

No. \_\_\_\_\_

---

In the  
**Supreme Court of the United States**

---

SUNIL DEO,  
*Petitioner,*  
v.

PEOPLE OF THE STATE OF CALIFORNIA,  
*Respondent.*

---

**On Petition for a Writ of Certiorari to the  
Fourth Appellate District,  
Court of Appeal of the State of California**

---

**PETITION FOR WRIT OF CERTIORARI**

---

Ryan C. Squire  
*Counsel of Record*  
Zi C. Lin  
Robert Garrett  
Jennifer R. Slater  
GARRETT & TULLY, P.C.  
225 S. Lake Ave., Suite 1400  
Pasadena, CA 91101  
(626) 577-9500  
rsquire@garrett-tully.com

*Counsel for Petitioner*

## **QUESTIONS PRESENTED**

1. Does California's application of Penal Code section 115 to deprive lienholders of their property, which conflicts with U.S. Supreme Court precedent holding that similar statutes which extinguish and destroy the value of liens are unconstitutional, constitute an uncompensated taking in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution?

2. Does California's application of Penal Code section 115 to void deeds of trust without affording a meaningful hearing that considers an innocent lender's bona fide encumbrancer status, and which conflicts with U.S. Supreme Court precedent and the laws of other states, constitute a violation of due process under the Fifth and Fourteenth Amendments to the U.S. Constitution?

## **PARTIES TO THE PROCEEDING**

Sunil Deo is the petitioner before this Court. Mr. Deo was the real party in interest/appellant below. Mr. Deo is not a criminal defendant, and there are no criminal proceedings against him.

The People of the State of California is the respondent before this Court. The State was the plaintiff/respondent below.

Yolanda Astorga-Lider was the criminal defendant below. She did not participate in the proceedings at issue regarding the validity of Mr. Deo's deed of trust.

**STATEMENT OF RELATED PROCEEDINGS**

*Sunil Deo v. Jose Manuel Lorenzana, et al.*, San Diego Superior Court case no. 37-2017-000377 45-CU-OR-CTL. This case is pending.

There are no additional proceedings in any court that are directly related to this case.

## TABLE OF CONTENTS

QUESTIONS PRESENTED . . . . .	i
PARTIES TO THE PROCEEDING. . . . .	ii
STATEMENT OF RELATED PROCEEDINGS . . .	iii
TABLE OF AUTHORITIES . . . . .	vii
PETITION FOR WRIT OF CERTIORARI . . . . .	1
OPINION BELOW. . . . .	3
JURISDICTION. . . . .	3
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED. . . . .	3
STATEMENT OF THE CASE. . . . .	3
A. Factual background. . . . .	3
B. Procedural history. . . . .	4
1. Penal Code section 115. . . . .	4
2. The State successfully voids Mr. Deo's deed of trust under section 115. . . . .	5
3. Mr. Deo appeals, arguing the criminal court ignored well-settled California precedent when it voided Mr. Deo's deed of trust. . . . .	6
4. The orders voiding Mr. Deo's deed of trust are affirmed on appeal. . . . .	8

## REASONS FOR GRANTING THE PETITION . . . 10

- A. The State’s use of Penal Code section 115 to void Mr. Deo’s lien conflicts with U.S. Supreme Court precedent and constitutes an uncompensated taking under the Fifth and Fourteenth Amendments. . . . . 10
- B. Penal Code section 115 and the California opinion, which deprive purchasers and lienholders of a meaningful hearing in violation of due process, conflict with U.S. Supreme Court precedent and the laws of other states. . . . . 13
- C. Penal Code section 115 violates due process because it is arbitrary and lacks a reasonable relation to a proper legislative purpose. . . . . 18
- D. Certiorari should be granted to resolve the Constitutionality of criminal statutes which void property interests.. . . . 20

## CONCLUSION. . . . . 21

## APPENDIX

- Appendix A Opinion in the State of California Court of Appeal, Fourth Appellate District, Division One, No. D073992 (May 2, 2019) . . . . . App. 1
- Appendix B Order Certifying Opinion for Publication in the State of California Court of Appeal, Fourth Appellate District, Division One, No. D073992 (May 22, 2019) . . . . . App. 20

Appendix C	Order Declaring Recorded Instruments Void in the Superior Court of the State of California for the County of San Diego, Central Division, No. SCD266414 (March 5, 2018) . . . . .	App. 23
Appendix D	Order in the Superior Court of the State of California for the County of San Diego, Central Division, No. SCD266414 (February 23, 2018) . . . . .	App. 29
Appendix E	Order Denying Petition for Review in the Supreme Court of California, No. S256533 (August 28, 2019) . . . . .	App. 35
Appendix F	Cal. Penal Code § 115 . . . . .	App. 36
Appendix G	Deed of Trust (with attached Exhibits) (March 28, 2014) . . . . .	App. 42

