No. 23-

IN THE

Supreme Court of the United States

GREGORY GARMONG,
Petitioner,

v.

TAHOE REGIONAL PLANNING AGENCY, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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May 6, 2024

QUESTION PRESENTED

Did the Ninth Circuit err in affirming dismissal of, and declaring frivolous, constitutional due process claims pursuant to an express private right of action under federal law when five other circuits, district courts and commentators recognize a property interest in such claims flowing from the Fifth Amendment and this Court has held the same with respect to due process interests under the Fourteenth Amendment?

PARTIES TO THE PROCEEDING

Petitioner is Gregory Garmong.

Respondents are:

Tahoe Regional Planning Agency

John Marshall (in official and individual capacities)

Bridget Cornell (in official and individual capacities)

Joanne Marchetta (in official and individual capacities)

Jim Baetge (in official and individual capacities)

James Lawrence (in official and individual capacities)

Bill Yates (in official and individual capacities)

Shelly Aldean (in official and individual capacities)

Marsha Berkbigler (in official and individual capacities)

Casey Beyer (in official and individual capacities)

Timothy Cashman (in official and individual capacities)

Belinda Faustinos (in official and individual capacities)

Austin Sass (in official and individual capacities)

Nancy McDermid (in official and individual capacities)

Barbara Cegavske (in official and individual capacities)

Mark Bruce (in official and individual capacities)

Sue Novasel (in official and individual capacities)

Larry Sevison (in his official and individual capacities)

Maria Kim

Verizon Wireless, Inc.

Complete Wireless Consulting, Inc.

Crown Castle

RULE 14.1(b)(iii) STATEMENT

This case arises from the following proceedings in the U.S. District Court for the District of Nevada and the U.S. Court of Appeals for the Ninth Circuit:

Garmong v. *Tahoe Regional Planning Agency, et al.* Case 3:17-cv-00444-RCJ-WGC (D. Nev. June 7, 2018)

Garmong v. *Tahoe Regional Planning Agency, et al.* Case No. 18-16824 (9th Circuit Mar. 26, 2020)

Garmong v. *Tahoe regional Planning Agency, et al.* Case No. 21-16653 (9th Cir. Nov. 4, 2022)

Garmong v. *Tahoe Regional Planning Agency, et al.* Case No. 22-15869 (9th Cir. Oct. 30, 2023)

No other proceedings in state or federal trial or appellate courts, or in this Court, directly relate to this case.

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PETITION FOR A WRIT OF CERTIORARI

Gregory Garmong respectfully petitions for a writ of certiorari to the Ninth Circuit so that the Court may review the judgments of the United States Court of Appeals for the Ninth Circuit.

OPINIONS AND ORDERS BELOW

The Ninth Circuit's Order Denying petitioner's petitions for rehearing is reproduced at Pet. App. 1a-2a. The Ninth Circuit's Memorandum in Case No. 22-15869 is unpublished and reproduced at Pet. App. 3a-6a. The district court's Order awarding fees is unpublished and reproduced at Pet. App 17a-31a. The Ninth Circuit's Memorandum in Case No. 21-16653 is unpublished and reproduced at Pet. App. 7a-11a. The district court's Order following remand is unpublished and reproduced at Pet. App. 32a-53a. The Ninth Circuit's Memorandum in Case No. 18-16824 reversing dismissal and remanding is unpublished and reproduced at Pet. App. 12a-16a. The district court's first order of dismissal is unpublished and reproduced at Pet. App. 54a-59a. The district court's order denying a temporary restraining order is unpublished and reprinted at Pet. App. 60a-67a.

STATEMENT OF JURISDICTION

The Ninth Circuit entered judgment in case no. 22-15869 on October 30, 2023 and denied timely petitions for rehearing and rehearing en banc on December 7, 2023. Pet. App. 1a. On March 2, 2024, Justice Kagan extended the time to file this petition to May 5, 2024. This Court has jurisdiction under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISION AND COMPACT PROVISIONS INVOLVED

The Fifth Amendment provides in relevant part:

No person shall be . . . deprived of life, liberty, or property, without due process of law.

The Tahoe Regional Planning Compact provides in relevant part:

> TRPA Compact Article VI(j)(3): Any aggrieved person may file an action in an appropriate court of the States of California or Nevada or of the United States alleging noncompliance with the provisions of this compact or with an ordinance or regulation of the agency. In the case of governmental agencies, "aggrieved person" means the Tahoe Regional Planning Agency or any State, Federal or local agency. In the case of any person other than a governmental agency who challenges an action of the Tahoe Regional Planning Agency, "aggrieved person" means any person who has appeared, either in person, through an authorized representative, or in writing, before the agency at an appropriate administrative hearing to register objection to the action which is being challenged, or who had good cause for not making such an appearance.
>
> Article VI(j)(5): In any legal action filed pursuant to this subdivision which challenges an adjudicatory act or decision of the agency to approve or disapprove a project, the scope of judicial inquiry shall extend only to whether there was prejudicial abuse of discretion. Prejudicial abuse of discretion is established if the agency has not proceeded in a manner required by law or if the act or decision of the agency was not supported by substantial evidence in light of the whole record. In making such

