . . close communications with Teichert is not scarce in this record." Pet. App. 55a. The district court's careful post-judgment opinion extensively details evidence that the County's only objective in targeting plaintiffs was meeting Teichert's demand to put plaintiffs' small mining operation out of business. Pet. App. 51a-59a.

Simply put, the jury found that the County's treatment of plaintiffs was arbitrary and irrational—meeting the "shocks the conscience" test, Pet. App. 21a (citing *United States v. Salerno*, 481 U.S. 739, 746 (1987))—because it lacked any legitimate governmental objective. Pet. App. 21a, 58a-59a. The County's asserted environmental and expansion rationales were pretextual—they were never valid and never the County's actual objectives. *Id.*

The evidence further showed that the County's conduct proximately caused the permanent stoppage of gravel mining on the

property, depriving the Schneiders of their source of income and the Hardestys of the business they spent 30 years building. Pet. App. 59a-63a.

"What happened during the four years from initial reports to closure of the mine forms the core of the case that went to trial." Pet. App. 12a. After a five-week trial, the jury, considering the totality of the evidence and the entirety of the County's course of conduct, found for plaintiffs on all of their claims against the County. The jury found that the County violated both families' substantive-due-process rights, awarding compensatory damages for losses resulting from destroying the mining enterprise. Pet. App. 11a. The jury also found the County liable for violating both families' procedural-due-process rights. Pet. App. 72a. The Schneiders also brought a First Amendment right-to-petition claim, arising primarily from the retaliatory $8.8 million surety requirement, as to which the jury also found the County liable. Pet. App. 82a-87a.

On appeal, the County "elected not to challenge" the First Amendment and procedural-due-process verdicts. Sacramento County Op. Br., *available at* 2018 WL 5880006 (C.A.9), 23. It challenged the substantive-due-process verdict primarily on the theory that "arbitrary and unreasonable" are two separate elements of a substantive-due-process claim and

that it is possible for admittedly arbitrary government action simultaneously to be reasonable. *Id.* at 41-44. As to the Hardestys, the County also argued that destruction of their 30-year-old mining business was not evidence they were deprived of interests in pursuing their chosen occupation. *Id.* at 29-34.

The Ninth Circuit panel affirmed the County's liability for violating plaintiffs substantive-due-process rights in a nine-paragraph, unpublished, non-precedential memorandum. Pet. App. 1a-7a. The memorandum opinion devotes two paragraphs, one as to each family, to the substantive-due-process liability verdicts. "Because the County did not [timely] raise its argument that the Hardestys failed to support their chosen profession," the court reviewed that issue for plain error, noting that "the jury was presented with evidence that the County ordered the Hardesty mining operation to shut down; the County did so based on impermissible political motivations;" and that the County's arbitrary and unreasonable actions caused the destruction of Hardesty S&G. Pet. App. 4a-5a. The court of appeals also held "[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." Pet. App. 5a.

Although affirming substantive-due-process liability, the panel reversed and remanded the damages as excessive. Pet. App. 2a, 5a-6a. The court denied petitions for rehearing from the County and plaintiffs, Pet. App. 103a-104a, and also denied a motion to stay its mandate pending the County's filing of its petition for certiorari. Accordingly, the case is now in the district court on remand, pending a new trial to redetermine damages. *See* Pet. App. 7a.

SUMMARY OF THE ARGUMENT

This Court has long emphasized that the Fourteenth Amendment's Due Process Clause protects individuals against arbitrary and irrational exercises of governmental power without any reasonable justification in the service of a legitimate governmental objective. Plaintiffs proved, and the jury found, they were the victims of such governmental abuses.

The County's attempt to show conflicts on important legal issues relies on misrepresenting the facts and issues involved in this case. This case does not involve a routine permitting decision, occupational licensing, or government employment. The families' mining enterprise was permanently destroyed by the County's protracted course of conduct at the behest of a large corporate competitor and for no legitimate governmental reason.

Regardless, even if this case actually presented the issues on which the County seeks review, the County cannot show any relevant conflict on any question with ramifications beyond this case.

The County shows no conflict between Ninth Circuit precedent and the Eleventh Circuit regarding substantive-due-process claims stemming from "executive land-use" actions. The non-precedential memorandum opinion in this case does not address the issue, because the County chose not to raise it below. The only precedential Ninth Circuit case cited by the County on this issue did not determine whether executive land-use decisions give rise to valid substantive-due-process claims.

The County likewise cannot show a conflict between the Ninth and Seventh Circuits, both of which require substantive-due-process plaintiffs in the land-use context to meet a high burden of showing egregious, arbitrary and irrational government conduct. Below, the County abandoned any argument that plaintiffs also needed to show inadequate state procedures. In any event, the unchallenged procedural-due-process verdict establishes that state procedures were constitutionally defective.