## TABLE OF AUTHORITIES

### CASES

<i>Alamo Rent-A-Car, Inc. v. Mendenhall</i> , 113 Nev. 445 (1997) . . . . .	16
<i>Albice v. Premier Mortg. Services of Washington, Inc.</i> , 174 Wash.2d 560 (2012) . . . . .	17
<i>Allen v. Ayer</i> , 26 Or. 589 (1895) . . . . .	17
<i>Allison v. Crummey</i> , 64 Okla. 20 (1916) . . . . .	17
<i>Anders v. Anders</i> , 143 Fla. 721 (1940) . . . . .	16
<i>Armstrong v. Manzo</i> , 380 U.S. 545 (1965) . . . . .	14
<i>Armstrong v. United States</i> , 364 U.S. 40 (1960) . . . . .	1, 12, 13
<i>Bevilacqua v. Rodriguez</i> , 460 Mass. 762 (2011) . . . . .	17
<i>Bicknell v. Jones</i> , 203 Kan. 196 (1969) . . . . .	17
<i>Bowen v. Gilliard</i> , 483 U.S. 587 (1987) . . . . .	13
<i>Brown v. Khoury</i> , 346 Mich. 97 (Mich. 1956) . . . . .	17



<i>Christian, by Holt, v. Waialua Agr. Co.,</i> 33 Haw. 34 (1934) . . . . .	16
<i>County of Sacramento v. Lewis,</i> 523 U.S. 833 (1998) . . . . .	19
<i>Darling Int’l, Inc. v. Carter,</i> 294 Ga. 455 (2014) . . . . .	16
<i>Dixon v. Kaufman,</i> 79 N.D. 633 (1953) . . . . .	17
<i>Erickson v. Bohne,</i> 130 Cal.App.2d 553 (1955) . . . . .	7
<i>Faison v. Lewis,</i> 25 N.Y.3d 220 (2015) . . . . .	17
<i>Fallon v. Triangle Management Services, Inc.,</i> 169 Cal.App.3d 1103 (1985) . . . . .	7
<i>First Fiduciary Corp. v. Blanco,</i> 276 N.W.2d 30 (Minn. 1979) . . . . .	17
<i>First Interstate Bank of Sheridan v. First Wyoming Bank, N.A. Sheridan,</i> 762 P.2d 379 (Wyo. 1988) . . . . .	17
<i>Fishman v. Murphy ex rel. Estate of Urban,</i> 433 Md. 534 (2013) . . . . .	17
<i>Flemming v. Thompson,</i> 343 A.2d 599 (Del. 1975) . . . . .	16
<i>Gonsoulin v. Sparrow,</i> 150 La. 103 (1921) . . . . .	17

<i>Hovey v. Hobson</i> , 53 Me. 451 (1866) . . . . .	17
<i>Jones v. Comer</i> , 123 W. Va. 129 (1941). . . . .	17
<i>Kavanau v. Santa Monica Rent Control Bd.</i> , 16 Cal.4th 761 (1997) . . . . .	11
<i>Lingle v. Chevron U.S.A. Inc.</i> , 544 U.S. 528 (2005). . . . .	11
<i>Louisville Joint Stock Land Bank v. Radford</i> , 295 U.S. 555 (1935). . . . .	1, 11, 12
<i>Luhrs v. Hancock</i> , 181 U.S. 567 (1901). . . . .	15
<i>Martinez v. Affordable Housing Network, Inc.</i> , 123 P.3d 1201 (Colo. 2005). . . . .	16
<i>Martin v. S. Salem Land Co.</i> , 94 Va. 28 (1897) . . . . .	17
<i>Mathews v. Eldridge</i> , 424 U.S. 319 (1976). . . . .	14
<i>Melendrez v. D &amp; I Inv., Inc.</i> , 127 Cal.App.4th 1238 (2005) . . . . .	7
<i>Mennonite Bd. of Missions v. Adams</i> , 462 U.S. 791 (1983). . . . .	1, 14
<i>Mullane v. Central Hanover Bank &amp; Trust Co.</i> , 339 U.S. 306 (1950). . . . .	14
<i>Mullins v. Merchandise Sales Co.</i> , 192 So.2d 700 (Miss. 1966). . . . .	17

<i>Nebbia v. New York</i> , 291 U.S. 502 (1934) . . . . .	18
<i>Nobles v. Marcus</i> , 533 S.W.2d 923 (Tex. 1976) . . . . .	17
<i>Ockey v. Lehmer</i> , 189 P.3d 51 (Utah 2008) . . . . .	17
<i>People v. Denman</i> , 218 Cal.App.4th 800 (1985) . . . . .	4, 13, 20
<i>Petring v. Kuhs</i> , 350 Mo. 1197 (1943) . . . . .	17
<i>Petta v. Host</i> , 1 Ill. 2d 293 (1953) . . . . .	16
<i>Pingleton v. Shepherd</i> , 219 Ark. 473 (1951) . . . . .	16
<i>Puharic v. Novy</i> , 317 Pa. 199 (1934) . . . . .	17
<i>Rael v. Cisneros</i> , 82 N.M. 705 (1971) . . . . .	17
<i>Roller v. Holly</i> , 176 U.S. 398 (1900) . . . . .	19
<i>Rosenberg v. Smidt</i> , 727 P.2d 778 (Alaska 1986) . . . . .	16
<i>Rosenthal v. Great W. Fin. Sec. Corp.</i> , 14 Cal.4th 394 (1996) . . . . .	7

