No. 20-1286

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

REPLY IN SUPPORT OF 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

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provision

INTRODUCTION

This case presents two substantive due process questions that have divided lower courts. First, the circuits disagree on whether municipalities' executive land-use decisions, such as permit rulings, may be challenged via substantive due process claims, particularly when state-law remedies are adequate. Second, the circuits disagree on whether an occupational-liberty claim that the government has deprived an individual of a chosen profession is actionable under substantive due process.

Sacramento County's petition demonstrated that, over the last century, this Court has steadily narrowed substantive due process to protect only fundamental rights, such as the right to marry or to raise children, in contrast to state-law property and contract rights. Here, Plaintiffs seek to vindicate purely economic interests grounded in state law.

Plaintiffs do not dispute this account. Instead, Plaintiffs' brief in opposition focuses on their version of the facts, emphasizing overheated allegations of a corporate conspiracy and sham hearings. Yet they never tie their allegations to the purely legal issues the County has placed before this Court. Plaintiffs eventually turn to the questions raised in the County's petition. But they are unable to rebut the existence of multiple circuit splits on important issues. Contrary to Plaintiffs' contention, other circuits would have rejected the theories underlying Plaintiffs' substantive due process claims that survived scrutiny in the Ninth Circuit.

Despite Plaintiffs' efforts to show otherwise, this case is an ideal vehicle to decide the questions presented. Reversal would eliminate or narrow further proceedings in this case, and would clarify an area of the law that sorely needs it. Plaintiffs' objections to the suitability of review are illusory. This Court should grant a writ of certiorari and reverse the judgment of the Ninth Circuit.

ARGUMENT

1. *Factual disputes flagged by Plaintiffs do not diminish the need for review.* The brief in opposition relitigates factual disputes regarding the County's motives for regulating Plaintiffs' mining operation. Plaintiffs claim the County had no valid reason to require them to obtain a mining permit, and they assert the County sought to benefit a competitor. Opp'n 4–13, 16, 20–23. Even if a jury could have believed these assertions, they have nothing to do with the legal questions in the County's petition. The County's motives are irrelevant to whether executive land-use decisions, such as permit denials, are actionable under substantive due process, and to whether a chosen-profession theory implicates substantive (as opposed to procedural) due process. Plaintiffs' emphasis on the facts is an effort to distract attention from the important legal issues raised in the County's petition.

Plaintiffs also recast the factual basis of their substantive due process claims to avoid the circuit splits identified in the County's petition. Plaintiffs claim, for example, that this case does not involve a land-use permitting decision or occupational

licensing. Opp'n 20. Nonsense. Plaintiffs' central contention is that the County required them to obtain a mining permit for invalid reasons, driving them from the business and impairing their use of the land. *See* Pet. 7.

2. *The circuits disagree regarding whether an executive (non-legislative) land-use decision can give rise to a substantive due process claim*. The petition showed that the Eleventh Circuit bars substantive due process challenges to executive land-use decisions, while the Ninth Circuit does not. *See* Pet. 13, 15–16 (citing *Crown Point Dev., Inc. v. City of Sun Valley*, 506 F.3d 851, 852–53, 855–56 (9th Cir. 2007)). Plaintiffs attempt to minimize the conflict by pointing out that *Crown Point* did not address the distinction between legislative and executive action. Opp'n 24–26. But the very fact that *Crown Point* drew no lines is what matters. Without limitation, *Crown Point* authorized substantive due process claims based on wrongful land-use decisions, including executive decisions like the denial of a permit in that case. *See* Pet. 15–16.

