

No. 26-249

In the
Supreme Court of the United States

RANDY QUAID AND EVGENIA H. QUAID,
Petitioners,

v.

CRAIG GRANET; R. SCOTT TURICCHI; LANNETTE
TURICCHI; FIDELITY NATIONAL TITLE INSURANCE
COMPANY; JAMES HEPWORTH; SUSAN WILLIAMS;
BRUCE BERMAN; TONY DAVIS, IN HIS OFFICIAL
CAPACITY; COUNTY OF SANTA BARBARA,
Respondents.

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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

INTRODUCTION

Only one group of respondents opposes the petition: Fidelity National Title Insurance Company and its attorney, James Hepworth. Their brief concedes the premise on which the petition rests. California law, they acknowledge, "distinguishes between litigation-related communications and independently actionable noncommunicative conduct," and the courts below "did not hold that unlawful evidence gathering is always privileged if evidence is later used in court." Opp. 9. "The Ninth Circuit did not approve unlawful database access." Opp. 6.

The judgment below, however, does not honor that line. The Ninth Circuit held that the Quaids' claims "all stem from the defendants obtaining the Quaids' criminal history records and disclosing those records in a judicial proceeding," treated both steps as a single "communicative act," and held that "[b]ecause additional facts would not overcome this 'absolute privilege,'" amendment would be futile. App. 3. If unlawful acquisition of evidence lies outside the privilege, as respondents concede, then a holding that no additional facts could state a claim required some analysis of the alleged acquisition. None appears. App. 3-4.

Respondents' remaining points (that they did not personally access a database, that no nonprivileged claim has been identified, and that the case is a poor vehicle) do not answer the question presented. Each is addressed below.

ARGUMENT

I. The Opposition's Concessions Confirm the Error in the Categorical Futility Ruling.

A. Respondents recast the ruling below.

Respondents describe the Ninth Circuit as holding that the privilege "barred the claims as pleaded." Opp. 6. The panel held more. It held that "additional facts would not overcome" the privilege and affirmed dismissal with prejudice on that basis alone. App. 3-4. Its only reason was that obtaining the records and disclosing them in court together formed one "communicative act." App. 3. The district court likewise treated the records as "obtained, shared, and submitted" in connection with the state proceedings, and it read *Kimmel v. Goland* as confined to the illegal recording of telephone calls. App. 33. Neither court separately analyzed the alleged acquisition of the records before any filing.

B. The line respondents acknowledge is the line California law draws.

Section 47(b) "does not bar recovery for injuries from tortious conduct regardless of the purpose for which such conduct is undertaken." *Kimmel v. Goland*, 51 Cal. 3d 202, 205 (1990). The California Supreme Court illustrated the point with a burglary. A prospective litigant who "burglarized defendant's premises in order to obtain evidence" could not invoke the privilege, because both that example and the unlawful recording in *Kimmel* "involve violation of a penal statute." *Kimmel*, 51 Cal. 3d at 212. The gravamen test that respondents invoke (Opp. 10) states the same limit: "unless it is demonstrated that

an independent, noncommunicative, wrongful act was the gravamen of the action, the litigation privilege applies." *Rusheen v. Cohen*, 37 Cal. 4th 1048, 1065 (2006).

Respondents stress that *Kimmel* described its holding as limited to its facts. Opp. 9. The principle it applied is not narrow. The California Supreme Court has since stated it as the general test: "the key in determining whether the privilege applies is whether the injury allegedly resulted from an act that was communicative in its essential nature." *Rusheen*, 37 Cal. 4th at 1058. *Kimmel*'s reasoning also fits this case. The claim there sought damages "not for injuries arising from the broadcast and publication of private conversations, but from the recording of them," and the right to a remedy "accrued at the moment of the violation." *Kimmel*, 51 Cal. 3d at 212. So too here. The proposed claim seeks damages for the unauthorized acquisition, receipt, and possession of the records, a wrong complete before any filing.

Nor does *Rusheen* help respondents. Opp. 10. It extended the privilege to postjudgment enforcement only because enforcement "did not provide an independent basis for liability separate and apart from the filing" of the privileged declarations. *Rusheen*, 37 Cal. 4th at 1065. Unlawful receipt and possession of criminal-history records do provide such a basis. They are misdemeanors whether or not the records are ever filed. See Part III, *infra*.

