

No. \_\_\_\_\_

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In The  
**Supreme Court of the United States**

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BI-RITE AUTO TRANSPORT, INC.,  
MIKAL JONES, and ANGELA ANDERSON,

*Petitioners,*

vs.

RUSSELL DILDAY, TANNA DILDAY,  
MARY ANN FERRERO, and  
PLEASANT VALLEY CANAL COMPANY,

*Respondents.*

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**On Petition For A Writ Of Certiorari To The  
Court Of Appeal Of The State Of California,  
Fifth Appellate District**

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**PETITION FOR WRIT OF CERTIORARI**

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## **QUESTIONS PRESENTED**

1. Is California's scheme of procedural due process in its Code of Civil Procedure and Civil Rules of Court satisfactory of constitutionally protected due process rights secured by the XIV Amendment?
2. Does the XIV Amendment require, as a minimum, that California courts adhere to State procedural requirements for disposition of civil cases?
3. Where the right to appeal a civil judgment is granted by a state court's settled procedure, does federal due process prohibit denying a litigant that right on grounds not authorized by the state statute?
4. Is it a violation of federal due process requirements for a state appeal court to deny substantial consideration of the appeal when it is presented in accordance with the rules and laws of the forum state?

## **PARTIES TO THE PROCEEDINGS**

### ***Petitioners:***

Bi-Rite Auto Transport, Inc.

Defendant and Cross Complainant  
Below

Mikal Jones

Defendant and Cross Complainant  
Below

Angela Anderson

Defendant and Cross Complainant  
Below

### ***Respondents:***

Russell Dilday, Tanna Dilday, Mary Ann Ferrero,

Plaintiffs and Cross Defendants  
Below

Pleasant Valley Canal Company,

Cross Defendants Below

**STATEMENT IDENTIFYING PARENT  
CORPORATIONS AND SUBSIDIARIES**

There is no parent or publicly held company owning 10% or more of any stock of Bi-Rite Auto Transport, Inc.

**STATEMENT OF RELATED CASES**

*Dilday, et al. v. Jones, et al.*, No. F077682, Court of Appeal of the State of California, Fifth Appellate District (Jan. 12, 2022) (unpublished).

*Dilday, et al. v. Jones, et al.*, No. PCU261738, Superior Court of the State of California for the County of Tulare (May 10, 2018) (unpublished).

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## INTRODUCTION

This petition for certiorari to the California Supreme Court seeks to establish a standard of procedural due process under Amendment XIV of the United States Constitution where state law and rules of court grant appeal rights, but the state court of appeal arbitrarily and capriciously denies those rights to a party litigant. Instantly, the petitioners have timely and duly invoked their rights to be heard on appeal within sixty days of being notified that the California Superior Court has entered final and appealable judgment against them. Nonetheless, the California Court of Appeal dismissed petitioners' appeal, asserting that the judgment of the Superior Court was final and the petitioners had been notified in writing thereof, more than sixty days prior to the date petitioners filed their notice of appeal. The Court of Appeal based its fallacious finding on an argument that, notwithstanding the trial court's grant of a rehearing on the issues it entered final judgment upon and notwithstanding that petitioners had filed their notice of appeal well within the sixty day period following the court's final judgment on the rehearing, that rehearing did not reset the time for appealing the decision. In short, the Court of Appeal ruled that to be timely and heard on appeal of a judgment, the petitioners would have to file their notice of appeal before the Superior Court ruled after rehearing, even if it changed its ruling, as long as the change in ruling did not substantively affect the judgment originally issued. Petitioners here assert that this refusal to give them the benefit of a substantive hearing on

appeal deprived them of their property rights without due process of law and certiorari is warranted to correct this deprivation.

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### **OPINIONS BELOW**

The California Court of Appeal for the Fifth Appellate District dismissed petitioners' appeal as untimely without substantive consideration on January 12, 2022. It denied without opinion petitioners' subsequent motion for rehearing on February 3, 2022 and the California Supreme Court denied petitioners' petition for review without substantive comment on April 22, 2022. Remittitur issued to the Superior Court of California, County of Tulare on April 26, 2022.

