No. 06-

IN THE

Supreme Court of the United States

DAVID EICHENLAUB, *et al.*,
Petitioners,

v.

TOWNSHIP OF INDIANA, *et al.*,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *County of Sacramento* v. *Lewis*, 523 U.S. 833 (1998), this Court held that a police officer engaged in a high-speed pursuit does not violate the Fourteenth Amendment's guarantee of substantive due process unless his actions "shock the conscience." The courts of appeals are deeply divided over the following question:

Whether—as the Third Circuit below held, in accord with the Tenth, Eleventh, and D.C. Circuits—all substantive-due-process claims involving executive action are subject to the "shocks the conscience" standard, or whether—as the First, Second, Fourth, Fifth, Sixth, Seventh, and Ninth Circuits have held—only certain types of executive action are subject to that standard.

PARTIES TO THE PROCEEDINGS

Petitioners are David Eichenlaub, Daniel Eichenlaub, and Barbara Eichenlaub. They were plaintiffs in the District Court, appellants in the first appeal before the United States Court of Appeals for the Third Circuit, and appellees/cross-appellants in the second appeal before the Third Circuit.

Respondents are Township of Indiana; Township of Indiana Board of Supervisors; Dorothy T. Claus; George E. Dull, Jr.; Charles R. Federoff; Jeffrey D. Peck; Daniel L. Taylor, in their official capacities; Township of Indiana Code Enforcement Officer Jeffrey S. Curti, in his official capacity; Dan Anderson, in his official capacity; Mildred Brozek, Administratrix of the Estate of Kevin Brozek; and Township of Indiana Engineer Daniel B. Slagle, in his individual and official capacity. They were defendants in the District Court, appellees in the first appeal before the United States Court of Appeals for the Third Circuit, and appellants/cross-appellees in the second appeal before the Third Circuit.

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PETITION FOR A WRIT OF CERTIORARI

David, Daniel, and Barbara Eichenlaub ("the Eichenlaubs") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The initial opinion of the Third Circuit affirming the District Court's entry of summary judgment in part and reversing in part is reported at 385 F.3d 274 and reprinted in the appendix hereto ("App.") at 1a. The second opinion of the Third Circuit affirming the District Court's trial and post-trial rulings is not reported and is reprinted at App. 22a. The opinion of the District Court rejecting the Magistrate Judge's report and entering judgment against the Eichenlaubs on their

substantive-due-process claim is not reported and is reprinted at App. 35a. The Magistrate Judge's Report and Recommendation is not reported and is reprinted at App. 48a.

JURISDICTION

The judgment of the Court of Appeals was entered on January 25, 2007. App. 22a. A timely petition for rehearing and rehearing *en banc* was denied on February 23, 2007. App. 101a. On May 15, 2007, Justice Souter extended the time within which to file a petition for a writ of certiorari to and including June 25, 2007. App. 102a. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

INTRODUCTION

This case concerns an important question of constitutional law: whether the "shocks the conscience" test applies to all substantive-due-process claims involving executive action, or only to a certain subset. In *County of Sacramento* v. *Lewis*, 523 U.S. 833 (1998), this Court "granted certiorari to resolve a conflict among the Circuits over the standard of culpability on the part of a law enforcement officer for violating substantive due process in a pursuit case." *Id.* at 839 (citation omitted). The Court held that the correct test for these sorts of cases is whether the police action "shocks the conscience." *Id.* at 847. Since *Lewis*, the federal courts of appeals have divided seven-to-four over whether "shocks the conscience" likewise provides the substantive-due-process "standard of culpability" for *all* executive officers in *all* contexts.

This case squarely presents that question. The Eichenlaubs, petitioners here, were embroiled in a land-use

dispute with government officials in Indiana Township, Pennsylvania. As the dispute dragged on, these officials subjected the Eichenlaubs to egregious treatment, including baseless civil citations and a colossal retroactive "mid-year" property-tax assessment that changed the existing $6,800 bill into one for more than $68,000. Armed with evidence that this treatment was retaliatory, the Eichenlaubs filed suit under 42 U.S.C. § 1983, alleging that the Township's actions were driven by an "improper motive" and therefore violated the Fourteenth Amendment's substantive-due-process guarantee.

While the case was pending, the Third Circuit in a separate case jettisoned its longstanding "improper motive" test, concluding that this Court's decision in *Lewis* established "shocks the conscience" as the uniform standard to evaluate *all* executive action in substantive-due-process cases. *See United Artists Theatre Circuit, Inc.* v. *Township of Warrington*, 316 F.3d 392 (3d Cir. 2003). A year later, the Eichenlaubs' case reached the Third Circuit, and the panel reaffirmed the new rule it had fashioned in *United Artists*. Applying the "shocks the conscience" test, the Court of Appeals held that the Eichenlaubs failed to state a substantive-due-process claim.

The Third Circuit's across-the-board "shocks the conscience" rule squarely conflicts with the rulings of at least seven other circuits. Three circuits—the First, Seventh, and Ninth—have explicitly considered, and rejected, the rule that *Lewis*'s "shocks the conscience" standard applies to all executive-action cases. And at least four more—the Second, Fourth, Fifth, and Sixth—have repeatedly declined to use the "shocks the conscience" test in certain executive-action contexts (often land-use cases). Meanwhile, the Tenth, Eleventh, and District of Columbia Circuits have embraced the categorical approach the Third Circuit has taken. This Court should grant certiorari to resolve the multiple conflicts on this important and recurring question.

STATEMENT OF THE CASE

1. Petitioners are a married couple, Daniel and Barbara Eichenlaub, and Daniel's brother, David Eichenlaub. The Eichenlaubs own two parcels of property in Indiana Township, Pennsylvania ("the Township"). Beginning in the mid-1990s, the Eichenlaubs sought the Township's permission to develop one parcel for residential use and to grade portions of the other parcel for use as a container nursery for their landscaping business.

But the Township refused, leveling a number of meritless and arbitrary objections to the Eichenlaubs' proposals. For example, respondent Jeffrey Curti informed the Eichenlaubs that they could not build homes on the first parcel unless they obtained both a grading permit and approval for a revised subdivision plan under the Township's current subdivision ordinance. The law was clear that the Eichenlaubs did not need any such approval—their land was governed by an earlier-approved subdivision plan. Nonetheless, the Eichenlaubs relented. Under protest, they applied for and received a grading permit, hired an engineering firm, and then submitted a revised subdivision plan.