Respondents' own authority confirms the distinction. In *Mansell v. Otto*, 108 Cal. App. 4th 265 (2003) (cited at Opp. 9), the court found "the litigation privilege inapplicable to the noncommunicative acts alleged in the complaint": the

unauthorized reading of confidential records. *Mansell*, 108 Cal. App. 4th at 267-68, 271. The claim failed only because the defendants had obtained the records "through the court's normal processes, including a court order." *Mansell*, 108 Cal. App. 4th at 268. The Quaid's allege the opposite: the records were routed to private counsel without subpoena, discovery request, court order, or law-enforcement purpose. Pet. i, 9.

Jacob B. v. County of Shasta, 40 Cal. 4th 948 (2007) (cited at Opp. 7-9), is not to the contrary. There the database access, "which plaintiff does not even contend was unlawful," was not the gravamen; the injury arose from a letter filed in court. *Jacob B.*, 40 Cal. 4th at 957. Here the Quaid's contend that the acquisition itself was unlawful. Pet. 7-8.

C. A categorical futility ruling cannot rest on a premise respondents disavow.

Respondents say Rules 12(b)(6) and 15 "are not the source of any genuine dispute warranting review." Opp. 6. But the judgment under review is a Rule 15 judgment: it forecloses amendment altogether. A court "should freely give leave when justice so requires," Fed. R. Civ. P. 15(a)(2), and "[i]f the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits." *Foman v. Davis*, 371 U.S. 178, 182 (1962). The Ninth Circuit rested on futility alone. App. 3-4. A futility holding that treats unlawful acquisition as a protected communication cannot be squared with respondents' concession that unlawful evidence

gathering is not privileged merely because the evidence is later used in court. Opp. 9.

Respondents also say the petition identifies no split and no conflict with this Court's decisions. Opp. 5-7. The Quaid's do not claim a split. Their point is narrower. The judgment rests on the premise that obtaining the records and disclosing them were one communication. App. 3. Respondents do not defend that premise on its own terms. They defend the result on a different ground, that they personally accessed no database (Opp. 9-10), on which the Ninth Circuit did not rely. App. 3. When the rationale for a with-prejudice judgment cannot be squared with the rule the respondent concedes, vacatur and remand lets the court of appeals apply that rule in the first instance.

The Quaid's do not ask this Court to reweigh facts. They ask that the rule respondents themselves describe be applied before amendment is foreclosed. At a minimum, that warrants vacatur and remand. Pet. 12.

II. The Database-Access Objection Does Not Answer the Question Presented.

Respondents' principal argument is that the Quaid's "identify no well-pleaded allegation that either respondent personally accessed a law-enforcement database." Opp. 2; see Opp. 9-11. Personal access is not the test.

In *Kimmel*, the attorney defendant did not make the recordings. He was alleged to have "furthered the unlawful agreement" by "aiding, abetting, counseling, advising and encouraging" his clients' recording. *Kimmel*, 51 Cal. 3d at 207-08. The

California Supreme Court rejected his claim to special immunity ("Nothing in the text of section 47(2) suggests the existence of such an 'attorney exception'") and remanded the case for trial. *Kimmel*, 51 Cal. 3d at 205, 212-13.

The FAC alleges that Hepworth "communicated and acted in concert" with the Sheriff's Office employee, the prosecutor, and Granet to elicit sealed, non-public information about the Quaid's. Opp. 3, 10; Pet. 3; App. 32. It further alleges that the participants maintained "direct lines of communication" about the records and acted in concert. App. 24. Whether those allegations can be pleaded with the specificity needed to show participation in an unlawful acquisition is exactly what an amended pleading would test. *Foman*, 371 U.S. at 182. Respondents' objection goes to how an amended complaint should be judged, not to whether any amendment could be allowed.

The ruling below also is not limited to these respondents. It applies equally to the private respondents alleged to have received and possessed the records. App. 3. Granet and the Turicchis have not filed a brief defending the judgment.