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### **STATEMENT OF JURISDICTION**

On April 26, 2022, the Court of Appeal of the State of California in and for the Fifth Appellate District after the California Supreme Court entered its decision to deny review of the final decision issued by the Court of Appeals where a petition for rehearing was timely filed and denied. This court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

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## **RELEVANT STATUTES, RULES, AND CONSTITUTIONAL PROVISIONS**

### **California Code of Civil Procedure § 473:**

(a)(1) The court may, in furtherance of justice, and on any terms as may be proper, allow a party to amend any pleading or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect; and may, upon like terms, enlarge the time for answer or demurrer. The court may likewise, in its discretion, after notice to the adverse party, allow, upon any terms as may be just, an amendment to any pleading or proceeding in other particulars; and may upon like terms allow an answer to be made after the time limited by this code.

(2) When it appears to the satisfaction of the court that the amendment renders it necessary, the court may postpone the trial, and may, when the postponement will by the amendment be rendered necessary, require, as a condition to the amendment, the payment to the adverse party of any costs as may be just.

(b) The court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect. Application for this relief shall be accompanied by a copy of the answer or other pleading proposed to be filed therein, otherwise the application shall not be granted, and shall be made within a

reasonable time, in no case exceeding six months, after the judgment, dismissal, order, or proceeding was taken. However, in the case of a judgment, dismissal, order, or other proceeding determining the ownership or right to possession of real or personal property, without extending the six-month period, when a notice in writing is personally served within the State of California both upon the party against whom the judgment, dismissal, order, or other proceeding has been taken, and upon his or her attorney of record, if any, notifying that party and his or her attorney of record, if any, that the order, judgment, dismissal, or other proceeding was taken against him or her and that any rights the party has to apply for relief under the provisions of Section 473 of the Code of Civil Procedure shall expire 90 days after service of the notice, then the application shall be made within 90 days after service of the notice upon the defaulting party or his or her attorney of record, if any, whichever service shall be later. No affidavit or declaration of merits shall be required of the moving party. Notwithstanding any other requirements of this section, the court shall, whenever an application for relief is made no more than six months after entry of judgment, is in proper form, and is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, vacate any (1) resulting default entered by the clerk against his or her client, and which will result in entry of a default judgment, or (2) resulting default judgment or dismissal entered

against his or her client, unless the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect. The court shall, whenever relief is granted based on an attorney's affidavit of fault, direct the attorney to pay reasonable compensatory legal fees and costs to opposing counsel or parties. However, this section shall not lengthen the time within which an action shall be brought to trial pursuant to Section 583.310.

(c)(1) Whenever the court grants relief from a default, default judgment, or dismissal based on any of the provisions of this section, the court may do any of the following:

(A) Impose a penalty of no greater than one thousand dollars (\$1,000) upon an offending attorney or party.

(B) Direct that an offending attorney pay an amount no greater than one thousand dollars (\$1,000) to the State Bar Client Security Fund.

(C) Grant other relief as is appropriate.

(2) However, where the court grants relief from a default or default judgment pursuant to this section based upon the affidavit of the defaulting party's attorney attesting to the attorney's mistake, inadvertence, surprise, or neglect, the relief shall not be made conditional upon the attorney's payment of compensatory legal fees or costs or monetary penalties

imposed by the court or upon compliance with other sanctions ordered by the court.

(d) The court may, upon motion of the injured party, or its own motion, correct clerical mistakes in its judgment or orders as entered, so as to conform to the judgment or order directed, and may, on motion of either party after notice to the other party, set aside any void judgment or order.

**California Code of Civil Procedure § 904.1:**

(a) An appeal, other than in a limited civil case, is to the court of appeal. An appeal, other than in a limited civil case, may be taken from any of the following:

(1) From a judgment, except an interlocutory judgment, other than as provided in paragraphs (8), (9), and (11), or a judgment of contempt that is made final and conclusive by Section 1222.

