Case No. 07-16472

IN THE
UNTIED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ERNEST MERRILL and LILA MERRILL,
Plaintiffs and Appellants

vs.

COUNTY OF MADERA, ANGELA BASCH, MARK MEYERS and GARY GILBERT,
Defendants and Appellees.

On appeal from the United States District Court for the
Eastern District of California, Fresno Division, Case No. 1:05-CV-0195
The Honorable Anthony W. Ishii, United States District Judge

APPELLANTS' OPENING BRIEF

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A. Jurisdiction of the District Court

The United States District Court for the Eastern District of California (Hon. Anthony W. Ishii, presiding) had jurisdiction over the underlying case pursuant to 28 U.S.C. § 1331 as the causes of action rested on violations of federal constitutional provisions. The Merrills and each of the Defendants were residents of the County of Madera, and Defendant County of Madera is a political sub-division of the State of California. After a jury trial and judgment in favor of Defendants, the Court entered judgement on July 11, 2007. On July 22, 2007, the Merrills moved for a new trial; that motion was denied.

B. Jurisdiction of the Appellate Court

The statutory provision which confers jurisdiction on the Appellate Court is 28 U.S.C. § 1291. The jury verdict and order after jury trial was filed and dated July 11, 2007. A motion for new trial was filed on July 22, 2007 and denied by order of the court on December 10, 2007. The Notice of Appeal was filed on August 8, 2007. This is an appeal from a final judgment adjudicating all of the claims with respect to all of the parties in this matter.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the District Court err in dismissing the Merrills' substantive due process claims based on *Armendariz* and its progeny?
2. Did the District Court err in granting the County's motion for judgement FRCP Rule 50 and refusing to allow the Merrills to amend their complaint based on *Armendariz* and its progeny?
3. Did the District Court err in denying the Merrills' motion for a new trial of their substantive due process claims based on *Armendariz* and its progeny?

I
STATEMENT OF THE CASE

The District Court dismissed all of the Merrills' substantive due process claims early on in this case because it was relying on *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996) (en banc) ("*Armendariz*"). Before the end of the trial proceedings this Court had overturned *Armendariz* and held that claims like the Merrills' were no longer barred.

This Court must overturn the rulings which the District Court based on *Armendariz* since the Merrills were not allowed to proceed to the jury on their substantive due process claims. Even though they had the facts and evidence to prove their claims, the jury had no way to find in favor of the Merrills. In other words, the Merrills did not get their day in court.

This case was brought by Ernest and Lila Merrill on February 11, 2005 because the County of Madera[1] unlawfully prevented and hindered the use and development of their property, denied permits and refused to provide notice of why the permits

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[1] The Merrills brought this action against the County of Madera as well as three employees of the County, Angela Basch, a code-enforcement officer, Mark Meyers, who issues permits on behalf of the County, and Gary Gilbert, a County Supervisor. The defendants will collectively be referred to as the "County" for simplicity. It is not disputed that each of the individual defendants is sued for acts taken in their roles as County officials or employees. The names of the individual defendants will be utilized where it makes sense to distinguish their acts.

were denied or what was required to obtain permits, denied requests for administrative hearings and orchestrated and manufactured the arrest of Mr. Merrill with regard to various claimed land-use and permit violations. The County then utilized the pending criminal charges, and threatened future criminal charges, to involve other government agencies and officials in an effort to force the Merrills to expend over $1 million in constructing a road on their property, and to make improvements to their property. None of the improvements were required by law. These actions were allegedly taken at the urging and direction of Defendant Gilbert, a County Supervisor, after his wife suffered the embarrassment of being ejected from the Merrills' ranch for trespassing.

The County claims that it was concerned about massive earth movement and improper grading techniques utilized on the property and that it had Mr. Merrill arrested only because he refused to comply with the permitting process. The County also claims that this was not merely the concern of the County alone, but that of other agencies, including the Fish and Game Department.

The facts show that other departments and agencies only became involved at the County's urging, that the County mislead other agencies about the activities on the ranch property which instigated citations and that it had no justifiable reason for taking the actions it did. Upon being notified that he needed a permit to maintain his

private roads, even though the County had previously told him he did not need any permits (other than the ones he had already obtained from the County), Mr. Merrill stopped work and attempted to obtain those permits. He was not told what he needed to do to obtain further permits and was instead arrested and threatened with further arrests and jail time if he did not construct a mile of paved road on the ranch at a cost of over $1 million.

The Merrills later learned that:

a) the road was not required by any law,

b) they were the only people in Madera County that had been required to obtain grading permits for maintaining private roads,

c) Defendant Gilbert had been allowed to grade and maintain his driveway on a neighboring property to the ranch, without obtaining a permit,

d) Defendant Gilbert had secret meetings with the public to discuss the Merrills' land use situation,

e) Mr. Merrill was the only person ever to have been arrested for land-use and permit violations related to grading in Madera County,

f) County officials and employees had conspired to arrest Mr. Merrill under the pretense of holding a meeting with Mr. Merrill to resolve his land-use issues, and

g) various County employees and officials had told Mr. Merrill that he did not need to have any permits to grade and maintain his private roads.

The Merrills also made claims in this action regarding various administrative issues relating to the release of performance bonds.

On February 15, 2005 the County defendants filed a motion to dismiss pursuant to FRCP 12 (b) (6) claiming that, under *Armendariz* and its progeny, the Merrills' substantive due process claims were subsumed into their land-use claims, and may only be prosecuted under the Takings Clause of the Fifth Amendment. Because the Merrills had not sought just compensation in a state takings case, their substantive due process claims were therefore dismissed. The District Court granted that motion, with leave to amend. The Merrills then filed an amended complaint without any substantive due process claims, in conformity with the order of the District Court.