The Township still refused to approve the Eichenlaubs' plans. The respondent Board of Supervisors ("Board") voted to deny the revised subdivision plan that the Eichenlaubs were forced to needlessly prepare in the first place. App. 54a. The Board's action triggered a two-month process that followed the same predictable cycle: The Eichenlaubs repeatedly revised their plan to conform to the Board's wishes and the Board repeatedly denied the plan anyway. *Id.* 54a-55a. Throughout this period, the Eichenlaubs wrote letters to the Board and appeared at Board meetings to protest the Board's actions. Finally, on June 22, 1999, the Board voted to conditionally approve the yet-again-revised plan. *Id.* 55a. But when they received a draft developer's agreement from the Township, the Eichenlaubs realized that it subjected

them to numerous conditions and obligations not applied to other Township property owners. The Eichenlaubs therefore withdrew their plan application. *Id.*

2. It was at this point that the Eichenlaubs' problems began in earnest. Displeased with the Eichenlaubs for having criticized and publicized the Township's arbitrary actions, the Township launched a series of attacks against them. The most egregious example involved the Eichenlaubs' taxes. In early 2001, property owned by the Eichenlaubs and their father had received a collective assessment of $6,800. J.A. 1083-1086. The Eichenlaubs promptly paid these taxes. But in October of the same year, the Eichenlaubs received notice of a *retroactive* assessment change, upping the tax bill on the same property for the same year *tenfold*, to $68,000. *Id.*; *see also* App. 69a. Through discovery, the Eichenlaubs learned that the Township employee responsible for this stunning turnabout was the girlfriend of Kevin Brozek, the Township manager who long had been embroiled in the Eichenlaubs' land-use dispute. App. 68a. Based on this information and other details gleaned from discovery, the Eichenlaubs alleged before the District Court that Brozek's girlfriend had "transmitted false information" to the County so that the Eichenlaubs' tax bill would be increased. *Id.* 69a.

This was far from the only retaliation the Eichenlaubs alleged in their Complaint and subsequent filings. At the outset, respondents applied onerous subdivision requirements to the Eichenlaubs' land, even while acknowledging that the same requirements were not being applied to other landowners. *See* J.A. 572-574 (deposition of Jeffrey Curti). Respondents also conducted unannounced inspections of the Eichenlaubs' property and issued them baseless citations for having allegedly violated the Township's Grading Ordinance. To compound matters, respondent Curti reported the supposed violations to county officials, leading the county to issue unfounded compliance notices. App. 56a. The Eichenlaubs were fully cleared of the cited violations. *Id.* But

the respondents were not yet done with the Eichenlaubs. In March 2001, the Board obstructed the Eichenlaubs' ability to develop their land by refusing to sign off on documents allowing utility companies to serve their property. *Id.* 67a-68a. To the surprise of at least one Board member, this decision was made behind closed doors and never subjected to a public vote. *Id.* 68a. These abuses of authority were further livened by comments ranging from revealing to vicious: One Township official, for example, derided David Eichenlaub as a "troublemaker," J.A. 864-865, and referred to the Eichenlaubs' attorney in graphically vulgar terms, stating, among other things, that he wanted to "sever" the attorney's head. J.A. 1075-1077; *see also* App. 67a n.4.

3. The Eichenlaubs filed suit in September 1999. App. 51a. They alleged, among other things, that Township officials violated their First Amendment rights to petition and to be free of retaliation and their Fourteenth Amendment rights to equal protection and substantive due process. *Id.* 4a-5a. Their substantive-due-process claim was based on then-controlling Third Circuit law, which required a showing that the government's actions were (1) not rationally related to a legitimate government interest, or (2) " 'motivated by bias, bad faith, or improper motive.' " *Parkway Garage, Inc.* v. *City of Philadelphia*, 5 F.3d 685, 693 (3d Cir. 1993) (quoting *Midnight Session, Ltd.* v. *City of Philadelphia*, 945 F.2d 667, 683 (3d Cir. 1991), *cert. denied*, 503 U.S. 984 (1992)). This settled rule stemmed from *Bello* v. *Walker*, 840 F.2d 1124 (1988), *cert. denied*, 488 U.S. 851 (1988), in which the court held that, because arbitrary action is the " 'touchstone' " of due process, a plaintiff must allege " 'some element of abuse of governmental power.' " *Id.* at 1129 (quoting *Davidson* v. *Cannon*, 474 U.S. 344, 353 (1986)).

This test was easily satisfied by (among other things) the abusive inspections the respondents conducted, the regulatory approvals they maliciously withheld, and the mammoth

mid-year retroactive tax hike they levied on the Eichenlaubs' property. All of these actions were based on an improper motive—namely, Township officials' anger at the Eichenlaubs for publicly taking them to task during the development dispute.

After discovery, both sides moved for summary judgment. In a Report and Recommendation, the Magistrate Judge recommended that the Eichenlaubs' substantive-due-process claim proceed to trial. App. 92a. The Magistrate Judge relied on the Eichenlaubs' allegations, supported by record evidence, that the respondents had subjected them to "inconsistent interpretation and application of the Township's ordinances," vilified them at meetings, issued baseless citations, refused to sign crucial documents, and improperly increased their tax assessment by an order of magnitude. *Id.* 56a; *see generally id.* 53a-69a. Crucially, the Magistrate Judge found that these allegations sufficed to survive summary judgment under the *Bello* test: "[T]he aggregate factual scenario includes questions of improper motives and bias which must be resolved by a jury." *Id.* 92a.

4. The Magistrate's Report was transmitted to the District Court for consideration. But before that court could rule, the legal landscape shifted: On January 14, 2003, a panel of the Third Circuit discarded the *Bello* "improper motive" test. In *United Artists*, 316 F.3d at 400-401, the panel held, over a vigorous dissent, that the *Bello* standard had been displaced by this Court's 1998 decision in *Lewis*.

