No. 21-_____

IN THE

Supreme Court of the United States

BRAD HEIDELBERG D/B/A RIO SECO RESOURCES, SPENCER LEIGH, GARY DUANE SANDERS, DONNA SANDERS SANMAN, PERSHING BENNETT MOORE, JR., SANDRA GAYLE WARD, BETH J. BARTON, READ B. JOHNSTON, AND JAMES STANFIELD LUCKIE,

Petitioners,

v.

D.O.H. OIL COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the Eleventh District Court of Appeals of Texas

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Since *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), this Court has repeatedly held that—for known or reasonably ascertainable persons—due process requires more than notice by publication or posting. This Court has repeatedly applied those bedrock due-process requirements to displace the effect of state statutes that restrict the time for known and reasonably ascertainable persons to challenge a judgment where they were not given constitutionally sufficient notice. *E.g.*, *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 491 (1988). Lack of sufficient due process makes the underlying judgment void.

Petitioners were known or reasonably ascertainable from County property records. But their nonparticipating royalty interests were sold at foreclosure for allegedly unpaid taxes, where the County provided notice by mere posting, incorrectly referencing Petitioners as purported "unknown owners" of those mineral interests.

The Appellate Court's opinion assumes that "service of process by posting was ineffective 'to apprise [Petitioners] of the pendency of the action and afford them an opportunity to present their objections,'" such that Petitioners were "deprived of their property without due process," quoting *Mullane.* (App., *infra*, 7a.) Yet the Appellate Court went on to affirm the trial court's summary-judgment grant against Petitioners based on a two-year state-limitations statute.

May a state-limitations statute preclude challenge to a judgment obtained by notice that is constitutionally insufficient to meet the requirements of due process as established in *Mullane* and its progeny?

PARTIES TO THE PROCEEDINGS

Petitioners in this Court were interpleader defendants in the state district court, appellants in the state appellate court, and petitioners in the state supreme court.

Respondent D.O.H. Oil Company was an interpleader defendant in the state district court, appellees in the state appellate court, and respondents in the state supreme court.

Though they are not petitioners here, for clarity, Softvest LLP, AOG Mineral Partners Ltd., Jim Allan Sanders Revocable Living Trust, Jeffery A. McWhorter, Judith A. Cole, Mara Beth Stevenson, Vicki L. Sires, Gail J. Gunn, Wade Philip Koehl, and Kimberly Wendt-Gonsalves were other defendants in the state district court and were also appellants in the state appellate court.

RELATED CASES

There are no proceedings that are directly related to this case.

CORPORATE DISCLOSURE STATEMENT

There are no corporate disclosures necessary for Petitioners, who are all individuals who were sued in their individual capacities. Petitioner Brad Heidelberg has an unincorporated name he does business as, Rio Seco Resources, but it is not a distinct legal entity.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the Court of Appeals of Texas, Eleventh District, in this case.

OPINIONS BELOW

The opinion of the Appellate Court of the State of Texas, Eleventh District (App., *infra*, 1a–13a) is unreported but the memorandum opinion may be located at 2020 WL 3025919.

The Appellate Court's denial of rehearing (App., *infra*, 31a) is unreported, and the Supreme Court of Texas's denial of Petitioners' petition for review (App., *infra*, 33a) is unreported.

STATEMENT OF JURISDICTION

The judgment of the Appellate Court was filed on June 4, 2020 (App., *infra*, 1a), and rehearing was denied on October 8, 2020 (App., *infra*, 31a). The Supreme Court of Texas denied discretionary review on October 15, 2021. (App., *infra*, 33a.) This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a). *See also Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 485 (1975).

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fourteenth Amendment, U.S. Const. amend. XIV, § 1, provides in relevant part:

> No State shall… deprive any person of life, liberty, or property, without due process of law.

PRELIMINARY STATEMENT

This case presents a core constitutional deformity—that Petitioners were not provided due process—which the Texas Appellate Court explicitly acknowledges but the requisite effect of which it ignores: that the underlying judgment was void.

The Appellate Court's opinion assumes that "service of process by posting was ineffective 'to apprise [Petitioners] of the pendency of the action and afford them an opportunity to present their objections,'" such that Petitioners were "deprived of their property without due process," quoting *Mullane.* (App., *infra*, 7a.) Yet the Appellate Court says it could not "end [its] discussion there." (*Id.* at 8a.)

The Appellate Court goes on to construe the Texas Supreme Court's opinion in *In re E.R.*, 385 S.W.3d 552 (Tex. 2012) to have "indicated" that "there must be some bounds upon the right to challenge ineffective service of process." (App., *infra*, 9a.) The Appellate Court said that it believed that "the Tax Code provides the bounds to which the court in *E.R.* referred." (*Id.*) In the Appellate Court's view, the then-unknowing Petitioners should have paid taxes to toll the statutory limitations.

Never mind the evidence that Petitioners still did not know that their mineral interests had been foreclosed upon because the operator—QEP Energy—was still paying Petitioners royalties on those interests while the statutory two-year-limitations period passed.

The Appellate Opinion disregards the clear directive of the longstanding constitutional imperative of due process that begins with *Mullane*. The Appellate Court made no attempt to explain how a state

limitations statute could provide "bounds upon the right to challenge ineffective service of process" to outmaneuver explicitly assumed constitutional infirmity.

The Appellate Court's judgment should be summarily reversed in light of this Court's unbroken chain of cases directing state courts that due process is required. There are no circumstances where the failure to provide constitutionally sufficient due process can be ignored.

At the very least, the judgment should be vacated and remanded for reconsideration in light of this Court's opinions in *Mullane*, *Tulsa Professional Collection Services*, and *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80 (1988).

Alternatively, the Court should grant plenary review.

STATEMENT

A. Factual Background

This case arises from the failure to give notice to Petitioners that Martin County, Texas sued to take their royalty interests at a foreclosure sale.

