No. 21-1569

In The
Supreme Court of the United States

SOUTHPOINTE PARTNERS, LLC,

Petitioner,

v.

LOUISVILLE METRO GOVERNMENT, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The Kentucky Court Of Appeals

REPLY IN SUPPORT OF CERTIORARI

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ARGUMENT

The Respondents' brief in opposition shows exactly why certiorari is warranted in this case: they proudly defend Kentucky's ability to vitiate § 1983 and they dare this Court to intervene.

Respondents submit that Kentucky's legislature is capable of denying SouthPointe any remedy for the financial harm caused by an agency's denial of due process, even though § 1983 has long guaranteed some form of financial redress.

Beyond simply misstating the law, the consequences of the decisions below defeat the purpose of § 1983 and greatly diminish the force and application of federal law in state court. Because of the grave implications to both federal statutory civil rights and foundational due process principles, certiorari should be granted.

I. The Abrogation of a Federal Statutory Claim Warrants Review.

Respondents argue exactly what SouthPointe warned in its Petition: that Kentucky can disregard or nullify SouthPointe's federal statutory claims by simple recitation to judicial review. Like the courts below, Respondents give no consideration to the separate and unique injury that flows from a violation of constitutional rights—the very injury that § 1983 demands be redressed.

As critical Reconstruction Era civil rights legislation enacted pursuant to Section 5 of the Fourteenth Amendment, § 1983 was designed in part to provide a statutory claim to combat racial injustice and the "lawless conditions existing in the South in 1871." *Monroe v. Pape*, 365 U.S. 167, 174 (1961). While that was a direct goal, the scope of § 1983 is "cast in general language." *Id.* at 183. Congress provided all individuals a private right of action to provide a remedy "where state law was inadequate" and "to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice." *Id.* at 173-74. More simply, § 1983 applies "categorically to the deprivation of constitutional rights under color of state law." *Baxter v. Bracey*, 140 S.Ct. 1862-63 (2020) (certiorari denied) (Thomas, J., dissenting).

Because of this categorical application across the country, a plaintiff may invoke § 1983 regardless of any state tort remedy that might be available. *Zinermon v. Burch*, 494 U.S. 113, 125 (1990). In other words, "overlapping state remedies are generally irrelevant to the question of the existence of a cause of action under § 1983." *Id.* It has been the law for decades that § 1983's federal remedy "is supplementary to the state remedy, and the latter need not be sought out and refused before the federal one is invoked." *Monroe*, 365 U.S. at 183, *overruled on other grounds by Monell v. Department of Soc. Servs. of City of N.Y.*, 436 U.S. 658 (1978). State and local policymakers expose themselves to liability under § 1983 "if they deliberately disregard an individual's constitutional due process

rights." *Bradley v. Village of Univ. Park, Ill.*, 928 F.3d 875, 880 (7th Cir. 2019). This is true "even when state law also offers postdeprivation remedies." *Id.*[1] The existence of a separate state remedy or separate violation of state or local law has no bearing on whether a plaintiff may *state a claim* under § 1983.

While other state tort remedies can, in some narrow contexts, preclude § 1983 procedural due process claims, it may only do so when the remedy provided is both adequate and analogous to the relief available under § 1983. *Parratt v. Taylor*, 451 U.S. 527 (1981); *Albright v. Oliver*, 510 U.S. 266 (2017). Because § 1983 is essentially a statutory tort for constitutional injuries, adequate and independent state remedies most typically come in the form of state tort law claims against state or local officials. *Id.* at 541 (postdeprivation state tort action afforded all process due).