On or about December 1, 2006, the County filed a motion for summary judgement. That motion was granted in part and denied in part. A jury trial commenced on or about June 19, 2007 and proceeded through July 10, 2007. On or about June 29, 2007 the County defendants made a motion to dismiss pursuant to FRCP Rule 50. The District Court granted, in part, the County's FRCP Rule 50 motion and then permitted the Merrills to seek leave to amend their complaint. That motion for leave to amend was denied on July 5, 2007, the court again relying on

Armendariz. The jury completed deliberation on the remaining two causes of action and found for the County defendants on both of the remaining counts. The order after judgment was filed on or about July 11, 2007.

The Merrills then filed a motion for a new trial, and that motion was also denied by the District Court, on or about December 11, 2007. In denying the Merrills' motion for a new trial, even though the District Court acknowledged the decision in *Crown Point Development, Inc. v. City of Sun Valley*,506 F.3d 851 (9th Cir. 2007) the District Court declined to follow *Crown Point* and reverse its prior ruling, because the Merrills had not raised *Crown Point* in their motion.[2]

II
STATEMENT OF FACTS

At the time of the events in this case, Ernest Merrill was a 77 year old man. (Excerpt of Record ("ER") Vol. 2, P.11:14-15.) Mr. Merrill, along with his wife, owned about 4,500 acres of land in Madera County known as the "Dream Catcher Ranch."[3] (ER Vol. 2, P. 46:6-44:12.) The Merrills intended to raise cattle, subdivide

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[2] The District Court's decision notes that the Merrills did not raise the *Crown Point* decision. However, *Crown Point* was decided well after the Merrills' motion was filed but before the District Court made its decision on the motion for new trial.

[3] The ranch property was held in the name of Dream Catcher Ranch, Inc., a wholly owned business of Mr. Merrill, and the County and all parties involved treated the Merrills as owners of the ranch.

the ranch into parcels of various size for residential lots, as well as to construct their own home on the land. (ER Vol. 2, P. 19:20-20:3.) When the Merrill's purchased the ranch, on April 2, 2002, it contained a dirt road stretching from the north end all the way to the southern border of the ranch, which was the only reasonable access to the ranch. The ranch contained about twenty miles of roads which accessed all parts of the nearly seven square mile ranch. (ER Vol. 2, P. 12:1-8.)

In May of 2002, Mr. Merrill purchased a mobile home to be placed on the ranch. (ER Vol. 2, P. 15:19-22.) In conjunction with the purchase of the mobile home, Mr. Merrill obtained a permit for placing the home. (ER Vol. 2, P. 16:6-10.) The permit was dated May 28, 2002. (ER Vol. 2, P. 17:2-5.) On or about June 12, 2002 Mr. Merrill filled out a "compliance application" and paid a "developer fee" to the County. (ER Vol. 2, P. 17:13-18:13.) With these permits in hand, Mr. Merrill began grading the existing roads simply to maintain them so the various parts of the ranch could be utilized. Mr. Merrill had previously been told by an employee of the County, "Manuel,"[4] that he was not required to obtain a grading permit and that it was included within his permit for his mobile home. (ER Vol. 2, P. 23:13-24:7.)

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[4] There are two Manuels that worked for the County at the relevant times; Manuel Ruiz and Manuel Orianta. It appears that the "Manuel" Mr. Merrill spoke to at the County office was Mr. Orianta. (ER Vol. 2, P. 10:12 -17.)

Sometime in June of 2002, and prior to the County's enforcement actions, Mrs. Gail Gilbert entered the ranch and was told to leave by a worker because she was "trespassing." (ER Vol. 2, P. 53:10-18.) Mrs. Gilbert testified that she had seen grading activity on the ranch. (ER Vol. 2, P. 53:7-9.) Mrs. Gilbert is married to Defendant Gilbert, who was then a county supervisor. (ER Vol. 2, P. 52:7-9.) Mrs. Gilbert testified that being ejected from the ranch was embarrassing to her. (ER Vol. 2, P. 54:23-25.)

Shortly after Mrs. Gilbert's ejection from the ranch, the County placed a "stop work" or "red tag" at some place on the ranch. The red tag was dated June 21, 2002. (ER Vol. 2, P. 48:1-8.) On that date the Merrills were on their honeymoon. (ER Vol. 2, P. 51:8-11.) Mr. Merrill did not have actual notice of the June 21st red tag and did not see it or become aware of it until a later visit from County employees because it was placed about seven miles away from the grading activity. (ER Vol. 2, P. 21:8-24; 22:13-25.)

On or about June 26, 2002, a County employee, Tom Graham, came to the ranch and told Mr. Merrill that he had a "red tag" on his property for doing work without a permit. (ER Vol. 2, P. 22:22-25.) Mr. Merrill informed Mr. Graham that he had a permit for the mobile home. (ER Vol. 2, P. 22:18-20.) That day Mr. Merrill and his contractor went to the County offices and asked to obtain a grading permit.

(ER Vol. 2, P. 23:10-12.) Mr. Merrill was then told by Manuel that, even though he had previously told Mr. Merrill he did not need a permit, a permit for grading the private roads was now required. (ER Vol. 2, P. 24:8-17.) Mr. Merrill asked for the permit and was told he could not have one but he could come down the next day for an appointment to try to get one. (ER Vol. 2, P. 24:20-25:2.) Mr. Merrill returned and spoke with Manuel again, as well as Mark Meyers, Tom Graham and a fourth County employee. (ER Vol. 2, P. 25:3-7.) Again he was denied a permit. (ER Vol. 2, P. 24:8-11.) Mr. Merrill then met with an employee from the County Environmental Health Department who told him he did not need a grading permit to continue working on his septic system. (ER Vol. 2, P. 26:14-25.)

