No. 21-621

In The
Supreme Court of the United States

VINCE FLAHERTY, ET AL.

Petitioners,

v.

HOLLY HILL INVESTMENTS, LLC

Respondent.

On Petition for Writ of Certiorari to the
California Court of Appeal, Second District

PETITION FOR WRIT OF CERTIORARI

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OCTOBER 22, 2021

ORIGINAL

QUESTION PRESENTED

Whether California's no-evidence-allowed rule concerning the adequacy of service of notice of judgment is consistent with the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

PARTIES TO THE PROCEEDINGS

Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing before the California Court of Appeal:

The petitioner, *viz.*, Vince Flaherty et al., was the Defendant-Appellant.

The respondent, *viz.*, Holly Hill Investments LLC, was the Plaintiff-Respondent.

STATEMENT OF RELATED PROCEEDINGS

Holly Hill Investments, LLC vs. Vince Flaherty (2019) Trial Court: 19STRO07920; Appeal: B306603

Holly Hill Investments, LLC vs. Vince Flaherty (2019) Trial Court: 19SMCV02002

Vince Flaherty vs. U.S. Bank, N.A.; Bank of America, N.A.; Countrywide Home Loans, JPMorgan Chase & Company, et al (2012) Trial Court: SC118787; Appeal: B282415

Vince Flaherty vs. Countrywide Home Loans (2012) Trial Court: SC117683; Appeal: B250380

U.S. Bank, N.A. vs. Vince Flaherty (2012) Trial Court: 12R04263 (Original Number: 12U04263)

Vince Flaherty vs. Bank of America, N.A. (2011) Trial Court: SC108012; Appeal B230938

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Regulations

Other Authorities

PETITION FOR WRIT OF CERTIORARI

Petitioner Vince Flaherty respectfully petitions for a writ of *certiorari* to review the judgment of the California Court of Appeal in this case.

OPINIONS BELOW

The unpublished order and opinion of the California Court of Appeal dismissing the appeal appears beginning at *Pet.App. 2a.* The California Supreme Court's unpublished order denying review appears at *Pet.App.F 1a.*

STATEMENT OF JURISDICTION

The judgment of the California Supreme Court issued on May 26, 2021. *Pet. App. 1a.* This petition was timely filed on October 22, 2021, pursuant to the authority of the Court's orders of March 19 and April 15, 2020, and July 19, 2021, Orders List, 594 U.S. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION

The Fourteenth Amendment to the United States Constitution provides in relevant part:

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

INTRODUCTION

Over sixty years ago, this Court faced down and reined in financial institutions that routinely failed to give adequate notice before depriving people of their property. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). Today, on the cusp of the second nation-wide foreclosure crisis within fifteen years, this case offers the Court an opportunity to revisit and renew its commitment to the most basic tenet of due process: "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." *Mullane*, 339 U.S. at 315. California's rule barring the admission of contrary or conflicting evidence on the adequacy of service of a notice of judgment—which under California law triggers the right and time to appeal and was here employed to bar a homeowner from seeking review of an unlawful detainer action—cannot be reconciled with *Mullane.*

Renewal of the *Mullane* principle is necessary, and again in the context of financial institutions, because automation of the process by which homes are foreclosed has led to a widespread, error-riddled, computer-driven process of unlawful, and unjust, divestments of the majority of Americans' most valuable possession, their home. The twist, in this instance, is the California courts' connivance in this electronic cloud of confusion now enshrouding so many titles. This Court previously addressed and provided a framework for improving this issue when applied to

the financial institutions themselves. It is now necessary to provide a framework for addressing state courts' enabling of financial institution misconduct.

This case offers an excellent vehicle for considering this issue. A predatory, money-laundering, offshore shell corporation (Vol. 20, p. 4169, Network Visualizer Chart) with neither legal nor equitable interest in the Flaherty family home has been anonymously attempting to take that home and its equity for years. In the latest round, that offshore company's LLC deliberately withheld the notice of entry of judgment necessary to trigger the time to appeal. Meanwhile, that notice was not made available by the court. The California appellate courts then applied a rule barring the acceptance of evidence on the adequacy of service. The result is yet another title clouded by predacious practices without the judicial review required by state law. Unless and until California's no-evidence-on-presumption of service rule is set aside, this sequence of events will continue to recur time and again.

STATEMENT OF THE CASE

Plaintiff-Respondent Holly Hill Investments, LLC (hereinafter "Investments"), the nationally operating off-shore investor shell company pursing this action, which closed escrow through Stewart Title in Quebec Canada to avoid United States disclosure rules (CT-S Vol. 14, p. 3029, 9-15), filed an unlawful detainer action in the Los Angeles Superior Court on December 20, 2017 (*Pet.App.* 3a) against Petitioner Vince Flaherty and his family (hereinafter "Flaherty or Homeowners") who had *not defaulted* on their 2006

Countrywide mortgage. (Vol. 15, pp. 3225-3230, Vol. 16, pp. 3289 & 3363.) Investments claims an interest in the Property through an alleged succession of so-called "Mortgage Pass-Through Certificates," (*Pet.App.* 3a) the legality of which and the in-fact existence of are factually disputed. *Id.* In 2012, a fraudulent trustee's sale took place on paper only (CT-S Vol.7, pp.1413-1416) during the pendency of a preliminary injunction prohibiting any sale, and a trustee's deed was issued in contravention of that injunction. *See, Flaherty v. Bank of Am., N.A.*, (Cal. Ct. App. Jan. 3, 2013), No. B230938, 2013 WL 29392, at *2 ("On November 9, 2010, the trial court granted Flaherty's application for issuance of a preliminary injunction," and January 3, 2013 ruling "The preliminary injunction remains in effect." p. 17). (CT-S Vol. 9, pp. 1883-1901; CT Vol. 4, p. 680; S267741, Reply, p. 16.)