At the 20th century's turn, the grandfather of some Petitioners, H.A. Moore, applied for and obtained the original Texas patent to Section 3 in Martin County—denoted the H.A. Moore Survey. (CR799–805.) He reserved the mineral interests upon a later land sale, and the other Petitioners acquired ownership through Moore's heirs. (*Id.*)

1. There is no evidence Petitioners were ever taxed for the NPRI.

At some point the operator (QEP) reported producing-interests to the County. *See* TEX. NAT. RES. CODE § 91.503 (operator's responsibility). That is how the

County learns there is NPRI[1] that was now producing and was, thus, now taxable.

The County appraised the now-producing NPRI but incorrectly issued the tax statement to the predecessor operator, Rising Star Energy, not Petitioners. (CR835, 837.) In the underlying litigation, the County explained that sometimes tax bills get sent to operators if they own the interest, or if an operator is a potential contact for that interest, then "hopefully they will let us know who does own that interest." (CR946.)

The County alleged $3,517.58 in taxes owed to Martin County for 2009–2012 (CR835) and $7,652.77 to Grady ISD for 2010–2012 (i.e., excluding 2009). (CR836–37.) For determining these taxes, the NPRI's appraised value was $156,240. (CR835.)

The Record does not show that any of the Petitioners had ever been taxed on their Section 3 NPRI—and indeed they never were for the years alleged in the Foreclosure suit, nor for any prior years. (CR150; CR946 ("Q. When the identity of a royalty interest

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[1] "**NPRI**" refers to Petitioners' Section 3 nonparticipating royalty interests. Nonparticipating royalties are one of five rights and attributes of a property's "mineral estate," which refers to the landowner's right to exploit minerals under their land. *E.g.*, *French v. Chevron U.S.A., Inc.*, 896 S.W.2d 795, 797 (Tex. 1995). The owner of a present or future interest in the mineral estate may convey or reserve his mineral interest, and may also convey a fractional mineral interest. *Id.* A royalty interest is the right to receive a share of gross production of the minerals produced under a minerals lease, free of the costs of production, from the operator-lessee under the lease's terms. *Heritage Res., Inc. v. NationsBank*, 939 S.W.2d 118, 121–22 (Tex. 1996). A nonparticipating royalty interest is limited—it entitles the holder only to a right to a share of production, not to participate more fully in other benefits of production. *See, e.g., Plainsman Trading Co. v. Crews*, 898 S.W.2d 786, 789–90 (Tex. 1995).

[owner] is unknown, in your experience, where does the tax office send the tax statement? A. Well, of course, an unknown owner would not have an address, so it would not be sent.").

2. The County sues "unknown owners."

In 2011, to foreclose on the alleged tax delinquency, the County sued the .0325 interest owners in the Mabee B 37676 lease as "unknown."[2] (CR1071.)

Only a portion of Section 3's owners were apparently deficient in paying taxes—the predominate owners weren't sued under the identified lease from which the County was attempting to generically identify allegedly deficient royalty owners. (*See* CR1071 (only "unknown owners of a .03125 royalty interest" in the Mabee "B" 37676 lease were sued).) The County was using the fractional-lease-interest amount to indirectly and generally establish who the County was suing, by a total-interest amount none of Petitioners owned, even though the County was incorrectly identifying them as "unknown."

3. Petitioners were known or reasonably ascertainable by the County.

For years QEP had been paying Petitioners the royalties for the NPRI. (CR60, 716, 860–92.) Petitioners were also being taxed on *other* mineral interests they held in the County. (*E.g.*, CR156.) But, even after their Section 3 NPRI began producing and thus became taxable, Petitioners were never sent a tax bill

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[2] "**Foreclosure suit**" refers to Case Number 6469 in the 118th Judicial District Court for Martin County, Texas.

Separately, to be clear, no single Petitioner owned a .0325 interest, not even the Petitioners collectively owned that total, listed interest amount. Petitioners owned a mere percentage of that total fractional interest.

for their Section 3 NPRI.

Yet, Petitioners were known or reasonably ascertainable by the County per the County's own property records:

- Pershing Moore, Jr. (CR268–74, 327–36),
- Stan Luckie (CR337–87),
- Brad Heidelberg, d/b/a Rio Seco Resources (CR672, 275–78, 306–07),
- Spencer Leigh (CR672, 275–78, 306–07),
- Sandra Ward (CR279),
- Gary Sanders (CR279),
- Donna Sanman (CR279),
- Read Johnston (CR264–65, 260–61, 308–20), and
- Beth Barton (CR264–65, 260–61, 308–20).

The County delegates foreclosure's legal functions to a law firm, here involving an attorney. To permit citation by posting, he swore under oath that the Section-3-Interest-owners at issue could not be located "after diligent inquiry," and that he should be paid $200 for this work. (CR1103–05.)

That attorney has since refuted that he had personal knowledge to provide that testimony (CR904, 913, 922) and denies having any evidence of any effort to locate the property owners foreclosed upon. (CR911.) The County's Chief-Appraiser and Tax-Assessment-Collector says documents in her and Tax-Assessor's offices would have enabled Petitioners' identification and location for personal service. (CR941–43.)

Petitioner Johnston noticed that he was not receiving a tax statement on his Section 3 NPRI. So he took the initiative to visit the offices of Martin County to

ask why his statement had not included any Section 3 taxes. (CR954–55.) The County told Johnston that he did not owe anything for Section 3. (CR954.)

