No. 18-1526

In The

Supreme Court of the United States

PATRICK J. TOBIN,

Petitioner,

vs.

CITY & COUNTY OF SAN FRANCISCO,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

PATRICK J. TOBIN, Petitioner
P.O. Box 2059
Hanford, California 93230
Telephone (559) 582 9360
Telecopier (559) 582 9350
Prowag1@gmail.com

QUESTION PRESENTED

1. WHETHER THIS COURT HERE MUST EXERCISE ITS SUPERVISORY POWERS OVER LOWER FEDERAL COURTS UNDER RULE 10(a) TO KEEP THEM FROM ENCROACHING ON THE EXCLUSIVE RIGHT OF THE STATES TO DEFINE THEIR OWN LAWS?

PARTIES TO PROCEEDING

The Petitioner is Patrick J. Tobin, a retired Sergeant-Inspector with the San Francisco Police Department. The Respondents are the City and County of San Francisco through its public safety arm: The San Francisco Police Department.

RULE 29.6 STATEMENT

The Respondents are the City and County of San Francisco, California and no individuals with corporate affiliations are party to this suit.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

INTRODUCTION

It is virtually impossible to justify the federal court's exercise of pendent jurisdiction over state law matters under the very clear limits of the federal judicial power defined by the United States Constitution. However, by exercising its common law power, the Court has extended the federal courts' jurisdiction in that area to allow consideration of those claims presented which "arise from a common nucleus of operative fact." See *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726 (1966).

The only justification for pendent jurisdiction lies in considerations of judicial economy, convenience and fairness to litigants. 74 Harv. L. Rev. 1660, 1661 (1961).

Because of the well-recognized state interest in developing and applying its own laws in accordance with its own policies, the power to decide questions of state law has been left to the state courts. If a federal court chooses to hear a state law claim, that court is bound to apply the appropriate state law to those claims. See *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938); U.S. Const. Amend. X.

The federal courts are courts of limited jurisdiction, and these courts only have subject matter jurisdiction over claims where there is both constitutional and congressional authority. See *Aldinger v. Howard*, 427 U.S. 1, 15 (1976). Constitutional authority is derived from U.S. Const. Art. III, § 2, which enumerates the categories over which there is federal judicial power. These categories are the absolute outer limits of

jurisdiction and any more than this is unconstitutional. 9 Lewis & Clark L. Rev. 295, 310 (2005).

A disturbing trend has been developing within our federal district courts and Circuit Courts of Appeals (and particularly within the Ninth Circuit): federal judges are increasingly choosing to exercise pendent jurisdiction over state law claims, only to subsequently abdicate their duty to follow the prevailing state law espoused by states' legislatures and analyzed by states' highest courts, instead applying their own ("federal") analysis to those issues. This ongoing widespread nullification of state law *can and will* erode the constitutional fabric in which pendent jurisdiction is woven.

By insisting that federal judges mechanically follow state law, this Court sought to prevent selective forum-shopping. 1982 Duke L. J. 704, 725. However, by allowing certain federal judges to dance around the Constitutional mandate, this Court actually encourages selective forum-shopping: perpetuating a dirty cycle wherein cunning lawyers seeking to obtain a strategic advantage "keep tabs" on (and/or support in judicial campaigns) those federal judges who are more inclined to construe issues of state law with a "federal flavor." This necessarily incentivizes both lawyers and judges to "cheat" the federalist system at the expense of state sovereignty.

Here in the instant case, we have a federal judiciary that could care less about the prevailing state rationale. The federal judges here – on both the district

and appellate court level – wanted to dispose of the case in a manner they saw fit, and opportunistically reasoned that Tobin's claims were untimely under the California Government Code, despite the unequivocal language expressed in California Government Code § 911.3(b) that any defense as to the time limit for presenting a claim described in subdivision (a) is *waived* by the public agency's failure to give adequate notice of noncompliance or untimeliness to the claimant.

OPINIONS BELOW

The opinion of the court of appeals ("Pet. App. 1") is unreported. The opinion of the district court is unreported.

STATEMENT OF JURISDICTION

The court of appeals entered final judgment on January 3, 2019, and denied a petition for rehearing on February 1, 2019. ("Pet. App. 2")

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

California Government Code § 911.2:

(a) A claim relating to a cause of action for death or for injury to person or to personal property or growing crops shall be presented as provided in Article 2 (commencing with Section 915) not later than six months after the accrual of the cause of action. A claim relating to any other cause of action shall be presented as provided in Article 2 (commencing with Section 915) not later than one year after the accrual of the cause of action.

(b) For purposes of determining whether a claim was commenced within the period provided by law, the date the claim was presented to the Department of General Services is one of the following:

(1) The date the claim is submitted with a twenty-five dollar ($25) filing fee.

(2) If a fee waiver is granted, the date the claim was submitted with the affidavit requesting the fee waiver.

(3) If a fee waiver is denied, the date the claim was submitted with the affidavit requesting the fee waiver, provided the filing fee is paid to the department within 10 calendar days of the mailing of the notice of the denial of the fee waiver.