Ultimately, on October 13, 2017, Stewart Title in Quebec ordered the recording of a grant deed to Investments, executed by an "Assistant Vice President" of Bank of America ("BofA") as attorney in fact for U.S. Bank (*Pet.App.* 3a) which had already sold its interest, if any, back to BofA in 2013 (Vol. 19, pp. 3947-3959; Vol. 9.) after it received a void trustee's deed; and failed to gain a right of possession in its dismissed 2012 unlawful detainer action (CT-S Vol. 11, 2200-2201.) – and then, failed to bring another action for possession during the 5-year statute of limitations period for maintaining an action for possession. (CT-S Vol. 5, p. 951, fn. 8.)

On January 18, 2018, Investments requested, and the court entered, the default of one of Flaherty's sons,

Michael Flaherty (*Pet.App.* 3a), even though Michael resided in Colorado and was never served the summons, complaint, nor 3-day notice. (CT-S Vol. 10, p.1959.) Investments falsely alleged him driving out of a garage at the California property – all in order to obtain an ex parte order to post and mail (within a week of the filing of the complaint) when he resided in Colorado. (Vol. 20, p.4153) The Court had no jurisdiction over him yet did not file the responsive pleadings he sent from Colorado because it denied his fee waiver requests. (Vol.19, pp. 4098-4100, ¶¶5-19.)

On March 14, 2018, Investments filed a motion for summary judgment or in the alternative summary adjudication under the court's fast-track landlord /tenant unlawful detainer rules. *Pet.App.* 4a.

On March 22, 2018 Flaherty submitted a timely opposition (CT-S Vol.7, pp. 1379-1394.); an appendix of evidence in opposition to summary judgment (CT-S Vols. 8-9, pp. 1425-1860); a table of evidentiary objections in opposition to the motion for summary judgment (CT-S Vol. 7, pp. 1342-1359.); a separate motion for summary judgment in favor of defendants (CT-S Vol. 7, 1360-1370.) containing the same facts which caused U.S. Bank to dismiss its unlawful detainer action 6 years prior; a Decl. of John Marshall evidencing there had never been a public auction in 2012 (CT-S Vol. 7, pp. 1413-1416.); a request for judicial notice in support of the Homeowners' motion for summary judgment (CT-S Vol. 9, pp.1162-1956.); as well as a separate statement of material facts – and later a notice of errata (CT-S Vol. 12, pp. 2437-2443.) – which was one of several correcting material errors caused by the fire-drill schedule of these rushed

landlord/tenant proceedings that should have never been held, or at least should have been consolidated with the active quiet title action SC118787 against "U.S. Bank and all who would take title through them." Three motions for consolidation were filed – the first, because of the fast-track nature of the proceedings, before what Homeowners believed was going to be trail on March 26, 2018. (CT-S Vol. 12, pp. 2614-2615; AOB, pp. 31-33; B292261, Reply, p.6.)

However, the court held a hearing on Investments' motion for summary judgment. No evidentiary hearing was held. *Pet.App.* 5a. It was at that point that the proceedings went from merely unpleasant (Investments' sham service – eve of Christmas filing – and surprise ex parte appearance) to Kafka-esque.

Due to the Court's admitted misfiling of Flaherty's declaration in opposition to summary judgment—the hearing failed to consider important evidence. *Pet.App.* 6a "After the hearing concluded, the court clerk allegedly noticed Flaherty's declaration behind the tab of another exhibit." Because the Superior Court sent Flaherty on a wild goose chase to find the missing exhibit already contained in the court's records, Flaherty also missed the opportunity to participate in the hearing. *Pet.App.* 5a-6a. (Vol. 10, p. 2175)

According to the four-week-late filed minute order *dated* 3/26/2018 "Flaherty asked for, and was granted, an opportunity to go to his car to retrieve his conformed copy of his exhibits, and was told to return at 11:05....but Vince did not return until shortly before noon, at which time he was advised that we

continued his hearing to 1:30. (CT-S Vol. 15, pp. 3147.)

However, the minute order dated 6/4/2018 tells a different story: "...He later returned saying he did [not] have a copy in his car and would have to drive home to retrieve a copy and could return in an hours [sic], which he was permitted to do. ... Since Hart was unable to provide any reasonable estimate for Flaherty's arrival, and the court was engaged in another matter that afternoon. the matter was heard at 1:40. (CT-S Vol. 17, pp. 3640-3643.)

Yet contrary to the gist of the minute orders, Flaherty did return within the time he was given. *Pet.App* 39(a). Moreover, the reporter's transcript makes it patently clear that Flaherty did not wish to go in search of the "missing" declaration the court could supposedly not locate. (CT-S Vol. 17, p. 3641, ¶3.) The judge had simply interrupted him, derailing oral argument:

(RT pp. 18-22).

MR. FLAHERTY: ...NOBODY SERVED ANY PAPERS. I RECALL LORIANN'S DECLARATION THAT SHE HAD NOT –

THE COURT: YOU CANNOT ARGUE ON HER BEHALF –

MR. FLAHERTY: I AM NOT ARGUING ON HER BEHALF. I AM JUST SAYING --

THE COURT: EXCUSE ME. I DON'T EVEN HAVE A DECLARATION FOR YOU.

[RT, pp. 18-19]

THE COURT: COULD YOU JUST CHECK IN YOUR CAR AND SEE IF YOU HAVE IT, PLEASE.

MR. FLAHERTY: BEFORE I DO THAT –

THE COURT: NO –

MR. FLAHERTY: – SHOULD WE ARGUE THE REST OF THIS?

THE COURT: NO, WE SHOULDN'T. I WOULD LIKE TO SEE THE DECLARATION.

[RT, p. 22]

Homeowner was not allowed to be heard before being sent from the courtroom at 10:37 (RT, 22). He could not find the declaration in the car, returned to the courtroom in no more than 10-15 minutes, was told to go home to find it, from Santa Monica to Pacific Palisades, and given an hour to do that. (Minute Order, 6/4/2018, Vol.17, p.3642, Lines 3-6.)