Unsatisfied, Johnston went across the street (a small number of steps in that small West Texas town, *see* CR933) to the Appraisal District Office to confirm the County's position—and the County's Chief Appraiser also so confirmed. (*Id.*)

Johnston yet still pressed further to discuss his interests—and spent two days investigating public records at the courthouse to return with proof of ownership to ensure that the County's records were accurate. (*Id.*) But yet again he was rebuffed. (*Id.*)[3]

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[3] A portion of the Record evidence (i.e, CR799-1116) was the subject of a motion to strike by DOH. In their appeal, Petitioners included as an issue that the trial court abused its discretion in granting that motion, but the Appellate Court did not reach the issue; therefore, the issue was preserved pursuant to Tex. R. App. P. 53.2(f), 53.4. Many of the implicated documents are public records, and some can be found elsewhere in the Record attached to earlier filings, which were not the subject of a motion to strike (e.g., found elsewhere in the Record: CR810, 819–57, 881–84, 954–73, 976–1065, 1069–93, 1096–1116). Also, the trial court entered conflicting rulings on this issue, as the trial court's final judgment overruled DOH's objections to Petitioners' motion for summary judgment, which were inclusive of DOH's objections grounding the motion to strike. (App., *infra*, 17a–18a.) Thus, DOH's prior strike-motion was, in the end, overruled when the trial court granted summary judgment for DOH. (App., *infra*, 17a–18a) Regardless, this Court may reverse the Appellate Court summarily on the sole question that this Petition presents without needing to address or rely on the stricken items because the Appellate Court has presumed that Petitioners were deprived of their property without due process. (App., *infra*, 7a.) If that presumption is legally invalid, the Opinion is fatally flawed and must be reversed and remanded for further consideration.

4. The County forecloses.

Later, on September 16, 2013, the trial court entered a judgment of foreclosure (CR843–46) and the Section 3 NPRI were sold. (CR852–55.)

The Sheriff's Deed purports to sell the royalty interest of "unknown owners of a .03125 royalty interest…" (App., *infra*, 25a.) There is no evidence that any of the Petitioners ever saw the Sheriff's deed (rather, the testimony is the opposite, CR860–92).

DOH purchased the NPRI appraised to be worth $156,240 for $460,000. (CR127.) That purchase price well covered the $11,170.35 in assessed taxes.

5. QEP keeps paying Petitioners the NPRI's royalty payments through the limitations period.

QEP took over as operator of wells at Section 3. (CR520.)

After the 2013 sale, DOH contacted QEP and demanded to begin receiving the royalties QEP was paying Petitioners. (CR534.) QEP refused.

QEP had an extensive title opinion prepared, which QEP procured from its title counsel. (CR601–91.) DOH did not object to this Record submission. Each Petitioner and their respective ownership amount is also listed therein. (CR605, 670–74.)

On March 10, 2015, within the statutory two-year redemption period, QEP notified DOH (but not Petitioners) that QEP had been advised to suspend the interest until DOH's dispute regarding having purchased the NPRI could be cured. (CR716.) QEP asked DOH for more information. (*Id.*)

The two-year redemption period (i.e., Petitioners' limitations) ran as of September 16, 2015. There is no evidence that the Petitioners, as of that date, were

aware of anything jeopardizing their interests; Petitioners' unrebutted testimony establishes the opposite. (*See* CR860–92.)

Petitioners had still been receiving royalty payments from QEP nearly three years after the foreclosure sale. (*E.g.*, CR60 (6.5.16 royalty payment to Barton); CR504.)

B. Proceedings below

1. Interpleader proceeding in the district court

QEP stopped royalty payments on Section 3 to Petitioners and, by October 2016, filed an interpleader suit in Texas state court, suing Petitioners, among others, and Respondent DOH Oil Company, alleging that defendants were making competing demands to the royalty payments owed from the same NPRI. (CR7.)

The instigation of QEP's suit was both when and how Petitioners learned that any legal process related to their NPRI was ongoing. (CR866–67 (Heidelberg), 870–71 (Leigh), 872–73 (Luckie), 878–79 (Sanders), 885–86 (Sanman), 876–77 (Moore), 891–92 (Ward), 860–61 (Barton), and 868–69 (Johnston).)

Petitioners answered and claimed the Foreclosure sale was void. (CR22–28, 48–54.) Petitioners, therefore, judicially challenged the sale contemporaneous with learning that their mineral rights had been foreclosed upon. (CR860–92.)

Petitioners explicitly raised in their motion for summary judgment that proper service was a prerequisite to personal jurisdiction. (CR72, 781.) Petitioners explained that a judgment entered in violation of due process was void. (CR72, 781.)

Petitioners asserted that they could collaterally attack the Foreclosure-suit judgment. (CR72, 781.) And they cited *Tulsa Professional Collection Services v. Pope* when explaining that such a judgment could be challenged at any time, despite any statutory limitations. (CR781.)

The County admits that what happened to Petitioners here was "not fair." (CR 940.) So did the trial court. (CR489.) Nevertheless, the trial court granted DOH's motion for summary judgment on the basis of DOH's motion, which as a sole issue asserted the state-limitations statute (CR555), Texas Tax Code section 33.54 (App., *infra*, 35a), as DOH's defense.

2. Petitioners' appeal and petition for review

Petitioners timely appealed. Petitioners raised their constitutional concerns as the opening issue for their appeal. That issue explicitly concerned the trial court's failure to appropriately apply *Mullane*, *Peralta*, and *Tulsa Professional Collection Services* to void the Foreclosure-suit's judgment for lack of personal jurisdiction as a result of the complete failure of due process. (*Id.*)

The Appellate Court of Texas, Eleventh District, affirmed. It acknowledged that the Fourteenth Amendment requires notice by more than posting for Petitioners—known or readily ascertainable persons to the County—and assumed that Petitioners were deprived of their property without due process. (App., *infra*, 7a.) Yet, the Appellate Court suggested there were heretofore unidentified "bounds" on due-process rights, like the state-limitations statute in the Texas Tax Code that Appellee DOH was primarily arguing. (App., *infra*, 10a.)