a determination the court shall not exercise its independent judgment on evidence but shall only determine whether the act or decision was supported by substantial evidence in light of the whole record. In any legal action filed pursuant to this subdivision which challenges a legislative act or decision of the agency (such as the adoption of the regional plan and the enactment of implementing ordinances), the scope of the judicial inquiry shall extend only to the questions of whether the act or decision has been arbitrary, capricious or lacking substantial evidentiary support or whether the agency has failed to proceed in a manner required by law.

STATEMENT OF THE CASE

INTRODUCTION

The question presented arises from Ninth Circuit decisions in this case that address an open question for the Court regarding Due Process Clause interests in private rights of action established under federal law. The Ninth Circuit held not only that no constitutional property interests protect a private right of action but also doubled down on that holding by declaring such a claim "frivolous at the outset" and the proper subject of a $773,897.69 fee award against a civil rights plaintiff who had standing and scrupulously followed the procedures for bringing the private right of action. The court of appeals' opinions in this case establish precedent that threatens to chill the exercise of express private rights of action created by federal law.

Petitioner Gregory Garmong (Mr. Garmong) challenged approval of a permit by the Tahoe Regional Planning Agency ("TRPA") to construct a commercial cell tower very near Lake Tahoe in an environmentally sensitive area where such construction is prohibited by the Tahoe Regional Compact (the "Compact"). The Compact, enacted into law by Congress, provides a private right of action for those aggrieved by the actions of the agency charged with enforcing the Compact, the Tahoe Regional Planning Agency ("TRPA").

Surprisingly, this Court has yet to address the question of whether, under the Due Process Clause of the Fifth Amendment, litigants have property interests in such actions. Long ago the Court answered a similar question in the affirmative regarding property interests under the Due Process Clause of the Fourteenth Amendment for private rights of action under state law. See *Logan* v. *Zimmerman Brush Co.*, 455 U.S.

422, 428 (1982) ("a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause"). "A claimant has more than an abstract desire or interest in redressing his grievance: his right to redress is guaranteed by the State, with the adequacy of his claim assessed under what is, in essence, a 'for cause' standard, based upon the substantiality of the evidence." *Id.* at 431. Mr. Garmong and claimants like him who benefit from grants of private rights of action under federal law also should have the same protected interest in having their claims assessed on proper standards rather than dismissed, and sanctions imposed, on unreasonable and untenable grounds.

Contrary to the Ninth Circuit's emphatic rejection of any due process interests associated with a private right of action under federal law, four circuits have held that an express private right of action confers due process property interests under the Fifth Amendment. This conflict is both important and recurring (Sup. Ct. R. 10) because private rights of action under federal law are numerous and encompass all manner of civil rights such as religious freedom and liberties, environmental protections, voter registration, and fair credit reporting. The Ninth Circuit's holding here completely divests those private rights of action of any constitutionally cognizable interest and, moreover, stands as a dark threat to litigants like Mr. Garmong who seek to enforce their civil rights in matters great and small.

A. Factual Background

Mr. Garmong owns a home in the Lake Tahoe Basin. Pet. App. 69a; see also *Tahoe-Sierra Pres. Council, Inc.* v. *Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 307 (2002) (Lake Tahoe is "a 'national treasure that must be pro-

tected and preserved.'"). Within a short walking distance from his home is a trail head where hikers like Mr. Garmong can enjoy the National Forest. Pet. App. 87a-88a. In 2014, respondent Complete Wireless applied for a permit from co-respondent, the TRPA, to build a cell tower at the trail head. *Id.* The proposed site was in an area where no such projects are allowed according to the TRPA's own ordinances. Pet. App. 86a-87a.

The TRPA's Rules of Procedure ("ROP") require notice to property owners in the affected area "reasonably early in the project review process." Pet. App. 73a. Although that process had officially commenced in 2014 (and informally commenced years earlier, no later than 2008), TRPA did not send notice until February 9, 2017, and Mr. Garmong only received it on February 14. Pet. App. 73a-74a. The notice recited that TRPA had scheduled a hearing for February 23 and set a deadline of February 22 for submission of written comments. *Id.* TRPA's ROP in effect at the time made an appearance in person or in writing necessary for those who would challenge an application for a permit. *Id.* Mr. Garmong twice asked for a postponement in order to review the TRPA's application file but was rebuffed. Pet. App. 79a-80a. Mr. Garmong was able to attend the hearing and submitted comments pointing out that the TRPA had no discretion to permit the project in that sensitive area under its own ordinances, but the hearing officer overruled his objection and issued the permit. Pet. App. 81a-82a. The TRPA board rejected Mr. Garmong's appeal without explanation. *Id.*

The TRPA State Compact, between California and Nevada, provides an express private right of action for those aggrieved by a TRPA decision. See Art. VI(j)(3)

("[a]ny aggrieved person may file an action in an appropriate court . . . of the United States alleging noncompliance with the provisions of this compact). Pet. App. 14a-15a. As an agreement among states, the Compact is approved by Congress and becomes federal law. Pet. App. 84a.

