U.S. Court of Appeals Docket Nos. 18-15772 & 18-15773

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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,

Plaintiffs-Appellees,

vs.

SACRAMENTO COUNTY; ROGER DICKINSON; JEFF GAMEL; and ROBERT SHERRY,

Defendants-Appellants,

AMICI CURIAE BRIEF FILED WITH CONSENT OF ALL PARTIES IN SUPPORT OF APPELLANTS SACRAMENTO COUNTY, ROGER DICKINSON, JEFF GAMEL, AND ROBERT SHERRY

On Appeal from Judgment and Order of the
United States District Court for the Eastern District of California
The Honorable Kimberly J. Mueller, Judge
Case Nos.10-2414 and 12-2457-KJM-KJN

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SUBMISSION OF AMICUS CURIAE BRIEF WITH CONSENT OF ALL PARTIES

Pursuant to Fed. R. App. P. 29(a)(2), the League of California Cities and the California State Association of Counties hereby submits an amicus curiae brief in support of appellants, urging reversal of the judgment in the above action. Counsel for amici has received consent to file the brief from counsel for all parties on appeal.

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STATEMENT OF IDENTITY AND INTEREST OF AMICI

The League of California Cities ("League") is an association of 475 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

The California State Association of Counties ("CSAC") is a nonprofit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California, and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter with the potential to affect all California counties.

Specifically, the League and CSAC respectfully submit that affirmance of the lower court judgment would have a serious impact on the day-to-day operations of public entities in providing basic safety services to the public. The brief discusses the adverse impact the lower court decision has on the ability of public entities to partner with

private entities in funding important safety programs and ensuring timely adherence to a regulatory scheme. In addition, the brief discusses the manner in which the lower court decision undermines the ability of public entities to act on citizen complaints concerning enforcement of health and safety regulations and indeed impairs the ability of the public to effectively bring potential violations to the attention of regulatory authorities. Finally, the brief addresses California's comprehensive regulatory scheme concerning the actions of public officials which squarely and rationally governs much of the conduct that forms the basis of plaintiffs' lawsuit, in contrast to the amorphous, ad hoc substantive due process claim that has led to the improper and unsupportable judgment here.

No counsel for a party authored the following amici brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of the brief. No persons other than amici, their members, or their counsel made a monetary contribution to the preparation or submission of the brief.

INTRODUCTION

Plaintiffs secured an unprecedented $105 million judgment against the County of Sacramento, County officials and County employees premised upon regulatory action taken by the County as a result of complaints concerning the plaintiffs' mining operation from a competitor, federal and state regulators, as well as members of the public. The slender reed on which this due process claim rests is the contention that the action of the County and its employees and officials was arbitrary and capricious, and motivated by political corruption in the form of lawful campaign donations to public officials, minor holiday gifts given to County staff, and funding provided to the County by other mining companies to ensure prompt processing and enforcement of mining permits.

In their opening briefs, the County and the individual appellants have compellingly detailed the many legal errors that infect the judgment and require a reversal with directions, or at the very least, reversal for a new trial. However, beyond the absence of legal support for the judgment, reversal is necessary in order to avoid severe disruption of the manner in which public entities carry out the day-to-day task of enforcing safety regulations.

As we discuss, the district court concluded that improper motive can be inferred merely from the fact that a private company, pursuant to statutory authorization, funds a regulatory program, or submits (along with members of the public) a complaint concerning a

competitor's violation of health and safety regulations. This tenuous theory of liability, which subjects public officials and employees to entanglement in litigation and potential liability, undermines the ability of public entities to partner with private companies to ensure prompt and comprehensive regulatory compliance, and respond to complaints concerning violation of health and safety regulations. In addition, the notion that a freewheeling substantive due process claim is a necessary bulwark against political corruption is belied by California's comprehensive regulatory scheme which governs the actions of public officials and employees in rigorous fashion, including imposition of criminal penalties and civil liability. The district court judgment represents bad law, and even worse public policy. The judgment should be reversed.