Petitioners moved for rehearing, examining and discussing the errors made in the Opinion, including that the Foreclosure-suit judgment was void for lack of due process. But Petitioners' rehearing motion was denied. (App., *infra*, 31a.)

Petitioners timely filed a Petition for Review to the Texas Supreme Court, urging the same federal constitutional issues that Petitioners had raised before both lower courts. That court denied review on October 15, 2021. (App., *infra*, 33a.)

This petition follows.

REASONS FOR GRANTING THE PETITION

A. The Appellate Court's Opinion treats receipt of due process as a mere option.

1. Due process has been required since 1612.

The rule that a judgment without jurisdiction is void traces back to the English Year Books and was made settled law in the year 1612. *See Burnham v. Super. Ct. of Cal.*, 495 U.S. 604, 608 (1990).

"Traditionally that proposition was embodied in the phrase *coram non judice*, 'before a person not a judge'—meaning, in effect, that the proceeding in question was not a *judicial* proceeding because lawful judicial authority was not present, and could therefore not yield a *judgment*." *Id.* at 608–09 (emphasis in original).

And, long before the Fourteenth Amendment was adopted, American courts invalidated or denied recognition to judgments that violated this common-law principle. *See id.* at 609 (citing *Grumon v. Raymond,* 1 Conn. 40 (1814); *Picquet v. Swan,* 19 F.Cas. 609 (No.

11,134) (CC Mass.1828); *Dunn v. Dunn,* 4 Paige 425 (N.Y.Ch. 1834); *Evans v. Instine,* 7 Ohio 273 (1835); *Steel v. Smith,* 7 Watts & Serg. 447 (Pa.1844); *Boswell's Lessee v. Otis,* 9 How. 336, 350, 13 L.Ed. 164 (1850)).

2. Without due process, a judgment is void.

The Fourteenth Amendment promises each American that "[n]o State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law…" U.S. CONST. amend. XIV, § 1.

A few years after the Fourteenth Amendment was adopted following the Civil War, this Court announced that the judgment of a court lacking personal jurisdiction violated the Due Process Clause of the Fourteenth Amendment as well. *Id.* (citing *Pennoyer v. Neff*, 95 U.S. 714, 732 (1878)). A judgment obtained without personal jurisdiction is "void," an "absolute nullity," "has no binding force without the State," and "is not entitled to any respect in the State where rendered." *Pennoyer*, 95 U.S. at 732.

A state court has no power to render a personal judgment against a defendant that is valid in the rendering state and entitled to full faith and credit elsewhere unless the defendant is "given adequate notice of the suit." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980). The Amendment's Due Process Clause limits a state court's power to exercise jurisdiction over a defendant. *Ford Motor Co. v. Montana Eighth Judicial District Court*, 141 S.Ct. 1017, 1024 (2021).

Personal jurisdiction consists of two distinct components. First, the exercise of jurisdiction must be consistent with the Due Process Clause of the United States Constitution; and, second, the exercise of jurisdiction must be consistent with the state's jurisdictional requirements. *See U.S. v. Bigford*, 365 F.3d 859, 865–66 (10th Cir. 2004).

a. To satisfy the Due Process Clause, strict compliance with service of process is required.

"Before a State may take property and sell it for unpaid taxes, the Due Process Clause of the Fourteenth Amendment requires the government to provide the owner notice and opportunity for hearing appropriate to the nature of the case." *Jones v. Flowers*, 547 U.S. 220, 223 (2006).

"If the record fails to affirmatively show strict compliance with the rules of civil procedure governing issuance, service, and return of citation, error is apparent on the face of the record, and attempted service of process is invalid and of no effect." *Id.* "When the attempted service of process is invalid, the trial court acquires no personal jurisdiction over the defendant, and the default judgment is void." *Id.*

For Fourteenth-Amendment Due-Process-Clause challenges, the **error** need not be limited to affirmatively appearing in the record of the underlying matter, as the rule of verity—otherwise referred to as the no-extrinsic-evidence rule—"ceases when it affirmatively appears from the record that the judgment adjudicated and determined matters upon which the parties were not heard." *Peralta*, 485 U.S. at 84–85 n.9.

b. This Court has reversed Texas courts for ignoring requisite due process before.

Previously, when Texas did not follow federal precedent on due-process issues, this Court reversed. *See, e.g.*, *Armstrong v. Manzo*, 380 U.S. 545, 550 (1965) ("An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.").

Thus, Texas has adjusted to at least suggest that the law regarding personal jurisdiction is as strict as it is federally: "Personal jurisdiction, a vital component of a valid judgment, is dependent 'upon citations issued and served in a manner provided for by law.'" *In re E.R.*, 385 S.W.3d at 563. "A complete failure of service deprives a litigant of due process and trial court of personal jurisdiction; the resulting judgment is void…" *Id.* at 566.

But if so, in this case, the Appellate Court should have reversed on the basis of Texas law if it were federally consistent: "There is no presumption in favor of proper issuance, service, and return of citation." *Mandel v. Lewisville ISD*, 445 S.W.3d 469, 474 (Tex. 2014). "The purpose of citation is to give the court jurisdiction over the parties and provide notice to the defendant that it has been sued by a particular party asserting a particular claim, so that due process will be served and the defendant will have an opportunity to appear and defend the action." *Id.* at 482.