Later in 2017, Mr. Garmong filed suit pursuant to Art. VI(j)(3), and other federal and state laws, against the TRPA, the responsible TRPA personnel, the contractors, and the cell company. In that complaint (as amended), he alleged "a constitutionally protected property interest in the denial of the application for Permit by TRPA for the construction of the Project." Pet. App. 86a. Mr. Garmong further alleged that TRPA's own rules and ordinances deprived it of discretion to permit a primarily commercial project in the area in question. *Id.*

B. Initial Dismissal and First Appeal

The United States District Court for the District of Nevada dismissed the suit on the ground that Mr. Garmong lacked Article III standing. Pet. App. 54a-59a.[1] Mr. Garmong appealed to the Ninth Circuit, which summarily reversed in a March 2020 Memorandum opinion. Pet. App. 12a-16a. The panel held that Mr. Garmong had properly alleged that the cell tower would "interrupt the view path for one of [his] primary

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[1] Mr. Garmong also moved for a temporary restraining order and a preliminary injunction. Both motions were denied. Pet. App. 60a-67a (order denying TRO). At a hearing on August 7, 2018, the district court orally denied Mr. Garmong's preliminary injunction motion on the ground that the district court was going to allow Mr. Garmong to file a second amended complaint in order to address the court's standing concerns. The district court instead dismissed and closed the case on August 28, 2018, which the Ninth Circuit found to be an abuse of discretion. See Pet. App. 12a.

locations to enjoy Lake Tahoe" and that "[t]he TRPA's own documents support the plausibility of this allegation." Pet. App 14a. The panel further held that Mr. Garmong had shown that his injury was traceable to TRPA's failure "to consider its own regulations" and that he had asked the district court to "prohibit the permit from being 'legally . . . maintained.'" Pet. App. 14a-15a (quoting Art. VI(j)(3)). The panel also held that the Compact confers an express private right of action in Art. VI(j)(3). *Id.*

The district court had also erred by dismissing the entirety of Mr. Garmong's complaint on standing grounds without conducting a claim-by-claim analysis as required by this Court's precedents. Pet. App. 15a. (citing, inter alia, *Davis* v. *Fed. Election Comm'n*, 554 U.S. 724, 734 (2008)). Nor had the district court properly conducted an examination of Mr. Garmong's separate motion for preliminary injunction. Finally, the panel found the district court abused its discretion when it "reneged on an explicit assurance [that Mr. Garmong could further amend] without [further] explanation." Pet. App. 15a-16a. The panel taxed the defendants with costs for the appeal. *Id.*

C. Dismissal on Remand

In a September 2021 opinion on remand, the district court again dismissed Mr. Garmong's amended complaint and indicated that it would award fees to the defendants. The district court first took issue with Mr. Garmong's allegations regarding the unreasonably short period of notice and his lack of access to the TRPA materials needed for preparation of an objection. Pet. App. 33a-34a. The district court, as it had previously, conducted an independent investigation of the weather during those February days as well as Mr. Garmong's allegations of how long it would take to reach TRPA's offices. *Id.*

With respect to more substantive matters, the district court found that the Compact "preempted" numerous of Mr. Garmong's claims because the Compact also provided in its Articles (Art. VI(j)(5)) that "[i]n any legal action . . . which challenges a[] . . . decision of the agency to approve . . . a project, the scope of judicial inquiry shall extend only to whether there was prejudicial abuse of discretion." Thus, according to the district court, Mr. Garmong's supplemental state claims against other defendants for additional harms he suffered during the course of the permitting and hearing process, had to be dismissed. Pet. App. 37a-40a.

As to violations of the Compact itself, including Mr. Garmong's allegation that TRPA had failed to follow its own regulations by permitting a commercial project where none was permitted, Pet. App. 86a-87a, the district court held such claims "incognizable" under the provisions of Art. VI(j)(5) which, according to the district court, "limits claims against [the TRPA Defendants] to judicial review." Pet. App. 41a.