The *Lewis* case involved two young motorcyclists who led police on a high-speed chase that ended in tragedy: The motorcycle tipped over, and the trailing police car, unable to stop, rammed it from behind, killing a passenger. The decedent's family filed a substantive-due-process claim against the officers. Reversing the district court's judgment in favor of the officers, the Ninth Circuit panel concluded that the " 'appropriate degree of fault to be applied to high-

speed police pursuits is deliberate indifference to, or reckless disregard for, a person's right to life and personal security.' " *Lewis*, 523 U.S. at 838 (quoting court of appeals opinion). The Ninth Circuit's decision created a circuit split over whether substantive-due-process claims in police-pursuit cases were governed by the "deliberate indifference" standard the Ninth Circuit adopted, or by a "shocks the conscience" standard, as other courts of appeal had held. *See id.* at 839-840 (listing cases on either side of the split, all involving police pursuits). In its petition for certiorari, the County framed the question presented as whether the appropriate substantive-due-process standard in police-pursuit cases is " 'shocks the conscience * * * or is 'deliberate indifference' or 'reckless disregard.' " *Id.* at 855-856 (Rehnquist, C.J., concurring in the conclusion "that 'shocks the conscience' is the right choice among the alternatives posed in the question presented").

This Court began by acknowledging the narrow issue before it: "We granted certiorari to resolve a conflict among the Circuits over the standard of culpability on the part of a law enforcement officer for violating substantive due process in a pursuit case." *Id.* at 839 (citation omitted). Turning to the contours of substantive due process, the Court wrote that "[t]he touchstone of due process is protection of the individual against arbitrary action of government," *id.* at 845 (quoting *Wolff* v. *McDonnell*, 418 U.S. 539, 558 (1974)) (quotation marks omitted) (alteration in *Lewis*), and that it "ha[d] spoken of the cognizable level of executive abuse of power as that which shocks the conscience." *Id.* at 846. The Court held that in a situation calling for split-second decision-making, only an intent to cause harm could shock the conscience:

> Like prison officials facing a riot, the police on an occasion calling for fast action have obligations that tend to tug against each other. * * * They are supposed to act decisively and to show restraint at the

> same moment, and their decisions have to be made "in haste, under pressure, and frequently without the luxury of a second chance." * * * [W]hen unforeseen circumstances demand an officer's instant judgment, even precipitate recklessness fails to inch close enough to harmful purpose to spark the shock * * * . [*Id.* at 853 (quoting *Whitley* v. *Albers*, 475 U.S. 312, 320 (1986)).]

Because no such intent to cause harm had been alleged in *Lewis*, the Court concluded that the police officer's actions there did not violate the Constitution. *Id.* at 854.

Writing five years later, the Third Circuit's divided panel in *United Artists* held that *Lewis* had radically reshaped the law of substantive due process. Despite the avowedly narrow issue resolved by this Court in *Lewis*, the *United Artists* panel read *Lewis* to mean that the "shocks the conscience" test should henceforth apply not just to cases involving police pursuit (or to cases involving law enforcement generally), but instead to *all* executive action cases of any sort. 316 F.3d at 401. Because the "improper motive" test was "much less demanding" and "swe[pt] much more broadly" than "shocks the conscience," the panel wrote, it should be discarded. *Id.* at 400.

Judge Cowen dissented. He wrote that the majority's reliance on *Lewis* was "misguided" because the scenario there—a high-speed police chase—was "extremely far afield" from the land-use issues presented in *United Artists*. *Id.* at 405 (Cowen, J., dissenting). He went on to explain that extending *Lewis*'s "shocks the conscience" standard to every substantive-due-process claim would "leave[ ] the door ajar for intentional and flagrant abuses of authority by those who hold the sacred trust of local public office." *Id.* at 406-407. According to Judge Cowen, the "shocks the conscience" standard simply did not translate to the land-use context. Unlike police misconduct cases, "which tend to stir our

emotions," land use was "mundane"; in this context, the "shocks the conscience" standard had no meaning. *Id.* at 407. He predicted—accurately—that the district courts would struggle with the "awkward analogy" between *Lewis* and land-use cases, and that "[t]he confusion and potential for disparate results * * * will haunt us for years to come." *Id.*

Weeks later, the Third Circuit declined to rehear *United Artists*—a decision that drew another powerful dissent, this time from Judge Nygaard. *See United Artists Theatre Circuit, Inc.* v. *Township of Warrington*, 324 F.3d 133, 134 (3d Cir. 2003) (en banc) (Nygaard, J., dissenting from denial of rehearing and rehearing en banc). Judge Nygaard explained that there were "inherent problems with reading *Sacramento* v. *Lewis* as creating a blanket 'shocks the conscience' standard for all substantive due process claims." *Id.* That is because the test is appropriate in due-process cases only "where the actor cannot deliberate," since "[i]n those situations, exigencies may excuse" less exacting standards like "deliberate indifference." *Id.* at 135. But, of course, many—if not most—executive actions are "decisions [that] are not made in the heat of the moment without ability to deliberate." *Id.* To the contrary, "they are (or should be) deliberate decisions made after proper consideration." *Id.* For those actions, "[t]he appropriate standard, as repeatedly articulated before and after *Lewis*, is 'improper motive.' " *Id.*

5. In examining the Eichenlaubs' substantive-due-process claim, the District Court acknowledged that the Third Circuit's recent decision in *United Artists* controlled. The court therefore rejected the *Bello* "improper motive" test that the Magistrate Judge had relied on and instead applied the "shocks the conscience" standard. This made a dispositive difference. According to the District Court, "[t]he conduct alleged by the Eichenlaubs, while arguably (as reflected in the Report and Recommendation) a question of fact for the fact finder under the lesser 'improper motive' standard,

simply cannot * * * withstand summary judgment under the higher 'shocks the conscience' standard." App. 44a. It also entered judgment for the Township on the other counts in the Eichenlaubs' Complaint. *Id.* 47a.