(2) From an order made after a judgment made appealable by paragraph (1).

(3) From an order granting a motion to quash service of summons or granting a motion to stay the action on the ground of inconvenient forum, or from a written order of dismissal under Section 581d following an order granting a motion to dismiss the action on the ground of inconvenient forum.

(4) From an order granting a new trial or denying a motion for judgment notwithstanding the verdict.

- (5) From an order discharging or refusing to discharge an attachment or granting a right to attach order.
- (6) From an order granting or dissolving an injunction, or refusing to grant or dissolve an injunction.
- (7) From an order appointing a receiver.
- (8) From an interlocutory judgment, order, or decree, made or entered in an action to redeem real or personal property from a mortgage thereof, or a lien thereon, determining the right to redeem and directing an accounting.
- (9) From an interlocutory judgment in an action for partition determining the rights and interests of the respective parties and directing partition to be made.
- (10) From an order made appealable by the Probate Code or the Family Code.
- (11) From an interlocutory judgment directing payment of monetary sanctions by a party or an attorney for a party if the amount exceeds five thousand dollars (\$5,000).
- (12) From an order directing payment of monetary sanctions by a party or an attorney for a party if the amount exceeds five thousand dollars (\$5,000).
- (13) From an order granting or denying a special motion to strike under Section 425.16.

(14) From a final order or judgment in a bifurcated proceeding regarding child custody or visitation rights.

(b) Sanction orders or judgments of five thousand dollars (\$5,000) or less against a party or an attorney for a party may be reviewed on an appeal by that party after entry of final judgment in the main action, or, at the discretion of the court of appeal, may be reviewed upon petition for an extraordinary writ.

**California Rules of Court, rule 8.104:**

(a) Normal time:

(1) Unless a statute or rules 8.108, 8.702, or 8.712 provides otherwise, a notice of appeal must be filed on or before the earliest of:

(A) 60 days after the superior court clerk serves on the party filing the notice of appeal a document entitled "Notice of Entry" of judgment or a filed-endorsed copy of the judgment, showing the date either was served;

(B) 60 days after the party filing the notice of appeal serves or is served by a party with a document entitled "Notice of Entry" of judgment or a filed-endorsed copy of the judgment, accompanied by proof of service; or

(C) 180 days after entry of judgment.

(2) Service under (1)(A) and (B) may be by any method permitted by the Code of Civil Procedure, including electronic service when

permitted under Code of Civil Procedure section 1010.6 and rules 2.250-2.261.

(3) If the parties stipulated in the trial court under Code of Civil Procedure section 1019.5 to waive notice of the court order being appealed, the time to appeal under (1)(C) applies unless the court or a party serves notice of entry of judgment or a filed-endorsed copy of the judgment to start the time period under (1)(A) or (B).

(b) No extension of time; late notice of appeal: Except as provided in rule 8.66, no court may extend the time to file a notice of appeal. If a notice of appeal is filed late, the reviewing court must dismiss the appeal.

(c) What constitutes entry: For purposes of this rule:

(1) The entry date of a judgment is the date the judgment is filed under Code of Civil Procedure section 668.5, or the date it is entered in the judgment book.

(2) The entry date of an appealable order that is entered in the minutes is the date it is entered in the permanent minutes. But if the minute order directs that a written order be prepared, the entry date is the date the signed order is filed; a written order prepared under rule 3.1312 or similar local rule is not such an order prepared by direction of a minute order.

(3) The entry date of an appealable order that is not entered in the minutes is the date the signed order is filed.

- (4) The entry date of a decree of distribution in a probate proceeding is the date it is entered at length in the judgment book or other permanent court record.
- (5) An order signed electronically has the same effect as an order signed on paper.
- (d) Premature notice of appeal:
  - (1) A notice of appeal filed after judgment is rendered but before it is entered is valid and is treated as filed immediately after entry of judgment.
  - (2) The reviewing court may treat a notice of appeal filed after the superior court has announced its intended ruling, but before it has rendered judgment, as filed immediately after entry of judgment.
- (e) Appealable order: As used in (a) and (d), "judgment" includes an appealable order if the appeal is from an appealable order.