Finally, the district court addressed what it viewed to be "procedural due process" and "equal protection causes," including, again, Mr. Garmong's allegation that TRPA had failed to follow its own codes. Pet. App. 44a, 91a. The district court held that "where a government reviewing body has discretion to approve or deny a permit application, a party 'is not constitutionally entitled to insist on compliance with the procedure itself.'" Pet. App. 24a (quoting *Shanks* v. *Dressel*, 540 F.3d 1082, 1092 (9th Cir. 2008) (rejecting constitutional claims where "the ordinances in question did not significantly limit" discretion and no private right of action existed)). The district court also dismissed Mr. Garmong's constitutional claims against the private parties because he had "no protected property or liberty interest." The district court denied leave to amend

and invited a motion for attorney's fees on the ground that Mr. Garmong's "constitutional claims were 'frivolous, unreasonable, or without foundation.'" Pet. App. 52a (quoting *Hughes* v. *Rowe*, 449 U.S. 5, 14 (1980), summarily *reversing* an award of attorney's fees where prisoner had plausibly pled that his initial confinement to segregation violated due process because it occurred without a prior hearing). The district court later approved, without modification, the defendants' fee motions in the amount of $773,897.69, and reiterated its holding that Mr. Garmong, "has not and cannot successfully assert a property interest in the approval or denial of the Permit." Pet. App. 24a.

D. Second Appeal

Mr. Garmong argued to a different panel of the Ninth Circuit that he had a right to bring his action under Art. VI(j)(3) of the Compact, which "specifically provides for private enforcement." Appellant Br. 48 (citing *Cal. ex rel. Van de Kamp* v. *TRPA*, 766 F.2d 1319, 1326 (9th Cir. 1985)). He further contended that the district court had erred in depriving him of a "constitutionally protected property interest [by denying his challenge to] the application for Permit by TRPA for the construction of the Project." Appellant Br. 61-62. The panel affirmed, however, citing Art. VI(j)(5) as the only basis for judicial review and one that preempted all other claims: "The TRPA Compact provides that the exclusive means of challenging a TRPA permitting decision is a judicial-review claim brought under Article VI(j)(5)." Pet. App 8a.

The panel dismissed Mr. Garmong's constitutional claims on the same grounds as the district court, declaring that "where a government entity has discretion in permitting decisions, there is no constitutionally

protected property interest in the denial of that permit." Pet. App 9a (also citing *Shanks*, 540 F.3d at 1091).

E. Appeal on Award of Attorney's Fees

Another Ninth Circuit panel affirmed the district court's award of attorneys' fees. Mr. Garmong contended that the district court had failed to adequately address the supposed frivolousness of each claim as required by circuit precedent. The panel instead declared all of Mr. Garmong's claims, "frivolous at the outset" and relied upon Mr. Garmong's purported "history of asserting frivolous claims." Pet. App. 5a (citing *In re Becraft*, 885 F.2d 547, 549-50 (9th Cir. 1989) (tax denier who had raised the same argument regarding the Sixteenth Amendment's non-ratification in multiple circuits)).

F. Petitions for Rehearing

Mr. Garmong unsuccessfully petitioned the Ninth Circuit for rehearing three times. After his second appeal was rejected following remand, Pet. App. 3a, Mr. Garmong sought rehearing in light of the conflict between the reasoning of the first and second Ninth Circuit panels. As noted, the second panel had declared that Art. VI(j)(5) was "the exclusive means of challenging" a TRPA decision, Pet. App 8a, whereas the first panel had found Mr. Garmong's action arose under Art. VI(j)(3) and that he had standing to bring it. Pet. App. 14a-15a. Mr. Garmong's second petition sought rehearing on the private right of action holding following the award of attorneys' fees. Mr. Garmong also directly petitioned the en banc court to reconcile the Ninth Circuit's contradictory holdings on the private cause of action provisions in the Compact.

On December 7, 2023, the Ninth Circuit denied both the second petition for rehearing and the direct petition for en banc review. Pet. App. 1a. Mr. Garmong's timely petition to this Court thus seeks review of both the fee award, premised upon the absence of any Fifth Amendment Due Process property interest in the private right of action, and the Ninth Circuit's underlying rationale regarding the private right of action that unreasonably deprived him of that cause of action.

REASONS FOR GRANTING THE PETITION

I. THIS COURT HAS YET TO DECIDE WHETHER THE FIFTH AMENDMENT CONFERS A PROPERTY INTEREST TO LITIGANTS WITH A PRIVATE RIGHT OF ACTION

Whether the Fifth Amendment to the United States constitution confers property interests in a private right of action under federal law is an open question for this Court. To be sure, it is not a particularly difficult question, but it is nonetheless an important one given the broad swath of civil rights protected by private rights of action under federal law. See *infra* at 22-23. And because Congress, courts and agencies have included those private rights of action in numerous federal laws and regulations, it has also been a recurring one. See *infra* II, III.

Over 40 years ago, the Court held that the Fourteenth Amendment confers property interests upon a litigant with a private right of action arising under state law. See *Logan*, 455 U.S. at 432. And "the question whether a litigant has a 'cause of action' is analytically distinct and prior to the question of what relief, if any, a litigant may be entitled to receive." *Davis* v. *Passman*, 442 U.S. 228, 239 (1979). Despite the long-

established precedent protecting private rights of action arising under state law, this Court simply has not had occasion to address due process protections for private rights of action arising under federal law.