<i>Scott D. Erler, D.D.S. Profit Sharing Plan v. Creative Fin. &amp; Investments, L.L.C.,</i> 349 Mont. 207 (2009) . . . . .	17
<i>Seeger v. Odell,</i> 18 Cal.2d 409 (1941) . . . . .	13, 20
<i>Shappy v. Downcity Capital Partners, Ltd.,</i> 973 A.2d 40 (R.I. 2009) . . . . .	17
<i>Shook v. Sou. B. &amp; L. Ass’n,</i> 140 Ala. 575 (1904) . . . . .	16
<i>Smith v. S. Royalton Bank,</i> 32 Vt. 341 (1859) . . . . .	17
<i>Snyder v. Lincoln,</i> 150 Neb. 580 (1948) . . . . .	17
<i>Stewart v. Preston Pipeline Inc.,</i> 134 Cal.App.4th 1565 (2005) . . . . .	7
<i>Swindell v. Overton,</i> 310 N.C. 707 (1984) . . . . .	17
<i>Swinehart v. Turner,</i> 44 Idaho 461 (1927) . . . . .	16
<i>U.S. v. California &amp; O. Land Co.,</i> 148 U.S. 31 (1893) . . . . .	2, 14, 15, 16, 18
<i>U.S. v. Carolene Products Co.,</i> 304 U.S. 144 (1938) . . . . .	18
<i>U.S. v. Huckabee,</i> 83 U.S. 414 (1872) . . . . .	14

<i>U.S. v. Security Industrial Bank</i> , 459 U.S. 70 (1982) . . . . .	2, 11, 12
<i>Very v. Russell</i> , 65 N.H. 646 (1874) . . . . .	17
<i>Virginia Corp. v. Galanis</i> , 223 Conn. 436 (1992) . . . . .	16
<i>Williams v. Spinks</i> , 7 Tenn. App. 488 (1928) . . . . .	17
<i>Wright v. Howell</i> , 35 Iowa 288 (1872) . . . . .	16, 17

## CONSTITUTION

U.S. Const. amend. V . . . . .	3, 6, 7, 10
U.S. Const. amend. XIV . . . . .	3, 6, 7, 10

## STATUTES AND RULES

28 U.S.C. § 1257 . . . . .	3
Cal. Civ. Code § 1107. . . . .	7
Cal. Civ. Code § 1214. . . . .	7
Cal. Civ. Code § 1217. . . . .	7
Cal. Penal Code § 115 . . . . .	<i>passim</i>
Florida Statute § 817.535 . . . . .	2, 20, 21
Montana Code Annotated 70-20-404 . . . . .	17
Nevada Revised Statute § 104.2403(1) . . . . .	16
Sup. Ct. R. 10(b) . . . . .	10

Sup. Ct. R. 10(c) . . . . .	10, 20
Sup. Ct. R. 13 . . . . .	10

## PETITION FOR WRIT OF CERTIORARI

The State of California (“the State”), employing a criminal statute, Penal Code section 115, voided petitioner Sunil Deo’s deed of trust (and thus, his lien against the subject real property) without due process of the law and in violation of the Takings Clause, ignoring the undisputed fact that Mr. Deo—who is not even accused of criminal conduct—was a bona fide encumbrancer without notice of any purported fraud with respect to his deed of trust. It is well-settled that a lien is a Constitutionally protectable property interest. (*Mennonite Bd. of Missions v. Adams*, 462 U.S. 791 (1983) (*Mennonite*)); *Armstrong v. United States*, 364 U.S. 40, 46 (1960); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 594 (1935) (*Radford*).)

This Court should grant certiorari to resolve a conflict in the treatment of bona fide purchasers/encumbrancers of property under section 115 and the published opinion entitled *People v. Astorga-Lider*, 35 Cal.App.5th 646 (2019) (“California opinion”) on the one hand, and U.S. Supreme Court precedent and the laws of other states regarding bona fide purchasers/encumbrancers on the other hand.

Section 115 and the California opinion violate the due process rights of purchasers and lienholders of real property. The statute empowers the State to void and extinguish recorded documents between private citizens (including deeds and deeds of trust), without affording a meaningful hearing that considers a party’s bona fide purchaser/encumbrancer status. Section 115 destroys the value of property without any compensation, thus violating the Takings Clause.

Further, the California opinion holds that a purchaser or lienholder defending his or her deed or lien from the State's attempt to void it under section 115 has the burden to prove the accused committed ***no criminal act*** in the first instance. (App. 1-19.)

Section 115's termination of property rights without any compensation also conflicts with U.S. Supreme Court precedent which holds that similar statutes violate the Takings Clause of the Fifth and Fourteenth Amendments. (*U.S. v. Security Industrial Bank*, 459 U.S. 70, 75 (1982) (*Security Industrial*).)

Section 115 and the California opinion also directly conflict with well-settled U.S. Supreme Court precedent (as well as the laws of other states), which holds that a bona fide purchaser/encumbrancer's interest is valid *without* having to disprove criminal conduct. (*U.S. v. California & O. Land Co.*, 148 U.S. 31, 42 (1893) (*California and O.*).)

Certiorari should also issue because this is an issue of national importance. California is not the only state which has enacted unconstitutional criminal statutes to void recorded property interests. Florida Statute section 817.535 similarly ignores the fact that a party is a bona fide purchaser/encumbrancer, and empowers the state of Florida to void purported false or fraudulent instruments without compensation. Review by this Court is necessary to resolve the Constitutionality of these destructive statutes.



## **OPINION BELOW**

The California Court of Appeal's opinion is reported at 35 Cal.App.5th 646 and reproduced at App. 1-19. The criminal court's two orders voiding Mr. Deo's deed of trust are reproduced at App. 23-34.