Nor can the County show any circuit split regarding whether the Hardestys' occupational liberty interest in owning and operating the private business that the County destroyed

warranted substantive-due-process protection. The County does not even acknowledge precedent of this Court recognizing a substantive-due-process cause of action for arbitrary and irrational infringement of occupational interests. Instead, the County relies on inapposite cases, primarily ones involving government employees. Government as employer has greater power to act in relation to its employees than government as sovereign in relation to private citizens. Cases from multiple circuits that are actually analogous to this case—involving egregious government conduct arbitrarily and unreasonably targeting private business owners—uniformly hold that plaintiffs like the Hardestys have a constitutional cause of action.

In any event, reversal as to the Hardestys' claim on that basis would not resolve this case. The Hardestys proved the deprivation of multiple protected interests in addition to occupational liberty, which the Ninth Circuit did not reach. Additionally, it is established that the Hardestys were also deprived of the procedure due them.

Finally, this case is not a suitable vehicle for resolving the conflicts the County contends exist. The Ninth Circuit's perfunctory memorandum opinion carries no precedential weight, and it does not even mention the legal issues the County purports to present to this Court. It is

largely the County's own fault that these issues were not developed below.

This case is in an interlocutory posture, because the Ninth Circuit remanded it for further proceedings. In the district court, the County is presently arguing that the remand reopened all issues in the case, including those the County asks this Court to consider now.

And the County's assertion that the unchallenged procedural-due-process verdict is separable from the legal questions in its petition is wrong. Plaintiffs' procedural- and substantive-due-process claims all stem from the same overall course of egregious government conduct. The established procedural defects further support the County's substantive-due-process liability and also render moot distinctions that the County (unsuccessfully) attempts to draw between the Ninth Circuit's jurisprudence and that of other circuits.

ARGUMENT

The Court has "emphasized time and again that the touchstone of due process is protection of the individual against arbitrary action of government, whether the fault lies in a denial of fundamental procedural fairness or in the exercise of power without any reasonable justification in the service of a legitimate governmental objective." *Cty. of Sacramento v.*

Lewis, 523 U.S. 833, 845-46 (1998) (internal quotation marks, alterations, and citations omitted). In this case, as the jury found and the Ninth Circuit affirmed, the County both denied plaintiffs fundamental procedural fairness and subjected them to exercises of power with no justification in the service of any legitimate governmental objective. "[T]he substantive due process guarantee protects against government power arbitrarily and oppressively exercised," *id.* (citing *Daniels v. Williams*, 474 U.S. 327, 331 (1986)), as it was here.

In its attempt to conjure circuit splits on momentous legal issues from the interstices of the Ninth Circuit's cursory unpublished memorandum opinion, the County begins with wholesale misrepresentation of the facts. The Schneiders' verdict does not rest on a routine "permitting decision." *E.g.*, Pet. 16. The destruction of the Hardestys' lifelong business operation had nothing to do with licensing. *See id.* at 22. Both families were permanently deprived of the livelihood generated from their decades of effort mining at the Schneider ranch by the arbitrary and irrational course of conduct the County waged at the behest of politically powerful Teichert.

As the jury found, the County's asserted regulatory rationales—"environmental" and "expansion"—were pure pretext. The County's

only objective in driving plaintiffs out of the business of gravel mining was to appease the large corporate competitor. The County does not even try to defend targeting plaintiffs to benefit Teichert as a legitimate governmental objective.

The County's attempts to show relevant legal conflicts are thus doomed from the start because they are based on mischaracterizing the claims at issue. The Schneiders did not complain of a discrete "executive land-use" action such as an adverse permitting decision. The Hardestys were not terminated by an employer from particular jobs, much less government jobs, like the plaintiffs in cases on which the County relies. The County targeted the families with a series of illegitimate actions that were designed to and did permanently shutter the vested mining enterprise that the County previously recognized, approved, and acknowledged as operating in compliance with all applicable environmental and other regulations.

But even on their own terms, the County's arguments for the existence of relevant circuit splits on important legal issues fail. The County, which failed in the Ninth Circuit to develop legal issues it now attempts to pursue in this Court, identifies no Ninth Circuit precedent actually conflicting with the Eleventh Circuit's purported rule regarding executive

land-use actions and cannot show that the outcome in this case would have been any different in the Seventh Circuit. As to deprivation of the Hardestys' rights to pursue their chosen occupation, cases involving government as employer are inapposite, and the only analogous cases involving private business owners accord with the result here.