Commentators have noted that this Court's holding in *Logan* either should or does support a Fifth Amendment property interest in a federal claim. And several courts have either held or supposed as much. See supra II, III. But none of these sources can point to such a holding from this Court as it does not yet exist. E.g., Charles H. Koch & Richard Murphy, 3 Admin. L. & Prac. § 8:33 (3d ed.) ("although these cases relate to states under the Fourteenth Amendment, the same law applies to federal due process under the Fifth Amendment."); Jeremy A. Blumenthal, *Legal Claims As Private Property: Implications for Eminent Domain*, 36 Hastings Const. L.Q. 373, 376–77 (2009) (the "Court has 'squarely' held that even an unadjudicated cause of action is constitutional property" and, in *Logan*, "the Court considered that proposition 'settled'"); Helen Hershkoff, *Waivers of Immunity and Congress's Power to Regulate Federal Jurisdiction–Federal-Tort Filing Periods As A Testing Case*, 39 Seton Hall Legis. J. 243, 269–70 (2015) ("the Court has recognized that a cause of action is a 'species of property protected by the Fourteenth Amendment's Due Process Clause,' with the same rule applicable to the Fifth Amendment.") (citing *Logan*); see also *Rodriguez-Mora* v. *Baker*, 792 F.2d 1524, 1526 (11th Cir. 1986) (per curiam) ("That the Court thought these cases [*Logan*, et al.] informed its view of the Fourteenth Amendment due process clause suggests that in this area the reaches of the Fourteenth and Fifth Amendments are coextensive.").

This case presents the opportunity to decide this open question at a time when "impact litigation" is a

reality of the legal landscape. Individuals and organizations across the spectrum of political interests employ such litigation in an effort to enforce the law and protect civil liberties. Where Congress has allowed such private enforcement, litigants' causes of action have constitutional protections. Those protections do not guarantee success, of course, but they do require that district courts and courts of appeals take them seriously.

II. A 4-1 CIRCUIT SPLIT EXISTS OVER WHETHER A FEDERAL CAUSE OF ACTION IS A PROTECTED PROPERTY INTEREST UNDER THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT

1. The Fourth Circuit has recognized a property right in a federal plan providing individuals "a right to redress injuries caused by workplace discrimination." *Strickland* v. *United States*, 32 F.4th 311, 350 (4th Cir. 2022). The plaintiff in *Strickland* brought numerous claims against the United States, the Administrative Office of the United States (AO), and others stemming from her use of the Fourth Circuit's Employment Dispute Resolution Plan (EDR Plan) to resolve her sexual harassment complaints. *Id.* at 319. Among her claims was that the defendants violated her right to due process under the Fifth Amendment by mishandling the EDR. *Id.* The district court dismissed her complaint against the governmental entities on sovereign immunity grounds and also concluded that she stated no "cognizable claims for relief against the Individual Capacity Defendants." *Id.* at 320.

The Fourth Circuit reversed, holding that plaintiff's due process claim "adequately allege[d] the deprivation of cognizable property rights." *Id.* at 346. The EDR Plan, the Fourth Circuit explained, "provide[d] Strickland, in part, a right to redress injuries caused by

workplace discrimination, *a right that is functionally equivalent to a cause of action*." *Id.* at 351 (emphasis added). And it rejected the defendants' argument that "the Plan itself is the exclusive remedy for enforcing the rights granted by the Plan." *Id.* Once the defendants adopted the EDR Plan, the Fourth Circuit stated, the Plan created a "protected property interest[] under the Fifth Amendment." *Id.* at 352.

2. The Eighth Circuit likewise has held that the "right to sue under the FTCA [Federal Tort Claims Act] is a property interest protected by due process." *Wilson ex rel. Wilson* v. *Gunn*, 403 F.3d 524, 527 (8th Cir. 2005). The FTCA claim at issue was for medical malpractice by a government-funded physician. *Id.* at 526. The district court granted summary judgment for the defendants.

The Eighth Circuit recognized that the right of action under the FTCA was a protected due process property interest. The panel nonetheless affirmed on statute of limitations grounds, which had not been imposed in an "'arbitrary and irrational way.'" *Id.* at 527 (citing *Honeywell, Inc.* v. *Minn. Life & Health Ins. Guar. Ass'n*, 110 F.3d 547, 554 (8th Cir. 1997)).

3. The Federal Circuit also has recognized that "a legal cause of action is property within the meaning of the Fifth Amendment." *All. of Descendants of Tex. Land Grants* v. *United States*, 37 F.3d 1478, 1481 (Fed. Cir. 1994). A class action for alleged taking of land grants was brought against the United States by "heirs and descendants of Mexican nationals who," prior to 1836, received grants for land in present-day Texas from Spain or Mexico. *Id.* at 1480-81. The Court of Claims granted summary judgment on statute of limitations grounds. The Federal Circuit affirmed on the same ground but held that plaintiffs did have a

cognizable property interest in the claims themselves, as well as properly pled Takings Clause claims.

