No. 22-1250

# In The
# Supreme Court of the United States

MICHAEL DONATELLI and PETER CHIEN,

*Petitioners,*

v.

SCOTT E. JARRETT, CHRISTOPHER GREENWOOD, STEVEN BROY, DANA M. KELLEY, ROD BELANGER, TOWN OF OLD ORCHARD BEACH,

*Respondents.*

**On Petition For A Writ Of Certiorari To The Maine Supreme Judicial Court**

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether the Petitioners properly raised in their motions for relief from judgment an issue under the Due Process Clause of the Fourteenth Amendment and whether that issue was addressed by either the Maine Superior Court or the Maine Supreme Judicial Court.

2. Whether the decisions by the Maine Superior Court denying the Petitioners' motions for relief from judgment and the Maine Supreme Judicial Court affirming the denial of those motions, both of which were based on an application of state law, implicate a question under federal law that requires resolution by the Supreme Court.

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## JURISDICTION

Contrary to the representation in the Petitioners' Petition, this Court lacks jurisdiction to hear this matter on certiorari review. As discussed more thoroughly below, this Court has jurisdiction under 28 U.S.C. § 1257(a) to review final judgments rendered by the highest court of a state only if the Petitioners raised a violation of the United States Constitution or federal law below or the state court expressly decided such an issue. The supposed constitutional violation the Petitioners mention in their Petition – an "apparent" violation of the Due Process Clause of the Fourth Amendment – was neither properly raised below nor referenced by either the Maine Superior Court or the Maine Supreme Judicial Court, sitting as the Law Court ("the Law Court"). Therefore, this Court lacks jurisdiction to conduct certiorari review of the Law Court's decision in this matter.



## INTRODUCTION

Respondents Scott E. Jarrett, Christopher Greenwood, Steven Broy, Dana M. Kelley, Rod Belanger, Town of Old Orchard Beach ("the Respondents") respectfully request that the Court deny the Petition for Writ of Certiorari seeking review of the Memorandum of Decision by the Law Court issued on March 2, 2023, which affirmed the Order of the Maine Superior Court for York County ("the Superior Court") dated July 25, 2023. Pet. App. B (Law Court decision); Pet. App. D

(Superior Court decision). The Petitioners did not raise below – and the courts below did not decide – the federal question the Petitioners have identified in their Petition. Therefore, the Court lacks jurisdiction to review the Law Court's decision. In any event, the Petitioners have failed to generate an issue worthy of review by this Court. For both of these reasons, the Court should reject the Petitioners' request.

## STATEMENT OF THE CASE

As the Respondents outline below, the Memorandum Decision that is the subject of the Petitioners' request for certiorari review resolved the second appeal the Petitioners took in this case. In the first appeal, the Petitioners challenged a Superior Court order dismissing their complaint with prejudice for failure to comply with court orders. The Law Court dismissed that appeal as untimely. The Petitioners made several attempts to persuade the Law Court to set aside its dismissal order, all of which the Law Court denied.

In the second appeal, the Petitioners challenged a Superior Court order denying motions for relief from judgment in which they argued that the dismissal order should be set aside based on "new evidence" or on an error by the Superior Court in applying Maine Rule of Civil Procedure 5(b). The Law Court affirmed the Superior Court's order denying those motions. Notably, neither the Superior Court – in denying the motions –

nor the Law Court – in affirming that decision – addressed any federal questions.

### A. The First Appeal to the Law Court

On May 22, 2019, the Petitioners filed a complaint in Superior Court against the Respondents. By an order dated June 17, 2021 and docketed on June 18, 2021, the Superior Court dismissed the case with prejudice due to the Petitioners' failure to comply with court orders. Pet. App. C, Pet. at 15[1] (hereinafter "the June 17 Order"). Notably, the Petitioners acknowledge that they received the court orders with which they failed to comply no later than June 1, 2021 – more than two weeks before the dismissal order. Pet. at 3-4.