## **JURISDICTION**

The California Court of Appeal issued its opinion on May 2, 2019. The opinion was certified for publication on May 22, 2019. The California Supreme Court denied review on August 28, 2019. This Court has jurisdiction under 28 U.S.C. section 1257.

## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

The Fifth and Fourteenth Amendments to the U.S. Constitution, and California Penal Code section 115 (reproduced at App. 36-41).

## **STATEMENT OF THE CASE**

### **A. Factual background.**

Petitioner Mr. Deo lent \$275,000 of his personal funds to Jose Manuel Lorenzana and Nohemi Lorenzana (collectively the "Lorenzanas") to finance their purchase of real property in San Ysidro, California. The loan was secured by a deed of trust. The loan was procured by a third party mortgage broker. Unbeknownst to Mr. Deo, this loan was part of a fraudulent scheme concocted by Yolanda Astorga-Lider, a family friend of the Lorenzanas.' Mr. Deo never had any contact with Ms. Astorga-Lider or the Lorenzanas during the entire loan transaction, which

closed in March 2014. Mr. Deo's deed of trust was recorded on March 28, 2014. (App. 42-93.)

## **B. Procedural history.**

### **1. Penal Code section 115.**

In 1872, California enacted Penal Code section 115, making it a felony for any person to knowingly procure or offer any "false or forged instrument" to be recorded. (App. 36.) The purpose of the statute is to "preserve the integrity of public documents." (*People v. Denman*, 218 Cal.App.4th 800, 810 (1985) (*Denman*).)

In 2014, section 115 was amended to add subsections (e) through (h). Section 115, as amended, was made effective as of January 1, 2015, *after* Mr. Deo's deed of trust was recorded. (App. 41.)

Section 115(e)(1) empowers the State to bring a motion in criminal court to void a false or forged instrument *after* a person is convicted under that section. (App. 37.)

Section 115(f) authorizes the criminal court, after notice to "interested parties" (which includes purchasers and lienholders), and a hearing, to issue an order voiding the allegedly false or forged instrument. (App. 38-41.)

Section 115(f)(9)(B) provides that if any party files a civil quiet title action to determine the validity of the false or forged instrument and/or to determine that party's bona fide purchaser/encumbrancer status before the hearing on the State's motion to void the false or forged instrument, the criminal court "may consider

that as an additional ***but not dispositive factor*** in making its determination” whether to void the false or forged instrument. (App. 41, emphasis added.)

**2. The State successfully voids Mr. Deo’s deed of trust under section 115.**

In January 2017, the State initiated criminal proceedings against Ms. Astorga-Lider in connection with more than one dozen allegedly fraudulent loans, including Mr. Deo’s. On February 13, 2018, the criminal court held a hearing on the State’s motion to void the deeds of trust.

On February 23, 2018, the criminal court granted the State’s motion and voided the deeds of trust (including Mr. Deo’s) despite the fact the Lorenzanas ***admitted under oath*** that their ***signatures were genuine and authentic*** on approximately 25 documents associated with Mr. Deo’s loan, ***including*** the promissory note, deed of trust, closing instructions and loan disclosures. These facts were never in dispute. (App. 29-34; court of appeal appellant’s appendix (“COA AA”) 506-508, 515-535, 538-567, 570, 581-583, 687-699, 705-738, 741-743, 746, 843-847, 850-854.)<sup>1</sup>

It was also undisputed that the Lorenzanas ***benefited*** from Mr. Deo’s loan, as it paid the bulk of the purchase price for their property:

---

<sup>1</sup> The criminal court’s February 23 order did not attach copies of the voided documents. The criminal court issued a second order on March 5, 2018 which also voided the deeds of trusts (including Mr. Deo’s), and attached copies of the voided documents as required by section 115(e)(1). (App. 23-28.)

After causing the \$360,000 to be wired to an account she controlled, Astorga-Lider wired a small portion of these funds to escrow as a down payment for the Lorenzanas' purchase of the Wittman Property. ***She caused the rest of the purchase price to be paid by the Deo loan.***

(App. 5 [California opinion], emphasis added.)

Nevertheless, the criminal court adjudicated that Mr. Deo's deed of trust, along with ten other deeds of trust, to be false or forged instruments and therefore void. The criminal court ignored the fact that Mr. Deo filed a civil action to confirm his bona fide encumbrancer status *before* the State moved to void Mr. Deo's deed of trust. (App. 7, 16 [California opinion].)<sup>2</sup>

**3. Mr. Deo appeals, arguing the criminal court ignored well-settled California precedent when it voided Mr. Deo's deed of trust.**

In April 2018, Mr. Deo appealed the orders voiding his deed of trust to the California Court of Appeal. Mr. Deo argued the criminal court's orders and section 115 violated the Due Process Clause and constituted an uncompensated taking under the Fifth and Fourteenth

---

<sup>2</sup> The civil action is captioned *Sunil Deo v. Jose Manuel Lorenzana, et al.*, San Diego Superior Court case no. 37-2017-000377 45-CU-OR-CTL. This action was filed on October 10, 2017, *before* the State filed its motion to void the deeds of trust on November 8, 2017. (App. 7, 16 [California opinion].)

Amendments. (Appellant's opening brief ("AOB"), pp. 28-30.)

