No. 22-

IN THE

Supreme Court of the United States

AARON HASHIM AND PAUL HASHIM,
Petitioners,

v.

MALIA M. COHEN, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS STATE CONTROLLER OF THE STATE OF CALIFORNIA, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Controller's actions under color of the California Unclaimed Property Law, Cal. Civ. Proc. Code §§ 1300, et seq. ("UPL"), violate the Due Process Clause of the Fourteenth Amendment because they deprive owners of their property without affording constitutionally adequate notice.

2. Whether the Controller's actions under color of the California UPL violate the Takings Clause of the Fifth Amendment because they take private property without just compensation.

PARTIES TO THE PROCEEDING

Petitioners (Plaintiffs-Appellants below) are Aaron Hashim and Paul Hashim, on behalf of themselves and other persons similarly situated.

Respondent (Defendant-Appellee below) is Malia M. Cohen, individually and in her official capacity as State Controller of the State of California.

RELATED CASES

Johnson v. Cohen, No. A161442, 2023 WL 2534784 (Cal. App. 1st Dist. Mar. 16, 2023)

Peters v. Cohen, U.S. District Court Eastern District of California, Case No. 2:22-cv-00266 (JAM) (DB)

Salvato v. Harris, U.S. District Court District of New Jersey, Case No. 21-12706 (FLW)

Schramm v. Mayrack, U.S. District Court District of Delaware, Case No. 22-1443 (MN)

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PETITION FOR WRIT OF CERTIORARI

Petitioners Aaron Hashim and Paul Hashim respectfully petition for a Writ of Certiorari to review the judgment of the Supreme Court of California in this case.

OPINIONS BELOW

The order of the Supreme Court of California (Pet. App. 1a) is unreported. The opinion of the Court of Appeal for the First Appellate District dated February 28, 2023 (*id.* at 2a–21a) is unreported.

JURISDICTION

The Supreme Court of California issued its order denying review on May 31, 2023. Pet. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in relevant part: "[N]or shall private property be taken for public use, without just compensation."

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides, in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

STATUTORY PROVISIONS INVOLVED

Relevant portions of California's Unclaimed Property Law, Cal. Civ. Proc. Code §§ 1300, *et seq.*, are reprinted in the Appendix (Pet. App. 22a–49a).

STATEMENT

The California Unclaimed Property Law ("UPL"), Cal. Civ. Proc. Code §§ 1300, *et seq*., authorizes the State Controller to appropriate the property of purportedly "unknown" persons, to auction or otherwise sell it off, and to retain the proceeds. Under this scheme, the Controller confiscates security deposits, uncashed money orders, unused insurance benefits, idle shares of stock, and even safe-deposit boxes and bank accounts if those assets lie "dormant"—i.e., with no account activity by the rightful owner—for three years. Of course, a "buy-and-hold" investment strategy will often result in a substantial period of inactivity and thus trigger a finding of "dormancy."

Unless the property's rightful owner can be located, the State of California uses the funds in these accounts for its own benefit. The State's Controller is not required to provide any individualized notice at all to persons whose property is less than $50 in value—only to list their property in a notice to be published in a newspaper, website, or other media (sometimes in aggregate form with no name or address specified in connection with the property). As of 2015, the State, in its last publicly available valuation of the UPL fund, estimates that over fifty percent (50%) of the UPL fund is made up of cash

amounts below $50.[1] (For those whose property is above the $50 threshold, the UPL scheme provides for unconstitutionally inadequate notice.) The Controller also seizes property from foreign citizens with no notice whatsoever.

Since the inception of this case, the California unclaimed property fund has grown from 5 million accounts to 70.4 million accounts belonging to citizens residing in California, other states, and foreign countries. Under this scheme, tens of millions of persons are deemed to be "unknown" to the State of California, including LeBron James, former House Speaker Nancy Pelosi, former Governor Arnold Schwarzenegger, and former Presidents George W. Bush and Barack Obama.

Tellingly, when California seeks to locate taxpayers to force them to pay amounts that are due and owing, it is quick to resort to the Department of Motor Vehicles ("DMV") database and other readily available sources of information. Yet when it comes time to seize property under the UPL, the State is inexplicably not able to find millions of its own citizens and numerous persons of global renown, and thus deems those same property owners "unknown." These same databases are then used by the Controller to verify the identity of the owners and to determine

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[1] Mac Taylor, *Unclaimed Property: Rethinking the State's Lost & Found Program*, LEGISLATIVE ANALYST'S OFFICE (Feb. 10, 2015), at pp. 16–17, https://lao.ca.gov/reports/2015/finance/Unclaimed-Property/unclaimed-property-021015.pdf.

whether they may later reclaim the property under this UPL scheme.

In 2007, the Ninth Circuit rejected the State's defense of the UPL scheme and opined that it did not comply with the "requirement that notice be given *before* an individual's control of his property is disturbed." *Taylor v. Westley*, 488 F.3d 1197, 1201 (9th Cir. 2007) (*Taylor II*) (emphasis added). Following the Ninth Circuit's ruling in *Taylor II*, a federal district court issued a preliminary injunction against the UPL scheme. Pet. App. 12a. But the State effectively evaded the injunction by re-enacting the UPL and papering over its unconstitutional provisions. Since then, California has continued to seize billions of dollars' worth of private property, and the private audit companies that administer the scheme have reaped hundreds of millions of dollars in commissions and fees. The federal injunction issued in the wake of *Taylor II* was rendered essentially meaningless.