4. In *Haitian Refugee Center* v. *Smith*, 676 F.2d 1023, 1026 (5th Cir. Unit B 1982), a class of Haitian refugees seeking political asylum brought an action against the Immigration and Naturalization Services ("INS") alleging that an expedited INS consideration process was a one-sided scheme to ensure deportation. The district court found that the INS's treatment of the Haitians asylum petitions violated the due process clause of the Fifth Amendment. In affirming, the Fifth Circuit observed that "the Supreme Court has . . . recognized that constitutionally protected liberty or property interests may have their source in positive rules of law, enacted by the state or federal government." *Id.* at 1037–38. It concluded that "Congress and the executive ha[d] created, at a minimum, a constitutionally protected right to petition [the United States] government for political asylum." *Id.* at 1038.

III. OTHER CIRCUITS HAVE SUGGESTED THAT PRIVATE RIGHTS OF ACTION UNDER FEDERAL LAW ARE PROTECTED PROPERTY INTERESTS UNDER THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT

1. In *National Union Fire Insurance Co. of Pittsburgh* v. *City Sav., F.S.B.*, 28 F.3d 376 (3d Cir. 1994), the Third Circuit acknowledged a property interest in a federal cause of action. It did so by positing a hypothetical in a footnote. The hypothetical entailed the Resolution Trust Corporation ("RTC") taking over a financial institution as a receiver and, after doing so, injuring a party. *Id.* at 389 n.16. Such an injury would give rise to a cause of action. *Id.* Yet, in the hypothetical, by the time the cause of action arose, the RTC's

window for creditors to bring claims under the Financial Institutions Reform, Recovery and Enforcement Act (FIRREA) had already passed. *Id.* Thus, the RTC could defend against the injured party's claim, using the jurisdictional bar to "argue that no court has jurisdiction over the claim." *Id.* As a result, the injured party would be "forever deprive[d]" of a hearing. *Id.* The Third Circuit opined that "this result would violate the Due Process Clause of the Fifth Amendment." *Id.*

2. The Seventh Circuit has acknowledged that the reasoning of *Logan* indicates that the Fifth Amendment's Due Process Clause confers a property interest on federal causes of action. See *Laurens* v. *Volvo Cars of N. Am., LLC*, 868 F.3d 622 (7th Cir. 2017). The Supreme Court "has long held 'that a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause.'" *Id.* at 627. It also described *Logan* as "approaching [the] Fifth Amendment's Due Process Clause the same way." *Id.* And the Seventh Circuit explained that it "has applied [the *Logan*] rule expansively," in a variety of contexts. *Id.*

3. The Eleventh Circuit has observed "[n]othing in the cases themselves suggests that the Court intended to limit" their scope "to deprivations inflicted by a state or its officials." *Rodriguez-Mora*, 792 F.2d at 1526. Quite the contrary. The Eleventh Circuit found "compelling reasons for applying [*Logan* and its progeny] to cases brought under the Fifth Amendment." *Id.*

4. The Ninth Circuit itself observed that *Logan* might be applied to federal causes of actions. See *In re Consol. U.S. Atmospheric Testing Litig.*, 820 F.2d 982, 989 (9th Cir. 1987). In that case, however, the Ninth Circuit held that the conversion of state tort claims by operation of law into claims against the government

under the Federal Tort Claims Act (FTCA) did not implicate any property interests and did not effect an unconstitutional taking. *Id.* at 990-91. The plaintiffs were civilians exposed to radiation as a result of the bombing of Hiroshima or nuclear testing and the defendants in the case were government contractors and the government. While the Ninth Circuit cited *Logan*, it considered the FTCA's protections sufficient for the plaintiffs' cause of action. *Id.* at 988, 990-91.

5. Similarly, in *Patchak* v. *Jewell*, 828 F.3d 995 (D.C. Cir. 2016), the D.C. Circuit acknowledged that a cause of action under the Administrative Procedure Act (APA) may be a protected property interest. The plaintiff challenged the Secretary of the Interior's decision to take a plot of land in trust for a Native American tribe under the Indian Reorganization Act (IRA). *Id.* at 999. Following a finding by this Court that the plaintiff had prudential standing to bring the suit, Congress passed the Gun Lake Act to "reaffirm[] the Department of the Interior's decision" and "remov[e] jurisdiction from the federal courts over any actions relating to that property." *Id.* The district court then dismissed the case. *Id.* The plaintiff appealed, alleging that the Gun Lake Act violated his due process rights under the Fifth Amendment.