I. THE COUNTY CANNOT SHOW A RELEVANT CONFLICT REGARDING SUBSTANTIVE-DUE-PROCESS LIABILITY FOR "LAND-USE" DECISIONS.

As noted above in respondents' Statement, the County fundamentally misrepresents this case as involving a simple "land-use decision," *e.g.* Pet. 18, rather than a protracted overall course of conduct arbitrarily and irrationally targeting plaintiffs for illegitimate reasons. Thus, the County's characterization of this case as an example of the Ninth Circuit allowing a substantive-due-process challenge to a run-of-the-mill "permitting decision," *id.* at 16, grossly misrepresents the record.

The County's first question presented defines "*legislative* land-use decisions" as enacting "zoning ordinances and other broadly applicable rules governing how people use property" and "*executive* land-use decisions" as "adjudicating permit and variance requests affecting particular people or parcels." Pet. i. This case involves no such land-use decision.

Plaintiffs challenged neither the adoption nor enforcement of any land-use regulation. The Board of Supervisors had already long since voted unanimously that the Mine complied with zoning and was exempt from permit requirements. Plaintiffs' claims arose from the County's autarchic decision to target them for ruin, misusing regulatory tools at its disposal under false pretenses, to benefit plaintiffs' competitor.

Regardless, the County cannot demonstrate a relevant conflict between the Ninth Circuit and other circuits as to the County's purported question regarding executive land-use decisions.

A. This Case Presents No Relevant Conflict Between the Ninth and Eleventh Circuits.

The County cannot point to anything in the unpublished memorandum decision addressing any putative distinction between executive and legislative land-use decisions as relevant to substantive-due-process claims. The opinion contains no such discussion.

Instead, the County relies on *Crown Point Development, Inc. v. City of Sun Valley*, 506 F.3d 851 (9th Cir. 2007), a case not even cited in the memorandum below, as supposedly representative of Ninth Circuit jurisprudence regarding substantive due process and executive land-use actions. But the County

misrepresents the Ninth Circuit's holding in *Crown Point*. That case does not hold "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." Pet. 15. Rather, although the underlying facts involved denial of a permit, *Crown Point*'s holding was expressly limited to finding that, under *Lingle v. Chevron U.S.A. Inc.,* 544 U.S. 528 (2005), the Fifth Amendment does not categorically bar substantive-due-process claims merely because they relate to land use: "We now explicitly hold that *the Fifth Amendment does not invariably preempt a claim* that land use action lacks any substantial relation to the public health, safety, or general welfare." *Crown Point*, 506 F.3d at 856 (emphasis added). *Crown Point* expressly notes that its holding is limited to that issue regarding Fifth Amendment preemption. *Id.* at 856-57 ("This said, there is scant basis for us to go further. We decline to do so . . . ."). *Crown Point* did not reach the issue whether, on its merits, a substantive-due-process claim based on an executive land-use decision could succeed.

Thus, the County has not cited even a single precedential case from the Ninth Circuit holding, in supposed conflict with the Eleventh Circuit, that a successful substantive-due-process claim arose purely from an executive land-use decision.

The memorandum opinion affirming the County's substantive-due-process liability is, of course, not such a case. Not only does the opinion carry no precedential force, but it nowhere even addresses the issue of a purported distinction between executive and legislative land-use actions. *See generally* Pet. App. 1a-7a. Its one-paragraph discussion of the substantive-due-process liability verdict in favor of the Schneiders contains no pronouncements about any purported legal issue that the County seeks to raise before this Court. *See* Pet. App. 5a. In that discussion, the memorandum does not even cite *Crown Point*—or any legal authority. *Id.*

Moreover, the fact that *Crown Point* did not bind the Ninth Circuit panel in this case to allow substantive-due-process claims based on executive land-use actions negates the County's excuse for not developing this legal issue below. An argument that a mere permitting decision cannot give rise to substantive-due-process liability would likely have failed, given that the jury verdict was based on the egregious course of arbitrary and irrational conduct. But *Crown Point* did not preclude the County from raising the argument in its appeal brief. It was the County's own decision to refrain from raising the purported executive-legislative distinction until its petition for rehearing *en banc*. Thus, among many reasons this case is a defective vehicle for addressing the question the County

seeks to present is the County's own failure to develop the issue below.

The only court of appeals that the County identifies as having purportedly "divided land-use challenges into two categories," Pet. 13, is the Eleventh Circuit. The County cites *Hillcrest Property, LLP v. Pasco Cty.*, 915 F.3d 1292 (11th Cir. 2019), and *Greenbriar Village, L.L.C. v. Mountain Brook*, 345 F.3d 1258 (11th Cir. 2003) (per curiam). Because the County identifies no conflicting Ninth Circuit precedent and because the unpublished memorandum below reflects no holding on this issue, which the County could have raised on appeal but did not, this case does not establish any conflict between the Ninth and Eleventh Circuits. If the Court is ever inclined to address the Eleventh Circuit's apparently unique approach to substantive due process in the land-use context, a case from the Eleventh Circuit, or at least one raising an actual conflict with that circuit's jurisprudence, could be an appropriate vehicle. This case is not.