Two Justices of this Court have already addressed the California UPL in a prior case, opining that "the constitutionality of current state escheat laws is a question that may merit review in a future case." *Taylor v. Yee*, 136 S. Ct. 929, 930 (2016) (Alito, J., joined by Thomas, J., concurring in the denial of certiorari). Those Justices expressed their concern that States are "doing less and less to meet their constitutional obligation to" reunite property owners with their property before seeking escheatment, even as they more aggressively go about classifying property as abandoned. *Id.* The Justices added:

> This trend—combining shortened escheat periods with minimal notification procedures—raises important due process concerns. As advances in technology make it easier and easier to identify and locate property owners, many States appear to be doing less and less to meet their constitutional obligation to provide adequate notice before escheating private property. Cash-strapped States undoubtedly have a real interest in taking advantage of truly abandoned property to shore up state budgets. But they also have an obligation to return property when its owner can be located. To do that, States must employ notification procedures designed to provide the pre-escheat notice the Constitution requires.

Id.

The concerns expressed by Justice Alito, joined by Justice Thomas, were well founded, and the time has come for this Court to grant review to examine the constitutionality of the UPL scheme. This case presents an ideal vehicle for doing so. It involves a class action on behalf of property owners whose property is valued at less than $50 and thus who are entitled to *no individualized notice whatsoever* under the UPL. Hence, this case presents the stark legal question of whether the government can seize private property under an unclaimed property statutory scheme without providing any notice at all. This Court should grant plenary review over this case to put constitutional limits on a California scheme that

is a recipe for abuse, resulting in millions of instances of deprivation of property without due process and unconstitutional takings of property.

A. Background

As this Court recognized more than 60 years ago, "rapidly multiplying State escheat laws, originally applying only to land and other tangible things," have "mov[ed] into the elusive and wide-ranging field of intangible transactions." *W. Union Tel. Co. v. Pennsylvania*, 368 U.S. 71, 79 (1961). According to California's Controller, today the most common forms of unclaimed property are bank accounts and safe deposit box contents; stocks, mutual funds, bonds, and dividends; uncashed cashier's checks and money orders; certificates of deposit; matured or terminated insurance policies; estates; mineral interests and royalty payments; trust funds and escrow accounts; and utility account deposits.[2]

Unclaimed property statutes have become significant sources of state revenue, as illustrated by the recent dispute over escheatment proceeds before this Court in *Delaware v. Pennsylvania*, 143 S. Ct. 696, 707 n.7 (2023). In 2001, for instance, California's Controller had seized property worth approximately $2.7 billion; by 2007, the amount seized had grown to $4.1 billion. Today, the Controller holds property valued at over $11.9 billion, taken from over 70.4

[2] CALIFORNIA STATE CONTROLLER, *About Unclaimed Property*, https://www.sco.ca.gov/upd_about_unclaimed_property.html (last visited Aug. 10, 2023).

million accounts (more than a four-fold increase in two decades) for a program that was initiated in 1950.

B. Statutory Framework

Under the California UPL, the escheatment process is triggered when there is no activity with respect to an account or when the owner has had no contact with the holder (such as a bank) for a fixed period of time (known as the "dormancy period"). In this case, the relevant dormancy period is three years. Thus, a bank customer who opens a savings account and deposits wedding gifts but leaves the account untouched for three years, or an investor who buys and holds stocks without engaging in subsequent sales or purchases for three years, will trigger the "dormancy" definition. After three years of dormancy, the property is statutorily defined as "abandoned" or "unclaimed," and the Controller is automatically authorized to take title to the property. When the UPL was enacted in 1959, the dormancy period was fifteen years. In 1976, it was reduced to seven (7) years; in 1988 to five (5) years, and in 1990 to three (3) years. *See* Statutory Notes, 2007 Main Volume, Cal. Civ. Proc. Code § 1513; *see also* Stats. 1976, c. 648, § 1 & c. 1214 § 1; Stats. 1988, c. 286 § 2; Stats. 1990, c. 450 (S.B. 57), § 4.[3]

Holders of property (which are "Banking organizations," "Business associations," "Financial organizations," and other entities defined by Section

[3] A later amendment extended the dormancy period back to five years only for "any other written instrument on which a banking or financial organization is directly liable," such as a certified check. Stats. 1990, c. 1069 (S.B. 1186), § 1.

1501 as "Holders") are required to identify property that, per the UPL, has been statutorily defined as "unclaimed" and therefore subject to confiscation by the State. Holders of property have a strong incentive to report "unclaimed" property because failure to timely report and remit such property subjects a holder to potential financial sanctions. The UPL permits the assessment of interest from the date property should have been reported up to as much as 12% per annum. Cal. Civ. Proc. Code § 1577.

Holders of property are regularly audited by private companies hired by the State to ensure they have reported unclaimed property. These private auditors are incentivized to increase the amount of property seized because they are paid an 11% commission from the seized property, which may even increase with the rate of seizures.[4] These commissions are paid from the private funds without notice to the owners of the property who are paying them.

The carrots used with private auditors and the sticks used with Holders of property not only lubricate the funnel for unclaimed property to slide into the coffers of the state, but also increase the risk of erroneous seizures.

Further, there are no published state regulations governing this process—only constantly changing internet "guidelines" found on the Controller's

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[4] *See, e.g.*, David G. Savage, *Is California doing enough to find owners of 'unclaimed' funds before pocketing the money?*, L.A. Times (Jan. 7, 2016, 3:00 A.M. PT), https://www.latimes.com/nation/la-na-court-california-cash-20160107-story.html.

website (*e.g.*, "State of California Unclaimed Property Holders Handbook").[5] This absence increases the risk of error.