When Ms. Hart became worried, he might not return in time she asked the clerk, Ms. Lee, how much more time remained. The clerk said: "YOU HAVE FIFTEEN MORE MINUTES." Ms. Hart asked if there might be a little more time if needed. This time, according to Ms. Hart and the court reporter in her email, the clerk yelled at her, "FIFTEEN MINUTES!" Ms. Hart immediately went into the hallway, called Mr. Flaherty to let him know, and learned he was coming up from the parking lot.

However, the judge took the bench as soon as Ms. Hart went into the hallway (Vol. 13, p. 2664), memorialized that neither Defendant was in court – and excused opposing counsel to leave for lunch (RT p.23). The judge took the bench so fast that when Ms. Hart went back in the courtroom to tell the clerk that Mr. Flaherty was coming upstairs, the next case had been called. At about 11:36, when he came into the courtroom bringing the declaration – well within the hour he had been given, let alone the extra 15 minutes – opposing counsel was walking out. The judge told him he was too late, and to come back after lunch. (Vol. 11, p. 2187, ¶8.) After lunch, at about 1:25, Homeowners encountered difficulty finding parking next to the courthouse. Ms. Hart got out of the car so she would be sure to be in the courtroom if the matter were called first. (Vol. 10, p. 2175.)

¶ THE COURT: I TOLD MR. FLAHERTY TO COME BACK AT 1:30 AND HE IS NOT BACK; IT IS NOW 1:40. I HAVE ANOTHER MATTER. WE HAVE BEEN WAITING AN HOUR AND 45 MINUTES FOR HIM.

¶ MS. HART: HE'S PARKING.

¶ THE COURT: WHAT?

¶ MS. HART: HE'S PARKING.

¶ THE COURT: I WILL HAVE TO HANDLE THE MATTER.

Two minutes later, when Homeowner arrived in the courtroom both summary judgments had been granted. Investments' counsel was directed to prepare an order and judgment in conformity with the ruling

(RT p. 26). This however, Investments did not do.

There was never an order of summary judgment prior to the 6/22/18 order appealed from. (CT-S Vol.18, p. 3796.) The minute order *dated* 3/26/2018 granting summary adjudication of possession (*Pet.App.* 6a) (CT-S Vol.15, p. 3147.) was not served to Homeowners (CT-S Vol. 14, p. 3018.) by Investments until 5/22/2018. (CT-S Vol. 12, p. 2597); Decl. Flaherty (CT-S Vol. 15, p. 3083, ¶10.)

"Investments did not submit an order within five days of the [summary judgment] hearing on March 26, 2018, as Rule 3.1312(a) required. Instead, it waited sixty-three (63) days after the ruling and forty-four (44) days after judgment had been entered in this matter." (CT-S Vol 12, pp. 2596-2604; Objection to Proposed Order re Judgment, p. 1, ¶ 2; CT-S Vol. 14, p. 3018, Motion for Consolidation.)

The obsolete 3/26/2018 *tentative ruling* (CT-S Vol.11, pp. 2239-42) handed to Homeowners at Investments' MSJ hearing of 3/26/2018, was the only ruling they had to work from when composing their 4/9/2018 473(b) motions (Vols. 12-11, 2168-2194) and 5/22/2018 Reply. The proof of that is in the Reply (CT-Vol.12, p. 2608), because it wastes valuable rejoinder on the issues that the property was never posted and Homeowner never served – and that Flaherty did timely file his Opposition and declaration (Vol. 7, p. 1490) that the court sent him to find, derailing oral argument. However, he did aver by declaration (p. 2187), contrary to the Courts' representations, not receiving any notices or service at all, and that Exhibit "S" the "third notice" *was not included in the papers*

later sent to him by Investments. (p.2192) *Pet.App.* 6a.

Thereafter, on 5/19/2018 Homeowners received an ex parte communication (CT-S Vol.12, p. 2598.) dated 5/17/2018 that Investments' counsel had with the court alerting it to the "procedural gap" (CT-S Vol.13, p.2683) that judgment was entered without a supporting order. Although the court routinely faxed orders to Investments without notice to Homeowners, it remains unclear how Investments was able to obtain the minute order dated 3/26/2018 when Homeowners were told by the clerks that no order existed. (CT-S Vol.12, p. 2597, ¶4.) Homeowner then contacted the filing clerk who noted from the court's computer system that the "events" whereby the minutes dated 3/26/2018 (and sprung on Homeowners too late to be addressed in their 473(b) motion) "were uploaded to the court system on 4/24 and again on 4/27/2018." (CT-S Vol. 12, p. 2598 ¶5.)[1]

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[1] Contrary to the 3/26/2018 minutes, Investments *merely recited, but never proved* the fraudulent trustee's sale complied with the then-and-now existing provisions of §2924. (*Pet.App* 28a.) As a purchaser from one who alleged purchase at a nonjudicial foreclosure sale, Investments was required to *prove*, but could not *prove*, the alleged sale conformed to §2924. Investments admitted in its Responses to Requests for Admissions (Vol. 9, pp. 1800-1841) that it couldn't prove the nonexistent nonjudicial sale conformed to §2924.

In all the years from 2012 to 2018 that the same judge who wrote the 3/26/2018 minute order presided over both the quiet title action SC118787 and the UD action SC128569 without consolidating them, there was never any evidentiary hearing in either case. Nor was the quiet title action

But according to the Court of Appeal, a document titled "Notice of Entry of Judgment" and file-stamped April 4, 2018, purported to reflect that the motion for summary adjudication was granted on March 26, 2018, and entering judgment in favor of Investments as against Flaherty, [his ex-wife], and Flaherty's son." *Pet.App.* 7a. The Court of Appeal went on to state that the purported Notice of Entry of Judgment was served by mail and that it was filed with the Superior Court, as reflected by the court's case summary, on April 4, 2018. *Pet.App.* 7a. However, Flaherty submitted competent evidence to the Court of Appeal that in fact no service occurred and that he was unable, despite

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dismissed, subject to res judicata (*Pet.App.* 29a.), nor dismissed on the merits, with prejudice, as the minute order *dated* 3/26/2018 falsely stated. (*Pet.App.* 28a, 31a.)