**California Rules of Court, rule 8.108:**

- (a) Extension of time: This rule operates only to extend the time to appeal otherwise prescribed in rule 8.104(a); it does not shorten the time to appeal. If the normal time to appeal stated in rule 8.104(a) is longer than the time provided in this rule, the time to appeal stated in rule 8.104(a) governs.
- (b) Motion for new trial: If any party serves and files a valid notice of intention to move for

a new trial, the following extensions of time apply:

- (1) If the motion for a new trial is denied, the time to appeal from the judgment is extended for all parties until the earliest of:
  - (A) 30 days after the superior court clerk or a party serves an order denying the motion or a notice of entry of that order;
  - (B) 30 days after denial of the motion by operation of law; or
  - (C) 180 days after entry of judgment.
- (2) If the trial court makes a finding of excessive or inadequate damages and grants the motion for a new trial subject to the condition that the motion is denied if a party consents to the additur or remittitur of damages, the time to appeal is extended as follows:
  - (A) If a party serves an acceptance of the additur or remittitur within the time for accepting the additur or remittitur, the time to appeal from the judgment is extended for all parties until 30 days after the date the party serves the acceptance.
  - (B) If a party serves a rejection of the additur or remittitur within the time for accepting the additur or remittitur or if the time for accepting the additur or remittitur expires, the time to appeal from the new trial order is extended for all parties until the earliest of 30 days after the date the party serves the rejection or 30 days after the date on which the

time for accepting the additur or remittitur expired.

(c) Motion to vacate judgment: If, within the time prescribed by rule 8.104 to appeal from the judgment, any party serves and files a valid notice of intention to move—or a valid motion—to vacate the judgment, the time to appeal from the judgment is extended for all parties until the earliest of:

- (1) 30 days after the superior court clerk or a party serves an order denying the motion or a notice of entry of that order;
- (2) 90 days after the first notice of intention to move—or motion—is filed; or
- (3) 180 days after entry of judgment.

(d) Motion for judgment notwithstanding the verdict:

(1) If any party serves and files a valid motion for judgment notwithstanding the verdict and the motion is denied, the time to appeal from the judgment is extended for all parties until the earliest of:

- (A) 30 days after the superior court clerk or a party serves an order denying the motion or a notice of entry of that order;
- (B) 30 days after denial of the motion by operation of law; or
- (C) 180 days after entry of judgment.

(2) Unless extended by (g)(2), the time to appeal from an order denying a motion for judgment notwithstanding the verdict is governed by rule 8.104.

(e) Motion to reconsider appealable order: If any party serves and files a valid motion to reconsider an appealable order under Code of Civil Procedure section 1008, subdivision (a), the time to appeal from that order is extended for all parties until the earliest of:

- (1) 30 days after the superior court clerk or a party serves an order denying the motion or a notice of entry of that order;
- (2) 90 days after the first motion to reconsider is filed; or
- (3) 180 days after entry of the appealable order.

(f) Public entity actions under Government Code section 962, 984, or 985: If a public entity defendant serves and files a valid request for a mandatory settlement conference on methods of satisfying a judgment under Government Code section 962, an election to pay a judgment in periodic payments under Government Code section 984 and rule 3.1804, or a motion for a posttrial hearing on reducing a judgment under Government Code section 985, the time to appeal from the judgment is extended for all parties until the earliest of:

- (1) 90 days after the superior court clerk serves the party filing the notice of appeal with a document entitled "Notice of Entry" of

judgment, or a filed-endorsed copy of the judgment, showing the date either was served;

(2) 90 days after the party filing the notice of appeal serves or is served by a party with a document entitled "Notice of Entry" of judgment or a filed-endorsed copy of the judgment, accompanied by proof of service; or

(3) 180 days after entry of judgment.