On appeal, a panel of the Third Circuit reversed the District Court in part, remanding for further consideration of the Eichenlaubs' First Amendment retaliation claim, equal-protection claim, and claim for mandamus-related damages. *Id.* 1a ("*Eichenlaub I*"). The court, however, affirmed the District Court on substantive due process. The panel acknowledged the Eichenlaubs' allegations that "zoning officials applied subdivision requirements to their property that were not applied to other parcels; that they pursued unannounced and unnecessary inspection and enforcement actions; that they delayed certain permits and approvals; [and] that they improperly increased tax assessments." *Id.* 18a. The Third Circuit accepted, in other words, that the Eichenlaubs had alleged improper motive. But the court, applying *United Artists*, deemed these allegations inadequate because they "d[id] not rise sufficiently above that at issue in a normal zoning dispute to pass the 'shocks the conscience test.' " *Id.* In so holding, the court observed that the Magistrate Judge had used the "improper motive" standard, that the "shocks the conscience" standard had been adopted by the "intervening decision" in *United Artists*, and that therefore the District Court had been "correct" to employ the "shocks the conscience" test. *Id.* 19a. It is this holding that the petitioners ask this Court to review on certiorari.[1]

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[1] In a May 16, 2007 opposition to the Eichenlaubs' motion for an extension of time to file this petition, respondents argued that the Eichenlaubs did not contest the "shocks the conscience" standard below. Not so. The Eichenlaubs expressly (and successfully) advocated for the "improper motive" standard before the Magistrate Judge. Of course, by the time they filed their briefs in the Third Circuit, that court had already issued its decision in *United Artists*. It is well-settled that the Third Circuit "strictly adheres to

On remand, the case went to the jury on the retaliation and mandamus claims. App. 24a. The jury returned a verdict in favor of David Eichenlaub on the retaliation claim and in favor of Daniel and Barbara Eichenlaub on the mandamus claim. *Id.* 24a-25a. After trial, the District Court awarded the Eichenlaubs fees and costs. *Id.* 26a. The Third Circuit affirmed. *Id.* 27a ("*Eichenlaub II*"). The court denied rehearing and rehearing en banc on February 23, 2007, and the Eichenlaubs timely filed this petition for certiorari to challenge the Third Circuit's decision in *Eichenlaub I* to employ the "shocks the conscience" test in analyzing substantive-due-process claims.[2]

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its Internal Operating Procedure 9.1 which provides: 'It is the tradition of this Court that the holding of a panel in a precedential opinion is binding on subsequent panels.' " *Mariana* v. *Fisher*, 338 F.3d 189, 201 (3d Cir. 2003), *cert. denied*, 540 U.S. 1179 (2004). Thus in the Third Circuit, "*no* subsequent panel overrules the holding in a precedential opinion of a previous panel." *Id.* (emphasis added). The Eichenlaubs in their appellate briefs explained that they had at all times advocated for the "improper motive" standard, but acknowledged what was indisputable: "Recently, in *United Artists*, [the Third Circuit] adopted a 'shocks the conscience' standard for * * * claims of substantive due process rights regarding land use matters." Opening Brief of Appellants at 33. Given that the panel hearing the Eichenlaubs' appeal had no power to overrule or revisit the rule adopted by the *United Artists* panel, the Eichenlaubs were under no obligation to do anything more than they did to preserve the question: identify the standard they had consistently advocated but then argue the appeal under the controlling standard in the Third Circuit.

[2] Respondents also argued in their May 16 filing that this petition is untimely because it was not filed within 90 days of the Third Circuit's decision in *Eichenlaub I*. That is exactly wrong. It is hornbook law that this Court may grant certiorari from a second appellate decision in a given case and "may consider questions raised on the first appeal, as well as 'those that were before the court of appeals upon the second appeal.' " *Mercer* v. *Theriot*, 377

REASONS FOR GRANTING THE WRIT

I. THE COURTS OF APPEALS ARE DEEPLY DIVIDED OVER WHETHER THE "SHOCKS THE CONSCIENCE" STANDARD APPLIES TO ALL SUBSTANTIVE-DUE-PROCESS CLAIMS INVOLVING EXECUTIVE ACTION.

The Third Circuit's decision in this case exacerbates an entrenched circuit split on a question federal courts regularly face: whether the "shocks the conscience" standard applies across the board to all executive action, or just to certain types of executive action. The Third Circuit below held that it applies universally to all executive action, joining the Tenth, Eleventh, and District of Columbia Circuits in embracing that categorical rule. But at least seven other circuits—the First, Second, Fourth, Fifth, Sixth, Seventh, and Ninth—have recognized and applied other yardsticks when evaluating certain types of executive action. This intractable seven-to-four circuit split is reason enough to grant the writ. *See* S. Ct. R. 10(a); *Braxton* v. *United States*, 500 U.S. 344, 347 (1991) (a "principal purpose for which we use our certiorari jurisdiction * * * is to resolve conflicts among the United States courts of appeals"). And because the split has only intensified in the last year—with eight judges in the Ninth Circuit dissenting when that court refused to rehear *en*

U.S. 152, 153 (1964) (granting certiorari from second decision and considering questions resolved in first decision) (quoting *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 257 (1916)); *see also* Robert L. Stern *et al.*, *Supreme Court Practice* 359 (8th ed. 2002) ("Of course, where the question for Supreme Court review was resolved * * * on a first appeal in which a new trial was ordered, followed by a new trial and a second appeal to the lower court * * *, the 90-day rule does not bar review of the certiorari point decided on the first appeal * * * . [I]t is enough if certiorari is sought within 90 days following the second or last of the judgments rendered below.").

banc a decision that conflicts with the Third Circuit's approach—certiorari is particularly justified.

1. The decision below squarely conflicts with the decisions of other circuits that have expressly held that *Lewis*'s "shocks the conscience" standard does not apply to every substantive-due-process claim involving executive action. *See, e.g.*, *Kennedy* v. *City of Ridgefield*, 439 F.3d 1055, 1064 (9th Cir. 2006) ("We have not added a requirement that the conscience of the federal judiciary be shocked by deliberate indifference * * *.") (quotation marks, citation, and alteration omitted); *Davis* v. *Rennie*, 264 F.3d 86, 99 (1st Cir. 2001) (the nature of the executive action at issue "removes this case from the ambit of *Lewis* and its 'shocks the conscience' standard"); *cert. denied*, 535 U.S. 1053 (2002); *Khan* v. *Gallitano*, 180 F.3d 829, 836 (7th Cir. 1999) (concluding that the "shocks-the-conscience analysis [i]s not generally applicable to all substantive-due-process claims").