The proof of that is the Court's own case management system. (AOB, Attachment 4.) On July 23, 2019 a new judge in the title action, SC118787, finally GRANTED the request to admit video evidence proving there had been no posting nor service. The new Court stated Homeowner adequately alleged Investments' "title to the property was faulty, that Investments knew this, and that Investments was engaged in a scheme with Defendants to acquire and transfer bad title. Plaintiff seeks to join Investments in the instant matter, and to admit video evidence that it alleges shows Investments never properly served its unlawful detainer complaint and/or three-day notice, despite representing to the court in the unlawful detainer matter that it had completed service." (AOB, Attachment 4.) Nevertheless, on 7/29/2019, after receiving a 30-page ex parte letter from Investments' counsel specially appearing, the Court vacated the order without prejudice, stating: "Plaintiff may bring this motion before the Court if the matter is remanded on appeal" (AOB, Attachment 4.)

repeated and persistent efforts, to find this notice in the Superior Court's filing system. (Pet. for Recon. (Cal. Ct. App.), and to accept declarations of clerks under special seal, B292261, 3/10/2021, Exhs. 1 & 2.)

The Court of Appeal then turned its attention to the "post-judgment" proceedings. On April 9, 2018, well within the time limits provided, Flaherty filed a motion for relief under Code of Civil Procedure section 473(b). *Pet.App.* 7a. Flaherty pointed out in his motion that he was prevented from providing evidence to the Superior Court because he was required to leave the courtroom to search for the declaration that the Court supposedly could not find. *Id.*

Although the Court of Appeal repeatedly refers in its factual recitation to this as a motion for relief from the judgment in a begging-the-question effort to demonstrate that the written judgment necessary for appeal had been issued, entered and served, it is important to note that Section 473(b) motions provide for relief from "a judgment, dismissal, order, or other proceeding taken against him or her." Code Civ. Proc. § 473, subd. (b). Flaherty has consistently maintained the Section 473(b) motion was not a motion for relief from a written judgment – but from the Superior Court's non-appealable, verbal interlocutory order.

Homeowner respectfully objected to the four-week-late minute order's version of events (CT-S Vol.17, p. 3640.) by filing a time-stamped reporter's transcript of that hearing (RT pp. 15-28), and an email from the court reporter (Vol. 13, p. 2664.) who also did not agree with the judge's rendition of the summary judgment hearing (AOB. pp. 56-60.) *Pet.App.* 11a (CT-S Vol. 10.

p. 2168.)

On April 12, 2018, Investments filed an application for a writ of possession, which the Superior Court issued—despite the timely, pending 473(b) motion for relief—on April 19, 2018. *Pet.App.* 8a.

On April 24, 2018, Flaherty filed a motion to stay enforcement of the writ of possession, and requested to pay "rent" until trial. On April 24, 2018 the Superior Court granted the motion and Flaherty paid $12,000 in "rent" (CT-S Vol. 12, pp. 2551-2552).

On April 27, 2018 Investments brought an ex parte motion to remove the stay, supported by a request for judicial notice (Vol. 12, pp. 2458-2468) which contained; 1) the 1989 grant deed and legal description of 17474 – insinuating that the vesting the second home on the property was currently the same; 2) an allegation nonexistent in Investments' RJN, purporting to show Flaherty "conveniently" changed his address on the pleadings to 17470 (when he did so only when 17470 was leased); 3) a document from the Cal. Sec. of State showing the 2009 cancellation of [a different] Villa Tramonto, LLC; and 4), the Declaration of real estate agent Jeff Russell which while admitting he visited the home (using the fake name of Jon Polo) at the request of Jon Freeman prior Investments' purchase of the questioned deed (from Bank of America acting as attorney in fact for U.S. Bank), falsely alleged that the Flaherty family used their home solely as a rental (CT-S Vol. 12, pp. 2466-2468.)

On the morning of the same day, April 27, 2018, Flaherty and his former wife filed objections and

oppositions to Investments ex parte (CT-S Vol. 12, pp. 2470-2513.) with declarations and screenshots evidencing the August 18, 2017 website chat when prior to Investments buying its deed, real estate agent Jeff Russell introduced himself with the fake name of Jon Polo (CT-S Vol. 12, p. 2507) when pretending to be interested in renting the home to gain information for Investments LLC's manager Jon Freeman. (CT-S Vol 12, pp. 2507-2509.) The courtroom assistant Nancy Lee stamped the filing copies received but they were not filed until after the hearing.

Flaherty had wanted the Court to see the "coming soon" internet listing of Mr. Russell which proved he had a perverse interest in seeing the Flaherty family lose their home. (CT-S Vol.12, pp. 2467-68; AOB p.12). However, the judge cut Mr. Flaherty off and began to rule (RT 41-42) before he could apprise her of the ex parte documents he then pointed to in his hand.

> THE COURT: IF YOU CANNOT RELAX WHILE I AM SPEAKING AND YOU HAVE TO POINT TO YOUR PAPER AND SEEM POISED TO SAY SOMETHING WITHOUT LISTENING THEN I WILL JUST RULE IN CHAMBERS.
>
> MR. FLAHERTY: NO, I'M LISTENING, YOUR HONOR
>
> [Still in same position.]
>
> THE COURT: I AM NOT GOING TO TOLERATE SOMEBODY TRYING TO -- NOT LISTENING TO WHAT I'M SAYING. I'M SAYING THIS FOR YOUR BENEFIT. I KNOW WHAT I AM SAYING.
>
> MR. FLAHERTY: - - I AM LISTENING, YOUR HONOR.