Record owners are jurisdictionally protected by the Texas Rules. Rule 117a governs the service of process in all suits for the collection of delinquent *ad valorem* taxes. Tex. R. Civ. P. 117a (App., *infra*, 37a); *see also*

Tex. R. Civ. P. 2 ("Rule 117a shall control with respect to citation in tax suits."), *and* Tex. R. Civ. P. 110 (same). Rule 117a prohibits service upon owners like Petitioners by posting.[4]

Moreover, status as a "party" inures only **after** service of process is properly effectuated. *See Google Inc. v. Expunction Order*, 441 S.W.3d 644, 647 (Tex. App.—Houston [1st Dist.] 2014, no pet.) (holding that the trial court was without jurisdiction because company was not served with process in accordance with Texas law and was therefore not a party to the suit); *see also Wilson v. Dunn*, 800 S.W.2d 833, 836 (Tex. 1990) (critical to the existence of personal jurisdiction is "citation issued and served in a manner provided for by law."); *Uvalde Country Club v. Martin Linen Supply Co.*, 690 S.W.2d 884, 885 (Tex. 1985) (per curiam) (holding that service of process which fails to comply with the law is invalid—i.e., "of no effect"—and does not establish a trial court's jurisdiction over a party).

Because the Fourteenth Amendment requires due process for a judgment's validity, without it, the judgment in the Foreclosure suit is void.

The Appellate Court's judgment should be summarily reversed.

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[4] Although Rule 117a authorizes citation by posting under limited circumstances, the Rule expressly prohibits service by posting upon "record owners of [the] property or of any apparent interest therein," and such record-owners "shall not be included in the designation of 'unknown owners.'" (App., *infra*, 38a–39a.) Thus, the Rule places on the County the duty of proper notice and its requisite diligent search of the known or unknown nature of relevant owners.

B. The Appellate Court presumes Petitioners were not provided sufficient due process—but holds that is not dispositive.

The Appellate Court expressly assumed that Petitioners "were deprived of their property without due process." (App., *infra*, 7a.)

Petitioners allege a complete lack of service. The Record affirmatively reveals that Petitioners were not served with process. Petitioners received no notice, did not appear, nor did they have any chance to object or defend themselves. (*See* App., *infra*, 7a.)

A summary reversal is established by this combination alone: (a) the Appellate Court's presumption in the Opinion that Petitioners were not provided due process, paired with (b) this Court's unbroken chain of caselaw requiring sufficient due process for a judgment's validity.

Because of *that*, this Court may stop reading here and decidedly reverse.

That is, unless this Court is also interested in this case's usefulness as a vehicle to prohibit (a) the no-extrinsic-evidence rule under the Fourteenth Amendment, (b) state limitations precluding challenges to judgments that are void for violating the Fourteenth Amendment, or (c) a state from saddling its citizens with the responsibility to affirmatively ensure their own constitutional rights.

Nevertheless, Petitioners continue their briefing in an abundance of caution to cover items raised in prior briefing between the parties, to assure this Court that there is no separate reason that the Appellate Court's opinion might be otherwise valid. It is not.

C. This Court has already reversed a Texas attempt to use a procedural obstacle to negate challenge to judgments void for lack of due process.

DOH has argued that Petitioners cannot collaterally attack the Judgment.

Previously, some confusion concerning collaterally attacking judgments arose in Texas, which the Texas Supreme Court traced to its decision in *McEwen v. Harrison*, 345 S.W.2d 706 (Tex. 1961). *See PNS Stores, Inc. v. Rivera*, 379 S.W.3d 267, 272 (Tex. 2012). "To the extent that *McEwen* may be read to foreclose a collateral attack on a judgment based on the failure to serve a party with notice, it has been overruled by *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80 [] (1988)…" *PNS Stores*, 379 S.W.3d at 272.

Thus, this Court should expect Texas courts to abide by *Peralta*'s reality, as the Texas Supreme Court has explained: "In *Peralta*, the United States Supreme Court held that a 'judgment entered without notice or service is constitutionally infirm,' and some form of attack must be available when defects in personal jurisdiction violate due process." *Rivera*, 379 S.W.3d at 272–73. The Court stated that "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under the circumstances, to ap-

prise interested parties of the pendency of the action." *Peralta*, 485 U.S. at 84. Thus, the "[f]ailure to give notice violates 'the most rudimentary demands of due process of law.'" *Id.* (quoting *Armstrong v. Manzo,* 380 U.S. 545, 550, 85 S. Ct. 1187, 14 L.Ed.2d 62 (1965)). In light of *Peralta,* therefore, the Texas Supreme Court held that a judgment may also be challenged through a collateral attack when a failure to establish personal jurisdiction violates due process. *Rivera*, 379 S.W.3d at 273.

The presumption supporting judgments "does not apply when the record affirmatively reveals a jurisdictional defect." *Id.* The "rule of verity ceases when it affirmatively appears from the record that the judgment adjudicated and determined matters upon which the parties were not heard." *Peralta*, 485 U.S. at 84–85 n.9; *Rivera*, 379 S.W.3d at 273–75.[5]

Here, Petitioners allege a complete lack of service and the Record affirmatively shows it.

Peralta therefore demands that, due to the complete failure of notice to Petitioners, they must be permitted as a matter of constitutional law to collaterally attack the judgment as void.

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[5] *See also Security State Bank & Trust v. Bexar Cty.*, 397 S.W.3d 715, 723 (Tex. App.—San Antonio 2012, pet. denied). "[A] judgment is void if the defects in service are so substantial that the defendant was not afforded due process." *Rivera*, 379 S.W.3d at 275. Accordingly, federal constitutional law demands that Texas law make available a collateral attack on a judgment that is void for an interested party who was not named as a party, based on a complete lack of notice. *Security State Bank*, 397 S.W.3d at 722–23. "As opposed to a mere defect in service, a complete failure or lack of service on a party with a property interest adversely affected by the judgment constitutes a due process violation that warrants setting the judgment aside." *Id.*

D. Due-process rights prevail over any state procedural obstacles to challenging a void judgment.

Generally, state procedural law—including statutes of limitation, procedural requirements, and the rule of verity (i.e., the no-extrinsic-evidence rule)—cannot shield a judgment that is constitutionally infirm. *See Peralta*, 485 U.S. at 84. This Court in *Peralta*, a case arising out of Texas courts, addressed the interplay between state and federal due-process guarantees. *Id.*

Peralta had filed a bill of review for a default judgment against him as a guarantor. *Id.* at 81–82. The creditor won summary judgment on the ground that, under Texas law, Peralta needed to show a "meritorious defense," which summary judgment the appellate court affirmed. *Id.* at 82.

