

No. 26-249

IN THE
Supreme Court of the United States

RANDY QUAID AND EVGENIA H. QUAID,
Petitioners,

v.

CRAIG GRANET, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

**RESPONDENTS FIDELITY NATIONAL TITLE
INSURANCE COMPANY AND JAMES
HEPWORTH'S BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI**

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QUESTION PRESENTED

Randy Quaid and Evgenia H. Quaid (“Petitioners”) seek review of an unpublished, nonprecedential memorandum disposition applying California’s litigation privilege to case-specific allegations arising from state-court litigation. The question presented is:

Whether this Court should grant certiorari to review an unpublished Ninth Circuit decision that applied settled California litigation-privilege law to hold that Petitioners’ privacy tort claims against private litigants and their counsel were barred because the alleged injury stemmed from litigation-related communications and filings in a judicial proceeding.

CORPORATE DISCLOSURE STATEMENT

Respondent Fidelity National Title Insurance Company (“Fidelity”) is a subsidiary of Fidelity National Title Group, Inc., and Fidelity National Title Group, Inc. is a subsidiary of FNTG Holdings, LLC. FNTG Holdings is a subsidiary of Fidelity National Financial, Inc., a publicly traded corporation. Fidelity National Financial, Inc. trades on the New York Stock Exchange under the ticker symbol FNF. No other publicly held corporation owns 10% or more of Fidelity National Title Insurance Company’s stock. Respondent James Hepworth (“Hepworth”) is an individual.

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INTRODUCTION

Petitioners’ petition for certiorari (the “Petition”) should be denied. Petitioners ask this Court to review an unpublished, nonprecedential memorandum disposition that applied settled California litigation-privilege law to a pleading arising out of related state-court litigation. The decision below creates no conflict among the federal courts of appeals, no conflict with a state court of last resort on an important federal question, and no conflict with any decision of this Court. It is instead a fact-specific application of California state law to Petitioners’ own allegations and the state court filings of which the district court took judicial notice.

Supreme Court Rule 10 reserves review “only for compelling reasons.” It also recognizes that certiorari is rarely granted when the asserted error consists of a misapplication of a properly stated rule of law. *Id.* Petitioners identify no federal question, much less an important one. Their disagreement is with the Ninth Circuit’s conclusion that the gravamen of their claims against private litigants and counsel was litigation-related communication. That is a state-law, case-specific issue. That does not fit any of the justifications for certiorari.

The Petition also overstates the case against Fidelity and Hepworth. Petitioners’ “antecedent database” theory depends principally on alleged conduct by a law-enforcement employee and a prosecutor. But Petitioners do not seek review of the rulings that removed from the case the government actors allegedly responsible for the database access

and dissemination. As to Fidelity and Hepworth, Petitioners identify no well-pleaded allegation that either respondent personally accessed a law-enforcement database or independently retrieved criminal-history from such database. Petitioners instead allege that Hepworth communicated with other litigation participants to elicit information ultimately used in the state-court proceedings. (Pet. 2-3; Pet. App. C 23-24, 32-34.) The California litigation privilege exists to protect that type of litigation-related communication from derivative tort litigation. The Ninth Circuit's ruling on this settled California litigation-privilege law does not provide any justification for granting certiorari. Because of that, the Court should deny the Petition.

STATEMENT

This case arises from a long-running dispute over real property in Santa Barbara, California. In related state-court quiet-title proceedings, Petitioners filed claims and cross-claims against several parties, including respondents Fidelity and attorney Hepworth. (Pet. iii, 2-3; Pet. App. C 22-24.) In connection with those proceedings, other litigants sought to rely on Petitioners' alleged fugitive status and related criminal history records in support of state-court motion practice. (Pet. 2-4; Pet. App. C 23-24, 32-34.)

Petitioners later filed this federal action asserting privacy related claims. As relevant here, the operative First Amended Complaint alleged that a Santa Barbara law enforcement employee accessed Petitioners' criminal-history and arrest records,

disseminated them to Assistant District Attorney Anthony Davis, and that Davis circulated the information to Craig Granet, private counsel for the Turicchis in the related state-court litigation. (Pet. 2-3; Pet. App. C 23-24.) Petitioners further alleged that Hepworth “communicated and acted in concert” with Serrano, Davis, and Granet to elicit sealed, nonpublic information. They separately alleged that Serrano, Davis, Granet, and Williams maintained “direct lines of communication” concerning Petitioners’ criminal-history and arrest records. (Pet. 3; Pet. App. C 24, 32.)