[Still in same position, dumbfounded.]

THE COURT: OKAY. I AM VERY DISAPPOINTED BY THE STATEMENTS THAT ARE ALLEGED AGAINST THE DEFENDANTS WITH REGARD TO WHERE YOU LIVE AND WHEN YOU CHANGED YOUR ADDRESS AND HOW YOU – OKAY, MR. FLAHERTY, I'M RULING –

THE COURT STANDS UP

RT 41-43

Thereafter, the court faxed Investments, but not Homeowners, its minute order wrongly memorializing "at the hearing the court was repeatedly interrupted by Mr. Flaherty's extreme gestures." (CT-S Vol. 12, p. 2540 ¶5.)

In the minute order of June 4, 2018, Court denied the 473(b) motion for relief. *Pet.App.* 8a-9a. Investments did not file a copy of a notice of entry of judgment on that minute order, issued June 22, 2018, until June 28, 2018. *Pet.App.* 9a-10a. Thereafter, on August 21, 2018, Flaherty filed his notice of appeal. *Pet.App.* 10a. Of importance to the hidden inferences drawn by the Court of Appeal, it should be stated that at a hearing on an unrelated motion on June 27, 2018, Flaherty protested the lack of a "supporting order" or a notice of entry of judgment necessary for appeal, and that it was "*not entered*" in the court's filing system. (RT 6/27/2018, p. 72, lns. 2-3; CT-S Vol. 14; p. 3017.)

THE COURT: THE JUDGMENT WAS ALREADY ENTERED IN THE UD CASE AND IS IN THE PROCESS –

MR. FLAHERTY: ENTRY OF JUDGMENT IS KIND OF IN THE PROCESS –

> THE COURT: WELL, I DON'T KNOW WHAT "KIND OF" MEANS. JUDGMENT WAS ENTERED...

[RT 6/27/2018, p. 71, lines 15-20.]

> MR. FLAHERTY: WITHOUT A SUPPORTING ORDER. IT WAS A NAKED JUDGMENT, AND **IT WAS NOT ENTERED.** [Emphasis added.]

[RT 6/27/2018, p. 72, lines 2-3.]

Homeowner makes it clear that he received no order to appeal from, and the online case summary showed no order.

> THE COURT: BUT THAT'S BEEN RULED ON,
>
> MR. FLAHERTY: YES. YOUR HONOR.
> THE COURT: OKAY.
>
> MR. FLAHERTY: AND **THE ORDER FROM THAT HEARING HAS NOT BEEN SIGNED AND FILED WITH THE COURT EITHER.** [Emphasis added].

[RT 6/27/2018, p. 72; lines 11-13.]

Proceedings before the Court of Appeal include the March 10, 2021 Motion for Reconsideration, and sworn testimony in the form of declarations from Flaherty and two confidential Superior Court clerks attesting to personal knowledge that (1) Homeowner and the clerks did try to locate the Notice of Entry of Judgment but to no avail; and (2), the purported "judgment" of April 4, 2018, was not available to the public via the Superior Court's online filing system until the end of July 2018. (Pet. for Recon. (Cal. Ct. App.), Decl. Flaherty; *id.* Exhs. 1 & 2.)

A letter, on Superior Court stationary and bearing the signature of the court's Operations Manager for the Unlimited Civil Department, attests that, because of the Court's old filing system, she is "unable to determine what specific date the April 4, 2018 Notice of Entry of Judgment or Order [CIV-130] was made into the case management system." *Id.*, Exh. 3.

Despite Investments' contrary allegations, it never sent the initial entry of judgment to Homeowners. According to the clerk's declaration, the entry of judgment signed and stamped 4/3/2018 was not uploaded to the court system until 7/24/2018. Nor was it served to Homeowner by the Court which did fax it on 7/24/2018 to Investments. Homeowner repeatedly inquired to the Dept. O Clerk, Ms. Lee, if there was entry of judgment, and was told it would be sent to Investments. When Homeowner complained – the clerk said it didn't matter to whom it was sent. (Vol.12, pp.2797-2598, ¶4.)

Likewise, there was never any order after the first summary judgment hearing of 3/26/2018 – for over 60 days. (CT-S Vol. 12, pp. 2596-2604; Objection to Proposed Order p.1, ¶2.) According to the clerk's declaration, the court had belatedly uploaded the initial entry of judgment even though it was dated 4/3/2018 – while Investments did not file its Notice of Entry of Judgment until 6/29/2018 (CT-S, Vol. 19, p. 3973.) Homeowner timely appealed on 8/21/2018 from the only entry of judgment possible – dated 6/29/2018.

To this date, the California Court of Appeal has not acted on the Petition for Reconsideration it accepted for filing. The Supreme Court of California, however,

denied discretionary review on May 26, 2021. *Pet.App.* 1a. This timely petition for certiorari follows.

REASONS FOR GRANTING THE PETITION

I. The Financial Industry Is Attempting To Limit Due Process Protections at the Very Time They Are Needed Most.

Beginning in the mid-1990s, the mortgage industry (and later the broader financial industry) began to transform the law of real property. Instead of a publicly accessible, public maintained land recording system, the industry adopted a paperless system called Mortgage Electronic Registration System (MERS). Putative transfers of promissory notes and deeds among financial institutions now occur within this system instead of through the familiar processes of deeds and recordation.[2]

The opacity and unaccountability of this MERS system led to repeated abuses (and many more simple errors), where "robosigners" were instructed to sign assignments of mortgage dated the day before trustee's sales – and, in this not-to-uncommon instance where a signer crossed out the backdate and wrote in the correct date 8/1/2012 (CT-S, Vol. 4, p. 726) proving, in conjunction with the unconveyed note produced in discovery (CT-S Vol. 9, pp. 1946-1955.), that U.S. Bank had not been any manner of a