Further, and in any event, the Ninth Circuit's precedential case law already stringently constrains judicial scrutiny of municipal land-use decisions. It is well-established in that circuit that federal courts "were not created to be the Grand Mufti of local zoning boards, nor do they sit as super zoning boards or zoning boards of appeals." *Dodd v.*

Hood River Cty., 136 F.3d 1219, 1230 (9th Cir. 1998) (internal quotation marks, citations, and alterations omitted) (quoting *Hoehne v. County of San Benito,* 870 F.2d 529, 532 (9th Cir. 1989), and *Raskiewicz v. Town of New Boston,* 754 F.2d 38, 44 (1st Cir. 1985)). Contrary to the County's insinuations, courts in the Ninth Circuit are not superintending every routine land-use decision by municipalities. The County's arbitrary and irrational course of conduct targeting plaintiffs here—no mere routine permitting decision—is, thankfully, an extreme outlier.

B. This Case Presents No Relevant Conflict Between the Ninth and Seventh Circuits.

Nor can the County show any relevant conflict between this case and the Seventh Circuit's jurisprudence. Even if there were such a conflict, this case would remain an unsuitable vehicle for resolving it, given that the non-precedential memorandum opinion contains no analysis of the issues the County seeks to raise; that the County failed to develop those issues below; and that the established facts of this case involve not a simple permitting decision but an egregious course of conduct. But, regardless, far from being in conflict, the Seventh Circuit's standard for finding substantive-due-process violations in the land-

use context is essentially the same as that applied in the Ninth Circuit.

In the Seventh Circuit, "'Unless a governmental practice encroaches on a fundamental right, substantive due process requires only that the practice be rationally related to a legitimate governmental interest, or alternatively phrased, that the practice be neither arbitrary nor irrational.'" *Gen. Auto Serv. Station v. City of Chicago*, 526 F.3d 991, 1000 (7th Cir. 2008) (quoting *Lee v. City of Chicago*, 330 F.3d 456, 467 (7th Cir. 2003)). Similarly, in the Ninth Circuit, "the 'irreducible minimum' of a substantive due process claim challenging land use action is failure to advance any legitimate governmental purpose." *Shanks v. Dressel*, 540 F.3d 1082, 1088 (9th Cir. 2008). Thus, a substantive-due-process plaintiff in the Ninth Circuit must show that the governmental land-use action "was arbitrary and irrational," *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 920 F.2d 1496, 1508 (9th Cir. 1990), just as must a plaintiff in the Seventh Circuit.

There is thus no conflict between the standards applied to substantive-due-process claims involving land-use decisions in the Seventh and Ninth Circuits. And the "arbitrary and irrational" test applied by both circuits also answers the County's concern about whether rights related to land-use deserve protection as fundamental rights. The

Ninth and Seventh Circuits both recognize that, when no fundamental right is at stake, only the most egregious governmental conduct violates substantive due process. While a fundamental right may enjoy protection from even light encroachment, in the land-use context, a substantive-due-process plaintiff must clear the much higher bar of establishing that the governmental action served no legitimate governmental purpose. *See Lee*, 330 F.3d at 467; *Shanks*, 540 F.3d at 1088; *Samson v. City of Bainbridge Island*, 683 F.3d 1051, 1058 (9th Cir. 2012).

Here, the jury found, and the Ninth Circuit affirmed, that the County's conduct served no legitimate governmental objective and was egregious. The County, of course, disputed below that respondents met that "exceedingly high burden." *Samson*, 683 F.3d at 1058; *Shanks,* 540 F.3d at 1088. But it cannot dispute, as a legal matter, that the burden the Ninth and Seventh Circuits both impose is exceedingly high.

The County does not propose to challenge in this Court the jury's finding that the County's conduct amounted to "an abuse of power lacking any reasonable justification in the service of a legitimate governmental objective." *Samson*, 683 F.3d at 1058 (quoting *Shanks*, 540 F.3d at 1088). Rather, it will ask the Court to adopt a rule under which plaintiffs have no

constitutional remedy even for such an abuse of power. The County has not demonstrated a split by which the Seventh Circuit would deny plaintiffs any remedy for such an abuse.

Finally, to the extent the County contends there is a conflict arising from a purported Seventh Circuit requirement that plaintiffs in this context allege inadequate state procedures, it again asks this Court to consider an issue that the County failed to develop below. In its district court post-judgment motions, the County attempted to argue that plaintiffs failed to meet a supposed exhaustion requirement by pursuing state-court mandamus relief, and the district court expressly held that the state procedures were not adequate. Pet. App. 87a-88a ("plaintiffs lacked an adequate opportunity to litigate"). The County abandoned any challenge to that holding in its appeal. Although the County's statement of the case in its Ninth Circuit opening brief referred to the possibility of challenging "local zoning decisions" in state court, its arguments regarding the substantive-due-process verdicts never mentioned the adequacy of state procedures as an issue. Sacramento County Op. Br., *available at* 2018 WL 5880006 (C.A.9), 16, 41-52. Given that this issue was never raised in the Ninth Circuit, the memorandum opinion, accordingly, says nothing about it. Pet. App. 4a-5a.