During this time, Leonard Garoupa, the County Resource Management Agency director, told Defendant Meyers that arresting Mr. Merrill was "probably the only solution we [the County] was going to be able to find." (ER Vol. 2, P. 55:21-23; 66:19-67:3.)

On or about Friday, June 28, 2002, Manuel Ruiz came to the ranch and cited Mr. Merrill for allegedly continuing grading. (ER Vol. 2, P. 27:8-29:12.) On that date the only work being performed was work on the permitted septic system. (ER Vol. 2, P. 27:12-14.) Mr. Ruiz stated that if Mr. Merrill did not sign the citation he would have him arrested. (ER Vol. 2, P. 28:17-19.) On the following Monday, July

1, 2002, a "stop work" order from Mark Meyers was executed. (ER Vol. 2, P. 30:3-13.) Mr. Merrill claimed he did not receive the "stop work" order at that time. (ER Vol. 2, P. 31:5-9.) At some point afterward a meeting was arranged with the County. (ER Vol. 2, P. 32:20-33:4.) At the meeting the County revealed that it had arranged the meeting in order to have Mr. Merrill arrested. (ER Vol. 2, P. 34:3-7.) After his arrest, Mr. Merrill was threatened with further arrests and charges relating to the condition of the ranch. (ER Vol. 2, P. 36:18-38:6; 39:23-40:4.)

At some point in the fall - after his arrest - Mr. Merrill attended a town meeting in which Mr. Garoupa, the department supervisor for the department which issued grading permits, stated in response to a question from the public about grading and maintaining private roads, that a landowner could grade and maintain private roads without a permit. (ER Vol. 2, P. 13:24-14:15.) Thus, it became apparent that each of the previous actions taken against the Merrill, and Mr. Merrill in particular, were simply pretext for some ulterior motive. The jury could have reasonably found that Mrs. Gilbert's embarrassment and the immediate and severe response of the County to the Merrills activities were connected.

The County's claimed motivation in pursuing Mr. Merrill so vigorously was the alleged "construction" of roads without proper permits. (ER Vol. 2, P. 78:5-9.) The County also claimed, at trial, that there were concerns about erosion. (ER Vol.

2, P. 79:9-14.) The County also attempted to offer speculation about what Mr. Merrill might have been intending - i.e. to create roads that were open to the public - as part of their justification for the enforcement actions. (ER Vol. 2, P. 80:5-9, 82:3-10.)

Notwithstanding the County's alleged concern for the public, and its claim that many other agencies were concerned about the activities on the ranch, the facts actually show that the County manufactured the interest and basis for further enforcement actions against Mr. Merrill. For instance, Mr. Merrill was cited by the Fire Department for having an open trench across one of the roads on the ranch. Mr. Hartsuyker, from the Fire Department, was called out to the property by Defendant Meyers in July 2002 - after Mr. Merrill had been arrested. (ER Vol. 2, P. 58:5-18.) As to the citation regarding the trench, Mr. Merrill had a permit to work on his septic system, and that trench was part of the system. (ER Vol. 2, P. 58:6-9.) Mr. Hartsuyker cited Mr. Merrill for having the open trench but he was not told by the County that the County had forced Mr. Merrill to stop work on the trench - including filling in the trench. (ER Vol. 2, P. 59:16-24.) Had Mr. Hartsuyker been told that Mr. Merrill was forced by the County to stop work on the trench, he would not have cited Mr. Merrill for the trench. (ER Vol. 2, P. 58:10-60:6.) Mr. Hartsuyker also testified that, contrary to the County's contention, there was no fire department requirement

to have the entire length of the ranch road improved. (ER Vol. 2, P. 57:4-7.)

The Department of Fish and Game, another agency that the County alleges was "concerned" about the conditions on the ranch, was also initially called in by the County. (ER Vol. 2, P. 61:14-22.) Part of the basis for Fish and Game's enforcement activity was the perception that Mr. Merrill would not comply with the County stop work orders. (ER Vol. 2, P. 62:12-18.) However, by this time Mr. Merrill had stopped all work and had been arrested. (ER Vol. 2, P. 126:16-18; 127:10-14.)

Another concern the County asserted was erosion. However, an engineer hired by Mr. Merrill, Greg Merrill (no relation), stated that he had attempted to winterize[5] the road but was prevented from doing so by the County. (ER Vol. 2, P. 63:20-64:11.) Mr. Merrill further testified that he attempted to meet with the County to resolve the issues and obtain the needed permits. (ER Vol. 2, P. 65:1-4.) However, Defendant Meyers did not show up to the meeting and left a message for Mr. Merrill to "go away." (ER Vol. 2, P. 65:15-23.) This meeting was required in part because Plaintiff Merrill had been ordered to report to court for a probation violation based on his inability to maintain the ranch property. (ER Vol. 2, P. 41:1-42:24; 65:5-8.) At the time he revoked the permit Mr. Meyers was aware that revoking the permit

[5] "Winterizing" a road is a process which helps prevent erosion and runoff during the rainy season.

would prohibit Mr. Merrill from complying with the terms of his probation. (ER Vol. 2, P. 68:2-8.) Mr. Meyers was further aware that if Mr. Merrill did not comply with the terms of his probation he would likely go to jail for sixty days. (ER Vol. 2, P. 70:17-20.)