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[2] "The notes may thereafter be transferred among members without requiring recordation in the public records." (*Fontenot v. Wells Fargo Bank, N.A. (2011)* 198 Cal.App.4th 256, 267, 129 Cal.Rptr.3d 467, disapproved on other grounds by *Yvanova v. New Century Mortg. Corp.* (2016) 62 Cal.4th 919, 939, fn. 13, 199 Cal.Rptr.3d 66, 365 P.3d 845.)

beneficiary when it was alleged to have bid as a beneficiary on 7/23/2012. (CT-S Vol. 10, p. 2093, hand-dated *ultra vires* assignment crossing out backdate the robosigner was expected to endorse. These types of infractions have led to multiple government investigations. In 2011, notwithstanding that all state courts have rightly held the assignor must be the owner of the promissory note or debt, the FDIC, Federal Reserve Board, and Office of the Comptroller of the Currency had to enter into a consent decree with the operators of MERS to curtail, among other things, a MERS System member from directing its agent or employee to execute an assignment in the capacity of an Assistant Secretary of MERS if it were assigning a property interest to itself (without consideration as to the true beneficial owner of the property interest).

This case exemplifies the problems with this shadow property system, created and maintained entirely by financial industry interests. Had the required public processes been followed, the subsequent doubling down of deceptions concerning the Flaherty family's mortgage, over a period of several years, would have likely never happened. But because millions of mortgages were being transferred electronically through MERS with nothing more than sometimes back-dated signatures, the stability and solemnity, and therefore the accuracy of, the process of protecting private property rights was lost. (CT-S Vol. 15, pp. 3236-3250). CT-S Vols. 15-16, pp. 3259-3273.)

That it is a home at issue, rather than some less constitutionally hallowed property interest, and that the Flaherty home has had its title wrongfully clouded

by an industry group acting with little oversight beyond decade-old consent decrees with MERS and the banks, gives the notice and due process issues in this case a special force. The uses and abuses of the MERS System when a new foreclosure crisis is looming, highlight the importance of the constitutionally inadequate notice used to exclude evidence of the valuable property interest the Flaherty family still possesses in their home.

II. The California Court of Appeal No-Evidence-on-Service Rule Strikes at the Heart of the Due Process Guarantee.

The Court of Appeal held: "Flaherty's declaration that he did not receive the notice of entry of judgment . . . is not sufficient to rebut the statements attested to in the proof of service." *Pet. App. 17a.* In support of this astonishing proposition, it cited the following California cases: *McKeon v. Sambrano* (1927) 200 Cal. 739, 741; *Sharp v. Union Pacific R.R. Co.* (1992) 8 Cal. App. 4th 357, 360; *Glasser v. Glasser* (1998) 64 Cal.App.4th 1004, 1008–1009.

Whether the above-cited cases do or do not on some ethereal plane stand for the Court of Appeal's astonishing proposition, the reality is that they are treated by the Court of Appeal and Supreme Court of California as such. The question is thus cleanly presented: Does denying a litigant facing the potential loss of his home the opportunity to contradict information about whether he received notice of a critical part of the proceeding violate due process?

The answer is yes. Implicit in the Court's prior cases finding a constitutional basis for the requirement of

adequate service is the necessary corollary that the adequacy of service must be available for judicial determination. Due process therefore requires notice and an opportunity to be heard on whether service was adequate, which California's conclusive presumption of service denies.

A. The California approach violates due process, simpliciter.

As an initial matter, there can be little question that due process protections attach to a proceeding intended to divest a person of his home, or that they attach to a right to appeal when that appeal has been made available to some. *See Evitts v. Lucey*, 469 US 387, 390 (1985); *Wolff v. McDonnell*, 418 U.S. 539, 557-558 (1974). The text of the Third, Fourth and Fifth Amendments make special reference to property and citizens' homes are considered to be sacred under the Constitution. A person's home relates to his basic ability to function in society, to his or her personal dignity, well-being, security, and strength through which he or she can function in the community as a contributing person and worker. A person who is homeless is at great risk of physical harm, loss of self-esteem, loss of employment, loss of privacy and loss of identity in the community, and he is at great risk of becoming a burden on society.

Basic due process consists of: (a) notice of a hearing (i.e., the notice here of a judgment entitling a person to appeal), *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965); (b) a hearing, *Fuentes v. Shevin*, 407 U.S. 67, 80-81 (1972); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969); (c) before an impartial tribunal, *Wong*

Yang Sung v. McGrath, 339 U.S. 33 (1950). Notice and a hearing are certainly basic requirements of due process which should be met prior to altering a home owner's status (making him a tenant at sufferance subject to summary eviction proceedings). *See Bell v. Burson*, 402 U.S. 535, 542 (1971); *Board of Regents v. Roth*, 408 U.S. 564, 570 nn. 7, 8 (1972).

By taking away a right to appeal, with the result of an effort to take away a person's home, without providing the Flaherty family an opportunity to contest the adequacy of service of notice of entry of judgment, the California Court of Appeal denied the Flaherty family these most basic constitutional protections.

B. To the extent the California rule operates as a conclusive presumption, it violates due process.

This Court has considered the Constitution's rules for conclusive presumptions on at least three occasions. In *Morissette v. United States*, 342 U.S. 246 (1952), the defendant was charged with willful and knowing theft of Government property. Although his attorney argued that for his client to be found guilty, "'the taking must have been with felonious intent'," the trial judge ruled that " '[t]hat is presumed by his own act.'" *Id.*, at 249. After first concluding that intent was in fact an element of the crime charged, and after declaring that "[w]here intent of the accused is an ingredient of the crime charged, its existence is . . . a jury issue," *Morissette* held:

> It follows that the trial court may not withdraw or prejudge the issue by instruction that the law raises a presumption of intent from an act. It often is tempting to cast in terms of a 'presumption' a conclusion which a court thinks probable from given facts. . . . [But] [w]e think presumptive intent has no place in this case. *A conclusive presumption which testimony could not overthrow would effectively eliminate intent* as an ingredient of the offense. A presumption which would permit but not require the jury to assume intent from an isolated fact would prejudge a conclusion which the jury should reach of its own volition. A presumption which would permit the jury to make an assumption which all the evidence considered together does not logically establish would give to a proven fact an artificial and fictional effect. In either case, this presumption would conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime."