Prior to escheating the property to the State, and subject to an exception,[6] banks and other financial institutions holding property valued at $50 or more for deposit, account, shares, or other interest, "shall make reasonable efforts" to notify property owners—by mail, or, if the owner has consented to electronic notice, electronically—that the owner's property will escheat. (Cal. Civ. Proc. Code § 1513.5, subds. (a), (b)). The UPL provides that Holders *need not give notice* to owners of "deposits, accounts, shares, or other interests of less than fifty dollars ($50)." Cal. Civ. Proc. Code § 1513.5, subd. (c); *see also id.* at § 1514, subds. (a), (b) (notice for safe deposit box or repository); § 1516, subds. (a), (b), (d) (notice for dividends and securities); § 1520, subds. (a), (b) (notice for tangible and other intangible personal property valued at $50 or more). Notice is inadequate even for property worth $50 or more;[7] but for property

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[5] CALIFORNIA STATE CONTROLLER, *Laws, Regulations, and Guidelines*, https://sco.ca.gov/upd_lawregs.html (last visited Aug. 10, 2023).

[6] The exception is that the holder need not mail notice to an owner whose address the holder's records disclose to be inaccurate. Cal. Civ. Proc. Code § 1515.5, subd. (a).

[7] If the Notice Report provides the Controller with the owner's SSN, Section 1531 requires the Controller to send the owner's name and SSN to the Franchise Tax Board ("FTB") to determine whether the FTB has a Current address for that person. Section 1531(d). Citizens residing in other states and

worth less than $50, there is no individualized notice at all.

Holders are required to send the Controller an annual notice report ("Notice Report") listing the "unclaimed" and "abandoned" properties in question, the owners' names, and their last known addresses. Cal. Civ. Proc. Code § 1530(d). Holders are not required to report the owner's Social Security Number (SSN) for any type of escheated property, even if the holder possesses the SSN. Notably, any person who does not have a Social Security Number and does not reside in the State of California will receive neither direct mail nor publication notice of any kind.

Moreover, the UPL provides that items under $25 in value may be aggregated into a single lump sum on

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those who do not pay taxes in California would have no record of their correct address at the FTB. The same is true of foreign citizens residing in other countries, who also do not have U.S. Social Security Numbers. If the FTB address and the Holder's address are the same, the Controller sends notice to that address. If the FTB has an address different from that provided by the Holder, or multiple addresses, the Controller mails just one arbitrary notice to the FTB address only, and she does not send any notice to the address reported by the Holder, or contained in another California database, such as the records of the DMV. If the FTB has no address, then the Controller sends notice to the address reported by the Holder (*i.e.*, "the Last Known Address" or "LKA"), which is already known to be a stale address and is the reason for the UPL report to the Controller in the first place.

If the Holder does not provide an SSN, which is not a mandatory requirement under the UPL, then the Controller does not request information from the FTB, or any other electronic database accessible to her. She merely sends notice to the stale address reported by the Holder.

the Notice Report received by the Controller. Cal. Civ. Proc. Code § 1530, subd. (b)(2), (b)(5). Examples of such aggregation are contained in the record at 8 CT 2140–43, e.g., "State Farm Insurance Policyholders - $6 Million." The State never learns the owners' names for these accounts, and the Controller maintains no owner identification and no records whatsoever for these property owners. Therefore, it is impossible for these property owners to reclaim their property from the Controller.

No more than 165 days after the Notice Report is filed with the Controller, "the Controller shall mail a notice to each person having an address listed in the report who appears to be entitled to property of the value of fifty dollars ($50) or more escheated under this chapter." Cal. Civ. Proc. Code § 1531, subd. (b). No sooner than seven (7) months and no later than seven (7) months and fifteen (15) days after the Notice Report is filed, Holders are required to pay or deliver to the Controller "all escheated property specified in the report." Cal. Civ. Proc. Code § 1532.

To summarize: the UPL provides that owners of property worth less than $50 are entitled to *no individualized notice at all*, either from the holder under Section 1513 or from the Controller under Section 1531. Yet the State estimates that over fifty percent (50%) of the UPL fund is made up of cash amounts below $50.[8] Still, the UPL requires no individualized notice whatsoever, even on multiple payments owed to a single owner that in aggregate exceed $50, such as in the case of royalty checks and

[8] Taylor, *supra* note 1, at pp. 16–17.

installment payments. Moreover, items under $25 in value may be combined on the Notice Report received by the Controller, so that the State has *no record at all* of the names and last known addresses of those owners.

Section 1531(a) of the UPL provides that, "[w]ithin one year after payment or delivery of escheated property," "the Controller shall cause a notice to be published in a manner that the Controller determines to be reasonable, which may include, but not be limited to, newspapers, Internet Web sites, radio, television, or other media." (Cal. Civ. Proc. Code § 1531(a)). The Controller has implemented this requirement through a practice of generic, inconspicuous 3" x 5" "block" publication notices in newspapers that do not provide actual notice to the owners that their specific property has been appropriated by the State. (Sample advertisements are contained in the record at 8 CT 2098-2101.) The generic "advertisements" are often published on dates calculated to reduce readership, e.g., Thanksgiving Day. It is overwhelmingly likely that only a miniscule fraction of affected property owners will happen upon these notices. The vast majority would have no notice that their property rights have been lost.

The Controller has also created a website (https://sco.ca.gov/search_upd.html) which, in theory, allows property owners to search online for property appropriated by the Controller. Owners who locate their property online may submit a claim form to the Controller and engage in the claim process of seeking to retrieve their property.

But the website has often been broken. (Stevens Decl. 9 CT 2595-2622.) And, even when it is operational, its efficacy is hampered by the fact that no identifying information is listed on the website (or maintained by the Controller) in the case of amounts under $50, or for aggregated amounts, so that it is impossible for the owners of those sums to locate or claim their property. (8 CT 2139-2143.) For items under $25 in value, the Controller does not know the identity of the property owners and does not post the property owners' names on the public website. In many instances, the property has already been sold by the time it appears on the website, which is merely a catalogue of sold property, though the website identifies the property as though it might still exist.