After unsuccessfully moving the Superior Court to reconsider its dismissal order, the Petitioners filed a notice of appeal with the Superior Court on October 4, 2021. By an Order dated October 14, 2021, the Law Court dismissed the appeal as untimely. *Chien v. Jarrett*, Docket No. Yor-21-326, Order (Oct. 14, 2021). The Law Court also denied successive motions by the Petitioners to reconsider its order dismissing the appeal.

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[1] Petitioners have not assigned unique page numbers to the materials in the appendix. Therefore, in citing those materials, Respondents will refer to the pages assigned to the pages of the Petition.

### B. The Second Appeal to the Law Court

Four months after the Law Court denied the last motion to reconsider, on May 20, 2022, the Petitioners filed a motion with the Superior Court for relief from judgment pursuant to Maine Rule of Civil Procedure 60(b)(2). App. D, Pet. at 17 & n.1. That motion was principally grounded on the argument that the Petitioners obtained new evidence after June 17, 2021 to establish that the Superior Court violated Maine Rule of Civil Procedure 5(b). App. D, Pet. at 18. On June 15, 2022, the Petitioners filed a second motion for relief from judgment, ostensibly pursuant to Rule 60(b)(2). App. D, Pet. at 17 & n.1. In the second motion, the Petitioners argued that the Superior Court should have added three days to the time for the Petitioners to comply with the May 27 Order, citing Maine Rule of Civil Procedure 6. App. D, Pet. at 17 & n.1.

By an order dated July 25, 2022 and docketed on July 26, 2022, the Superior Court denied the Petitioners' May 20 and June 15 motions. App. D, Pet. at 16-19. The Superior Court interpreted the Petitioners' second motion for relief from judgment as alleging legal error, and therefore considered it under Rule 60(b)(1). App. D, Pet. at 17 & n.1. The Superior Court denied that motion on the grounds that the three-day rule did not apply to compliance with court orders. App. D, Pet. at 17-18 & n.2. The Superior Court denied the Petitioners' first motion for relief because the alleged communications between them and the Respondents' attorney were not newly-discovered evidence of the Superior Court's alleged failure to comply with Rule 5(b), nor

did they change the facts surrounding the disposition of the case. App. D, Pet. at 18-19. Moreover, the Superior Court held that the Petitioners had not demonstrated that their failure to comply with court orders was the result of excusable neglect. App. D, Pet. at 18-19. On August 11, 2022, the Petitioners filed a notice of appeal.

In their brief to the Law Court, the Petitioners did not identify any federal questions in their statement of issues. *Chien v. Jarrett*, Maine Law Docket No. Yor-22-259, Appellants' Blue Brief at 10-13 ("Blue Br. at ___"). Nor did they present any developed arguments relative to a federal question. Blue Br. at 16-26. While the Petitioners did make one passing reference to "due process" in the context of criticizing the Superior Court's May 27 Order, they did not indicate that they were referring to due process under federal law, nor did they argue that their due process rights were violated by that order. Blue Br. at 24.

On March 2, 2023, the Law Court issued a Memorandum Decision affirming the Superior Court's order. App. B, Pet. at 13-14. The Law Court noted that the Petitioners "make numerous arguments on appeal, most of which are based on a misapprehension of the Maine Rules of Civil Procedure." App. B, Pet. at 13-14. The Law Court found no merit in the Petitioners' arguments and ruled that "[t]he trial court properly exercised its considerable discretion in denying their motions for relief from judgment where [the Petitioners] failed to demonstrate that their failure to monitor their case and comply with court orders was the result

of excusable neglect." App. B, Pet. at 14. The Law Court subsequently denied the Petitioners' motion for reconsideration. App. A, Pet. at 12.

