No. _____

In the
Supreme Court of the United States

MATTHEW LIEBOVICH, ESTHER LIEBOVICH, AND ANDREW LIEBOVICH,
Petitioners,
v.

DIANE JANICE TOBIN, LORI ROBIN, AND MARC CHOPP, AS TRUSTEES,
Respondents.

On Petition for Writ of Certiorari to the California Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Notice is an "elementary and fundamental requirement of due process," so where a court enters a judgment absent notice, the Due Process Clause demands "'wip[ing] the slate clean . . . [and] restor[ing] the petitioner to the position he would have occupied had due process of law been accorded to him in the first place." *Peralta v. Heights Med. Ctr., Inc.*, 485 U.S. 80, 84, 87 (1988) (internal citation omitted).

Citing California Code of Civil Procedure section 473, subdivision (d) ("The court *may*. . . set aside any void judgment or order"), a state appellate court held trial courts have *discretion* to deny motions to vacate a void judgment – even one entered without notice. The Court of Appeal held *Peralta* did not apply because it did not "purport[] to address whether the existence of a meritorious defense may be considered when a trial court is exercising its discretion under section *473, subdivision (d).*" (Emphasis in original.)

Does *Peralta* compel courts to vacate void judgments entered absent notice, or does the lack of express reference in this Court's opinion to California Code of Civil Procedure section 473, subdivision (d) permit California courts to deny such motions to vacate? More generally, does U.S. Supreme Court precedent constrain the application of a state statute only when the decision specifically cites the statute?

PARTIES

Petitioners, who were appellants in the California litigation, are Matthew, Esther, and Andrew Liebovich. Respondents, who were respondents in the California litigation, are Diane Janice Tobin, Lori Robin, and Marc Chopp, as Trustees.

CORPORATE DISCLOSURE STATEMENT

The Liebovich siblings are individuals. None of the parties has a parent corporation or publicly held stock owner.

RELATED PROCEEDINGS

Liebovich v. Tobin (BP138119) (Los Angeles Superior Court) [denying motion to vacate] (May 2, 2018).

Liebovich v. Tobin (B292177) (California Court of Appeal) [reversing and remanding in part] (Sep. 5, 2019).

Liebovich v. Tobin (BP138119) (Los Angeles Superior Court) [denying motion to vacate] (Dec. 18, 2019).

Liebovich v. Tobin (B306184) (California Court of Appeal) [affirming Superior Court denial] (Aug. 26, 2021).

Liebovich v. Tobin (S271214) (California Supreme Court) [denying review] (Nov. 10 , 2021).

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The California Supreme Court's denial of review is attached as Appendix A. The California Court of Appeal opinion is attached as Appendix B, and can be found at 2021 WL 3782064. The Superior Court ruling is attached as Appendix C.

JURISDICTION

The California Supreme Court denied petitioners' petition for review on November 10, 2021. This Court has jurisdiction under 28 U.S.C. § 1257.

PERTINENT CONSTITUTIONAL PROVISIONS AND STATUTES

The Fifth Amendment to the United States Constitution provides "No person shall be . . . deprived of life, liberty, or property, without due process of law." The Fourteenth Amendment provides that no "State deprive any person of life, liberty, or property, without due process of law." California Code of Civil Procedure section 473, subdivision (d) provides a "court may . . . on motion of either party after notice to the other party, set aside any void judgment or order."

STATEMENT OF THE CASE

A. Factual background

In 2006, Shirley and Theodore Liebovich amended their trust substantively to provide equal shares for their four children, and provided that grandchildren would inherit the share of a predeceasing parent. App. 4-5. Procedurally, they provided they must act

jointly to "alter, modify, or amend" the trust, and Shirley gave Theodore power of attorney to exercise certain functions, but not to amend beneficiaries or waive legal notice. App. 5.

Between 2007 and 2011, Theodore amended the trust four times (each time signing for himself and purportedly on Shirley's behalf). App. 5. These amendments, inter alia, acknowledged son Bruce's death, deprived Bruce's four children (petitioners) of any share of the estate, and thus left almost the entire estate to respondents, daughters Diane and Lori (the Trustees). App. 5.

Theodore then petitioned to (1) amend the 2006 amendment to enable the trust's modification through the power of attorney; (2) to amend the power of attorney to enable him to amend the trust on Shirley's behalf; and (3) enforce these amendments retroactively. App. 5. Theodore did not serve Shirley with the petition, and purported to waive notice on her behalf. App. 5. The court granted the petition in 2013. App. 6. Theodore died nine months later. App. 7.