As relevant to this petition, Mr. Deo argued that the criminal court's ruling was contrary to California law. A deed (or deed of trust) is void if the grantor's signature is forged or if the grantor is unaware of the nature of what he or she is signing. (*Erickson v. Bohne*, 130 Cal.App.2d 553, 555–556 (1955).) A voidable deed, on the other hand, is one where the grantor is aware of what he or she is executing, but has been induced to do so through fraudulent misrepresentations. (*Fallon v. Triangle Management Services, Inc.*, 169 Cal.App.3d 1103, 1106 (1985).)

One who signs a document is presumed to know its contents and cannot escape from being bound by contending he or she did not read the document. (*Stewart v. Preston Pipeline Inc.*, 134 Cal.App.4th 1565, 1588-1589 (2005).) Even where a party is purportedly fraudulently induced to sign a contract, the contract cannot be voided when the signing party was negligent in his or her failure to discover the true nature of the executed document. (*Rosenthal v. Great W. Fin. Sec. Corp.*, 14 Cal.4th 394, 419-420, 423 (1996).)

A bona fide purchaser/encumbrancer who pays valuable consideration for his interest in real property in good faith, and who records his interest, receives his interest free and clear of all prior unrecorded claims in the property which are unknown to him, including claims that an instrument in the chain of title is voidable. (*Melendrez v. D & I Inv., Inc.*, 127 Cal.App.4th 1238, 1251, 1257 (2005); Cal. Civ. Code §§ 1107, 1214, 1217.)

Mr. Deo thus argued his deed of trust was *voidable*, not void. It was not forged. It is undisputed that Mr. Deo paid valuable consideration (\$275,000) for his lien, and the Lorenzanas signed the loan documents and benefited from the loan. It was undisputed that Mr. Deo did not know of Ms. Astorga-Lider's misconduct. (COA AA 297-298, 422-426, 433-453, 846-847.) Mr. Deo should have been afforded bona fide encumbrancer protection. Instead, the State extinguished Mr. Deo's lien without any compensation.

**4. The orders voiding Mr. Deo's deed of trust are affirmed on appeal.**

The Court of Appeal issued the California opinion on May 2, 2019, affirmed the criminal court's orders, and held that a lien can be avoided if there was a criminal act, *regardless* of whether the alleged victims ratified the conduct, and *regardless* of whether the beneficiary of the lien was an innocent bona fide encumbrancer.

The California opinion ignored the well-settled principles of voidable versus voidable instruments, and bona fide purchaser/encumbrancer.

More importantly for this petition, the criminal court held that private contract and property rights simply are not relevant and do not matter, explaining that Mr. Deo's "arguments, based on civil quiet title and contract law principles, are not of the moment." (App. 15 [California opinion].) Instead, the Court of Appeal fashioned a novel rule out of the ether, requiring a purchaser/lienholder seeking to protect his

or her property rights to prove *there was no criminal conduct in the first instance*:

Deo's argument that the Deo Deed of Trust is voidable not void asks us to ignore the *criminal circumstances* giving rise to section 115 here. ... Deo has not explained why the superior court's reasoning is incorrect. In short, **he has not illustrated why section 115 does not apply to the instant action or why we should follow general contract law and disregard the undisputed criminal activity leading the Lorenzanas to sign the Deo Deed of Trust.**

(App. 15-16 [California opinion], emphasis added.)

The Court of Appeal rejected Mr. Deo's Constitutional arguments, holding:

On this record, we conclude Deo's due process claims are without merit. [¶] Similarly, we are not persuaded by Deo's assertion that the superior court's order voiding the Deo Deed of Trust constituted a taking without just compensation under the Fifth Amendment of the United States Constitution.

(App. 17-18 [California opinion].)

The California opinion was deemed unfit for publication when it was issued. However, the State requested publication so the opinion would have precedential effect, and the Court of Appeal ordered publication on May 22, 2019. (App. 20.)

Mr. Deo filed his petition for review to the California Supreme Court on June 25, 2019, again arguing that the California opinion and section 115 violated the Due Process Clause and the orders voiding Mr. Deo's deed of trust constituted an uncompensated taking under the Fifth and Fourteenth Amendments. (Pet. for review, pp. 24-27.)

The California Supreme Court denied review on August 28, 2019. (App. 35.) This petition for a writ of certiorari is timely under U.S. Supreme Court Rules rule 13.

#### **REASONS FOR GRANTING THE PETITION**

**A. The State's use of Penal Code section 115 to void Mr. Deo's lien conflicts with U.S. Supreme Court precedent and constitutes an uncompensated taking under the Fifth and Fourteenth Amendments.**

The Court should grant certiorari because the California Supreme Court has: (1) "decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals" (U.S. Supreme Court rule 10(b)) and "has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court" (U.S. Supreme Court rule 10(c)).

"The Takings Clause of the Fifth Amendment, made applicable to the States through the Fourteenth [citation], provides that private property shall not 'be taken for public use, without just compensation.'"



(*Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 536 (2005).) Governmental action that constitutes a permanent physical invasion or deprives a property of all viable economic use is usually a “categorical” taking requiring compensation. (*Kavanau v. Santa Monica Rent Control Bd.*, 16 Cal.4th 761, 774 (1997).)

In *Security Industrial*, *supra*, 459 U.S. 70, this Court held the retroactive application of a bankruptcy statute to avoid non-purchase money liens on a debtor’s household furnishings and appliances violated the Takings Clause, as “the governmental action here would result in a complete destruction of the property right of the secured party.” (*Security Industrial*, at 75.)