Mr. Merrill had obtained a permit to grade his roads after his arrest, but then his permit was revoked by Mr. Meyer. It was not reinstated because the County changed the conditions for issuance of the permit without notice. (ER Vol. 2, P. 69:16-70:16.) Upon revoking Mr. Merrill's permit, and knowing that Mr. Merrill would be in violation if he did not grade the roads, Mr. Meyers then directed another employee to write a letter to the state attorney attempting to get Mr. Merrill's probation revoked and have him sent to jail. (ER Vol. 2, P. 70:21-71:25.)

As further evidence of the arbitrary and capricious manner in which the County enforced its rules and regulation, Mr. Merrill's predecessor in title had been allowed to grade the roads without a permit for nearly thirty years. (ER Vol. 2, P. 72:1-74:6.) Mr. Wheeler, the ranch manager for that time period, testified that he graded, went through creeks, and placed and replaced culverts in streams without notice to any government agency that entire time, and had never been cited for any violation. (ER Vol. 2, P. 74:21-75:1.)

The Merrills eventually obtained permission to build a barn, and a house,

although it took five years, and upon the doorstep of trial, to obtain a permit from the County. (ER Vol. 2, P. 49:25-50:15.)

III
SUMMARY OF ARGUMENT

The District Court erred in granting the Rule 12(b)(6) motion, granting the County's Rule 50 motion, and denying the Merrills' request to amend their complaint because it relied on the case, and reasoning of, *Armendariz*. The District Court also erred in denying the Merrills' motion for a new trial. Because of the reliance on *Armendariz*, the Merrills' claims were completely eviscerated and the jury was left with no potential to find in the Merrills' favor, even after having proved their claims.

Armendariz stood for the proposition that all claims relating to the value of land or property are subsumed into the Takings Clause of the Fifth Amendment. Because takings cases require that a plaintiff seek just compensation in state court proceedings, and the Merrills did not seek just compensation, each of the Substantive Due Process claims were dismissed along with the takings claims as being barred by the Takings Clause. The District Court tangled with this issue when it decided the County's Rule 50 motion - because it had dismissed the substantive due process claims, if the Merrills were required to obtain a grading permit there would be no procedural due process violation because the Merrills did not obtain that permit. On

the other hand, if they were not required to obtain the permit, there would be no procedural due process violation because there would be no procedure due the Merrills. "[I]t would be some violation by the defendants [...] that was - - [....] not a procedural due process claim. That's a substantive claim, whether its abuse of discretion or whatever." (ER Vol. 1, P. 30:13-31:18.)

Armendariz and its progeny were, and are, invalid and have been overruled and superceded by rulings of this Court, and the United States Supreme Court. Accordingly, each of the District Court's rulings based in reliance on *Armendariz* were decided incorrectly and must be reversed.

IV
STANDARDS OF REVIEW

A. Standard of Review for Rule 12(b)(6) Motion

This Court must review the District Court's ruling on a FRCP Rule 12 (b) (6) motion *de novo*. *Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1061 (9th Cir. 2004). All well-pleaded factual allegations are to be construed in the light most favorable to the pleader, and accepted as true. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 578 (2007); *Johnson v. Riverside Healthcare System*, 534 F.3d 1116, 1122 (9th Cir. 2008).

A motion to dismiss for failure to state a claim should not be granted unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the

claim that would entitle him to relief. See *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984) (citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)); see also *Palmer v. Roosevelt Lake Log Owners Ass'n*, 651 F.2d 1289, 1294 (9th Cir. 1981).

B. Standard of Review for Motion for Leave to Amend

A denial of a motion for leave to amend after a responsive pleading has been filed is reviewed for an abuse of discretion, *National Abortions Fed'n v. Operation Rescue*, 8 F.3d 680, 681 (9th Cir. 1993); *Loehr v. Ventura County Community College Dist.*, 743 F.2d 1310, 1313 (9th Cir. 1984); *Klamath-Lake Pharm. v. Klamath Med. Serv. Bureau*, 701 F.2d 1276, 1292 (9th Cir. 1983), "but such denial is 'strictly' reviewed in light of the strong policy permitting amendment," *Unigard Sec. Ins. Co. v. Lakewood Eng'g & Mfg. Corp.*, 982 F.2d 363, 371 (9th Cir. 1992) (quoting *Texaco, Inc. v. Ponsoldt*, 939 F.2d 794, 798 (9th Cir. 1991)). "[L]eave [to amend] shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). In exercising its discretion "a court must be guided by the underlying purpose of Rule 15 -- to facilitate decision on the merits rather than on the pleadings or technicalities." *United States v. Webb*, 655 F.2d 977, 979 (9th Cir. 1981).

Four factors are commonly used to determine the propriety of a motion for leave to amend. These are: bad faith, undue delay, prejudice to the opposing party, and futility of amendment. *Loehr*, 743 F.2d at 1319; *Howey v. United States*, 481 F.2d

1187, 1190 (9th Cir. 1973). These factors, however, are not of equal weight in that delay, by itself, is insufficient to justify denial of leave to amend. *Webb*, 655 F.2d at 980; *Hurn v. Retirement Fund Trust of Plumbing*, 648 F.2d 1252, 1254 (9th Cir. 1981).

C. Standard of Review for Motion for New Trial

A district court's denial of a Rule 59 motion for a new trial is reversed for an abuse of discretion. *Molski v. M.J. Cable, Inc.*, 481 F.3d 724, 728 (9th Cir. 2007); *Far Out Productions, Inc. v. Oskar*, 247 F.3d 986, 992 (9th Cir. 2001); *Defenders of Wildlife v. Bernal*, 204 F.3d 920, 928-29 (9th Cir. 2000). A district court abuses its discretion when it bases its decision on an erroneous view of the law or a clearly erroneous assessment of the facts. *Coughlin v. Tailhook Ass'n*, 112 F.3d 1052, 1055 (9th Cir. 1997). The denial of a motion must also be reversed where the district court has "made a mistake of law." *Molski*, 481 F.3d at 729.