In *Khan* v. *Gallitano*, the Seventh Circuit considered—and rejected—the rule that "shocks the conscience" applies across the board. Underscoring the uncertainty that pervades this question, the Seventh Circuit observed that "[t]he courts have long struggled to identify the appropriate analysis for substantive-due-process claims." 180 F.3d at 833. It identified two substantive-due-process analyses used by this Court: the *Lewis* "shocks the conscience" test and the "fundamental rights and liberties" test adopted in *Washington* v. *Glucksberg*, 521 U.S. 702 (1997). Rejecting a one-size-fits-all approach, the Seventh Circuit held that the type of executive action at issue in *Khan* warranted a different standard than "shocks the conscience." According to the Seventh Circuit, "[t]he circumstance[ ] in *Lewis*, a high-speed chase where government officials had to make split-second decisions, has no resemblance to the situation in this case." *Id.* at 836. Unlike the Third Circuit—which thought that this Court's decision in *Lewis* articulated a universal standard for all substantive-due-process claims involving executive action—

the Seventh Circuit recognized that the *Lewis* Court "made clear that its shocks-the-conscience analysis was not generally applicable to all substantive-due-process claims." *Id.* (citing *Lewis*, 523 U.S. at 851). Accordingly, the court concluded "that the *Glucksberg* fundamental rights analysis generally applies in substantive-due-process cases, but for particular circumstances such as the high-speed chase in *Lewis* or pre-trial detention, the specialized analysis adopted for those circumstances would apply." *Id.*

Likewise, in *Davis* v. *Rennie*, the First Circuit rejected "shocks the conscience" in a case involving an involuntarily committed mental patient. The *Davis* court considered a substantive-due-process claim by a patient who, while being restrained by several mental-health workers, was punched repeatedly in the face by another worker. 264 F.3d at 92-94. At the close of trial, the defendants "asked the judge to instruct the jury that it could impose liability only if it found that the [defendants'] failure to intervene to protect [the plaintiff] involved behavior so extreme as to 'shock the conscience.'" *Id.* at 98-99. The trial court refused to give this instruction—a refusal the First Circuit affirmed on appeal. The court wrote that the defendants, "unlike the police officer in *Lewis*, did not face competing obligations between restoring order and exacerbating disorder." *Id.* at 99. The court wrote that that "factual element * * * removes this case from the ambit of *Lewis* and its 'shocks the conscience' standard." *Id.* Indeed, the court emphasized that "there is precedent for subjecting the conduct of a mental health worker to a more exacting standard than that of a prison guard controlling a riot or a police officer chasing a fleeing car." *Id.* (citing *Youngberg* v. *Romeo*, 457 U.S. 307, 321-322 (1982)). The court therefore held that "the trial court's decision to reject the 'shocks the conscience' standard is consistent with this distinction." *Id.* at 99-100.

Finally, just last year in *Kennedy* v. *City of Ridgefield*, the Ninth Circuit rejected the "shocks the conscience" standard

in evaluating whether a state-created danger violated substantive due process. In *Kennedy*, the defendant police officer received a complaint from a woman who said her daughter had been abused by a neighbor. 439 F.3d at 1057. Despite the complainant's warning that her neighbor was dangerous, the officer contacted the neighbor about the alleged abuse without notifying the complainant that he was doing so. *Id.* at 1058. That night, the neighbor broke into the complainant's home and shot her and her husband while they slept. *Id.* The defendant officer appealed from a denial of qualified immunity and the Ninth Circuit affirmed. In rejecting the qualified-immunity claim, the court reiterated that the standard to be applied was "deliberate indifference"—*not* "shocks the conscience." *Id.* at 1064. And like the Seventh Circuit in *Khan*, the Ninth Circuit emphasized that this approach was fully supported by precedent: "We have not added a requirement that the conscience of the federal judiciary be shocked by deliberate indifference, because the use of such subjective epithets as 'gross' 'reckless' and 'shocking' sheds more heat than light on the thought process courts must undertake in cases *of this kind*." *Id.* at 1064-1065 (quoting *L.W.* v. *Grubbs*, 92 F.3d 894, 900 (9th Cir. 1996)) (quotation marks and alteration omitted) (emphasis added).

The panel decision in *Kennedy* drew a strongly worded dissent, as did the court's subsequent denial of rehearing *en banc*. Eight judges would have reviewed the case *en banc* in part because they—like the Third Circuit below—considered it settled by this Court's decision in *Lewis* that "liability cannot attach here where no 'conscience shocking' abuse of power can be alleged." *Kennedy* v. *City of Ridgefield*, 440 F.3d 1091, 1094 (9th Cir. 2006) (en banc) (Tallman, J., dissenting from denial of rehearing and rehearing en banc) (citing *Lewis*, 523 U.S. at 850).

These three cases dramatize the entrenched split in the circuits over this important and recurring question. They also

illustrate the confusion that this split continues to sow. After all, eight judges of the Ninth Circuit within just the last year wrote separately to criticize the rule that the *Kennedy* panel articulated. These splits alone justify certiorari.

2. But the circuit split runs deeper still. Four other circuits—the Second, Fourth, Fifth, and Sixth—have adopted an approach to substantive-due-process claims that squarely conflicts with the categorical approach adopted by the Third Circuit: They apply the "shocks the conscience" test to some claims of executive action but not to others.

The Second Circuit, for example, has held that in some cases "only Government conduct that 'shocks the conscience' can violate due process." *United States* v. *Rahman*, 189 F.3d 88, 131 (2d Cir. 1999) (citing *Lewis*); *see also O'Connor* v. *Pierson*, 426 F.3d 187, 203 (2d Cir. 2005) (the test "when challenging executive action" is "shocks the conscience") (citing *Lewis*, 523 U.S. at 846); *Smith ex rel. Smith* v. *Half Hollow Hills Cent. School Dist.*, 298 F.3d 168, 173 (2d Cir. 2002) ("The protections of substantive due process are available only against egregious conduct" that "shock[s] the conscience"). But the Second Circuit has applied an entirely different standard to several categories of executive-action substantive-due-process cases. In the land-use context, for instance, the court held as recently as April of this year that "[i]n order to prove that their right to substantive due process was violated" by government refusal to grant a given land-use permit or certificate, plaintiffs "must show (1) that they had a valid property interest in the certificate * * * and (2) that the Town infringed that interest in an arbitrary or irrational manner." *O'Mara* v. *Town of Wappinger*, 485 F.3d 693, 700 (2d Cir. 2007); *accord Clubside, Inc.* v. *Valentin*, 468 F.3d 144, 152 (2d Cir. 2006); *Harlen Assocs.* v. *Incorporated Village of Mineola*, 273 F.3d 494, 503 (2d Cir. 2001).