California Government Code § 911.3:

(a) When a claim that is required by Section 911.2 to be presented not later than six months after accrual of the cause of action is presented after such time without the application provided in Section 911.4, the board or other person designated by it may, at any time within 45 days after the claim is presented, give written notice to the person presenting the claim that the claim was not filed timely and that it is being returned without further action. The notice shall be in substantially the following form:

"The claim you presented to the (insert title of board or officer) on (indicate date) is being returned because it was not presented within six months after the event or occurrence as required by law. See Sections 901 and 911.2 of the Government Code. Because the claim was not presented within the time allowed by law, no action was taken on the claim. Your only recourse at this time is to apply without delay to (name of public entity) for leave to present a late claim. See Sections 911.4 to 912.2, inclusive, and Section 946.6 of the Government Code. Under some circumstances, leave to present a late claim will be granted. See Section 911.6 of the Government Code. You may seek the advice of an attorney of your choice in connection with this matter. If you desire to consult an attorney, you should do so immediately."

(b) Any defense as to the time limit for presenting a claim described in subdivision (a) is waived by failure to give the notice set forth in subdivision (a)

within 45 days after the claim is presented, except that no notice need be given and no waiver shall result when the claim as presented fails to state either an address to which the person presenting the claim desires notices to be sent or an address of the claimant.

California Labor Code § 1102.5:

(a) An employer, or any person acting on behalf of the employer, shall not make, adopt, or enforce any rule, regulation, or policy preventing an employee from disclosing information to a government or law enforcement agency, to a person with authority over the employee, or to another employee who has authority to investigate, discover, or correct the violation or noncompliance, or from providing information to, or testifying before, any public body conducting an investigation, hearing, or inquiry, if the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation, regardless of whether disclosing the information is part of the employee's job duties.

(b) An employer, or any person acting on behalf of the employer, shall not retaliate against an employee for disclosing information, or because the employer believes that the employee disclosed or may disclose information, to a government or law enforcement agency, to a person with authority over the employee or another employee who has the authority to investigate, discover, or correct the violation or noncompliance, or for providing information to, or

testifying before, any public body conducting an investigation, hearing, or inquiry, if the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation, regardless of whether disclosing the information is part of the employee's job duties.

(c) An employer, or any person acting on behalf of the employer, shall not retaliate against an employee for refusing to participate in an activity that would result in a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation.

(d) An employer, or any person acting on behalf of the employer, shall not retaliate against an employee for having exercised his or her rights under subdivision (a), (b), or (c) in any former employment.

(e) A report made by an employee of a government agency to his or her employer is a disclosure of information to a government or law enforcement agency pursuant to subdivisions (a) and (b).

(f) In addition to other penalties, an employer that is a corporation or limited liability company is liable for a civil penalty not exceeding ten thousand dollars ($10,000) for each violation of this section.

(g) This section does not apply to rules, regulations, or policies that implement, or to actions by employers against employees who violate, the confidentiality of the lawyer-client privilege of Article 3 (commencing

with Section 950) of, or the physician-patient privilege of Article 6 (commencing with Section 990) of, Chapter 4 of Division 8 of the Evidence Code, or trade secret information.

STATEMENT OF THE CASE

STATEMENT OF FACTS:

Tobin filed suit on June 28, 2011 in the Superior Court of California, City and County of San Francisco ("Superior Court,") Case No. CGC-11-512076 against defendants City and County of San Francisco, ("CCSF") San Francisco Police Department, ("SFPD") John Murphy, ("Murphy") Kevin Cashman, ("Cashman") and Does I through 40, inclusive. ("State Court Action") The State Court Action alleged causes of action for, among other claims, violation of California Labor Code § 1102.5. See Pet. App. 3 at 18 Tobin did not comply with the provisions of the California Government Tort Claims Act Cal. Gov. Code § 905, *et seq.* in that he failed, prior to filing his suit in the Superior Court to present CCSF with a claim for damages on the facts underlying his lawsuit. Tobin did not serve process issued pursuant to his complaint on any party.

On December 23, 2011, Tobin presented CCSF with the prerequisite governmental tort claim. On February 13, 2012, CCSF notified Tobin by first class mail that his claim was rejected on its merits. The notice did not mention any procedural, or timeliness defect. On December 20, 2012 Tobin filed his First Amended

Complaint in the matter in the State Court Action adding several defendants. The Superior Court issued an amended summons. On March 4, 2013, Tobin served the amended summons and complaints on the defendants.

On April 3, 2013, each defendant filed its Notice of Removal of the action in the United States District Court, for the Northern District of California ("District Court") Case Number 3:13-cv-01504 pursuant to the provisions of 28 U.S.C. § 1441(a) – (b) because the First Amended Complaint pled a cause of action under 42 U.S.C. § 1983. *Id.* at 22.