STATEMENT OF THE CASE

The League of California Cities and California State Association of Counties adopt and incorporate by reference the statement of facts and statement of the case contained in the opening briefs of the County and the individual appellants.

ARGUMENT

I. THE DISTRICT COURT JUDGMENT UNDERMINES THE ABILITY OF PUBLIC ENTITIES TO PARTNER WITH PRIVATE COMPANIES TO ENSURE PROMPT AND COMPREHENSIVE PERMITTING AND REGULATION OF INDUSTRIES THAT SERVE THE PUBLIC.

As noted, the district court concluded that among the evidence the jury could properly consider in determining that the defendants violated plaintiffs' due process rights by enforcing regulatory standards on their mining operation was the fact that funding for aspects of the County regulatory program was provided by plaintiffs' competitors. In essence, plaintiffs argued that the regulatory action was a quid pro quo for their competitors' ongoing funding of the County's program. Yet, the notion that a public—private partnership concerning funding to ensure prompt and comprehensive permitting is somehow prima facie evidence sufficient to support an inference of improper motive is untenable.

As a threshold matter, there is nothing conceptually improper about a public entity effectively requiring a private company to pay for being regulated. For example, it is well established in California that local governments may assess fees against a party engaged in regulated activity to pay for costs associated with the regulation. Cal. Gov't Code § 66014 (West 2018). Indeed, Public Resources Code section 2207(e) specifically authorizes public entities to impose a fee upon each mining

operation to cover the reasonable costs incurred in regulating the operation.

By their very nature, some industries will necessarily require regulatory inquiry that will consume a vast amount of public resources, surface mining being a prime example. Both the regulators and the regulated must address a broad spectrum of subjects, requiring close scientific scrutiny and rigorous engineering analysis. Few, if any, public entities will typically have sufficient staff to conduct the necessarily comprehensive regulatory evaluation that public health and safety requires, in speedy fashion. Allowing public entities to partner with private companies with the former effectively depositing permit fees in advance and funding a comprehensive regulatory evaluation, avoids bottlenecking the permitting process and ensures both speedy and comprehensive health and safety regulation. This serves the public interest by allowing companies engaged in important industries, such as mining, to provide services to the public as soon as it is feasible.

The district court's conclusion that such public—private partnerships can constitute sufficient evidence to establish improper motivation for regulatory activity will necessarily have an immediate, deleterious effect on the regulation of surface mining. No public entity would engage in partnership with private mining interests to fund and speed the permitting process in the face of overwhelming potential liability, or, at the very least, entanglement in litigation.

While adverse impact on mining regulation alone would be sufficient grounds to reject the district court's reasoning, the judgment threatens the entire spectrum of public—private cooperation in the regulation of complex activities that may affect the health and safety of the public and the environment in a multitude of ways. As the individual appellants note in their opening brief, Government Code section 65950.5 authorizes expedited processing of natural gas projects if an applicant pays additional fees to cover the special staffing needs. And the South Coast Air Quality Management District (SCAQMD) similarly allows applicants to pay additional fees to cover the cost of expedited permit processing. SCAQMD Rule 301(v) (2018).[1/] These well- established priority processing procedures are plainly jeopardized by the district court decision here. Moreover, any public entity contemplating joint private—public activity to more readily process permitting for environmentally sensitive industries will be discouraged from doing so. In sum, the district court's judgment hamstrings public entities by stripping the regulatory tool box of an effective means to assess and enforce requirements in prompt fashion, avoid long delays in the ability of necessary industries to provide services to the public and shift the considerable expense of regulating mining and similar industries from public coffers to private parties.

[1/] South Coast AQMD, http://yourstory.aqmd.gov/docs/default-source/rule-book/reg-iii/rule-301.pdf?sfvrsn=4 (last visited Nov. 8, 2018).

The public benefit conferred by encouraging public—private partnership in regulating activities that are subject to complex scientific and environmental assessment counsels against adoption of the district court's unsupported, and indeed unsupportable reasoning that such arrangements create an inference of improper influence in the making of regulatory decisions. Because the judgment rests on this patently flawed premise, it must be reversed.