The Fourth, Fifth, and Sixth Circuits take the same basic approach as the Second, which is to say each applies "shocks the conscience" to some types of executive action, but another test for other types of executive action. Thus, the Fourth Circuit has consistently held that a substantive-due-process violation in the land-use context requires a showing "(1) that [plaintiff] had property or a property interest; (2) that the state deprived [it] of this property or property interest; and (3) that the state's action falls so far beyond the outer limits of legitimate governmental action that no process could cure the deficiency." *Tri County Paving, Inc.* v. *Ashe County*, 281 F.3d 430, 440 (4th Cir. 2002) (quoting *Sylvia Dev. Corp.* v. *Calvert County*, 48 F.3d 810, 827 (4th Cir. 1995)); *accord Sunrise Corp. of Myrtle Beach* v. *City of Myrtle Beach*, 420 F.3d 322, 328 (4th Cir. 2005), *cert. denied*, 126 S. Ct. 1618 (2006).

Similarly, the Fifth and Sixth Circuits apply a rational-basis test when evaluating substantive-due-process claims in the land-use context. *See Simi Inv. Co., Inc.* v. *Harris County*, 236 F.3d 240, 250-251 (5th Cir. 2000) ("[W] e must ask next whether this denial is rationally related to a legitimate governmental interest."), *cert. denied*, 534 U.S. 1022 (2001); *Mikeska* v. *City of Galveston*, 451 F.3d 376, 379 (5th Cir. 2006); *Brody* v. *City of Mason*, 250 F.3d 432 (6th Cir. 2001). In *Brody*, for example, the Sixth Circuit ruled that "to sustain a substantive due process claim, in the context of zoning administrative action, 'a plaintiff must show that the state administrative agency has been guilty of 'arbitrary and capricious action' in the strict sense, meaning 'that there is no rational basis for the * * * [administrative] decision.'" *Id.* at 438 (quoting *Pearson* v. *City of Grand Blanc*, 961 F.2d 1211, 1221 (6th Cir. 1992)) (alteration in *Brody*).[3] The Sixth

[3] The First Circuit also declines to apply *Lewis* in land-use cases; it instead regularly has applied a disjunctive test that mentions the *Lewis* standard but can be met without conscience-shocking behavior. *See, e.g., SFW Arecibo, Ltd.* v. *Rodríguez*, 415 F.3d 135,

Circuit also applies a rational-basis test in other executive-action situations, including a school board's denial of tenure to a teacher accused of misconduct. *See Flaskamp* v. *Dearborn Pub. Schs.*, 385 F.3d 935, 943 (6th Cir. 2004).

3. Although seven circuits have adopted a rule that conflicts with the Third Circuit's rule below, three other circuits—the Tenth, Eleventh, and District of Columbia Circuits—have embraced the Third Circuit's approach. *See, e.g.*, *Camuglia* v. *City of Albuquerque*, 448 F.3d 1214, 1222 (10th Cir. 2006) (applying *Lewis* rubric in context of restaurant inspections); *Tinker* v. *Beasley*, 429 F.3d 1324, 1327 (11th Cir. 2005) (requiring substantive-due-process claimant to meet both *Lewis* test and *Glucksberg* "deeply rooted" test); *Fraternal Order of Police Dep't of Corrs. Labor Comm.* v. *Williams*, 375 F.3d 1141, 1145 (D.C. Cir. 2004) (applying *Lewis*). These circuits have, in other words, applied "shocks the conscience" across the board and have done so on the understanding that the test is a "general rule" governing executive-action cases. *Nix* v. *Franklin County Sch. Dist.*, 311 F.3d 1373, 1375 (11th Cir. 2002) (applying "shocks the conscience" to the case of a high school student who died during an in-school accident), *cert. denied*, 538 U.S. 946 (2003). The Eighth Circuit, for its part, apparently labors under an intra-circuit split: It has applied a rationality test in certain land-use cases, *see Iowa Coal Min. Co.* v. *Monroe County*, 257 F.3d 846, 853 (8th Cir. 2001), while in other cases of the same type it has applied the "shocks the conscience" formulation, *see Koscielski* v. *City of Minneapolis*, 435 F.3d 898, 902 (8th Cir. 2006).

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141 (1st Cir. 2005) ("[S]ubstantive due process prevents governmental power from being used for purposes of oppression, or abuse * * * that shocks the conscience, or action that is legally irrational") (internal citations omitted), *cert. denied*, 126 S. Ct. 829 (2005). That is hardly surprising, given that the First Circuit has explicitly held in other cases that *Lewis* does not apply universally. *See Davis*, 264 F.3d at 99. *See supra* at 15.

4. The circuits thus divide seven-to-four on the question presented by this petition. The Third, Tenth, Eleventh, and D.C. Circuits apply "shocks the conscience" across the board; their sister circuits (with the possible exception of the Eighth Circuit) do not. And the split has not gone unnoticed. Courts recognized a burgeoning divide even before *Lewis*, *see Pearson*, 961 F.2d at 1217, and the persistent confusion since *Lewis* was handed down has led commentators to note that the case "leaves lower courts guessing as to the proper analysis"[4] and that there is "wide variation among the circuit courts" as to which test applies.[5]

5. Nor is this split unique to the federal courts of appeals. Among the State courts of last resort, some have followed the Third Circuit and applied the "shocks the conscience" test across the board. *See, e.g.*, *Laughter* v. *Board of County Com'rs for Sweetwater County*, 110 P.3d 875, 891 (Wyo. 2005) (citing *United Artists* for the proposition that "the 'improper motive' standard * * * has been abrogated"). Others have followed the seven federal appellate courts that have taken the opposite tack. The South Dakota Supreme Court, for instance, has followed the First Circuit and adopted that court's disjunctive land-use test, asking whether government action is oppressive *or* conscience-shocking *or* irrational. *See Tri County Landfill Ass'n* v. *Brule County*, 619 N.W.2d 663, 668 (S.D. 2000) (citing *PFZ Props., Inc.* v. *Rodriguez*, 928 F.2d 28, 31-32 (1st Cir. 1991), *cert. dis-*

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[4] Matthew D. Umhofer, *Confusing Pursuits:* Sacramento v. Lewis *and the Future of Substantive Due Process in the Executive Setting*, 41 Santa Clara L. Rev. 437, 491 (2001).