*Security Industrial* is in accord with a number of other U.S. Supreme Court cases, which hold that the impairment of liens without just compensation constitutes an impermissible taking. In *Radford*, *supra*, 295 U.S. 555, this Court held that the Frazier-Lemke Act violated the Takings Clause because it impaired the value of a bank’s non-purchase money lien. The Act, which only applied retrospectively, permitted the bankruptcy debtor to purchase encumbered property for less than its fair market value. This Court held that the Act was void because it effected a “taking of substantive rights in specific property acquired by the Bank ...” (*Radford*, at 590.) In the *Radford* opinion, Justice Brandeis stated:

[T]he Fifth Amendment commands that, however great the Nation’s need, private property shall not be thus taken even for a wholly public use without just compensation. If the public interest requires, and permits, the

taking of property of individual mortgagees in order to relieve the necessities of individual mortgagors, resort must be had to proceedings by eminent domain; so that, through taxation, the burden of the relief afforded in the public interest may be borne by the public.

(*Id.*, at 602.)

Furthermore, in *Armstrong*, *supra*, 364 U.S. 40, this Court invalidated a Maine statute that impaired materialmen liens on navy boats. Under that statute, the United States took title and possession of the uncompleted hulls and unused materials when the prime contractor defaulted on its obligations to the United States, thus making it impossible for the materialmen to enforce their liens. This Court found a taking:

The total destruction by the government of all compensable value of these liens, which constitute compensable property, has every possible element of a Fifth Amendment “taking” and is not a mere “consequential incidence” of a valid regulatory measure.

(*Armstrong*, at 48.)

*Security Industrial* is on point here. The California opinion applied section 115 retrospectively, as the Deo deed of trust was recorded prior to the effective date of the pertinent subsections (e) through (h) of section 115. (App. 42.) Section 115 completely destroyed the value of Mr. Deo’s deed of trust without any compensation. This constitutes a taking.

Further, the character of the government action supports the finding that section 115 results in an unconstitutional taking, as it is “an enactment that forces ‘some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.’” (*Bowen v. Gilliard*, 483 U.S. 587, 608 (1987) quoting *Armstrong, supra*, 364 U.S. at 49.) The purpose of section 115 is to “preserve the integrity of public documents” under California’s recording acts. (*Denman, supra*, 218 Cal.App. 4th at 810.) This is a burden that should be borne by the public as a whole, not by innocent purchasers/lienholders whose property rights are destroyed by the State. Because “[t]he purpose of the [California] recording acts is to afford protection not to those who make fraudulent misrepresentations but to ***bona fide purchasers for value***,” section 115 does not serve its intended purpose. (*Seeger v. Odell*, 18 Cal.2d 409, 415 (1941) (*Seeger*), emphasis added.) Instead, section 115 destroys the property rights of the very class of persons it was intended to protect.

**B. Penal Code section 115 and the California opinion, which deprive purchasers and lienholders of a meaningful hearing in violation of due process, conflict with U.S. Supreme Court precedent and the laws of other states.**

“[P]rior to an action that will affect an interest in life, liberty, or property protected by the Due Process Clause, a State must provide ‘notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to

present their objections.” (*Mennonite, supra*, 462 U.S. at 795, quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).)

“Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for **hearing appropriate to the nature of the case.**’ ... A fundamental requirement of due process is ‘the opportunity to be heard.’ [Citation.] It is an opportunity which must be granted at a meaningful time and in a **meaningful manner.**” (*Armstrong v. Manzo*, 380 U.S. 545, 550, 552 (1965), emphasis added; *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).)

This Court has long recognized the distinction between void (forged) versus voidable (false) documents, and the bona fide purchaser/encumbrancer defense. Indeed, this Court held in *California & O., supra*, 148 U.S. at 40 that the doctrine of bona fide purchaser/encumbrancer is favored in law and equity. “Strong as a plaintiff’s equity may be, it can in no case be stronger than that of a purchaser who has put himself in peril by purchasing a title, and paying a valuable consideration, without notice of any defect in it, or adverse claim to it.”<sup>3</sup> (*Id.*; see also *U.S. v. Huckabee*, 83 U.S. 414, 422 (1872).) [“But if duress in fact existed this would not make the conveyance void,

---

<sup>3</sup> “The essential elements which constitute a bona fide purchase are ... : a valuable consideration, the absence of notice, and presence of good faith.” (*California & O.* at 42.)

but voidable only, and a bona fide purchaser for valuable consideration, without notice, would hold the estate against the original grantor.”]; *Luhrs v. Hancock*, 181 U.S. 567, 574 (1901) [“The deed of an insane person is not absolutely void; it is only voidable; that is, it may be confirmed or set aside.”].)

*California & O.* involved a Congressional Act that granted tracts of land to the State of Oregon for the construction of a military road, and authorized the sale of the tracts as long as the road was built. The State of Oregon conveyed the tracts to the Oregon Central Military Road Company for construction of the road. The Oregon Central Military Road Company did not construct the road, and sold the tracts to certain individuals, who in turn sold the tracts to the California & Oregon Land Company.

The United States sued the California & Oregon Land Company to recover the tracts on the ground that the Oregon Central Military Road Company misrepresented that the road had been completed, and it obtained title to the tracts by fraud. The California & Oregon Land Company defended itself on the ground that it was a bona fide purchaser, and presented evidence that it paid valuable consideration for the tracts, paid the taxes on the tracts, and had no knowledge of the fraud. This Court found in favor of the California & Oregon Land Company even though the allegations of fraud were uncontested, finding that “[t]he testimony shows that the *purchasers knew of nothing wrong* in respect to the title, or the proceedings of the road company, or any officials connected with the

transfer of title.” (*California & O.*, *supra*, 148 U.S. at 44, italics added.)