V
ARGUMENT

"The concept of substantive due process . . . forbids the government from depriving a person of life, liberty, or property in such a way that shocks the conscience or interferes with rights implicit in the concept of ordered liberty." *Nunez v. City of Los Angeles*, 147 F.3d 867, 871 (9th Cir. 1998) (citation and internal

quotation marks omitted). If proved, the Merrills' claims would certainly "shock the conscience" and illustrate the County deprived the Merrills of both liberty and property.

A. The Trial Court Erred in Dismissing the Merrills' Substantive Due Process Claims Because it Relied upon *Armendariz* and its Progeny, and the Merrils Had Properly Plead, and Showed Sufficient Evidence to Support Such Claims.

The Merrills' case was trimmed considerably at the outset because the District Court applied *Armendariz* and dismissed all of the Merrills' substantive due process claims. This one decision shaped the entire course of the trial; what evidence was sought; what claims the Merrills pursued; the evidentiary rulings of the District Court; and its decisions on later dispositive motions. However, *Armendariz* was wrong and the Merrills should have been allowed to pursue those substantive due process claims. From the beginning the Merrills have claimed that they were impermissibly restricted in their liberty and property interests by a County government which made *ad hoc* legislative and executive decisions geared only at depriving the Merrills of their rights. Those reasons the County posited for why and how the laws were applied against them were merely pretextual to cover up a general animus against the Merrills and their possible development plans. Having been denied, early on, the opportunity to pursue those claims, the Merrills proceeded on

what remained to them - equal protection and procedural due process with regard to some of the more innocuous claims the Merrills had against the County.

1. This Court Must Decide this Case Based on Present Law.

Where the law changes pending appeal, the Court must resolve an appeal by applying the law in effect at the time it renders its decision. *Thorpe v. Housing Authority*, 393 U.S. 268, 281-282 (1969). This is true whether the change was constitutional, statutory or judicial. See *Uebersee Finanz-Korp. A.G. v. McGrath*, 343 U.S. 205, 213 (1952); *Vandenbark v. Owens-Illinois Glass Co.*, 311 U.S. 538, 543 (1941); *Grosso v. United States*, 390 U.S. 62, 70-71 (1968); *Swarner v. United States*, 937 F.2d 1478, 1484 (9th Cir. 1991); 5 Am.Jur.2d, Appeal and Error 729.

Thus, this Court must apply the rule of *Lingle*[6], *Lewis*[7], *Crown Point* and their progeny and may not apply the reasoning in *Armendariz* even though not raised before the District Court.[8]

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[6] *Lingle v. Chevron USA*, 544 U.S. 528 (2005)

[7] *County of Sacramento, et al. v. Teri Lewis and Thomas Lewis, Personal Representatives of the Estate of Philip Lewis, Deceased*, 523 U.S. 833 (1998)

[8] Where "the question presented is one of law, [this Court will] consider it in light of 'all relevant authority,' regardless of whether such authority was properly presented in the district court." *Ballaris v. Wacker Siltronic Corp.*, 370 F.3d 901, 908 (9th Cir. 2004) (quoting *Elder v. Holloway*, 510 U.S. 510, 516 (1994)).

2. Because the Only Reason the Merrills' Substantive Due Process Claims Were Dismissed Was Because of an Error of Law, the Order of the District Court's Decision Must Be Reversed and the Merrils Must Be Allowed to Pursue Those Claims.

The District court's decision to dismiss the Merrills' substantive due process claims was based on *Armendariz* which held that all substantive due process claims relating to real property were essentially takings claims which must be prosecuted under the Takings Clause of the 5th Amendment to the U.S. Constitution. Prior to completing proceedings in the trial court, this Court overruled *Armendariz* and its reasoning in the case of *Crown Point Development, Inc. v. City of Sun Valley*, 506 F.3d 851 (9th Cir. 2007) ("*Crown Point*") noting that *Armendariz'* "blanket" obstacle to substantive due process claims had been removed.

In *Armendariz* this Court held that when challenging a land use regulation's validity, the plaintiff/property owner must rely on a takings theory, even where the claim is the government's acts were illegitimate and violate due process. Accordingly, after *Armendariz*, plaintiffs could no longer maintain due process claims where the claims relate to or arise out of land-use and property rights.

After *Armendariz*, the United States Supreme Court ruled in *Lingle v. Chevron USA*, 544 U.S. 528 (2005) ("*Lingle*") that if a property owner's assertion is that a regulation interferes with economically beneficial uses it is a takings claim, but if the

claim is that the government's action is arbitrary or does not substantially advance a legitimate public interest, it is a substantive due process claim. This reasoning completely stripped *Armendariz* of its validity, as recognized by this Court later in *Crown Point*.

In *Crown Point* a developer was constructing a subdivision on a 9.76 acre parcel. The subdivision was to be concluded through five phases and the developer had received approval for 39 units on the property. After the first three phases were complete, the City of Sun Valley then changed the amount of homes to be built in Phase 4 from eight to six, thus requiring the developer to construct town-homes in Phase 5 to comply with city density requirements. The developer and the Crown Point homeowners association appealed to the City regarding the density requirements in Phase 5. Their appeal was denied. There was a round of litigation in the state court system, but Crown Point also filed an action the U.S. District Court, for the District of Idaho, alleging a single due process violation for the City's alleged interference with its property rights based on the City's denial of the permit appeal.