(g) Cross-appeal: (1) If an appellant timely appeals from a judgment or appealable order, the time for any other party to appeal from the same judgment or order is extended until 20 days after the superior court clerk serves notification of the first appeal.

(2) If an appellant timely appeals from an order granting a motion for new trial, an order granting—within 150 days after entry of judgment—a motion to vacate the judgment, or a judgment notwithstanding the verdict, the time for any other party to appeal from the original judgment or from an order denying a motion for judgment notwithstanding the verdict is extended until 20 days after the clerk serves notification of the first appeal.

(h) Service; proof of service: Service under this rule may be by any method permitted by the Code of Civil Procedure, including electronic service when permitted under Code of Civil Procedure section 1010.6 and rules 2.250-2.261. An order or notice that is served must be accompanied by proof of service.

**United States Constitutional Amendment XIV:**

Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2: Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3: No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4: The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5: The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

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## **STATEMENT OF THE CASE**

The initial complaint was filed on July 20, 2015 in the Superior Court of the State of California, County of Tulare, by Russell and Tanna Dilday, Mary Anne Ferrero, and Pleasant Valley Canal Company, and following demurrer, the first amended complaint—the operative complaint—was filed and mooted the demurrer. Jones et al. answered and cross-complained against Russell and Tanna Dilday, Mary Anne Ferrero, and Pleasant Valley Canal Company. The Dildays and Ferrero answered the cross-complaint.

The Court of Appeal for the State of California refused to grant an appeal on the merits to Jones, et. al. on the contrived grounds that Appellant was untimely in presenting their notice of appeal, which was presented following the entry of a final judgment of the Superior Court of California, in the above-referenced 2015 matter involving enforcement of Jones, et. al.'s property rights pursuant to the above-referenced earlier-in-time judgment of the Superior Court entered on June 20, 2013. See Pet. App. 4-17

The notice of appeal followed a trial by court, which concluded in written argument submitted by the parties, which produced a tentative ruling by the court, affording Jones, et. al. as well as plaintiffs, an opportunity to object to any perceived errors in the court's tentative ruling and statement of decision. The trial court set hearing for those objections of counsel to be heard on February 21, 2018. Due to inadvertence, defendants' counsel was late for the hearing and the

court overruled all of their objections in counsel's absence, and final judgment was entered based on the court's overruling the objections, on February 26, 2018. See Pet. App. 2-3

Defendants timely moved the court under California Code of Civil Procedure section 473, subdivision (b)(2). The court after hearing on the motion on April 19, 2018, granted a re-hearing on their objections despite counsel's inadvertent tardiness on February 26, 2018. See Pet. App. 2-3 The re-hearing so ordered by the trial court took place on May 8, 2018. Following that hearing, the trial court, on May 10, 2018, issued a 33-page written Statement of Decision amending several of its rulings denying objections, but held that this amendment of ruling would not substantively affect the outcome of its judgment and so reinstated the February 26, 2018 judgment. See Pet. App. 4-17

The Court of Appeal denied Appellant's Petition for rehearing under Rule 8.268 of the California Rules of Court. See Pet. App. 4-17 The Supreme Court of the State of California subsequently denied discretionary review to Jones, et. al. See Pet. App. 4-17

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### **STATEMENT OF FACTS**

The complaint filed by Dilday, et. al. in 2015 sought to remove property/property rights from Jones, et. al. that had previously been decreed by the Superior Court to belong to Jones, et. al. by way of a court order dated June 18, 2013 which stemmed from court trial

where the matter was tried before the Superior Court and the matter was submitted for decision, the Superior Court released its tentative decision, subsequently reduced to writing and entered as the court's final judgment on June 18, 2013, denying the action to quiet title to the prescriptive easement prayed for and finding that no prescriptive easement burdened the Property owned by Jones, et. al., while rather finding that the evidence warranted granting PVCC a conditional, irrevocable license to maintain the water delivery system across the Property that, among other things, permitted PVCC to enter onto the Property for the purpose of maintaining and servicing the water delivery system, while no similar license was granted to Dildays, who had voluntarily removed themselves as parties litigant, nor to any other user of PVCC water to connect to the canal across Property, or to enter and occupy the Property for any purpose. See Pet. App. 1 There have been no appeals, or other challenges: direct, or collateral, to the final judgment of the court: thereby creating in Jones, et. al. a property right recognized by the Superior Court of the State of California.