II. THE LOWER COURT DECISION UNDERMINES THE ABILITY OF PUBLIC ENTITIES TO ACT ON CITIZEN COMPLAINTS CONCERNING ENFORCEMENT OF HEALTH AND SAFETY REGULATIONS AND IMPAIRS THE ABILITY OF THE PUBLIC TO BRING VIOLATIONS TO THE ATTENTION OF REGULATORY AUTHORITIES.

The district court also concluded that the jury's finding of a substantive due process violation based upon the County's regulatory action was the result of a complaint submitted to the County by plaintiffs' competitor. This was consistent with plaintiffs' theory of the case that but for complaints made by their competitor, and the allegedly improper relationship between the County and their competitor, no enforcement action would have been taken against them.

Underlying the district court's reasoning is the premise that an adverse inference as to the propriety of the County's action can be drawn from the fact that enforcement proceedings were prompted by a complaint, as opposed to independent inspection by the County, and

that the complaint was made by plaintiffs' competitor. Yet, the district court's reasoning is illogical and undermines the basic foundation for virtually every regulatory scheme.

As a threshold matter, the suggestion that there is something unusual about enforcement activity being taken as a result of a complaint, instead of inspection activity, runs counter to everyday experience. Few, if any, public agencies have sufficient staff to conduct sua sponte inspections and ferret out violations of health and safety regulations for all regulated activities within their jurisdiction. The County of Sacramento alone covers almost 994 square miles,[2/] with the County of Los Angeles encompassing an astounding 4,084 square miles.[3/] The reality is that absent complaints from members of the public (regardless of their relationship to the regulated entity) to prompt inspection and subsequent regulatory action, it is unlikely that any public entity could effectively enforce a regulatory scheme. In short, regulatory action prompted by a complaint is neither unusual nor suspicious—it is the normal course of regulatory enforcement.

Moreover, that regulatory action is undertaken as a result of a complaint from a competitor of the regulated entity cannot constitute

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[2/] Sacramento County, *Demographics and Facts*, http://www.saccounty.net/Government/Pages/DemographicsandFacts.aspx (last visited Nov. 8, 2018).

[3/] County of Los Angeles, *Geography & Statistics*, https://www.lacounty.gov/government/geography-statistics/statistics/ (last visited Nov. 8, 2018).

prima facie evidence that the regulatory action is somehow tainted by the self-interest of the complaining party. First, as the County notes in its opening brief, even business entities have a First Amendment right to petition the government for redress of grievances. (Individual Appellants' Opening Brief ("AOB") 64.) A process that inhibits regulatory action based solely on the identity of the complaining party effectively raises a barrier to any redress that a public entity might provide in response to a valid complaint. Quite simply, the petitioning rights of a business entity cannot be viewed as lesser than those of a member of the general public. *Cf., Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 350-53 (2010).

In addition, the district court's conclusion that a complaint received from a business competitor raises an inference that the regulatory process is tainted has a deleterious effect on the right of individual members of the public to have their voices heard in making complaints concerning regulatory violations. Indeed, this case amply underscores the problem. Here, the County received complaints concerning plaintiffs' mining operation from plaintiffs' competitor, as well as members of the public. The district court concluded that the jury could properly find that the entire regulatory process was tainted by the fact that plaintiffs' competitor was among the complaining parties, apparently without regard to the validity of any citizen complaints. (1ER 36-38.)

The net result of the district court's reasoning is that the complaints of private citizens will necessarily be muted, indeed

effectively silenced, insofar as a complaint is also made by someone with a business interest adverse to that of a regulated entity. This is not and cannot be the law. It essentially creates the regulatory equivalent of the "heckler's veto," whereby the adverse response of an audience to a First Amendment protected activity is used to justify curtailing the activity. *See*, *e.g.*, *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 119 (2001). The receipt of a "tainted" complaint from a business competitor would necessarily inhibit regulatory enforcement in response to otherwise valid complaints from members of the public for fear that regulatory action will spawn a suit by the subject of the action.