Further, newspaper and website notice under Section 1531(a) operate only after the fact, *after* the Controller has seized the owner's property. Thus, the Controller has shifted the burden of conveying constitutional notice from the government to the citizens, who must ferret out their own property information by looking through newspapers or running queries on an often-broken government website. Common sense dictates that if property owners are not told ahead of time that the Controller is taking their property, then they would have no reason to search a website database and to file a claim form for return of their property.

When California seeks to locate residents to force them to pay taxes that are due and owing, it is quick to resort to all government databases to locate them, such as the DMV database and other readily available sources of information. Yet when it comes time to provide constitutional notice and to return property

under the mandatory language of UPL that requires state officials to locate the owners and to return their property, the same property owners are "unknown" to the State, which does not use the available databases.

Moreover, the Controller has ready access to private commercial databases such as Accurint to locate owners of unclaimed property. The Controller does not use either Accurint or any other commercial database to locate the purportedly "unknown" owners of "unclaimed" property and to provide them with the best possible notice before or after their property is taken by the State.

As the Controller was decreasing the amount spent on notice, the State was simultaneously spending increasingly large sums of money on private auditors to expand the amount of property seized. The auditors are paid on a percentage commission, which rises with the rate of seizures. This strategy predictably redounded to the State's financial benefit. In 2001, the Controller had seized property worth approximately $2.7 billion; by 2007, it had grown to $4.1 billion from 8.7 million persons. Today, the Controller holds property valued at over $11.9 billion, taken from over 70.4 million persons.[9] The California property seizures are growing at an exponential rate, and—as foreshadowed by Justices Alito's concurrence in *Yee*, 136 S. Ct. at 930—there is clearly little regard for "reuniting" "unknown" owners with their "unclaimed property" prior to its seizure and sale.

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[9] CALIFORNIA STATE CONTROLLER, *Search for Unclaimed Property,* https://www.sco.ca.gov/search_upd.html (last visited Aug. 10, 2023) .

C. Procedural History

In 2013, petitioners filed this putative class action in California state court, alleging that the Controller violated their constitutional rights with respect to property governed by the UPL. Pet. App. 3a. Petitioners owed no state taxes or penalties, violated no laws, and did nothing wrong that would entitle California to seize and sell their property. Rather, petitioners alleged that they were the owners of certain unclaimed property—specifically, money in an amount less than $50. *Id.* Petitioners also alleged that the Controller does not possess or even request owner-identifying information for unclaimed property with a value of less than $50, thereby effecting a permanent deprivation and taking of their property without constitutional notice. *Id.* at 3a–4a. They asserted causes of action for: (1) declaratory relief; (2) deprivation of the constitutional right to procedural due process in violation of 42 U.S.C. § 1983; (3) unconstitutional taking of personal property in violation of 42 U.S.C. § 1983; (4) violation of the UPL; and (5) breach of fiduciary duty. *Id.* at 4a. The trial court sustained a demurrer with leave to amend as to plaintiffs' first, second, and fourth causes of action, and without leave to amend as to their third and fifth causes of action. *Id.*

Petitioners then filed a second amended complaint. Upon the Controller's motion, the trial court dismissed with prejudice the claim that the Controller violated the UPL by failing to request identifying information for owners of unclaimed property valued at less than $50. *Id.* at 4a–5a. The court granted petitioners leave to amend their

remaining claims for declaratory relief and deprivation of procedural due process under 42 U.S.C. § 1983. *Id*. at 5a. With respect to the latter claim, the court found that petitioners could not state a claim against the Controller individually due to the doctrine of qualified immunity, but it granted petitioner leave to amend as they "may be able to amend the [second amended complaint] to state a cause of action against the State directly to the extent they seek damages equal to the amount of the property held in trust only or an injunction." *Id*.

In December 2014, petitioners filed a third amended complaint ("TAC")—the operative complaint for present purposes—against the Controller in his official capacity—alleging claims for declaratory relief and deprivation of procedural due process in violation of 42 U.S.C. § 1983. *Id*. at 5a. Defendant demurred to the TAC and moved to strike it for noncompliance with the order allowing plaintiffs leave to amend. *Id.* The trial court granted defendant's motion to strike the TAC and ruled that the demurrer was moot. *Id.*

On appeal, the California First District Court of Appeal reversed the trial court's decision dismissing the case and awarded costs to petitioner. *See Hashim v. Betty T. Yee*, 2019 WL 4182640, 2019 Cal. App. Unpub. LEXIS 5888 (Cal. App. 1st Dist. Sept. 4, 2019). The Court of Appeal ruled that the trial court had abused its discretion in granting the motion to strike, holding that, "when read liberally as it must be," the TAC "seeks injunctive relief and return of plaintiffs' wrongfully taken property. *Id.*

On remand, the trial court again sustained defendant's demurrer to plaintiffs' third amended complaint without leave to amend and entered the judgment at issue. Pet. App. 6a.

The Court of Appeal affirmed. The Court ruled that "[f]irst, and importantly, plaintiffs do not cite to the operative pleading or set forth its allegations in their briefing," *id.* at 13a—even though the Court of Appeal had previously ruled in its September 2019 decision that petitioners' TAC adequately pled their constitutional claims.