Under settled California law, defendants had the right to file a notice of appeal and be heard substantively on that appeal in the Court of Appeal of the State of California. The only condition on that right was that the notice of appeal be filed with the court 60 days after being served the "Notice of Entry" of judgment or a filed-endorsed copy of the judgment, or, 180 days from the date of that entry of judgment if no written notice were given, unless a statute or pertinent rule of court

should provide otherwise. The Court of Appeal denied defendants' right to appeal the judgment, without hearing, on the ground that the notice of appeal was not filed with the court until May 24, 2018, which date the Court of Appeal held was outside the 60-day limit for filing notice of appeal proscribed under California Rules of Court, rule 8.104, subdivision (a), finding that regardless of the trial court's hearing on the motion for relief under California Code of Civil Procedure section 473, subdivision (b)(2) on April 19, 2018, and its granting of such relief, and the court's granting of rehearing on counsel's objections to the tentative ruling on May 8, 2018, and subsequent issue of a 33-page Amended Statement of Decision on May 10, 2018, the operative final judgment of the trial court was entered on February 26, 2018 and defendants had written notice thereof. On that basis alone, the Court of Appeal issued remittitur affirming the judgment of the trial court. See Pet. App. 1 The Supreme Court of the State of California subsequently denied discretionary review to Jones, et. al. See Pet. App. 1 Consequently, the State of California has denied Jones, et. al. their right to review the ruling of the trial court which serves to deprive them of liberty and/or property by way of restricting use thereof.

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**REASONS FOR GRANTING THIS PETITION****I. California's Refusal To Hear Defendants' Appeal Was A Deprivation of Defendants' Procedural Due Process.**

This petition should be heard because the California state court has decided an important question of federal law in a way that conflicts with relevant decisions of this Court. Rules of the Supreme Court of the United States, rule 10 Here, the California state court has decided the question of whether adequate due process is afforded to instant defendants in a way that undoubtedly conflicts with relevant decisions of this Court. To wit, this Court consistently held that due process is not a technical conception with a fixed content unrelated to time, place, and circumstances; rather, it is flexible and calls for such procedural protections as a particular situation demands. *Mathews v. El-drige* (1976) 424 U.S. 319, 334 [96 S. Ct. 893, 902]; see also *Morrissey v. Brewer* (1972) 408 U.S. 471, 481 [92 S.Ct. 2593, 2600] The very essence of due process is a requirement that a person in jeopardy of loss to life, liberty, or property, be given notice of the case against them as well as a reasonable opportunity to challenge the purported violation. *Ibid.* While the Constitution forbids the federal and state governments from depriving persons of liberty or property without due process of law, and, while California does provide a scheme of procedural due process in its Code of Civil Procedure and Civil Rules of Court intended to protect due process rights to its citizens, it appears unclear by way of the court decisions underlying the instant petition

whether the State of California deems it a violation of federal due process requirements to deny substantial consideration of an appeal, filed as a matter of right secured by the state's well-settled laws and procedures, to a party that has both timely as a matter of law, as well as reasonably timely under the circumstances, filed notice of appeal of a judgment that serves to deprive him of liberty and property. *Ibid.*; see also U.S. Const. Amend. XIV. Once it is determined due process applies, there must be flexibility in determining what procedural protections are demanded by the particular situation. *Morrissey v. Brewer*, *supra*, 408 U.S. at 481 [92 S. Ct. at 2600]