Section 115 and the California opinion deprive lienholders like Mr. Deo of a meaningful hearing, ignore the bona fide purchaser/encumbrancer defense, and stand for the proposition a purchaser or lienholder must prove there was no criminal conduct in the first instance to protect his or her property interest. (App. 15-16 [California opinion].) This conflicts with this Court’s decision in *California & O.*, and the laws of other states in our nation, which uniformly recognize a bona fide purchaser/encumbrancer defense to allegedly fraudulent documents, and do not require the purchaser or lienholder to disprove fraudulent conduct to protect their property rights. For example, Nevada Revised Statute section 104.2403(1) provides in pertinent part: “A purchaser of goods acquires all title which his transferor had or had power to transfer ... A person with voidable title has power to transfer a good title to a good faith purchaser for value.” (*Alamo Rent-A-Car, Inc. v. Mendenhall*, 113 Nev. 445, 450 (1997).)<sup>4</sup>

---

<sup>4</sup> Other states which recognize the bona fide purchaser/encumbrancer defense include: **Alabama** (*Shook v. Sou. B. & L. Ass’n*, 140 Ala. 575 (1904)); **Alaska** (*Rosenberg v. Smidt*, 727 P.2d 778, 784 (Alaska 1986)); **Arkansas** (*Pingleton v. Shepherd*, 219 Ark. 473, 475 (1951)); **Colorado** (*Martinez v. Affordable Housing Network, Inc.*, 123 P.3d 1201, 1205 (Colo. 2005)); **Connecticut** (*Virginia Corp. v. Galanis*, 223 Conn. 436, 444 (1992)); **Delaware** (*Flemming v. Thompson*, 343 A.2d 599, 600 (Del. 1975)); **Florida** (*Anders v. Anders*, 143 Fla. 721 (1940)); **Georgia** (*Darling Int’l, Inc. v. Carter*, 294 Ga. 455, 459 (2014)); **Hawaii** (*Christian, by Holt, v. Waialua Agr. Co.*, 33 Haw. 34, 54–55 (1934)); **Idaho** (*Swinehart v. Turner*, 44 Idaho 461 (1927)); **Illinois** (*Petta v. Host*, 1 Ill. 2d 293, 305 (1953)); **Iowa** (*Wright v.*

In order to protect his or her property rights under section 115, the California opinion burdens an innocent purchaser or lienholder with defending a criminal defendant charged with recording a false or forged instrument, and to prove that there was ***no criminal conduct***. That untenable burden violates due process.

---

*Howell*, 35 Iowa 288, 291–92 (1872); **Kansas** (*Bicknell v. Jones*, 203 Kan. 196, 204 (1969)); **Louisiana** (*Gonsoulin v. Sparrow*, 150 La. 103, 106-107 (1921); **Maine** (*Hovey v. Hobson*, 53 Me. 451, 458 (1866)); **Maryland** (*Fishman v. Murphy ex rel. Estate of Urban*, 433 Md. 534, 547–48 (2013)); **Massachusetts** (*Bevilacqua v. Rodriguez*, 460 Mass. 762, 778 (2011)); **Michigan** (*Brown v. Khoury*, 346 Mich. 97, 99 (Mich. 1956)); **Minnesota** (*First Fiduciary Corp. v. Blanco*, 276 N.W.2d 30, 33 (Minn. 1979)); **Mississippi** (*Mullins v. Merchandise Sales Co.*, 192 So.2d 700, 704 (Miss. 1966)); **Missouri** (*Petring v. Kuhs*, 350 Mo. 1197, 1205 (1943)); **Montana** (*MCA 70-20-404*; *Scott D. Erler, D.D.S. Profit Sharing Plan v. Creative Fin. & Investments, L.L.C.*, 349 Mont. 207, 214 (2009)); **Nebraska** (*Snyder v. Lincoln*, 150 Neb. 580, 581 (1948)); **New Hampshire** (*Very v. Russell*, 65 N.H. 646 (1874)); **New Mexico** (*Rael v. Cisneros*, 82 N.M. 705, 707–08 (1971)); **New York** (*Faison v. Lewis*, 25 N.Y.3d 220, 224-225 (2015)); **North Carolina** (*Swindell v. Overton*, 310 N.C. 707, 714 (1984)); **North Dakota** (*Dixon v. Kaufman*, 79 N.D. 633, 649 (1953)); **Oklahoma** (*Allison v. Crummey*, 64 Okla. 20 (1916)); **Oregon** (*Allen v. Ayer*, 26 Or. 589, 594–595 (1895)); **Pennsylvania** (*Puharic v. Novy*, 317 Pa. 199, 201 (1934)); **Rhode Island** (*Shappy v. Downcity Capital Partners, Ltd.*, 973 A.2d 40, 44 (R.I. 2009)); **Tennessee** (*Williams v. Spinks*, 7 Tenn. App. 488, 493 (1928)); **Texas** (*Nobles v. Marcus*, 533 S.W.2d 923, 926 (Tex. 1976)); **Utah** (*Ockey v. Lehmer*, 189 P.3d 51 (Utah 2008)); **Vermont** (*Smith v. S. Royalton Bank*, 32 Vt. 341, 353 (1859)); **Virginia** (*Martin v. S. Salem Land Co.*, 94 Va. 28, 48-49 (1897)); **Washington** (*Albice v. Premier Mortg. Services of Washington, Inc.*, 174 Wash.2d 560 (2012)); **West Virginia** (*Jones v. Comer*, 123 W. Va. 129 (1941)); and **Wyoming** (*First Interstate Bank of Sheridan v. First Wyoming Bank, N.A. Sheridan*, 762 P.2d 379, 382 (Wyo. 1988)).