The Court of Appeal then addressed the merits of Petitioners' claims and held that their "takings claims are substantively deficient." *Id.* at 14a. Although "Plaintiffs alleged that they held a protected property right in money in amounts under $50[,]" "the trial court was correct in finding that plaintiffs have not alleged that the government took a property interest." *Id.* The Court of Appeals opined that "plaintiffs' property under UPL 'has not been taken at all, but has merely been held in trust for them by the Controller.'" *Id.* (citation omitted). "Furthermore, any property deprivation that may have occurred resulted from plaintiffs' inattention to their property, not a government taking for which just compensation is due." *Id.* The Court of Appeal pointed to *Texaco, Inc. v. Short*, 454 U.S. 516 (1982), which upheld an Indiana statute providing that a severed mineral interest that is not used for a period of 20 years automatically lapses and reverts to the current surface owner of the property, unless the mineral owner files a statement of claim in the local county recorder's office.

The Court of Appeal also rejected Petitioners' due process claim. The Court recited that "plaintiffs again fail to satisfy their burden to demonstrate that they pleaded valid [due process] claims . . . because they entirely fail to cite to the operative pleading or set forth its allegations in their brief." Pet. App. at 16a.

In addition, the Court of Appeal addressed the merits of Petitioners' due process claim and "found no cause to reverse the judgment" because "plaintiffs concede in their appellate brief, as they did in their opposition to the demurrer below, that the UPL is facially constitutional." *Id.* at 17a. "The necessary consequence of Plaintiffs' concession that the UPL is facially valid," the court claimed, "is a concomitant concession that the UPL is not constitutionally infirm for failing to require the Controller to provide pre-escheat direct mail notice to owners of property valued under $50." *Id.* at 17a–18a. The Court of Appeal also found that petitioners "have not alleged facts showing that the Controller permanently deprived them of their property without due process." *Id.* at 18a. "While plaintiffs allege that 'it is difficult, if not impossible,' for owners of property valued at less than $50 to recover their property because the Controller allegedly does not maintain owner-identifying information therefor, at the same time, plaintiffs allege that the Controller gives verbal claim instructions to owners of property under $50 for how to 'prove up' their claims." *Id.* "Plaintiffs do not allege that they sought return of their property from the Controller, or that the Controller denied their claims." *Id.*

The California Supreme Court denied discretionary review on May 31, 2023. *Id.* at 1a.

REASONS FOR GRANTING THE WRIT

This case presents an excellent opportunity for this Court to revisit the constitutional concerns raised by Justice Alito, joined by Justice Thomas, in *Yee*, 136 S. Ct. at 930 (opinion concurring in the denial of certiorari). Justices Alito and Thomas explained that "process which is a mere gesture is not due process. Whether the means and methods employed by a State to notify owners of a pending escheat meet the constitutional floor is an important question." *Id.* (citations omitted). The Justices concluded that "the constitutionality of current state escheat laws is a question that may merit review in a future case." *Id.*

It is now time for this Court to review the longstanding refusal of the California courts to properly apply federal constitutional standards to the UPL. In a series of rulings, including the decision by the Court of Appeal in this case, the state courts of California have effectively immunized the Controller from scrutiny under the United States Constitution. For example, in *Harris v. Westly*, 116 Cal. App. 4th 214 (Cal. App. 2d Dist. 2004), the Court of Appeal invented the novel legal theory that constitutional notice is provided, even when none is admittedly given, because the mere existence of a statute constitutes "constructive notice" that property could be seized. *Id.* at 223 n.15.

In *Fong v. Westly*, 117 Cal. App. 4th 841 (Cal. App. 3d Dist. 2004), the Court of Appeal approved the Controller's action in seizing and selling Berkshire

Hathaway stock without notice at a time when the value of the stock was $7,082 per share. 117 Cal. App. 4th at 847. The injured shareholders (employees who were owed stock in their employee stock purchase plan) discovered the seizure long after the fact and filed a constitutional claim against the Controller. The California courts rejected the claim on the grounds that the Controller was not required to provide constitutional notice or even to comply with Section 1531 of the UPL, and that the Controller is immune from liability under Section 1566 because the owners' claims supposedly arose primarily from the Controller's sale of their escheated property. 117 Cal. App. 4th at 851–54. Even though the stock had appreciated considerably in value (now worth over $500,000 per share), the Court of Appeal reasoned that the injured shareholders had received the full amount allowed under the law from the unnoticed seizures and sale because they had already recovered the proceeds from the unnoticed sale of their stock, *id.* at 852–54.

The Supreme Court of California has continued to cite both the Fong and Harris decisions with approval in the context of the UPL. *See, e.g., Azure Limited v. I-Flow Corp.*, 46 Cal.4th 1323, 1328, 1330, 1336 (2009).

The instant case continues the pattern of the California courts' failure to properly apply federal constitutional standards to the UPL. The decisions of the California courts cannot be squared with foundational precedent of this Court regarding the pre-deprivation notice required by the Due Process Clause, including *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), and *Jones v. Flowers*,

547 U.S. 220 (2006). The California decision in this case also conflicts with numerous decisions by federal Courts of Appeals.

In addition, the decisions of the California courts conflict with precedent of this Court regarding the Takings Clause, including *Horne v. Department of Agriculture*, 135 S. Ct. 2419 (2015).

Review is also warranted because this case involves an important issue of law involving the property rights of millions of people. Every year, tens of thousands of California residents, including many elderly residents of limited means, suffer the appropriation of their property with no meaningful notice and no meaningful avenue of recourse. Such a blatantly unconstitutional system, which serves only the fiscal self-interest of California, warrants this Court's review. Moreover, because state unclaimed property laws spanning the states are intertwined, this Court's review of the decision at issue will guide other States in implementing their unclaimed property laws Constitutionally. By providing guidance on the constitutional standards such schemes must satisfy, review of this decision would enable this Court to protect the due process rights of millions of Americans throughout the country.

I. Certiorari Is Warranted To Review The Constitutionality Of The California UPL Scheme Under The Due Process Clause.

The decision below conflicts with this Court's foundational precedent establishing the notice requirements of Due Process, as well as with decisions

by the federal Courts of Appeals faithfully applying that precedent.