[5] Parna A. Mehrbani, *Substantive Due Process Claims in the Land-Use Context: The Need For a Simple and Intelligent Standard of Review*, 35 Envtl. L. 209, 217 (2005); *see also id.* at 229 (cataloguing the "myriad" legal tests used by the federal circuits to evaluate substantive-due-process cases in land-use settings).

missed, 563 U.S. 257 (1992)). And other States have taken a similar approach.[6]

This Court should exercise its certiorari jurisdiction to resolve these deep divisions within the country. The Fourteenth Amendment's guarantee of substantive due process should mean the same thing in Pennsylvania as it does in California and everywhere in between.

II. THE THIRD CIRCUIT'S RULE CONFLICTS WITH THIS COURT'S PRECEDENTS.

The rule adopted by the Third Circuit, and followed by a minority of other circuits, is also in direct conflict with this Court's substantive-due-process cases. Decades before this Court first articulated a "shocks the conscience" test in *Rochin* v. *California*, 342 U.S. 165 (1952)—a case that, like *Lewis*, involved police action—the Court had consistently held that substantive due process was offended by arbitrary, irrational government action. After *Rochin*, that framework continued to govern all substantive-due-process cases involving executive action except for two categories: those involving police and prisons. The Third Circuit erred in concluding that *Lewis* implicitly overruled this Court's earlier precedents. After all, "[t]his Court does not normally overturn, or * * * dramatically limit, earlier authority *sub silentio*." *Shalala* v. *Illinois Council On Long Term Care, Inc.*, 529 U.S. 1, 18 (2000). The Court should grant the writ and clarify that the "shocks the conscience" test is limited to the sorts of law enforcement scenarios at play in *Lewis* and *Rochin*. *See* S. Ct. R. 10(c) (certiorari is warranted when "a

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[6] *See, e.g.*, *Blumenthal Inv. Trusts* v. *City of West Des Moines*, 636 N.W.2d 255, 266 (Iowa 2001) (applying "improper motive and by means that were pretextual, arbitrary and capricious, and * * * without any rational basis" standard) (quotation marks omitted); *Worsley Cos.* v. *Town of Mount Pleasant*, 528 S.E.2d 657, 660 (S.C. 2000) (applying "arbitrarily and capriciously deprived of a cognizable property interest" standard).

United States court of appeals * * * has decided an important federal question in a way that conflicts with relevant decisions of this Court").

1. "[T]he Due Process Clause, like its forebear in the Magna Carta, was intended to secure the individual from the arbitrary exercise of the powers of government." *Daniels* v. *Williams*, 474 U.S. 327, 331 (1986) (internal citations and quotation marks omitted) (quoting *Hurtado* v. *California*, 110 U.S. 516, 527 (1884)). That factor—*arbitrary* action of government, *i.e.* action "based on random choice or personal whim," *see* Compact Oxford English Dictionary of Current English (2005)—is the "touchstone" of due process protection. *Wolff*, 418 U.S. at 558.

The Court's substantive-due-process tests have never strayed from the basic notion that it is this sort of government behavior—arbitrary or irrational official action—that offends due process. Thus, in *Village of Euclid* v. *Amber Realty*, 272 U.S. 365 (1926), the Court explained that a zoning ordinance would violate substantive due process as applied if it were "clearly arbitrary and unreasonable, having no substantial relation to public health, safety, morals or general welfare." *Id.* at 395. In *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), the Court reiterated this test, holding that landowners have a substantive-due-process right "to be free of arbitrary or irrational zoning actions." *Id.* at 263. And in *Schad* v. *Borough of Mount Ephraim*, 452 U.S. 61 (1981), the Court wrote that "[w]here property interests are adversely affected by zoning, the courts * * * have sustained the regulation if it is rationally related to legitimate state concerns." *Id.* at 68. Nowhere in these cases, or in others like them, did the Court mention "shocks the conscience."

2. The phrase "shocks the conscience," in fact, has made an appearance in only a handful of this Court's substantive-due-process cases. The test originated in *Rochin*, a case in

which police officers forcibly pried open a suspect's mouth and later pumped his stomach to obtain drug evidence. The Court held that this sort of behavior violated substantive due process, characterizing the police action as "conduct that shocks the conscience." 342 U.S. at 172. But the Court gave no hint that this formulation was intended to abrogate the well-settled substantive-due-process approach it had charted in the decades leading up to *Rochin*.

Indeed, the phrase "shocks the conscience" reappeared only sporadically over the next 40 years—and always in the context of police or prisons. Thus in *Breithaupt* v. *Abram*, 352 U.S. 432, 435 (1957), the Court used the test to evaluate a police-misconduct claim by a suspect whose blood was taken against his will. In *Whitley*, 475 U.S. at 327, the Court addressed a claim by a prisoner shot in the leg during a prison riot. And in *United States* v. *Salerno*, 481 U.S. 739, 746 (1987), the test was mentioned in evaluating a claim that certain pretrial detention practices were unconstitutional.[7]

3. Nothing in *Lewis* suggests—much less holds—that "shocks the conscience" is to be applied across the board to every type of executive action when evaluating a substantive-due-process claim. To the contrary, the Court in *Lewis* carefully followed its established practice of limiting the "shocks the conscience" test to executive actions that actually

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[7] In *Collins* v. *City of Harker Heights*, 503 U.S. 115 (1992), this Court considered a claim by a sanitation-department employee who died of asphyxia after entering a manhole to unstop a sewer line. In considering his wife's substantive-due-process claim against the city, the Court mentioned "shocks the conscience" in passing. *Id.* at 128. But the Court clarified that this claim was evaluated under the same standard the Court has always used for non-police executive action: arbitrariness and rationality. Thus, the Court explained that its "refusal to characterize the city's alleged omission in this case as arbitrary in a constitutional sense rests on the presumption that the administration of government programs is based on a rational decisionmaking process." *Id.*

implicate police conduct. Thus, the Court clarified that it had granted certiorari "to resolve a conflict among the Circuits over the standard of culpability *on the part of a law enforcement officer* for violating substantive due process *in a pursuit case*." 523 U.S. at 839 (emphases added). And confirming that it intended no radical revision to existing precedent, the Court emphasized that the narrow "issue in th[e] case is whether a police officer violates the Fourteenth Amendment's guarantee of substantive due process by causing death through deliberate or reckless indifference to life in a high-speed automobile chase aimed at apprehending a suspected offender," or whether the officer is liable in that event only if he engages in conduct that "shock[s] the conscience." *Id.* at 836. *See also id.* at 855-856 (Rehnquist, J., concurring) (joining the Court in "concluding that 'shocks the conscience' is the right choice among the alternatives posed in the question presented").