## REASONS FOR DENIAL OF THE WRIT

### I. THIS COURT LACKS JURISDICTION TO REVIEW THE MAINE SUPREME JUDICIAL COURT'S DECISION.

This Court's authority to review final decisions by the highest court of a state is derived from 28 U.S.C. § 1257. That statute provides in pertinent part:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

§ 1257(a). The Petitioners do not maintain that jurisdiction for their Petition rests on the first two categories in Section 1257(a). Rather, they suggest that the Court can review the Law Court's decision under the third category by asserting that the decision to affirm

the Superior Court's order was "in apparent violation of the due process clause of the Fourteenth Amendment." Pet. at 1.

However, jurisdiction under the third category in Section 1257(a) requires that the pertinent federal question be "raised, preserved, or passed upon in the state courts below." *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969). Based on its interpretation of the statutes governing its jurisdiction, this Court has long held that it "will not decide federal constitutional issues raised here for the first time on review of state court decisions." *Id*. Therefore, this Court has "consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions. . . ." *Id*.

This Court has also noted prudential reasons for declining to review state court decisions in which a federal question was not raised before or decided by the state courts. For example, "[q]uestions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind." *Id*. Moreover, the Court has noted that "in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality." *Id*. Finally, the Court has noted that a supposed federal issue "may be blocked by an adequate state ground." *Id*. In short, this Court has consistently recognized that state courts should be given the first opportunity to

consider constitutional challenges in the context of potentially adequate state grounds. *Id*.

This Court has described what constitutes adequate preservation of federal issues before state courts. A party seeking certiorari review must clearly express before the state courts that its objection is premised on federal law rather than state law: "[T]here should be no doubt from the record that a claim under a *federal* statute or the *Federal* Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law." *Webb v. Webb*, 451 U.S. 493, 501 (1981) (emphasis in original). This Court has held that passing references to violations of "due process" are insufficient to meet this standard, as the state courts could infer that the alleged violation implicated state – rather than federal – due process protection: "the passing invocations of 'due process' we found therein, *see* App. 196, 209, 226-227, fail to cite the Federal Constitution or any cases relying on the Fourteenth Amendment, but could have just as easily referred to the due process guarantee of the Alabama Constitution, *see* Ala. Const., § 13 (1901), and thus they did not meet our minimal requirement that it must be clear that a *federal* claim was presented. . . ." *Adams v. Robertson*, 520 U.S. 83, 89 n.3 (1997) (emphasis in original) (citing *Webb*, 451 U.S. at 496-97 & 501; *Bowe v. Scott*, 233 U.S. 658, 664-65 (1914)). In fact, this Court considers it "settled" that "an averment making no reference to the Constitution of the United States and asserting no express rights

thereunder is solely referable to the state constitution, which in this instance has a due process clause, and affords no basis whatever for invoking the jurisdiction of this court." *Bowe*, 233 U.S. at 665 (citing *Miller v. Cornwall R.R. Co.*, 168 U.S. 131, 134 (1897); *Harding v. Illinois*, 196 U.S. 78 (1904)).

In addition to raising a federal question below, the party seeking certiorari review of a decision by a state's highest court is obliged to demonstrate through the record that the pertinent federal question was decided by the state courts. *See* Sup. Ct. R. 14(1)(g)(i) (setting forth requirements for petition for writ of certiorari if review of a state-court judgment is sought). This requirement is two-fold: the proponent must show from the record that the issue was raised both before the trial court and before the state's highest court. *See id.*; *see also Webb*, 451 U.S. at 495-96 (holding that the party seeking certiorari review had failed to demonstrate in the record where the federal issue had been raised in the state trial court or in the state supreme court). This Court has held that unless it affirmatively appears on the state court record that the state's highest court passed upon the question of constitutionality under the Constitution, "this Court is without jurisdiction of the appeal." *Bailey v. Anderson*, 326 U.S. 203, 207 (1945) (citations omitted). Moreover, if the state's highest court does not expressly discuss a federal constitutional challenge, this Court presumes it resolved the appeal without the need to address that challenge: "[t]his Court has frequently stated that when 'the highest state court has failed to pass upon a federal

question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary.'" *Webb*, 451 U.S. at 495-96 (quoting *Street v. New York*, 394 U.S. 576, 582 (1969)).