A. The Decision Below Conflicts With This Court's Precedent.

In *Mullane*, this Court held that notice by newspaper publication was insufficient with respect to known present beneficiaries of a trust and did not satisfy due process. 339 U.S. 306. This Court observed that the "elementary and fundamental requirement of due process . . . 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" before they are deprived of property. *Id.* at 313 (emphasis added). "[P]rocess which is a mere gesture is not due process," but rather the "means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Id.* at 315.

The California UPL falls far below the standards of *Mullane,* even though technological advances since 1950 make it vastly *easier* to locate individuals now than it was when *Mullane* was decided. Petitioners and the putative class they represent are owners of property worth less than $50 whom the UPL affords *no individualized or pre-deprivation notice at all*, either from the Holder of their property under Section 1513 or from the Controller under Section 1531. This is not a small matter. The State estimates that over fifty percent (50%) of the UPL fund (now

amounting to $11.9 billion) is made up of cash amounts below $50.[10]

The UPL flouts this Court's teaching that "[t]he right to prior notice"—*before* the State seizes or appropriates property—"is central to the Constitution's command of due process." *U.S. v. James Daniel Good Real Property*, 510 U.S. 43, 53 (1993). "The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment—to minimize substantively unfair or mistaken deprivations of property. . . ." *Fuentes v. Shevin*, 407 U.S. 67, 80–81 (1972). In *Fuentes*, this Court held that the loss of kitchen appliances and household furniture was significant enough to warrant a pre-deprivation hearing. In *Connecticut v. Doehr*, 501 U.S. 1 (1991), this Court held that a state statute authorizing prejudgment attachment of real estate without prior notice or hearing was unconstitutional, in the absence of extraordinary circumstances, even though the attachment did not interfere with the owner's use or possession and did not affect, as a general matter, rentals from existing leaseholds. "[E]ven the temporary or partial impairments to property rights that such encumbrances entail are sufficient to merit due process protection." *Id.* at 12; *see also Fuentes*, 407 U.S. at 86 ("The Fourteenth Amendment draws no bright lines around three-day, 10-day or 50-day deprivations of property. Any significant taking of property by the State is within the purview of the Due Process Clause."); *N. Ga.*

[10] Taylor, *supra* note 1, at pp. 16–17.

Finishing v. Di-Chem, Inc., 419 U.S. 601, 606 (1975) (state garnishment statute subject to constitutional due process where plaintiff's property "was impounded").

And in *Jones*, this Court reaffirmed that "*[b]efore* a state may take property and sell it for unpaid taxes, the Due Process Clause of the Fourteenth Amendment requires the government to provide the owner 'notice and opportunity for hearing appropriate to the nature of the case.'" 547 U.S. at 223 (emphasis added and quoting *Mullane*, 339 U.S. at 313). This Court held "that when mailed notice of a tax sale is returned unclaimed, the State must take *additional reasonable steps* to attempt to provide notice to the property owner before selling his property, if it is practicable to do so." *Id.* at 225 (emphasis added). This Court concluded:

> There is no reason to suppose that the State will ever be less than fully zealous in its efforts to secure the tax revenue it needs. The same cannot be said for the State's efforts to ensure that its citizens receive proper notice before the State takes action against them.

Id. at 239.

In *Jones*, this Court reasoned that a State may not rely solely on mailed notice "when the government learns its attempt at notice has failed." *Id.* at 227. This case demonstrates that California's meager attempts at notice under the UPL scheme have predictably failed not once, but *millions of times* and that the State makes no attempt to provide individualized notice at all for property worth less than $50. The scheme has resulted in a situation

where millions of people have been denied meaningful notice of the seizure of their property, just as the homeowner in *Jones* was not afforded meaningful notice. And just as in *Jones*, "the government's knowledge that notice pursuant to the normal procedure was ineffective triggered an obligation on the government's part to take additional steps to effect notice." *Id.* at 230.

The State' reliance on its unclaimed property website fails for two reasons. First, the website offers only *post-deprivation* notice *after* the State has already seized the property. That is unconstitutionally inadequate. *See James Daniel Good Real Property*, 510 U.S. at 54 ("All that the seizure left [the property owner], by the Government's own submission, was the right to bring a claim for the return of title at some unscheduled future hearing"). Similarly, in *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791 (1983), this Court held that a "party's ability to take steps to safeguard its interests does not relieve the State of its constitutional obligation" to provide meaningful pre-deprivation notice. *Id.* at 799.

Further, the website is not meaningful notice. Property owners who have received no prior notice that their property has been seized have no reason to look at the State's (often-broken) website to try to identify their appropriated property. *Mullane* held that newspaper advertisements are not constitutionally adequate (except in special circumstances) because "[c]hance alone" brings a person's attention to "an advertisement in small type inserted in the back pages of a newspaper." *Mullane*, 339 U.S. at 315. The same is true of the Controller's website.

Moreover, property worth less than $50 is typically aggregated rather than individually listed, so even if owners of property worth less than $50 happen upon the website, they will not find individually identifiable information for their property. In reality, the website conveys no notice at all to property owners and is nothing more than a catalogue of the owners' sold and destroyed property.

The California scheme has resulted in the absurd situation where the Controller holds property amounting to more than $11.9 billion belonging to 70.4 million supposedly "unknown" persons, including LeBron James, former House Speaker Nancy Pelosi, former Governor Arnold Schwarzenegger, and former Presidents George W. Bush and Barack Obama.

The results of this fatally flawed system speak for themselves. The ostensible statutory purpose of the UPL program is to locate and return private property to "unknown" owners, and not to declare "known" citizens to be "unknown" simply for purposes of seizing their property for use by the State. California's procedures have hardly produced "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." 339 U.S. at 313. Indeed, the opposite is true.