The district court's conclusion that regulatory action prompted by a complaint rather than independent inspection gives rise to an inference of improper motive that can be ascribed to a public entity, and that the vested interests of a complaining party necessarily taints the entire regulatory process, is flatly wrong and undermines the foundation of regulatory action. At the same time, it adversely impacts the ability of the public to petition the government for redress of grievances, and, worse yet, does so in the context of an area in which the public has a vital interest—regulation of commercial activities that pose a threat to public safety and the environment. The reasoning of the district court should be rejected, and the judgment reversed.

III. CALIFORNIA'S COMPREHENSIVE REGULATION OF THE CONDUCT OF PUBLIC OFFICIALS AND EMPLOYEES UNDERSCORES THAT THE AD HOC, AMORPHOUS SUBSTANTIVE DUE PROCESS CLAIM EMBRACED BY THE DISTRICT COURT IS BOTH UNNECESSARY AND UNWISE.

As the County and the individual defendants note in their opening briefs, plaintiffs cobbled together a substantive due process claim premised on conduct by County officials and employees that falls within the everyday, ordinary scope of their official duties. Insisting that even the most routine and innocuous acts be viewed through the prism of alleged "corruption," plaintiffs have created a swath of potential liability that threatens almost every public official or employee involved in health and safety regulation. Recognition of such tenuous claims for liability under the guise of a substantive due process claim is supported neither by the law nor public policy. California rigorously regulates the conduct of public officials and employees, and there is no need to fashion a substantive due process claim out of whole cloth, especially given, as noted above, the adverse impact such claims have on the regulatory process.

Among the evidence cited by plaintiffs in support of their "corruption" claim is the receipt of political campaign contributions and minor holiday gifts by County officials and employees from plaintiffs' competitor. Yet, California is a national leader in promoting transparency and fairness in elections and government operations. The

Political Reform Act requires candidates and committees to file campaign statements by specified deadlines disclosing contributions received and expenditures made. Cal. Gov't Code § 84200, et seq. (West 2018). These documents are public and may be audited by the Fair Political Practices Committee and Franchise Tax Board to ensure that the public is fully informed and improper practices prohibited.

California also places a limit on campaign contributions for state offices, and local governments are free to enact their own laws concerning campaign contributions for local office. Not surprisingly, the County of Sacramento has strict limits on campaign contributions for County office. Sacramento Cty. Code § 2.115, et seq. (2018).[4/] The state also places strict limitations on receipt of gifts, honoraria and travel expenses by local officials and employees.[5/] Failure to comply with

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[4/] A list of city and county campaign finance regulations can be found at http://www.fppc.ca.gov/learn/campaign-rules/local-campaign-ordinances.html (last visited Nov. 8, 2018).

[5/] Local elected officers, candidates for local elective office, local officials specified in Government Code Section 87200, and judicial candidates, may not accept gifts from any single source totaling more than $470.00 in a calendar year. Cal. Gov't Code § 89503 (West 2018). Receipt of gifts aggregating to $470.00 or more during any 12-month period may subject an official to disqualification from any decision concerning the donor. Cal. Gov't Code § 87103(e) (West 2018). Employees of a local government agency who are designated in the agency's conflict of interest code may not accept gifts from any single source totaling more than $250.00 in a calendar year if the employee is required to report receiving income or gifts from that source on his or her annual statement of economic interests (Form 700). Cal. Gov't Code § 89503(c) (West 2018).

those limitations can result in criminal prosecution and substantial fines, or in administrative or civil monetary penalties for as much as $5,000 per violation or three times the amount illegally obtained. *See* Cal. Gov't Code §§ 83116, 87200, 89520, 89521, 91000, 91004, 91005.5 (West 2018).

California also prohibits public employees and officials from taking any official action with respect to any matter in which they have a personal financial interest. Cal. Gov't Code § 1090 (West 2018). Violating, or aiding and abetting an official or employee in violating the conflict of interest law is punishable by fine and imprisonment. Cal. Gov't Code § 1097 (West 2018).