The district court dismissed the claims against Fidelity and Hepworth, as well as claims against other private-party defendants, under California’s litigation privilege, Cal. Civ. Code § 47(b). (Pet. App. C 29-34.) The district court explained that the records were “obtained, shared, and submitted in connection with judicial proceedings in the Quiet Title Action.” (Pet. App. C 32.) The court held that the publication underlying Petitioners’ privacy claims consisted of communications made in judicial proceedings, by litigants or litigation participants, to achieve the objects of litigation, and with a logical relation to the action. (Pet. App. C 33.) The court rejected Petitioners’ reliance on *Kimmel v. Goland*, 51 Cal. 3d 202 (1990), because *Kimmel* was limited to illegal recordings of confidential telephone conversations, whereas Petitioners’ claims were based on “Defendants’ submission of Plaintiffs’ criminal records in court proceedings and the communicative acts leading up to their filing.” (Pet. App. C 33-34.)

The district court dismissed other defendants on separate grounds. The County of Santa Barbara and Davis were dismissed because Petitioners failed to comply with California's Government Claims Act. (Pet. App. C 26-29.) Also, Serrano was dismissed without prejudice for failure to effect service. (Pet. App. B 10-11.) Berman obtained dismissal of the slander of title claim under the two-dismissal rule, and the district court entered a limited vexatious-litigant order and fee/cost award concerning the Berman-related property claims. (Pet. App. B 19-20; Pet. App. C 34-49.)

The Ninth Circuit affirmed in an unpublished memorandum disposition. (Pet. App. A.) As to Fidelity and Hepworth and the remaining defendants, the court held that Petitioners' invasion-of-privacy, public-disclosure, and conspiracy claims were barred by California's litigation privilege because the claims "all stem from the defendants obtaining the Quaid's criminal history records and disclosing those records in a judicial proceeding." (Pet. App. A 3.)

The Ninth Circuit further held that the claims were based on communicative acts and that each defendant invoking the privilege was a party to a state court proceeding and offered the records to support a legal theory. (Pet. App. A 3.) Because additional facts would not overcome the absolute privilege, the court held that amendment would be futile. (Pet. App. A 3-4.)

The Ninth Circuit denied panel rehearing and rehearing en banc. (Pet. App. D.) Petitioners then

filed the Petition, which expressly disclaims review of the Government Claims Act ruling, the Rule 4(m) dismissal of Serrano, the Berman slander-of-title dismissal, the vexatious-litigant order, and the fee award. Pet. 4. The Petition is therefore limited to Petitioners' disagreement with the litigation-privilege and futility rulings as to certain private litigants and counsel.

REASONS FOR DENYING THE PETITION

I. The petition presents no cert-worthy federal question.

This Court's certiorari jurisdiction is discretionary and is exercised only for compelling reasons. (Sup. Ct. R. 10.) The Petition does not identify any such reason. It identifies no circuit split. It identifies no conflict between the Ninth Circuit and any state court of last resort on an important federal question. It identifies no conflict with any decision of this Court. And it identifies no important federal question that should be settled by this Court.

The decision below is unpublished and nonprecedential. (Pet. App. A 1.) It did not announce a rule of federal law. It did not interpret a federal statute. It did not create any new pleading standard. It simply applied California's litigation privilege, as interpreted by the California Supreme Court, to Petitioners' allegations and to state-court litigation materials of which the district court took judicial notice. At most, Petitioners contend that the courts below misapplied settled law

to the facts of this case. That is not a basis for certiorari under Rule 10.

Petitioners attempt to frame the case as implicating Federal Rules of Civil Procedure 12(b)(6) and 15. But those rules are not the source of any genuine dispute warranting review. The Ninth Circuit applied ordinary dismissal and amendment principles and concluded that further amendment would be futile because California's absolute litigation privilege barred the claims as pleaded. (Pet. App. A 3-4.) The Ninth Circuit's conclusion that amendment would be futile was a routine, case-specific application of settled law. (*See Curry v. Yelp Inc.*, 875 F.3d 1219, 1228 (9th Cir. 2017) (affirming dismissal with prejudice where amendment would be futile.))