Indeed, contrary to its misrepresentation that it "fully aired the arguments here in its rehearing petition, affording the Ninth Circuit an opportunity to change its approach," Pet. 25, the County in fact did not even mention this argument about the Seventh Circuit's approach in its rehearing petition. Sacramento County Pet. for Rehearing at 10-14, *Hardesty v. Sacramento Cty.*, 824 F. App'x 474 (9th Cir. 2020) (Nos. 18-15772, 18-15773). Rather, the rehearing petition requested only that the *en banc* court "adopt the Eleventh Circuit's position." *Id.* at 13.

Moreover, the County's appeal did not challenge the jury verdict and district court judgment holding that the County violated plaintiffs' procedural-due-process rights. Sacramento County Op. Br., *available at* 2018 WL 5880006 (C.A.9), 23; *see also* Pet. App. 72a-80a. Thus, in this case, the inadequacy of state procedures afforded to plaintiffs was established and not appealed. Whether or not adequacy of state procedures is relevant to the substantive-due-process inquiry can make no difference to the outcome of this case.

II. THE COUNTY CANNOT SHOW A RELEVANT CONFLICT REGARDING SUBSTANTIVE-DUE-PROCESS CLAIMS OF PRIVATE BUSINESS OWNERS SUBJECTED TO ARBITRARY AND IRRATIONAL GOVERNMENT CONDUCT.

The judgment below accords with precedent of this Court, ignored by the County, indicating that government infringement of the liberty interest in pursuing one's chosen occupation offends substantive due process when it is arbitrary and irrational. *Harrah Independent School Dist. v. Martin*, 440 U.S. 194 (1979), recognized such a cause of action for a teacher who was discharged for not complying with a continuing-education requirement. *Id.* at 198-99. Because she was not asserting a fundamental right, for her substantive-due-process claim to succeed, she would have "to show that there is no rational connection" between the requirement and a legitimate government objective, which she could not. *Id.* The Hardestys, by contrast, have made that showing here. *E.g.*, Pet. App. 5a.

In seeking a ruling that the Hardestys had no substantive-due-process claim, the County is asking the Court to overturn *Harrah*, without even acknowledging that precedent. Nor can the County show a conflict with any relevant case law from other circuits.

A. The County Relies Primarily on Cases About Government Employment; No Cases Involving Private Businesses Conflict.

The County does not cite a single conflicting case from any circuit that applies to the circumstances of this case. In this case, the Hardestys were owners and operators of a private business, not County employees. The jury found, and the Ninth Circuit affirmed, that arbitrary and irrational conduct by the County—acting not as employer but as sovereign—destroyed the private business to which the Hardestys had devoted their entire adult lives and that was their livelihood.

The County relies primarily on cases involving government employees suing their governmental employers. Such cases may conflict with *Harrah*, which involved a public-school teacher. And, in any event, they are inapposite to this case.

The County cites no case in which any circuit has held that a private business owner lacked a cause of action against a governmental entity for its arbitrary and irrational treatment of the private party. Indeed, in the only cases identified by the County that are actually analogous to this case, the courts held that plaintiffs in the Hardestys' position had claims.

The County fails to demonstrate there is either a conflict regarding claims involving shuttering private businesses for illegitimate reasons or a burgeoning raft of litigation involving such claims requiring the Court's attention. The latter failure perhaps reflects the rarity of government conduct as egregious as the County's toward the Hardestys.

The County's argument that some circuits recognize only procedural-due-process protection for an individual's occupational liberty interest relies primarily on two cases: *Zorzi v. County of Putnam*, 30 F.3d 885 (7th Cir. 1994), and *Singleton v. Cecil*, 176 F.3d 419 (8th Cir. 1999) (*en banc*), in which the Eight Circuit agreed with the Seventh Circuit's decision in *Zorzi*. Each of those cases involved a terminated municipal employee suing the government employer over the termination. The plaintiff in *Zorzi* was fired from her job as a sheriff's office dispatcher. 30 F.3d at 888. The plaintiff in *Singleton* was fired from his job as a police officer—an at-will employee position under the applicable Missouri law. 176 F.3d at 420.

Those cases' holdings that government employees did not have substantive-due-process claims against their government employers for employment actions are inapposite to this case. And even in the government-employment context, there is little daylight between the

Ninth and the Seventh and Eighth Circuits regarding substantive-due-process claims.