How can an *innocent* buyer or encumbrancer be expected to *prove* his or her interest was *not* procured by fraud? Must he or she defend the criminally accused? Moreover, the very notion guts the purpose and foundation of the bona fide purchaser/encumbrancer defense, which *recognizes* the existence of fraudulent or otherwise unauthorized conduct in connection with the transaction in the first instance. (*California & O.* at 44.) The purpose of the principle is to *defend against* otherwise fraudulent real property interests.

**C. Penal Code section 115 violates due process because it is arbitrary and lacks a reasonable relation to a proper legislative purpose.**

The Due Process Clause imposes limitations on legislation. “[A] statute would deny due process which precluded the disproof in judicial proceedings of all facts which would show or tend to show that a statute depriving the suitor of life, liberty, or property had a rational basis.” (*U.S. v. Carolene Products Co.*, 304 U.S. 144, 152 (1938); *Nebbia v. New York*, 291 U.S. 502 (1934) (*Nebbia*)). The Due Process Clause prevents the government from enacting legislation that is “arbitrary” or “discriminatory” or lacks “a reasonable relation to a proper legislative purpose.” (*Nebbia*, *supra*, 291 U.S. at 537.)

Section 115 is arbitrary because it empowers the criminal court to *ignore* a pending civil lawsuit where a purchaser or lienholder asserts bona fide purchaser/encumbrancer status, and where the innocent parties’ private contract and real property rights will be decided. Section 115(f)(9)(B) provides that



if any party files a civil quiet title action to determine the validity of the false or forged instrument and/or to determine that party's bona fide purchaser/encumbrancer status before the hearing on the States' motion to void the false or forged instrument, the criminal court "may consider that as an additional *but not dispositive factor* in making its determination" whether to void the false or forged instrument. (App. 41 [Penal Code § 115], emphasis added.)

Although section 115(f) provides for notice and a hearing in connection with the motion to void a recorded instrument, that procedure does not comport with due process requirements because the criminal court's unfettered discretion to ignore a party's bona fide purchaser/encumbrancer status renders the hearing ***meaningless***. "The right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion." (*Roller v. Holly*, 176 U.S. 398, 409 (1900).)

Section 115 allows the State unfettered discretion to anoint a person a "victim" of criminal conduct, and enrich that person by giving him or her property that rightfully belongs to a bona fide purchaser or clearing his or her property of a lien that rightfully belongs to a bona fide encumbrancer.

A statute or regulation also violates due process if it is an "exercise of power without any reasonable justification in the service of a legitimate governmental objective." (*County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998).) The purported purpose of section 115 is to "preserve the integrity of public documents" under

California's recording statutes. (*Denman, supra*, 218 Cal.App. 4th at 810.)

However, the purpose of the recordings acts is to *protect* bona fide purchasers/encumbrancers. (*Seeger, supra*, 18 Cal.2d at 415, emphasis added.)

It is Constitutionally impermissible for section 115 to ignore the very class of persons (bona fide purchasers/encumbrancers) that the recording statutes are intended to *protect*.

**D. Certiorari should be granted to resolve the Constitutionality of criminal statutes which void property interests.**

Grant of certiorari is also warranted because the Constitutionality of criminal statutes which void titles and liens is an important federal question that California has decided contrary to this Court and other states. (Supreme Court Rule of Court 10(c).)

California is not the only state to enact a criminal statute which deprives bona fide purchasers and lienholders of due process. In 2013, Florida enacted a similar statute, Florida Statute section 817.535, which mandates that Florida criminal courts void instruments with a "materially false, fictitious, or fraudulent statement or representation" affecting an owner's interest in property when there is a conviction under that statute:

(7) If a person is convicted of violating this section, the sentencing court ***shall*** issue an **order declaring the instrument forming the basis of the conviction null and void** and

may enjoin the person from filing any instrument in an official record absent prior review and approval for filing by a circuit or county court judge. ...

(Emphasis added.)

Section 817.535 does not provide for a bona fide purchaser/encumbrancer defense, and does not even require a hearing before the criminal court voids the false or fraudulent instrument. Indeed, section 817.535 uses the mandatory word “shall” to *require* the criminal court to void the questioned instrument. Mr. Deo is not aware of any cases which have analyzed the Constitutionality of section 817.535.

There is a pressing need for this Court to decide the Constitutionality of section 115 and the California opinion to give guidance to the states regarding the limits of statutes which deprive parties of their Constitutionally protected property rights.

### CONCLUSION

For the forgoing reasons, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

Ryan C. Squire

*Counsel of Record*

Zi C. Lin

Robert Garrett

Jennifer R. Slater

GARRETT & TULLY, P.C.

225 S. Lake Ave., Suite 1400

Pasadena, CA 91101

(626) 577-9500

rsquire@garrett-tully.com

*Counsel for Petitioner*

November 25, 2019