Nor does the Petition present an important federal issue involving access to law-enforcement databases. The Ninth Circuit did not approve unlawful database access. It did not decide whether public officials may disclose restricted records. The public official claims were dismissed on independent grounds that Petitioners do not ask this Court to review. (Pet. 4; Pet. App. A 4.) What remains is a claim against private litigants and attorneys based on communications and litigation filings in a state court action. That is not a suitable basis for review in this Court.

Critically, Petitioners' own framing confirms the absence of a federal issue. Their question presented asks whether the lower courts properly applied California Civil Code section 47(b) to alleged

antecedent database conduct, and their argument principally asserts that the decision below conflicts with the California Supreme Court's decisions. (Pet. i, 5-9.) Petitioners identify no conflict among the federal courts of appeals and no conflict with a decision of this Court. Their asserted error is, at most, a case-specific misapplication of California privilege law. Thus, their asserted conflict is not with another federal court of appeals or this Court. It is with their view of California cases such as *Kimmel*, *Rusheen*, *Silberg*, *Jacob B.*, *Moore*, and *Mansell*. A request for this Court to correct an alleged misapplication of state law privilege doctrine in an unpublished disposition does not satisfy Rule 10.

II. The decision below correctly applied settled California law.

California Civil Code section 47(b) privileges publications or broadcasts made in judicial proceedings. The California Supreme Court has long instructed that the privilege is construed broadly and applies to communications made in judicial or quasi-judicial proceedings by litigants or other authorized participants to achieve the objects of litigation and having some connection or logical relation to the action. (*Silberg v. Anderson*, 50 Cal. 3d 205, 212 (1990); *Rusheen v. Cohen*, 37 Cal. 4th 1048, 1057 (2006))

The privilege is absolute. It bars all tort causes of action other than malicious prosecution, including privacy-based tort claims. (*Flatley v. Mauro*, 39 Cal. 4th 299, 322 (2006); *Jacob B. v. County of Shasta*, 40 Cal. 4th 948, 960-61 (2007)) Its purpose is to afford

litigants and witnesses the utmost freedom of access to the courts without fear of subsequent derivative tort actions. (*Silberg*, 50 Cal. 3d at 213) California courts have applied the privilege broadly to litigation communications by parties, attorneys, and witnesses, including testimony and related litigation communications. (*Moore v. Conliffe*, 7 Cal. 4th 634, 638 (1994); *Hagberg v. California Fed. Bank*, 32 Cal. 4th 350, 360-61 (2004))

Petitioners' operative claims against Fidelity, Hepworth, and the other private defendants were invasion of privacy, public disclosure of private facts, and conspiracy to invade privacy. (Pet. App. A 3.) The Ninth Circuit held that those claims "all stem" from obtaining Petitioners' criminal-history records and disclosing them in a judicial proceeding, that the claims were based on communicative acts, and that the defendants invoking the privilege were parties or participants who offered the records to support a legal theory in the state-court proceeding. (Pet. App. A 3.) That holding tracks *Silberg*, *Rusheen*, *Flatley*, *Moore*, and *Jacob B.*

Petitioners' contrary theory depends on recasting litigation communications as "antecedent database misconduct." But the courts below reasonably rejected that characterization. The district court found that the relevant records were "obtained, shared, and submitted in connection with judicial proceedings in the Quiet Title Action." (Pet. App. C 32.) The court further explained that the alleged wrong as to the private defendants consisted of the submission of Petitioners' records in court proceedings and the communicative acts leading up to

that filing. Pet. App. C 33-34. The Ninth Circuit affirmed on the same ground. (Pet. App. A 3.)