Because it can point to nothing even mentioning this issue in the unpublished memorandum below, the County cites the Ninth Circuit's opinion in *Engquist v. Oregon Department of Agriculture*, 478 F.3d 985 (9th Cir. 2007), *aff'd*, 553 U.S. 591 (2008). But *Engquist*, in which the plaintiff's employment was terminated by a state agency, expressly recognized that "constitutional review of government employer decisions is more constrained than the review of legislative or regulatory ones." *Id.* at 990, 997. Quoting a Seventh Circuit case, *Engquist* limited substantive-due-process claims "for a public employer's violations of occupational liberty . . . to extreme cases, such as a 'government blacklist, which when circulated or otherwise publicized to prospective employers effectively excludes the blacklisted individual from his occupation, much as if the government had yanked the license of an individual in an occupation that requires licensure.'" *Id.* at 997-98 (quoting *Olivieri v. Rodriguez,* 122 F.3d 406, 408 (7th Cir. 1997)). Under that standard, the Ninth Circuit held Engquist had no substantive-due-process claim against her government employer for her termination, *id.* at 999, the same result that would have obtained in the Seventh Circuit under *Zorzi* or the Eighth Circuit under *Singleton*.

To the extent, if any, there is even a nuanced conflict between *Engquist* and *Zorzi* and *Singleton* in the government-employment context, it is irrelevant to this case not involving government employment. The County's assertion that it makes no difference that the cases it relies on involved public-employee plaintiffs, Pet. 22, is wrong. "[T]here is a distinction between the 'government acting "as a proprietor" that was managing "its own internal affairs" rather than as a "lawmaker" that was attempting "to regulate or license".'" *Engquist*, 478 F.3d at 994 (quoting *Singleton*, 176 F.3d at 425). "[T]he government as employer indeed has far broader powers than does the government as sovereign." *Waters v. Churchill,* 511 U.S. 661, 671 (1994) (O'Connor, J., plurality opinion). That distinction explains why, under the Ninth Circuit's standard, government employees have substantive-due-process claims only for employer actions with consequences extending beyond the particular government job. *See Engquist*, 478 F.3d at 998 (public employees only have "substantive due process protection against government employer actions that foreclose access to a particular profession to the same degree as government regulation").

In short, this case accords with *Harrah* and presents no conflict with *Zorzi* and *Singleton*. Other cases relied on by the County

likewise do not show the existence of any relevant conflict.

In *Illinois Psychological Ass'n v. Falk*, 818 F.2d 1337 (7th Cir. 1987), the plaintiffs had no claim because they suffered no deprivation of their occupations. They were restricted only from being on hospital medical staffs, not from practicing psychology at hospitals. *Id.* at 1344 ("Being a member of a hospital's medical staff is not an occupation; it is a privilege attached to an occupation.").

Other cases the County cites say nothing about occupational liberty having *only* procedural-due-process protection because, in the first instance, they involved *only* procedural-due-process claims. *Bowman v. Iddon*, 848 F.3d 1034, 1039-40 (D.C. Cir. 2017); *Jones v. Bd. of Comm'rs of Alabama State Bar*, 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 (1st Cir. 1979). Observing, in a case presenting only procedural-due-process claims, that an occupational interest enjoys procedural-due-process protection is not the same as saying there are no circumstances in which such an interest may also warrant substantive-due-process protection. And at least one of these cases did not involve an occupational interest at all: the plaintiffs were

removed from bank directorships, positions not constituting their occupations, and "retained the same employment after their removal." *Rodriguez*, 596 F.2d at 491-92 & n.4.

Hill v. Borough of Kutztown, 455 F.3d 225 (3d Cir. 2006), is, like *Zorzi* and *Singleton*, inapposite because it involved a terminated public employee. *Id.* at 230. In the only portion of *Hill* the County cites, *Hill* discusses only a procedural-due-process claim. *Id.* at 235. A footnote in *Hill*, not cited by the County, notes that a substantive-due-process claim was not available under Third Circuit precedent specific to "public employment." *Id.* at 234 n.12.

The County cannot identify a single case from any circuit applying its preferred rule in the context of a private business owner-operator subjected to arbitrary and irrational government conduct. Rather, the only cases the County cites involving plaintiffs like the Hardestys allowed claims like the one on which the Hardestys prevailed. *San Jacinto Sav. & Loan v. Kacal*, 928 F.2d 697, 702-04 (5th Cir. 1991); *Chalmers v. City of Los Angeles*, 762 F.2d 753, 755-59 (9th Cir. 1985). The Third and Sixth Circuits also allow similar claims. *Thomas v. Indep. Twp.*, 463 F.3d 285, 290, 297 (3d Cir. 2006); *Sanderson v. Village of*

Greenhills, 726 F.2d 284, 286-87 (6th Cir. 1984) (per curiam). There is no split of authority when, as here, all the pertinent authority is on the same side of the issue in question.