On May 6, 2015 with leave of the district court granted after contested motion, Tobin filed his Second Amended Complaint alleging three causes of action against defendants. The first alleged a violation of the provisions of California Labor Code section 1102.5, the second alleged a violation of California Government Code section 3300 to section 3311, and the third alleged a cause of action under 42 U.S.C. § 1983. The Second Amended Complaint alleged compliance with the California Government Tort Claims Act.

On August 4, 2015, upon stipulation of the parties, the district court dismissed all individual defendants. On October 4, 2016, the district court granted summary judgment as to defendant CCSF on all causes of action. Pet. App. 4 On the first cause of action for violation of Cal. Labor Code § 1102.5, the district court ruled that the claim filed by Tobin under the California Government Tort Claims Act was untimely filed and

could, therefore, not resurrect the original complaint filed almost six months earlier. As a result, the district court ruled, the relation-back provisions of Rule 15, Federal Rules of Civil Procedure could not apply to the First or Second Amended Complaints and the state law claims were therefore barred by the statute of limitation. That statute of limitation provided that as a matter of California law, once the governmental entity rejected in writing the claim upon its merits, as it did here on February 13, 2012, any suit on that claim must be filed within six months of the rejection letter. The district court ruled that although the original complaint had been filed prior to the issuance of the rejection letter, it could not be revived because there had been no timely compliance with the California Government Tort Claims Act. The district court rejected Tobin's argument that CCSF waived its right to defend against the untimely presentation under California state law because CCSF's failed to reject the claim in writing on the express basis of that untimely presentation. Affirming, the Court of Appeals for the Ninth Circuit also rejected Tobin's argument in this regard as "lacking merit," without elaborating upon its reasoning.

On January 17, 2019 Tobin submitted a Petition for Panel Rehearing on the issue of waiver of untimely presentation under prevailing California State Law, which was denied on February 1, 2019. Pet. App. 2

REASON FOR GRANTING THIS PETITION

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THE CALIFORNIA STATE SUPREME COURT ON THE INTERPRETATION OF CALIFORNIA GOVERNMENT CODE § 911.3(b.)

The Ninth Circuit held that Appellant Patrick J. Tobin's ("Tobin's") argument that CCSF waived its defense of untimeliness, which thereby mandated that Tobin's First and Second Amended Complaint relate back to his initial complaint, were without merit. The court's holding was in direct contradiction to the prevailing rationale of the State of California: a California State statute (here, California Government Code section 911.3(b.)) that was crafted in accord with the will of the state legislature, upheld in numerous published decisions of the California State Supreme Court, (see e.g., *Phillips v. Desert Hospital*, 49 Cal.3d 699, 709 (Cal. 1989)), and ultimately nullified by the federal court's refusal to conform to Constitutional procedure.

Although federal/state comity as well as the tenuous nature of federal pendent jurisdiction itself requires the federal courts exercising it to adhere strictly and without question to California precedent, the lower federal courts in this case did not. Instead, both the district court and the Ninth Circuit Court of Appeals completely ignored the California Law. See *Johnson v. Frankell*, 520 U.S. 911, 916 (1997).

The California State Supreme Court clearly held in *Phillips*: "Further, as [defendant government agency]

failed to notify plaintiffs of any timeliness defects (§ 911.3, subd. (a)), [defendant government agency] has similarly waived any defenses it might have raised on the ground of plaintiffs' asserted failure to present a timely claim (§ 911.3, subd. (b))." 49 Cal.3d at p. 711; see also *Wiley v. County of San Diego*, 58 Cal.App.4th 434, 445 (Cal.App. 1997) (citing *Phillips* at 706: "Government Code section 911.3, subdivision (b) is equally unequivocal that the public entity's failure to comply with the notice requirement results in a waiver of any defense based on the timeliness of the claim.").

There does not appear to be any way that The State of California can be any more clear in espousing its intent that California Government Code section 911.3(b) mandate waiver by the public entity of its defense of untimely claim presentation where the public entity does not timely notify the claimant of its determination that the claim is untimely presented. While here the court was undeniably bound by California Law to regard the claim filed by Tobin under the California Government Tort Claims Act as timely for all purposes, the court ruled (against the very clear California mandate) that Tobin's argument that CCSF waived its defense of untimeliness thereby allowing his First and Second Amended Complaint to relate back to his initial complaint were without merit.

Federal justices in a federalist system should not feel as empowered to disregard state law as they appear to feel here and now. Accordingly, this Court should grant Certiorari here, so that it may rein in rogue federal justices who feel so empowered, and seek

to restore the delicate balance between Constitutionality and comity that allows pendent jurisdiction to exist within American jurisprudence.

CONCLUSION

The refusal by the district court as well as the Court of Appeals to conform its decision to settled California law amounts to the imposition of federal interpretation over state law under the guise of exercising pendent jurisdiction. This court must exercise its supervisory powers to prevent the extra jurisdictional actions of the Court of Appeals from overcoming the constitutional limitations of the federal judicial power.

Respectfully submitted,

PATRICK J. TOBIN, Petitioner
P.O. Box 2059
Hanford, California 93232

Originally filed: May 2, 2019
Re-filed: June 6, 2019