After the Texas Supreme Court denied review, Peralta appealed to this Court, which reversed unanimously. *Peralta*, 485 U.S. at 86–87. Texas courts' prioritization of the state law's "meritorious defense" requirement over fundamental federal due-process rights was held to be "plainly infirm." *Id.*

"While the legislature may elect not to confer a property interest, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards." *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 541 (1985). The mere fact that the state has procedures for deprivations of property does not displace constitutional protections. *See Vitek v. Jones*, 445 U.S. 480, 491 (1980) (fact that the State provides its own procedures doesn't diminish constitutional minimum procedural protections).

1. A state law time-limit cannot bar a collateral attack on an invalid judgment.

Whether limitations can bar an attack upon a judgment necessarily must be a secondary consideration—the first: determining whether the judgment attacked had jurisdiction, without which limitations to challenge that judgment cannot even begin to operate.

Regardless, a "State law time-limit to challenge a judgment is unenforceable when it violates due process." *See In re E.R.*, 385 S.W.3d at 561.

In *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478 (1988), this Court reversed the Oklahoma Supreme Court because a due-process violation undermined the judgment—even though the challenge was filed beyond the state's statutory two-month deadline. Oklahoma's probate laws require creditors to present contract claims to an estate's executor within two-months of notice by publication that probate is commencing. *Id.* at 481. A creditor whose claim was barred as untimely challenged that judgment, arguing that service by publication was not constitutionally sufficient. *Id.* The mere fact that the legal proceedings triggered the time-bar did not remove any due-process problem. *Id.* This Court reversed; service by publication or posting was insufficient. *Id.*

Merely because a state statute sets forth a time-limit for attack cannot provide a basis to negate due-process attacks upon judgments lacking jurisdiction.

Due process is a fundamental right. The Appellate Court's judgment should be summarily reversed.

2. Texas's no-extrinsic-evidence rule is unconstitutional.

a. Texas's no-extrinsic-evidence rule.

The no-extrinsic-evidence rule prevents courts

from considering extrinsic evidence that contradicts mere recitals in a judgment. For example, if a default judgment recites that the defendant received proper notice, the no-extrinsic-evidence rule would prevent the defendant from later proving that he did not receive notice—no matter how persuasive his evidence.

The Texas Supreme Court first articulated the no-extrinsic-evidence rule in 1895. *Crawford v. McDonald*, 33 S.W. 325, 328 (Tex. 1895). Under the no-extrinsic-evidence rule, a collateral attack on a void judgment can be successful only if the service error is apparent on the face of the underlying record (i.e., the opposing lawyer got the mere recitation of service of process wrong or omitted it).

Only one month after *Crawford*, the same court explained that there are several exceptions to this rule. *Templeton v. Ferguson*, 33 S.W. 329, 332 (Tex. 1895). "[T]here are classes of cases over which a court has not, under the very law of its creation any possible power." *Id.* The court gave examples, that the rule does not apply to (a) administrating the estate of a living person, (b) administrating the estate of a deceased soldier when prohibited by statute, (c) an administration in bankruptcy of a person who dies before the proceedings were instituted, (d) a suit for divorce in a foreign country in which neither of the parties is domiciled, and (e) a suit to recover against a nonresident served by publication for a purely personal judgment. *Id.*

That wasn't all. The same Texas court found another exception about thirty years later, permitting the use of extrinsic evidence in a challenge to a probate-court order authorizing the sale of a homestead to pay the decedent's creditors. *Cline v. Niblo*, 8 S.W.2d 633, 635–36 (Tex. 1928) (holding that the order

could be attacked as void even though "its void character may not appear on the face of the record.")

Thus, Texas's no-extrinsic-evidence rule has been subject to a growing list of exceptions.

b. In contrast, the majority rule for use of extrinsic evidence in a collateral attack in the United States is the "modern rule."

The majority (and "modern") rule across the United States is that judgments may be attacked collaterally with extrinsic evidence. *See Bigford*, 365 F.3d at 867 n.4 (citing RESTATEMENT (SECOND) OF JUDGMENTS § 77).

"The modern rule begins with the premise that the opportunity to be heard is an interest generally paramount to that of insuring the finality of judgments." RESTATEMENT (SECOND) OF JUDGMENTS § 77(b). The rationale of this rule is most consistent with the Fourteenth Amendment.

While permitting such a collateral attack with extrinsic evidence "opens the possibility of fraudulent avoidance of judgments," were the rule the opposite—i.e., to foreclose such an attack—*that* rule must assume that the claimant will likely lie in a way that cannot be adequately rebuffed because the memory of possible witnesses has faded by the time the claim is litigated. *See id.*

The modern rule thus holds that the only practical accommodation to this presented problem is including an evidentiary rule that the proof contradicting the Record must be clear and convincing. *Id.*

This modern rule should be a uniform federal rule as required by the Fourteenth Amendment.

County deed records, like those the Petitioners presented, meet that proof standard.

3. No state law—whether limitations or the no-extrinsic-evidence rule—empowers any U.S. court to render judgment violating the Constitution.

In *York v. State*, 373 S.W.3d 32, 41–42 (Tex. 2012), the Texas court reasoned that, as a matter of fundamental, constitutional law, the trial court had no power to render judgment in violation of the U.S. Constitution, which includes the Due Process Clause. 373 S.W.3d at 42; U.S. CONST. amend. XIV, § 1.