Moreover, the County's reference to cases concerning "licensed private workers like the Hardestys," Pet. 22, further shows how its arguments bear no connection to the actual facts of this case. The Hardestys' claims have nothing to do with occupational licensing. The County destroyed the successful business enterprise that constituted the Hardestys' lifelong occupation. Indeed, perhaps the only relevant mention of a license at trial was Joe Hardesty's testimony that, after the County got done with it, almost the only thing left of the Hardesty S&G business was "a business license." 8.SER.2216-17.

B. Reversal on the Question Presented Would Not Dispose of the Hardestys' Claim.

The County can show neither a conflict regarding the existence of a substantive-due-process claim for the deprivation of the Hardestys' occupational-liberty interest nor any reason the unpublished judgment below warrants reversal on that issue. Additionally, reversal on that ground would not resolve this

case. Contrary to the County's misrepresentations, this case does not cleanly present the legal issue whether occupational-liberty deprivations are actionable under substantive due process in isolation.

If the Court were to grant certiorari and hold, contrary to all circuits that have considered the issue, that private business owners in the Hardestys' position have no substantive-due-process claim for deprivation of occupational liberty, additional issues would remain. First, the Hardestys were deprived not just of their occupational-liberty interest but of multiple protected interests. Second, it is established as fact in this case that the same course of conduct that underlay the Hardestys' substantive-due-process claim also violated procedural due process.

In addition to depriving them of their interest in pursuing their chosen occupation of owning and operating Hardesty S&G, the Hardestys proved that the County's destruction of that business involved other deprivations. Pet. App. 30a-32a. The goodwill of Hardesty S&G was "a property interest entitled to protection." *Soranno's Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1316 (9th Cir. 1989); *see* Pet. App. 31a-32a. The Hardestys had a protectable property interest in operating the

Mine under the previously recognized vested right. *See* Pet. App. 30a-31a; CAL. PUB. RES. CODE §2776. The shutdown also infringed the Hardestys' right to devote land to a legitimate use. *See, e.g.*, *Washington ex rel Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 121 (1928); *see also* Pet. App. 32a.

Because the court of appeals rejected the County's main argument that the Hardestys had no evidence they were deprived of their occupational liberty, it did not reach the issues of whether any of the additional deprivations was sufficient to support the substantive-due-process verdict. Pet. App. 4a-5a. Reversal as to the Hardestys' occupational interest would require that the other deprivations be addressed.

Particularly because the procedural-due-process verdict was not even appealed, it would also be necessary to determine the effect of that verdict for the County's liability for infringing the Hardestys' occupational liberty. The County can no longer dispute that the course of conduct causing the destruction of Hardesty S&G violated the Hardestys' procedural rights. It would hardly be fair to deprive the Hardestys of a constitutional remedy on a *post hoc* basis because they were required to plead their claims under circuit

precedent that, like precedent in all other circuits to address the issue, recognized a substantive-due-process cause of action for business owners targeted by arbitrary and irrational government conduct.

III. This Case Is Not a Suitable Vehicle for Reviewing the Questions the County Poses.

As discussed above, the County cannot demonstrate that this case presents any relevant conflict with the jurisprudence of any other circuit. The County identifies no precedential Ninth Circuit authority in conflict with the Eleventh Circuit's purported rule regarding executive land-use actions; nor can it show that the result in this case would be different in the Seventh Circuit. As to deprivation of the Hardestys' occupational liberty, the County identifies no conflicting cases applying to private business owners targeted by arbitrary and irrational government conduct, only inapposite cases involving government employees that do not even squarely conflict with Ninth Circuit precedent regarding government employment.

But even were there any relevant conflicts, this case does not present a suitable vehicle for resolving them. As noted above, although the County could have developed issues pertinent to its purported questions in the Ninth Circuit, it

chose not to. It now asks this Court to review afresh questions purportedly embedded in two short paragraphs of the Ninth Circuit's nine-paragraph, unpublished memorandum opinion. The perfunctory opinion contains no analysis—or even conclusory statements of law—pertinent to the County's proposed questions. Pet. App. 5a-6a. And, as discussed above, the County cannot demonstrate relevant conflicts even with Ninth Circuit precedent supposedly lurking behind the non-precedential memorandum in this case.

The County cites examples of cases in which this Court granted certiorari as to non-precedential memorandum opinions. Those cases differ sharply from this case as they involved well-developed circuit splits on issues being hotly and widely litigated.