III. The Quaid's Have Identified the Nonprivileged Claim They Would Plead.

Respondents assert that the Quaid's "do not identify what nonprivileged claim they could plead." Opp. 10. The claim is this. The Quaid's would amend their invasion-of-privacy and conspiracy claims (App. 25) so that they rest on the acquisition itself, not on any court filing. The amended pleading would allege that:

- on June 7, 2023, Reggie Serrano, a Santa Barbara Sheriff's Office employee, retrieved the Quaid's criminal-history, warrant-status, mug-shot, and jail records from a law-enforcement database for an unofficial, private civil-litigation purpose (App. 2 n.1, 24; Pet. i, 2-3);
- Serrano sent the records to Assistant District Attorney Anthony Davis, who forwarded them to Granet, private counsel for the Turicchis, under a June 7, 2023 cover email from Davis to Granet (App. 24, 32);¹
- no subpoena, discovery request, or court order authorized that routing (Pet. 9);
- the recipients were not authorized by law to receive the records and knew it; Hepworth acted in concert with Serrano, Davis, and Granet to elicit them; and Williams took part in the communications about them (Pet. 3; App. 24, 32); and
- the damages sought are limited to the injury from unauthorized acquisition, receipt, and possession, with no recovery for any court filing (Pet. 12).

California law makes that conduct independently unlawful. A person authorized to receive state summary criminal-history information who

¹ The district court's order describes the June 7, 2023 cover email as a "cover email from Davis to Berman." App. 32. That is a misdescription. The email, attached to the FAC as Exhibit A, was from Davis to Granet, consistent with the same order's account that Davis forwarded the records to Granet. App. 23, 24, 32.

knowingly furnishes it to an unauthorized person commits a misdemeanor. Cal. Penal Code § 11142. The same is true of records of local criminal justice agencies. Cal. Penal Code §§ 13302, 13303. And any person who, "knowing he is not authorized by law to receive a record or information obtained from a record, knowingly buys, receives, or possesses the record or information is guilty of a misdemeanor." Cal. Penal Code § 11143; see Cal. Penal Code § 13304 (same, for local records). Receipt and possession are not communications. They are the kind of "violation of a penal statute" that *Kimmel* held the privilege cannot immunize. *Kimmel*, 51 Cal. 3d at 212.

Civil Code § 1798.53, which the Quaid identified below as a statutory privacy remedy (Pet. 11), may supply an additional remedy to the extent the records came from state-agency systems. The amended claim does not depend on it.

IV. The Vehicle Objections Are Overstated.

Government actors. Respondents argue that the parties "most directly connected" to the database conduct "are not before the Court." Opp. 11. That is because the rulings dismissing the County, Davis, and Serrano rest on separate grounds that the petition does not challenge. Pet. 4. Their absence narrows the case. The privilege holding is the only basis on which the private respondents were dismissed (App. 3; App. 34 & n.4), and *Kimmel* shows that private participants may answer for an unlawful acquisition they did not physically perform. 51 Cal. 3d at 207-08, 212-13. Contrary to respondents' suggestion that a ruling "would not cleanly resolve any live claim" (Opp. 11), vacatur would remove the

only barrier to amendment against every private respondent held privileged.

Unpublished disposition. Respondents stress that the decision is nonprecedential. Opp. 11-12. The Quaid's do not seek a new rule of law. They seek vacatur of a judgment that bars their claims with prejudice on a premise respondents disavow. Pet. 12; Opp. 9. An unpublished disposition bars those claims just as completely.

Procedural history. Respondents "do not ask this Court to revisit" the vexatious-litigant ruling. Opp. 12. Neither do the Quaid's. Pet. 4. That order is "limited to Plaintiffs' claims against Berman related to the Mountain Drive property (not all Defendants and all claims)." App. 19. The Ninth Circuit affirmed the denial of leave to amend on futility alone. App. 3-4.

Preservation. The Quaid's argued below that section 47(b) does not reach noncommunicative conduct, and the district court rejected their *Kimmel* argument. App. 33. The Ninth Circuit decided the privilege and futility questions. App. 3-4. The opposition does not contend otherwise. See Sup. Ct. R. 15.2.

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, the Court should grant the petition, vacate the judgment of the Ninth Circuit, and remand for that court to decide whether the Quaid's may amend to plead claims limited to the alleged antecedent unauthorized acquisition, receipt, and possession of restricted law-enforcement records,

as distinct from any privileged litigation communication.

Respectfully submitted,

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