The Petitioners have failed to meet any of these requirements to establish this Court's jurisdiction. First, the Petitioners have not demonstrated through the record that they preserved an argument under the Due Process Clause of the Fourteenth Amendment. They have presented the Court with nothing to establish that either of the motions for relief from judgment they filed with the Superior Court was grounded on a federal constitution argument. Similarly, they have not shown that their appeal to the Law Court of the order denying those motions raised any federal constitutional issues. Notably, their principal brief to the Law Court does not include an assignment of error based on a federal constitutional violation. And while their principal brief to the Law Court does contain one passing reference to "due process," it does not refer to the Fourteenth Amendment or the federal Due Process Clause; therefore, it is presumed that the passing reference was to the due process provision in Maine's Constitution. *See Adams*, 520 U.S. at 89 n.3; *Bowe*, 233 U.S. at 664-65; *see also* Maine Const. Art. I, Sec. 6-A ("No person shall be deprived of life, liberty or property without due process of law. . . ."). The Petitioners cannot ground jurisdiction on a federal constitutional claim that they did not raise or properly preserve below. *See Cardinale*, 394 U.S. at 438.

Second, the Petitioners have failed to demonstrate that the Maine courts actually decided a federal constitutional issue. The Superior Court did not refer to any constitutional issues – let alone a federal constitutional issue – in denying the Petitioners' motions for relief from judgment. App. D. Similarly, the Law Court's memorandum of decision does not allude to or decide any federal constitutional issues. App. B. And even if the record could be read to suggest that the Petitioners had raised a federal constitutional issue on appeal, the Law Court's silence in this regard should be understood to mean that it was able to resolve the appeal without the need to address any constitutional issue. *See Webb*, 451 U.S. at 495-96. For all of these reasons, this Court lacks jurisdiction over the Law Court's decision because no federal constitutional issue was raised, preserved, or passed upon by Maine's courts.

## II. THE PETITIONERS HAVE NOT RAISED AN ISSUE THAT MERITS RESOLUTION BY THIS COURT.

The Petitioners suggest that the Superior Court and the Law Court both erred in interpreting the effective date of a court order under Maine law. They further suggest that the interpretation of Maine law applied by the Superior Court and the Law Court violated due process under the Fourteenth Amendment because it was "unfair" to them. Neither of these issues justify certiorari review.

As noted above, this Court's certiorari review of final decisions of the highest court in a state is limited to issues of federal law. 28 U.S.C. § 1257(a). Therefore, to the extent the Petitioners argue that this Court should overrule the Law Court's interpretation of when orders issued by Maine courts become effective under Maine law, that argument seeks relief that is beyond this Court's authority. *See Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g*, 467 U.S. 138, 151 (1984) (acknowledging that this Court had no authority to revise a state supreme court's interpretation of its state's jurisdictional law); *Wardius v. Oregon*, 412 U.S. 470, 477 (1973) (acknowledging that state courts are the final arbiters of their state's own law).

Moreover, this Court has noted that certiorari review is not intended to reach decisions that would first require the Court to resolve issues that may turn on the correct interpretation of antecedent questions under state law. *See N.C.P. Mktg. Grp., Inc. v. BG Star Prods.*, 556 U.S. 1145, 1147 (2009) (statement of Kennedy, J., respecting denial of the petition for writ of certiorari). Since the Petitioners' due process arguments would require this Court, in the first instance, to interpret Maine law as to when the Superior Court's order became effective, the Court should decline to reach the issue.

