ORIGINAL

21-1222
NO. _____

In The Supreme Court of the United States

JOEL D. JOSEPH,

Petitioner,

v.

AMERICAN GENERAL LIFE INSURANCE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does this court's decision in *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938), require the United States Court of Appeals for the Ninth Circuit to conduct oral argument in a diversity case under the California Constitution which requires oral argument on appeal?

2. Does res judicata apply to an earlier proceeding when the earlier case was not ripe for adjudication?

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*Asterisk denotes cases chiefly relied on.

Opinions Below

This case was filed in the United States District Court for the Southern District of California. Defendant filed a motion for summary judgment on the basis of res judicata, which was granted. App. 3. Petitioner appealed to the Ninth Circuit, which affirmed the dismissal on August 25, 2021, without holding a hearing that was required by the California Constitution. Petitioner filed a timely petition for rehearing en banc which was denied on December 10, 2021. App.3. This petition was filed within 90 days of the denial of the petition for rehearing. App.1.

Jurisdiction

The jurisdiction of the District Court was based on diversity of citizen ship under 28 U.S.C. §1332.

Constitutional Provisions Involved

Article III, Section 2 of the Constitution provides: "The judicial Power shall extend to all Cases, in Law and Equity, arising under the Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; --between Citizens of different States . . . ."

Statement of the Case

Petitioner's father purchased a multi-million-dollar life insurance policy from American General Life Insurance Company on his life and on his wife's life. Payment to the beneficiaries of the policy was to be on death of the second spouse. Petitioner is the trustee of the life insurance trust to whom the insurance policy was to be paid. After his father's death, but before his step-mother's death, Petitioner filed two cases, one in Florida and the other in California. These cases were both premature since the policy would not be paid until both insureds died. Both cases were dismissed and their appeals were also dismissed. This case was filed after Petitioner's stepmother passed away.

Reasons for Granting the Writ

This case is of exceptional importance because the decision below is in conflict with the decision of the United States Supreme Court in *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938) because oral argument is required under the California Constitution and is a substantial right. Because this argument applies to thousands of cases brought under California law in federal court, or transferred to federal court, this court should grant certiorari to consider whether this court's decision in *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938) requires the application of mandatory oral argument as specified in the California

Constitution. A decision on this issue will prevent forum shopping that deprives plaintiffs of the right to oral argument in California.

The decision below is also in conflict with the Sixth Circuit's decision in *Ohio ex rel. Boggs v. City of Cleveland,* 655 F.3d 516, 522 (6th Cir. 2011) because when an earlier claim could not have been brought, res judicata or claim preclusion, does not apply.

The panel of the Ninth Circuit made a substantial error when it found that Petitioner's claims could have been raised in a prior federal action. Since the insurance policy was based on second to die basis, no recovery or claim was possible until Beatrice Joseph died. Since she died in 2018, no claim could have been made before then.

I. Oral Argument is Required in Diversity Cases Under the California Constitution.

This court has never decided whether oral argument under the California Constitutional is a fundamental substantive right and whether, under *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938), oral argument is required in diversity cases brought in California.

A. Substantive State Law Must be Applied

The U.S. Supreme Court, in *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938), ruled that the federal courts must apply state law concerning substantive issues in diversity cases. The Court in *Erie* held:

> Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. 304 U.S. at 78.

The requirement of oral argument in the California Constitution constitutes substantive state law. There are two main objectives of the *Erie* decision:

(1) to discourage forum shopping among litigants, and

(2) to avoid inequitable administration of the laws. This second objective is sometimes referred to as "vertical uniformity" and is rooted in the idea that in a given state, the outcome of the litigation should not be grossly different just because a litigant filed a

claim in a state court rather than a federal court or vice versa.

This court should grant certiorari to prevent forum shopping and to provide for the equal administration of the laws.

B. California's Supreme Court Has Ruled that Appellate Courts Must Have Oral Argument

The right to oral argument is a substantive issue. The California Constitution gives parties on appeal the right to oral argument on the merits in both the California Supreme Court and the Court of Appeal. Cal. Const., art. VI, § § 2, 3; *Moles v. Regents of University of California* (1982) 32 Cal.3d 867, 872. In *Moles v Regents of University of California, supra,* the court said:

> Roscoe Pound once wrote, "Good oral argument before a bench not too large is excellent insurance against one-judge decisions." (Pound, Appellate Procedure in Civil Cases (1941) p. 393.) Reflecting this policy, California law has long required that appeals be decided only by the justices who have heard oral argument and have participated in the early deliberations of the court. To hold otherwise would inevitably violate the

right to oral argument on appeal and would contravene important policy considerations. 32 Cal. 3d 874.