Neither the no-extrinsic-evidence rule nor statutory limitations may supersede Petitioners' Fourteenth-Amendment right to due process.

a. A Texas appellate court has already recognized that, if due-process has been violated, the no-extrinsic-evidence rule cannot apply.

Albeit dicta, one Texas Court of Appeal has previously noted that the no-extrinsic-evidence rule "could not apply if a defendant did not receive *any* notice of the suit or judgment (i.e., if the service violated the due process clause of the Fourteenth Amendment as in *Peralta*)." *Dispensa v. Univ. State Bank*, 987 S.W.2d 923, 930 n.6 (Tex. App.—Houston [14th Dist.] 1999, pet. denied).

The Fourteenth Court of Appeal began its explanation for this conclusion by discussing *Peralta*. Peralta received no actual or constructive notice of the suit or judgment against him. He found out about the judgment against him two years after it had been entered, leaving him with only one option—a bill-of-review proceeding that required him to show that he had a meritorious defense, which he did not have. *See Dispensa*, 987 S.W.2d at 927 (discussing *Peralta*).

Peralta "argued that if he had received timely notice of the suit he could have taken several steps to avoid the full brunt of the suit, such as impleading the employee whose debt he guaranteed, working out a settlement, paying the debt, or selling the property himself to get more money than could be obtained at a constable's sale." *Id.* This Court agreed that Peralta's due process rights were violated because the default judgment was entered without notice. Thus, the procedural requirement to show a meritorious defense was an unconstitutional obstacle to ensuring his right to due process.

Accordingly, Texas's meritorious-defense requirement would no longer be required where, as in *Peralta*, no notice had been provided as required by the Due Process Clause. *Dispensa*, 987 S.W.2d at 928.

The Appellate Court here has the state-supreme-court directives to make the right decision and, with this judgment, chose not to obey them. Petitioners here were not "unknown" owners, so it is not genuinely disputed that they received no notice of the suit. And each of the Petitioners submitted affidavit testimony explaining that they did not have any idea that their mineral rights had been taken under color of state law, unconstitutionally, in a Sheriff's sale until QEP filed the underlying Interpleader petition on October 20, 2016. (CR8, 866–67 (Mr. Heidelberg), 870–71 (Mr. Leigh), 872–73 (Mr. Luckie), 878–79 (Mr. Sanders), 885–86 (Ms. Sanman), 876–77 (Mr. Moore), 891–92 (Ms. Ward), 860–61 (Ms. Barton), and 868–69 (Mr. Johnston).) (*See also*, App., *infra*, 7a.)

b. In re E.R. *did not establish extra-textual bounds to due process, and it is factually inapt to this case.*

In the Opinion, the Appellate Court states that the

"Texas Supreme Court indicated in *E.R.* that there must be some bounds upon the right to challenge ineffective service of process. There, the mother acquired actual notice of the termination order, but the record was silent as to when she obtained that notice or what actions she took in response." (App., *infra*, 9a.)

Contrary to the Appellate Court's recharacterization, the Texas Supreme Court did not in that case establish extra-textual bounds to constitutional due-process rights. Instead, that court remanded that prior service-of-process challenge because the petitioner apparently had actual notice of the underlying suit's parental-rights termination order. (App., *infra*, 9a.) The challenge by the mother in *In re E.R.* was pretextual. 385 S.W.3d at 566. From the facts, it appeared that she knew what was happening and others were acting in reliance upon her knowledgeable inaction. *Id.* at 570.

None of those facts are present in this case—as discussed above, the Record shows the opposite.

In re E.R. cannot be used as the Appellate Court is applying it—indeed it and *York* stand for the opposite proposition. *See* U.S. CONST. amend. XIV, § 1; *York*, 373 S.W.3d at 42. *See also Rivera*, 379 S.W.3d at 273–75; *Peralta*, 485 U.S. at 84–85 n.9.

The bottom line: No state law may inhibit someone's Fourteenth-Amendment right to due process, which eliminates the ability of statutes of limitation, procedural requirements, and the rule of verity (i.e., the no-extrinsic-evidence rule) from shielding a judgment that is constitutionally infirm.

The Appellate Court's judgment should be summarily reversed.

E. No state may saddle citizens with the state's duty to ensure citizens' own constitutional rights.

The Appellate Court says it "seems reasonable to expect property owners to know that taxes on their property are due each year and to know whether they personally paid those taxes." (App., *infra*, 10a.) "It seems equally as reasonable to expect that property owners would pay their property taxes in the year following a tax sale and each year thereafter, as provided by the Legislature." (*Id.*)

That attempted maneuver does not work to avoid Due-Process-Clause requirements either.

1. Well-established precedent negates state statutory attempts to shirk constitutional duties.

"[A] party's ability to take steps to safeguard its interests does not relieve the State of its constitutional obligation." *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 799 (1983).

Contrary to this proposition, the Appellate Court applies Texas Tax Code § 33.54 to require Petitioners to have acted to safeguard their own interests before and without ever receiving constitutionally required notice via adequate service-of-process.

But even waiver of due-process rights must be analyzed specific to the complainant's situation and cannot be instituted as a matter of statutory process. *See Mennonite*, 463 U.S. at 799. In *Davis Oil Co. v. Mills*, the Fifth Circuit Court of Appeals, applying *Mennonite*, held that noncompliance with a Louisiana request-notice statute could not constitute a waiver of due-process rights. 873 F.2d 774, 787–88 (5th Cir.

1989). Trying to use the statute to "establish a *presumption* that any person failing to request notice had waived" their due-process rights would be unconstitutional. *Id.* at n.21 (emphasis in original). "To shift in this fashion the burden of compliance with the Due Process Clause almost entirely to the shoulders of individual property owners would eviscerate the protections afforded by the Constitution." *Id.*

Therefore, the Appellate Court's reasoning—suggested as common sense—has already been declared an unconstitutional attempt to outmaneuver due-process requirements.