In any event, the Court should deny the Petitioners' request for certiorari review for at least two additional reasons. First, the Petitioners waived their due process argument by failing to develop it below. Maine follows the "'settled appellate rule' enunciated by the

First Circuit Court of Appeals that 'issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.'" *Mehlhorn v. Derby*, 2006 ME 110, ¶ 11, 905 A.2d 290 (quoting *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990)). Maine's treatment of undeveloped arguments is consistent with federal law. *See*, *e.g.*, *Rockwood v. SKF USA Inc.*, 687 F.3d 1, 9 (1st Cir. 2012) (noting our "clear" case law barring civil litigants from raising arguments for the first time on appeal); *United States v. Nishnianidze*, 342 F.3d 6, 18 (1st Cir. 2003) (finding *pro se* argument waived for failure to develop the argument on appeal).[2] Since the Petitioners did not present a developed argument pertaining to due process before the Superior Court or the Law Court, the argument is deemed waived.

Second, the record does not support an arguable due process claim as a matter of law. In order to state a viable procedural due process claim, the Petitioners would be required to demonstrate two elements: "(i) deprivation by state action of a protected interest in life, liberty, or property, and (ii) inadequate state process." *Reed v. Goertz*, 143 S. Ct. 955, 961 (2023) (citing *Zinermon v. Burch*, 494 U.S. 113, 125 (1990)). Assuming, for the purposes of argument, that the Petitioners could demonstrate a deprivation by state action of a

[2] The dismissal of the Petitioners' first appeal, coupled with their failure to present developed due process arguments below, also constitutes a procedural default that precludes the Petitioners from pursuing their supposed arguments. *Cf. Snowden v. Singletary*, 135 F.3d 732, 736 (11th Cir. 1998) (discussing procedural default in the context of habeas corpus review).

protected property interest, the process the Petitioners received in this case was not inadequate as a matter of law. Specifically, the Petitioners had an adequate post-deprivation remedy for the Superior Court's alleged improper dismissal order though an appeal to the Law Court. Such a postdeprivation remedy precludes a due process claim. *See Hudson v. Palmer*, 468 U.S. 517, 533 (1984) (holding that "an unauthorized intentional deprivation of property by a state employee does not constitute a violation of the procedural requirements of the Due Process Clause of the Fourteenth Amendment if a meaningful postdeprivation remedy for the loss is available"). It is, of course, irrelevant that the Petitioners failed to file a timely appeal to the Law Court of that dismissal order – so long as the post-deprivation remedy was available. *See*, *e.g.*, *Hadfield v. McDonough*, 407 F.3d 11, 21 (1st Cir. 2005) (failure to pursue available postdeprivation remedy forecloses due process claim). Therefore, the Petitioners cannot demonstrate a due process violation.

Finally, contrary to the Petitioners' implication, this Court's decision in *Pereira v. Sessions*, 138 S. Ct. 2105 (2018) has no bearing on this case. In *Pereira*, the Court resolved a split among the United States Circuit Courts of Appeals as to the interpretation of two provisions of federal statutory law. The Court's decision clarified the meaning of the term "notice to appear" in one of those provisions and explained how the second provision lends contextual support to – rather than conflicts with – that meaning. *Id*. at 2114-15. Notably, *Pereira* did not involve a due process claim, nor did it

resolve any broad questions as to requirements for notice under the Due Process Clause.

The present case does not share any pertinent qualities with *Pereira*. The central issue in the present case involves an interpretation of the Maine Rules of Civil Procedure and orders issued by the Superior Court under those rules, not an issue of federal statutory law. Therefore, as noted above, it does not fall within this Court's purview. *See Three Affiliated Tribes*, 467 U.S. at 151; *Wardius*, 412 U.S. at 477. Moreover, there is no indication from the Petition that this issue is contested by Maine courts – let alone courts from other jurisdictions. Since "certiorari jurisdiction exists to clarify the law," *City & Cty. of San Francisco v. Sheehan*, 575 U.S. 600, 610 (2015), the lack of a demonstrable conflict among the Maine courts or between those courts and any other court militates against certiorari review. *See Bunting v. Mellen*, 541 U.S. 1019, 1021 (2004) (noting that the absence of a direct conflict among the Circuits justified a denial of certiorari review). Consequently, the Petitioners have not presented an issue that merits certiorari review.

## CONCLUSION

For the reasons discussed above, the Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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