The D.C. Circuit considered the question of whether "a cause of action is a species of property requiring due process protection" to be "affirmatively settled." *Id.* at 1005 (quoting *Logan*, 455 U.S. at 428). Yet the D.C. Circuit rejected the plaintiff's claim because "the legislative process provides all the process that is due." *Id.*

IV. THE NINTH CIRCUIT'S DECISIONS IN THIS CASE ARE INDEFENSIBLE

The Ninth Circuit's error in substituting Art. VI(j)(5) for Art. VI(j)(3) is patent and represents an unreasonable deprivation of Mr. Garmong's property interests in his private right of action. "[T]he Due Process Clause grants the aggrieved party the opportunity to present his case and have its merits fairly judged." *Logan*, 455 U.S. at 433. "There are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause." *Société Internationale* v. *Rogers,* 357 U.S. 197, 209 (1958).

The strength of Mr. Garmong's Art. VI(j)(3) arguments found support from the earlier Ninth Circuit panel, which held that Mr. Garmong had standing precisely because he had a private right of action under Art. VI(j)(3). Pet. App. 14a-15a. The earlier panel also cited long-standing Ninth Circuit precedent, *California ex rel. Van de Kamp* v. *TRPA*, 766 F.2d 1319, 1326 (9th Cir. 1985) ("[t]he Tahoe Compact specifically provides for private enforcement. Article VI(j)(3).")

For TRPA, the Ninth Circuit's error is a litigation boon. Private rights of action complicate matters for agencies that must defend them. TRPA, however, now has further support for its self-serving claims that, because Art. VI(j)(5) references only TRPA's discretionary authority, TRPA itself is the only proper party to be sued, *all* other claims are preempted, and so-called "judicial review" is the only available action. See Motion to Dismiss at 12, *Eisenstecken* v. *TRPA*, No. 2:20-cv-02349-TLN-CDK (E.D. Cal. Mar. 3, 2021), Dkt. 13 ("Claims arising out of alleged acts or failure to act by TRPA may only be brought under the judicial review

provision of the Compact Art. VI(j)"); see also Appellee's Joint Answering Br. at 13-15, No. 21-16653 (9th Cir. Apr. 13, 2022), Dkt. 17 (same). TRPA thus attempts to cast itself as a federal agency whose decisions are subject to limited challenges and also entitled to administrative law deference. But the text of Art. VI(j) cannot support that reading because Art. VI(j)(5) on its face only defines the standard of review for actions against TRPA and says nothing about limitations on proper parties or preemption. TRPA has admitted as much in other cases.[2] There is, moreover, no authority of any sort that supports the Ninth Circuit's holding that "judicial review" under Art. VI(j)(5) is the only available action. That holding, put charitably, is made out of whole cloth.

Nor could Art. VI(j)(5) set forth such limitations on any reading because Congress must provide some indication that it meant to preempt state law claims in federal statutes. E.g., *Wyeth* v. *Levine*, 555 U.S. 555, 565 (2009) (preemption must be a "clear and manifest purpose of Congress"). To be sure, state law actions *against* TRPA that would directly conflict with TRPA's discretionary enforcement authority might be preempted, but the Compact contains no bar to Mr. Garmong and others bringing supplemental claims for independent breaches of duty or law. Neither the Ninth Circuit nor the district court therefore had grounds to dismiss Mr. Garmong's claims in their entirety and especially where he had a property interest in his core Art. V(j)(3) claim against TRPA for granting a permit that it had no authority to grant under its own rules. TRPA may dispute Mr. Garmong's inter-

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[2] *See* Motion to Dismiss at 12, *Eisenstecken* v. *TRPA*, 2:20-cv-02349-TLN-CDK (E.D. Cal. Mar. 3, 2021), Dkt. 13 (Art. VI(j)(5) specifies the standard of review).

pretation of its rules as mandatory rather than discretionary, but that is a proper merits question and one that no court got close to resolving here. Instead, Mr. Garmong's case was dismissed on an atextual technicality of pleading; namely, that he had not sought "judicial review" under Art. VI(j)(5).

The Ninth Circuit doubled down on its error by affirming the district court's award of attorney fees to the defendants. Pet. App. 6a. Both the Ninth Circuit and the district court relied heavily upon *Shanks* v. *Dressel*, 540 F.3d 1082, 1088 (9th Cir. 2008) for the proposition that "[w]hen executive action like a discrete permitting decision is at issue, only 'egregious official conduct can be said to be arbitrary in the constitutional sense': it must amount to an 'abuse of power' lacking any 'reasonable justification in the service of a legitimate governmental objective.'" But that case did not involve an express private right of action and, instead, was premised on a substantive due process claim brought by a neighborhood association contesting a discretionary building permit principally upon historic preservation grounds. Mr. Garmong, by contrast, had standing to bring a claim *provided for in the Compact* that the TRPA had no discretion to site a commercial facility in a prohibited area. Pet. App. 86a-87a.