In light of this language, many of the federal appeals courts read *Lewis* as limited to the specific type of executive action at issue there and its close analogs. For example, the Seventh Circuit has held that the "shocks the conscience" test is a "specialized analysis" to be used in "particular circumstances such as the high-speed chase in *Lewis* or pre-trial detention." *Khan*, 180 F.3d at 836. More recently, that court again emphasized that it is "*[i]n the context of the action of law enforcement authorities*" that the applicable test "'is most often described as an abuse of government power which shocks the conscience.' " *Christensen* v. *County of Boone*, 483 F.3d 454, 468 (7th Cir. 2007) (emphasis added) (quoting *Tun* v. *Whitticker*, 398 F.3d 899, 902 (7th Cir. 2005)). The Second Circuit has similarly acknowledged that *Lewis* answered a narrow question: What is the appropriate "standard by which to determine whether a plaintiff's due process rights have been violated *by police use of excessive force*." *Salamacha* v. *Lynch*, 165 F.3d 14, 1998 WL 743905, at *2 (2d Cir. 1998) (table disposition) (emphasis added). Com-

mentators have drawn the same conclusion, noting that "the Supreme Court's stated reason for its decision to grant certiorari in the *Lewis* case * * * was just about as narrow as possible." Mehrbani, *supra*, at 226 (citing *United Artists*, 316 F.3d at 405 (Cowen, J., dissenting)). And since *Lewis*, the Court has mentioned "shocks the conscience" in only one substantive-due-process case, *Chavez* v. *Martinez*, 538 U.S. 760 (2003), which, like the others, revolved around law-enforcement misconduct (this time the allegedly coercive interrogation of a wounded suspect).

4. There are good reasons why this Court has never extended "shocks the conscience" beyond its original police-and-prisons context. As Justice Kennedy explained in his concurring opinion in *Lewis*, "[t]he phrase has the unfortunate connotation of a standard laden with subjective assessments." *Lewis*, 523 U.S. at 857-858 (Kennedy, J., concurring); *see also id.* at 861 (Scalia, J., concurring in the judgment) (criticizing the "shocks the conscience" test as the "*ne plus ultra*, the Napoleon Brandy, the Mahatma Gandhi, the Cellophane of subjectivity"). That amorphous standard may suffice when evaluating police actions or prison conditions—both capable of precipitating visceral reaction—but it offers little insight for evaluating governmental abuses that may be less spectacular but equally egregious or arbitrary. The test therefore gives short shrift to claims alleging such abuses. As Judge Cowen explained in his dissent from the *United Artists* panel decision, "shocks the conscience" might be useful in a highly charged circumstance—for example, a police shooting—because such cases "stir our emotions and yield immediate reaction," but it is meaningless to ask whether one's conscience has been shocked when "lifeless property interests * * * are involved." 316 F.3d at 407 (Cowen, J., dissenting).

Moreover, as Judge Nygaard emphasized in his dissent from the denial of rehearing *en banc* in *United Artists*, " '[s]hocks the conscience' is useful in due process cases

where the actor cannot deliberate." 324 F.3d at 135 (Nygaard, J., dissenting). That is because, "[i]n those situations, exigencies may excuse" a state actor's failure to comply with more exacting standards like "deliberate indifference." *Id.* But for the vast majority of executive actions, "decisions are *not* made in the heat of the moment without ability to deliberate." *Id.* (emphasis added). To the contrary, "they are (or should be) deliberate decisions made after proper consideration." *Id.* For those types of executive action, "[t]he appropriate standard, as repeatedly articulated before and after *Lewis* is 'improper motive.' " *Id.*

Eichenlaub I illustrates how extending "shocks the conscience" beyond its traditional sphere distorts the substantive-due-process inquiry. The panel, applying the new test, rejected the Eichenlaubs' substantive-due-process claim in part because "there [was] no allegation of corruption or self-dealing" against the Township officials. App. 18a. But there is no reason why punitive and baseless government actions against a landowner should be actionable if taken for reasons of greed, but not if taken for reasons of revenge or other ill motives. As Judges Nygaard and Cowen both pointed out, *all* government "actions carried out with improper motive" are by necessity "so egregious * * * as to violate the Constitution." *United Artists*, 324 F.3d at 135 (Nygaard, J., dissenting from denial of rehearing en banc); *see also United Artists*, 316 F.3d at 407 (Cowen, J., dissenting) (decisions that are otherwise of local concern "*necessarily* assume constitutional dimension when the calculated, intentional, and deliberate abuse of government power is at hand") (enphasis in original). Such actions are, in a word, arbitrary. Yet the "shocks the conscience" test will capture some and not others, because it relies on a court's subjective sense of outrage to determine whether or not an abuse is actionable. It thus "leaves the door ajar for intentional and flagrant abuses of authority by those who hold the sacred trust of local public office." *Id.* at 406-407.

III. THE QUESTION PRESENTED IS IMPORTANT AND RECURRING.

Substantive-due-process cases are ubiquitous in the federal courts. A database search reveals nearly 2,000 appellate cases mentioning the doctrine in the nine years since *Lewis* was decided. The differing standards that the federal courts of appeals have adopted to resolve these substantive-due-process claims have led to confusion and a glaring lack of uniformity throughout the Nation. Because the question whether governmental conduct violates the Constitution should not turn on accidents of geography, this Court should grant the writ and bring much-needed clarity and uniformity to this important area of the law.

There is no question that the differing standards being employed in the lower courts of appeals are often outcome-determinative. After all, government action may be "arbitrary" or even "irrational" without shocking the conscience. The Eichenlaubs' case is a perfect example of why the correct standard matters. Their substantive-due-process claim, which the Magistrate Judge had concluded should survive summary judgment under the "improper motive" standard, App. 92a, was deemed a dead letter when "shocks the conscience" was applied. App. 44a. Given that a majority of the circuits apply arbitrariness or rationality review in at least some subset of substantive-due-process cases, and given that the federal appellate courts review dozens (sometimes hundreds) of substantive-due-process cases each year, the inescapable conclusion is that many federal-court litigants receive differing brands of constitutional justice depending on whether they happen to file their claims in a circuit that reads *Lewis* broadly or narrowly.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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