This Court held the Fifth Amendment would only preclude a due process claim if the claims were actually covered only by the Takings Clause. The three general categories of claims that are required to be tried under a Takings analysis are: "where government requires an owner to suffer a permanent physical invasion of property,

see *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); where a regulation deprives an owner of all economically beneficial use of property, see *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); and where the *Penn Central* factors[9] are met, *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978)." On the other hand, where the claim does not clearly fall into one of these three categories, the plaintiff's due process claims still survive.

This Court noted:

> In this, *Lingle* pulls the rug out from under our rationale for totally precluding substantive due process claims based on arbitrary or unreasonable conduct. As the [U.S. Supreme] Court made clear, there is no specific textual source in the Fifth Amendment for protecting a property owner from conduct that furthers no legitimate government purpose. Thus, the *Graham* rationale no longer applies to claims that a municipality's actions were arbitrary and unreasonable, lacking any substantial relation to the public health, safety, or general welfare...
>
> *Crown Point*, *supra*, 506 F.3d at 855-56.

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[9] The *Penn Central* factors are: (1) "[t]he economic impact of the regulation on the claimant"; (2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; and (3) "the character of the government action." *Penn Central*, *supra*, 438 U.S. at 124. "[T]he *Penn Central* inquiry turns in large part, albeit not exclusively, upon the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests." *Lingle*, *supra*, 544 U.S. at 540. Ultimately, this inquiry "aims to identify regulatory actions that are functionally equivalent to the classic taking in which the government directly appropriates private property or ousts the owner from his domain." *Id*. at 539. The *Penn Central* factors do not apply to the facts of this case.

Based on the foregoing, this Court reversed the order of the District Court dismissing Crown Point's substantive due process claim, even though it was clearly connected to land-use and property rights.

It is now well settled in this Circuit that there is no automatic bar to a substantive due process claim simply because the interest at issue relates to or arises out of property. See e.g. *Shanks v. Dressel*, 540 F.3d 1082, 1087 (9th Cir. 2008) ("...we have no difficulty concluding that the Takings Clause does not 'foreclose [] altogether' a due process claim..."); *Equity Lifestyle Props. v. County of San Luis Obispo*, 505 F.3d 860, 870 fn 16 (9th Cir. 2007) ("...Due process violations cannot be remedied under the Takings Clause, because 'if a government action is found to be impermissible--for instance because it fails to meet the 'public use' requirement or is so arbitrary as to violate due process--that is the end of the inquiry. No amount of compensation can authorize such action.'"); *Action Apt. Ass'n v. Santa Monica Rent Control Opinion Bd.*, 509 F.3d 1020, 1025 (9th Cir. 2007) ("...it is no longer possible . . . to read *Armendariz* as imposing a blanket obstacle to all substantive due process challenges to land use regulations."); *North Pacifica LLC v. City of Pacifica*, 526 F.3d 478, 484-85 (9th Cir. 2008).

In the present case, the Merrills initially filed a complaint grounded in substantive and procedural due process, along with equal protection, based on the

County's refusal to issue grading permits, refusal to issue permits for the Merrills' barn, and the arbitrary and capricious manner in which the County applied and enforced the permit regulations - including the orchestrated arrest of Mr. Merrill. The District Court dismissed each and every due process claim, relying on *Armendariz*, and its reasoning. The District Court noted:

> Substantive due process cannot supply the basis for a civil rights claim if the challenged governmental conduct is prohibited by another, more specific, constitutional right. *Graham v. Connor*, 490 U.S. 386, 394-95 (1989); *Buckles v. King County*, 191 F.3d 1127, 1137 (9th Cir. 1999); *Macri v. King County*, 126 F.3d 1125, 1128 (9th Cir.1997); *Armendariz v. Penman*, 75 F.3d 1311, 1319 (9th Cir. 1996). The Takings Clause contained in the United States Constitution's Fifth Amendment provides such an explicit source.
>
> Here, the Count 2 allegations made by Plaintiffs only reference the deprivation of their ability to develop their land. The notion of using "substantive due process to extend constitutional protection to economic and property rights has been largely discredited." *Armendariz*, 75 F.3d at 1318-19. Therefore, in order to address a deprivation of property interest alleged in Count 2, Plaintiffs are required to pursue such claim a under the Takings Clause. The court's correspondent discussion in regard to the Takings Clause count is found below.
>
> Given the foregoing, Plaintiffs' claim of a violation of substantive due process contained in Count 2 is dismissed.
>
> (ER Vol. 1, P. 75:19-76:8.)

Given that the District Court's reasoning and basis for dismissing the substantive due process claims is based on pre-*Crown Point* cases, it decided the

motion to dismiss incorrectly and the Merrills were accordingly deprived of their right to pursue those claims.

3. The Merrills Stated Facts in Support of Their Substantive Due Process Claims, and Sufficient Facts Were Adduced at Trial to Support the Same.

While the Takings Clause is not an automatic bar to substantive due process claims, that does not end the inquiry. The Merrills must have actually stated claims supporting a substantive due process violation. See e.g. *Shanks*, *supra*, 540 F.3d at 1087. For instance, in *Shanks*, the Court affirmed the dismissal of substantive due process claims, even though it acknowledged there was no bar because of the Takings Clause, because there was no government action alleged. Instead the plaintiffs had proceeded on a theory that the government's failure to prohibit the activities of a private actor supported a substantive due process claim. The Court noted that it was settled that the "failure to enforce" theories had previously been discredited and affirmed the dismissal of the substantive due process claims.