Where (as here) the government's own fiscal self-interest is involved, the requirements of due process should be even more stringent. This Court has warned that the government's financial interest (as well the financial interest of the private auditors the

State has incentivized to administer its scheme) creates the danger of self-dealing that raises constitutional red flags. This Court has long expressed constitutional "concern with governmental self-interest" when "the State's self-interest is at stake.'" *United States v. Winstar Corp.*, 518 U.S. 839, 896 (1996) (quoting *United States Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 26 (1977)).

B. The Decision Below Conflicts With Decisions by Federal Courts of Appeals.

The California decisions upholding the UPL cannot be squared with decisions by the federal Courts of Appeals that have faithfully applied this Court's decisions establishing the pre-deprivation notice required by the Due Process Clause. For example, in *Garcia-Rubiera v. Fortuno*, 665 F.3d 261 (1st Cir. 2011), the First Circuit held that, under *Jones v. Flowers*, Puerto Rico failed to give constitutionally adequate notice to insureds in connection with reimbursements for mandatory automobile insurance, which would otherwise escheat to the Commonwealth. The First Circuit explained that Puerto Rico had established a reimbursement procedure, but "has failed to give insureds notice of the contents of that procedure or where to find it. In fact, insureds will not find it unless they go in person to the proper office of government and make an 'appropriate request' for a copy of the regulation." *Id.* at 263–64. The California UPL scheme, which denies meaningful notice to millions of property owners, suffers from the same constitutional defect.

The Sixth Circuit found a due process violation where a state elevator inspector shut down a hotel's elevators without adequate advance notice, preventing it from renting rooms on five floors. *Sterling Hotels, LLC v. McKay*, 371 F.4th 463 (6th Cir. 2023): "When a deprivation of property 'occurs pursuant to an established state procedure'—as McKay acknowledges it did here—the state must provide adequate notice and an opportunity to respond before the deprivation." *Id.* at 467 (citation omitted); *see also Resnick v. KrunchCash, LLC*, 34 F.4th 1028, 1035 (11th Cir. 2022) (holding that temporary freeze on borrowers' bank accounts without prior notice amounted to deprivation of due process property interest; "even a temporary or partial deprivation of property without proper notice or a hearing violates due process").

Review is especially warranted because the Ninth Circuit has taken a different view of the UPL's constitutionality, creating an untenable judicial divergence in the same State. Four separate panels of the Ninth Circuit have held either that the UPL is unconstitutional or that federal constitutional claims should be allowed to proceed. *See Taylor v. Westly*, 402 F.3d 924, 926 (9th Cir. 2005), reh'g and reh'g en banc denied (May 13, 2005) (*Taylor I*) (Eleventh Amendment did not bar due process clam); *Taylor II*, 488 F.3d at 1200–02 (reversing denial of federal injunction); *Taylor v. Westly*, 525 F.3d 1288, 1291 (9th Cir. May 12, 2008) (*Taylor III*) (awarding interim legal fees); *Suever v. Connell*, 439 F.3d 1142 (9th Cir. 2006) (following *Taylor I*).

Thus, in *Taylor II*, the Ninth Circuit opined, "California cites no authority for the proposition that

due process is satisfied by a newspaper advertisement saying that a person concerned about his property can check a website to see whether he has already been (or soon will be) deprived of it." 488 F.3d at 1201. The Ninth Circuit noted the danger of "the permanent deprivation of [Petitioners'] property subsequent to California's sale of that property, which—pursuant to California's policy of *immediately* selling property after escheat—would frequently occur even if plaintiffs were diligent about monitoring their property." *Id.* at 1200 (emphasis in original).

The Ninth Circuit opined that the Controller was required to notify property owners of the impending seizure of their property *prior to* the seizure, in a manner reasonably calculated under all the circumstances to apprise them of that impending seizure and afford them an opportunity to object: "[b]efore the government may disturb a person's ownership of his property, 'due process requires the government to provide notice reasonably calculated, under all the circumstances, to apprise the interested party of the pendency of the action and afford him an opportunity to present his objections.'" *Id.* at 1201 (citation omitted). The Ninth Circuit held that the Controller's mailings "[did] not respond to the requirement that notice be given before an individual's control of his property is disturbed" (i.e. escheated). *Id.*; *see also Suever v. Connell*, 439 F.3d 1142, 1148 (9th Cir. 2006) (noting that the plaintiff's complaint against the UPL alleges types of harm that, if proven, would amount to "ongoing violation[s] of federal law").

Subsequent Ninth Circuit decisions have rejected certain challenges to the UPL,[11] but none of them approved the scheme at issue here: the seizure and appropriation of property with *no pre-deprivation individualized notice whatsoever*.

II. Certiorari Is Warranted To Review The Constitutionality Of The California UPL Scheme Under The Takings Clause.

Under the UPL scheme, the Controller physically appropriates private property and as a matter of course permanently divests owners of that property. Once this property is auctioned off or destroyed by operation of the UPL scheme, *the most* the rightful owner could recover is part of the monetary proceeds of the sale—which will afford little comfort or relief to the owner in circumstances where the sentimental value of the property (such as family heirloom jewelry in a safe deposit box) far exceeds its commercial value.

The Controller's physical appropriation of personal property under the UPL scheme effectuates a taking under this Court's decision in *Horne*.