Id. at 274–275 (emphasis added; footnote omitted.)

In *United States v. United States Gypsum Co.*, 438 U.S. 422, (1978), the Court reaffirmed the holding of

Morissette. In that case the Court held: "[U]ltimately the decision on the issue of intent must be left to the trier of fact alone. The instruction given [a conclusive presumption] invaded this factfinding function." *Id.* at 435 (emphasis added); *see Hickory v. United States*, 160 U.S. 408, 422 (1896).

As in *Morissette* and *United States Gypsum Co.*, the Court struck down a conclusive presumption in *Sandstrom v. Montana*, 442 U.S. 510 (1979), *holding modified by Boyde v. California*, 494 U.S. 370 (1990), because that conclusive presumption would "conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime," and would "invade [the] factfinding function" which in a criminal case the law assigns solely to the jury." *Id.* at 523. It is this last case, *Sandstrom*, that provides the necessary link in the connection of otherwise criminal cases to the due process requirements in this civil case. *Sandstrom* held that the conclusive presumption there had the effect of denying *due process*, and cited its seminal due process case *In re Winship*, 397 U.S. 358, 364 (1970). Conclusive presumptions therefore cannot be used where due process rights, such as those to constitutionally hallowed property, are at stake. *Cf. Manley v. State of Georgia*, 279 U.S. 1, 6 (1929) ("If the presumption is not unreasonable and is not made conclusive of the rights of the person against whom raised, it does not constitute a denial of due process of law."); *Chaidez v. Gonzales*, 486 F.3d 1079, 1085 (9th Cir. 2007) (voiding conclusive presumption that Postal Service delivered a relevant legal pleading).

Because of the procedural defects of conclusive presumptions, they have consistently received notoriously inhospitable treatment by courts. For example, Selective Service regulations establish a conclusive presumption that mailing a form shall constitute notice to a registrant of the contents of the communication, "whether he actually receives it or not." 32 C.F.R., § 1641.3. In *United States v. Bowen*, 414 F.2d 1268 (3rd Cir. 1969), the Third Circuit found this irrebuttable presumption unconstitutional as a violation of due process to the extent that it made rebuttal evidence irrelevant. Even in an area where the conclusive presumption has been the most deeply embedded into our jurisprudence—the question of legitimacy when a child is conceived during a marriage in which husband and wife were cohabiting—courts have permitted introduction of evidence when it is unreasonable to allow the conclusive presumption to prevail. *See generally* Comment, California Conclusive Presumption of Legitimacy—Its Legal Effect and Its Questionable Constitutionality, 35 So. CAL. L. REV. 437 (1962).

Conclusive presumptions are disfavored in the law. Every single conclusive presumption to touch upon a constitutional right has been invalidated by this Court. California's conclusive presumption of adequate service should suffer the same fate.

C. An opportunity to challenge the adequacy of service is implicit in the Court's due process cases concerning service.

In *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), which constitutionalized the right

to personal notice before deprivation of an important property interest, the Court wrote: "'The fundamental requisite of due process of law is the opportunity to be heard.' *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." *Id.* at 314.

This right—the right to adequate service—would be meaningless unless also accompanied by a right to *test* whether service was adequate. If all that might ever be required to prove service of a notice of entry of judgment is the winning party's say so (and that is the party tasked with serving such notices under California law), then notice could be provided by any means. Or, as here, not at all. A conclusive presumption has the effect of removing a matter from the scope of hearing and judicial determination or other factfinding. Doing so when the matter is a constitutional right—as the right to adequate notice is here—turns the Constitution into a paper tiger.

For this reason, other states' appellate courts have, when specifically addressing the sufficiency of evidence showing service of notice of entry of judgment, *actually inquired* rather than resorted to conclusive presumptions. *In re Bouchard*, 29 A.D.3d 79, 810 N.Y.S.2d 565 (N.Y. Ct. App. 2006) (approving in-fact unsuccessful mail service only because it was certified mail and the homeowner was at fault for not providing an updated address); *Wells Fargo Equip. Fin., Inc. v. Retterath*, 928 N.W.2d 1 (Iowa 2019) (requiring under due process adequate notice and

hearing in the underlying proceeding to excuse uncertified, undelivered related notice).

III. This Case Presents an Excellent Vehicle for Deciding the Question of Constitutionality of the California Court's Conclusive Service Presumption.

The equities strongly favor selecting this case to address California's conclusive service presumption. In addition to the due process violation inherent in not allowing the Flaherty family to contest the adequacy of the notice of entry of judgment, the Court of Appeal committed an all-too-common additional due process violation. Despite purporting to lack jurisdiction to hear the case, it went on to opine on the merits anyhow. While the Flaherty family does not raise this issue as a stand-alone ground for relief, it should color the Court's perception of the vehicle.

As Flaherty explained in numerous pleadings, he was never afforded an evidentiary hearing to demonstrate he was never late with his mortgage payments – and never defaulted on his mortgage loan (CT-S, Vol. 15, pp. 3225-3230; Vol. 16, p. 3289; Vol. 16, p. 3363) — and, that he only obtained a loan modification in 2009 to lower skyrocketing payments under the "Countrywide Negative Amortization Pay Option ARM" (Vol. 15, p. 3224.). But notwithstanding the loan modification, foreclosure had been ordered anyway, according to BofA, by a "new investor" whose identity was not yet revealed, and who called the loan by declining to honor the first of the two loan modifications. (CT-S, Vol. 16, p. 3289; pp. 3363-64.) Even though that happened, while still dual tracking

his home to foreclosure, BofA then approved the second loan modification (Vol.15, pp. 3225-3228) while its alter ego ReconTrust held a trustee's sale anyway in contravention of the preliminary injunction [3] — and therefore in violation of §2924. (CT-S, Vol. 4, pp. 655, 660, 680.)