As the individual appellants note in their brief (AOB 70-73), California's exhaustive regulatory scheme concerning public employees and officeholders strikes a balance between the need to maintain high ethical standards in public service, and protecting the constitutional rights of those individuals who wish to engage in the political process through contributions. California has set out clear guidelines for the conduct of public employees and elected officials that allow them to act reasonably and perform their essential duties without fear that their actions will be called into question at some later date.[6/]

[6/] The California Fair Political Practices Commission provides concise fact sheets, as well as detailed descriptions of the statutes and regulations governing campaign-finance limitations and the ethical rules applicable to public officials and employees. *See*

(*Footnote Continues On Next Page*)

The open ended substantive due process claim pursued by plaintiffs here is untethered to any specific standard that would allow a public employee to apprehend that his or her conduct could give rise to future liability. For example, a gift of cookies to the entire office has been transformed into evidence of undue influence sufficient to support a $105 million judgment, notwithstanding the fact that under California law and accompanying regulations, such a gift would fall well below the $470.00 ceiling, much less serve as a basis to challenge the propriety of government action. How can any public employee act expeditiously, or with any confidence at all, if every minor interaction with the public is fraught with the danger of acting in some manner that a jury, long after the fact and without specific guidance, may deem an ethical violation sufficient to impose catastrophic personal liability?

No public interest is served in effectively supplanting an extensive, well-established, and more importantly, **clear** regulatory scheme governing the ethical conduct of elected officials and public employees, with a muddy substantive due process claim. Indeed, allowing such claims will necessarily funnel regulatory challenges of this ilk to federal court for the very reason that state law would not countenance such illusory grounds for challenging regulatory action. *See*, *e.g.*, *Breakzone Billiards v. City of Torrance*, 81 Cal. App. 4th 1205, 1228-31 (2002) (rejecting challenge to land use decision based on

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http://www.fppc.ca.gov/learn/campaign-rules.html (last visited Nov. 8, 2018) and http://www.fppc.ca.gov/learn.html (last visited Nov. 8, 2018).

decision-maker's receipt of campaign contributions regulated by the Fair Political Practices Act).

Quite simply, the unduly relaxed standards employed by the district court in determining what evidence was sufficient to support plaintiffs' claim of undue influence, and failure to instruct the jury on the necessity of some showing of direct quid pro quo with regard to campaign contributions, will allow disgruntled applicants from a broad range of regulatory permits to make the proverbial "federal case" out of almost any local permit dispute. In an era when the federal courts are already overburdened, the notion that they should, under the guise of a free form substantive due process claim, routinely be asked to second guess local land use decisions that are already governed by specific state statutes, a fully fleshed out regulatory scheme and subject to state court judicial review, is unacceptable.

The judgment is contrary to the law and public policy. It must be reversed.

CONCLUSION

For the foregoing reasons, amici respectfully submit that the judgment should be reversed.

DATED: November 12, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE—PROPORTIONATE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that this **AMICI CURIAE BRIEF FILED WITH CONSENT OF ALL PARTIES IN SUPPORT OF APPELLANTS SACRAMENTO COUNTY, ROGER DICKINSON, JEFF GAMEL, AND ROBERT SHERRY** is proportionately spaced, has a typeface of 14 points or more, and contains 3,520 words.

DATED: November 12, 2018

BY: s/ Timothy T. Coates
Timothy T. Coates

CERTIFICATE OF SERVICE

(U.S. Court of Appeals Docket Nos. 18-15772 & 18-15773

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036.

I certify that on November 12, 2018, I electronically filed the foregoing **AMICI CURIAE BRIEF FILED WITH CONSENT OF ALL PARTIES IN SUPPORT OF APPELLANTS SACRAMENTO COUNTY, ROGER DICKINSON, JEFF GAMEL, AND ROBERT SHERRY** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that each appellant in the case is represented by counsel who are registered CM/ECF users and will be served by the appellate CM/ECF system.

BY: s/ Pauletta L. Herndon
Pauletta L. Herndon