The Ninth Circuit's holding in *Crown Point* opens the door to substantive due process liability that the Eleventh Circuit has closed. Indeed, the Ninth Circuit has applied substantive due process analysis to numerous executive actions, like "a routine, even if perhaps unwise or legally erroneous, executive decision to grant a third-party a building permit." *Shanks v. Dressel*, 540 F.3d 1082, 1089 (9th Cir. 2009); *see also Samson v. City of Bainbridge Island*, 683 F.3d 1051, 1057–58 (9th Cir. 2012) (applying substantive due process to a city's enforcement of a development moratorium); *Sinaloa*

Lake Owners Ass'n v. City of Simi Valley, 882 F.2d 1398, 1408–10 (9th Cir. 1989) (applying substantive due process to government decision to breach a private dam). In light of these decisions, the Ninth Circuit's statement that it does not sit as a super zoning board, *see* Opp'n 26–27, provides cold comfort to municipalities—seemingly all land-use decisions are subject to substantive due process review in the Ninth Circuit.

3. *The circuits are split regarding the availability of substantive due process to challenge land-use decisions when state-law remedies are adequate*. The Seventh Circuit bars substantive due process challenges to land-use decisions when applicable state law provides a remedy. *GEFT Outdoors, LLC v. City of Westfield*, 922 F.3d 357, 368–69 (7th Cir. 2019); Pet. 13–14. The Ninth and Eleventh Circuits, by contrast, impose no such limitation. Pet. 14–15. The availability of adequate state-law remedies would have doomed the Schneiders' lawsuit in the Seventh Circuit, but it was no impediment in the Ninth Circuit. This split of authority also merits review.

Here, Plaintiffs could have sought redress in California state court; indeed, they did so before abandoning state court for this federal lawsuit, Pet. 7. Accordingly, Plaintiffs' contention that the County unfairly resolved their permitting dispute, Opp'n 46–47, is beside the point. What matters is the indisputable availability of California remedies.

Also irrelevant is Plaintiffs' observation that the Seventh and Ninth Circuits use similar language to describe what a substantive due process plaintiff must prove in order to prevail. *See* Opp'n 27–30. The fact

remains that the Seventh Circuit imposes an inadequate-state-remedies hurdle that the Ninth Circuit does not. That circuit split warrants this Court's intervention.

4. *The circuits disagree on whether a chosen-profession theory is actionable under substantive due process.* Unable to deny the split of authority regarding whether chosen-profession claims implicate substantive due process, Plaintiffs offer three arguments why this Court should refrain from resolving the split. They are unpersuasive.

First, Plaintiffs contend they should not be compared to public-sector workers. *See* Opp'n 33–39. But the circuit split identified by the County applies to private- and public-sector workers alike. In a case involving private-sector workers (like the Hardesty Plaintiffs), the Seventh Circuit held that occupational liberty implicates only procedural due process, not substantive due process. *Ill. Psych. Ass'n v. Falk*, 818 F.2d 1337, 1343 (7th Cir. 1987). In the Fifth and Ninth Circuits, by contrast, private-sector workers may pursue substantive due process claims to vindicate their occupational-liberty interests. *Dittman v. California*, 191 F.3d 1020, 1029–31 (9th Cir. 1999) (entertaining acupuncturist's substantive due process claim); *San Jacinto Sav. & Loan v. Kacal*, 928 F.2d 697, 702–04 (5th Cir. 1991) (entertaining arcade owner's substantive due process claim). This circuit split is ripe for review.

In any event, Plaintiffs' place-of-work distinction makes little sense. It is true, as Plaintiffs emphasize, Opp'n 18, 36, that a citizen must accept certain limitations on his freedom in entering government

service. *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006); *accord Waters v. Churchill*, 511 U.S. 661, 671 (1994) (plurality opinion). But that First Amendment principle about what government employees may *say* has nothing to do with whether they may be *employed* and pursue their chosen professions. As explained in the County's petition, Pet. 22–23, the scope of an individual's liberty interest in pursuing the profession of his choice should not expand or contract depending on whether the individual works for the government or a private business. There is no legal or logical basis for allowing private-sector workers to pursue substantive due process claims while foreclosing them for public-sector workers.