The required threshold is that the Merrills must have been deprived of some constitutionally protected life, liberty or property interest. See *Action Apartment*, 509 F.3d at 1026. It is obvious that the Merrills were deprived of both a liberty and a property interest. Mr. Merrill was arrested for false and manufactured charges in an area of law which the County had never previously arrested anyone prior. Moreover,

the Merrills' property interests were deprived by the County in a number of ways. First, they were not allowed to maintain their private roads even though they were permitted as a matter of law to do so. Every parcel of land the Merrills owned in Madera County was "violated" by the County which hindered the Merrills' ability to sell the properties even though only a few parcels were subject to the enforcement action of the County. The Merrills were prohibited from working on their septic system even though they had all the proper permits for it. Mr. Merrill was threatened with jail time if he did not agree to the County's unlawful demands. The Merrills were denied permits and the County refused to tell them why they were not allowed to have the permits. Also, permits which the Merrills had legally obtained were cancelled without notice and without a proper basis.

Facts which tend to show a sudden change in course by the government, malice, bias, or pretext in relation to land-owner's use and enjoyment of his property, would support a substantive due process claim. *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 920 F.2d 1496, 1508 (9th Cir. 1990). In *Del Monte Dunes* a developer had proceeded to obtain approval for construction of homes on property in Monterey County. The city council had given its approval subject to the developer meeting fifteen conditions, which the developer substantially complied with. Nevertheless, the city council reversed itself, allegedly because of political pressure

from the neighbors, even though its planning staff recommended approval. In denying the development the city council gave only the most vague and broad reasons. The Court of Appeals stated, in remanding to the District Court, that "We cannot say at this stage of the proceeding that the actions of the city council, which we have detailed above, were not arbitrary and irrational and, thus, a violation of appellants' substantive due process rights." *Del Monte Dunes*, *supra*, 920 F.2d at 1508.

Similar to the situation in *Del Monte Dunes*, in this case the County had previously told Mr. Merrill that he was allowed to grade and maintain his private roads without the need for any further permits than he already had obtained. (ER Vol. 2, P. 23:22-24:17.) The record shows that the roads had been so maintained for at least twenty years prior to the Merrills' ownership and that culverts were placed in the streams - all without permits. Mr. Wheeler, who managed the ranch from 1979 through the 1990's, graded the roads a couple times a year - in the fall and in the spring. (ER Vol. 2, P. 72:1-73:21.) Mr. Wheeler also placed and replaced culverts in the property. (ER Vol. 2, P. 74:21-23.) Mr. Wheeler was not charged with any violations by the County for doing all of this work. (ER Vol. 2, P. 74:24-75:1.) These were the same roads that Mr. Merrill had been grading and maintaining when he was cited and arrested. (ER Vol. 2, P. 76:5 - 13.) Mr. Wheeler had even been

grading the roads in the time when the Gilberts had moved in next door, and still he had never been cited. (ER Vol. 2, P. 77:2-12.)

The grading continued in April of 2002 when Mr. Merrill purchased the ranch and was not objected to until immediately after Mrs. Gilbert was ejected from the ranch property. From that point until Mr. Merrill's arrest was less than forty days. There has been, and can not be, any rational explanation for why grading and maintaining the ranch roads was permissible without any permits for twenty years, but within 90 days of the Merrills' purchase - and about a month after Mrs. Gilbert was ejected from the ranch - permits were suddenly required for grading the roads. Indeed, the County did not even offer any reasons that the permits were required, did not tell Mr. Merrill what he needed to do in order to obtain his permits, except in the most vague terms, and did not explain how to have the violations lifted. (ER Vol. 2, P. 41:4-10; 42:8-10; 43:11-21; 44:13-45:1.)

The Merrills' substantive due process claims were stated in the second cause of action in their original complaint as follows[10]:

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[10] The Second Count is captioned as follows:

Count 2
All Plaintiffs vs. All Defendants
U.S. Const. Amendments 5 and 14; Cal. Const. Article 1, Section 7
42 U.S.C. 1983; 42 U.S.C. 1985; 42 U.S.C. 1986

> C. Defendants acted in concert to intentionally, willfully and maliciously created and applied laws and regulations in an unfair, irrational, arbitrary and capricious manner so as to result in plaintiffs not being able to develop the Dream Catcher Ranch.
>
> D. Plaintiffs asked for hearings to challenge the denial of permits, and asked for administrative reviews of the Planning Department's decisions. The Board of Supervisors, including defendant Gary Gilbert and the other defendants, were aware of these requests to exhaust administrative remedies. However, at no time did any of the defendants grant plaintiffs a hearing.

(ER Vol. 2, P. 133.) The Complaint further incorporated 36 other paragraphs into this cause of action. (ER Vol. 2, P. 120-137.) The facts alleged in the Complaint indicate there was an intentional and knowing effort on the part of the County, at the direction of Defendant Gilbert, to hinder the Merrills' ownership interest and development intentions of the ranch property. (ER Vol. 2, P. 123-132.) It appears from the Complaint that the motive was, at least in part, a personal animus on the part of Defendant Gilbert against the Merrills in response to the ejection of his wife from the ranch for trespassing, as well as concerns about traffic and development in Defendant Gilbert's neighborhood. The alleged acts include illegal arrests, threats of further arrests, arbitrary enforcement of laws and regulations, denial of permits without any reason and forcing the Merrills to expend over a million dollars to build a road which was not required by any law.

(Taking; Procedural Due Process; Substantive Due Process)

The evidence at trial, although not aimed at supporting the substantive due process claims because they were not at issue for the jury, further supported these contentions.

For all of the foregoing reasons, the District Court erred in dismissing all of the Merrills' substantive due process claims, and the Merrills stated claims that should have been presented to the jury.

B. The District Court Erred in Refusing to Allow the Merrills to Amend Their Complaint During the Trial Because It, Once Again, Relied upon Armendariz to Hold That the Merrills' Substantive Due Process Claims Were Barred as a Matter of Law.