Here, the State of California has refused to provide substantial consideration of an appeal of Petitioner, which was filed as a matter of right secured by California's well-settled laws and procedures conditioning that right on the notice of appeal's being filed with the court 60 days after being served the "Notice of Entry" of judgment or a filed-endorsed copy of the judgment, or, 180 days from the date of that entry of judgment if no written notice were given, unless a statute or pertinent rule of court should provide otherwise, which here should have applied because defendants did file a motion for relief under California Code of Civil Procedure section 473, subdivision (b)(2) which should have triggered extension under Rule 8.108, subdivision (c) if not outright renewal of time to file under California Code of Civil Procedure section 904.1. Cal. Code of Civil Procedure § 473, sub. (b)(2); Cal. Rules of Court, rule 8.108, sub. (c); see also Cal. Code of Civil

Procedure § 904.1; Cal. Rules of Court, rule 8.104, sub. (a); see also *Mathews v. Eldridge*, *supra*, 424 U.S. at 334 [96 S. Ct. 893, 902]; *Morrissey v. Brewer*, *supra*, 408 U.S. at 481 [92 S. Ct. at 2600] Notwithstanding such, the Court of Appeal denied defendants' right to appeal the judgment, without hearing, on the ground that the notice of appeal was not filed with the court until May 24, 2018, which date the Court of Appeal held was outside the 60-day limit for filing notice of appeal proscribed under California Rules of Court, rule 8.104, subdivision (a), finding that regardless of the trial court's hearing on the motion for relief under California Code of Civil Procedure section 473, subdivision (b)(2) on April 19, 2018, and its granting of such relief, and the court's granting of rehearing on counsel's objections to the tentative ruling on May 8, 2018, and subsequent issue of a 33-page Amended Statement of Decision on May 10, 2018, the operative final judgment of the trial court was entered on February 26, 2018 and defendants had written notice thereof.

This action begs the question of whether the due process provisions espoused in the Fourteenth Amendment and/or decisions of this Court require that California courts adhere to state procedural requirements for disposition of civil cases, and, whether federal due process prohibits denying a litigant of a state-conferred right to appeal a civil judgment on grounds not authorized by state statute. Appellant contends that, had the state court adhered to its own state procedural requirements for disposition of civil cases including the right to appeal a civil judgment of the trial

court, the due process afforded to Jones, et. al. would have been sufficiently flexible as the particular situation demands, and would have resulted in a timely filing of notice of appeal pursuant to either the “extended time period” proscribed under Rules of Court, rule 8.108, sub. (c) as a result of the court’s granting of defendant’s motion for relief under Cal. Code of Civil Procedure § 473, sub. (b)(2), or the “normal time period” proscribed under Rules of Court, rule 8.104, sub. (a) as a result of applicability of California Code of Civil Procedure section 904.1 to the May 8, 2018 hearing.

Alternatively, if this Court finds that the State of California denied defendants of the state-conferred right to appeal a civil judgment on grounds actually authorized by state statute, where notice of appeal was filed 79 days after being served the “Notice of Entry” of judgment and 14 days after the trial court issued a 33-page Amended Statement of Decision, then a question remains as to whether California scheme of procedural due process in its Code of Civil Procedure and Civil Rules of Court are sufficient to afford a reasonable opportunity to file the appeal challenging the judgment of the trial court that serves to deprive him of liberty and property.

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## CONCLUSION

The California Court of Appeal for the Fifth Appellate District’s dismissal of petitioners’ appeal as untimely without substantive consideration on January

12, 2022 could not comport with the due process requirements of the XIV Amendment. The proceeding is secured to petitioners as a matter of right and is an integral component of the judicial proceeding as a whole. While it is well settled that due process under the XIV Amendment does not require that an appeal from a trial court judgment be available, when the state laws and rules of court provide for such an appeal, denying that right capriciously amounts to a deprivation of the minimum due process rights secured by the XIV Amendment in civil actions, the purpose of which is, as here, to take property from a defendant. This court should grant certiorari to review this matter and clarify that while due process may not require appeal rights from a state court judgment, it nevertheless requires that when those rights are available, the party availing themselves of it must, with the appropriate procedural steps—as were followed here—grant the substance of those rights to the litigant.

Respectfully submitted,

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