Second, Plaintiffs cite *Harrah Independent School District v. Martin*, 440 U.S. 194 (1979) (per curiam), Opp'n 32–33, 36, without appreciating that it reveals a conflict in this Court's jurisprudence that bolsters the case for certiorari here. *Harrah* rejected a schoolteacher's substantive due process claim that was based on the school district's refusal to renew her contract. *Harrah*, 440 U.S. at 195, 198–99. The Court began by observing that the teacher was *not* suing to vindicate a fundamental right. *Id.* at 198. Then the Court analyzed whether the school district had acted rationally, and concluded that it had. *Id.* at 198–99.

The absence of a fundamental right at stake in *Harrah* would have ended the analysis before it started under this Court's modern substantive due process jurisprudence. *See Dist. Att'y's Off. for Third Jud. Dist. v. Osborne*, 557 U.S. 52, 72 (2009) (not applying rational-basis scrutiny after finding "no such substantive due process right" as a "right to DNA evidence"); *compare Obergefell v. Hodges*, 576 U.S.

644, 671 (2015) (recognizing substantive due process protection for same-sex marriage because "[t]he right to marry is fundamental as a matter of history and tradition"), *with id.* at 737 (Alito, J., dissenting) ("'[L]iberty' under the Due Process Clause should be understood to protect only those rights that are '"deeply rooted in this Nation's history and tradition."'" (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997))). So *Harrah* shows a discrepancy in the Court's own cases on the question in the petition—whether there is an actionable substantive due process claim (and whether rational-basis scrutiny is available or pertinent) when non-fundamental rights are infringed.

Third, the record belies Plaintiffs' effort to repackage the Hardestys' substantive due process theory as one of several alternatives, such as the deprivation of goodwill and the right to devote land to a legitimate use. *See* Opp'n 40–41. The Hardestys did not pursue these theories at trial—the jury was instructed that the Hardestys pursued *only* a chosen-profession claim. E.D. Cal. ECF No. 461 at 23. It is too late for the Hardestys to reframe their claim to avoid the circuit split discussed.

5. *There are no procedural obstacles to this Court's review*. The petition showed this case presents a good vehicle for reviewing the questions presented. Plaintiffs contend that the County did not preserve, or did not fully raise, some of the circuit splits and subsidiary issues discussed above. Opp'n 25–26, 31. This contention is misguided. Ninth Circuit law is firmly settled against the County on the questions raised in this Court, and a party need not take special steps to preserve purely legal arguments that would

be futile to raise. *E.g., United States v. Pepe*, 895 F.3d 679, 691 (9th Cir. 2018) (collecting cases and explaining that a "defendant need not raise a futile defense at trial in order to preserve it for appeal"). It is no surprise the Ninth Circuit's decision did not discuss the background legal principles the County challenges here: the panel lacked the authority to alter them. *See* Pet. 25.

And to preserve the questions for *this* Court's review, the County needed to litigate below an overarching "federal claim," not every subsidiary "argument." *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 378–79 (1995) (allowing petitioner to argue in this Court that Amtrak is a *federal* entity, after arguing below it is a *private* entity). The County met that burden by consistently arguing against substantive due process liability in the lower courts.

Nor is there merit to Plaintiffs' contention that this Court's review is premature due to the Ninth Circuit's remand. As the petition explained, Pet. 24, the questions presented here are purely legal and do not require additional factual development. If this Court grants review, the County will alert the district court to stay further proceedings. And if this Court reverses the Ninth Circuit's decision, the need for further proceedings in the district court will be narrowed or eliminated.

Finally, Plaintiffs are wrong that the County's decision not to challenge their *procedural* due process claims precludes review of their *substantive* due process claims. *See* Opp'n 31, 41–42, 46–47. Plaintiffs' procedural due process claims challenged the fairness of the County's hearing procedures, and the jury

awarded each set of Plaintiffs nominal damages on those claims. App. 13a, 74a–80a. By contrast, Plaintiffs' substantive due process claims attacked the motives for the County's regulatory decisions, yielding a verdict in excess of $100 million. Pet. 7. The claims are legally and factually distinct. Plaintiffs' procedural due process claims cannot rescue their substantive due process claims, which were tried on legally untenable theories.

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

June 4, 2021