It has never been a fact that the Flaherty home was validly purchased by U.S. Bank as there was never a conveyance, transfer or assignment of beneficial interest to U.S. Bank in any manner prior to the

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[3] See Flaherty v. Bank of Am., N.A., (Cal. Ct. App. Jan. 3, 2013), No. B230938, 2013 WL 29392, at *2 (acknowledging trial court's grant of an injunction against the sale covering the time it occurred). The fact a sale occurred anyhow in violation of the "then-and still-existing sections of §2924" (*Pet.App.* 28a.) is but one more in a long line of affronts to due process in this case. Free and fair open courts would have, for example, granted the February 2, 2018 motion to admit video surveillance evidence (Vol. 3, pp. 544-551) proving that Investments did not post any 3-day notices nor serve the summons and complaint (RT, 005-007). This issue is relevant to the gravamen of this petition in that the Court conclusively presumed the six affidavits of posting, due diligence and service (filed at Investments' surprise ex parte appearance within a week of filing its complaint) were truthful. Judge Beckloff, the ex parte hearing judge, would have never issued the post and mail order, nor mistakenly issued the minute owner referring to Investments as "the owner" of Homeowners' home had he known the affidavits were false. (Vol. 1, pp. 63-76). See, Homeowner's Ex Parte Motion to Admit Video Evidence, (Vol.3, p 544-546).

purported beneficiary's credit bid (CT-S Vol. 15, p. 3255, ¶237-9.) falsely memorialized by ReconTrust, which resulted in a void trustee's deed. ReconTrust merely annotated in its system that a beneficiary's credit bid had been made—even though there had been no actual sale nor bid at the location given. (CT-S. Vol.7, pp. 1413-1416; Vol. 5, pp. 991-999); AOB (Cal. Ct. App.), p. 33; Decl. Marshall, Vol. 7, pp. 1413-1416; Pet. for Recon. (Cal. Ct. App.), pp. 11-12.)

Those reasons are why, in addition to the fact that the purported sale violated the preliminary injunction, that the first UD action, U.S. Bank v. Flaherty, LASC 12R04263 (2012), was dismissed 6 years prior (CT-S Vol. 11, 2200-2201) — and, why next in 2013, after failing to evict the Flaherty's, U.S. Bank then sold whatever interest in the loan it had, if any, back to BofA for Countrywide (See, Decl. forensic expert McDonnell evidencing true chain of title with screenshots from the Bloomberg mortgage tracking system. (B292261, 3/10/2021).

Moreover, as touched upon above, U.S. Bank purported to have made a beneficiary's credit bid on July 23, 2012 when it had never been conveyed nor assigned Homeowners' mortgage in any manner (CT-S Vol. 15, p. 3255, ¶237-9). As a result, U.S. Bank never obtained legal nor equitable interest in the home. U.S. Bank had no right to sell the mortgage nor the home allegedly encumbered after it had sold the mortgage back to BofA in 2013. And, because the statute for maintaining an action for possession under CCP §§ 318, 319 and 322 had run before Investments purchased its 20-cents-on-the-dollar deed from U.S. Bank (AOB (Cal. Ct. App.), p. 11; CT-S Vol. 5, p. 955),

Investments has no standing to maintain this action. To insinuate otherwise in a matter that by the Los Angeles County Court of Appeal's own reasoning it lacked jurisdiction to consider, was a grave abuse of the judicial power, one justifying this Court's intervention.

Further, this is not a case in which the absence of due process, notice, and proper service was harmless. As recounted in the Statement of the Case and as was uncontested below, *there was no way for the Flaherty family to discover entry of judgment against them because of a California courts' practice of withholding and then back-dating the entry of judgment in its computer system.* This exceptional, and exceptionally egregious, practice[4] is unlikely a recurring issue as it appears to have been ostensibly discontinued with introduction of the new Journal Technologies computer system—and so the Flaherty family

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[4] The fact that no Notice of Entry of Judgment was uploaded to the court's system nor mailed to the Homeowners by Investments, is no conspiracy theory. All one has to do is look at the Notice Designating Record and Case Information Statement in B282415 (originally Flaherty v. U. S. Bank but changed to Flaherty v. JPMorgan Chase by the Court of Appeal), to see that Homeowner waited 59 days from when the same judge, Judge Cole, could have signed the Judgment from which to appeal, and then filed the Notice of Appeal on the day before the last day, May 4, so as not to lose the right to appeal. Two days later, May 6, the Court uploaded the Notice of Entry of Judgment, one day after it could have been considered untimely if Homeowner had not appealed because he didn't have a Notice of Entry of Judgment from which to appeal (B282415, Reply Br. at pp. 9-11, id.; and S-267741, p. 6.)

mentions this matter only to show the level of extreme bias underlying the issues of judicial mismanagement and violations of due process rights. The fact of its presence in this case, however, should counsel the Court to intervene on the recurring issue concerning California's service presumption.

CONCLUSION

As the Flaherty family noted below, this case presented for the state courts either a new—and difficult—question of law or an old and easy question of fact. The hard question of law is whether, in the absence of any method by which even a maximally diligent litigant could determine that judgment has been entered against him, a sophisticated anonymous offshore investor is able to strip him of his right to appeal in a matter as grave as the loss of a home. The state courts chose the hard question of law. This Court should accept their invitation to address this novel issue now, before a second foreclosure crisis enters full swing.

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October 22, 2021

APPENDIX