The high bar of "egregious official conduct" in *Shanks* does not apply for the additional reason that, as TRPA has observed elsewhere,[3] the Compact itself provides a different standard of review in Art. VI(j)(5): "prejudicial abuse of discretion." Art. VI(j)(5) further specifies that "[p]rejudicial abuse of discretion is established if the agency has not proceeded in a manner required by law or if the act or decision of the

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[3] *See supra* n. 2.

agency was not supported by substantial evidence in light of the whole record." Mr. Garmong's First Amended Complaint amply alleged facts (which the district court and the Ninth Circuit were bound to accept as true at this juncture) that met Art. VI(j)(5)'s standard and even the high bar of *Shanks*. Pet. App. 86a-87a.

Neither the district court nor the Ninth Circuit could reasonably rely upon a case about an implied substantive due process claim where no sanctions were at issue to declare Mr. Garmong's action "frivolous" and subject him to a massive fee award. The Ninth Circuit's further reliance upon cases involving tax deniers and private jet owners is similarly misplaced. Pet. App. 5a. Neither the District Court nor the Ninth Circuit pointed to—or could have pointed to—similar suits against TRPA and the other defendants filed by Mr. Garmong.

V. THIS CASE PRESENTS THE OPTIMAL VEHICLE FOR ADDRESSING THE QUESTION PRESENTED

1. Mr. Garmong preserved the question below. For example, Mr. Garmong's opening brief pointed to Mr. Garmong's assertion of a "protected [due process] property interest" in contesting approval of the permit and the district court's rejection of same. See Appellant's Opening Br. 61. Both the District Court and the Ninth Circuit not only addressed the scope of the constitutional protections surrounding his claims, but affirmatively held that he had *no* protected Due Process Clause property interests. The Ninth Circuit, for example, again relied upon *Shanks* for the proposition that "where a government entity has discretion in permitting decisions, there is no constitutionally protected property interest in the denial of that permit."

Pet. App. 9a.[4] Those courts emphasized their holdings by awarding fees against him at the motion to dismiss stage. The question is thus not only ripe for this Court's review but one of long-standing and great importance.

2. Congress frequently relies on people like Mr. Garmong to "secur[e] broad compliance" with federal law through private rights of action. See *Newman* v. *Piggie Park Enters., Inc.*, 390 U.S. 400, 401 (1968) (per curiam). Private plaintiffs are instrumental in protecting our religious liberties, our civil rights, our constitutional rights, and the environment. See, e.g., 42 U.S.C. § 2000bb-1(c) (creating a private right of action for individuals whose "religious exercise has been burdened"); 42 U.S.C. § 1983 (creating a private right of action for constitutional violations by state actors); *Barnes* v. *Gorman*, 536 U.S. 181, 185 (2002) (discussing the private right of action for intentional discrimination based on race or national origin); *Cannon* v. *Univ. of Chicago*, 441 U.S. 677, 703 (1979) (holding that individuals have a private right of action to sue for gender discrimination under Title IX); 42 U.S.C. § 7604 (Clean Air Act citizen-suit provision); 33 U.S.C. § 1365 (Clean Water Act citizen-suit provision); 16

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[4] The Ninth Circuit's opinion drops a footnote contending that Mr. Garmong "raises no objection on appeal" to the district court's characterization of his due process claims as procedural ones. Pet. App. 9a. But the district court addressed both due process property interests and due process "liberty interest[s]" in its opinion. Pet. App. 44a-46a. Mr. Garmong's briefing similarly distinguishes between property and procedural interests, as does the TRPA's, and the Ninth Circuit's analysis as well. It is true that the district court dismisses Mr. Garmong's "procedural due process" claims with prejudice, but that is obviously a misnomer as reflected by the language in all the opinions and the reliance by both courts on *Shanks*.

U.S.C. § 1540(g) (Endangered Species Act citizen-suit provision).[5]

3. The burdens of private actions fall entirely on the individuals and entities suing, while the benefits—the vindication of public policies of "the highest priority" to Congress—are enjoyed widely. *Newman*, 390 U.S. at 402. Here, Mr. Garmong alone bore the risks of suing privately while he sought to vindicate Congress's broader policy under the Compact: to protect the public's interest in maintaining the Lake Tahoe region, TRPA Art. I(a)(6) - (7), and such benefits accrue to the public at large. As this Court recognized in *Newman*, this disparity in costs and benefits can lead to underenforcement, and this disparity is only exacerbated as the risks to private litigants increase. 390 U.S. at 402. The Ninth Circuit's decisions in this case may well chill the exercise of rights by private litigants. See *Jones* v. *Cont'l Corp.*, 789 F.2d 1225, 1232 (6th Cir. 1986) (fee awards can dissuade individuals from enforcing federal law); see also *Van de Kamp*, 766 F.2d at 1325-26 (requiring plaintiff to post bond would chill private action under Art. VI(j)(3)).

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari or, in the alternative, summarily reverse the erroneous decisions of the Ninth Circuit.

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[5] Cases brought under these private rights often reach this Court. E.g., *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682, 688–90 (2014) (action brought under the Religious Freedom Restoration Act of 1993); *303 Creative LLC* v. *Elenis*, 600 U.S. 570 (2023).

Respectfully submitted,

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