B. Procedural history

After Shirley's 2017 death, petitioners moved to vacate the order disinheriting them. App. 8. The probate court denied the motion on the ground that *petitioners* were not entitled to notice, and any failure to serve *Shirley* with notice was irrelevant because it was not she who was bringing the instant challenge. App. 8. The Court of Appeal reversed and remanded

in part; it agreed that petitioners were not entitled to notice but held "the 2013 Order was *void on its face due to lack of notice to Shirley*," and petitioners had standing to challenge it. App 8, emphasis added. The Court of Appeal ordered the probate court to determine on remand (1) whether notice to Shirley "would have led to a different result"; and (2) whether petitioners had been diligent in bringing the motion. App. 8.

On remand, the probate court found (1) "Shirley's participation . . . would not have led to a different result"; and (2) petitioners had not been diligent. App. 31-32. The Court of Appeal affirmed the denial. It rejected petitioners' contentions: (1) that "trial courts must set aside [facially] void judgments and orders"; (2) and that when considering a motion to vacate a void order, courts may not "consider whether vacating the order and starting over would lead to a different result." App. 14-17. The Court of Appeal declined to follow *Peralta,* 485 U.S. 480*,* and its progeny because these cases did not specifically consider the language of section 473, subdivision (d): "[N]one of these cases purports to address whether the existence of a meritorious defense may be considered when a trial court is exercising its discretion *under section 473, subdivision (d).*" App. 17.

REASONS FOR GRANTING THE PETITION

This case concerns the important of notice and due process specifically, and the effect of this Court's precedents more generally.

I. Insofar as a state statute grants trial courts discretion to deny motions to vacate judgments and orders entered without notice, it conflicts with the Due Process Clause.

"[F]airness can rarely be obtained by secret, one-sided determination of facts decisive of rights." *Fuentes v. Shevin,* 407 U.S. 67, 81 (1972), quoting *Joint Anti-Fascist Refugee Comm. v. McGrath,* 341 U.S. 123, 170 (1951) (conc. opn. of Frankfurter, J.). Because notice to apprise interested parties of the action and to afford them an opportunity to present objections is an "elementary and fundamental requirement of due process," a judgment entered "without notice or service is constitutionally infirm." *Peralta*, 485 U.S. 80, 84.

Peralta made clear that where a party obtained a judgment without notice, the merits of the matter were immaterial. The appellee there urged the appellant needed to show the procedural violation caused prejudice, contending that "to have the judgment set aside, appellant was required to show that he had a meritorious defense." *Peralta*, 485 U.S. at 85. The Court rejected this prejudice requirement as "untenable." *Id*. This Court instead recalled its own precedent: "Where a person has been deprived of

property in a manner contrary to the most basic tenets of due process, 'it is no answer to say that in his particular case due process would have led to the same result because he had no adequate defense upon the merits.' " *Id*. at 86-87, quoting *Coe v. Armour Fertilizer Works*, 237 U.S. 413, 424 (1915).

The Court of Appeal recognized *Peralta*'s holding on this very question, as petitioners cited the case to show that when trial courts review motions to vacate orders obtained without due process, they may not "consider whether vacating the order and starting over would lead to a different result." App. 16. The state court, however, held *Peralta* did not govern the case, because it did not "purport[] to address whether the existence of a meritorious defense may be considered when a trial court is exercising its discretion *under section 473, subdivision (d).*" App. 17.

This case therefore presents the question of how courts consider motions to vacate judgments and orders entered without notice. Is such a motion one of the "discretionary, equitable calls" where the merits of the case matter, as the California court held, so the movant must show prejudice (App. 17), or does "The Due Process Clause demand[] no less" than " 'wip[ing] the slate clean to] "restore[] the petitioner to the position he would have occupied' " absent the due process failure? *Peralta*, 485 U.S. at 87, internal citation omitted.

II. This Court should address whether its decisions must expressly reference state statutes in order to supersede or constrain them.

The broader issue raised here is whether this Court's decisions bind state statutory and case law, or whether the state statutory tail may wag the constitutional dog. The instant Court of Appeal, instead of recognizing that the California Legislature had enacted section 473(d) decades before *Peralta* and thus had no opportunity to consider its constitutional command, held *Peralta* must yield to the statute because *Peralta* did not address section 473, subdivision (d) expressly.

This Court's decisions have never been thus cabined. For example, in deciding *Apprendi v. New Jersey*, 530 U.S. 466 (2000), this Court held that a jury must find beyond a reasonable doubt any fact needed to authorize an increase in the maximum sentence. This Court did not purport to identify every state sentencing provision that failed to comply with this rule, but that did not ensure their continuing validity. *Cunningham v. California*, 549 U.S. 270 (2007); *Blakely v. Washington*, 542 U.S. 296 (2004). Following *Apprendi*, this Court invalidated a California sentencing law in *Cunningham*, and a Washington law in *Blakely*, even though the *Apprendi* opinion referenced neither provision.

Certiorari will clarify the role of Supreme Court precedent and provide guidance to state courts.

CONCLUSION

This Court should grant certiorari.

Respectfully submitted,

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