At its core, however, an adequate state remedy *must* afford SouthPointe the opportunity to recover monetary damages for their constitutional injury and the resulting delay. Daniel S. Feder, *From* Parratt *to* Zinermon*: Authorization, Adequacy, and Immunity in a Systemic Analysis of State Procedure*, 11 CARDOZO L. REV. 831 (1990); *Gregory v. Town of Pittsfield*, 470 U.S. 1018, 1023 (1985) (order denying certiorari) (O'Connor, J., dissenting) ("it would be a novel extension . . . to

[1] It is equally clear that plaintiffs need not even exhaust applicable state or administrative remedies prior to asserting federal claims. *Patsy v. Board of Regents*, 457 U.S. 496, 500-01 (1982). *Knick v. Township of Scott*, 588 U.S. ___, 139 S.Ct. 2162 (2019).

infer that eventual restoration of a property interest, no matter how belated, constitutes an adequate remedy for the intervening deprivation and any consequent damages"). The purpose of a § 1983 claim is to compensate victims "essentially in the same manner as common law torts." *Carey v. Piphus*, 435 U.S. 247, 258-59 (1978). But even state *tort* remedies are not always adequate parallels to § 1983. Maria L. Marcus, *Wanted: A Federal Standard for Evaluating the Adequate State Forum*, 50 MD. L. REV. 131, 166 (1991).

Despite this, Respondents erroneously reject how § 1983 works and the claim to compensatory damages it provides. BIO at 10 ("SouthPointe appeals because it wants more than the General Assembly is willing to give it—compensatory damages, using Section 1983 as a vehicle where it is unavailable"). This is not surprising, given Respondents' belief that local agencies can wield unfettered discretion and may disregard individual constitutional liberties however they want to carry out their public purpose. *Id.* at 11 (citing Adrian Vermeule, *Common Good Constitutionalism* (2022)).

Furthermore, Respondents posit that state law is the sole arbiter of available relief and that Kentucky can deprive SouthPointe *any* remedy. *Id.* ("judicial review of administrative decisions is limited to what the legislature deems appropriate"). Behind this is an equally mistaken belief that the Kentucky General Assembly is the sole *source* of SouthPointe's available claims. Indeed, Respondents contend compensatory tort relief is not an available remedy because it is one

"Kentucky's General Assembly did not deem appropriate." *Id.* at 13.

But as Respondents themselves concede, § 1983 preempts state law when a state law "immunizes government conduct otherwise subject to suit under § 1983." *Id.* at 17 (quoting *Felder v. Casey*, 487 U.S. 131, 139 (1988)). That is exactly what happened in this case. In addition to refusing to allow SouthPointe to even plead both statutory and state common-law tort claims, the Kentucky Court of Appeals held that each of the individual Respondents enjoyed qualified immunity from SouthPointe's claims. Pet.App.27-30.

The decisions below allow officials operating under the color of state law to completely evade the application of § 1983. This Court should not let state decisions that ignore controlling federal law stand. Certiorari is warranted.

II. The Question Presented is Exceptionally Important.

As more and more matters become subject to "the will of unelected officials barely responsive" to the electorate, "[i]ntrusions of liberty would not be difficult and rare, but easy and profuse." *West Virginia v. EPA*, 597 U.S. ___ (2022) (Gorsuch, J., concurring) (slip op. at 5). Virtually all state administrative decisions are eventually appealable in some form under state law. It would defeat the express purpose of § 1983 for states to insulate administrative agencies and officials from federal tort liability simply because judicial review of

an agency's final decision is eventually available—especially when these "barely" accountable bureaucrats are perhaps the most prone to constitutional mischief.

It is easy to see how Respondents' radical interpretation can quickly go off the rails. No matter the injury, Respondents contend that no administrative official under the purview of Ky. Rev. Stat. § 100.347 can ever be sued for damages for *any* injury they cause, no matter how arbitrary. Whether the injury is one of procedural unfairness, invidious discrimination, or even a substantive violation of a right secured by the Bill of Rights, Respondents' position is unchanged: SouthPointe has no remedy. The ability to appeal a final administrative decision is not equivalent to state tort remedies and does not account for SouthPointe's discrete constitutional injury that occurred beyond the merits of Respondents' arbitrary and capricious decision.

States should not be permitted to "opt out" of § 1983, and certainly not without imposing some mechanism for plaintiffs to hold state actors directly accountable for constitutional injuries they cause.