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[11] In *Taylor III*, 525 F.3d 1288, the Court of Appeals opined that a legislative amendment to the UPL "[o]n its face" brought the UPL into compliance with the Constitution's due process requirements, *id.* at 1289, although the Ninth Circuit cautioned that the issues before it were limited and that its "review in this case is confined by our limited standard of review, and is not a definitive adjudication of the constitutionality of the new law and administrative procedure." *Id.* at 1290. In *Taylor v. Yee*, the Ninth Circuit rejected an as-applied challenge that the Controller had failed to provide constitutionally adequate notice and failed to take adequate steps to locate and notify certain property owners. 780 F.3d 928 (9th Cir. 2015).

135 S. Ct. 2419. *Horne* noted "the settled difference in our takings jurisprudence between appropriation and regulation" and held that the Ninth Circuit had erred in analyzing the seizure of raisins as a restriction on the use of personal property. *Id.* at 2428. This Court opined that the seizure was a physical appropriation of property, giving rise to a *per se* taking: "The Government's 'actual taking of possession and control' of the reserve raisins gives rise to a taking as clearly 'as if the Government held full title and ownership,' as it essentially does." *Id.* (internal citation omitted). This Court held that possible residual compensation offered to an owner, after physical appropriation of the property itself, did not excuse the taking. *Id.*

The Court of Appeal's insistence that the Controller merely holds unclaimed property "in trust" does not withstand scrutiny. Pet. App. 14a. The UPL Section 1300(c) defines the term "Escheat" as "the vesting in the state of title to property the whereabouts of whose owner is unknown . . . subject to the right of claimants to appear and claim the escheated property or any portion thereof." Cal. Civ. Proc. Code § 1300(c). Thus, the Controller does not merely take "custody" but takes "title," which vests in the State as the owner of the property, which is then sold or otherwise used by the State without notice to the true owner. For example, the contents of safe deposit boxes are held for varying periods of time and

then auctioned off on eBay.[12] Stock accounts are held for 18 months and then liquidated.[13] This is a classic taking of property under the Fifth Amendment.

The Court of Appeal also cited *Texaco,* but that case involved a mineral lapse statute and the specific state interests in the context of mineral development. 454 U.S. 516. "Certainly the State may encourage owners of mineral interests to develop the potential of those interests; similarly, the fiscal interest in collecting property taxes is manifest." *Id.* at 529. This Court explained that, "[t]hrough its Dormant Mineral Interests Act," "the State has declared that this property interest is of less than absolute duration; retention is conditioned on the performance of at least one of the actions required by the Act." *Id.* at 526. But the instant case (unlike *Texaco*) does not involve mineral rights. Private citizens who hold bank accounts and investment accounts, or store their valuables in safety deposit boxes, do not own their property at the sufferance of the government, and should not be required to "churn" their financial holdings or otherwise show periodic activity in their

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[12] ABC Good Morning America, *Not So Safe Deposit Boxes States Seize Citizens' Property to Balance Their Budgets,* YOUTUBE (May 12, 2008), http://www.youtube.com/watch?v=ZdHLIq0qHhU,http://abcnews.go.com/GMA/story?id=4832471&page=1#.Udhur5yLfCY.

[13] California State Controller's Office, *About the Unclaimed Property Program*, available at: http://www.sco.ca.gov upd_faq_about_q01.html ("Your investment accounts will be turned over to the State Controller's Office, which is required by law to sell the securities, no sooner than 18 months and no later than 20 months, after the due date for reporting the securities to the State Controller's Office.").

accounts, to prevent their property from reverting back to ownership by the government. This Court has never compared unclaimed property laws to rules governing mineral leases. *E.g., Delaware v. New York*, 507 U.S. 490 (1993); *Pennsylvania v. New York*, 407 U.S. 206 (1972); *Standard Oil Co. v. New Jersey*, 341 U.S. 428, 433–34 (1951); *Texas v. New Jersey*, 379 U.S. 674, 675–77 (1965).

Under the just compensation requirement of the Fifth Amendment, the government must establish the existence of a "'reasonable, certain and adequate provision for obtaining compensation'" at "the time of [a] taking." *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 124–25 (1974) (quoting *Cherokee Nation v. Southern Kansas R. Co.*, 135 U.S. 641, 659 (1890)). Here, the UPL scheme offers no compensation at all and is squarely inconsistent with the commands of the Fifth Amendment.

III. This Case Is a Suitable Vehicle to Review the Constitutional Issues Presented.

This case is an excellent vehicle for reviewing the constitutional questions presented. Although the Court of Appeal chided petitioners for supposedly not "cit[ing] to the operative pleading or set[ing] forth its allegations in their briefing," Pet. App. 13a–16a, the Court of Appeal proceeded to consider the merits of both the takings and due process claims. *Id.* at 14a–15a, 17a–18a. Those issues are squarely before this Court. Further, in September 2019, the Court of Appeal had held that petitioners' TAC adequately pled both takings and due process constitutional claims. *See Betty T. Yee*, 2019 WL 4182640.

Moreover, petitioners' brief in the Court of Appeal specifically referenced Justices Thomas and Alito's opinion with respect to the denial of certiorari in *Taylor v. Betty T. Yee*. *See* Appellant's Opening Br., at *7–8, *14 (*Hashim v. Yee*, 2021 WL 6286214 (Cal.App. 1 Dist. Dec. 23, 2021)); Appellant's Am. Opening Br., at 7–8, *14 (*Hashim v. Yee*, 2021 WL 6286214 (Cal.App. 1 Dist. Dec. 28, 2021)). The constitutional issues were plainly presented below.[14]

[14] The Court of Appeal's statement that Petitioners had somehow conceded that "the UPL is not constitutionally infirm for failing to require the Controller to provide pre-escheat direct mail notice to owners of property valued under $50[,]" Pet. App. 17a–18a, because they had not contended that the UPL is unconstitutional in every application (i.e., that it might have permissible applications in some instances, such as for property worth more than $50 for which adequate individualized notice is provided), makes little sense.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted.

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