Kimmel also does not support review. *Kimmel* held that the litigation privilege did not immunize illegal recording of confidential telephone calls in anticipation of litigation. (*Kimmel*, 51 Cal. 3d at 205, 211-12.) The California Supreme Court expressly limited that holding to the narrow facts before it: noncommunicative acts consisting of illegal recording. That limitation is relevant here. California law distinguishes between litigation-related communications and independently actionable noncommunicative conduct. (See *Kimmel*, 51 Cal. 3d at 211-12; *Mansell v. Otto*, 108 Cal. App. 4th 265, 271-72 (2003)) But, unlike the illegal recording in *Kimmel* or the allegedly unauthorized examination of confidential records in *Mansell*, Petitioners identify no allegation that Fidelity or Hepworth independently accessed a restricted database. Their allegations against these respondents concern communications regarding records used in the state-court proceedings.

The courts below applied that distinction. They did not hold that unlawful evidence gathering is always privileged if evidence is later used in court. They held that Petitioners' claims against these private litigants and counsel were based on litigation communications and filings, specifically the submission of the records in the state-court proceedings and the communications leading to their use. (Pet. App. C 33-34; Pet. App. A 3.) That conclusion does not conflict with *Kimmel*.

Rusheen reinforces the result. There, the California Supreme Court held that where the gravamen of the claim is communicative conduct, related noncommunicative acts are also privileged if they are necessarily related to the communicative acts. (*Rusheen*, 37 Cal. 4th at 1062-65.) Petitioners' claims fall within that rule. The alleged communications were related to the state-court proceedings and to records offered in support of a legal theory in those proceedings. (Pet. App. A 3; Pet. App. C 32-34.)

Petitioners insist that amendment should have been allowed to plead a statutory privacy claim more precisely. But Petitioners do not identify what nonprivileged claim they could plead against Fidelity or Hepworth. They do not allege that Fidelity or Hepworth accessed a law-enforcement database. As to Hepworth, Petitioners allege that he “communicated and acted in concert” with other litigation participants to elicit information. Petitioners separately allege that Serrano, Davis, Granet, and Williams maintained “direct lines of communication” concerning the records. (Pet. 3; Pet. App. C 24, 32.) Neither allegation states that Fidelity or Hepworth personally accessed or retrieved information from the law-enforcement database.

The petition therefore reduces to a disagreement with how the lower courts read the pleadings and applied settled state law privilege principles. That disagreement does not warrant this Court's review.

**III. This case is a poor vehicle of the
Petitioners' broader grievance.**

Even if the abstract question presented were important, this case would be a poor vehicle for deciding it. Petitioners' theory depends on alleged unauthorized acts by public officials: a law-enforcement employee's database access and a prosecutor's dissemination of records. But the County of Santa Barbara and Davis were dismissed for failure to satisfy the Government Claims Act, while Serrano was dismissed without prejudice for failure to serve. (Pet. App. A 4; Pet. App. B 10-11; Pet. App. C 26-29.) Petitioners expressly do not seek review of those rulings. (Pet. 4.) The parties most directly connected to the alleged "database" conduct therefore are not before the Court on that issue.

Petitioners ask for a remand limited to whether they may amend to plead claims directed to antecedent unauthorized access, retrieval, acquisition, receipt, possession, and routing of restricted law enforcement database material. (Pet. 12.) But as to Fidelity and Hepworth, Petitioners identify no well-pleaded facts establishing independent database access or retrieval. The alleged conduct is litigation communication. A ruling on the abstract boundary between unlawful evidence gathering and privileged litigation communications would not cleanly resolve any live claim against these respondents.

The case is also procedurally unsuitable because the decision below is unpublished and expressly nonprecedential. (Pet. App. A 1.) It does not

bind future Ninth Circuit panels except as permitted by Ninth Circuit Rule 36-3, and it does not purport to establish any categorical federal rule. Review is not needed to correct a nonprecedential state-law application limited to this record.

Finally, the district court found that Petitioners amended their pleading to omit mention of the quiet-title action as part of a dilatory effort to avoid defenses already raised by defendants. (Pet. App. C 39.) The record also includes a broader history of duplicative litigation related to the same property dispute, as reflected in the district court's vexatious-litigant analysis. (Pet. App. C 42-49.) Petitioners do not seek review of that order, and respondents do not ask this Court to revisit it. But that case-specific procedural background underscores why this matter is not appropriate for the clarification of any broader issue.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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