III. The Decision Below was Profoundly Wrong.

The state courts' treatment of SouthPointe's § 1983 claim is inexcusably lacking. The Kentucky Court of Appeals did not recognize the distinction between a federal statutory claim and collateral claims asserted under state common law. Instead, it simply held that the mere existence of the state statute

providing minimal "up or down" judicial review of a final decision bars *any* additional claims—in addition to holding that Respondents are immune from all tort liability, including § 1983. The rulings below were entirely driven by state-law determinations that Ky. Rev. Stat. § 100.347 is the exclusive remedy for *any* claim in any way relating to Respondents' actions.[2]

Moreover, it is certainly not "settled law," as Respondents contend, that the mere existence of judicial review of an agency decision is an adequate remedy to preclude SouthPointe from even pleading a § 1983 claim in state court. This is itself plainly at odds with *Ward v. Village of Monroeville, Ohio*, 409 U.S. 57, 61-62 (1972), which rejected the ability to correct "any unfairness" in an appeal as an adequate remedy because individuals are "entitled to a neutral and detached judge in the first instance."

The decisions below did not reflect the only viable construction of Ky. Rev. Stat. § 100.347; the state courts did not have to construe the judicial-review provision to exclude the entire universe of additional claims, including *federal claims*. Indeed, when statutory language is susceptible to multiple interpretations, courts may "shun" an interpretation that raises

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[2] This conclusion itself is directly contrary to Kentucky law, which the trial court noted in its original opinion granting SouthPointe summary judgment. *See* Pet.App.51; *American Beauty Homes Corp. v. Louisville & Jefferson Cnty. Planning & Zoning Comm'n*, 379 S.W.2d 450 (Ky. 1964) (state trial courts always have jurisdiction to determine "arbitrariness" even in the absence of a state statute authorizing judicial review).

constitutional doubts in favor of an alternative that avoids those problems. *Jennings v. Rodriguez*, 583 U.S. ___, 138 S.Ct. 830, 836 (2018). The decisions below did not reflect the only available interpretation of Ky. Rev. Stat. § 100.347. The state courts needlessly thwarted the application of the federal statute in state court by adopting a myopic interpretation of Ky. Rev. Stat. § 100.347 inconsistent with the Supremacy Clause.

The decisions below were profoundly wrong. Certiorari should be granted.

IV. This Case is the Right Vehicle.

Respondents are right that this case is "unique." BIO at 10. They simultaneously contend, however, that this case presents an inadequate vehicle to test the adequacy of Kentucky's remedies because SouthPointe did not "suffer a taking." *Id.* at 18. This ignores the overall meaning of due process itself and abrogates Respondents' obligation to ensure that the proceedings they were *required to provide* by local ordinance were impartial.

Due process of law essentially serves to guarantee protection from "all arbitrary government action." Randy E. Barnett & Evan D. Bernick, *No Arbitrary Power: An Originalist Theory of Due Process of Law*, 60 WM. & MARY L. REV. 1599, 1643 (2019); *Bank of Columbia v. Okely*, 17 U.S. (4 Wheat.) 235, 244 (1819) (Magna Carta was "intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of

private rights and distributive justice"). There can be no question that Respondents' actions toward SouthPointe were arbitrary—the trial court expressly held that they were. *See* Pet.App.51-53 (finding that Respondents "acted arbitrarily" in refusing to recognizing the already-approved street name and enforcing an inapplicable ordinance).

As a necessary element of due process and to safeguard against arbitrary actions, SouthPointe was entitled to an "impartial and disinterested tribunal." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980); *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868 (2009) (fair tribunal is a basic requirement of due process). This does not require SouthPointe to experience a taking under the Takings Clause. Likewise, Respondents are not absolved of their duty to conduct their proceedings fairly and impartially simply because SouthPointe eventually succeeded in overturning their arbitrary decision.

SouthPointe is entitled to seek redress for the constitutional injuries Respondents caused as a matter of federal statutory law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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