The Appellate Court's judgment should be summarily reversed.

2. The Appellate Court's holding significantly misapplies existing precedent concerning duties under the Texas Tax Code.

a. To have availed Petitioners of paying taxes, taxes would have had to have been owed—they were not.

For taxes on Petitioners' Section 3 NPRI to have been owed by Petitioners **at all**, the County would have had to have issued them a tax bill. *See* Tex. Tax Code § 31.04(a); *Aldine Indep. Sch. Dist. v. Ogg*, 122 S.W.3d 257, 270 (Tex. App.—Houston [1st Dist.] 2003, no pet.) ("Code section 31.04 specifically provides that the date taxes become delinquent is postponed until the first day of the next month after a tax bill is mailed…"). "[I]f no tax bill is ever mailed to the taxpayer, then the taxes never become delinquent, and, thus, penalties and interest never accrue." *Aldine ISD*, 122 S.W.3d at 270.

Having never been sent one (CR150), there were no

taxes for Petitioners to pay "during the year following the recordation of DOH's deed from the sheriff" or to "continue to pay … until [Petitioners] judicially challenged the sale." (App., *infra*, 10a.)

In fact, upon learning of this, Petitioners answered and claimed the sale was void. (*See* CR22–28, 48–54.) Record-evidence, therefore, confirms Petitioners' compliance with the Appellate Court's own ad-hoc standard: Petitioners judicially challenged the sale contemporaneous with learning that their mineral rights had been taken via foreclosure. (CR860–92.)

b. The Appellate Court's opinion obliges taxpayers, rather than taxing units, which directly conflicts with the Tax Code.

The Appellate Court concludes that it "seems reasonable to expect property owners to know that taxes on their property are due each year…" (App., *infra*, 10a.)[6] That conclusion directly contradicts the Tax Code.

First, the County never sent Petitioners a tax bill—entirely the County's burden under the Code. (*See supra,* § E.2.a.)

Second, no one can initiate paying taxes without notice of the amount owed, as the County determines that number each particular year via appraisal. *See* Tex. Tax Code §§ 1.04(2)(F), 23.01. Also, nothing may end up owed if the tax is below $15. *See* Tex. Tax Code § 31.01(f). Thus, mere knowledge that some taxes may

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[6] Nothing in the Record establishes that Petitioners were previously taxed on their Section 3 interests for *any* year or simply lapsed in payments—they were not and did not.

be owed doesn't enable anyone to pay a particular, sufficient amount.

Third, the Tax Code also explicitly places the burden on the taxing unit to send the tax bills out effectively, sometimes requiring waiver of penalties and interest. *See* Tex. Tax Code §§ 33.011, 31.04.

3. To shirk the County's constitutional duties, the Appellate Court uses constructive notice via the Sheriff's Deed.

While the Court's opinion never specifically uses the phrase "constructive notice," the opinion centrally invokes that concept, holding that Petitioners had an obligation to "pay taxes within one year after the date the sheriff's deed is recorded and thereafter until the tax sale is contested." (App., *infra*, 11a.)

But that cannot work.

In prior briefing, Petitioners have set forth Texas law concerning why they had no duty to search the property-records' registry for notice of a new filing concerning their NPRI, and that a sheriff's deed cannot evidence title or provide notice. But to save this Court's time, Petitioners omit that discussion from this Petition, as it can be addressed in later filings.

The bottom line remains that use of constructive notice for Petitioners—known or reasonably ascertainable persons—cannot meet the Fourteenth Amendment's requirements, especially here.

First, the Sheriff's Deed purports to sell the royalty interest of "unknown owners of a .03125 royalty interest…"—none of the Petitioners own a .03125 royalty interest in the 37676 Mabee "B" Lease. (App., *infra*, 25a.)

Second, the Sheriff's Deed fails to identify any of the Petitioners individually; rather than name the

record owners, it uses the title "unknown owners." *See Mennonite*, 462 U.S. at 795–96 ("The chance of actual notice is further reduced when as here the notice required does not even name those whose attention it is supposed to attract, and does not inform acquaintances who might call it to attention.").

Even if a Sheriff's deed could somehow provide sufficient constructive notice to meet the Due Process Clause for known or reasonably-ascertainable persons, there must be something in the deed to direct Petitioners' attention to their personal connection to the deed. *See Mennonite*, 462 U.S. at 798 ("But unless the mortgagee is not reasonably identifiable, constructive notice alone does not satisfy the mandate of *Mullane*."). Having never been sent a tax bill for their Section 3 interests, Petitioners had no basis to presume their mineral interests were personally jeopardized. *See Hue Nguyen v. Chapa*, 305 S.W.3d 316, 325–26 (Tex. App.—Houston [14th Dist.] 2009, pet. denied).

DOH asserts notice was given and thus bears the burden of proving it. *See Burns & Hamilton Co. v. Denver Inv. Co.*, 217 S.W. 719, 723 (Tex. Civ. App.—Fort Worth 1919, no writ). But DOH did not submit evidence concerning what the Petitioners knew when the Sheriff's Deed was filed—facts essential to hold the Sheriff's Deed put Petitioners on notice.

Event still, such "notice" is not that to which Petitioners were entitled—i.e., notice of a pending tax sale. *See Mennonite*, 463 U.S. at 800.

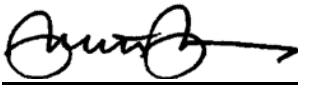
The Appellate Court's judgment should be summarily reversed.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court should summarily reverse the judgment below; at the least, the Court should vacate that judgment and remand for further proceedings in light of *Mullane*, *Tulsa Professional Collection Services*, and *Peralta*. Alternatively, in recognition of the grave constitutional issues presented, the Court may choose to set the case for plenary review. Petitioners finally request general relief.

Respectfully submitted,

Matthew M. Mitzner

By: 

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