Of the factors to be utilized by the District Court in deciding a motion for leave to amend the complaint, in this case the District Court was only concerned with "prejudice to the opposing party." The District Court believed the County would be unduly prejudiced by the proposed amendments. For instance, in denying the request to amend to add a cause of action based on the secret meeting held by Defendant Gilbert, the District Court noted: "the defendant would not have been on notice that this would have been a separate claim." (ER Vol. 1, P. 52:25-53:1.) However, Defendant Gilbert was on notice the Merrills believed he was behind the trouble that the Merrills were suffering. The original Complaint notes: "Gary Gilbert pressure[d] individuals at the Madera Planning Department to ruin plaintiffs attempts to improve

the Dream Catcher Ranch." (ER Vol. 2, P. 122:15-16.) The Merrills did not discover that Mr. Gilbert had secret meetings until the trial because Mr. Gilbert had been less than honest about them during his deposition. (ER Vol. 1, P. 49:3-52:13.) At his deposition Mr. Gilbert was asked if he had been involved in any meetings with neighbors about the Merrills' ranch and their intended development. (ER Vol. 1, P. 50:4-13.) Mr. Gilbert denied that he had been involved. (*Ibid*.) However, at trial Mrs. Gilbert testified that she was present at a private meeting, held in the County chambers with her husband and various neighbors and County officials regarding the Merrills and their ranch. (*Ibid*.) This is contrary to the earlier deposition testimony.

The District Court even noted the inconsistency, but stated that the defense was not on notice sufficient to allow the Merrills to pursue the secret meeting claim. (ER Vol. 1, P. 52:18-53:1.)

After the motion to dismiss was heard, the District Court allowed the Merrills to move to amend their complaint. The District Court denied the Merrills' requests to amend. The District Court relied on the *Armendariz* decision and ruled that it would bar some of the Merrills' requested amendments because they related to the valuation of land. The District Court noted:

> ...the new cloud on the title claim, the new refusal access to a building claim, are substantive due process claims that to the extent that they relate ultimately to the property, the value of the property, the

> development of the property, that the *Armendariz* case at 75 F.3d, 1311, Ninth Circuit 1996 case, which I did cite in my ruling on the motion to dismiss, made it clear that the notion of using substantive due process to extend constitutional protection to economic and property rights has largely been discredited.

(ER Vol. 1, P. 56:16 - 25.)

The District Court continued to deny the entire motion to amend based primarily on the *Armendariz* case because the claimed damages related mainly to the impairment of the valuation or development of the Merrills' ranch. (ER Vol. 1, P. 56:113-57:10.)

In all of this the District Court was incorrect. *Armendariz* was not good law after *Lingle* and *Lewis*, and certainly it is no longer good law after *Crown Point*. Because the District Court's only basis for denying these amendments was the *Armendariz* case, these decisions should be overruled as an abuse of discretion.

C. The District Court Erred in Denying the Merrills' Motion for a New Trial Because, Even Though it Was Aware *Armendariz* Had Been Overturned it Declined to Follow this Court.

After trial the Merrills moved for a new trial or a directed verdict. Although *Crown Point* was decided by this Court in the time between the end of the trial and the District Court's decision, and even though the District Court acknowledged the *Crown Point* decision, it still refused to order a new trial.

The District Court stated that it did not believe *Crown Point* was applicable because the takings claims were dismissed because they were not ripe. As noted,

infra, this Court must decide this case consistent with current law. The current state of due process litigation in this Circuit is that if a plaintiff states a claim for due process, even where that claim is related to or arises out of property interests, if it is not necessarily a takings case, it is not precluded by the Takings Clause. As discussed more fully above, the Merrills' claims were substantive due process claims and not takings claims, in their essence.

Because those claims were not subsumed by the Takings Clause the District Court should have allowed the Merrills to try them before the jury and thus, the District Court erred as a matter of law. For this reason, the District Court's decision was incorrect on a matter of law and must be reversed as an abuse of discretion.

VI
CONCLUSION

The Merrills were forced to expend over $1 million to construct a road that no law required, they were cited for manufactured deficiencies, and arrested even after complying with these unreasonable, arbitrary and unlawful decisions by the County. The Complaint plead violation of the Merrills' substantive due process rights. The District Court's dismissal of these claims shaped the entire course of the proceedings - discovery, evidentiary motions, dispositive motions, and the jury trial. The problem is that the District Court relied upon a case which has been discredited and

completely overruled. Because the Merrills have the right to prosecute substantive due process claims, the ruling of the District Court should be reversed and this case should be remanded for further proceedings. This Court should order a new trial in which the Merrills' claims, including their substantive due process claims, are allowed to be tried. As part of this order, each of the evidentiary rulings and pre-trial rulings should be revisited by the District Court in light of the substantive due process claims.

Date: September 29, 2009

Respectfully submitted,

MAGWOOD LAW FIRM

s/Andrew A. Magwood
Andrew A. Magwood, Attorney for
Ernest and Lila Merrill.

CERTIFICATE OF COMPLIANCE

Form 8. Certificate of Compliance Pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32-1 for Case Number 07-16472.

I certify that pursuant to Fed. R. App. P. 32 (a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening brief is proportionately spaced, has a typeface of 14 points or more and contains 8,002 words.

Date: September 29, 2009

Respectfully submitted,

MAGWOOD LAW FIRM

s/Andrew A. Magwood
Andrew A. Magwood, Attorney for
Ernest and Lila Merrill.

CERTIFICATE OF SERVICE

I hereby certify that on September 29, 2009, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days, to the following non-CM/ECF participants:

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