C. Oral Argument is An Important Right

Justice William J. Brennan observed:

> [O]ften my whole notion of what a case is about crystallizes at oral argument. This happens even though I read the briefs before oral argument . . . . Often my idea of how a case shapes up is changed by oral argument . . . . Oral argument with us is a Socratic dialogue between Justices and counsel." Robert L. Stern, et al., *Supreme Court Practice: For Practice in the Supreme Court of the United States* 671 (2002) (quoting Harvard Law School Occasional Pamphlet No. 9, 22-23 (1967)).

Justice Antonin Scalia asserted that he used oral argument "[t]o give counsel his or her best shot at meeting my major difficulty with that side of the case. 'Here's what's preventing me from going along with you. If you can explain why that's wrong, you have me.' " Hon. Joseph W. Hatchett & Robert J. Telfer, III, *The Importance of Appellate Oral Argument*, 33 Stetson L. Rev. 139, 142 (2003) (quoting

Stephen M. Shapiro, Questions, Answers, and Prepared Remarks, 15 Litigation 33 (Spring 1989) (in turn citing *This Honorable Court* (WETA television broadcast 1988)).

Oral argument allows judges to probe the depth of counsel's arguments and positions, to test counsel's conviction and belief in his own assertions, and to satisfy the judge's own intellectual curiosity.

Judge Richard A. Posner of the Seventh Circuit noted, "the value of oral argument to judges is very high. Oral argument gives judges the chance to ask questions of counsel. It also provides a period of focused and active judicial consideration of the case." The *Federal Courts: Challenge and Reform,* Harvard University Press, Cambridge, Ma., 1999 at 161.

Judge Joel Dubina of the Eleventh Circuit Court of Appeals noted, "I have seen cases where good oral argument compensated for a poor brief and saved the day for that litigant. I have also seen effective oral argument preserve the winning of a deserving case." *From the Bench: Effective Oral Advocacy,* 20 Litigation 3, 3-4 (Winter, 1994).

II. The Decision of the Ninth Circuit is in Conflict with a Decision of the Sixth Circuit.

Contrary to the cursory opinion of the panel below, Petitioner's claims could not have been brought in a prior action between the parties.

The Sixth Circuit ruled in an analogous case that "res judicata does not apply to claims that ***were not ripe for review in a previous action***." *Ohio ex rel. Boggs v. City of Cleveland,* 655 F.3d 516, 522 (6th Cir. 2011) (emphasis added). In that case the relator brought two cases, one in 2002 before a runway was constructed, and again in 2008 when the runway was finished. The Court of Appeals ruled that the case was not ripe for adjudication when the earlier case was brought. That was very similar to the facts in the case at bar: When the first case was brought in Florida, the case was not ripe because Beatrice Joseph was alive. Also, the case was not ripe when the second case was filed. The Court of Appeals in *Ohio ex rel. Boggs v. City of Cleveland,* 655 F.3d 516, 522 (6th Cir. 2011) ruled:

> In the 2008 Action, the relators allege the "expansion [of the runway] has resulted in increased runway traffic that has interfered with Relator's use and enjoyment of the[ir] Property." Comp. ¶¶ 4–5; *see also id.*at ¶ 33 (alleging environmental harm from "increased air traffic of the expanded runways"). The City had planned the Airport's expansion and undertaken the first stage of the expansion well before the 2002 Action was filed, a point the City relies upon heavily; however, the 2004 and 2007 runway expansions had not yet

> occurred when the relators com-menced the 2002 Action and the environmental damages that the relators would incur from those expansions was indeterminate. Hence, the claims about the effects of the 2004 and 2007 runway expansions were in 2002 under Ohio law because, although the not ripe alleged actions of the city expanding the runway may have foretold their injury, the relators' damages were at best speculative at that time. Res judicata, therefore, cannot bar the claims related to the effects of the expansions in 2004 and 2007. *Ohio ex rel. Boggs v. City of Cleveland,* 655 F.3d 516, 523 (6th Cir. 2011)

Similarly, Petitioner could not have collected on a joint survivor life insurance policy in 2013 because the case was not yet ripe. The Florida case was not ripe. Neither was the earlier Central District of California case. This case only became ripe when Beatrice Joseph passed away in 2018. For this reason the decision of the panel is in conflict with the Sixth Circuit's ruling in *Ohio ex rel. Boggs v. City of Cleveland,* 655 F.3d 516, 522 (6th Cir. 2011).

III. Conclusion

Since no oral argument was conducted this case at the Ninth Circuit, the court's decision is in conflict with the Supreme Court's decision in *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938). Further, because this case is in conflict with a decision of the Sixth Circuit, *Ohio ex rel. Boggs v. City of Cleveland,* 655 F.3d 516, 522 (6th Cir. 2011), certiorari should be granted.

Respectfully submitted,
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