In *McDonald v. Domino's Pizza, Inc.*, 107 F. App'x 18 (9th Cir. 2004), *rev'd,* 546 U.S. 470 (2006), the court of appeals panel applied entrenched precedent from its own circuit while explicitly recognizing that "our sister circuits may reach a contrary result, *see, e.g.*, *Guides, Ltd. v. Yarmouth Group Prop. Mgmt., Inc.,* 295 F.3d 1065, 1071-73 (10th Cir. 2002)." *McDonald*, 107 F. App'x at 18-19. Thus, "[t]he Court of Appeals acknowledged that this approach set it apart from other Circuits." *Domino's Pizza*, 546 U.S. at 474. Here, the County has shown no relevant splits on the

questions it poses, much less any acknowledged by the panel below.

In *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731 (2020), the Court decided a trio of cases from different circuits—demonstrating, between them, a distinct split regarding the interpretation of "sex" as used in Title VII, a hotly contested issue of major public concern. "While these cases began the same way, they ended differently." *Id.* at 1738. Here, the County identifies no relevant conflict, let alone a decisive one. Nor does the County show that any issues in this unique case have, like the issue of how Title VII applies to discrimination against homosexual and transgender persons, been roiling lower courts and public discussion. Notably also, of the three cases consolidated in *Bostock*, the only one in which the circuit court decision was unpublished was also the only case in which the plaintiff had survived to benefit personally from the Court's favorable ruling. *Id.*

Kimbrough v. United States, 552 U.S. 85 (2007), involved a mature split on a frequently litigated issue regarding the federal sentencing guidelines. *Id.* at 93 n.4 (identifying nine circuits reflecting opposite sides of the split). *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993), likewise resolved a well-developed split on a frequently litigated issue, in that case,

regarding workplace sexual harassment. *Id.* at 20.

These cases do not help the County's argument that the Court should review the cursory unpublished decision below. The County can show neither a squarely drawn conflict nor that government conduct as egregious as the jury found the County's to be is so common as to generate frequent litigation analogous to this case.

The County also posits that the interlocutory posture of this case is no impediment to this Court's immediate review of legal issues regarding the applicability of substantive due process. However, on remand in the district court, the County is currently arguing that the Ninth Circuit's decision constituted an "open reversal," reopening all issues in the case to be relitigated. Joint Status Report at 4, *Hardesty v. Sacramento Metro. Air Quality Mgmt. Dist.*, 307 F.Supp.3d 1010 (E.D. Cal. 2018) (No. 2:10–cv–02414–KJM–KJN). Plaintiffs strongly reject that contention. But the County cannot have it both ways, arguing that the Ninth Circuit did not resolve all legal issues yet simultaneously telling this Court that the Ninth Circuit's disposition of those issues is ripe for the Court's review. Indeed, the Court finds cases that were remanded by a circuit court to be unripe even when it is undisputed that the circuit court

fully resolved legal issues. *E.g.*, *Bhd. of Locomotive Firemen & Enginemen v. Bangor & A. R. Co.*, 389 U.S. 327, 328 (1967) ("The Court of Appeals ruled on various legal issues presented to it but remanded to the District Court to consider whether there had in fact been a contempt, ..." "However, because the Court of Appeals remanded the case, it is not yet ripe for review by this Court. The petition for a writ of certiorari is denied.").

In the district court on remand, plaintiffs argue—and believe it is clear from the Ninth Circuit's memorandum—that the only remaining issue is redetermination of damages. *See* Pet. App. 2a, 5a-6a. Should the County succeed in getting the damages awards significantly reduced, its rationale for pursuing further review will be largely mooted. *See* Pet. 3, 17 (expressing concern about "breathtaking verdicts," notwithstanding that the Ninth Circuit here reversed the damages awards). And should the County prevail in its argument about an "open reversal," the legal issues will be litigated anew in the district court and, perhaps, the Ninth Circuit.

Finally, the issues the County presents are inseparable from the unchallenged procedural-due-process verdict. The County's assertion that plaintiffs' procedural-due-process claims "were tried on different facts and theories than" their substantive-due-process claims, Pet. 25, is

wrong. The procedural defects—which included, but were not limited to, the lack of any process when the County revoked the vested right and the procedurally defective sham "hearings" in which the County refused to address whether the vested right ever existed, all undertaken at the behest of plaintiffs' competitor—were part and parcel of the overall course of conduct underlying plaintiffs' substantive-due-process claims. *See, e.g.*, Pet. App. 12a-13a, 51a-59a, 73a-80a.

The lack of procedure thus constituted both evidence and aspects of the arbitrary and irrational treatment violating plaintiffs' substantive-due-process rights. The jury's un-appealed procedural-due-process verdict establishes that the myriad procedural defects proved at trial also underlie the substantive-due-process verdict. As noted above, as to the Schneiders' substantive-due-process claim, the procedural-due-process verdict established the inadequacy of state procedures; as to the Hardestys, it established the lack of procedure surrounding the deprivation of their occupational-liberty interests.

CONCLUSION

For these reasons, the Court should deny the petition.

Respectfully submitted,

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